



Order F23-66

**MINISTRY OF FINANCE, PUBLIC SERVICE AGENCY**

Alexander R. Lonergan  
Adjudicator

August 22, 2023

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Quicklaw Cite: [2023] B.C.I.P.C.D. No. 77

**Summary:** The applicant requested access to a variety of records containing information pertaining to a workplace investigation. The public body refused access to some information in the responsive records under several exceptions to disclosure in the *Freedom of Information and Protection of Privacy Act*. The adjudicator confirmed that the public body correctly applied s. 13 (advice or recommendations) and s. 22 (unreasonable invasion of a third party's personal privacy) to some of the information it withheld under those sections. The adjudicator determined that the public body must disclose the balance of the information at issue.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss.13(1), 13(2), 13(2)(a), 13(2)(k), 13(2)(m), 13(2)(n), 13(3), 22(1), 22(2), 22(2)(a), 22(2)(c), 22(2)(f), 22(3), 22(3)(d), 22(3)(g), 22(4)(a) and 22(4)(e).

**INTRODUCTION**

[1] The applicant requested that the Public Service Agency (PSA), which is an agency within the Ministry of Finance, provide access, pursuant to the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records relating to a workplace investigation involving the applicant and other employees of the PSA.

[2] The PSA granted the applicant access to the requested records but withheld much of the information in those records. In refusing to disclose that information, the PSA relied on ss. 13 (policy advice or recommendations), 14 (solicitor-client privilege), and 22 (unreasonable invasion of third party's personal privacy). The applicant asked the Office of the Information and Privacy

Commissioner to review the PSA's decision. Mediation did not resolve the issues in dispute and the matter proceeded to an inquiry.

## **Preliminary Matters**

### *Unauthorized Disclosure of Personal Information*

[3] The applicant's submission raises a new issue that was not listed in the notice of inquiry and the investigator's fact report. These documents indicate that ss. 13, 14, and 22(1) are the only matters at issue in this inquiry. The applicant's submission, however, contains a complaint that the PSA wrongly disclosed certain information which included personal information.<sup>1</sup> I understand this to be a complaint that the PSA contravened s. 33 of FIPPA. Section 33 of FIPPA regulates when a public body is authorized to collect, use, and disclose personal information in its custody or under its control.

[4] Past orders have said that parties may raise new issues at the inquiry stage only if permitted to do so.<sup>2</sup> The notice of inquiry and the OIPC's instructions for written inquiries both informed the applicant that parties may not add new issues to the inquiry without the OIPC's consent. The applicant did not request permission to introduce a complaint about wrongful disclosure of personal information as a new issue in this inquiry nor did she explain why she did not do so. I see no compelling reasons to add this issue. Therefore, I decline to add it or consider that matter any further.

## **Section 14 – Solicitor-Client Privilege**

[5] During this inquiry, the PSA reconsidered its initial decision and released additional records and information to the applicant. The PSA also withdrew reliance on s. 14 as a ground for refusing access to the withheld information. The information previously withheld under s. 14 is no longer at issue in this inquiry and the PSA now only refuses access to the withheld information under ss. 13 and 22.

## **Matters Unrelated to FIPPA**

[6] The applicant's submission alludes to various matters unrelated to FIPPA, including constructive dismissal, slander, human rights infringements, and

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<sup>1</sup> Applicant's submission at pages 9-11.

<sup>2</sup> Order F07-03, 2007 CanLII 30393 (BC IPC) at paras 6-11; and Order F10-37, 2010 BCIPC 55 (CanLII), at para 10.

complaints about the conduct of certain workplace investigations.<sup>3</sup> The PSA argues that these are not relevant to the inquiry<sup>4</sup> but then provides responses to some of them.<sup>5</sup>

[7] I do not have the authority to determine the applicant's complaints and allegations that are unrelated to FIPPA. The purpose of an inquiry under s. 56 is to decide the FIPPA issues in dispute between the parties but not to decide the outcome of matters unrelated to the application of FIPPA. I decline to consider these complaints and allegations, as well as the arguments that were specifically provided as responses to them other than insofar as they directly relate to a determination of the FIPPA issues in dispute.

## ISSUES

[8] The issues to be decided in this inquiry are the following:

1. Is the PSA authorized to refuse disclosure of the information in dispute pursuant to s. 13(1)?
2. Is the PSA required to refuse disclosure of the information in dispute pursuant to s. 22(1)?

[9] Section 57(1) of FIPPA places the burden on the PSA to prove that the applicant has no right of access to the withheld information under s. 13(1).

[10] Section 57(2) of FIPPA places the burden on the applicant to establish that disclosure of the withheld information would not unreasonably invade a third party's personal privacy under s. 22(1). However, the public body has the initial burden of proving the information at issue qualifies as personal information.

## DISCUSSION

### Background

[11] The applicant was an employee of the PSA. While working at the PSA, the applicant was involved in a workplace conflict with other employees.

[12] The applicant formally complained about the workplace conflict to her supervisors and requested that the PSA investigate, which it did. The conclusion of that internal investigation was that the applicant's complaints were unsubstantiated. The applicant was very dissatisfied with the conduct and conclusions of the internal investigation.

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<sup>3</sup> Applicant's submission, at pages 2-11.

