Order F06-11

INSURANCE COUNCIL OF BRITISH COLUMBIA

Celia Francis, Adjudicator
July 11, 2006

Quicklaw Cite: [2006] B.C.I.P.C.D. No. 18
Document URL: http://www.oipc.bc.ca/orders/OrderF06-11.pdf
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

Summary: Applicant requested access to her personal information in complaint letters. Insurance Council denied access to third-party personal information and to some of applicant's own personal information—in the form of other people's opinions about her—under s. 15(2)(b) and s. 22(1). Section 15(2)(b) found not to apply and s. 22(1) found not to apply to applicant's own personal information, including identities of opinion holders.

Key Words: expose to civil liability—unreasonable invasion—identifiable as part of an investigation into a possible violation of law—opinions or views—submitted in confidence—personal privacy—employment history—fair determination of rights—unfair exposure to harm—unfair damage to reputation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(2)(b), 22(1), 22(2)(c), (e), (f), (h), 22(3)(b) & (d).

Authorities Considered: B.C.: Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43; Order 00-52, [2000] B.C.I.P.C.D. No. 56; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 00-44, [2000] B.C.I.P.C.D. No. 48; Order 01-27, [2001] B.C.I.P.C.D. No. 27; Order 01-36, [2001] B.C.I.P.C.D. No. 37; Order 01-48, [2001] B.C.I.P.C.D. No. 50; Order 01-52, [2001] B.C.I.P.C.D. No. 56; Order 02-20, [2002] B.C.I.P.C.D. No. 20; Order F05-02, [2005], B.C.I.P.C.D. No. 2; Order F05-03, [2005] B.C.I.P.C.D. No. 3; Order F05-08, [2005] B.C.I.P.C.D. No. 9; Order F05-09, [2005] B.C.I.P.C.D. No. 10; Order F06-12, [2006] B.C.I.P.C.D. No. 19.

Cases Considered: *Canada (Information Commissioner) v. Canada (Ministry of Citizenship and Immigration),* [2002] FCA 270 F.C.J. (C.A.).

1.0 INTRODUCTION

[1] This order is a companion to Order F06-12,[1] which I am issuing concurrently with this one. The access applicant in this case was the subject of a complaint to the Insurance Council of British Columbia ("Council") by a former colleague. In the course of responding to the Council's letter about the complaint, the applicant requested a copy of the "complaint letter outlining the allegations". In its response, the Council referred to the complainant by name and denied access to the complaint letters,[2] saying

> Council takes the position that letters of complaint are confidential and can only be released as necessary for the due administration of the *Financial Institutions Act* (the "Act") or as required by law. Disclosure of a complaint or investigation is made only if it is consistent with the principals [*sic*] of administrative law and natural justice. At this stage, our investigation is continuing and release of the documents you have requested would not be necessary for administration of the Act. In accordance with the principals [*sic*] of natural justice, the documents you requested may be released at some future date.
>
> We also considered whether we could disclose the information to you pursuant to the *Freedom of Information and Protection of Privacy Act* ("FOIPPA"). However, Council has consistently taken the position that disclosure of this type of information is exempt from the general right of access pursuant to sections 15(1)(a), 15(2)(b), 22(2)(e), 22(2)(f) and 22(3)(b) of FOIPPA.

[2] The applicant requested a review of the Council's denial of access. Mediation through this office led to the disclosure of the two complaint letters in severed form. The Council's decision letter repeated its position on confidentiality of complaints and continued as follows:

> After consultation with the Office of the Information and Privacy Commissioner, we have concluded that it is justifiable to release some of the information you requested, given that you are the subject of the complaint, you are aware of the complainant's identity and you have already received information about the complaint as a necessary part of our investigation.
>
> Accordingly, please find enclosed a copy of the records you requested. We have severed information from the records which was not of concern to Council and did not form part of our investigation, as well as the personal information of third parties. Where information has been severed, I have made a note of the reason.

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[1] [2006] B.C.I.P.C.D. No. 19.

[2] As noted below, the Council said it received two complaint letters from the third-party complainant.

[3] Because the matter did not settle fully in mediation, a written inquiry took place under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("Act"). The applicant, the Council and the third-party complainant ("complainant") made representations in the inquiry.

2.0 ISSUE

[4] The notice for this inquiry said that issues in this case are:

1. Whether the Council is authorized to refuse access under s. 15.

2. Whether the Council is required to refuse access under s. 22.

[5] Under s. 57(1) of the Act, the Council has the burden of proof regarding s. 15 while, under s. 57(2), the applicant has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[6] **3.1 Preliminary Matters**—The complainant objected to the arrival of the applicant's submission in this office by fax, just before noon on the due date, saying the notice of inquiry instructs participants to send originals on or before the due date, if they are first sending material by fax. He said that his understanding was that the office's inquiry rules were meant to ensure that parties are treated fairly and professionally. He argued that "no partial bias or special exceptions can be allowed" to any of the parties and asked that the inquiry be closed as a result.[3]

[7] This office received the applicant's submission by fax an hour before it was due and the complainant received a copy of that fax in accordance with the schedule for exchanging submissions. He did not argue that he was prejudiced by receiving a copy of a fax and I am unable to detect any prejudice to the complainant's position or ability to make a reply through his having received, on schedule, a copy of a fax. The complainant's request is without foundation and I reject it.

