Office of the Information & Privacy Commissioner for British Columbia

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Order F17-13

VANCOUVER ISLAND HEALTH AUTHORITY

Elizabeth Barker
Senior Adjudicator

March 31, 2017

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Summary: A VIHA employee requested access to all information about her. VIHA provided records but refused to disclose some information under ss. 3(1)(d) (outside scope of Act), 13 (advice and recommendations), 14 (solicitor client privilege) and 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator determined that s. 3(1)(d) did not apply and VIHA was required to disclose that information to the applicant. The adjudicator confirmed VIHA's ss. 13, 14 and 22 decisions regarding some of the information. However, the adjudicator found that VIHA was not authorized or required to refuse to disclose other information under those exceptions and ordered VIHA to disclose it to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(d), 13(1), 13(2), 14, 22(1) and 22(3).

Authorities Considered: B.C.: Order 00-27, 2000 CanLII 14392 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order 02-29, 2002 CanLII 42462 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order 03-37, 2003 CanLII 49216 (BC IPC); Order F07-17, 2007 CanLII 35478 (BC IPC);Order F10-15, 2010 BCIPC 24 (CanLII); Order F14-44, 2014 BCIPC 47 (CanLII); Order F15-65, 2015 BCIPC 71 (CanLII); Order F16-15, 2016 BCIPC 17 (CanLII); Order F16-36, 2016 BCIPC 40 (CanLII).

Cases Considered: *John Doe v. Ontario (Finance*), 2014 SCC 36; *Blank v. Canada (Minister of Justice),* 2006 SCC 39; *Canada v. Solosky*, 1979 CanLII 9 (SCC); *Gichuru v. British Columbia (Information and Privacy Commissioner)* 2014 BCCA 259; *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180; *R. v. B.,* 1995 CanLII 2007 (BCSC).

INTRODUCTION

[1] The applicant in this case is an employee of the Vancouver Island Health Authority ("VIHA"). She made a request to VIHA under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for all information pertaining to her. VIHA disclosed some records but withheld other records and parts of records under ss. 3(1)(d) (outside scope of FIPPA), 13 (policy advice and recommendations), 14 (solicitor client privilege), 15 (harm to law enforcement) and 22 (unreasonable invasion of third party personal privacy) of FIPPA. Some information was also withheld as "not responsive" to the request.

[2] The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the public body's decision. As a result of mediation, the public body released more information, including all of the information marked as not responsive. However, mediation did not resolve all the issues in dispute and the applicant requested that they proceed to inquiry.

[3] In its initial submissions, VIHA stated that it was no longer withholding information under s. 15, and instead is relying on s. 13 to withhold that information.

ISSUES

[4] The issues to be determined in this inquiry are as follows:

1. Do some parts of the requested records fall outside the scope of FIPPA, pursuant to s. 3(1)(d)?[1]

2. Is VIHA authorized to refuse to disclose information under ss. 13 and 14 of FIPPA?

3. Is VIHA required to refuse to disclose information under s. 22 of FIPPA?

[5] Section 57 of FIPPA establishes the burden of proof in an inquiry. Although, s. 57 is silent regarding the burden of proof in cases involving s. 3(1), previous orders have established that the public body bears the burden of establishing that the records are excluded from the scope of FIPPA.[2]

[6] When access to information has been refused under ss. 13 and 14 of FIPPA, s. 57 says that the burden is on the public body to prove that the applicant has no right of access to the records or parts of the records. It is also up to VIHA to prove that the applicant has no right of access to her own personal

[1] Although the Notice of Inquiry states that s. 4(1) is also at issue, I need not consider it. Section 4(1) provides a right of access to records that are within the scope of FIPPA. The issue here is whether the records are outside the scope of FIPPA because s. 3(1)(d) applies.

[2] For example: Order 02-29, 2002 CanLII 42462 (BC IPC); Order F16-15, 2016 BCIPC 17 (CanLII); Order F15-65, 2015 BCIPC 71 (CanLII).

information. However, the burden is on the applicant to prove that disclosure of any personal information about a third party would not unreasonably invade third party personal privacy under s. 22 of FIPPA.

DISCUSSION

Preliminary matter

[7] After the inquiry closed, I asked VIHA to clarify the exceptions it was applying to certain records, as there appeared to be a typographical error in its severance report. VIHA responded by confirming that there was no typographical error. At the same time, however, VIHA provided some unsolicited commentary and argument about the information. I have not considered that commentary and argument in making my decision. VIHA had ample opportunity to provide its evidence and argument during the submission phase of the inquiry, which closed some time ago.

Records at issue

[8] All of the records at issue are about human resources matters. The vast majority of them are emails. There is also a four-page issues summary report and a few letters, some on VIHA letterhead and others on a law firm's letterhead. There are also several employment interview forms related to the applicant's job interviews, as well as some pages with job interview scores for the applicant and other candidates.

Scope of FIPPA

[9] VIHA is withholding parts of several interview forms under s. 3(1)(d). Section 3(1)(d) reads as follows:

> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
> …
> (d) a record of a question that is to be used on an examination or test;

[10] The interview forms were filled out by the panel members who interviewed the applicant for two job competitions in 2014. Specifically, VIHA is applying s. 3(1)(d) to withhold the part of the forms that contain the questions and associated acceptable (*i.e.*, boilerplate) answers. However, VIHA has given the applicant access to the part of the forms that contain the interviewers' handwritten notes of the applicant's actual answers and the scores.[3]

[3] The applicant acknowledges receiving this in her submissions at p.4.

[11] VIHA submits that the questions and associated acceptable answers are excluded from the scope of FIPPA, so the access rights provided under FIPPA do not apply.[4]

[12] The applicant submits that the information being withheld under s. 3(1) should have been disclosed to her because it was created by her.[5] I note that she has not seen the information in dispute, so it is understandable that she is mistaken in this regard. It is evident that none of the information being withheld was created by the applicant.

Analysis

[13] Section 3(1)(d) protects the integrity and fairness of the examination or testing process by preventing disclosure of information that would reveal the questions in advance to candidates. Section 3(1)(d) explicitly employs language in the future tense (*i.e.*, "is to be used").

[14] While I find that the interview forms are a record of a question or test, there is no information about whether any of the records "is to be" used again. VIHA provides no submissions or evidence about whether they are currently being used or if there is any intention to use them in the future. Therefore, I find that VIHA has not established that the information is a record of a question that "is to be used" on an examination or test.

[15] Ontario and Alberta have provisions similar to s. 3(1)(d) in their respective Freedom of Information and Protection of Privacy Acts. The decisions related to their equivalent provisions have also required evidence that the information is currently in use or will be used in the future.[6]

[16] In conclusion, VIHA has not met its burden of proving that s. 3(1)(d) applies to the records.

Advice or recommendations

[17] 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 a minister. The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by

[4] The access rights are set out in s. 4 of FIPPA.
[5] Applicant's submission at p. 2 (regarding Point 2).
[6] Alberta: s. 4(1)(g) "a question that is to be used on an examination or test" - *e.g.*, Order F2014-47, 2014 CanLII 72625 (AB OIPC). Ontario: s. 18(1)(h) information relating to specific tests or testing procedures or techniques that are to be used for an educational purpose, if disclosure could reasonably be expected to prejudice the use or results of the tests or testing procedures or techniques" – *e.g.*, Order PO-2387, 2005 CanLII 56504 (ON IPC).

preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[7]

[18] Section 13 has been the subject of many orders, which have held that it applies not only when disclosure of the information would directly reveal advice and recommendations, but also when it would allow accurate inferences about the advice or recommendations.[8]

[19] The process for determining whether s. 13 applies to information involves two stages.[9] The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If so, then it is necessary to consider whether the information falls within any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose the information under s. 13(1).

[20] VIHA submits that the information being withheld under s. 13(1) reveals advice and recommendations about how VIHA should manage the applicant's job classification and her workplace complaints and concerns. VIHA's Director of Information Stewardship, Access & Privacy says that the information being withheld under s. 13 is about human rights and labour relations matters that are currently ongoing, so the deliberative process and the advice and recommendations regarding them continue.[10] She says that this was a consideration in VIHA's decision-making regarding whether to disclose the information. For her part, the applicant disputes that s. 13(1) applies.

Does the information reveal advice or recommendations?

[21] I have reviewed the information being withheld under s. 13 and find that almost all of it directly reveals advice or recommendations, or would allow one to accurately infer such information. The information that I find is advice or recommendations is in emails between VIHA staff about human resources and personnel matters pertaining to the applicant and other employees. It is also in a four-page report[11] that is clearly part of the deliberative process about the same matters. The last page of the report includes a series of questions that directly reveal what advice is being sought. Further, one could infer from the balance of the report (including the titles and headings) what VIHA is deliberating about the matters that are the topic of the advice.

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[7] *John Doe v. Ontario (Finance*), 2014 SCC 36 at para. 45 and *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), at para. 105.
[8] For example: Order 02-38, 2002 CanLII 42472 (BCIPC); Order F10-15, 2010 BCIPC 24 (CanLII).
[9] Order F07-17, 2007 CanLII 35478 (BC IPC) at para 18.
[10] Director of Information Stewardship, Access & Privacy affidavit at paras. 10 – 12.
[11] Part 3 at pp. 29 – 32.

[22] However, there are three instances where I find that the information being withheld is not advice or recommendations, so s. 13(1) does not apply. The first is a short email with a one-page attachment that appears to be from the applicant's manager to another manager.[12] In these two pages, the applicant's manager summarizes a conversation he had with the applicant. Neither page contains anything that reveals advice or recommendations as defined by the case law. VIHA provides no information particular to these specific pages to explain why it thinks that they do.

[23] The second instance is a sentence explaining why someone did something.[13] VIHA provides no information about how this specific sentence amounts to advice or recommendations, and I cannot see how it does. I am not persuaded that this sentence reveals advice or recommendations, so I find that s. 13(1) does not apply to it.

[24] The third instance where I find that s. 13(1) does not apply is a letter to the applicant with a watermark that says "draft".[14] The letter contains no annotations or comments. I have not been given the final version of the letter to compare to the draft. VIHA provides no information about this specific record nor explains how it contains or otherwise reveals advice or recommendations. Previous Orders have stated that the fact that a document is a draft does not mean that the record can be withheld under s. 13(1). The usual principles apply and a public body can withhold only those parts of the draft that actually are advice or recommendations within the meaning of the section.[15] Given the lack of persuasive evidence regarding this particular record, I am unable to conclude that disclosing it would reveal any advice or recommendations developed by or for VIHA.

Does s. 13(2) apply?

[25] I have considered whether the information that I find would reveal advice or recommendations falls into any of the categories of information listed in s. 13(2). If it does, then VIHA must not refuse to disclose the information under s. 13(1).

[26] The applicant submits that s. 13(2)(n) applies because, she says, the information is about a possible violation of her human rights and labour law rights. However, I disagree that s. 13(2)(n) applies. Section 13(2)(n) says that the head of a public body must not refuse to disclose under s. 13(1) "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." The information

[12] Part 3 at pp. 28 and 36.
[13] Part 3 at p. 9. I address this record again under s. 22 at para. 41 below.
[14] Part 3 at pp. 33 – 34.
[15] Order 00-27, 2000 CanLII 14392 (BC IPC) at p. 6, Order 03-37, 2003 CanLII 49216 (BC IPC) at paras. 59 – 61 and Order F14-44, 2014 BCIPC 47 (CanLII) at para. 32.

being withheld under s. 13(1) is clearly not a decision, including reasons, so it is not the sort of information described in s. 13(2)(n). I also find that none of the other categories of information in s. 13(2) are at play in this case.

Summary of s. 13 findings

[27] In conclusion, VIHA has established that it may refuse to disclose information to the applicant under s. 13(1), with the exception of the three instances mentioned above, which are at Part 3, pages 9, 28, 33, 34 and 36 of the records. All of this information is also being withheld under s. 22, so I will consider it again below.

Solicitor client privilege

[28] VIHA is also withholding information under s. 14.[16] Section 14 states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The law is well established that s. 14 encompasses both legal advice privilege and litigation privilege.[17] VIHA submits that both legal advice privilege and litigation privilege apply to the information it is withholding under s. 14. The applicant disputes that either type of privilege applies.

Legal advice privilege

[29] For legal advice privilege to apply the following conditions must be satisfied:

1. there must be a communication, whether oral or written;

2. the communication must be confidential;

3. the communication must be between a client (or agent) and a legal advisor; and

4. the communication must be directly related to the seeking, formulating or giving of legal advice.

[30] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions above are satisfied, then legal advice privilege applies to the communications and the records relating to it.[18]

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[16] I have not considered the application of s. 14 to information that I have already found may be withheld under s. 13, which is at Part 1, pp. 31, 39, 44, 45, 70 and 74.
[17] *College, supra* at note 13, at para. 26.
[18] *R. v. B.,* 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.

[31] I have considered the records and parts of records withheld under s. 14, and I am satisfied that the following meet all four criteria for legal advice privilege:

(a) A seven-page letter from a lawyer to VIHA, which contains legal analysis and opinion and is marked as "private and confidential".[19]

(b) Emails between the lawyer or his legal assistant and VIHA staff regarding the legal opinion.[20]

(c) Emails between VIHA staff about the lawyer's opinion. These emails contain details that reveal aspects of the legal advice.[21]

(d) Emails between VIHA staff that reveal the nature of their communications with VIHA's legal counsel and the information they gave him when seeking his advice.[22]

[32] Records (a) – (d) reveal communications between a solicitor and client and those communications directly relate to the seeking, formulating or giving of legal advice. Further, there is no evidence that this letter and these emails were shared with anyone except the senders and recipients named, so I am satisfied that they were confidential communications. They may be withheld under s. 14.

[33] However, there are other emails that I find do not meet the criteria for legal advice privilege. They are as follows:

(e) An email chain between VIHA staff.[23] Nothing in this email chain suggests that anyone involved in the communication is a lawyer. VIHA says that any records being withheld under s. 14 that do not involve direct communications with legal counsel involve its "internal discussion regarding the seeking of advice and the advice given by VIHA's legal counsel."[24] However, this email chain contains no reference to legal advice, litigation or lawyers and nothing that could be described as a discussion regarding legal advice being sought or received.

(f) An email between VIHA staff.[25] The reasons why I find that record (e) is not protected by legal advice privilege apply equally to this email. It contains no reference to legal advice, litigation or lawyers, and VIHA does not provide any particulars about this email.

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[19] Part 1 at pp. 19-25; Part 3 at pp. 1 – 7.
[20] Part 3 at pp. 22, 24, 25 and 49
[21] Part 1 at pp. 6-7 and 69; Part 3 at pp. 44 – 45.
[22] Part 3 at pp. 49 – 50.
[23] Part 1 at pp. 8 – 12.
[24] Director of Information Stewardship, Access & Privacy's affidavit at para. 15.
[25] Part 3 at p. 26 – 27.

(g) An email chain about the date, time and location of a meeting.[26] VIHA does not say anything specific about this email or who is communicating in it. Therefore, I am not sure if anyone is a lawyer. However, even if one of the individuals who will attend the meeting is a lawyer, the email reveals nothing about the matter to be discussed at the meeting. The email makes no reference to legal advice, litigation or lawyers.

[34] In conclusion, I find that there is no information in records (e) – (g) about legal advice, litigation or lawyers. VIHA says nothing specific about these actual pages to explain its assertion that they reveal information that is privileged. Given the lack of specificity in its evidence, I am not persuaded that these pages reveal confidential communications between a solicitor and client that are directly related to seeking, formulating or giving legal advice. VIHA has not established that legal advice privilege applies to these pages.

Litigation privilege

[35] I have also considered whether litigation privilege applies to records (e) – (g). Litigation privilege encompasses communications between a client or his or her solicitor and third parties, if made for the purpose of pending or contemplated litigation.[27] Thus, litigation privilege applies only in the context of litigation itself and, once the litigation has concluded, the privilege ends.[28] Litigation privilege is not restricted to communication between solicitor and client.

[36] To establish litigation privilege, two elements must be present: [29]

1. litigation was ongoing or was reasonably contemplated at the time the document was created; and

2. the dominant purpose of creating the document was to prepare for that litigation.

[37] VIHA says that litigation was reasonably contemplated after the applicant raised the concerns that are the subject of the communications in the records.

[38] VIHA provides an affidavit from its Director of Information Stewardship, Access and Privacy, who was accountable for overseeing the management of the applicant's access request. She says "… by early 2014, when the Applicant raised her complaints about the application process and the issues regarding gender discrimination in relation to promotions, VIHA staff contemplated that

[26] Part 1 at p. 26, repeated at Part 3 at p. 40 – 41.
[27] *Blank v. Canada (Minister of Justice),* 2006 SCC 39 (CanLII) at para. 27.
[28] *Ibid* at paras. 34 – 41.
[29] *Gichuru v. British Columbia (Information and Privacy Commissioner)* 2014 BCCA 259 (CanLII) at para. 32, and *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.* 2006 BCSC 1180 (CanLII) at paras. 96 – 99.

there may be a prospect of litigation."[30] I give little weight to her statement about other individuals' thoughts. There is nothing in her affidavit, VIHA's submissions or the records themselves to indicate that the director had any personal involvement in, or knowledge of, the human resources issues and conversations contained in the emails. There is no affidavit evidence from the individuals who were actually involved in those email communications about what they did or did not reasonably contemplate about litigation at the time of the emails.

[39] Although VIHA says nothing specific about these particular emails, the records in dispute as a whole satisfy me that around the time of the email communication in records (e) – (g), VIHA staff had concerns that the applicant could possibly pursue legal action against VIHA regarding the matters they were discussing. The matters were of the same nature as those the applicant raised in her successful human rights complaint from several years earlier. The fact that the emails in record (e) were sent at all reveals an unusual or heightened level of caution and double-checking indicative of a concern that the applicant's human resource issues were not going to be resolved without further conflict. I also note that a record that I find is protected by legal advice privilege is dated around the same time period as records (e) – (g).[31] It supports my understanding that litigation of some sort regarding the applicant's human resources concerns was a worry for VIHA management. In conclusion, I am satisfied that litigation was reasonably contemplated at the time records (e) – (g) were created.

[40] However, for the following reasons, I do not find that the dominant purpose for creating records (e) – (g) was to prepare for litigation. These emails do not allude in any way to lawyers, legal advice, legal matters or litigation. They contain dialogue about the applicant's dissatisfaction and concerns regarding changes to her job classification, duties and job prospects. The emails are management's communications about those human resources matters. There is nothing suggesting that they were made for any purpose other than addressing and resolving those matters. While the applicant did eventually file a human rights complaint, that did not happen for approximately another five months. There is nothing in these emails that even remotely suggests that the email communications are occurring for the dominant purpose of any litigation, whether human rights related or otherwise.

[41] In conclusion, I cannot see anything in these emails or in the context in which they were communicated that indicates that they were created for the dominant purpose of preparing for litigation. I also note that VIHA does not actually say in its submissions or affidavit evidence that any of the records in dispute were created for the dominant purpose of litigation.

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[30] Director of Information Stewardship, Access and Privacy's affidavit at para. 16.
[31] Records at Part 1, pp. 19 – 25, repeated at Part 3, pp. 1 – 7.

[42] Given the lack of persuasive explanation and evidence regarding the criterion of dominant purpose, I am not satisfied that records (e) – (g) meet that second element for litigation privilege.

Summary of s. 14 findings

[43] In summary, I find that the records (a) – (d) are protected by legal advice privilege and may be withheld under s. 14. However, VIHA has not met its burden of establishing that records (e) – (g) are protected by legal advice privilege or litigation privilege, so they may not be withheld under s. 14. For clarity, the information that I find may not be withheld under s. 14 is at Part 1, pages 8 – 12 and 26, and Part 3 pages 26, 27, 40 and 41. VIHA applied no other exceptions to this information.

Disclosure harmful to personal privacy

[44] VIHA is withholding some information under s. 22.[32] Numerous orders have considered the application of s. 22, and I will apply those same principles here.[33]

Personal information

[45] The first step in the s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined as "recorded information about an identifiable individual other than contact information." 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."[34]

[46] I find that most of the information being withheld under s. 22 is personal information because it is about identifiable individuals. Most of it is third parties' personal information. However, some of the information being withheld is about the applicant, so it is her personal information.

[47] However, there is some information being withheld under s. 22 that is clearly not personal information, for instance, dates, subject lines and headers in emails and correspondence. Section 22 does not apply to the information that is not personal information, so VIHA is not required to refuse to disclose under that exception.

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[32] I will not consider information that I have already found may be withheld under ss. 13 and 14.
[33] See for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.
[34] See Schedule 1 of FIPPA for these definitions.

Section 22(4)

[48] The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If it does, disclosure would not be an unreasonable invasion of personal privacy. I find that VIHA is withholding no information of this type under s. 22.

Presumptions and relevant circumstances

[49] The third step in the s. 22 analysis is to determine whether any of the s. 22(3) presumptions apply to the balance of the personal information. If so, disclosure is presumed to be an unreasonable invasion of third party privacy. VIHA submits that the following four presumptions apply:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> …
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
> …
> (d) the personal information relates to employment, occupational or educational history,
> …
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
>
> (h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party,

[50] The fourth step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those in s. 22(2). It is at this step that any presumptions may be rebutted. The factors listed in s. 22(2) that play a role in this case are as follows:

> 22(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
> …
> (c) the personal information is relevant to a fair determination of the applicant's rights,
> …

> (f) the personal information has been supplied in confidence,
>
> (g) the personal information is likely to be inaccurate or unreliable,
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, …

[51] VIHA provides submissions about how previous Orders have interpreted and applied s. 22 to the facts in those earlier cases. VIHA does not explain where or why it believes the presumptions apply to the specific information in dispute. It submits that there are no circumstances which rebut the presumptions. It also says that there are no grounds to support disclosure of the personal information, considering the sensitivity of the information and its confidential nature. VIHA also says that disclosure of the information is not necessary for a fair determination of the applicant's rights (s. 22(2)(c)).

[52] I have reviewed the applicant's submissions regarding s. 22. Much of what she says does not pertain to the issues before me in this inquiry. However, she makes the point that she has requested her own personal information and is entitled to receive it where third party personal information can be severed. She also takes issue with VIHA's statement that the third party personal information is sensitive. The applicant also says that s. 22(2)(c) requires special attention, although she does not actually indicate that the third party personal information is relevant to a fair determination of her rights as s. 22(2)(c) has been interpreted in previous orders.[35] Rather, she explains that her recent human rights complaint is settled and that she has no ongoing litigation.

Information protected by a presumption

[53] VIHA does not explain where or why it believes the ss. 22(3)(b), (g) and (h) presumptions apply. It is not evident to me. I find that these presumptions do not apply to the personal information that I am considering here.

[54] However, I find that the s. 22(3)(d) presumption applies to personal information that is about the reclassification of third parties' jobs, the impact of those changes on their pay and work conditions, and career progression or movement between job classifications.[36] It also applies to the identity of employees who received a VIHA scholarship, the amount they received and what school and program they attend.[37] I also find that s. 22(3)(d) applies to a one-page hand-written record of the names of candidates who competed against the applicant in job competitions and the scores that the interview panel gave to each.[38] The only part of this page that was disclosed is the applicant's name and

[35] For example, Order F16-36, 2016 BCIPC 40 (CanLII) at paras. 39 – 65.
[36] Part 1 at pp. 1 – 3 and 15 – 17.
[37] Part 1 at p. 77.
[38] Part 4 at p. 1.

scores. As far as I can glean, this information relates to competitions that occurred in 2014.

[55] I can see no relevant circumstances that would rebut the s. 22(3)(d) presumption that disclosure of this information would be an unreasonable invasion of third party personal privacy. None of this third party personal information is also the applicant's personal information. There is nothing that indicates that disclosure of the details of these individuals' specific employment or occupational histories would be desirable for the purpose of subjecting VIHA's activities to public scrutiny. I find that disclosing this information would be an unreasonable invasion of third party personal privacy under s. 22(1).

Information to which no presumptions apply

[56] I find that none of the s. 22(3) presumptions apply to the balance of the personal information VIHA is withholding. My findings about whether disclosure of that information would be an unreasonable invasion of third party personal privacy are set out below.

[57] There is some third party personal information that is about an employee's feelings and emotional state.[39] Given its content and context, in my view, it is sensitive personal information. It is also the type of personal information that most people would only share in confidence with those they trust. In light of these circumstances, I find that disclosure would be an unreasonable invasion of third party personal privacy.

[58] There is one withheld excerpt in an email, in which the writer passes along praise about the conduct of named employees, one of which is the applicant.[40] VIHA has disclosed the names of all of the employees (and the praise). The withheld information contains an off-hand remark about other non-identified workers. It seems to me likely that the applicant could easily identify these other people, given the context of the email. In my view, this withheld excerpt is sensitive information as it is about how others perform in the workplace, and it could unfairly damage the reputation of those third parties because of its off-hand and judgemental tone (s. 22(2)(h)). The withheld excerpt contains no information about the applicant. Considering all circumstances, I find that its disclosure would be an unreasonable invasion of third party personal privacy.

[59] In another email, VIHA has withheld a suggestion about an administrative step related to unspecified individuals.[41] Although it is about unnamed individuals, I think that it is likely that the applicant will know who they are, given the context and content of what is said in the email. However, it is not sensitive information as it is about an innocuous work matter. It contains no judgement

[39] Part 1 at pp. 5 and 27; Part 3 at pp. 23 and 42.
[40] Part 3 at p. 9. I found s. 13 did not apply to this record at para. 23 above.
[41] Part 3 at p. 16.

about how anyone performs their work. Having considered all the circumstances I find that disclosing this information would not be an unreasonable invasion of third party personal privacy.

[60] VIHA is withholding a short email and its one-page attachment containing a factual summary of a conversation an individual had with the applicant.[42] The summary is a mix of the personal information of the writer, the applicant and two other individuals. The summary is a purely factual retelling of the writer's conversation with the applicant. It is clear that the applicant already knows the third party personal information given that she either heard it or said it herself during the conversation. The only part she may not know is the writer's opinion about why the applicant said what she did during their conversation. In my view, there is nothing sensitive about the nature of the writer's opinion or about any of the third party personal information. The same applies to the cover email, which contains nothing except administrative details about the exchange of the summary and any future information. I have also considered the fact that there is nothing in the summary or the cover email that suggests that the information was communicated in confidence. Therefore, I find that disclosure of this cover email and one page summary would not be an unreasonable invasion of third party personal privacy.

[61] VIHA is withholding a draft of a letter to the applicant.[43] The letter summarizes what was said during the writer's meeting with the applicant and what the applicant has communicated in her correspondence. There is a very small amount of third party personal information consisting of a recap of the writer's responses at the time of the meeting to what the applicant said to him about those third parties. The balance of the withheld information is the applicant's personal information. I have considered the fact that the letter does not reveal anything of a sensitive nature about anyone else or cast any negative light or judgement on any third party. The very small amount of information about the third parties is the type of generic, non-specific public statement that employers tend to make about successful job candidates. Having considered all relevant circumstances, I find that that disclosure of this letter in its entirety would not be an unreasonable invasion of third party personal privacy under s. 22(1).

[62] VIHA is withholding several snippets of third party personal information in an email exchange between two individuals (whose identities have already been disclosed).[44] It is the type of information most people share openly with others when explaining where they are going or where they have been, and it is part of the niceties of greetings and workplace etiquette. In my view, this is innocuous information that is devoid of any detail, sensitivity or apparent significance.

[42] Part 3 at p. 28 and 36.
[43] Part 3 at pp.33 – 34. This is the same letter that I found could not be withheld under s. 13 at para. 24 and 27 above.
[44] Part 3 at p. 38 and 39.

Further, it is over two years old. I find that disclosing it would not be an unreasonable invasion of third party personal privacy under s. 22(1).

Summary of s. 22 findings

[63] In summary, I find that disclosure of most of the personal information being withheld would be an unreasonable invasion of third party personal privacy under s. 22(1) of FIPPA. The only personal information that I find VIHA is not required to refuse to disclose under s. 22(1) is in Part 3 of the records at pages 16, 28, 36, 33, 34, 38 and 39.

CONCLUSION

For the reasons provided above, I make the following orders under s. 58 of FIPPA:

1. VIHA is not authorized under s. 3(1)(d) to refuse access to the records or part of the records in dispute. VIHA must give the applicant access to all of the information that it withheld under s. 3(1)(d).

2. I confirm VIHA's decision regarding s. 13 in part. However, VIHA is not authorized under s. 13(1) to refuse to disclose information at Part 3, pages 9, 28, 33, 34 and 36 of the records.

3. I confirm VIHA's decision regarding 14 in part. However, it is not authorized under s. 14 to refuse to disclose information at Part 1, pages 8–12 and 26 and Part 3, pages 26, 27, 40 and 41 of the records.

4. I confirm VIHA's decision regarding s. 22 in part. However, it is not required under s. 22 to refuse to disclose information at Part 3, pages 16, 28, 36, 33, 34, 38 and 39 of the records. For clarity, VIHA is required to refuse to disclose the final sentence of the email at Part 3, page 9 under s. 22(1).

5. I require VIHA to give the applicant access to the information it is not authorized or required to withhold by May 16, 2017. VIHA must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

March 31, 2017

ORIGINAL SIGNED BY

OIPC File No.: F15-61155

Elizabeth Barker, Senior Adjudicator