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

Order F08-20

VANCOUVER POLICE BOARD

Celia Francis, Senior Adjudicator

December 16, 2008

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Summary: The Board is not required to refuse disclosure of the target silhouette that the applicant requested. Given the extensive publicity surrounding the record and its contents, its disclosure would not unreasonably invade the third party's personal privacy. Even without that publicity, in light of the contents of the inscription, disclosure of the record would not unreasonably invade the third party's personal privacy.

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

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F08-16, [2008] B.C.I.P.C.D. No. 28; Order No. 81-1996, [1996] B.C.I.P.C.D. No. 7; Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43; Order No. 43-1995, [1995] B.C.I.P.C.D. No. 16.

1.0 INTRODUCTION

[1] The applicant, who is a journalist, made a request to the City of Vancouver ("City") under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). He asked for a copy of the "target silhouette and inscription given" in 2006 by the then Chief Constable of the Vancouver Police Department ("VPD") to the City Manager, City of Vancouver, "now in the possession of the Mayor or his staff." The City transferred the request to the Vancouver Police Board ("Board")[1]

[1] Under the *Police Act*, the Board is the body responsible for the Vancouver Police Department, the third party's employer at the time.

on the basis that the record "was the property of the Vancouver Police Board, as the employer of" the third party.[2]

[2] In its response to the access request, the Board said the City Manager had brought the matter to the attention of the Mayor in his role as chair of the Board and that the matter was, in the City Manager's view, an internal employer-employee issue. According to the Board's response, this meant that "disclosure of the document would be an unreasonable invasion of a third party's personal privacy as it relates directly to employment, occupation or educational history." The Board's response did not elaborate on why disclosure of the record to the third party's employer would in itself make disclosure to the applicant an unreasonable invasion of the third party's personal privacy.[3]

[3] The applicant asked this office to review the Board's response. In his request for review, he said the requested record "was widely publicized at the time" as what the third party called a "joke". The applicant also said that the third party had "publicly confirmed" giving the inscribed target to the City Manager and the mayor had publicly confirmed that the documents existed, as had the Police Complaint Commissioner. The applicant argued that privacy was not an issue because, among other things, the third party had given a number of people similar silhouettes and the third party had publicly stated that he had given this particular silhouette "as a gift". The applicant added that he failed to see how the record contained personal information relating to the third party's employment or occupational history.

[4] Because mediation by this Office was not successful, a written inquiry was held under Part 5 of FIPPA. The Board, the third party and the applicant all made submissions.

2.0 ISSUE

[5] The only issue in this inquiry is whether the Board is required to refuse disclosure of the requested record under s. 22(3)(d) or 22(3)(g) of FIPPA. Under s. 57(2), it is up to the applicant to prove that disclosure of personal information about a third party would not be an unreasonable invasion of the third party's personal privacy.

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[2] Section 11(1) of FIPPA allows a public body to transfer an access request to another public body, though not on the basis that the record is "the property" of the other public body. Transfers are allowed only where the record was produced by or for the other public body, the other public body was the first to obtain the record or where the record is in the custody or under the control of the other public body. The circumstances suggest that the last ground for transfer would apply here.

[3] I note that the Board's response to the applicant's access request did not comply with s. 8 of FIPPA which required the Board to tell the applicant "the reasons for the refusal". While the Board did give some reasons, these can hardly be described as fulsome. The Board's response also did not comply with the s. 8 requirement to tell the applicant "the provision of this Act on which the refusal is based."

3.0 DISCUSSION

[6] **3.1 Background**—The Board says that members of the Vancouver Police Department ("VPD") are required to qualify annually in the skill of firearms marksmanship. The VPD conducts the qualification process at a shooting range. Members are also encouraged to practice their marksmanship regularly at the shooting range, using targets such as the one in question. The Board says that used targets are normally recycled by staff at the shooting range, "but police officers may also take the used targets for their own purposes."[4]

[7] The copy of the target that the Board provided to me is just under a metre long. It has an orange-beige background, on which the outline of a human head and torso is depicted in blue. The target says: "Developed by: RCMP Training Academy Firearms Training" in the lower right corner. The target in issue has images of many holes, which I infer result from the original having been shot at a number of times. It has some ink marks and two numbers written on the left side. These may relate to grading of the results of the target practice, although the Board did not say. In the top right corner, there is a handwritten inscription addressed to the City Manager by first name and signed with two initials, which correspond to the third party's initials.

[8] The Board says that, in June 2006, the third party went to the office of the City Manager and left the inscribed target with the City Manager's secretary. After she received the target, the City Manager delivered it to the City's Mayor, expressing concern about the third party's conduct in giving her the target. After consultation, the Board addressed the incident as a disciplinary matter with the third party and the matter was resolved to the Board's satisfaction.[5]

[9] In response to media interest, in July 2006, the Board issued a media statement, a copy of which forms part of the Board's submissions here. The statement confirmed the incident, and quoted the Mayor as saying the matter was "sufficiently serious" to share with the Board. It said the third party had apologized in writing and that the "Deputy Police Complaint Commissioner is about to undertake some preliminary fact finding before deciding what further action, if any, may be considered".[6]

[10] The Office of the Police Complaint Commissioner released a report in August 2006 ("PCC Report") describing its review of the matter and explaining its decision not to order a formal *Police Act* investigation.[7] That report, a copy of

[4] Affidavit of Hollie Riordan, para. 4.
[5] Riordan Affidavit, para. 4.
[6] Exhibit "C", Riordan affidavit.
[7] Riordan Affidavit, para. 4.

which the Board submitted in evidence, further explains what happened. The report, which is publicly posted on the Police Complaint Commissioner's website, also sets out the contents of the record in issue here.[8]

[11] The Board's media statement and the PCC Report underscore an important and distinguishing feature of this case. There has, to say the least, been a great deal of publicity surrounding this entire matter. I take notice of the fact that, as indicated above, the third party's name is known in relation to this matter, details of the incident have been made public and the resolution of the case as a disciplinary matter is public knowledge.

[12] Against this backdrop, the Board and the third party nonetheless maintain that disclosure of the target, including its inscription, would be an "unreasonable" invasion of the third party's "personal privacy" within the meaning of s. 22. For the reasons given below, I have no hesitation in dismissing these assertions as without merit.

[13] **3.2 Statutory Framework**—Section 22(1) of FIPPA requires public bodies such as the Board to refuse to disclose personal information if its disclosure would be an "unreasonable" invasion of third-party "personal privacy". The relevant aspects of s. 22 read as follows:

> **Disclosure harmful to personal privacy**
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> 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 …
>
> (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 …
>
> (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, … .

[8] The Police Complaint Commissioner's report can be found here: http://www.opcc.bc.ca/Commissioners%20Reasons%20for%20Decision/2006/Graham%20Shooting%20Target%20Dec'n%20(2).pdf

> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> (a) the third party has, in writing, consented to or requested the disclosure, …

[14] A number of orders have discussed the approach to applying s. 22. I will follow that approach here without repetition.[9]

[15] **3.3 Unreasonable Invasion of Personal Privacy**—Both the Board and the third party contend that the disputed record constitutes personal information that "relates to employment, occupational or educational history" of the third party within the meaning of s. 22(3)(d), thus raising a presumed unreasonable invasion of the third party's personal privacy if the record is disclosed. The Board argued that the record was "a personal communication from the former Chief Constable" to the City Manager. When she delivered the record to the Mayor, the Board continued, the record became the subject of disciplinary action and was "transformed" into a record that related to the third party's employment and thus his employment history.[10]

[16] The third party argued that the record contains personal information about him and that the record "as a whole" relates to his employment history. As such, disclosure of the record would be an unreasonable invasion of his privacy, "along with the rest of the contents of [the third party's] employment file."[11] Neither the Board nor the third party said anything about how the record fits within s. 22(3)(g), although the notice of inquiry lists s. 22(3)(g) as an issue.

[17] By contrast, the applicant submits that neither the third party

> …nor his employer have considered these targets private matters or part of his employment file. He, in fact, states he regularly would pin targets on his locker or office door to be viewed by whomever passes by. He calls them "a symbol. It is a motivator, a silent reminder." And he treats them as if they are his property to do with as he chose.
>
> It is not Chief Graham's expectations that this information be kept private as part of his "employment, occupational history." As he states and others confirm in the email and the news story, Graham regularly hands out these targets as gifts to friends including Vancouver Sun Publisher Dennis Skulsky.[12]

[18] The applicant says s. 22(3)(g) also does not apply for the following reasons:

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[9] Order 01-53, [2001] B.C.I.P.C.D. No. 56.
[10] Paras. 23-24, initial submission.
[11] Para. 4, initial submission.
[12] Page 1, applicant's initial submission.

> …given that he regularly passes out these targets as gifts. In the case of the target in question, he has no expectation of privacy, nor does his employer have control over the document.
>
> He is not a "third party" evaluated by others. He generated the document and did with it as he chose and as he has done with other similar targets without, it seems, permission from his employer.
>
> Further, in the specific case of this document, he not only publicly confirmed its existence to The Sun, among others, he also confirmed the inscription: "A bad day at the range is better than the best day at work."[13]

Does the record contain personal information?

[19] A threshold question is whether the target contains the third party's "personal information". FIPPA defines personal information as "recorded information about an identifiable individual other than contact information." According to the Board, the target "clearly contains personal information" about the third party. It is, the Board argued, "a personal communication" from the third party to the City Manager—since the record was never released to the public, it was never "transformed from a personal communication to a public record."[14]

[20] I have difficulty understanding the Board's apparent distinction between a "personal communication" and a "public record" or the relevance of any such distinction to the issue of whether or not the target is "personal information" of the third party. There is no suggestion that the bullet holes shown on the target in some way reveal recorded information about the third party, including his shooting skill. The Board's position is simply that, because the target "was a personal communication", it is personal information.

[21] I noted recently in Order F08-16[15] that, to be "personal information", information must be "about" an identifiable individual and that not everything an individual says or does in the course of employment is "about" that individual. Moreover, the fact that a communication may be used as a basis for evaluating an individual's work performance also does not make the communication "personal information".[16]

[22] Thus, it is not enough to say that information is a "personal communication" for it to qualify as personal information within the meaning of FIPPA. A communication, "personal" or otherwise, may in whole or in part qualify as personal information, but only if the contents of the communication are

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[13] Page 1, applicant's initial submission.
[14] Para. 23, Board's initial submission.
[15] [2008] B.C.I.P.C.D. No. 28, at paras. 48-50.
[16] *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident and Safety Board)*, [2006] F.C.J. No. 704 (Fed. C.A.), at para. 55.

recorded information about an identifiable individual. For example, if A sends a confidential email to B saying "the sky is blue", that email may in one sense be a "personal communication", but the statement "the sky is blue" is not thereby turned into "personal information".

[23] In this case, the target is a printed form, as noted earlier, showing the silhouette of the head and torso of a human being. The target bears a number of bullet holes, which I accept for discussion purposes were created when the third party used the target for shooting practice. I am not prepared in the circumstances to find that the record of the placement and number of the bullet holes is personal information of the third party. Certainly, the printed form is not his personal information. Section 22 does not therefore apply to the target itself.

[24] That said, the note inscribed on the target is, I accept, third-party personal information in that the third party is identifiable, both from his initials on the record and from the circumstances of its creation and delivery to the City Manager. In addition, the inscription expresses the third party's view, albeit in a general way, of the relative merits of shooting practice and office work. The Board's own evidence in this inquiry, in the form of the public report of the Police Complaint Commissioner, reveals what that opinion was.[17]

[25] Accordingly, as regards the question of whether "personal information" is involved here, I find that only the message inscribed on the target qualifies as the third party's personal information.

Does section 22(4) apply?

[26] Apparently in reference to s. 22(4)(a), the Board argued that personal information "loses its private status" only when the individual to whom it relates consents in writing to its disclosure. Both the Board and the third party said he had never consented to the disclosure of the record.[18]

[27] I accept that the third party has not consented to the disclosure of his personal information in the record and I therefore find that s. 22(4)(a) does not apply here. No other provision of s. 22(4) applies here either.

Unreasonable invasion of privacy

[28] The next question is whether the personal information—again, the message inscribed on the target—relates to the third party's employment history within the meaning of s. 22(3)(d). In support of its argument that disclosure of the personal information would raise the presumed unreasonable invasion of personal privacy under s. 22(3)(d), the Board relies on this passage from

[17] I return below to the consequences of this public knowledge around what the inscription is.
[18] Para. 31, Board's initial submission; para. 8, third party's initial submission.

Order No. 81-1996,[19] which involved an access request for records relating to a settlement between the public body and a former employee:

> Disclosure of information that fits into this category is also presumed to be an unreasonable invasion of a third party's personal privacy. The CVRD has applied this section to each of the ten records actually in dispute. In Order No. 52-1995, September 15, 1995, p.6, I stated: "Once a person has been hired, I am inclined to view what is put in his or her personnel file about his or her hiring as then being covered by section 22(3)(d)." I now find that what happens up until a person's employment ends is also part of the personnel file and is thus also covered by this section.[20]

[29] According to the Board, this shows that the presumption raised under s. 22(3)(d) "is broadly cast", with the presumption not being confined to "reports, assessments or sanctions", but one that applies to "the personnel file as a whole."[21]

[30] I do not read Order No. 81-1996 as going as far as the Board contends. The Board's characterization is that anything that is in a "personnel file"—however that may be defined—is somehow "personal information" that "relates to employment, occupational or educational history." Rather, what I take Commissioner Flaherty to say is that, in that particular case, records reflecting dealings between the former employee and the employer leading up to termination of that employment and settling on certain arrangements in relation to the termination were part of the former employee's employment history and termination of that employment did not change that fact.

[31] Section 22(3)(d) is not a basket clause in the sense that anything that is found in a "personnel file" qualifies as personal information relating to someone's employment, educational or occupational history. Each element of personal information that is said to be covered by the s. 22(3)(d) presumption has to be considered on its own merits. The section does not create a class exemption from disclosure for the category of records known as personnel files.

[32] Commissioner Loukidelis dealt with a similar argument in Order No. 330-1999[22] where he noted that the personal information must itself relate to "employment history". He added that "the contents of a record do necessarily not [*sic*] qualify as part of someone's personnel file simply because that record is physically located in the file."

[33] The evidence here shows that the third party delivered the target with its message to the City Manager at her office, although his reasons for doing so are

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[19] [1996] B.C.I.P.C.D. No. 7, p. 6.
[20] The Board failed to cite any of the numerous, more recent decisions from this office about s. 22(3)(d).
[21] Para. 38, initial submission.
[22] [1999] B.C.I.P.C.D. No. 43, at p. 8.

not clear. However, the content of the message does concern—possibly facetiously, possibly in earnest—his personal view of workplace matters. As such, the message relates to his employment history and I am satisfied that s. 22(3)(d) applies to the information in it. I arrive at this conclusion, not because the record was used later in connection with a disciplinary matter involving the third party or because it is currently in his personnel file, but from the content of the message and the context of its delivery to the City Manager.

[34] However, I find that s. 22(3)(g) does not apply to the message. It does not consist of evaluative material about the third party, character references about him or any other similar information that previous orders have found to fall within this provision. The later use of the record in a disciplinary matter involving the third party also has no relevance.

[35] **3.4 Relevant circumstances**

Unfair damage to reputation

[36] The third party argued that a relevant consideration was s. 22(2)(h), on the grounds that "media coverage about the Record in July and August 2006 was clearly detrimental to" the third party's reputation. Disclosure would be likely "to result in further publicity and further degrade" the third party's reputation "in a manner that is both unfair and unnecessary".[23] The third party did not elaborate on this argument.

[37] The applicant responded that "embarrassment is not an exception" under FIPPA. Disclosure of a copy of the record would reveal nothing more than what the third party has already admitted to publicly, he said, in which case, how could providing him with a copy "unfairly" damage the third party's reputation? "I am not asking for disciplinary records, which would be whatever written reports would exist" as a result of this incident, the applicant said, but simply "the target with the inscription itself."[24]

[38] The third party provided no support for his argument that the publicity surrounding the shooting target incident damaged his reputation. He also did not explain how disclosure of the record itself could potentially result in negative effects to the third party, including in light of what is, as the Board admits, already publicly well known.[25]

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[23] Para. 6, initial submission. The third party also referred to Order No. 62-1995, [1995] B.C.I.P.C.D. No. 35, where an applicant sought a teacher's disciplinary records. Former Commissioner Flaherty observed at p. 6 that there had been media coverage of the matter.

[24] Pages 1-2, reply submission.

[25] Para. 25, initial submission.

[39] In such circumstances, I have difficulty understanding how any damage to the third party's reputation on disclosure of the record itself would be "unfair", nor how it would be "unnecessary", whatever the third party meant by that latter term. In any case, given the innocuous, even jocular, content of the note, I do not see how its disclosure would have the dire effect that the third party argued. I find that s. 22(2)(h) does not apply here.

Media coverage and PCC's report

[40] The Board acknowledged that, although the entire record has not been disclosed, the applicant and the public "know a good deal" about the record, including its inscription and the fact that it is a used target. However, the Board argued, the fact that there has been media coverage about the record and that the Board and the third party have made public statements about it "did not displace or 'waive' [the record's] otherwise private character" and turn it into a "public document".[26]

[41] In support of this argument, the Board referred to Order No. 43-1995,[27] where Commissioner Flaherty remarked that previous leaks of a record to the media do not mean a record is in the "public domain". Similarly, in the Board's submission, the summary of the contents of the record in the PCC's report "did not displace the private nature of the Record." The Board does not believe the applicant is entitled to any more information than the summary he has already received through his own efforts and the PCC report.[28]

[42] I take the Commissioner to mean in Order No. 43-1995 that, in that case, the leak, that is, the unauthorized disclosure, of a record was not an appropriate relevant circumstance to consider under s. 22(2) and did not rebut the presumed unreasonable invasion of privacy. There is, of course, no suggestion that the public disclosure of information about the incident in this case, in the form of the PCC report and City of Vancouver media releases, was unauthorized. Order No. 43-1995 therefore does not assist the Board.

[43] As I intimated earlier, however, it is relevant—and I give considerable weight to the fact—that, through the PCC report and the media releases about the incident, not to mention the extensive attendant media coverage, the nature of the record, the contents of the inscription and the resolution of the incident as a disciplinary matter are already publicly known. This relevant circumstance favours disclosure of the inscription and rebuts the presumption in s. 22(3)(d).

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[26] Paras. 25-27, initial submission; para. 2, reply submission.
[27] [1995] B.C.I.P.C.D. No. 16, at p. 4.
[28] Paras. 25-33, initial submission. The third party stated in his initial submission that he supports the Board's submission.

Other relevant circumstances

[44] The parties did not raise any other relevant circumstances listed in s. 22(2) and I do not consider that any of them applies. I do however find that, in the circumstances of this case, given the innocuous content of the inscription, its disclosure would not be an "unreasonable invasion" of the third party's privacy.

Conclusion on section 22

[45] I have found that the printed target is not personal information and that s. 22 therefore does not apply to it. I have also found that s. 22(3)(d), but not s. 22(3)(g), applies to the inscription on the target. I have also found that the media coverage around the incident and the public disclosure of the content of the inscription, together with the innocuous content of the inscription, favour disclosure of the inscription and rebut the presumption in s. 22(3)(d). I therefore find that s. 22(1) does not require the Board to refuse the applicant access to the inscription.

4.0 CONCLUSION

[46] For reasons given above, I require the Board to give the applicant access to the record in its entirety.

[47] I require the Board to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before January 30, 2009 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

December 16, 2008

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator