Office of the Information & Privacy Commissioner for British Columbia

Protecting privacy. Promoting transparency.

Order F18-10

DISTRICT OF SECHELT

Erika Syrotuck
Adjudicator

March 8, 2018

CanLII Cite: 2018 BCIPC 12
Quicklaw Cite: [2018] B.C.I.P.C.D. No. 12

Summary: The applicant made a request to the District of Sechelt for all correspondence, reports or notes relating to incidents that occurred on his property and that were the subject of complaints by third parties. The District of Sechelt refused to disclose portions of the records under ss. 15(1) (harm to law enforcement) and 22 (harm to personal privacy) of FIPPA. The adjudicator found that s. 22 applied to some but not all of the information in dispute and that ss. 15(1)(c) and (d) did not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(c), 15(1)(d), 22(1), 22(2), 22(3), 22(4).

Authorities Considered: BC: Order 01-53, 2001 CanLII 21607 (BC IPC); Order F14-38, 2014 BCIPC 41; Order F17-01, 2017 BCIPC 1; Order F16-03, 2016 BCIPC 3; Order F05-18, 2005 CanLII 24734 (BC IPC); Order F16-12, 2016 BCIPC 14; Order No. 563-1998, 1998 CanLII 2594 (BC IPC); Order F15-22, 2015 BCIPC 24; Order 00-01, 2000 CanLII 9670 (BC IPC); Order F11-03, 2011 BCIPC 3; Order 50-1995, [1995] B.C.I.P.D. No. 23.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31.

INTRODUCTION

[1] The applicant made a request to the District of Sechelt (District) for all correspondence, reports or notes relating to incidents that occurred on his property and that were the subject of complaints by third parties. The District provided records in response to the applicant's request but withheld some

information under ss. 15 (harm to law enforcement) and 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the District's decision. Mediation did not resolve the issues and the matter proceeded to inquiry.

ISSUES

[2] The issues to be determined in this inquiry are:

1. Is the District required to refuse to disclose the information in dispute under s. 22 of FIPPA?

2. Is the District authorized to refuse to disclose the information in dispute under s. 15(1) of FIPPA?

[3] Section 57(2) of FIPPA places the burden of proof on the applicant to establish that disclosure of information would not be an unreasonable invasion of third party personal privacy under section 22. Under s. 57(1) of FIPPA, the burden of proof is on the District to establish that the applicant has no right of access under s. 15(1).

DISCUSSION

Background

[4] The applicant obtained a bylaw variance from the District allowing him to shoot geese on specific properties. A third party complained to the District and sought to have the variance rescinded. The District investigated the complaint and recommended that the city council rescind the variance. The council later rescinded the variance. The applicant is seeking the records related to the District's investigation.

Records in Dispute

[5] The applicant made a request to the District for all correspondence, reports or notes relating to incidents that occurred on his property and that were the subject of complaints by third parties. In response to the applicant's request, the District provided 98 records. Some records were fully or partially disclosed and some were withheld entirely.

[6] During the inquiry, the applicant narrowed and clarified his request. He says he only seeks the bylaw officer's reports on the incident and the subsequent report that was given to the District regarding the incident.[1] There are only three

[1] Email from the applicant dated January 9, 2018.

records that match this description and these are the records I have considered in this inquiry. Two records are titled "Bylaw Enforcement Incident Reports"[2] (Reports). The District withheld some of the information in both Reports. The Reports are a chronological summary of the investigation including excerpts from emails, a copy of the relevant bylaw and variance, and entries describing actions taken throughout the course of the investigation. The content of the Reports overlap: one of the Reports only covers part of the investigation while the other spans the duration of the investigation. The District applied ss. 22 and 15(1)(c) and (d) to the majority of the withheld information in the Reports. The District also withheld a small amount of information in the Reports under s. 15(1)(c) only.

[7] The other record I have considered in this Inquiry is a three page Memorandum from the Bylaw Enforcement Officer to the District's Corporate Officer (Memo).[3] The District withheld three paragraphs under ss. 15(1)(c) and (d) and 22.