[8] The complainant also objected in his reply submission to the applicant addressing s. 15 in her initial submission. He said it was his understanding that the inquiry related only to s. 22, based on the letter he received with the notice of inquiry. He wondered if his ability to respond had been compromised if s. 15 is indeed an issue. He asked that I ignore the applicant's comments on s. 15 if they are irrelevant.[4]

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[3] Undated letter, received by this office April 25, 2005.
[4] Page 1, reply submission.

[9] The notice for this inquiry—which the complainant received—states that both ss. 15 and 22 are in issue. The letter to the complainant told him that the purpose of the inquiry was in part to determine whether s. 22 of the Act applies and offered him an opportunity to make representations on that exception from his own perspective. The complainant was not asked nor required to comment on the Council's application of s. 15.

[10] It was, on the other hand, entirely appropriate for the applicant to make representations on both ss. 15 and 22, as the Council relied on both sections to deny her information in response to her access request. I have considered her submissions on both exceptions.

[11] **3.2 Background**—The Council said that it is a regulatory body appointed under s. 220(1) of the *Financial Institutions Act* ("FIA") to license and regulate the conduct of insurance agencies, agents and adjusters in British Columbia. It said that its "mandate is to protect the public by ensuring that insurance licensees meet the minimum licensing requirements and practice the business of insurance in good faith, in a competent and trustworthy manner and in accordance with the usual practice".[5] It said that it receives an average of 400 complaints and inquiries every year, resulting in 100 formal investigations and 35 to 40 disciplinary decisions.[6]

[12] The Council said that its policy in handling investigations is to provide licensees with a summary of the allegations but not the original complaint letter. It said that, in many cases, complaint letters include irrelevant information that is outside the Council's jurisdiction or which does not give rise to concerns about the licensee's conduct. In support of this, it provided with its submission a copy of a policy entitled "Complaint Review and Reporting – Informing Licensees of Investigations".[7]

[13] The Council said that the access applicant in this case is an employee of an insurance agency and that the complainant, a former employee of the agency, made complaints about the applicant to the Council. It noted that the applicant is aware of the complainant's identity. It said that the applicant was told of the investigation and provided with a summary of the complaints that, on their face, were within the Council's jurisdiction and a concern to the Council, and that she was given the opportunity to respond to the complaint.[8]

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[5] Lines 20-23, initial submission.
[6] Lines 17-28, initial submission; paras. 2-8, Wallace affidavit.
[7] Para. 10, Wallace affidavit; Exhibit "A", Wallace affidavit.
[8] Lines 29-40, initial submission; paras. 11-12, 16-17, Wallace affidavit.

[14] The Council said that the records at issue are:

- An undated one-page letter of complaint about the applicant from the complainant with three attached pages numbered 3, 4 and 5, date stamped May 11, 2004.
- An unsigned letter dated May 4, 2004 from the complainant.[9]

[15] The Council said that portions of the records in dispute were not part of the investigation as they were irrelevant or outside the Council's jurisdiction. It said that the investigation is still ongoing.[10]

[16] **3.3 Legislative Framework**—The Council outlined the legal authority under which it regulates insurance agents and investigates complaints. It said that, under s. 232 of the FIA, it has the authority to conduct investigations to establish whether there has been compliance with the FIA by licensees. Under s. 231 of the FIA, it has the authority to take disciplinary action—including suspension or cancellation of a licensee's licence or fining of a licensee—for specified breaches or failures to act.[11]

[17] The Council also drew my attention[12] to ss. 218 and 243(4) and (5) of the FIA which read as follows:

> ***Confidential information***
>
> 218 An individual or entity who, under this Act or the regulations, obtains
>
> (a) information, or
>
> (b) records
>
> that are submitted in accordance with a request that is made or an obligation that is imposed under this Act or the regulations must not disclose the information or records to any individual or entity other than for the purposes of administering this Act and the regulations, for the purposes of a prosecution or if required by law.
>
> ***Immunities***
>
> 243(4) Subject to subsection (5), all communications with, and information supplied and records or things produced to, the commission, superintendent or council with respect to
>
> (a) an applicant for an insurance agent, insurance salesperson, insurance adjuster or employed insurance adjuster licence, a licensee or former licensee,

[9] Lines 54-67, initial submission; paras. 13-14, Wallace affidavit.
[10] Paras. 16-18, Wallace affidavit.
[11] Lines 94-172, initial submission.
[12] At lines 82-92 & 174-198, initial submission.

(b) an applicant for a business authorization or a permit under section 187,

(c) an inquiry, examination or investigation under this Act, or

(d) the compliance of a person with this Act

are privileged and no action may be brought against a person as a consequence of the person having made that communication.

(5) Subsection (4) does not apply to a person who makes a communication, supplies information or produces records or things maliciously.

[18] **3.4 Exposure to Civil Liability**—The Council's first decision letter referred to ss. 15(1)(a) and 15(2)(b), but in its initial submission, the Council said that it was relying only on s. 15(2)(b). It confirmed this in its reply submission.[13] I do not therefore consider s. 15(1)(a) here.

