OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F05-32

GREATER VANCOUVER TRANSPORTATION AUTHORITY

James Burrows, Adjudicator
October 5, 2005

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Summary: The applicant requested a copy of a workplace investigation report. The public body provided the majority of the report, severing four lines from the 27 pages under s. 22. The severed information was submitted in confidence to the public body and its disclosure would unfairly expose third parties to harm. The public body is required by s. 22 to refuse to disclose the severed information.

Key Words: personal information—unreasonable invasion of personal privacy—workplace investigation—employment or occupational history—public scrutiny—fair determination of rights—unfair exposure to harm—submitted in confidence—inaccurate or unreliable personal information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), (b), (c), (e), (f) & (g), 22(3)(d) & (g), 22(4)(e).

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order No. 330-1999, [1999] B.C.I.P.D. No. 43; Order 01-07, [2001] B.C.I.P.C.D. No. 7.

1.0 INTRODUCTION

[1] The applicant made an access request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Greater Vancouver Transportation Authority (known as "Translink") for a copy of a report. Translink released the report, withholding a small amount of information from three pages of the report. The information was withheld under s. 22(1) of the Act. A summary of the information was provided to the applicant as required under s. 22(5) of the Act. The applicant requested that this Office review the decision of Translink to refuse disclosure. During mediation, Translink

agreed to disclose more information but still severed some information from the three pages of the report.

[2] As the matter did not settle in mediation, a written inquiry was scheduled under Part 5 of the Act for February 21, 2004. Translink asked the Commissioner not to hold an inquiry under s. 56 of the Act, but Adjudicator Carlson ruled that the matter should go forward to an inquiry. I have dealt with the resulting inquiry by making all findings of fact and law, and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[3] The issue before me in this inquiry is whether Translink was required by s. 22(1) of the Act to refuse to disclose the information in dispute. Under s. 57(2), the applicant has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[4] **3.1 Record At Issue—**The record at issue is a 27-page report resulting from an investigation conducted by an independent consultant for Coast Mountain Bus Company, an operating subsidiary of Translink. The applicant was provided with the full report except for a few severed lines, one from p. 10, a portion of a line on p. 11 and two sentences and two phrases from p. 13. As described in the summary that Translink provided to the applicant under s. 22(5), "the withheld information can be summarized as descriptions by employees of respective interactions to which they were parties."

[5] **3.2 Legislation—**Translink withheld the disputed information under s. 22 of the Act. The parts of s. 22 argued by the applicant and the public body are provided below:

> **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
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> (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,
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> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,

> (c) the personal information is relevant to a fair determination of the applicant's rights,
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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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> (g) the personal information is likely to be inaccurate or unreliable,
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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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> (d) the personal information relates to employment, occupational or educational history,
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> …
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
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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,
>
> …

[6] **3.3 Third-Party Personal Privacy—**In Order 01-53,[1] the Commissioner reviewed the application of s. 22 and I have followed his approach to application of s. 22 here without repeating the discussion. In determining whether or not the information should be released, I will examine the various arguments and relevant circumstances that the applicant and the public body have presented in their evidence and submissions.

Information about position, functions or remuneration of public body employee

[7] Firstly, the applicant argued that disclosure of the information should not be considered an unreasonable invasion of a third-party's privacy since it was part of a workplace investigation, and therefore must fall under s. 22(4)(e), as the information would relate to the workplace functions or position of an employee of a public body. In this vein, the applicant also argued that the investigation was not a harassment

[1] [2001] B.C.I.P.C.D. No. 56.

investigation but an investigation into safety issues and the ability of the applicant to perform in the applicant's position. The applicant also contended that the information was historical worksite information and therefore simply factual information about the functions of workers. The public body argued that the investigation does not specifically deal with the position, functions or remuneration of the third parties as employees of a public body.

[8] The severed information clearly was recorded as part of a workplace investigation. As the investigator has deposed, the purpose of the investigation was to examine personnel issues in which the applicant was involved. From the affidavit of the investigator and my review of the investigation report, I accept that the purpose of the investigation was to examine personnel issues.

