Order F06-21

MINISTRY OF FORESTS AND RANGE

Justine Austin-Olsen, Adjudicator
December 19, 2006

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Summary: The applicant requested a copy of the report evaluating a research proposal that he submitted for funding through Forestry Innovation Investment. The Ministry provided the applicant with the requested record, which included comments made by the individuals who had reviewed the proposal, but severed the names of the reviewers under s. 22 of FIPPA. The Ministry also later claimed that s. 17 applied and authorized it to sever the names of the reviewers. The statutory presumption under s. 22(3) does not apply in this case. However, there are relevant factors under s. 22(2) that weigh against disclosure of the reviewers' names and s. 22(1) does apply. Since the Ministry is required by s. 22(1) to sever the names of the reviewers, s. 17 need not be considered.

Key Words: late notice of new issue—duty to respond completely and without delay—abuse of process—appropriate persons—third-party personal privacy—position, function or remuneration of public body employees—acting in personal capacity—personal recommendation or evaluation—supplied in confidence—unfair exposure to harm—unfair damage to reputation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 7, 10(2)(a), 17, 22(1), 22(2)(a),(b),(e),(f),(h), 22(3)(h), 22(4)(e), 54(b), 56(3).

Authorities Considered: B.C.: Order No. 327-1999, [1999] B.C.I.P.C.D. No. 40.; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-52, [2002] B.C.P.I.C.D. No. 53; Order 04-07, [2004] B.C.I.P.C.D. No. 7; Order 04-20, [2004] B.C.I.P.C.D. No. 20; Order 04-25, [2004] B.C.I.P.C.D. No. 25.

Cases Considered: *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2006 BCSC 131.

1.0 INTRODUCTION

[1] This inquiry arises out of a decision to partially deny access to records generated through a program under the Ministry of Forests and Range ("Ministry").

[2] In 2002, the Ministry entered into an agreement with Forintek Canada Corp. ("Forintek") for administration of the Forest Innovation Investment programs, including forestry research. Forintek subsequently entered into an agreement with the Science Council of British Columbia ("Science Council"[1]) for administration of the evaluation process for proposed forestry research projects.[2]

[3] In 2003, the administration of Forestry Innovation Investment ("FII") programs was transferred to a new company, Forestry Innovation Investment Ltd. ("FII Ltd."), whose sole shareholder is the Province of British Columbia, as represented by the Minister of Forests and Range.[3] Responsibility for the research program was subsequently transferred back to the Ministry under the name Forest Investment Account – Forest Science Program. PriceWaterhouseCoopers LLP ("PWC") is the current administrator of the new Forest Science Program.[4]

[4] On March 4, 2005, the applicant made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for access to the Progrid Assessment Report, and the comments made by individual reviewers, for a research proposal he submitted for funding through FII during the summer 2002 request for proposal process.

[5] On April 26, 2005, the Ministry responded and provided the applicant with a copy of the report, but on the page that contained the comments made by the reviewers who had evaluated the applicant's research proposal, it withheld the names of those individuals under s. 22 of FIPPA. I will refer to the severed report as the "record in dispute".

[6] The applicant requested a review of the Ministry's decision by this Office and, after attempts to resolve the matter through mediation were unsuccessful, a notice of inquiry was issued on January 13, 2006.

[7] By letter dated January 20, 2006, the Ministry advised the applicant that, in addition to s. 22, it was taking the position that s. 17 of FIPPA also applied to

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[1] Since renamed the Innovation and Science Council of BC and currently operating as the BC Innovation Council.
[2] Locke affidavit, paras. 6 and 7.
[3] Locke affidavit, para. 9.
[4] Locke affidavit, para. 10.

the record in dispute and authorized the Ministry to withhold the names of the reviewers.

[8] In addition to the applicant and the Ministry, this Office invited participation in the inquiry from the third parties—the reviewers whose names were withheld from the applicant (the "reviewers")—and from the Science Council, PWC, Forintek, and FII LTD.[5] The applicant, the Ministry, the reviewers, the Science Council and PWC provided written submissions in this inquiry.