[19] The relevant part of s. 15(2) reads as follows:

Disclosure harmful to law enforcement

15(2) The head of a public body may refuse to disclose information to an applicant if the information …

(b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record, …

[20] Schedule 1 to the Act defines "law enforcement" as follows:

"law enforcement" means

(a) policing, including criminal intelligence operations,

(b) investigations that lead or could lead to a penalty or sanction being imposed, or

(c) proceedings that lead or could lead to a penalty or sanction being imposed;

[21] The Commissioner has considered s. 15(2)(b) a few times, for example, in Order 00-52[14] and Order 01-48.[15] In Order 00-52, at p. 9, the Commissioner remarked on the need to show that a record is a "law enforcement record" and to establish a reasonable expectation that disclosure of information from that "law

[13] Lines 28-29, reply submission.
[14] [2000] B.C.I.P.C.D. No. 56.
[15] [2001] B.C.I.P.C.D. No. 50.

enforcement record" could expose someone to civil liability. He also said that some evidence and argument as to the veracity or falsity of the disputed information would be in order. Other evidence, such as the existence of law suits, along with establishing a relationship between those law suits and information sought in the "law enforcement record", would be relevant as well. The Commissioner also said that an access applicant's expressed intention not to sue anyone carried some weight but not much.

[22] In the applicant's view, the severed information does not relate to a law enforcement investigation. She said that the complainant provided the complaint letters with the intention of harming her reputation and that such attempts do not fall under the Act's protection or under s. 15(2)(b). A reasonable person should expect consequences from making defamatory remarks about another person, she said, and the complainant's conduct and allegations were unacceptable. The applicant expressed concern that, as a result of the complainant's intent to tarnish "an otherwise unblemished record", the allegations will remain on her insurance licensing record throughout her career.[16] She said that all parties are aware that the complainant "has persistently pressed for a negative conclusion in the investigation against the Applicant, despite Council's advice to the contrary".[17] The applicant did not say whether or not she intends to take any legal action against the third party.

[23] The Council said that its investigations are "law enforcement" and that the records in question are "law enforcement records", for the purposes of s. 15 of the Act. It referred to the definition of "law enforcement" in Schedule 1 of the Act and said it has the authority under s. 232 of the FIA to conduct investigations which can result in the imposition of penalties or sanctions under s. 231 of the FIA. It then referred to orders which have affirmed that a self-regulating body's disciplinary proceedings are "law enforcement" for s. 15 purposes. The Council said that the complaints in this case led to the Council initiating investigations under s. 232 of the FIA and that the complaint letters are therefore "law enforcement records".[18]

[24] The Commissioner has held that self-governing bodies such as the Law Society of British Columbia have a "law enforcement" mandate for s. 15 purposes. I made a similar finding in Order F05-03[19] about the British Columbia Veterinary Medical Association. Here, I accept the Council's argument that, for the reasons it gives, its disciplinary processes are "law enforcement" for the purposes of s. 15. I therefore also accept the Council's argument that the complaint records—as the instruments which triggered an investigation which

[16] The Council said that any such information is kept on its file for information purposes only and is not a matter of public record; see lines 83-86, reply submission.
[17] Pages 6-7, initial submission.
[18] Lines 200-254, initial submission.
[19] [2005] B.C.I.P.C.D. No. 3.

could have led to the imposition of a penalty or sanction—are "law enforcement records" for the purposes of s. 15(2)(b).

[25] The next step is to consider whether disclosure of the severed information in these letters could reasonably be expected to expose someone to civil liability. The Council argued that there is such an expectation. It admitted that it is not aware of any expressed intention of the applicant to commence a civil action against the complainant but said that it could not expect to be aware of any such intentions. The Council based its view on an "objective review of the records" based on their content. In an *in camera* portion of its submission, it pointed to allegations in the letters which it argued support its position and gave some general reasons for taking this view. The investigation of the complaint is still ongoing, it reiterated.[20]

[26] The Council said in its reply that it does not determine whether allegations are false but whether, on a balance of probabilities, there is sufficient evidence to establish a breach of the FIA and what if any disciplinary action it will take.[21]

[27] The Council said that it does not accept that it must establish that the identified statements are false or that the maker of the statements knew them to be false at the time the statements were made in order to rely on s. 15(2)(b). It continued as follows:

> To the extent that Orders 00-52 and 01-48 are authority for the proposition that section 15(2)(b) is only applicable to records containing information that is acknowledged by the author to be false, the Council says that those orders are wrongly decided.[22]

[28] Orders 00-52 and 01-48 do not say these things. As I note above, the Commissioner remarked in Order 00-52 that, to establish that s. 15(2)(b) applies, some evidence and argument as to the veracity or falsity of the disputed information would be in order, along with evidence confirming the existence of lawsuits by the applicant and their relationship to the information sought. In Order 01-48, the Commissioner referred to the above comments from Order 00-52 and went on to find that s. 15(2)(b) did not apply as, although he accepted that the disputed records were "law enforcement records" for s. 15(2)(b) purposes, he did not agree with the public body's interpretation of the applicants' motives for requesting the records. He also noted that the author of the letters contended that the things he was saying about the applicants—some of them critical—were true.