Section 22

[8] Section 22 requires that a public body withhold personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. In this case, the relevant portions of this section are the following:

> (1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> > (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
> >
> > ...
> >
> > (f) the personal information has been supplied in confidence,
> >
> > …
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> > …

[2] Records 1.3 and 1.4 as indicated in the records package.
[3] Record 1.30 as indicated in the records package.

> (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,
>
> …
>
> (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,
> …

Personal Information

[9] The first step in any s. 22 analysis is to determine whether the information in dispute is personal information.

[10] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information." FIPPA defines contact information as "information to enable an individual at a place of business to be contacted and includes the name, position or title, business telephone number, business address, business email or business fax number of the individual."[4]

[11] Most of the information in the Memo and the Reports is about a complaint made by a third party about the applicant. The information clearly identifies the third party, and as such it is the third party's personal information. Because the complaint is about the applicant, this information is simultaneously his personal information.

[12] Some of the information in the Reports is about communications to or from District employees about the investigation. This information clearly identifies the District employees and so it is their personal information.

[13] A small amount of the disputed information in the Reports is only about the applicant, and is his personal information alone. Revealing this would not unreasonably invade any third parties' personal privacy, so s. 22(1) does not apply to it.

[14] Some of the disputed information is not personal information. The District withheld dates from the Reports. The dates are not information about an

[4] For definitions, see *Freedom of Information and Protection of Privacy Act,* Schedule 1.

identifiable individual, and therefore are not personal information. They may not be withheld under s. 22.

Section 22(4)

[15] The next step is to determine whether any of the circumstances in s. 22(4) apply. Section 22(4) describes circumstances where disclosure of personal information is not an unreasonable invasion of personal privacy.

[16] Neither the District nor the applicant made submissions on s. 22(4). Section 22(4)(e) applies to information that is about an employee's position, functions or remuneration. Former Commissioner Loukidelis described the type of information that falls within s. 22(4)(e) as follows:

> … any third-party identifying information that in some way relates to the third party's job duties in the normal course of work-related activities falls into s. 22(4)(e). I refer here to objective, factual statements about what the third party … did or said in the normal course of discharging her or his job duties, but not qualitative assessments or evaluations of such actions.[5]

[17] In my view, s. 22(4)(e) applies to a small amount of the personal information in dispute in the Reports because it consists of objective factual statements about what District employees did and said in the course of the investigation. Disclosure of this information is not an unreasonable invasion of third party privacy, therefore the District is not authorized to withhold it under s. 22.

Section 22(3)

[18] The next step in the analysis is to determine whether s. 22(3) applies to the remaining personal information. Section 22(3) describes circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's privacy.

[19] The District submits that s. 22(3)(b) applies because the personal information compiled is identifiable as part of bylaw enforcement investigations. Previous orders have found that s. 22(3)(b) applies to information gathered during bylaw investigations.[6] Since all of the records in dispute relate to the District's investigation into a possible violation of the bylaw variance, I find that s. 22(3)(b) applies to all of the personal information within them. Disclosing the information in dispute is presumed to be an unreasonable invasion of third parties' personal privacy.

---

[5] Order 01-53, 2001 CanLII 21607 (BC IPC) at para 40.
[6] Order F17-01, 2017 BCIPC 1 at para. 63; See also Order F14-38, 2014 BCIPC 41 at para 24 and Order F16-03, 2016 BCIPC 3 at para. 31.

Section 22(2)

[20] The next step is to consider all relevant circumstances, including the circumstances listed under s. 22(2) to determine if disclosure of the personal information is an unreasonable invasion of third party personal privacy. It is at this stage that any presumptions under s. 22(3) can be rebutted.