2.0 ISSUES

[9] The issues in this inquiry are:

1. Is the Ministry required by s. 22(1) of FIPPA to withhold the names of the reviewers?

2. Is the Ministry authorized by s. 17 of FIPPA to withhold the names of the reviewers?

[10] Under s. 57(1) of FIPPA, the Ministry has the burden of proof with respect to the application of s. 17. Under s. 57(2) of FIPPA, the applicant has the burden of proving that s. 22(1) does not require the Ministry to withhold the names of the reviewers.

3.0 DISCUSSION

[11] **3.1 Procedural Objections**—The applicant has raised several procedural objections which I will deal with first. The applicant sets out some of these objections specifically as such in his submissions and raises others in the course of addressing particular points.

Late notice of reliance on s. 17 of FIPPA

[12] As noted, the Ministry informed the applicant by letter dated January 20, 2006 that, in addition to s. 22 of FIPPA, it was relying on s. 17 as authorizing it to withhold the names of the reviewers. Although the Ministry provided the letter to the applicant after the Notice of Inquiry was issued, it advised the applicant that a review of this "new" decision could be requested by contacting this Office within 30 days.

[13] Upon receipt of the Ministry's January 20, 2006 letter the applicant contacted this Office, objecting both to the lateness of the Ministry's decision and the manner in which it was communicated. The Registrar of Inquiries advised all parties to the inquiry that, in order to accommodate the new decision by the

[5] See section 54(b) of FIPPA.

Ministry to rely on s. 17, additional time would be allowed for the parties to revise, amend, or resubmit their initial submissions as appropriate. The Registrar advised the applicant to include his concerns about the Ministry's "new" decision in his initial submission.

[14] The applicant's submissions characterize the Ministry's actions in this regard as, among other things, an "abuse of process" and a violation of ss. 6(1), 7 and 10(2)(a) of FIPPA.[6] With the exception of s. 6(1), for the reasons that follow, I do not agree.

[15] If a matter has already proceeded to the inquiry stage, and the public body determines that another section of FIPPA applies to the records in dispute, the proper course of action is for the public body to contact the Registrar of Inquiries and advise that it wishes to raise a new issue in the inquiry. However, whether or not a public body, or any party, will be permitted to do so will depend upon the particular circumstances.

[16] The time limits for response to an access request imposed by s. 7 and the circumstances for a time extension afforded by s. 10 are not engaged when a public body attempts to raise a new issue during the inquiry phase. However, the same cannot be said of s. 6(1) of FIPPA. Section 6(1) imposes a continuing obligation on a public body to respond "without delay … openly, accurately and completely" to a request for records. As expressed in Order 04-07:[7]

> …That obligation extends to "every reasonable effort to assist … and to respond without delay … openly, accurately and completely." This is a fundamental principle of the Act, as is the protection of personal information, and cannot be disregarded or dismissed by a public body, either prior to, or at any stage of, the review and inquiry process.

[17] Although the above comments were made in the context of evidence that additional records existed that had not yet been provided to the applicant, they apply equally here. The continuing obligation imposed on public bodies by s. 6(1) includes the duty to provide a complete response in a timely manner. As noted in Order 02-52, a complete response is one that includes the reasons for withholding or severing records:[8]

> …In responding "completely" to a request, a public body must make every reasonable effort to search for responsive records and then it must, in order to have responded "completely", either provide the records it located to the applicant or provide grounds for withholding those records. …

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[6] Applicant's initial submission, para. 1.
[7] Order 04-07, [2004] B.C.I.P.C.D. No. 7 at para. 65.
[8] Order 02-52, [2002] B.C.I.P.C.D. No. 53 at para. 42.

[18] Further, the obligation under s. 6(1) to provide a complete response requires a public body to make every reasonable effort to provide all of the grounds for withholding those records.

[19] In this case, the record in dispute is a single page. In its letter to the applicant the Ministry expressed regret about "the lateness of the addition" but offered no explanation about why it did not decide to rely on s. 17 earlier in the process. In response to the applicant's submission that the Ministry breached s. 6(1) by raising s. 17 late in the day, the Ministry says this:[9]

> The Applicant was advised by the Ministry that the information at issue was protected by s. 22 of the Act. The Ministry further advised the Applicant that the information at issue would be an unreasonable invasion of third party personal privacy. As such, the Ministry clearly conveyed to the Applicant the reasons for the refusal and the provision of the Act upon which the refusal was based.

[20] I take the Ministry to be saying in essence that, since the applicant was told that the record was severed under s. 22, and the additional reliance on s. 17 did not change the severing, it had fulfilled its duty under s. 6(1) to respond completely.

[21] I disagree. If a public body wishes to rely on new sections of FIPPA to sever or withhold a record or part of it, it has not responded "completely" until it has communicated that decision to the applicant. While this may occur after the time limit in s. 7 has expired, the public body remains subject to the requirement in s. 6(1) to respond "without delay". That being said, as unsatisfactory as I find the Ministry's response, based upon the material that I have before me I am unwilling to go so far as making a finding that the Ministry breached its duty to the applicant under s. 6(1) of FIPPA.

[22] I understand that the applicant is frustrated with the Ministry. However, in the circumstances of this case I do not find that the action of the Ministry amounts to an abuse of process. Although the Ministry erred by not raising s. 17 in a timely way, the applicant has not been prejudiced in this inquiry by the Ministry's action. The applicant was provided with an opportunity to consider and respond to the Ministry's position on the applicability of s. 17 and he has dealt with this issue in his written submissions.

[23] As for the manner in which the Ministry communicated the decision to the applicant, it is unfortunate that the letter referred the applicant to this Office for a review of its "new" decision rather than acknowledging directly that what it was doing was raising a new issue in the inquiry. However, in my view this is more properly characterized as mistaken rather than an abuse of process. I find

[9] Ministry's reply submission, para. 1.

nothing that leads me to the conclusion that the Ministry deliberately attempted to circumvent the requirements of FIPPA or to frustrate the inquiry process.

Participation by "appropriate persons" in this inquiry

[24] The applicant objects to this Office's invitation to the Science Council, PWC, Forintek and FII Ltd. to participate in this inquiry as "appropriate persons".[10] The applicant submits that these "appropriate persons" are not individuals, but organizations who are or were involved in administration of the program giving rise to the record in dispute. The applicant asserts that they are not independent, they are essentially agents of the Ministry and permitting their participation in the inquiry amounts to "stacking the deck in favour of the public body."[11] The applicant further objects to this Office obtaining input from the Ministry about which organizations constituted "appropriate persons" and not permitting the applicant "comment and input" before a decision to invite them was made.[12]

[25] The applicant has been afforded, and has taken advantage of, the opportunity to argue not only the merits of the decision to invite the above-noted organizations to participate in this inquiry, but to respond directly to the submissions made by the Science Council and PWC. The fact that their submissions may be consistent with those of the Ministry has nothing to do with the fairness of the inquiry. Regardless of how many participants there are, or what positions they advance, I will decide the issues according to the merits on the evidence before me. As such, I decline the applicant's request "that the appropriate persons and their submissions be dropped from the inquiry."[13]

Submission of in camera material

[26] The applicant objects to the inclusion of *in camera* material in the submissions made by the Ministry and by the reviewers. The applicant questions whether the criteria for the submission of *in camera* material have been satisfied and also complains that it is difficult to make a proper reply without having access to this material. [14]

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[10] Section 54(b) of FIPPA provides that, upon receiving a request for a review, the Commissioner must give a copy to "…any other person that the commissioner considers appropriate." Section 56(3) of FIPPA provides:

> The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review must be given an opportunity to make representations to the commissioner during the inquiry.

[11] Applicant's initial submission, paras. 7-8.
[12] Applicant's reply submission, paras. 5-8.
[13] Applicant's initial submission, para. 9.
[14] Applicant's reply submission, paras. 18, 30, 31, 34 and 78.

[27] Part of the *in camera* material consists of information that would identify the reviewers. As this is precisely the information in dispute, I find that this material is properly submitted *in camera*.

[28] As for the remainder, I do not accept that everything submitted, in particular by the Ministry, was properly *in camera*. However, I have not relied on material which, in my view, was not properly submitted *in camera*. As such, in the course of the submissions made by all of the parties, the applicant has been given the opportunity to consider and respond to all of the relevant material in this case to which I have given weight in making my decision. I realize this *ex post facto* determination is perhaps little consolation to the applicant, but given what I have said above, it is my view that there is nothing to be gained at this stage by insisting that the Ministry review and defend the submission of its *in camera* material.

Form of certain submissions

[29] The applicant objected that submissions by the reviewers and the organizations:[15]

> …did not provide explicit evidence…Instead [they] provided a series of paragraphs with opinion, opinion presented as evidence, and argument, all inter- and co-mingled.

[30] All of the submissions made in this case, including those made by the Ministry and the applicant, contained to a greater or lesser degree a mix of fact, sworn and unsworn evidence, opinion and argument. In coming to my decision in this inquiry, I have considered the nature of the material contained in each of the submissions in determining what weight, if any, may be placed on it.

[31] **3.2 Personal Privacy**—The relevant portions of s. 22 of FIPPA 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

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

[15] Applicant's reply submission, paras. 52, 62, 71, 77 and 86.

> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
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> …
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> (e) the third party will be exposed unfairly to financial or other harm,
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> (f) the personal information has been supplied in confidence,
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> …
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> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
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> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
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> (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,
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> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

[32] In Order 01-53 and in other orders, the Commissioner has set out the manner in which s. 22 is to be applied in determining whether it requires a public body to sever or withhold records.[16] I have applied the approach set out in Order 01-53 without repeating it here.

Personal information

[33] The first step is to determine whether or not the names of the reviewers are personal information under FIPPA. The relevant terms defined in Schedule 1 of FIPPA are as follows:

> "personal information" means recorded information about an identifiable individual other than contact information.
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> "contact information" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.

[16] Order 01-53, [2001] B.C.I.P.C.D. No. 56 at paras. 22-24. See also, *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2006 BCSC 131 at para. 45.

[34] There is no dispute that an individual's name is personal information as that term is defined above. For reasons that I discuss further below, I find also that in these circumstances the names of the reviewers are not "contact information". The reviewers were acting in their personal capacity, and as such, their names are personal information under FIPPA.

Information about position or functions

[35] The applicant argues that the names of at least some of the reviewers fall under s. 22(4)(e) of FIPPA, citing Orders 01-15 and 04-20 in support.[17] He submits that "there is no evidence that the reviewers were on holidays or on leave without pay to do their reviews" and therefore they were not acting in their personal capacities when reviewing the research proposals submitted for funding.[18]

[36] The Ministry's position is that any Ministry staff who chose to act as reviewers for the Science Council did so voluntarily, as forestry professionals, and not as Ministry employees. As such, their names do not constitute information about a "third party's position, functions or remuneration as an officer, employee or member of a public body" as specified in s. 22(4)(e).[19]

[37] In Order 01-15, the Commissioner discussed what type of information falls under s. 22(4)(e):[20]

> [35] The Ministry argues that s. 22(1) applies to the names of Ministry employees and descriptions of their actions. As I noted in Order 00-53, [2000] B.C.I.P.C.D. No. 57, public body employees are third parties for the purposes of s. 22. This does not mean, however, that all recorded information about them must be withheld under s. 22(1). The information in records 4-9 as to Ministry employees' names and actions *appears in the context of work-related activities and relates to their functions as employees of a public body*. It therefore falls under s. 22(4)(e), in my view, such that disclosure of that information would not result in an unreasonable invasion of the employees' personal privacy. See Order 00-53. …
>
> [Emphasis added.]

[38] Similarly, in Order 04-20, the Adjudicator held that s. 22(4)(e) applied because the records in dispute related to "the third parties' actions and dealings with the applicant in the workplace, as employees of the public body."[21]

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[17] Applicant's initial submission, paras. 30-31.
[18] Applicant's reply submission, para. 40.
[19] Ministry's reply submission, para. 16.
[20] Order 01-15, [2001] B.C.I.P.C.D. No. 16 at para. 35.
[21] Order 04-20, [2004] B.C.I.P.C.D. No. 20 at para. 18.

[39] The applicant has provided with his submissions a list of names of individuals which comprise the pool from which the reviewers of his research proposal were selected.[22] It is clear from looking at that list that some of the individuals are employees of public bodies, while others are not. This is consistent with the Ministry's description of the Science Council's method of conducting reviews of research proposals that were submitted for consideration during the relevant period:[23]

> The Council used a peer review method involv[ing] broad representation from throughout the forestry community. The Council contacted organizations representing the main sectors of the forestry community including industry, government, academia and related agencies. These organizations nominate[d] representatives for consideration [by] the Council. The Council also contact[ed] individuals who [had] previously served as reviewers for forest research in past years or who could provide relevant expertise for the evaluation process.

[40] The Ministry submits that in evaluating research proposals for the Science Council, all individuals acting as reviewers did so "in their capacity as experts who are part of a specialized research community" and not as a job requirement of the particular organization that employs them.[24]

[41] It is not disputed that participation in the Science Council review process was voluntary or that individuals were selected on the basis of their qualifications as forestry professionals. Although the process indicates that organizations contacted by the Science Council were asked to nominate representatives for consideration to act as reviewers, there is no evidence that any of those organizations required their employees to act as such as a condition of their employment. The fact that these individuals had to draw upon the same expertise in conducting their reviews that they would use in fulfilling their paid positions is to be expected and does not by itself transform the individual's voluntary professional service into execution of a work-related matter.

[42] It is also not a necessary condition, as the applicant suggests, that these individuals be on holiday or on leave without pay from their jobs while providing this voluntary professional service to the Science Council.[25] An employer may make other arrangements with an employee or may even choose to support its employee in volunteering his or her professional expertise by permitting the employee to perform the service during work hours.

[43] I therefore find that, in participating in the review process, the reviewers were acting in their personal capacities as forestry professionals and not as

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[22] Applicant's initial submission, para. 18 and attachment A19.
[23] Ministry's initial submission, para. 4.09.
[24] Ministry's reply submission, para. 13.
[25] Applicant's reply submission, para. 40.

employees of their respective organizations, public or private. The name of each of the individual reviewers who provided comment on the applicant's research proposal is not "information about the position, functions or remuneration of those individuals or the how, when or why of their discharge of official functions."[26]

Presumed unreasonable invasions of personal privacy

[44] The Ministry argues that the unreasonable invasion of personal privacy presumed under s. 22(3)(h) of FIPPA is engaged here. The reviewers also clearly believe that s. 22(3)(h) applies, even where they do not expressly refer to it.

[45] As noted above, s. 22(3)(h) provides that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if,

> … 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.

[46] The preliminary question raised by this section is whether the reviewers have in this case "supplied…a personal recommendation or evaluation."

[47] The Ministry submits that the reviewers have provided a "personal recommendation or evaluation" within the meaning of s. 22(3)(h).[27] The Ministry refers to Order No. 327-1999 in support and says that the "facts of this case are similar" and, on that basis, I should find that s. 22 requires the names of the reviewers to be severed. The Ministry goes on to submit that:[28]

> [i]n this case, the reviewers acted as volunteers. Further, the reviewers did not act in their capacity as employees of their respective organizations. As such, the Third Parties were acting in their personal capacities when they were making their recommendations. As such, the Ministry submits that the section 22(3)(h) presumption applies to the personal information at issue in this case.

[48] The applicant submits that this section of FIPPA does not apply because the reviewers were asked to evaluate a research proposal and not a person. The applicant refers to Order 04-25 in support, where the Adjudicator said that the purpose of this section of FIPPA "is to protect the identities of third parties who supplied, in confidence, evaluation, reference and similar information about an individual."[29] Although I am not of the view that it is necessarily confined to

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[26] Order 01-07, [2001] B.C.I.P.C.D. No. 7, at para. 19.
[27] Ministry's initial submission, paras. 4.44-4.46.
[28] Ministry's initial submission, para. 4.47.
[29] Order 04-25, [2004] B.C.I.P.C.D. No. 25, at para. 114.

a human resources or investigative context, the applicant is correct that in most cases this Office has considered s. 22(3)(h) in those circumstances.

[49] In Order No. 327-1999, cited by the Ministry, in issue were personal evaluations of an applicant's university graduate studies application.[30] The Commissioner found that s. 22(3)(h) applied to the names of the individuals who supplied the evaluations. In this case, the reviewers were asked to evaluate and comment on the applicant's research proposal. The content of each reviewer's evaluation was provided to the applicant, but their identities were withheld. I accept that there is some similarity here to the situation described in Order No. 327-1999. That being said, based on the material that I have before me, it is not entirely clear that the similarities are enough to bring the evaluations made by the reviewers in this case within the ambit of s. 22(3)(h).

[50] Generally speaking, an evaluation of a graduate studies application involves some assessment of an individual's complete academic history. This is the context within which the individual's potential to succeed in his or her chosen field of graduate level academic study is evaluated. The situation in this case is somewhat different. The reviewers here were not asked to evaluate the competence of the applicant as an individual and his potential as a researcher, they were asked to provide summary comments about a single research proposal that was submitted (and evaluated) using very specific guidelines. I am unable to conclude in this particular case that s. 22(3)(h) applies.

[51] **3.3 Section 22(1) and Relevant Circumstances Under s. 22(2)––** Although I have found that the reviewers' names are not subject to a statutory presumption against disclosure under s. 22(3), that is not the end of the matter. Section 22(1) still requires that the names be withheld if their disclosure would be an unreasonable invasion of third-party personal privacy. I have therefore considered whether any of the relevant factors in s. 22(2) weigh in favour of or against a finding that disclosure of the reviewers' names would unreasonably invade those individuals' personal privacy.

Section 22(2)(a)––subjecting the activities of government to public scrutiny

[52] The applicant takes the position that the reviewers were evaluating proposals for public funding and that disclosure of their names is "desirable for the purpose of subjecting the activities of the government of British Columbia…to public scrutiny."[31] According to the applicant:[32]

> The proposals were submitted as a part of [a] program to distribute public funds. It is therefore important to know whether those involved in the

[30] Order No. 327-1999, [1999] B.C.I.P.C.D. No. 40.
[31] FIPPA, s. 22(2)(a); Applicant's initial submission, para. 36.
[32] Applicant's initial submission, para. 36.

> decision-making process (i.e. the reviewers) were qualified, were pre-disposed or biased, or were in a conflict of interest. It is also important to ensure that reviews are not sloppy or shoddy.

[53] While I agree with the applicant that all of these things are important, the applicant has not demonstrated how any of these goals would be met by disclosing the names of the individual reviewers as opposed to the list of reviewers and the substantive content of the specific reviews themselves, which have already been disclosed. I agree with the Ministry that public accountability goals have been met by providing the applicant with the opinions and conclusions of the reviewers and by the applicant having received a list of the individuals in the pool from which the reviewers were drawn.[33] I do not find this factor to be relevant in these circumstances.

Section 22(2) (b)––likely to promote protection of the environment

[54] The applicant argues that, since the proposals relate to the "maintenance and improvement of forests which are an integral part of the environment", disclosure of the names of the reviewers will result in better forest management and improved environmental protection.[34] The applicant's submission goes no further than this and is not persuasive. I do not find this factor to be relevant in these circumstances.

Section 22(2)(e)––unfair exposure to financial or other harm

[55] The applicant's position on this issue is essentially that, since no identifiable harm has befallen other reviewers whose names were previously released in error by the Ministry (which I discuss further below), this factor is not relevant.[35] The Ministry submits that the reviewers may be exposed unfairly to harm if their names are disclosed because the forestry research community in B.C. is small and individuals who act as reviewers will in all likelihood have some ongoing professional contact with proponents for funding to Forestry Innovation Investment.[36] The Ministry argues that this exposure to harm would be "unfair" because, in agreeing to participate in the review process, the reviewers had a reasonable expectation that their identities would be kept confidential.[37]

[56] The reviewers express similar concerns about harm to their professional relationships in the event their names are disclosed. One reviewer makes the point that the competitive funding environment in science disciplines requires that "processes…be in place to protect both the applicant, and the reviewer from

[33] Ministry's initial submission, paras. 4.29-4.30
[34] Applicant's initial submission, para. 45.
[35] Applicant's reply submission, para 30.
[36] Ministry's initial submission, para. 4.34.
[37] Ministry's initial submission, para. 4.37.

retribution by the other party," and that the most effective means of protection for the reviewer is anonymity.[38]

[57] As identified above, the general concern appears to be that, where a reviewer does not recommend a proposal for funding, the proponent may in some cases attempt to seek retribution. This retribution could be in the form of refusing to work with a particular reviewer or, if the roles of reviewer and proponent are in the future reversed, to reject any proposals made by individuals who previously acted as reviewers and did not support a particular proposal. This may not necessarily be harmful in a large research community, but I accept that it could cause difficulties in a more insular one. Indeed, the applicant's own submission seems to confirm the legitimacy of this concern that professional relationships would be compromised if it were known that a reviewer did not recommend a particular proposal for funding:[39]

> The imagined harm between a reviewer and a proponent is a specious argument. Why would a reviewer who does not believe in the work of a proponent want to work or continue to work with the proponent? It would be deceitful on the part of a reviewer to do so. On the other hand, the proponent might not want to work with the reviewer or have the reviewer working with him if the reviewer does not support the work of the proponent. It is a bit presumptuous of reviewers to think that proponents want to work with them.

[58] I find that disclosure of the reviewers names in this case would unfairly expose them to harm by risking or compromising professional relationships in this relatively small research community. I find this to be a relevant factor weighing against disclosure.

Section 22(2)(f)––personal information supplied in confidence

[59] The applicant submits that there is nothing to indicate that the names of the reviewers were to be kept confidential. In support, the applicant states that, while the Request for Proposal to which he responded stated that proposals would be peer reviewed, it did not say that the peer review would be anonymous or confidential. The applicant further submits that the record itself is not marked as confidential and that the Ministry previously released the names of reviewers for five other proposals made by the applicant.[40]

[60] For the reasons that follow, I find that, in this case, the review process was intended to be confidential and that the names of individuals acting as reviewers were intended to be kept anonymous. Therefore, the names of the reviewers were "supplied in confidence" within the meaning of s. 22(2)(f) of FIPPA.

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[38] Submission of Reviewer dated January 18, 2006, at para. 4.
[39] Applicant's reply submission, para. 51,
[40] Applicant's initial submission, at paras. 48-54.

[61] I accept the submissions of the reviewers stating that they participated in the process with the understanding that they were conducting confidential peer reviews of the research proposals that had been submitted, and that this accorded with their experience acting as peer reviewers in other circumstances.[41] I also accept the submission of the Science Council that the use of anonymous peer review for evaluating proposals for public and private funding is common practice.[42]

[62] The fact that the Ministry previously disclosed the names of reviewers for other proposals made by the applicant does not affect my finding that the information was supplied in confidence. This earlier disclosure was an admitted error on the part of the Ministry[43] and does not affect the original understanding and intent of the reviewers, which was to act as anonymous peer reviewers of the proposals submitted for consideration for funding, including the applicant's. I find the confidentiality of supply to be a relevant factor weighing against disclosure.

Section 22(2)(h)––unfair damage to reputation

[63] In this case, the circumstances described above in the discussion under s. 22(2)(e) apply equally to s. 22(2)(h). I accept that there is a valid concern that the professional reputations of the reviewers might be unfairly damaged by the release of their names to proponents who are unhappy with the comments made during the review process and who take the comments personally. I find this to be a relevant factor that weighs against disclosure.

[64] **3.4 Conclusion on s. 22 of FIPPA––**Taking into account the relevant factors in s. 22(2), I find that they weigh against disclosure of the reviewers' names and I am satisfied that s. 22(1) applies to the record in dispute.

[65] I have considered all of the applicant's submissions in this inquiry and it is abundantly clear that he feels the Request for Proposal process was unfair. While I understand his frustration, this is not the correct forum for consideration of those complaints. Nothing in the applicant's submissions provides a sufficient basis for him to meet the burden of proof that is imposed by s. 57(2) of FIPPA. I find that s. 22(1) of FIPPA applies to the record in dispute and requires the Ministry to withhold the names of the reviewers from the applicant.

[66] **3.5 Harm to Financial or Economic Interests of the Ministry––**Given my finding that s. 22(1) applies to the record in dispute and requires the Ministry to withhold the names of the reviewers from the applicant, it is not necessary for me to consider whether s. 17 applies.

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[41] Submission of Reviewer dated January 27, 2006 at para. 6; submission of Reviewer dated January 18, 2006 at para. 3; submission of Reviewer dated January 24, 2006 at p. 1.
[42] Submission of the Science Council, paras. 6 and 7.
[43] Ministry's reply submission, para. 2.

4.0 CONCLUSION

[67] For the reasons given above, under s. 58(2)(c) of FIPPA, I require the Ministry to refuse access to the information it has withheld from the applicant under s. 22(1) of FIPPA.

December 19, 2006

ORIGINAL SIGNED BY

Justine Austin-Olsen
Adjudicator

OIPC File No. F05-25466