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[20] Lines 256-270; Appendix "B", which it submitted on an *in camera* basis.
[21] Lines 45-49, reply submission.
[22] Lines 271-276, initial submission.

[29] The Council went on to say that the intent of s. 15(2)(b) is to protect persons who provide information in law enforcement investigations from exposure to civil liability for the information provided. The essence of the Council's argument was that, regardless of whether or not the allegations are true, or whether the author believes them to be true, the author is exposed to civil liability.

[30] The Legislature's intention is, of course, relevant and important in interpreting a statutory provision, but the plain language of the provision cannot be ignored and the context in which it appears is also relevant.

[31] Section 15(2)(b) requires, first, that the information in question be found "in a law enforcement record" and, second, that disclosure of the information "could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record". Accordingly, there must be evidence to support a finding of a reasonable expectation of exposure to civil liability of the author of the record or anyone quoted or paraphrased in the record.

[32] It is not enough that the record contains, as the Council puts it, information provided in a law enforcement investigation. If the Legislature's intention, as characterized by the Council, were the only consideration in interpreting s. 15(2)(b), the Council's position, taken to its extreme, would authorize a public body always to withhold information provided in law enforcement investigations. This could swallow up other aspects of s. 15, such as s. 15(1)(d), which protects information that would "reveal the identity of a confidential source of law enforcement information". I do not think the Legislature intended such a broad scope for s. 15(2)(b).

[33] There is no indication that the applicant intends to sue the complainant or otherwise take legal action against him as a result of his complaints. In any case, she appears to be aware of the immunity s. 243(4) of the FIA affords, although she appears to believe this is negated by s. 243(5) of the FIA.[23] The Council also did not state whether the complainant's allegations were true or false and did not provide me with any references to relevant case law to support its arguments in this case. The complainant on the other hand, appears to believe that what he said about the applicant was true.[24]

[34] I do not need to decide the s. 15(2)(b) issue on the above basis. This is because s. 243 of the FIA expressly provides protection for qualified privilege or communications made to the Council in the course of investigations, which is the case here. In the Council's view, the policy rationale behind this protection is clear: to encourage insurance agents and members of the public to provide

[23] Paras. 2-3, reply submission.
[24] Pages 4-5, reply submission.

information to the Council and allow it to fulfil its statutory mandate to regulate insurance agents and protect the public.[25]

[35] Although the Council drew my attention to s. 243(4) of the FIA and acknowledged that it provides protection for communications made to it during investigations, it did not explain why it thought this provision would not function in this case to prevent a defamation suit or other civil action.

[36] Section 243(4) of the FIA expressly states that no action may be brought against someone as a consequence of making a communication to the Council. It is in my view a complete answer to the Council's argument on the issue of exposure to civil liability. If no liability is possible, there can be no reasonable expectation of exposure to liability. In view of the protection afforded by s. 243(3), I find that s. 15(2)(b) does not apply here.

[37] **3.5 Personal Privacy**—The Council said that it also applied s. 22(1) to the severed information. The relevant parts of s. 22 read as follows:

> **Disclosure harmful to personal privacy**
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights, …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence, …
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation, …
>
> (d) the personal information relates to employment, occupational or educational history, …

[25] Lines 278-291, initial submission.

> (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation, …

[38] Numerous orders have considered the principles for applying s. 22. See, for example, Order 01-53.[26] I will not repeat those principles but have applied them in this decision.

Whose personal information is in issue?

[39] "Personal information" is defined in Schedule 1 of the Act as "recorded information about an identifiable individual other than contact information". The Council said that the severed information is mainly the "personal information" of third parties, including their opinions, disclosure of which would be an unreasonable invasion of personal privacy, especially that of the complainant. The Council acknowledged that some of the severed information is opinions about the applicant and therefore the applicant's personal information. However, the applicant is not, in the Council's view, entitled to know that a specific person holds a particular opinion about her. While the opinions are that person's personal information, who holds the opinion is not, the Council believes, and it is not possible to sever the two types of information. It said that the applicant knows who made the complaints and disclosing the complainant's opinion of the applicant would be unreasonable invasion of the complainant's personal privacy, as, in the Council's view, the applicant is not entitled to know that the complainant holds the opinion.[27] The Council did not explain why it thinks this nor did it refer me to any relevant orders or decisions in support of this argument.

[40] I agree with the Council that the severed information includes—in fact, consists mainly of—third-party personal information, in the form of the complainant's comments about his own situation and his comments and allegations about individuals other than the applicant. As the Council acknowledged, the severed information also includes comments and opinions about the applicant, mainly by the complainant. The Council correctly observed that this is the applicant's personal information.

[41] I disagree, however, with the Council's argument that the identity of a person who holds an opinion about an applicant is not part of that personal information. While that identifying information is the personal information of the third party, it is also, in my view, an integral part of the opinions about the applicant. The comments and opinions in this case are only "about" the applicant and, aside from the fact that the third parties hold those opinions about her, the information consisting of their comments and opinions is not "about" those third parties.

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[26] [2001] B.C.I.P.C.D. No. 56.
[27] Lines 350-363, initial submission.

[42] The Federal Court of Canada expressed a similar view when it considered this issue in *Canada (Information Commissioner) v. Canada (Ministry of Citizenship and Immigration)*.[28] It found there that the names of interviewees were their personal information but also part of the access applicant's personal information, being the opinions and views they had expressed about him in the course of a workplace investigation. The decision in *Ministry of Citizenship and Immigration* relies on a definition of personal information in the federal legislation which is different from the one in the British Columbia Act. It nevertheless warrants some consideration in this situation, where I am assessing the nature of the information in dispute.

[43] The fact that the third parties are identifiable as having expressed opinions or made comments about the applicant means they have a privacy interest in relation to possible disclosure of the fact that, as identifiable individuals, they hold opinions about the applicant. I therefore consider below whether disclosure to the applicant of the third parties' opinions and comments about the applicant, associated with them as identifiable individuals, would be an unreasonable invasion of their privacy.

Other information

[44] Among the severed information are references to matters that the complainant had apparently discussed earlier with a Council employee. It is not always clear to whom, if anyone, the complainant is referring in some of these portions, although he appears to be referring to individuals other than the applicant. Because of this, I have treated these portions as third-party personal information for the purposes of this decision.

[45] The withheld information also contains some general remarks and allegations that the complainant and others made about the insurance agency as a corporate entity. As the remarks are not directed at or about identifiable individuals, this information is not personal. Section 22 thus does not apply to this information. Nor does any other exception apply on its face, including s. 21(1).[29] I have therefore marked this information for release by the Council to the applicant.

[46] **3.6 Presumed Unreasonable Invasion of Privacy**—I note elsewhere in this decision that the applicant appears to be interested only in her own personal information. However, she also appears to want complete access to

[28] 2002 FCA 270 F.C.J. (C.A.)

[29] For similar findings, see Order 01-36, [2001] B.C.I.P.C.D. No. 37, where the Commissioner found that s. 21(1) did not apply to a list of rubber recycling businesses that the third party had compiled. See also Order 01-27, [2001] B.C.I.P.C.D. No. 27, where the Commissioner found that s. 21(1) did not apply to a list of companies that had been the subject of complaints to the Financial Institutions Commission.

the complaint records,[30] perhaps in the belief that the severed information is all or mostly about her. As some of the severed information is the applicant's personal information in the form of third parties' opinions about her, and other information is third-party personal information, I have considered whether disclosure of all of the severed portions would be an unreasonable invasion of third-party privacy.

Investigation into a possible violation of law

[47] Section 22(3)(b) applies to the third-party personal information only, the Council said. However, in its view, disclosing the applicant's personal information would result in the disclosure of this type of third-party personal information. It referred to Order 02-20,[31] in which the Commissioner accepted that, for the purposes of s. 22(3)(b), the Law Society's disciplinary investigations under the *Legal Profession Act* and Law Society rules are investigations "into a possible violation of law".

[48] The applicant does not believe s. 22(3)(b) applies, as "the investigation into the alleged violations had concluded with the Applicant being cleared of any wrongdoing".[32] The Council disputed this statement in its reply, saying the investigation was not concluded and it has not made a finding or determination that there was no wrongdoing on the applicant's part. It said that it has told the applicant verbally that, except for one issue still under investigation, it did not intend to pursue disciplinary action for the other issues of concern. Nevertheless, it said, remedial or other action might still result.[33]

[49] The circumstances in this case are analogous to those in Order 02-20. I accept that the Council's complaint investigation process is "an investigation into a possible violation of law" for the purposes of s. 22(3)(b). It follows that the third-party personal information in the complaint letters was compiled for such a purpose. The results of the investigation and whether or not the investigation is over are irrelevant for the purposes of s. 22(3)(b). I find that s. 22(3)(b) applies to the third-party personal information in the complaint letters. Its disclosure is thus presumed to be an unreasonable invasion of third-party privacy.

Employment history

[50] The applicant does not believe there is any third-party employment history information in the records.[34] For its part, the Council said that some of the severed information is the personal information of third parties, including the complainant. In the Council's view, this personal information relates to the

[30] p. 2, reply submission.
[31] [2002] B.C.I.P.C.D. No. 20.
[32] Page 8, initial submission.
[33] Lines 29-35, reply submission.
[34] Page 8, initial submission.

complainant's employment history and disclosure of this information would be an unreasonable invasion of that third party's privacy.[35]

[51] Past orders have found that information related to workplace complaints about an individual or to investigations into an individual's actions and behaviour in the workplace is information related to that individual's employment history. It may also be the employment history information of the complainant and witnesses. In this case, the complaint letters contain information related to the workplace activities and behaviour of a number of individuals—including the applicant and the complainant—as well as to complaints associated with those activities. It is the employment history of all of these individuals, including the complainant. As far as the third parties are concerned, this information falls under s. 22(3)(d) and its disclosure is presumed to be an unreasonable invasion of third-party privacy.

Confidential personal or personnel evaluations

[52] The Council did not raise the possible application of s. 22(3)(h) but it merits some discussion here, given that the opinions and views about the applicant originated with the third parties. The purpose of s. 22(3)(h) is to conceal the identity of a third party who provided personal information about the applicant to the public body, but in the specific circumstances described in s. 22(3)(h).[36] The Commissioner has held in past orders that this provision applies to confidential references or evaluations in a workplace context and that it does not apply to an employee's allegations about a fellow employee.[37]

[53] Further, in Order F05-30,[38] I said the following about the type of information covered by s. 22(3)(h):

> ***Personal evaluations***
>
> [41] I do not consider that the withheld information constitutes "personal recommendations or evaluations, character references or personnel evaluations" as described in s. 22(3)(g). Past orders have interpreted this section as referring, for example, to formal performance reviews, to job or academic references or to comments and views of investigators about a complainant's or respondent's workplace performance and behaviour in the context of a complaint investigation. See, for example, Order F05-02, at paras. 57-59, Order 01-53, at paras. 42-47, and Order 01-07,[39] at para. 21.

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[35] Lines 382-394, initial submission.
[36] See, for example, para. 19, Order 02-45, [2002] B.C.I.P.C.D. No. 45.
[37] See, for example, Order 01-07, [2001] B.C.I.P.C.D. No. 7, at paras. 21-22, which discuss the nature of the information and circumstances to which s. 22(3)(h) applies. See also Order 00-44, [2000] B.C.I.P.C.D. No. 48.
[38] [2005] B.C.I.P.C.D. No. 41.
[39] [2001] B.C.I.P.C.D. No. 7.

> [42] In this context, where the information flows from an exploration of the reasons for tension and conflict between the FRS's management and its employees, employees' and managers' comments or complaints about each other's workplace attitudes or behaviour do not constitute this type of evaluative or reference material. Similarly, s. 22(3)(h) does not apply, since the purpose of that section is to protect the identity of someone who provided, in confidence, the type of evaluative information alluded to in s. 22(3)(g). See para. 47, Order 01-53, for a similar finding.

[54] The information in question is not a personal or personnel evaluation or recommendation about the applicant by, for example, her manager. Nor is it, to take another example, an employment reference given by a former employer. Rather, the information consists of opinions and allegations about the applicant's workplace actions and behaviour expressed by a former colleague and by another third party. This is not the type of information that falls under s. 22(3)(h).

[55] In any event, for reasons I discuss below, it has not been established that the information was supplied in confidence by the third parties. Moreover, the Council has already disclosed to the applicant the fact that the records contain third parties' opinions about her and she already knows the identity of the complainant. Section 22(3)(h) has for these reasons no relevance in this situation.

[56] **3.7 Relevant Circumstances**—The parties raised a number of relevant circumstances in this case. The complainant said he did not consent to the disclosure of the complete complaint letters. He cited ss. 22(2)(e), (f) and (h) as factors, but he did not elaborate. The applicant and the Council developed their views to some extent.

Fair determination of rights

[57] The Council said the disclosure of the information in question is not relevant to a fair determination of the applicant's rights in the ongoing investigations. It said that she has been provided with a summary of the portions of the complaints that were within the Council's jurisdiction and of concern to the Council and has been given an opportunity to respond. It said that it has not withheld any information from the applicant that relates to the specific complaints addressed in the investigation and is not currently considering any disciplinary action. Thus, in its view, she has "already been afforded her rights to natural justice and procedural fairness" and s. 22(2)(c) is not a relevant factor.[40]

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[40] Lines 398-406, initial submission; lines 47-55 & 90-99, reply submission. I note that at lines 31-33 of its reply submission, the Council phrases this statement slightly differently, saying that, except for one outstanding issue still under investigation, it did not intend to pursue disciplinary action but that remedial or other action might still result. I take the Council's point however that it has provided the applicant with all information relevant to the complaints it decided to investigate and that there is therefore no support for a s. 229(2)(c) argument.

[58] The applicant argued, on the contrary, that the information is relevant to a fair determination of her rights

> … to disclosure of damaging information contained in false allegations and complaints lodged with a governing body, directly related to the Applicant's professional reputation and ability to earn a living. Persons taking deliberate actions based on false pretenses do not enjoy the protection of this Legislation.[41]

[59] The third party countered that he believed the statements to be true and that "there were no deliberate actions based on any false pretenses".[42]

[60] Although the applicant argued that she has a right to the disclosure of any "damaging information", I accept the Council's argument that it has already disclosed to the applicant the information of concern to it from a regulatory point of view and which might therefore have a bearing on her legal rights in its complaint and disciplinary processes. I accept that the remaining information that relates to the applicant is not relevant to a fair determination of the applicant's "legal rights" in the Council's ongoing investigation and disciplinary processes. I find that s. 22(2)(c) does not apply to this information.

Unfair harm and damage to reputation

[61] The applicant rejected any suggestion that, as a result of disclosure of the complaint letters, the complainant would be exposed unfairly to harm or that his reputation would suffer any damage. She argued that a reasonable person would expect that false allegations about the applicant would be disclosed under the principles of fairness and natural justice. She said that she is entitled to copies of the records, as they pertain to her "rights to face [her] accuser".[43]

[62] The applicant indicated in her submissions that she mainly wants access to her own personal information. The severed information that relates to her consists of the third parties' remarks and complaints about things the applicant said and did in the workplace and their (subjective) opinions and views about her actions in the workplace. I do not see how disclosure to the applicant of her own personal information in the form of other people's opinions or complaints about her could cause unfair harm to any third party nor damage to any third party's reputation, particularly if, as the complainant contends, he believes what he said about her to be true. I agree with the applicant that ss. 22(2)(e) and (h) are not relevant here.

