Order F07-19

BRITISH COLUMBIA ARCHIVES

Michael McEvoy, Adjudicator

September 25, 2007

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Summary: The applicant requested records from the British Columbia Archives relating to events that occurred at Woodlands School in the early 1960's. The BC Archives properly withheld the requested records under s. 22(1) and was not required to release them under s. 25(1)(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), 22(2)(g), 22(2)(h), 22(3)(a), 22(3)(b), 22(3)(d), 22(3)(g), 22(3)(i), 22(4)(d), 25(1)(b).

Authorities Considered: B.C.: Order No. 322-1999, [1999] B.C.I.P.C.D. No. 35; Order 01-19, [2001] B.C.P.I.C.D. No. 20; Order 01-20 [2001] B.C.I.P.C.D. No. 21; Order 01-53, [2001] B.C.P.I.C.D. No. 56; Order F05-18, [2005] B.C.I.P.C.D. No. 26.

Cases Considered: *Ontario (Attorney General) v. Fineberg*, [1994] O.J. No. 1419, 19 O.R. (3d) 197 (Div Ct).

1.0 INTRODUCTION

[1] The applicant has researched and written about the treatment of people at Woodlands School ("Woodlands") and requests records under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") held by the British Columbia Archives ("BCA") which relate to the operation of Woodlands during a period in the early 1960s.

[2] The applicant and the BCA differ somewhat about events leading up to the determination about the scope of this inquiry. Based on the parties' submissions, I would summarize matters as follows: The applicant initially sought two boxes of

records from the BCA, each containing five files. Discussion between the parties narrowed the request to a single file. The BCA refused to disclose any records in that file. The applicant sought a review of that decision by this Office. During the mediation process the BCA fully disclosed some of the disputed records while releasing others in a severed form, leaving 80 pages[1] of the file entirely undisclosed. What I am able to say about the disputed records, without disclosing withheld personal information, is that in general terms they relate to an incident which was alleged to have occurred at Woodlands in 1962. The BCA said their disclosure would result in the unreasonable invasion of the personal privacy of third parties.

[3] When further mediation did not resolve the matter, an inquiry was held under Part 5 of FIPPA.

[4] This Office invited submissions from the applicant, the BCA and, under s. 54(b) of FIPPA, the Ministry of Children and Family Development ("MCFD") as an appropriate person. The latter was invited to participate in this inquiry because the BCA informed this Office that MCFD may at one time have had custody and control of the records now placed in the BC Archives.[2]

2.0 ISSUES

[5] The first issue in this inquiry is whether the BCA is required by s. 22 to withhold the requested records. Under s. 57 (2) of FIPPA, the applicant has the burden of proving that s. 22(1) does not require the BCA to withhold the requested records.

[6] The applicant also argues that pursuant to s. 25(1)(b) of FIPPA it was in the public interest to disclose the requested records. The Notice of Inquiry does not list this as an issue, but for reasons set out below I deal with it in this Order. FIPPA is silent with regard to which party has the burden of proof in s. 25 matters, leaving each party responsible for submitting arguments and evidence to support its position.

3.0 DISCUSSION

[7] **3.1 Background**—The parties provided me little by way of background about Woodlands. However the applicant, in her submissions, drew my attention to a report entitled, The Need to Know: An Administrative Review of Woodlands. That report, written by Dulcie McCallum, and commissioned by MCFD in 2000, provides a useful context for this inquiry:

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[1] The Portfolio Officers Fact Report states that 50 pages were withheld while the applicant believed the number to be 68 pages. The BCA says the total number of pages is 80. Having now reviewed the records I confirm that the BCA withheld 80 pages of material.

[2] Portfolio Officer's Fact Report, para. 6.

> Woodlands operated from 1878 to 1996. During the decade beginning in 1986, residents were deinstitutionalized, with the majority finding community placements. The population of children and adults at Woodlands ranged over the life of the institution from as many as 1,200 children and adults to a few hundred during the final phases of closure. Children were placed in Woodlands by the Superintendent of Child Welfare when taken into care as wards of the State or by parents who admitted their children on a voluntary basis in order to receive medical and personal care, education, and training. Adults were admitted voluntarily by their principal caregivers or by the State under mental health legislation. They were placed in Woodlands because they had mental and physical disabilities. In order to be considered for admission, a diagnosis of mental retardation was considered essential.[3]

[8] **3.2 Preliminary matters**—The applicant raises three procedural objections and a general preliminary issue which I will deal with first.

Is MCFD an appropriate person to which notice should be given?

[9] The applicant objects to MCFD being notified of this proceeding because she says the Ministry of Health, not MCFD, had responsibility for the requested records at the time they were generated.

[10] The applicant also has some concerns that MCFD might intervene in this inquiry to block her access to the requested records. Her concerns relate to a class action lawsuit that former Woodlands residents have launched against the BC government. She says that contrary to the claim of former Woodlands residents, the Minister responsible for MCFD denies that systemic abuse of Woodlands residents occurred. I infer from this that the applicant believes the disclosure of the requested records would adversely affect the government's defence of the class action suit and therefore MCFD would oppose the records being disclosed.[4]

[11] MCFD responded that it was an appropriate person because responsibility for the Woodlands records was transferred to it from the Ministry of Health.[5]

[12] This office has a broad discretion to give notice of a request for review to any person considered appropriate. Section 54 of FIPPA reads as follows:

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[3] The Need to Know: An Administrative Review of Woodlands School, August 2001, page 17; a report by Dulcie McCallum, commissioned by the British Columbia Ministry of Children and Families.

[4] Applicant's initial submission, page 2. The applicant notes parenthetically that the requested records should not be prejudicial to MCFD's interest in the pending legal action because a recent court ruling has effectively prevented anyone abused in BC government care prior to 1974 from seeking legal recourse. See also footnote 14 for more on this issue.

[5] MCFD's reply submission, page 1.

Notifying others of review

54 On receiving a request for a review, the commissioner must give a copy to

(a) the head of the public body concerned, and

(b) any other person that the commissioner considers appropriate.

[13] This office believed MCFD may have had some responsibility for the records in issue. For this reason it was appropriate that MCFD was given notice. Simply because MCFD might have opposed the applicant's position is no reason to deny it notice of the inquiry.[6]

Submission of in camera material

[14] The applicant objects to the inclusion of *in camera* material in the submissions of the BCA because she says it is impossible to answer BCA's arguments to the Commissioner which have been withheld from her. The applicant says this is not a security certificate issue and believes that the submission of items *in camera* precludes the opportunity for comment and could deny a just and fair hearing, as well as being constitutionally invalid.[7] She asks how she can be made to bear the burden of proof in this inquiry if she is denied the total content of the BCA submissions.[8]

[15] My authority to receive material *in camera* is found in s. 56 of FIPPA. Commissioner Loukidelis has stated that s. 56(2):

> …gives me the authority to conduct an inquiry in private and s. 56(4)(b) gives me the authority to decide whether a "person is entitled to ... have access to or to comment on representations ... by another person". Moreover, s. 47(3)(a) of the Act explicitly prohibits me from disclosing, in an inquiry or order, any information that the public body is required or authorized to refuse to disclose under the Act.[9]

[16] While I understand the applicant's concerns, it is clear to me that the disclosure of the BCA's submission would reveal the very matters which are the subject of this inquiry. Therefore I am satisfied that the material the BCA submitted *in camera* is properly received on that basis.

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[6] As it turned out MCFD took no position in this inquiry.
[7] Applicant's reply submission, page 3.
[8] Applicant's reply submission, page 4.
[9] Order 01-19, [2001] B.C.I.P.I.D. No.20.

Burden of Proof and the Charter of Rights

[17] The applicant states in her reply submission that with reference to the burden of proof described in s. 57(2) of FIPPA, she has a constitutional right of access to the requested records under the right of freedom of expression pursuant to s. 2(b) of the *Canadian Charter of Rights and Freedoms ("Charter")*. In support of this the applicant cites *Ontario (Attorney General) v. Fineberg*.[10] The applicant says in that case it was argued that freedom of the press provided by s. 2(b) of the *Charter* entails a constitutional right of access to any and all government information in possession and under the control of government, subject to whatever limitations might be justified pursuant to s. 1 of the *Charter*.

[18] The Notice of Written Inquiry sent to parties in this and all FIPPA proceedings of this kind set out rules so that matters can be conducted fairly. Parties are given the opportunity to state their case through an initial submission and then allowed to respond to each others arguments by way of a reply submission. New arguments are not permitted in reply because it would be unfair to other parties who do not have a chance to respond.

[19] The applicant submitted her *Charter* argument for the first time in her reply submission. I therefore find it is not properly raised and for that reason I will not consider it here.

Applicant's request for severed material

[20] The applicant raises an additional matter which I would also characterize as preliminary in nature. The gist of her submission is that it is not necessary to undertake a s. 22 analysis of the requested records because, in her words,

> …I am asking for a severed copy, I am not asking for the release of personal information that would violate the privacy rights of persons either living or dead.[11]

[21] The BCA responds:

> …that it is not possible to sever the 80 pages that were withheld from disclosure to the Applicant, in a manner that would protect the personal privacy of certain individuals who are identified in those pages, and still provide a meaningful response to the Applicant's request.[12]

[22] I have carefully reviewed the records and the party's submissions and I agree with the BCA. Given the state of the records and the evidence before me

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[10] [1994] O.J. No. 1419, 19 O.R. (3d) 197(Div Ct).
[11] Applicant's reply submission, page 2.
[12] BCA's reply submission, page 4.

that the applicant is especially knowledgeable about matters relating to the records, it is not possible to provide the applicant with records that both provide a meaningful response to her request and protect the privacy of third parties.

[23] Therefore my adjudication of the s. 22 issue will be decided on the basis of whether disclosing the personal information of third parties in question is an unreasonable invasion of their privacy according to the relevant provisions of FIPPA.

[24] **3.3 Must the information be disclosed in the public interest?**— Much of the applicant's initial and reply submissions focus on her contention that the withheld records should be released under s. 25(1)(b) of FIPPA. If s. 25(1) applies to this case, it would override any other exceptions to the disclosure of the requested records. For this reason I will deal with the applicant's s. 25(1)(b) argument first. As I noted above, this issue was not contained in the Notice of Inquiry. However, because the BCA did respond to the applicant's s. 25(1)(b) argument I am prepared to address it here. Section 25 states in part:

> **Information must be disclosed if in the public interest**
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> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
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> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[25] The applicant cites Order No. 322-1999[13] in support of her contention that s. 25(1)(b) should be applied to allow for the release of the requested records. That Order considered factors to be taken into account when a public body considers whether it is in the public interest to waive a fee under s. 75(5) of FIPPA.

[26] In this case the applicant has asked me to consider a number of those factors in determining whether it would be in the public interest under s. 25(1)(b) to disclose the requested records.

[27] For example, the applicant argues that the conditions in which former Woodlands residents lived is a matter of current public debate. She states that the issue is again in the public spotlight because the BC government proposed

[13] [1999] B.C.I.P.C.D. No. 35.

a settlement offer to former residents of Woodlands who were abused after 1974.[14]

[28] The applicant states that parents were encouraged and sometimes pressured to turn their children over to the Woodlands institution, sometimes on the basis that their children would get better care. She asks whether the public now has the right to know what conditions were really like for children inside Woodlands.[15]

[29] In its reply submission the BCA acknowledges that there is a general public interest in the disclosure of some of the information requested. However, the BCA submits that this public interest falls well below the threshold contemplated in s. 25 of FIPPA.

[30] My first observation about the applicant's s. 25(1)(b) argument is that Order No. 322-1999, which she asks me to consider, does not apply to s. 25(1)(b). That Order as I noted earlier was made in reference to a fee waiver decision under s. 75(5) of FIPPA.

[31] My second observation is that s. 25(1)(b) of FIPPA has specifically been considered in a number of previous orders. In Order 01-20[16] for example, Commissioner Loukidelis stated:

> [T]he fact that the public may be, or may have been, interested in a record does not necessarily mean that is "clearly in the public interest" to disclose it, without delay, under s. 25(1)(b) of the Act.
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> …Section 25 applies despite any other provision of the Act, whether or not an access request has been made. It requires disclosure "without delay" where information is about a risk of significant harm to the environment or to the health and safety of persons or where disclosure is for any other reason clearly in the public interest. Although the words used in s. 25(1)(b) potentially have a broad meaning, they must be read in conjunction with the requirement for immediate disclosure and by giving full force to the word "clearly", which modifies the phrase "in the public interest".[17]

[32] Even if I assume, without deciding, that disclosure of the requested documents is clearly in the public interest within the meaning of s. 25(1)(b), the required elements of urgent and compelling need for publication are not present in this case.

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[14] Applicant's reply submission, page 1. The applicant says that 1974 was the year the *Crown Proceedings Act* became law and that a recent BC Court of Appeal decision held that the Crown is not liable for events preceding that year.
[15] Applicant's reply submission, page 2.
[16] [2001] B.C.I.P.C.D. No. 21.
[17] [2001] B.C.I.P.C.D. No. 21, paras. 37 and 38.

[33] The applicant states she hopes to use the records to corroborate stories told to her by former Woodlands residents and to also inform the public of events in the 1960's. These may be worthy objectives and, for the sake of discussion here, in the public interest, but they do not give rise to an urgent and compelling need for compulsory public disclosure despite any of FIPPA's exceptions.

[34] For these reasons, I find that s. 25(1)(b) does not require the BCA to disclose the requested records.

[35] **3.3 Unreasonable Invasion of Personal Privacy––Section 22 of the Act**—The portions of s. 22 of FIPPA relevant in this case read:

> 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.
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> (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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> …
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> (g) the personal information is likely to be inaccurate or unreliable, and
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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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> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> (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,
>
> …
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

…

(i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

…

(d) the disclosure is for a research or statistical purpose and is in accordance with section 35,

[36] In Order 01-53,[18] the Commissioner set out the manner in which s. 22 is to be applied in determining whether a public body is required to sever or withhold records on the basis that disclosure would constitute an unreasonable invasion of third party personal privacy. I have applied that same analytical framework in coming to a decision about the applicability of s. 22 to the records in this case.

[37] As noted above, s. 57(2) of FIPPA provides that the applicant bears the burden of proving that disclosure of personal information in question would not be an unreasonable invasion of a third party's personal privacy.

Does the withheld material contain personal information?

[38] The withheld material is recorded information about identifiable individuals, specifically Woodlands staff and patients, and is therefore personal information.

Does any personal information fall into s. 22(4)?

[39] The applicant signed a research agreement in 1994 which covered records that are not the subject of this inquiry and which expired in August, 1996.[19] It would appear from the applicant's submission that she considered registering for another research agreement in November 2006[20] but there is no evidence before me that this actually occurred. Therefore s. 22(4)(d) does not apply to the applicant and nor does any other part of s. 22(4).

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[18] [2001] B.C.I.P.C.D. No. 56 at paras. 22-24.

[19] The BCA wrote to the applicant in May 1996 expressing concern about possible breaches of its research agreement with the applicant because of a newspaper article that appeared under the applicant's name in the Vancouver Sun. The BCA noted that the article identified several hospital employees and patients. The BCA's letter stated that if those names were made available under the research agreement then the agreement would have been breached. On the other hand, the letter continued, if the applicant derived the names from publicly available records, then no breach would have occurred. The BCA offered the applicant assistance to ensure any future breach did not occur. [BCA's submission, Exhibit I] The applicant makes no reference to this issue in her reply submission and I draw no conclusions from it.

[20] Applicant's initial submission, page 3.

Is there a presumed unreasonable invasion of a third party's personal privacy?

[40] The BCA told the applicant in its decision letter that it would not release the requested records because their disclosure was presumed to be an unreasonable invasion of a third party's privacy. Specifically the BCA cited ss. 22(3)(a), (b), (d), (g), (h) and (i) in support of its position. The applicant's submission, as I have noted and dealt with above, is that she is not seeking to violate any person's privacy rights.

[41] I have carefully reviewed the records and find that they contain personal information which, if disclosed, is presumed to be an unreasonable invasion of a third party's privacy. Without revealing the withheld personal information, I can say the following about how the presumptions of s. 22(3) apply to the requested records:

- The records contain extensive references to the employment history and character references and personnel evaluations of Woodlands employees.
- Reference is made in some of the records to the medical condition of Woodlands residents.
- There is reference to personal information that was compiled and is identifiable as part of a police investigation.
- The records also contain an identifying characteristic delineated in s. 22(3)(i).

Relevant circumstances

[42] Section 22(2) directs me to consider relevant circumstances which favour the disclosure or non-disclosure of the requested records.

Section 22(2)(a) of FIPPA – holding a public body to public scrutiny

[43] The applicant states that disclosure of the records at issue is:

> [D]esirable for the purposes of subjecting the historic activities of the BC government to public scrutiny and is desirable in furthering the public interest in those historic activities and the current activities of the government with regard to addressing historic activities.[21]

[44] The essence of the applicant's submission is that the provincial government has done little to address past abuses which occurred at Woodlands

[21] Applicant's reply submission, page 3.

and will not acknowledge that systemic abuse of residents occurred at the facility. The applicant says that the provincial government recently made a settlement offer to former residents who were abused at Woodlands after 1974[22] and that it was widely reported in the media that former residents of Woodlands considered the offer to be inadequate, demeaning and inhumane.[23] The applicant believes that gaining access to the requested records:

> …would further the public understanding of the conditions that existed for some children while they were in care at Woodlands and would further enlighten the public interest in the debate.[24]

[45] I infer from the applicant's submission that she believes disclosing the disputed records would give credence to the view that government has done little to address the concerns of former Woodlands residents, thereby creating increased scrutiny of the present government's actions.

[46] The BCA states that in determining whether to release the records in question it considered s. 22(2)(a) of FIPPA:

> BC Archives submits that, by providing the Applicant with a severed copy of the file, the activities of the government of British Columbia were subjected to public scrutiny. The disclosure of the information that was severed from the file and withheld from disclosure to the Applicant would contribute nothing further in this regard, and would in fact constitute an unreasonable invasion of the personal privacy of a number of third parties.[25]

[47] With respect to the application of s. 22(2)(a), Adjudicator Austin-Olsen noted in Order F05-18 that:

> What lies behind s. 22(2)(a) of the Act is the notion that, where disclosure of records would foster accountability of a public body, this may in some circumstances provide the foundation for a finding that the release of third party personal information would not constitute an unreasonable invasion of personal privacy.[26]

[48] The submissions of the BCA and the applicant reference a body of information about the treatment of former Woodlands residents which is already in the public domain and that has resulted in government's activities being the subject of scrutiny. The applicant notes that the treatment of Woodlands residents was the focus of an administrative review by Dulcie McCallum published in 2002 and noted earlier in this Order. That review dealt in detail with many allegations of abuse of residents at Woodlands. The applicant herself has

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[22] Applicants reply submission, page 1.
[23] Applicant's reply submission, page 2. Reference to a media report on this issue is also found in the BCA's reply submission, Exhibit 1.
[24] Applicant's reply submission, page 2.
[25] BCA's reply submission, para. 4.3.
[26] [2005] B.C.I.P.C.D. No. 26.

written on the topic in the Vancouver Sun newspaper. The BCA also points out that it has provided numerous severed documents to the applicant which cast further light on this issue.

[49] The applicant is of the view that the requested file:

> [C]learly documents abuse of residents at Woodlands in 1962-63 and the revelation of that abuse could substantiate interviews I have had with Woodlands former residents who have described horrific instances of abuse.[27]

[50] It is important that government be held to account for the way it treats its citizens in care, particularly vulnerable citizens, such as those who were residents of Woodlands. If the disclosure of these records led to this kind of public scrutiny, this would be a desirable end and therefore a factor to be considered in rebutting the presumption that release of the records would be an unreasonable invasion of a third person's privacy.

[51] My review of the records in dispute indicates the breadth of the information in the file is much less substantial than the applicant believes. The scope of the undisclosed records is relatively narrow, relating to, as I noted earlier, an alleged incident at Woodlands in 1962. The applicant has already been provided with many severed records which disclose allegations about the treatment received by Woodlands residents. The BCA was able to disclose those records without revealing any identifying personal information.

[52] I am of the view that disclosure of the requested records would be desirable for the purpose of subjecting the activities of the government of British Columbia to public scrutiny, but only in a very limited way. I reach this conclusion based on the narrow focus of the requested records combined with the evidence before me that there is already much information about the treatment of Woodlands residents publicly available. It is doubtful that disclosure of the requested records would add much to the public scrutiny of government's actions.

[53] In summary I find that s. 22(2)(a) is a relevant consideration which weighs in favour of disclosure of the records. However, for the reasons noted above, I attribute limited weight to this consideration.

Section 22(2)(g) and Section 22(2)(h) — Is the information unreliable or inaccurate and would it unfairly damage a third persons reputation?

[54] I have already indicated that the requested records relate to an alleged incident that occurred at Woodlands in 1962. My review of the records suggests

[27] Applicant's reply submission, page 2.

there is good reason to believe that the basis for the allegation is likely to be inaccurate and unreliable. For this reason their disclosure would damage the reputation of one or more individuals identified in the records. I find this factor weighs significantly against disclosure of the records.

Other circumstances

[55] The applicant also asks that I consider ordering a release of the records because they may substantiate stories of abuse which former residents have told her. She states:

> I am only trying to confirm some of the stories they have told me, by accessing the records kept by the BC Archives.[28]

[56] The applicant gives no indication she has been either authorized or asked by former Woodlands residents to confirm stories she has been told. The applicant's own personal interest in verifying a story, without some other material reason under FIPPA, is not a relevant circumstance in determining whether I should or should not order disclosure of the requested records.

Section 22 Conclusion

[57] Taking account all relevant facts and circumstances in this inquiry, I conclude that disclosure of the requested records would constitute an unreasonable invasion of a third party's personal privacy. While consideration of s. 22(2)(a) of FIPPA supports the applicant's case in a limited way, all of the other circumstances weigh in favour of the opposite conclusion which I have reached.

4.0 CONCLUSION

[58] Pursuant to s. 58(2)(c) of FIPPA I require the BCA to refuse access to the records it withheld under s.22 of FIPPA.

[59] I have found that s. 25(1)(b) does not require the BCA to disclose the records it has withheld, and so no order is required in that respect.

September 25, 2007

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

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[28] Applicant's reply submission, page 2.