Office of the Information & Privacy Commissioner for British Columbia

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Order F16-32

CITY OF RICHMOND

Wade Raaflaub, Adjudicator

June 27, 2016

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Summary: The applicant asked the City of Richmond for records relating to complaints made about him. The City withheld some of the requested information on the basis that it revealed policy advice or recommendations under s. 13, that it was privileged under s. 14, that disclosure of the information would be harmful to law enforcement under s. 15, that disclosure would be harmful to individual or public safety under s. 19, and that disclosure would be harmful to the personal privacy of third parties under s. 22 of FIPPA. The adjudicator found that the City was authorized to refuse access to the information at issue under ss. 13 and 14, but not under s. 15 or 19. He found that the City was authorized or required to refuse access to some but not all of the information at issue under s. 22.

Statutes Considered: B.C.: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 13, 13(1), 13(2), 13(2)(a), 13(3), 14, 15, 15(1), 15(1)(f), 15(1)(l), 19, 19(1), 19(1)(a), 19(1)(b), 22, 22(1), 22(2), 22(2)(a), 22(2)(c), 22(2)(e), 22(2)(f), 22(3), 22(3)(a), 22(3)(d), 22(4), 22(5), 56(1), 57(1), 57(2), 58, 58(2)(a), 58(2)(b), 58(2)(c) and 59(1), and Schedule 1 (definitions of "contact information" and "personal information"). **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 13.

Authorities Considered: B.C.: Order 00-06, 2000 CanLII 6550 (BC IPC); Order 00-02, 2000 CanLII 8819 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order F13-04, 2013 BCIPC 4 (CanLII); Order F14-38, 2014 BCIPC 41 (CanLII); Order F14-47, 2014 BCIPC 51; Order F15-12, 2015 BCIPC 12 (CanLII); Order F15-41, 2015 BCIPC 44 (CanLII); Order F15-52, 2015 BCIPC 55 (CanLII); Order F15-60, 2015 BCIPC 64 (CanLII); Order F15-67, 2015 BCIPC 73; Order F15-72, 2015 BCIPC 78 (CanLII).

Cases Considered: *R. v. B.*, 1995 CanLII 2007 (BC SC); *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)*, 1995 CanLII 634 (BC SC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII); *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII).

INTRODUCTION

[1] This inquiry involves an applicant's request to the City of Richmond ("City") under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for records relating to complaints that the City had received about him.

ISSUES

[2] The issues in this inquiry are whether the City is authorized to refuse to disclose information under ss. 13, 14, 15 and/or 19 of FIPPA, and whether it is required to refuse to disclose other information under s. 22.

[3] In accordance with s. 57(1), the City has the burden of proving that the applicant has no right of access to information under ss. 13, 14, 15 and/or 19. In accordance with s. 57(2), the applicant has the burden of proving that disclosure of any personal information of third parties would not be an unreasonable invasion of their personal privacy under s. 22.

DISCUSSION

[3] **Background** - The applicant is a former employee of the City who was employed as a bylaw enforcement officer. His employment was terminated following complaints about his performance and interactions with the public and other staff. Under FIPPA, he requested copies of records relating to those complaints, including communications between particular staff, and copies of the bylaw tickets that were the subject of complaints from members of the public.

[4] The City refused to grant the applicant access to portions of the requested records under ss. 13 (policy advice or recommendations), 14 (legal advice), 15 (disclosure harmful to law enforcement) and 22 (disclosure harmful to personal privacy) of FIPPA.

[5] The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the City's decision. Investigation and mediation did not resolve the matter. The applicant then asked for an inquiry.

[6] The City raised the application of s. 19 (disclosure harmful to individual or public safety) for the first time in its initial inquiry submissions. I have allowed the late raising of this particular exception to disclosure because its purpose is to prevent harm to the safety or mental or physical health of others. Further, the applicant had the opportunity to object to the late application of s.19 to the records when he provided his own inquiry submissions, and he made no objection. Finally, the applicant is not prejudiced, in the end, as a result of my conclusion on the application of s. 19.

[7] **Information at Issue** - The information at issue consists of severed portions of 260 pages found in an overall set of 363 pages of responsive records. The 260 pages consist almost entirely of email correspondence, with the addition of a complaint letter, a computer screen shot reflecting a complaint, and copies of parking tickets.

Policy advice or recommendations – s. 13

[8] Section 13(1) of FIPPA authorizes a public body to withhold information that reveals policy advice or recommendations, subject to certain exceptions. The relevant parts of s. 13 read as follows:

> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
>
> …
>
> (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

Policy advice or recommendations – s. 13(1)

[9] Section 13 is designed to protect 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.[1] The Supreme Court of Canada has explained the rationale behind withholding information as advice or recommendations under freedom of information legislation as follows:

> [...] The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely

[1] Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 22.

> to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed.[2]

The British Columbia Court of Appeal has stated that advice includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.[3] Previous OIPC orders have added that a public body is authorized to refuse access to information that would enable an individual to draw accurate inferences about advice or recommendations.[4]

[10] The information at issue under s. 13 consists of portions of the same email appearing on both pages 354 and 361 of the records. The City submits that the information reveals advice or recommendations that its Director of Human Resources provided to the City's General Manager, regarding the decision to terminate the applicant's employment, subsequent to a follow-up meeting that the applicant had requested with them. I agree that the information reveals advice or recommendations, as it sets out the Director's opinion on what course of action the City should take following the meeting, along with his reasons for that opinion based on circumstances and facts that he presents.

Information that may not be withheld under s. 13(1) – s. 13(2)

[11] Section 13(2) states that a public body cannot rely on s. 13(1) to withhold certain types of information. I find that none of them appear here.

[12] In particular, I considered whether the information withheld under s. 13(1) was "factual material" within the terms of s. 13(2)(a). I find that it is not. The Supreme Court of British Columbia has stated that background facts in isolation are not protected from disclosure under s. 13(1); however, where factual material is assembled from other sources and becomes integral to the analysis and views expressed in a record, that assembly is part of the deliberative process and the factual material has the same protection as the opinion or advice itself.[5] The Court explained that, otherwise, disclosure of the assembled facts would allow an accurate inference to be drawn as to advice or recommendations developed by or for the public body.[6]

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[2] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at para. 45, considering *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 13.
[3] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner*), 2002 BCCA 665 (CanLII) at para. 113.
[4] See, e.g., Order F15-60, 2015 BCIPC 64 (CanLII) at para. 12.
[5] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII) at para. 52.
[6] *Ibid.*

[13] Here, the facts that the City withheld in the email setting out the author's advice on how to deal with the applicant was assembled from other sources and was integral to the analysis and views expressed by him.

Information in existence for 10 years or more – s. 13(3)

[14] Section 13(3) precludes a public body from withholding information under s. 13(1) if the information is more than 10 years old. The provision is not applicable in this inquiry, as the information at issue came into existence between 2012 and 2014.

Exercise of discretion – s. 13(1)

[15] Because s. 13(1) sets out a discretionary exception to disclosure, a public body must properly exercise its discretion when refusing to give access to information under it.

[16] Here, the Director of the City Clerk's Office explains in an affidavit that, when deciding to withhold the information at issue, he considered particular facts set out elsewhere in his affidavit and the nature and sensitivity of the requested information. He also turned his mind to s. 13's purpose of permitting free and candid internal discussions about an issue, balanced against FIPPA's purpose of giving the applicant a right of access to his own personal information.

[17] Given this explanation, I find that the City properly exercised its discretion to withhold information under s. 13.

Conclusion – s. 13

[18] I conclude that the City is authorized to withhold the information at issue under s. 13, as it reveals policy advice or recommendations.

Legal advice – s. 14

[19] Section 14 of FIPPA states:

> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[20] Previous OIPC orders have stated that s. 14 encompasses both legal advice privilege (also referred to as solicitor client privilege or legal professional privilege) and litigation privilege.[7] Here, the City withheld information on the basis that it is subject to legal advice privilege. The applicant makes no submissions regarding s. 14.

[7] See, e.g., Order F15-41, 2015 BCIPC 44 (CanLII) at para. 43.

Information subject to legal advice privilege – s. 14

[21] The test for legal advice privilege, or solicitor client privilege, has been articulated as follows:

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
>
> 2. the communication must be of a confidential character;
>
> 3. the communication must be between a client (or his agent) and a legal advisor; and
>
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.[8]

[22] The above criteria have been consistently applied in OIPC orders,[9] and I will consider the same criteria here.

[23] The City submits that the content of an affidavit sworn by its lawyer establishes that the four criteria are met in this case. The City did not provide me with copies of the records to which it applied s. 14, but on my request, it prepared a chart describing them. The records being withheld consist of email correspondence, including some attachments. Based on the lawyer's affidavit and the description of each record, I find that the information in them is subject to legal advice privilege, for the following reasons.

[24] The chart describing the records indicates that the emails were written communications between two staff members of the City and the City's lawyer. These two staff members were acting on behalf of the City when communicating with the lawyer, and I am therefore satisfied that the communications were between the City, as client, and the City's lawyer, as legal advisor.

[25] The City's lawyer says in her affidavit that she considered the emails to be confidential, and the City incorporates this view by way of a reference to the lawyer's affidavit in its submissions. Further, the chart describing the emails indicates that they were between only the City's two staff members and the

[8] *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22, cited with approval in Order 00-06, 2000 CanLII 6550 (BC IPC) at p. 8.
[9] See, e.g., Order F15-52, 2015 BCIPC 55 (CanLII) at para. 10, and Order F15-67, 2015 BCIPC 73 (CanLII) at para. 12.

lawyer. There is nothing to suggest that anyone else was involved in the email correspondence. I am therefore satisfied that the emails were confidential communications between the City and its lawyer.

[26] Finally, I am satisfied by the City's description of the emails that they were communications directly related to the seeking, formulating, or giving of legal advice. The chart indicates that the email correspondence began with discussions between the lawyer and City staff regarding the latter's request for legal advice, followed by the response of the City's lawyer, and the exchange of draft documents between the City staff and lawyer. The chart goes on to indicate that the email correspondence continued with the provision of further legal advice by the lawyer. Finally, with respect to the draft documents that were attached to some of the emails, which drafts are referred to in both the chart and the lawyer's affidavit, I note that privilege also covers factual information given and received in confidence as part of the necessary exchange of information between solicitor and client for the purpose of providing legal advice.[10]

Conclusion – s. 14

[27] I conclude that the City is authorized to refuse the applicant access to the information at issue under s. 14, as it is subject to solicitor client privilege.

Disclosure harmful to law enforcement – s. 15

[28] The City specifically relied on ss. 15(1)(f) and (l) to withhold the information at issue under s. 15. Those sections read as follows:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
> …
>
> (f) endanger the life or physical safety of a law enforcement officer or any other person,
> …
>
> (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.
> …

[29] In order for a public body to rely on s. 15(1), it must establish that disclosure could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described the standard of proof as requiring a reasonable expectation of probable harm. The standard is between what is probable and what is possible, and it requires a public body to provide evidence

[10] *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)*, 1995 CanLII 634 (BC SC) at para. 58.

"well beyond" or "considerably above" a mere possibility of harm.[11] A determination of whether the standard of proof is met is contextual, and the necessary quantity and quality of evidence will ultimately depend on the nature of the issue, the inherent probabilities or improbabilities, or the seriousness of the allegations or consequences.[12]

[30] In deciding whether the City has established a reasonable expectation of probable harm, I have borne in mind the foregoing, as has been done in other OIPC orders.[13]

Disclosure endangering physical safety – s. 15(1)(f)

[31] The information at issue under s. 15(1)(f) consists of portions of a letter and email correspondence complaining to the City about the applicant, as well as portions of email correspondence relating to those complaints.

[32] With respect to its application of s. 15(1)(f), the City states that it knows of no circumstances in which the applicant has physically harmed any person in connection with his employment, but submits that there is a clear risk that the applicant may seek to contact certain individuals and confront them about their allegations. It argues that the records may provoke or instigate behaviours that may place others at risk, and that there has been a history of aggressive and confrontational conduct by the applicant evident in the records themselves. The City provides further argument and affidavit evidence in support of its position, which was submitted *in camera* with prior approval.[14]

[33] While the applicant does not directly respond to the application of s. 15 in his submissions, he alleges that it was actually certain members of the public who acted aggressively toward him, as opposed to the reverse.

[34] I find that s. 15(1)(f) is not applicable in this inquiry. I have considered what the City says about the applicant's alleged aggressive or confrontational behaviour. My review of the City's *in camera* evidence does not lead me to believe that there is a reasonable expectation of harm to anyone's physical safety if the information at issue were disclosed.[15]

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[11] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) [*Ontario*] at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) [*Merck*] at paras. 197 and 199.

[12] *Ontario* at para. 54, citing *Merck* at para. 94, in turn citing *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII) at para. 40.

[13] See, e.g., Order F15-72, 2015 BCIPC 78 (CanLII) at para. 8.

[14] The City also raises the possibility of mental or emotional harm to third parties, which I address in the context of s. 19 later in this Order.

[15] The City withheld much of this same information under ss. 19 and 22, the application of which I review later in this Order.

Disclosure harmful to security of property or system – s. 15(1)(l)

[35] The City submits that a paragraph in an email on page 84 of the records falls within the scope of s. 15(1)(l) because its disclosure may pose a risk to the security of City equipment and resources. The surrounding information reveals that there was a concern about the use of the City's radio communications system. However, I find that disclosure of the paragraph in question could not reasonably be expected to harm that system, as the City has offered no evidence or explanation that shows any link between disclosure and the alleged harm. I do not see a link, in any event.

Conclusion – s. 15

[36] I conclude that the City is not authorized to refuse the applicant access to the information at issue under s. 15(1)(f) or (l), as disclosure could not reasonably be expected to endanger the physical safety of anyone, or harm the security of the City's radio communications system. The City has not met its burden of establishing that s. 15(1)(f) or (l) apply.

Disclosure harmful to individual or public safety – s. 19

[37] Section 19 reads, in part, as follows:

> 19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
>
> (a) threaten anyone else's safety or mental or physical health, or
>
> (b) interfere with public safety.

[38] The City applied s. 19(1) to the same information to which it applied s. 15(1)(f), namely parts of a letter and emails setting out or discussing complaints about the applicant.

[39] While the City does not specifically say that it is relying on s. 19(1)(a), as opposed to or in addition to s. 19(1)(b), it appears from the submissions that it is relying only on s. 19(1)(a). The City does not allege, and my review of the records does not suggest, that disclosure of the information at issue would possibly interfere with public safety under s. 19(1)(b).

Disclosure threatening safety or mental or physical health – s. 19(1)(a)

[40] The test for establishing the application of a harms-based exception to disclosure was set out earlier in this Order. In the context of s. 15(1)(f), I was not satisfied that disclosure of the information at issue could reasonably be expected

to endanger anyone's physical safety if disclosed. For the same reasons, I find that disclosure could not reasonably be expected to threaten anyone's safety or physical health under s. 19(1)(a).

[41] I now turn to whether disclosure of the information at issue could reasonably be expected to threaten anyone's mental health. The City submits that the nature of the matters discussed in the records provides a reasonable basis on which to conclude that disclosure may cause mental or emotional harm, including anxiety, stress and fear of retribution, on the part of particular third parties identified in the records. The applicant did not address the application of s. 19 in his submissions.

[42] I have reviewed the City's submissions and affidavit evidence, including those parts that were accepted *in camera* with prior approval, as well as reviewed the content of the records themselves. The City points to specific lines of information in the records that indicate the nature of the applicant's behaviour, as well as the concerns of third parties in relation to him. However, I am not satisfied that the possible harm, if the information at issue were disclosed, amounts to a threat to anyone's mental health within the terms of s. 19(1)(a). A threat to "mental health" is not raised merely by the prospect of someone being made upset.[16] Rather, s. 19(1)(a) may be applied, for instance, where disclosure can reasonably be expected to cause "serious mental distress or anguish".[17] In this case, while certain third parties have concerns in relation to the applicant, and they may become upset if the information at issue were disclosed, I find that the possible harm to them does not reach a sufficient level of seriousness for the information to be captured by s. 19(1)(a).[18]

Conclusion – s. 19

[43] I conclude that the City is not authorized to refuse the applicant access to the information at issue under s. 19, as disclosure could not reasonably be expected to threaten anyone's safety or mental or physical health, or interfere with public safety.

Disclosure harmful to personal privacy – s. 22

[44] Section 22(1) of FIPPA requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. The section applies only to personal information, so the first step is to determine whether the information at issue is

[16] Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 74.
[17] Order 00-02, 2000 CanLII 8819 (BC IPC) at p. 5.
[18] The City withheld much of this same information under s. 22, the application of which I review later in this Order, with the result that most of it must be withheld on the basis that disclosure would be an unreasonable invasion of the personal privacy of third parties.

personal information as defined by FIPPA. If so, the next step is to decide whether the information falls within any of the situations set out in s. 22(4), in which case disclosure is expressly not an unreasonable invasion of personal privacy. If s. 22(4) does not apply, it is then necessary to determine whether any of the provisions of s. 22(3) are engaged, in which case disclosure is presumed to be an unreasonable invasion of third party privacy, although any such presumptions are rebuttable.

[45] Whether or not presumptions against disclosure arise under s. 22(3), it is necessary to consider all relevant circumstances, including those listed in s. 22(2), in determining whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy. If the conclusion is that disclosure would unreasonably invade the personal privacy of a third party, the final step is to decide whether s. 22(5) applies so as to require the public body to release a summary of any information to the applicant.

[46] Also adopting the foregoing approach, the City submits that disclosure of the information at issue would be an unreasonable invasion of the personal privacy of various third parties. The applicant does not squarely address the application of s. 22 in his submissions. However, based on what he writes, it would appear that he considers that disclosure of the information at issue would not unreasonably invade anyone's personal privacy. He says that he would like more information to better understand the substance of the complaints made against him, the nature of the City's investigation and response, and why his employment was terminated.

Personal information – definition

[47] Schedule 1 to FIPPA defines "personal information" as "recorded information about an identifiable individual other than contact information". In turn, "contact information" is defined as "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".

[48] I find that no "contact information", within the terms just set out, appears in the records before me. Some of the members of the public provided a business address when making their complaints, but they did so for a personal rather than business purpose. A work telephone number or address, which would typically be "contact information" under FIPPA, is not "contact information" when provided in the context of a personal matter, such as a personal complaint.[19] Here, I find that the addresses that complainants provided to the City, whether associated with their home or business, is their personal information.

[19] Order F14-38, 2014 BCIPC 41 (CanLII) at para. 19.

[49] I now turn to whether the remaining information at issue is personal information. The Commissioner has adopted the following approach in determining whether information constitutes personal information:

> I accept that, in order to be personal information, the information must be reasonably capable of identifying a particular individual either alone or when combined with information from other available sources. The information need not identify the individual to everyone who receives it; it is sufficient in a case such as this if the information reasonably permits identification of the individual to those seeking to collect, use or disclose it.[20]

[50] I find that most of the remaining information that the City withheld under s. 22 is the personal information of third parties. This includes the names of members of the public who made complaints about the applicant, details about their personal activities at the time of the events giving rise to their complaints, and their thoughts, feelings and opinions about the applicant's conduct. Further, there is the personal information of staff of the City, such as details about their shifts and absences, and their views about the applicant.

[51] Some of the information withheld from the applicant under s. 22 is his own personal information, for instance where third parties are expressing opinions about him. However, I find that this is simultaneously the personal information of the third parties. An individual's opinion about another individual can constitute the former's personal information to the extent that he or she is revealed as the one who provided the opinion.[21]

[52] Finally, some of the information at issue is not personal information. Specifically, there are some sentences in an email appearing on both pages 73 and 91 of the records that conveys only the general nature of a particular complaint. I find that this information, whether alone or in conjunction with information available from other sources, would not identify the particular complainant. Accordingly, s. 22 does not apply to this information and it cannot be withheld under the section.

[53] As there is information that the City withheld under s. 22 that is the personal information of third parties, including some that is inextricably intertwined with the applicant's own personal information, I must now decide whether disclosure of the information would be an unreasonable invasion of the personal privacy of the third parties.

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[20] Order F13-04, 2013 BCIPC 4 (CanLII) at para. 23.
[21] See, e.g., Order F14-47, 2014 BCIPC 51 at para. 14.

No unreasonable invasion of person privacy – s. 22(4)

[54] Section 22(4) enumerates situations in which the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. I considered whether any of the situations exist here, but find that none of them do.

Presumptions against disclosure – s. 22(3)

[55] Section 22(3) enumerates situations in which there is a presumption that disclosure of personal information is an unreasonable invasion of a third party's personal privacy. The provisions relevant to this inquiry are as follows:

> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …

[56] The City cites the above provisions and submits that they apply in this inquiry. I agree that there is a presumption against disclosure of some of the information at issue on the basis that it relates to medical history under s. 22(3)(a). Specifically, there is information that provides the reason for staff absences. There is also a presumption against disclosure of some of the information at issue under s. 22(3)(d), on the basis that it relates to the employment history of City staff.

[57] While there are presumptions against disclosure of some of the personal information at issue under ss. 22(3)(a) and (d), I must go on to review any relevant circumstances in favour of, or against, disclosure. I must do the same for the remaining personal information at issue, which is not subject to any presumption against disclosure.

Relevant circumstances – s. 22(2)

[58] Section 22(2) requires a public body to consider all relevant circumstances, both those enumerated in the section as well as any others, in determining whether the disclosure of third party personal information would be unreasonable. The provisions of s. 22(2) that are possibly applicable in this inquiry are:

> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> …

Desirability of public scrutiny – s. 22(2)(a)

[59] The City notes that a relevant circumstance weighing in favour of disclosure of information is that it is desirable for the purpose of subjecting the activities of a public body to public scrutiny under s. 22(2)(a). However, it submits that the circumstance is not relevant here, and I agree. The records concern a specific employment matter between the applicant and the City, which does not warrant public scrutiny. Insofar as there is a public interest in knowing how the City addressed complaints from citizens, by rescinding a bylaw ticket for instance, this type of information was not severed from the records. Finally, the applicant does not himself assert that s. 22(2)(a) is engaged in this inquiry.

Fair determination of the applicant's rights – s. 22(2)(c)

[60] The applicant implicitly raises the possible application of s. 22(2)(c). Referring to the complaints and allegations made against him and the City's response, he says that he requires the information at issue so that he can make a proper defence and ensure that he is treated fairly and is compensated for what has been unjustly done to him. The City counters that, while the applicant has filed a grievance regarding the termination of his employment, he has been given access to as much information as possible, with essentially only information that would identify the complainants being withheld from him, including information that the City considers particularly sensitive because it reveals the thoughts and feelings of third parties.

[61] Previous orders have established that the following four criteria must be met in order for s. 22(2)(c) to apply: (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 personal information sought by the applicant 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.[22]

[62] Here, I find that the first and second of the above criteria are met, given that the applicant has a grievance under way, further to his collective employment rights. However, I find that the information that has been withheld from him has an insufficient bearing on the determination of his rights, and that disclosure is not necessary in order for him to prepare for the grievance proceeding or ensure a fair hearing. This is because the applicant has already been given access to the bulk of the substance of the complaints made against him, and the nature of the City's response following the complaints. In my view, the applicant does not need the additional information at issue in order to have a fair opportunity to challenge his termination. I recognize that some of the withheld personal information would provide context for the applicant, for instance by revealing the thoughts or feelings of particular third parties who dealt with him. However, I consider that this information would add only insignificant or superfluous detail about the applicant's alleged inappropriate conduct, and would therefore not be of real assistance to him for the purpose of his grievance.

[63] Even if I were to find that the information was relevant to a fair determination of the applicant's rights under s. 22(2)(c), I would go on to find that this circumstance was outweighed by the competing relevant circumstances, which as a whole indicate that disclosure would be an unreasonable invasion of personal privacy.

Unfair exposure to harm – s. 22(2)(e)

[64] The City raises the circumstance set out in s. 22(2)(e). It argues that certain third parties will be exposed unfairly to harm if their personal information is disclosed. It references its submissions regarding possible harm to their physical safety under s. 15, and harm to their mental health under s. 19. It says that there is a heightened sensitivity about releasing the personal information of some of the third parties, due to the confrontations that they had with the applicant. I accept that this weighs against disclosure of some of the personal information, insofar as disclosure risks causing third parties mental stress or anxiety.

[22] See, e.g., Order F15-12, 2015 BCIPC 12 (CanLII) at para 34.

Information supplied in confidence – s. 22(2)(f)

[65] The City submits that s. 22(2)(f) is also engaged in this inquiry. An affidavit of a City employee states that, in her experience, individuals have an expectation of confidentiality when making their complaints. My review of the content and context of the records also leads me to conclude that the complainants intended to make their complaints confidentially.[23] I therefore find that they supplied their personal information in confidence, which weighs against disclosure.

Other relevant circumstances

[66] The City also raises a non-enumerated circumstance that it considers relevant to disclosure of the information at issue. Specifically, it submits that disclosure of identifying or particularly sensitive information found in the complaints will make other individuals reticent to bring forward complaints in the future. I accept that this weighs against disclosure of some of the information at issue.

[67] I considered whether there are any other relevant circumstances in this case, but find that there are not. Neither party drew any others to my attention.

Conclusion – s. 22

[68] With respect to the personal information that the City withheld under s. 22, I find, after considering the relevant circumstances, that the presumptions against disclosure under ss. 22(3)(a) and (d) have not been rebutted. As for the information that is not subject to any presumption against disclosure, I find that the relevant circumstances weigh against disclosure. I therefore conclude that disclosure of all of the personal information at issue would be an unreasonable invasion of the personal privacy of third parties. The applicant has not met his burden of establishing otherwise.

Possible summary of information – s. 22(5)

[69] Section 22(5) requires a public body to give an applicant a summary of personal information supplied in confidence about the applicant, unless the summary would identify the third party who supplied it. The relevant parts of section 22(5) state:

[23] Previous OIPC orders have similarly noted that the content and context of complaints can provide a reasonable indication that the personal information in them was supplied in confidence: see, e.g., Order F14-38, 2014 BCIPC 41 (CanLII) at para. 36.

> (5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless
>
> (a) the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information, or
>
> …

[70] I have found that some of the information at issue consists of opinions about the applicant, which are simultaneously the personal information of the individuals providing the opinion. I have also found that this information was supplied in confidence in the context of complaints made by members of the public and City staff.

[71] I now turn to whether a summary of any personal information about the applicant can be prepared in a manner that does not identify the third parties who supplied the information. I find that it cannot. The information provided by the third parties about the applicant is very fact-specific and relates to unique incidents involving him. The context will almost certainly allow the applicant to ascertain who the incident pertains to, and therefore who made the complaint about him. Because a summary of the applicant's personal information that has been withheld from him cannot be prepared without identifying the individuals who supplied the information, no obligation on the part of the City arises under s. 22(5).

CONCLUSION

[72] For the reasons given above, I make the following orders under s. 58 of FIPPA:

1. The City is authorized to refuse the applicant access to the information at issue under s. 13. Under s. 58(2)(b), I confirm the City's decision to refuse access.

2. The City is authorized to refuse the applicant access to the information at issue under s. 14. Under s. 58(2)(b), I confirm the City's decision to refuse access.

3. The City is not authorized to refuse the applicant access to the information at issue under s. 15.

4. The City is not authorized to refuse the applicant access to the information at issue under s. 19.

5. The City is required to refuse the applicant access to most of the information at issue under s. 22. Under s. 58(2)(c), I require the City to

refuse access. The City is not required or authorized to refuse the applicant access to other information at issue under s. 22.

6. The information, to which the City must give the applicant access because neither s. 15(1), 19(1) nor 22(1) applies to it, consists of the following:

    a. in the email appearing on page 84 of the records, the last paragraph; and

    b. in the email appearing on both pages 73 and 91 of the records, the first eight words in the first paragraph, the first sentence in the second paragraph, and the first sentence in the third paragraph.

    Under s. 58(2)(a), I require the City to give the applicant access.

7. The City must provide the applicant with the information set out in paragraph 6 before August 10, 2016, in accordance with s. 59(1). The City must also concurrently provide the OIPC Registrar of Inquiries with a copy of its letter to the applicant, along with the information to be disclosed.

June 27, 2016

ORIGINAL SIGNED BY

Wade Raaflaub, Adjudicator

OIPC File Nos.: F14-59026 and F15-60140