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[41] Page 8, initial submission.
[42] Page 4, reply submissions.
[43] Pages 8 & 9, initial submission.

Supplied in confidence

[63] The Council said that its records, including the complaint letters in dispute, are deemed to be confidential under s. 218 of the FIA. It also said that the third party stated in the records that those submissions are "confidential". The Council acknowledged that complete confidentiality cannot be promised. It said, however, that its policy is to release information only when and as necessary for the due administration of the FIA or as required by law. It said that complainants realize that disclosure of some information, including their identities, may be required to address their concerns. However, the Council is of the view that complainants do not expect that the Council will send a copy of their complaint or statement to the affected licensee. It said that it does not do this.[44]

[64] The applicant argued that the complainant supplied personal information to the Council knowing that she, as the subject of the complaint, would be made aware of the content and source of the complaints. In her view, the third party, believing confidentiality was assured for his complaints, supplied the information to the Council under the pretence of protecting the public good, when in fact the allegations were made to harm her reputation "in an act of revenge".[45]

[65] The third party disputed the applicant's claims regarding his motives, saying he had no "other agenda" and no intentions to discredit the applicant. He simply reported what might be questionable behaviour by her to the Council, that the Council had requested that he be forthcoming with any information that might be of interest to it and that they were simply his opinions.[46] He also said he understood his complaints to be confidential, but did not elaborate on the basis for this belief.[47]

[66] While I accept that the third party supplied the records to the Council, I do not consider s. 218 of the FIA assists the Council's position on the "confidentiality" part of the "supplied in confidence" test. Section 218 of the FIA simply restricts disclosure of information or records obtained under the FIA to certain circumstances. It does not mean that the information or records were supplied in confidence in the first place. It also does not mean the Council is prohibited from disclosing the information in dispute to the applicant as part of its complaint investigation process. In my view, the Council could exchange not only complete complaints, but also responses, among the parties, as part of its administration of the FIA. Such a practice would promote transparency and public confidence in the complaint process.

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[44] Lines 408-437, initial submission.
[45] Page 8, initial submission.
[46] Page 2, reply submission.
[47] Page 5, reply submission.

[67] Section 218 of the FIA also does not, in my view, prevent the Council from disclosing the disputed information under the Act. For one thing, s. 218 does not apply to a disclosure "required by law" and the Act requires disclosure in response to an access request, except to the extent exceptions under the Act apply. Moreover, the FIA contains no clause stating that it overrides the Act. Thus, under s. 79 of the Act,[48] the Act prevails over any inconsistent or conflicting provisions in the FIA, including s. 218.

[68] I dealt with similar arguments on s. 218 of the FIA—in the context of s. 21(1)(b) of the Act—in Order F05-09.[49] I referred to the Commissioner's remarks on establishing confidentiality of supply in Order 01-36[50] and concluded that s. 218 of the FIA, while a factor, did not carry the day. I make the same finding here, for reasons discussed above and in Order F05-09.

[69] The Council did not provide me with any policies to show that it receives and treats complaints in confidence or to support its argument that complainants could reasonably expect that the Council would not provide complete copies of their complaints to licensees. As noted above, although the Council provided me with a copy of its policy entitled "Complaint Review and Reporting – Informing Licensees of Investigations",[51] this policy merely states that the Council will inform licensees of the allegations against them and give them an opportunity to respond. The policy says nothing about what the Council tells complainants to expect or whether the Council receives and treats complaints in confidence.

[70] Moreover, although the Council provided affidavit evidence[52] on the conduct of its complaint processes, this evidence also does not address the confidentiality of receipt and treatment of complaints. It simply confirms that the Council provides licensees with summaries of complaints of concern to the Council. In any case, the very fact that, in the interests of fairness and natural justice, the Council makes a practice of informing licensees of complaints means that it is not in a position to promise complete confidentiality to complainants, as the Council itself acknowledges.

[71] I note that the third party's complaint letter is marked "confidential" and that he claims that he understood his complaints to be confidential. These are again factors, but they do not, in my view suffice to establish confidentiality of supply. In any case, the third party does not say that he understood that the applicant, as the subject of his complaint, would not be told of his complaints. If he wished the Council to address his complaints, he presumably knew or could

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[48] Section 79 of the Act says the following: "If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act."
[49] [2005] B.C.I.P.C.D. No. 10.
[50] [2001] B.C.I.P.C.D. No. 37, at paras. 24-26..
[51] Exhibit "A", Wallace affidavit.
[52] Wallace affidavit.

reasonably be expected to infer, that the Council would tell the applicant of his complaints.

[72] Moreover, when the third party submitted his complaints, he appears simply to have responded to the Council's invitation to be forthcoming and apparently did not know which complaints the Council would choose to pursue, as being a concern from a regulatory point of view, and which it would disregard, as not being within its jurisdiction or as being of no concern to it. Thus, as far as he knew when submitting his complaints, the Council could have decided to disclose all of his comments and allegations to the applicant during the complaint investigation. I do not think that the third party can now say that, because the Council did not provide the applicant with a complete account of his complaints during the complaint investigation, the applicant is not entitled to know the nature of the remaining allegations, because he understood his complaints to be "confidential". There is also no indication that the other third party was speaking to the complainant in confidence when he commented on the applicant's workplace behaviour.