[9] In several orders, the Commissioner has found that information respecting someone's participation in this type of investigation is not information about the position, functions or remuneration of an employee of a public body. In Order 01-53, the Commissioner also noted that information created during an investigation falls under s. 22(3)(d), not s. 22(4)(e):

> [32] As in Order 01-07 and Order 00-44, [2000] B.C.I.P.C.D. No. 48, I agree that information created in the course of a complaint investigation and disciplinary matter in the workplace that consists of evidence or statements by witnesses or a complainant about an individual's workplace behaviour or actions is information that "relates to" the third party's "employment history". I also consider that an investigator's observations or findings, in the investigator's interview notes and in an investigation report itself, about an individual's workplace behaviour or actions are part of the third party's employment history. All of this information will be personal information that is subject to the presumed unreasonable invasion of personal privacy created by s. 22(3)(d).

[10] Moreover, I have carefully reviewed the withheld information and find that it does not fall under s. 22(4)(e). Therefore I find that s. 22(4)(e) does not apply to the withheld information.

Information relating to employment, occupational or educational history

[11] From my review of the severed information, I have determined that the information is the personal information of the applicant and of the third parties. While the information is about the applicant, it was supplied by third parties and it describes interactions between the parties. It is significant that the information was recorded as part of a workplace investigation but that is not sufficient to make it the employment history of the third parties. However, the information also is sufficiently connected with the employment relationship between the parties and I believe this is a significant factor in determining that it is employment history of all involved parties. I have, in reaching this conclusion, also considered the nature of the information. In addition, its release would provide third-party personal information to the applicant because it would identify the third parties. For these reasons, I find that the severed

information is the personal information of both the applicant and the third parties and disclosure of the third-party personal information is presumed to be an unreasonable invasion of third-party privacy under s. 22(3)(d).

[12] An individual's own personal information is rarely withheld from him or her. However, in Order No. 330-1999, [2] the Commissioner acknowledged that an individual's personal information might have to be withheld in some cases, if its disclosure would result in an unreasonable invasion of a third-party's privacy. He also confirmed that statements made by an individual may be the personal information of the person who gives the statement.

> I agree that in certain circumstances an individual's right of access to his or her own personal information will be overridden where disclosure of that information would unreasonably invade the personal privacy of a third party. Section 22 clearly contemplates this possibility. For example, s. 22(5) – which is discussed below – prevents an individual from having access to "personal information supplied in confidence about" that individual where its disclosure would reveal the identity of the third party who supplied that personal information. Section 22(3)(h) also acknowledges this possibility, since it protects the identity of the third party who has supplied a "confidential personal recommendation or evaluation, character reference or personnel evaluation" about someone else. It must be underscored, however, that the decision as to whether an applicant's access to her or his own personal information would unreasonably invade someone else's personal privacy has to be made under s. 22 as a whole.

[13] As the Act contemplates that an individual's personal information may be withheld if its disclosure would be an unreasonable invasion of a third-party's privacy, it is necessary for me to determine if this will be the case in the matter before me. I therefore need to examine the relevant circumstances as provided in s. 22(2).

[14] **3.4 Relevant Circumstances—**Having concluded that the severed information is the personal information of both the applicant and the third parties, it is now necessary to review the various circumstances which have been argued by both parties and any others which may be relevant, to determine whether disclosure would be an unreasonable invasion of third-party privacy.

Public scrutiny of a public body and to promote health and safety

[15] In the applicant's submission, the applicant argued that s. 22(2)(a) applied and that the release of the severed information is required to perform the applicant's work duties and to ensure public safety as provided under s. 22(2)(b). The public body contends in its reply submission that neither subsection applies to the severed information. Having reviewed the severed information, I agree with the public body. The information does not in any way allow public scrutiny or promote health and safety. It must be remembered that the public body has released virtually all of the 27-page report. The remaining information would not further any of the aims of s. 22(2)(a) or (b).

[2] [1999] B.C.I.P.D. No. 43 at p. 7.

Fair determination of applicant's rights

[15] In previous decisions, the Commissioner has found that the "rights" defined in s. 22(2)(c) are legal rights and there must be ongoing or contemplated legal action for this to be a relevant circumstance. For example, in Order 01-07,[3] the Commissioner reiterated the four factors for determining whether s. 22(2)(c) should be a relevant factor. The factors are that the rights must be legal rights, there must be ongoing or contemplated legal action, the requested personal information must have some bearing on the determination of the legal right and the personal information must also be needed to ensure a fair hearing.

[16] The applicant has submitted that an application for re-consideration of a case in which the applicant was involved is before the Labour Relations Board. I agree that such a proceeding does involve the determination of legal rights as set out by the Commissioner in Order 01-07. However, the applicant has not said how or why the third-party personal information is relevant to the applicant's legal rights in any proceeding under way at the time or in prospect. My review of the severed information leads me to the conclusion that withholding the severed information will not affect determination of the applicant's rights. I do not consider s. 22(2)(c) to be a relevant factor in determining if disclosure would be an unreasonable invasion of third-party privacy.

Exposure of third party to unfair financial or other harm

[18] The public body argues that s. 22(2)(e) is a relevant circumstance which favours non-disclosure of the severed information. Most of its argument related to this factor has properly been presented *in camera*. While I am not able to discuss the specifics of the argument, I can say that it involves worksite relationships, as does the entire report at issue. From my review of the argument of the public body and the affidavits of third parties, I agree that exposure of third parties to unfair financial or other harm is a relevant circumstance that must be considered in determining the applicability of s. 22 and that in this case it favours withholding the severed information.

Information supplied in confidence

[19] The public body has argued that the investigator told investigation participants that the information that they provided would be held in confidence. In his affidavit, the investigator confirmed that he made that assurance, evidence that is supported by an additional *in camera* affidavit. I accept that the participants were given assurance that the information would be held in confidence. While this type of assurance does not override the provisions of the Act, it is a relevant circumstance that favours withholding the personal information.

[3] [2001] B.C.I.P.C.D. No. 7, paras. 30 and 31.

Information likely to be inaccurate or unreliable

[20] The applicant has argued that, since the information is likely to be inaccurate or unreliable, it should be released. The applicant's contention is that, as the investigator has a "lack of…[relevant] knowledge and understanding", and all complaints of this nature should be addressed under a specific regulatory framework the applicant mentions, the investigator's report would be "unreliable and inaccurate." While the applicant may have concerns about the accuracy or reliability of the report, almost all of the report has been disclosed. Only a small amount of information has been withheld and, from my review, I do not find that the applicant has established that the information is likely to be inaccurate or unreliable.

Other relevant circumstances

[21] As almost all of the investigation report has been released to the applicant, what remains at issue is whether the release of the information would reveal the identity of the third parties who have made statements. The applicant has argued that, because of the number of individuals interviewed for the report, the applicant could not determine who the third parties were. The public body disagrees. It has argued that the nature of the statements would identify the individuals. The *in camera* affidavits also deal with this issue. Further, while the applicant also asserted that the applicant knows what the severed information is and who the source of the information was, the applicant did not provide me with evidence to support this claim (such as the identity of the source or the content of the actual severed information). I find that the information or identity is not known to the applicant.

[22] I have found that the personal information is employment history and that relevant circumstances favour withholding the information. I have found no relevant circumstances that favour disclosure. I find that disclosure of the severed information would be an unreasonable invasion of third-party privacy and that the public body has appropriately applied s. 22(1) of the Act.

4.0 CONCLUSION

[23] For the reasons given above, under s. 58 of the Act, I require Translink to refuse to disclose the withheld information under s. 22 of the Act;

October 5, 2005

ORIGINAL SIGNED BY

James Burrows
Adjudicator