



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F16-42

MINISTRY OF FINANCE

Celia Francis
Adjudicator

September 21, 2016

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Summary: An applicant requested records related to the discovery of asbestos at a building where he had worked for a time. The Ministry disclosed the records with the exception of a small amount of information related to other employees, which it withheld under s. 22(1) (harm to third-party privacy). The adjudicator found that s. 22(1) applied to this information and ordered the Ministry to withhold it.

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

Authorities Considered: B.C.: Order F15-03, 2015 BCIPC 3 (CanLII); Order F10-21, 2010 BCIPC 32 (CanLII); Order 01-53, 2015 BCIPC 3 (CanLII).

INTRODUCTION

[1] In May 2014, the applicant sent a request under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) to the Ministry of Finance (“Ministry”) for a variety of records related to renovations, lease agreements, air quality monitoring programs and other records connected to the discovery of asbestos in two buildings in Victoria BC. The Ministry responded in August of that year by disclosing the responsive records. It withheld some information in the records under s. 13 (advice or recommendations), s. 17 (financial harm to public body) and s. 22 (harm to third-party privacy) of FIPPA.

[2] The applicant requested a review by the Office of the Information and Privacy Commissioner (“OIPC”) of the Ministry’s decision to withhold information. During mediation by the OIPC, the Ministry disclosed more information and abandoned its reliance on ss. 13 and 17. Mediation did not, however, resolve the s. 22 matter and the applicant requested that it proceed to inquiry.

ISSUE

[3] The issue before me is whether the Ministry is required by s. 22 to deny the applicant access to information. Under s. 57(2) of FIPPA, it is up to the applicant to prove that disclosure of the information in dispute would not be an unreasonable invasion of third-party privacy.

DISCUSSION

Background

[4] The applicant’s request for records states that in 1983 the Ministry carried out renovations on two leased buildings in Victoria BC. He said the Ministry later discovered that one of the buildings contained asbestos and that it moved its employees out of the building to allow for removal of the asbestos. The applicant (who had worked in the building for a time) had concerns about the asbestos issue and so he made this request for records.

Record in dispute

[5] The record in issue is a two-page email string of April 24, 2012 between the Ministry of Forests, Lands and Natural Resources health and safety office (“FLNRO”) and the Public Service Agency workplace health and safety office (“PSA”).¹ In the email, FLNRO provided the PSA with the names of some public body employees (other than the applicant) who worked in the building at the time in question. The Ministry disclosed the emails to the applicant but withheld the names, position titles or work areas and present situations of the employees. This withheld information is the information in dispute.

Preliminary issue

[6] The applicant’s request for review complained about the way the Ministry had handled his request for records, in addition to disputing its decision to apply s. 22(1). His inquiry submission repeated that complaint and he also said that he was dissatisfied with the OIPC’s handling of his concerns.

¹ The PSA is part of the Ministry of Finance.

[7] The OIPC's usual practice is to investigate and dispose of complaints, without the need for an inquiry. There is no information before me to indicate that this did not occur with the applicant's complaint about the Ministry. In addition, the Investigator's Fact Report and the Notice of Inquiry do not refer to his complaint as an issue to be decided in this inquiry. Therefore, I do not consider his complaint to be an issue that is properly before me in this inquiry and so I will not consider it.

[8] If the applicant is dissatisfied with how the OIPC handled his complaint about the Ministry (or any other matter arising from the OIPC's processes), his proper recourse at this point is to bring his concerns directly to the OIPC's investigation section.

Approach to applying s. 22(1)

[9] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03:

Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.²

[10] I have taken the same approach in considering the s. 22 issues here.

Is the information "personal information"?

[11] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information.³ The Ministry argued that the withheld information is "personal information".⁴ The applicant did not directly address this issue, although he acknowledged that the withheld information includes the names of public body employees.

² 2015 BCIPC 3 (CanLII), at para. 58.

³ 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." See Schedule 1 of FIPPA for this definition.

⁴ Ministry's initial submission, paras. 21-28.

[12] The information in issue is recorded information “about” the employees as identifiable individuals. I find that it is “personal information”.

Does s. 22(4) apply?

[13] Section 22(4) of FIPPA sets out a number of situations in which disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy. The Ministry argued that none of these circumstances applies to the information in dispute. More specifically, the Ministry argued, s. 22(4)(e) does not apply in this context, as the information in dispute does not relate to the employees’ positions, functions or remuneration as employees of a public body.⁵ The applicant did not directly address this issue.

[14] Section 22(4)(e) reads as follows:

22(4) A disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy if

...

(e) the information is about the third party’s position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister’s staff,

...

[15] Past orders have said that s. 22(4)(e) covers information such as the name, title and remuneration (including severance payments) of a public body employee, as well as information on the duties or responsibilities of a public body employee. Past orders have also said that the context in which the information in dispute appears determines whether it falls under s. 22(4)(e) or s. 22(3)(d).⁶

[16] The information in dispute does not relate to the employees’ duties or functions as public body employees. I therefore agree with the Ministry that, in this context, the information in dispute is not the type of information s. 22(4)(e) is intended to cover. I also see no basis here for the application of any of the other s. 22(4) provisions. I find that s. 22(4) does not apply to the withheld information in issue.

Presumed unreasonable invasion of third-party privacy – s. 22(3)

[17] The next step is to consider whether disclosure of the information in issue is presumed to be an unreasonable invasion of a third party’s personal privacy.

⁵ Ministry’s initial submission, paras. 29-35.

⁶ See for example, Order 01-53, 2015 BCIPC 3 (CanLII), at para. 40 and Order F10-21, 2010 BCIPC 32 (CanLII), at paras. 22-24.

[18] The Ministry argued that s. 22(3)(d) applies to the information in dispute as, in this context, its disclosure would reveal the employees' work location at a time when they could have been exposed to asbestos. Disclosure could also reasonably reveal the employees' health status, the Ministry argued, and thus s. 22(3)(a) applies as well.⁷

[19] The applicant did not directly address s. 22(3). However, he said that his employer had always taken the position that asbestos fibre counts in the buildings in question were "well below the permitted safety levels established". He added that his recollection was that "certain employees", about whom the Ministry is concerned, had not worked in the building. He also argued that the Ministry had provided no evidence that they had worked there and, so, for his employer to argue now that these employees are "due privacy protection due to asbestos exposure is not only bafflingly illogical and contradictory, but also disingenuous and without merit".⁸

[20] The relevant provisions read as follows:

- 22(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,
 - ...

[21] Past orders have found that a public body employee's name and title, normally captured by s. 22(4)(e), are part of the employee's employment history under s. 22(3)(d), where they appear in the context of a workplace investigation.⁹

[22] I understand the applicant's point that the Ministry's position on the asbestos issues appears to be contradictory. However, the withheld information lists the employees' names, together with their titles and work areas at the time in question, as well as their present situations. The material before me also indicates that the Ministry gathered the names of employees it believed had worked in the building in question, for possible use later in workplace health and safety claims. Thus, in my view, the withheld information, when compiled for that purpose, relates to the employees' employment history for the purposes of s. 22(3)(d).

⁷ Ministry's initial submission, paras. 35-40.

⁸ Applicant's submission, p. 4.

⁹ See, for example, Order 01-53, at para. 40.

[23] Moreover, the context in which these employees' names appear indicates that they may have been exposed to asbestos, which in turn reveals information about their personal health risks. Thus, disclosure of the information in dispute would also reveal information about their medical history under s. 22(3)(a).

[24] I therefore find that ss. 22(3)(a) and (d) apply to the information in dispute. Disclosure of this information is thus presumed to be an unreasonable invasion of the employees' personal privacy.

Relevant circumstances – s. 22(2)

[25] In determining whether disclosure of personal information is an unreasonable invasion of personal privacy under s. 22(1) or 22(3), a public body must consider all the relevant circumstances, including those set out in s. 22(2). The factors include whether disclosure would subject the activities of a public body to public scrutiny and whether the information was provided in confidence. At this point, the presumption that disclosure of the withheld information would be an unreasonable invasion of third-party personal privacy may be rebutted.

[26] The Ministry argued that no relevant circumstances under s. 22(2) favouring disclosure apply in this case.¹⁰ The applicant did not directly address s. 22(2) although, as discussed above, he questioned the Ministry's logic in withholding the names. He did not, however, explain how the Ministry's supposedly illogical position on the asbestos issues outweighs any privacy concerns with disclosure of the employees' names. He also did not explain how his recollection that the employees in question had not worked in the building is a relevant factor. The applicant has not, in my view, shown how any of the relevant circumstances outweigh the presumed invasion of privacy.

[27] There is no evidence that the applicant needs the withheld information for a proceeding of some kind. I have also considered that there appear to be no transparency or accountability issues here. The material before me shows that the applicant is aware that he may have been exposed to asbestos when he worked in the building at the time in question. He has received documentation to that effect and knows how to make a workplace health and safety claim. There is also no indication that the Ministry did not inform other employees of their potential exposure. I therefore find that no relevant circumstances in s. 22(2) favour disclosure of the information in dispute.

¹⁰ Ministry's initial submission, paras. 42-43.

Conclusion on s. 22(1)

[28] I found that the information withheld under s. 22 is third-party personal information. I also found s. 22(4) does not apply to it, but that the ss. 22(3)(a) and (d) presumptions do. Having considered all relevant factors, including those in s. 22(2), I find that the presumptions have not been rebutted.

[29] I find the applicant has not met his burden of proof in this case and that disclosure of the information in dispute would be an unreasonable invasion of third-party personal privacy. I find that s. 22(1) requires that the personal information in dispute be withheld.

CONCLUSION

[30] For reasons set out above, under s. 58(2)(c), I require the Ministry to withhold the information it withheld under s. 22(1) of FIPPA.

September 21, 2016

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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