[73] For these reasons, I do not consider that the Council and the complainant have established confidentiality of supply of the complaint records. I find that s. 22(2)(f) does not apply in this case.

Is the applicant entitled to more information?

[74] I found above that the withheld third-party personal information falls under ss. 22(3)(b) and (d), but not s. 22(3)(h), and that the relevant circumstances in ss. 22(2)(c), (e), (f) and (h) do not apply to it. There is nevertheless a presumption that disclosure of the third-party personal information which falls under ss. 22(3)(b) and (d) would be an unreasonable invasion of third-party privacy. The applicant confined her arguments to her entitlement to her own personal information and did not attempt to argue that she should have access to personal information that relates to third parties. She has not discharged her burden regarding the personal information of third parties and I find that s. 22(1) applies to that personal information.

[75] I also found above that some of the withheld information, which consists of other people's opinions about the applicant, is her personal information and that this personal information includes the fact that the (identifiable) third parties expressed opinions or made comments about her. I then noted that the third parties have a privacy interest in the disclosure of those opinions which would necessarily reveal their identities as the opinion holders. I will now consider whether disclosure of the applicant's own personal information to her would be an unreasonable invasion of the privacy of those third parties, because the applicant would know both the things the third parties said about her and who said those things, but whose personal information is not otherwise involved.

[76] In *Ministry of Citizenship & Immigration,* the Federal Court of Appeal considered whether the access applicant was entitled to know the nature of allegations against him, including the names of those interviewed about him, and found that he was. While the test for disclosure of personal information in the federal legislation is different from that in the British Columbia Act, the Court's remarks and findings in that case, in my view, merit some consideration in dealing with the issue I am considering here.

[77] It will only be in rare circumstances that disclosure of an applicant's own personal information to the applicant will be an unreasonable invasion of third-party privacy,[53] for example, where s. 22(3)(h) applies or where the personal information of applicant and third party is intertwined and disclosure of the intertwined information would be an unreasonable invasion of third-party privacy. I found above that s. 22(3)(h) does not apply.

[78] As for the example of intertwined personal information of applicant and third party, I have already said that I consider the third parties' identities in this context, while their personal information, are an integral part of their opinions about the applicant and thus the applicant's personal information. I do not see a distinction under the Act between the complaint information the Council has already disclosed to the applicant, because it was a concern to the Council, and the third parties' opinions of the applicant which were not a concern to the Council from a regulatory point of view, and which the applicant thus did not receive as part of the complaint investigation. Both kinds of personal information are opinions about the applicant and are her personal information. Contrary to what the Council appears to argue, the test for disclosure here is whether disclosure of the opinions about the applicant would be an unreasonable invasion of third-party privacy, not whether the personal information is or is not a concern from a disciplinary or regulatory point of view.

[79] Although the Council does not have the burden of proof regarding third-party personal information, it does have the burden with respect to an applicant's own personal information.[54] It is thus expected to have reasonable grounds to deny an applicant access to her own personal information. The Council has not explained in this case why disclosure of the applicant's own personal information—in the form of the third parties' complaints about her that were not a regulatory concern—would be an unreasonable invasion of third-party privacy. It has simply asserted this and said she is therefore not entitled to these opinions. It seems to suffice, in the Council's mind, to say that the complaints were not a concern to it. While this might be relevant in the context of disclosure

[53] See para. 23, Order F05-08, [2005] B.C.I.P.C.D. No. 9, where I found that the case in question was one of those rare occasions in which third-party personal information could not reasonably be severed from the applicant's personal information. See also para. 48, Order 01-07, [2001] B.C.I.P.C.D. No. 7).

[54] See pp. 3-4, Order No. 330-1999, B.C.I.P.C.D. No. 43, where the Commissioner discusses this issue at some length.

as part of the Council's complaint investigation or other non-Act processes, it is not relevant under the Act to a consideration of whether disclosure would be an unreasonable invasion of third-party privacy.

[80] I fail to see how it would be an unreasonable invasion of the complainant's privacy for the applicant to know he expressed certain complaints about the applicant, which she does not happen to know about, but only because the Council chose not to investigate them. I see no distinction here between complaints the complainant made and those he passed on from another individual. Thus, I find that, in this case, disclosure of the intertwined personal information of the applicant and the third parties—that is, the third parties' opinions of the applicant and thus their identities as opinion holders—would not be an unreasonable invasion of third-party privacy. The applicant is, in my view, entitled to have access to all of the remaining withheld personal information that relates to her.

4.0 CONCLUSION

[81] For the reasons given above, under s. 58 of the Act, I make the following orders:

1. Subject to para. 2 below, I require the Council to refuse the applicant access to the information it withheld under s. 22(1);

2. I require the Council to give the applicant access to the information it withheld under s. 22(1), as highlighted in yellow on the copies of the records in dispute provided to the Council with its copy of this order.

July 11, 2006

ORIGINAL SIGNED BY

Celia Francis
Adjudicator

OIPC File: F04-22682