<sup>4</sup> PSA's final submission at paras 3, 4, and 11-13.

<sup>5</sup> PSA's final submission, at paras 8 and 9.

[13] The PSA subsequently retained an external investigator to conduct an independent external investigation of the applicant's complaints. The external investigator interviewed the applicant and third parties. The external investigator produced a written report (Report) for the PSA.

[14] The outcome of the external investigation was that the applicant's complaints were unsubstantiated. The PSA communicated the outcome of the investigation to the applicant.

[15] A short time later, the applicant made the FIPPA access request that is the subject of this inquiry. She requested that the PSA provide her with the following records and information:

- a) An unredacted copy of the Report;
- b) Documentation relating to the PSA's internal investigation; and
- c) The findings the PSA presented to the applicant.

### **Records and Information at Issue**

[16] There are 141 pages of records (Records) at issue. The Records are comprised of two copies of the Report and their appendices, emails, and other types of correspondence. The appendices to the Report included various meeting scripts and minutes, investigation terms of reference, the internal investigation's best practices checklist, and the applicant's written submissions regarding the workplace conflict.

[17] The PSA withheld various information from the Records. All of the withheld information is in dispute.

### **Section 22 – Unreasonable Invasion of Third-Party Personal Privacy**

[18] The PSA refused to disclose some of information in the Records under s. 22(1).<sup>6</sup> Section 22(1) requires a public body to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.<sup>7</sup>

[19] Past orders have considered the application of s. 22, and I will apply those same principles here.<sup>8</sup> Section 22 only applies to personal information, so the

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<sup>6</sup> Pages 1, 3, 12-19, 21-26, 29, 38-45, 47-52, 64, 95, 99-107, 109-110, and 124-141 of the Records.

<sup>7</sup> Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons, or organization other than (a) the person who made the request, or (b) a public body.

<sup>8</sup> Order F15-03, 2015 BCIPC 3 (CanLII) at para 58; and Order F16-38, 2016 BCIPC 42 (CanLII) at para 108.

first step in a s. 22 analysis is to determine whether the information in dispute is personal information. Section 22(4) then lists circumstances where disclosure is not an unreasonable invasion of a third party's personal privacy. Section 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. Whether or not s. 22(3) applies, all relevant circumstances must be considered, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of the third party's personal privacy. It is at that stage that a presumption created by s. 22(3) may be rebutted.

### *Personal Information*

[20] Under FIPPA, personal information is “recorded information about an identifiable individual other than contact information.” Contact information is “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.”<sup>9</sup>

[21] Past orders have said that information is about an identifiable individual when it is reasonably capable of identifying an individual, either alone or when combined with other available sources of information.<sup>10</sup> The information does not need to directly identify the individual to everyone who views it. The information is considered personal information if it reasonably permits identification of the individual on its own or in combination with information from other sources.<sup>11</sup>

[22] The PSA argues that the withheld information is third-party personal information, and any of the withheld information that is the applicant's personal information was withheld because it is inextricably intertwined with third party personal information.<sup>12</sup> In her submission, the applicant does not dispute that the information withheld under s. 22 is information that is reasonably capable of identifying individuals.

[23] I have reviewed all of the information the PSA withheld under s. 22. This information comprises names of individuals, statements made by and about individuals, descriptions of interactions between individuals, and the external investigator's evaluative commentary about individuals. All of it is about identifiable third parties so it is their personal information. Some of the third-party personal information is about their interactions with the applicant and for that reason it is also her personal information. There is also some information that

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<sup>9</sup> Schedule 1 of FIPPA contains the definitions of “personal information” and “contact information.”

<sup>10</sup> Order F19-13, 2019 BCIPC 15 (CanLII) at para 16, citing Order F18-11, 2018 BCIPC 14 (CanLII) at para 32.

<sup>11</sup> Order F21-17, 2021 BCIPC 22 (CanLII) at para 12; Order F16-38, 2016 BCIPC 42 at para 112; and Order F13-04, 2013 BCIPC 4 at para 23.

<sup>12</sup> PSA's initial submission at paras 55 and 56.

I find is only the applicant's personal information which has been severed from records documenting meetings that the applicant attended.

[24] I also find that none of the information is contact information. Some of the information includes the names and job titles of third parties which may have been contact information under different circumstances. However, disclosure of that information would reveal who said what to the investigator about the matter under investigation. I find that this information is personal information due to its surrounding context and locations in the Records.<sup>13</sup>

### ***Section 22(4) – Disclosure Not an Unreasonable Invasion of Privacy***

[25] The second step of this analysis is to determine whether any of the circumstances listed at s. 22(4) apply. Section 22(4) sets out specific circumstances under which a disclosure of a third party's personal information is not an unreasonable invasion of that third party's personal privacy.

#### *Written Consent to Disclosure by Third Party, Section 22(4)(a)*

[26] Section 22(4)(a) says that if a third party consents to disclosure in writing, then disclosure is not an unreasonable invasion of the third party's personal privacy.

[27] The PSA submits that s. 22(4)(a) is inapplicable because no third parties have provided written consents to disclosure of the withheld information.<sup>14</sup> The applicant did not argue that s. 22(4)(a) applies and I have no evidence of any third party consenting to disclosure of their personal information in the Records. I find that s. 22(4)(a) is inapplicable to the withheld information.

#### *Position, Functions or Remuneration as Employee or Officer, Section 22(4)(e)*

[28] Section 22(4)(e) says that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if 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. Past orders have found that s. 22(4)(e) applies to personal information when it is about individuals in the normal course of performing their work duties, and can include employee names, job titles, duties, functions, remuneration or positions.<sup>15</sup>

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<sup>13</sup> Order F21-08, 2021 BCIPC 12 (CanLII) at paras 101-103.

<sup>14</sup> PSA's initial submission at para 58.

<sup>15</sup> Order F20-54, 2020 BCIPC 63 (CanLII) at para 56; and Order 02-56, 2002 CanLII 42493 (BC IPC) at para 63 (upheld by the B.C. Court of Appeal at *Architectural Institute of B.C. v. Information and Privacy Commissioner for B.C.*, 2004 BCSC 217 (CanLII)).

[29] The PSA argues that the withheld personal information does not fall within s. 22(4)(e) because it was collected through a workplace investigation and not during the normal course of business.<sup>16</sup> In response, the applicant argues that the withheld personal information is about the third parties' job functions and duties because it pertains to their actions and conduct that occurred during working hours and in the context of their employment.<sup>17</sup>

[30] The majority of the withheld personal information is in witness statements, interview summaries and minutes, commentary by the external investigator regarding those statements, and evaluations of personnel by the external investigator. I find that the personal information is about individuals in the context of their involvement in a workplace investigation and, for that reason, s. 22(4)(e) does not apply.

[31] There is a small amount of personal information which is about the reasons for workplace absences, and I find that s. 22(4)(e) also does not apply to that information because that information speaks to individuals' unique circumstances as opposed to their performance of work duties in the normal course of events.

[32] I have reviewed the other subsections of s. 22(4) and find that none of them apply to the withheld personal information.

### **Section 22(3) – Presumptions of an Unreasonable Invasion of Privacy**

[33] The third step of an analysis under s. 22 is to determine whether the personal information that was withheld falls within one of the categories listed at s. 22(3). If it does, then disclosure of that information is presumed to be an unreasonable invasion of a third party's personal privacy.

[34] The PSA argues that ss. 22(3)(d) and (g) apply to the withheld personal information.<sup>18</sup> The applicant disagrees.<sup>19</sup>

[35] For the reasons that follow, I find that either ss. 22(3)(d) or (g) apply to the third-party personal information.

#### *Employment History, Section 22(3)(d)*

[36] Section 22(3)(d) says that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history.

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<sup>16</sup> PSA's initial submission at paras 59-60, and PSA's final submission at para 29.

<sup>17</sup> Applicant's submission at page 7.

<sup>18</sup> PSA's initial submission at para 62.

<sup>19</sup> Applicant's submission at page 9.

[37] The term “employment history” has been found in past orders to include descriptive information about a third party’s workplace behaviours or actions in the context of a workplace complaint investigation or disciplinary matter.<sup>20</sup> This includes information that clearly reveals the identity of subjects or witnesses that were interviewed as part of an investigation, such as what the witnesses said to investigators about the role that they and others played in the matter under investigation.<sup>21</sup>

[38] Section 22(3)(d) exists in tension with s.22(4)(e). As I determined above, s. 22(4)(e) does not apply to the withheld information because that information is not information about the third parties’ positions or functions as employees in the normal course performing their work duties.

[39] After carefully reviewing the Records, it is clear that most of the personal information withheld under s. 22 was gathered in the context of either the internal workplace investigation, the external investigator’s workplace investigation, or both. The withheld information also reveals the sources of this personal information including how, why, when, from whom, and by whom the information was gathered. I find that this personal information relates to employment history as contemplated by s. 22(3)(d), which creates a presumption that disclosure would be an unreasonable invasion of a third party’s personal privacy.

[40] I also find that s. 22(3)(d) applies to the balance of the personal information which is about the reasons for individuals’ workplace absences. Past orders have also found that s. 22(3)(d) applies to this type of personal information.<sup>22</sup>

*Personal and Personnel Evaluations, Section 22(3)(g)*

[41] Section 22(3)(g) says that disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if the personal information consists of personal recommendations or evaluations, character references or personal evaluations about the third party.

[42] Past orders have interpreted s. 22(3)(g) as referring to formal performance reviews, job or academic references, or to comments and views of investigators about an employee’s workplace performance and behaviour in the context of a workplace investigation.<sup>23</sup>

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<sup>20</sup> Order 01-53, 2001 CanLII 21607 (BC IPC) at paras 32-33; Order F20-13, 2020 BCIPC 15 (CanLII) at para 52; Order F15-52, 2015 BCIPC 55 (CanLII) at para 40.

<sup>21</sup> Order F21-08, 2021 BCIPC 12 (CanLII) at para 137.

<sup>22</sup> Order F16-32, 2016 BVIPV 35 (CanLII) at paras 50 and 56; and Order F23-49, 2023 BCIPC 57 (CanLII) at para 44.

<sup>23</sup> Order F05-30, 2005 CanLII 32547 (BC IPC), at para 41.

[43] The PSA submits that most of the withheld information engages s. 22(3)(g) because it contains the investigators' assessments of individual employees and evaluations of individual employee actions, both for the internal PSA investigation and the external investigation.<sup>24</sup>

[44] The disclosed portions of the Records, the submissions of the PSA, and the withheld information itself satisfy me that some of the personal information is personnel evaluations conducted by the external investigator.<sup>25</sup> Without revealing the specific portions of the Records that may contain evaluative commentary, I find that s. 22(3)(g) applies to some of the personal information at issue.

### **Section 22(2) – Relevant Circumstances**

[45] The final step in the s. 22 analysis is to determine whether disclosure of the personal information would be an unreasonable invasion of personal privacy. This is done by considering all relevant circumstances, including those listed in s. 22(2). An applicant may rebut a s. 22(3) presumption at this stage.

[46] The applicant and the PSA raise ss. 22(2)(a), (c) and (f) as relevant circumstances. Those sections state:

1. The disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny (s. 22(2)(a));
2. The personal information is relevant to a fair determination of the applicant's rights (s. 22(2)(c)); and
3. The personal information has been supplied in confidence (s. 22(2)(f)).

*Desirable for Subjecting the Public Body to Public Scrutiny,  
Section 22(2)(a)*

[47] To engage s. 22(2)(a), disclosure of the withheld information must be desirable for subjecting the activities of the public body to public scrutiny. This is different from a disclosure that subjects applicants or third parties to public scrutiny.<sup>26</sup> The purpose of s. 22(2)(a) is to make public bodies, not individual employees, more accountable.<sup>27</sup>

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<sup>24</sup> PSA's initial submission at paras 75-76.

<sup>25</sup> PSA's initial submission at para 35; Records (disclosed) at pages 3, 29, and 96.

<sup>26</sup> Order F16-14, 2016 BCIPC 16 (CanLII) at para 40.

<sup>27</sup> Order F18-47, 2018 BCIPC 50 (CanLII) at para 32.

[48] The applicant argues that the PSA is refusing to release the disputed information because it does not want to subject its activities to public scrutiny, and that the PSA does not want a truthful account to surface.<sup>28</sup> The PSA argues that disclosing the withheld information would subject third parties, but not the PSA, to public scrutiny. To support its argument, the PSA also argues that it already disclosed the information that would subject the PSA to public scrutiny.

[49] In her submission, the applicant refers to a heightened expectation of transparency of public service employees.<sup>29</sup> I reject this consideration because it blurs the line between scrutiny of a public body and scrutiny of its employees. Public service employees are entitled to the protection from unreasonable invasions of their personal privacy because they meet the definition of a third party as that term is used in FIPPA.<sup>30</sup>

[50] Disclosing the withheld personal information could reveal some information that the PSA relied on in making its decisions following the workplace investigation. This means that there is a connection between the withheld information and the public body's decision-making process. However, the withheld information is more directly related to the conduct and accountability of the applicant and third parties rather than the conduct and accountability of the PSA. Past orders have recognized this distinction<sup>31</sup> and found that this is insufficient for s. 22(2)(a) to apply.

[51] I also find that the PSA has already disclosed significant information about its actions that would permit public scrutiny of its conduct throughout the workplace investigation. I am not persuaded that disclosure of the withheld personal information would enhance scrutiny of the PSA in any way.

[52] Having considered s. 22(2)(a), I find that disclosure of the personal information at issue is not desirable for subjecting the activities of the PHSA to public scrutiny.

*Relevant to a Fair Determination of Applicant's Rights, Section 22(2)(c)*

[53] When assessing whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, s. 22(2)(c) requires a public body to consider whether the personal information is relevant to a fair

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<sup>28</sup> Applicant's submission at page 2.

<sup>29</sup> Applicant's submission at pages 6, 9 and 11.

<sup>30</sup> Order 00-53, 2000 CanLII 14418 (BC IPC) at page 11.

<sup>31</sup> Order F05-18, 2005 CanLII 24734 (BC IPC) at 49.

determination of an applicant's rights. Past orders have found that it applies where all of the following circumstances exist:<sup>32</sup>

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The withheld personal information must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.

[54] The applicant argues that some of the information withheld under s. 22 is relevant to a fair determination of her rights.<sup>33</sup> In her submission, the applicant makes various references to "slander,"<sup>34</sup> a concurrent Human Rights Tribunal proceeding,<sup>35</sup> and "determinant and constructive dismissal."<sup>36</sup>

[55] The PSA argues that the applicant has not established which rights of the applicant require determination or the relevance, let alone necessity, of the withheld information to such a determination of those rights.<sup>37</sup> The PSA also argues that alternative mechanisms are available in the Human Rights Tribunal procedures for the applicant to obtain the disputed information and that such procedures carry additional mechanisms to ensure third party privacy is protected.<sup>38</sup>

[56] I will address each of the four elements of the s. 22(2)(c) test below:

#### Part One: Legal Right

[57] The first part of the test relates to whether the right in question is a legal right drawn from the common law or a statute as opposed to a non-legal right based on moral or ethical grounds.

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<sup>32</sup> Order 01-07, 2001 CanLII 21561 (BCIPC) at para 31; Order F15-11, 2015 BCIPC 11 (CanLII) at para 24.

<sup>33</sup> Applicant's submission at page 8.

<sup>34</sup> Applicant's submission at page 9.

<sup>35</sup> Applicant's submission at page 4.

<sup>36</sup> Applicant's submission at page 10.

<sup>37</sup> PSA's final submission at para 34.

<sup>38</sup> PSA's final submission at paras 35-36.

[58] The PSA argues that the applicant has not set out to which of her rights the disputed personal information is relevant or why.<sup>39</sup> Although the applicant's submission is interspersed with claims to non-legal moral rights, I find that a reading of the applicant's submission as a whole clearly shows that the applicant is referring to her right to seek relief from an alleged human rights violation. The applicant did not indicate which specific grounds of discrimination she advances in her human rights claim. The applicant's submission also briefly refers to the terms "slander" and "constructive dismissal."

[59] The PSA does not dispute that the rights to seek relief from civil court and the Human Rights Tribunal are legal rights drawn from legislation and the common law.

[60] I find that the right to seek relief through a Human Rights Tribunal proceeding involves a legal right of the applicant which satisfies the first part of the s. 22(2)(c) test.

#### Part Two: Proceeding under way or contemplated

[61] The second part of the test requires the legal right in question to be related to a proceeding that is either under way or contemplated. Past orders have established that an applicant only needs to establish that they are intently considering the commencement of a proceeding.<sup>40</sup>

[62] The applicant says, "It is important that this information is available for other determinations such as the BC Human Rights tribunal evidence package and keeping in fairness, equity, and appropriate treatment of BC Public Service employees."<sup>41</sup> The submissions from both of the parties confirm that the applicant filed a human rights complaint and a Human Rights Tribunal proceeding is under way.<sup>42</sup> I find that the applicant's human rights claim meets the requirement for being under way or in contemplation.

[63] However, what the applicant says about fairness, equity and appropriate treatment of BC Public Service employees does not satisfy me that there are any other legal proceedings underway or contemplated.

#### Part Three: Information has a bearing on the legal right

[64] The third part of the test asks whether the personal information at issue has some bearing on, or significance for, a determination of the legal right in question. So, in order to pass the third part of the s. 22(2)(c) test, the personal

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<sup>39</sup> PSA's final submission at para 34.

<sup>40</sup> Order F16-36, 2016 BCIPC 40 at para 50.

<sup>41</sup> Applicant's submission at page 11.

<sup>42</sup> Applicant's submission at page 10; PSA's final submission at paras 31 and 33.

information at issue must have some bearing on the determination of the applicant's human rights claim.

[65] The applicant has not stated which specific grounds of discrimination her human rights claim is founded on, nor has she provided a copy of the complaint with her submission. Given the lack of explanation and detail, I do not have sufficient information to decide if the personal information at issue has any bearing on, or significance for, determining the issues in her human rights complaint.

[66] I also find that the personal information does not have a bearing on the applicant's right to file a human rights complaint because her complaint has already been filed and accepted by the tribunal for consideration.<sup>43</sup>

[67] In conclusion, the applicant has not established this third part of the test is met. Since all four parts of the test must be met, it is not necessary for me to consider the fourth part.

[68] I find that the above four criteria for the application of s. 22(2)(c) have not been met and therefore the personal information in dispute is not relevant to a fair determination of the applicant's rights. Accordingly, s 22(2)(c) does not apply to the personal information in dispute.

*Personal Information Supplied in Confidence, Section 22(2)(f)*

[69] Section 22(2)(f) requires a public body to consider whether the personal information has been supplied in confidence. Section 22(2)(f) requires evidence that an individual supplied the information under an objectively reasonable expectation of confidentiality at the time they supplied the information.<sup>44</sup>

[70] The applicant argues that it is a common practice for investigators to cite confidentiality at the beginning of investigation interviews, and as such this should not support withholding the disputed information.<sup>45</sup>

[71] The PSA submits that the external investigator advised the participants that all information they provided would be treated as strictly confidential and only revealed to other participants as necessary to ensure the investigation was fair. The PSA argues that this weighs in favour of withholding the disputed information.<sup>46</sup>

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<sup>43</sup> Applicant's submission at pages 4 and 10.

<sup>44</sup> Order F11-05, 2011 BCIPC 5 (CanLII) at para 41, citing Order 01-36, 2001 CanLII 21590 (BC IPC) at paras. 23-26.

<sup>45</sup> Applicant's submission at page 3.

<sup>46</sup> PSA's initial submission at paras 22, 82 and 87; Affidavit #1 of K.T. 17-20.

[72] The parties' submissions and evidence differ on whether the PSA's treated the investigation and its conclusions with an appropriate level of confidentiality. This issue is irrelevant to the s. 22(2)(f) analysis because the focus of the analysis is on the supplier of information and their expectation of confidentiality when the personal information was supplied.

[73] It is clear on the face of the Records that the people who supplied the personal information were repeatedly informed that their statements would be treated as confidential before, during, and after they supplied it.<sup>47</sup>

[74] I do not agree with the applicant's suggestion that an investigator citing confidentiality at the start of an interview should be given less weight because it is a common practice. In this case, the seriousness of the workplace investigation and the repeated nature of the assurances of confidentiality persuade me that the people who supplied the personal information had an objectively reasonable expectation that their statements would be treated as confidential.

[75] I conclude that s. 22(2)(f) is a relevant factor that weighs in favour of finding that disclosure would be an unreasonable invasion of third-party personal privacy.

#### Applicant's Existing Knowledge

[76] Past orders have found that where an applicant already knows the personal information in dispute, that this may weigh in favour of disclosure.<sup>48</sup> The parties did not provide arguments directly related to this factor but I find it is a relevant factor to consider in this case.

[77] Some of the withheld third-party personal information was severed from the minutes of meetings which the applicant attended.<sup>49</sup> These minutes contain records of spoken and written dialogue between the applicant and other individuals. The applicant obviously already knows the personal information contained in these parts of the Records and that weighs in favour of disclosing that specific information.

[78] The applicant's submission contains many statements speculating in detail about what the withheld personal information contains. These statements are helpful for determining the extent of her knowledge of the withheld third-party personal information. After comparing the applicant's statements against the withheld information, I find that the applicant does not have sufficient existing

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<sup>47</sup> Pages 4, 30, 54, and 60 of the Records.

<sup>48</sup> Order F17-02, 2017 BCIPC 2 (CanLII) at paras 28-30; and Order F15-14, 2015 BCIPC 14 (CanLII) at paras 72-74.

<sup>49</sup> Pages 99-107, 109-110, and 124-141 of the Records

knowledge of the rest of the information in dispute to weigh in favor of disclosing that information.

### Sensitivity

[79] Past orders have considered the sensitivity of the withheld personal information as a relevant factor to a s. 22 analysis.<sup>50</sup> Where the withheld personal information is sensitive this will weigh in favour of withholding it. If the withheld personal is not sensitive, then this will weigh in favour of disclosure.

[80] I find that most of the withheld personal information is of a moderate sensitivity because it contains assessments of third-party credibility, work performance, and the reason for an individual's inability to attend a meeting, all of which favours withholding this personal information.

### Applicant's Personal Information

[81] A factor supporting disclosure is that some of the severed information in minutes of meetings the applicant attended is solely her personal information. Past orders have stated that it would only be in rare circumstances where disclosure to an applicant of their own personal information would be an unreasonable invasion of a third party's personal privacy.<sup>51</sup>

[82] The rest of the information that is the applicant's personal information is also third-party personal information because it is about their interactions. It is so closely intermingled, in my view, it cannot be further teased apart and disclosed to the applicant without revealing the third-party personal information. Past orders have said that disclosure to an applicant is, in effect, disclosure to the world,<sup>52</sup> so I recognize that disclosing this joint personal information needs to be considered in that light and that weighs against disclosure of this information.

### **Conclusion on s. 22**

[83] I found that most of the information withheld under s. 22(1) is third parties' personal information. Some of it is about their interactions with the applicant so it is also her personal information. There is also a small amount of withheld information that is only about the applicant in minutes of meetings that she attended.

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<sup>50</sup> Order F16-52, 2016 BCIPC 58 (CanLII) at para 87; and Order F10-09, 2010 BCIPC 14 (CanLII) at para 123.

<sup>51</sup> Order F10-10, 2010 BCIPC 17 (CanLII) at para 37; and Order F20-13, 2020 BCIPC 15 (CanLII) at para 73.

<sup>52</sup> Order 03-25, 2003 CanLII 49204 (BC IPC) at para 24; and Order 01-52, 2001 CanLII 21606 (BC IPC) at para 73.

[84] All of the third parties' personal information relates either to their employment history or is personal evaluations of them, so I found that ss. 22(3)(d) and (g) apply and disclosing that information is presumed to be an unreasonable invasion of third-party personal privacy.

[85] I considered the relevant circumstances in ss. 22(2)(a), (c), (f), the applicant's existing knowledge of the personal information, the sensitivity of some of the personal information and the fact that some of the severed information is also the applicant's personal information. Only two factors weigh in favour of disclosure of some of the third-party personal information: the fact that it is also the applicant's personal information because it is about their interactions, and the fact that she has existing knowledge of it because it is in minutes of meetings she attended. All of the other circumstances that I considered did not weigh in favour of disclosure of the third-party personal information. In fact, the moderate sensitivity of some of that third-party personal information and the fact that much of it was supplied in confidence weighs strongly against disclosure.

[86] In conclusion, based on my consideration of all of those factors, I find that the ss. 22(3)(d) and (g) presumptions are not rebutted. Disclosing any of the third parties' personal information to the applicant would be an unreasonable invasion of the third parties' personal privacy so the PSA must refuse to disclose it under s. 22(1). The only personal information in dispute that I find s. 22(1) does not apply to is the information that is exclusively the applicant's personal information in the minutes of meetings she attended. I have highlighted the information that the PSA may not withhold under s. 22(1) in a copy of the records which is provided to the PSA along with this order.

### **Section 13(1) – Policy Advice or Recommendations**

[87] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or minister. Past orders recognize that s. 13(1) protects "a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations."<sup>53</sup> The purpose of s. 13(1) is to prevent the harm that would occur if a public body's deliberative process was exposed to public scrutiny.<sup>54</sup>

[88] Section 13(1) applies not only where the information directly reveals advice or recommendations, but also where knowledge of the information would

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<sup>53</sup> Order 01-15, 2001 CanLII 21569 (BCIPC) at para 22; and Order F23-13, 2023 BCIPC 15 (CanLII) at para 16.

<sup>54</sup> *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII) at para 52.

permit an accurate inference of the advice or recommendations.<sup>55</sup> This extends to factual or background information that is a necessary and integrated part of the advice or recommendation, including factual information compiled and selected by an expert, using their expertise, judgment and skill, for the purpose of providing explanations necessary to the deliberative process of the public body.<sup>56</sup>

[89] The term “advice” is broader than “recommendations”<sup>57</sup> and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.<sup>58</sup> “Recommendations” include material relating to a suggested course of action that will ultimately be accepted or rejected by the one being advised.<sup>59</sup>

[90] The first step in the s. 13 analysis is to determine whether disclosure of the withheld information would reveal advice or recommendations developed by or for the PSA. If so, I must determine whether the information is captured by any of the categories listed at s. 13(2), in which case the PSA must not refuse disclosure under s. 13(1). Finally, s. 13(3) says that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years.

#### *Positions of the Parties on s. 13*

[91] The PSA argues that all of the information it withheld under s. 13(1) would reveal advice or recommendations developed by and for it.<sup>60</sup> The applicant argues that the withheld information must not be withheld because ss. 13(2)(a), (k), (m) and (n) apply. The applicant does not explain how these provisions apply to the withheld information.<sup>61</sup>

[92] The PSA withheld some of the information from the Report and its appendices under both ss. 13(1) and 22(1). I have already confirmed above that s. 22 requires the PSA to withhold most of the information from the Report and I find now that this includes all of the information that the PSA also withheld under s. 13. Therefore, it is unnecessary for me to consider the applicability of s. 13 to the Report and I will only consider its applicability to the other information that was withheld under s. 13.<sup>62</sup>

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<sup>55</sup> Order 02-38, 2002 CanLII 42472 (BC IPC) at 135; and Order F17-19, 2017 BCIPC 20 (CanLII) at para 19.

<sup>56</sup> *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII) at para 94 [*Provincial Health*].

<sup>57</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII), [2014] 2 SCR 3 at para 24 [*Doe*].

<sup>58</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 113 [*College*].

<sup>59</sup> *Doe*, *supra* note 57, at para 23.

<sup>60</sup> PSA’s initial submission, at para 34.

<sup>61</sup> Applicant’s submission at pages 5-7.

<sup>62</sup> Pages 111, 112, and 115 of the Records.

Would disclosing the information at issue reveal advice or recommendations developed by or for a public body?

[93] The PSA characterizes the correspondence between the PSA's internal investigator and their human resources advisors as "advice the Ministry's internal investigator sought from the PSA via [their internal HR advisors]" and "advice to Ministry employees on how to address human resource matters and work-place complaints."<sup>63</sup> The applicant does not dispute that this specific withheld information may constitute advice or recommendations, but instead argues for the applicability of s.13(2)(a),<sup>64</sup> which I will address later.

[94] In my view, all of the information withheld under s. 13(1) from the correspondence between the PSA's internal investigator and its human resources advisors constitutes advice that was developed by and for the PSA. This information consists of advice on how to address human resource matters and workplace complaints. Revealing this information would permit immediate and accurate inferences as to what that advice was.

[95] The next step of this analysis is to determine whether any of the information that I found would reveal advice falls within one of the circumstances listed at s. 13(2). If so, PSA must not refuse to disclose it under s. 13(1).

*Factual Material, Section 13(2)(a)*

[96] Section 13(2)(a) prohibits the head of a public body from refusing to disclose any factual material in reliance on s. 13(1). "Factual material" is that which exists prior to its use in service of a particular purpose or goal, whereas "factual information" is information compiled from source materials by experts, using their expertise, for the specific purpose of providing the necessary explanations that aid the deliberative process.<sup>65</sup> I disagree with the applicant's argument that the difference between the two terms amounts to "semantics."<sup>66</sup>

[97] The information withheld from the internal correspondence<sup>67</sup> is neither factual information nor factual material on which advice is based. The withheld information contains the advice itself and descriptions of that advice. Accordingly, I find that s. 13(2)(a) is inapplicable to this withheld information.

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<sup>63</sup> PSA's submission at paras. 33 and 38.

<sup>64</sup> Applicant's submission at page 6.

<sup>65</sup> *Provincial Health*, *supra* note 56 at paras 93-94.

<sup>66</sup> Applicant's submission at page 6.

<sup>67</sup> Pages 111, 112, and 115 of the Records.

*Task Force, Council, Committee, or Similar Reports, Section 13(2)(k)*

[98] Section 13(2)(k) states that the head of a public body must not refuse to disclose under s. 13(1) a “report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body.”

[99] The applicant argues that s. 13(2)(k) applies to all of the information withheld under s. 13(1).<sup>68</sup> The PSA’s arguments focus on the inapplicability of this section to the external investigator.<sup>69</sup>

[100] I have reviewed the withheld information in detail and conclude that the internal correspondence<sup>70</sup> from which information was withheld under s. 13 is not a “report” as contemplated by s. 13(2)(k). Past orders have defined the term “report” as a formal statement or account of the results of the collation and consideration of information.<sup>71</sup> This correspondence does not approximate a formal report or anything close to it. Therefore, I find that s. 13(2)(k) does not apply.

*Information Cited Publicly as the Basis for Making a Decision,  
Section 13(2)(m)*

[101] Section 13(2)(m) requires disclosure of information that the head of a public body has cited publicly as the basis for making a decision or formulating a policy.

[102] None of the documents or submissions before me suggest that the PSA ever cited any of the information withheld under s. 13(1) publicly as the basis for its decision to not proceed with disciplinary actions or continue investigating the applicant’s complaint. For that reason, I find that s. 13(2)(m) is inapplicable to the withheld information.

*Discretionary Decisions and Reasons Affecting the Applicant,  
Section 13(2)(n)*

[103] Section 13(2)(n) requires disclosure of information that is a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant. Past orders have held that s. 13(2)(n) does not require the disclosure of all records which relate to

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<sup>68</sup> Applicant’s submission at page 7.

<sup>69</sup> PSA’s final submission at paras 17-18.

<sup>70</sup> Pages 111, 112, and 115 of the Records.

<sup>71</sup> Order F17-33, 2017 BCIPC 35 (CanLII) at para 17; and Order F21-41, 2021 BCIPC 49 (CanLII) at para 41.

the exercise of a discretionary power, but rather only the records which contain a decision or the reasons for it.<sup>72</sup>

[104] Citing affidavit evidence provided in support of their arguments, the PSA confirms in their submissions that the authority to determine whether to take formal disciplinary action (or not) lies with the Ministry of Health in consultation with the PSA and not with the external investigator.<sup>73</sup>

[105] A close examination of that withheld information reveals that it contains no decisions, or reasons for decisions, affecting the applicant's rights. The information contains no decisions or reasons for decisions at all. The information contains the advice from the PSA's internal human resources advisors to the internal investigator. Therefore, I find that s. 13(2)(n) does not apply to any of that withheld information.

#### *Section 13(3) – Records Older Than 10 Years*

[106] Section 13(3) says that s. 13(1) does not apply to information in a record that has been in existences for 10 or more years. The withheld information in this matter is contained entirely within records that are less than 10 years old. I find that s. 13(3) does not apply.

#### *Exercise of Discretion under s. 13(1)*

[107] Where s. 13(1) applies, a public body may exercise its discretion while disclosing or withholding that information because s. 13(1) says that a public body *may* (not *must*) refuse to disclose such information.

[108] The Commissioner can order a public body to exercise or re-exercise its discretion if the public body hasn't actually exercised its discretion or exercised its discretion inappropriately. Inappropriate exercises of discretion may include decisions that are made in bad faith, for improper purposes, by considering irrelevant factors, or after failing to consider relevant factors.<sup>74</sup>

[109] The applicant questions the PSA's motivations throughout her submission and specifically states that the PSA's behaviour is "suspect" with regard to the disclosures and severances that it made.<sup>75</sup> I understand these statements to be an argument that the PSA has inappropriately exercised any discretion it has under FIPPA.

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<sup>72</sup> Order No. 218-1998, at page 8; Order F20-37, 2020 BCIPC 43 (CanLII) at para 54; and Order F08-05, 2008 CanLII 13323 (BC IPC) at paras 7-8.

<sup>73</sup> PSA's initial submission at para 43, and PSA's final submission at para 22.

<sup>74</sup> Order F21-50, 2021 BCIPC 58 at para 92; and *Doe*, *supra* note 57 at para 52.

<sup>75</sup> Applicant's submission at pages 4, 5, 8, 9, and 11.

[110] Having reviewed the Records and the submissions of the parties, I cannot see any indicia of the PSA withholding information in bad faith or for improper purposes, nor can I see any failure by the PSA to consider relevant factors or that it considered irrelevant factors. I conclude that the PSA has exercised its discretion appropriately for the information I confirmed it was authorized to withhold under s. 13(1).

*Conclusion on Section 13*

[111] In conclusion, I find that some of the information withheld under s. 13(1) would reveal advice or recommendations developed by and for the PSA.<sup>76</sup> I also find that ss. 13(2) and 13(3) do not apply to that information. Therefore, I conclude that s. 13(1) authorizes the PSA to withhold that information from the Records. I have not considered the applicability of s. 13(1) to the information that I found was required to be withheld under s. 22(1).

**CONCLUSION**

[112] For the reasons given above, I make the following order pursuant to s. 58 of FIPPA:

1. I confirm, in part, the public body's decision to refuse to disclose the information in dispute under s. 13(1) of the Act.
2. Subject to item 3 below, I require the public body to refuse access to all of the information in dispute that it withheld under s. 22(1) of the Act.
3. I require the public body to grant the applicant access to the information that I have highlighted in green in a copy of the Records provided to the public body with this order.
4. The public body must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant together with a copy of the records described in item 3 above.

[113] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **October 3, 2023**.

August 22, 2023

**ORIGINAL SIGNED BY**

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Alexander R. Lonergan, Adjudicator

OIPC File No.: F21-85162

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<sup>76</sup> Pages 111, 112, and 115 of the Records.