



Order F21-13

BC PAVILION CORPORATION

Laylí Antinuk
Adjudicator

April 6, 2021

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Summary: The BC Pavilion Corporation (PavCo) requested that the OIPC decline to conduct an inquiry into PavCo's decision to refuse an applicant access to certain requested records. The records comprise video footage recorded at a specific time on CCTV cameras at the Vancouver Convention Centre and the Olympic Cauldron. The adjudicator found that it was not plain and obvious that s. 22(1) (unreasonable invasion of third-party privacy) applied to the requested records. Therefore, the adjudicator denied PavCo's request. The OIPC will conduct an inquiry into this matter.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(i), 22(3)(a), 56(1).

INTRODUCTION

[1] A journalist requested specific video footage from CCTV cameras at the Vancouver Convention Centre and the Olympic Cauldron. The BC Pavilion Corporation (PavCo) refused access to the records, asserting that disclosure would be an unreasonable invasion of third-party privacy under s. 22(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review PavCo's decision. Mediation did not resolve the matter and the applicant requested that it proceed to inquiry. PavCo then made an application to the OIPC, asking the Commissioner to exercise his discretion under s. 56 not to conduct an inquiry. This order addresses PavCo's s. 56 application.

[2] Under s. 56, the OIPC can decide whether or not to conduct an inquiry. PavCo has requested that the OIPC decline to conduct an inquiry in this case because it is plain and obvious that disclosure of the requested records would constitute an unreasonable invasion of third-party personal privacy under

s. 22(1). PavCo and the access applicant both provided submissions about whether the OIPC should conduct an inquiry.

ISSUE

[3] In this order, I will decide whether the OIPC should exercise its discretion under s. 56 to decline the access applicant’s request for an inquiry because it is plain and obvious that s. 22(1) applies to the records in dispute.

[4] When it comes to the burden of proof for applications under s. 56, the party asking the OIPC not to conduct an inquiry must establish why the OIPC should grant that request.¹ The other party – in this case, the access applicant – does not have a burden to show why the inquiry should proceed. However, if it appears obvious from past decisions that an inquiry will confirm that the public body properly applied FIPPA, the access applicant must provide “some cogent basis for arguing the contrary.”²

DISCUSSION

Background

[5] On August 14, 2017, a motorcycle stuntwoman (the stuntwoman) died during filming for the *Deadpool 2* movie at Jack Poole Plaza and the Convention Centre in Vancouver.³ The applicant seeks access to PavCo’s CCTV video footage of this tragic fatality.

[6] In its initial response to the access applicant, PavCo refused access to the video footage under s. 15(1) (harm to law enforcement) because, at the time, the Vancouver Police Department (VPD) and WorkSafeBC were each investigating the stuntwoman’s death. Once those investigations closed, PavCo offered the access applicant an opportunity to review the requested video footage at its office at a mutually agreeable time once COVID-19 safety protocols permitted. The applicant responded by requesting a copy of the video footage. PavCo then reconsidered its decision to allow the applicant to view the footage and refused access under s. 22(1).

¹ Order F16-37, 2016 BCIPC 41 at para. 10. See also Decision F08-11, 2008 CanLII 65714 (BC IPC) at para. 8.

² Decision F08-11, 2008 CanLII 65714 (BC IPC) at paras. 8 and 11. See also Decision F07-04, 2007 CanLII 67284 (BC IPC) at paras. 17-18.

³ The information summarized in the Background section comes from PavCo’s initial submission at p. 1; PavCo’s reply submission at p. 1; and the access applicant’s response submission at pp. 1-3. I accept as fact these aspects of the parties’ submissions, which the parties agree upon.

Records in dispute

[7] The records in dispute consist of three video clips (collectively, the footage) identified by PavCo as:

- 14015 SW Multiway @ 2017-08-14 T151233;
- 18018 SW Stair 20 Outside @ 2017-08-14 T151229; and
- 18071 Thurlow Entrance @ 2017-08-14 T151229.

[8] PavCo provided a copy of the footage and I have reviewed it.⁴ Having done so, I find that two of the video clips show different views of the stuntwoman riding her motorcycle inside and outside of a building prior to the fatal accident. The other video clip shows the fatal accident itself from quite a far distance. All the footage also shows numerous other people, some of whom are extras or other people working on the film set, and others who appear to be members of the public who are not part of the film set.

Discretion to conduct an inquiry – section 56

[9] Section 56(1) states:

If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry. [emphasis added]

As highlighted above, s. 56 uses the word “may” which gives the OIPC the discretion to decide whether or not to conduct an inquiry. The OIPC has exercised its discretion in favour of not conducting an inquiry for a variety of reasons in the past. For example, the OIPC has declined to conduct inquiries in situations where the records at issue plainly and obviously fall outside the scope of FIPPA, or where the legal principles of mootness, *res judicata* or issue estoppel clearly apply.⁵ In each instance, it must be clear that there is no arguable case that merits adjudication in an inquiry.⁶

[10] In this case, PavCo argues that it is “clear and obvious” that s. 22(1) applies in the circumstances and that disclosure of the footage of the fatal accident and the conditions leading up to it would be an unreasonable invasion of personal privacy.⁷ Accordingly, PavCo requests that the OIPC decline to conduct an inquiry.

⁴ The clips range between six and nine seconds.

⁵ Decision F08-11, 2008 CanLII 65714 (BC IPC) at para. 8. See also Decision F07-04, 2007 CanLII 67284 (BC IPC) at para. 16.

⁶ *Ibid.*

⁷ PavCo’s initial submission at p. 1.

[11] The access applicant contends that the inquiry must be allowed to proceed and that the OIPC should invite submissions from the film production company and the stuntwoman’s family or legal representatives.⁸

Unreasonable invasion of personal privacy – section 22

[12] Section 22(1) requires public bodies refuse to disclose personal information if disclosure would constitute an unreasonable invasion of a third party’s personal privacy.

[13] The analysis under s. 22 involves four steps:⁹

- 1) Determine whether the information in dispute is personal information.
- 2) Determine whether any of the circumstances described in s. 22(4) apply. If they do, then disclosure is *not* an unreasonable invasion of personal privacy.
- 3) Determine whether any of the presumptions listed in s. 22(3) apply. If they do, disclosure is *presumed* to be an unreasonable invasion of personal privacy. Presumptions may be rebutted by considering all relevant circumstances (the next step in the analysis).
- 4) Consider the impact that disclosure would have in light of all the relevant circumstances, including those listed in s. 22(2). Do the relevant circumstances weigh in favour of or against disclosure?

I will apply this analysis to determine whether, as PavCo submits, the application of s. 22(1) is plain and obvious, or open to argument.

Parties’ positions on s. 22

[14] As noted, PavCo submits that it is “clear and obvious” that s. 22(1) applies.¹⁰ In support of its argument, PavCo says that s. 22(2)(i) requires the consideration of whether “the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person’s personal privacy.” PavCo also draws my attention to s. 36(1)(c) which permits the disclosure of personal information relating to a deceased person for archival or historical purposes only after 20 or more years since their death. According to PavCo, ss. 22(2)(i) and 36(1)(c) indicate that FIPPA demonstrates a “particular reverence” for the personal information of deceased persons. PavCo says the

⁸ Access applicant’s response submission at p. 1.

⁹ For example, see Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 22-24.

¹⁰ The information summarized in this paragraph and the one that follows comes from PavCo’s initial submission at pp. 1-2.

stuntwoman passed away less than four years ago, so the disclosure of her personal information in the footage would constitute an unreasonable invasion of her privacy.

[15] PavCo also submits that the footage shows the stuntwoman's operation of the motorcycle mere moments before her death, so it should be treated with the same respect as medical information. Under s. 22(3)(a), the disclosure of a third party's medical information presumptively constitutes an unreasonable invasion of the third party's privacy.

[16] The applicant submits that the benefits of disclosure and possible publication of the footage far outweigh the harms.¹¹ He argues that the public would benefit from seeing the aftermath of the dangerous operation of a motorcycle without a helmet. According to the applicant, people who ride motorcycles would obtain and wear helmets if they saw the footage, and the public would be able to judge whether the VPD and WorkSafeBC came to correct conclusions in their investigations. The applicant also contends that the footage will not likely be high resolution, that images may be obscured, and that the distance between the CCTV camera and the accident is close to 60 meters. He further submits that PavCo previously agreed it would provide him with access to the footage.

Analysis and findings – is it plain and obvious that s. 22(1) applies?

[17] The first step in any s. 22(1) analysis requires a determination as to whether the information in dispute qualifies as personal information. Having reviewed the footage, I can see that it captures the images of numerous individuals who may or may not be identifiable given other available information. While I find it plain and obvious that the footage captures the moving image of the stuntwoman – which is her personal information – it is not obvious to me how many other individuals are identifiable nor is it clear to me whether or not PavCo decided that the release of any personal information about other third parties would constitute an unreasonable invasion of their privacy. The parties did not make submissions about this issue and it merits consideration.

[18] Further, it is not plain and obvious to me that any of the presumptions in s. 22(3) apply or that the footage contains personal information akin to any of those presumptions, including the presumption about medical information. Given PavCo's submissions respecting s. 22(3)(a), however, I accept that it is at least arguable that the footage contains information that is in some way analogous to information captured by a presumption. In my view, an inquiry is needed in order to properly explore and address PavCo's argument about s. 22(3)(a).

¹¹ The information summarized in this paragraph comes from the access applicant's response submission at p. 3.

[19] I am also of the view that it is at least arguable that, in addition to s. 22(2)(i), there may be other relevant circumstances in s. 22(2) that need to be considered and weighed before making a final decision in this case. For instance, while he does not explicitly refer to s. 22(2), the applicant's submission suggests that disclosure could promote public health and safety (a relevant circumstance under s. 22(2)(b)) and allow the public to scrutinize the VPD and WorkSafeBC investigations into the accident (a relevant circumstance under s. 22(2)(a)). Additionally, as noted above, the footage includes images of numerous other third parties who may be identifiable, meaning their personal information may also be at issue. The question of whether disclosure would be an unreasonable invasion of the personal privacy of those third parties must also be considered in light of the relevant circumstances that pertain to each one of them.

[20] In order to succeed in this application, PavCo must show that it is plain and obvious that s. 22(1) applies to all the footage. Based on the information before me at this stage, I am not satisfied that it is plain and obvious that PavCo properly applied s. 22(1). As I see it, and without reaching any determination on the final merits of this case, it is at least arguable that disclosure of some of the information in dispute (e.g. one or more of the video clips or edited versions thereof) may not be an unreasonable invasion of third-party personal privacy under s. 22(1). An inquiry is the proper forum to decide this matter.

[21] In conclusion, I do not find it plain and obvious that s. 22(1) applies to the requested records. In my view, this case merits adjudication in an inquiry. Therefore, the OIPC will conduct an inquiry into this matter.

CONCLUSION

[22] For the reasons given above, I have decided that this matter will proceed to inquiry under Part 5 of FIPPA.

April 6, 2021

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

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