22(2)(a) – Public Scrutiny

[21] Section 22(2)(a) is a circumstance that weighs in favour of disclosure where the disclosure is desirable for subjecting the activities of a public body to public scrutiny. In Order F05-18, the adjudicator described the rationale behind s. 22(2)(a) as follows:

> What lies behind s. 22(2)(a) of the Act is the notion that, where disclosure of records would foster accountability of a public body, this may in some circumstances provide the foundation for a finding that the release of third party personal information would not constitute an unreasonable invasion of personal privacy.[7]

[22] While the applicant has not expressly submitted that this section applies, I have considered it because the applicant raised concerns about how the District conducted the investigation. The applicant says that his reason for seeking the withheld information is that he feels the District's investigation was one-sided; specifically that there was never a discussion between him and the bylaw officer about the incident. The applicant states that if he had been contacted by the bylaw officer, he could have answered any questions about the incident. The applicant states that he believes the bylaw officer was biased about the incident and that she "manufactured" the report which formed the basis for the District staff's recommendation to cancel the variance.

[23] The disclosed records before me show that after the Sechelt council made the decision to rescind the variance, the Mayor of Sechelt wrote the applicant a letter in which he addressed the applicant's concern about the lack of an opportunity to present his position on the matter[8]. In the letter, the Mayor acknowledges that the applicant was not consulted in a timely matter but should have been. Given that the Mayor has already responded to the applicant's concern that he was not properly consulted, I am not satisfied that disclosing the third parties' personal information in the Reports and Memo would enhance public scrutiny of the way the District conducted the investigation. I do not find that subjecting the activities of the District to public scrutiny is a factor weighing in favour of disclosure of the personal information in dispute.

---

[7] Order F05-18, 2005 CanLII 24734 (BC IPC) at para. 49.

[8] Record 1.89; this letter was addressed to the applicant and was provided to the applicant in the records package.

22(2)(f) – Supplied in Confidence

[24] The District submits that it has both a formal policy and an operational practice that complainants' identities will be received in confidence unless required to be revealed though a legal process. I note that the District's stated policy is only about protecting the identities of the complainants and does not explain how it treats information supplied by complainants. The District did not provide any further details on if or how they applied this policy to the complainants in this case.

[25] None of the evidence or records before me directly addresses the expectations of any of the third parties when they supplied information to the District in the course of the investigation. I have considered the context in which the complaints arose and the information was supplied and, in my view, this is not a circumstance in which the third parties would have expected confidence given the nature of the incident. Further, the records before me show that the Mayor of Sechelt wrote a letter to the applicant about the dispute.[9] The letter expressly identifies the third party complainants. The letter also acknowledges that the original letter written by the complainants was posted on the District's website, demonstrating that the District did not hold the complainants identities in confidence. For these reasons, I am not satisfied that the complainants supplied their identities, or any other information, in confidence.

Applicant's knowledge

[26] Where the applicant knows the personal information in the records, ordinarily this will weigh in favour of disclosure.[10] In this case, the District refused to disclose some information in the Reports and the Memo that it disclosed to the applicant in other documents in the records package. For instance, there are several portions of the Reports and an introductory paragraph in the Memo that the District disclosed elsewhere in the records. Also, it is evident that the applicant knows the details of the complaint and the identity of complainants because the District posted the complaint letter on its website and the applicant quotes from it in his correspondence with the District. The fact that this information has already been disclosed to the applicant is a circumstance weighing in favour of its disclosure.

Conclusion on Section 22

[27] I found that s. 22(1) does not apply to some of the withheld information because it is either not personal information, is the applicant's personal information or is the type of personal information to which s. 22(4)(e) applies.

---

[9] Record 1.89; this letter was addressed to the applicant and was provided to the applicant in the records package.
[10] Order F16-12, 2016 BCIPC 14 at para. 34.

I found that the s. 22(3)(b) presumption applies to the balance of the personal information. I considered whether the personal information was desirable for the purpose of public scrutiny and whether the information was supplied in confidence, and found that neither of these circumstances weighed in favour of disclosure. I also considered the applicant's knowledge of the personal information in dispute and found that it is a circumstance weighing in favour of disclosure of some of the personal information.

[28] In conclusion, I find that the s. 22(3)(b) presumption is rebutted where the personal information in dispute was already disclosed to the applicant. I find that it would not be an unreasonable invasion of any third party's personal privacy to disclose the information that has already been disclosed to the applicant, as described above.

[29] The remaining personal information in dispute is communication with or about the complainants or witnesses. There is nothing before me that indicates this information has already been disclosed to the applicant. There are no circumstances that rebut the presumption about this third party personal information. I find that it would be an unreasonable invasion of the third parties' personal privacy to disclose this information.

Section 15

[30] Section 15(1) is a discretionary exception that allows public bodies to refuse to disclose information in circumstances that may be harmful to law enforcement. The relevant portion of s. 15(1) in this inquiry is:

> **15** (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> **…**
>
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
>
> (d) reveal the identity of a confidential source of law enforcement information,

[31] Schedule 1 of FIPPA defines "law enforcement" as:

> "law enforcement" means
>
> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
>
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

[32] It is well established that the language 'could reasonably be expected to' in access to information statutes means that the public body must establish that there is a reasonable expectation of probable harm.[11] This language tries to mark out a middle ground between that which is probable and that which is merely possible.[12] In order to establish that there is a reasonable expectation of probable harm, the public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground.[13]

[33] Previous orders have established that bylaw enforcement is a 'law enforcement matter' within the meaning of s. 15(1).[14]

15(1)(c) – harm to investigative techniques

[34] Section 15(1)(c) allows a public body to refuse to disclose information that could reasonably be expected to harm the effectiveness of investigative techniques and procedures, used or likely to be used, in law enforcement.

[35] The District claims that keeping the details of an investigation out of the public realm assists greatly in ensuring the effectiveness of investigation techniques and procedures used or likely to be used in bylaw enforcement. In the District's submissions, it openly describes some of the techniques it used to conduct the investigation, such as conducting interviews. Some of the disclosed records also reference actions that the District took during the investigation. For example, some of the disclosed records name other bodies that the District contacted and for what purpose.

[36] The District seeks to protect the information it collected during the investigation which is not the kind of information that s. 15(1)(c) is intended to protect. The purpose of s. 15(1)(c) is to protect the investigative techniques themselves rather than the content of a specific investigation.[15]

[37] In this case, the District has already revealed the techniques that it used while investigating the complaint against the applicant. Further, the District's evidence and submissions do not persuade me that disclosure of the information in dispute could reasonably be expected to harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement.

---

[11] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31* at para 54.
[12] *Ibid* at para. 54.
[13] *Ibid* at para. 54.
[14] See, for example, Order No. 563-1998, 1998 CanLII 2594 (BC IPC) at 8; Order 00-01, 2000 CanLII 9670 (BC IPC) at para. 4; Order F11-03, 2011 BCIPC 3 at para. 30.
[15] Order 50-1995, [1995] B.C.I.P.D. No. 23 at paras. 6-7. See also Order F15-22, 2015 BCIPC 24 at para. 23 and Order F05-18, 2005 CanLII 24734 (BC IPC) at para. 21.

15(1)(d) – Confidential Source

[38] Section 15(1)(d) allows a public body to refuse to disclose information if the disclosure could reasonably be expected to reveal the identity of a confidential source of law enforcement information.

[39] The District submits that due to the small size of the communities comprising Sechelt, the identity of a complainant can be determined based on the contents of a bylaw enforcement officer's investigation notes, reports or emails.

[40] As I noted earlier, one of the disclosed records is a letter from the Mayor of Sechelt to the applicant, acknowledging that the District posted the original letter of complaint about the applicant to its website. Additionally, the District disclosed the name and phone number of a witness in one of the Reports. It follows that disclosure of the disputed information in these circumstances would not reveal the identity of a confidential source of law enforcement information because the applicant already knows who made the complaint and who provided additional information as a witness. I find that s. 15(1)(d) does not apply.

CONCLUSION

[41] For these reasons, under s. 58 of FIPPA, I order that:

1. The District of Sechelt is not authorized to refuse to withhold the information in dispute under s. 15(1)(c) or (d).
2. Subject to 3 below, the District of Sechelt is required to refuse to disclose to the applicant the information it withheld under s. 22.
3. The District of Sechelt is not authorized to refuse to disclose the information underlined in red in the copy of the records that I have provided to the District along with this order.
4. The District of Sechelt must give the applicant access to the information underlined in red by April 23, 2018. The District of Sechelt must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

March 8, 2018

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator