OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F08-21

MINISTRY OF ADVANCED EDUCATION AND LABOUR MARKET DEVELOPMENT

Gale L. Prestash, Adjudicator

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Summary: The applicant requested records from a government program that nominates foreign workers for accelerated immigration. The Ministry disclosed the application forms, position descriptions, required qualifications and job offer letters but withheld some information in those records under s. 21 and s. 22. The test for s. 21 was not met. Some information must be withheld under s. 22 to prevent unreasonable invasion of third parties' personal privacy. Some of the information was not "personal information" and must be disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a)(ii), (b), (c)(i), (ii) and (iii), s. 22(1), 22(2)(c) and (f) and 22(3)(d) and (f).

Authorities Considered: B.C.: Order F08-03, [2008] B.C.I.P.C.D. No. 6; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order 02-04, [2002] B.C.I.P.C.D. No. 4; Order 03-41, [2003] B.C.I.P.C.D. No. 41; Order 01-01, [2001] B.C.I.P.C.D. No. 1; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order F05-29, [2005] B.C.I.P.C.D. No. 39; Decision F07-03 [2007] B.C.I.P.C.D. No. 14; Order F07-15, [2007] B.C.I.P.C.D. No. 21.

1.0 INTRODUCTION

[1] The applicant asked for access to records from the BC Provincial Nominee Program ("program") from the Ministry of Economic Development ("Ministry").[1] Employers use the program to speed the process for qualified

[1] Now the Ministry of Trade, Technology and Economic Development. According to a July 17, 2008 letter to the OIPC from the Ministry's counsel, while this inquiry was in progress, the program and its records were moved to the Ministry of Advanced Education and Labour Market Development. This order is therefore directed to that Ministry. I will refer to the former and current ministries as the "Ministry."

foreign workers to obtain permanent resident status and fill existing positions. The Ministry released program records, but withheld some information in them, including the identities of the employers and employees, the employees' qualifications, and some of the employment contract terms such as pay and benefits, under ss. 21 and 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] The applicant requested a review by this Office. Mediation by this Office did not fully resolve the issue. The applicant said it did not want to know the identities of the employees, but maintained that some of the other withheld information should be disclosed, including the employers' names and the pay and benefits. The matter proceeded to this written inquiry under Part 5 of FIPPA.

[3] This Office invited submissions from the applicant, the Ministry and the employers who had submitted applications to the program for the time period covered by the access request. The applicant, the Ministry and two employers made submissions.

[4] Those two employers did not ask to have their identities in their submissions considered *in camera* and as a result the applicant knows who they are. However, the main point of their submissions was that they should not be identified as participants in the program. I will refer to them as Employer A and Employer B.

2.0 ISSUES

[5] The issues in this inquiry are as follows:

1. Does s. 21 require the Ministry to withhold information?

2. Does s. 22 require the Ministry to withhold personal information?

[6] Under s. 57(1) of FIPPA, the Ministry has the burden of proof regarding s. 21. Section 57(2) provides that the applicant bears the burden of establishing that disclosure of third-party personal information would not be an unreasonable invasion of third-party personal privacy under s. 22.

3.0 DISCUSSION

[7] 3.1 Background

The program

[8] The British Columbia Provincial Nominee Program, Strategic Occupations category, "…aims to recruit and retain foreign skilled workers to help eligible

British Columbia employers meet their employment needs."[2] The province is experiencing a shortage of skilled workers in a number of areas, including the construction industry trades.[3] The Ministry predicts the shortage will continue to 2015. The Ministry "…intends to use the Program as a primary means of overcoming such a labour shortage through attracting foreign workers as permanent residents."[4] The program is designed, "at least in part, to facilitate provincial economic development."[5]

[9] The program operates under an agreement between the provincial and federal governments. Qualified employers and employees make a joint application to the Ministry. The Ministry ensures that program requirements are met. Those requirements include that the job offer reflects the market wage in the province and that the foreign worker is qualified to perform the particular job.[6] The Ministry then nominates the employee to Citizenship and Immigration Canada for accelerated immigration. If the application is successful, the federal government speeds up that person's immigration process.[7]

The access request

[10] The applicant asked the Ministry for copies of "[A]ll completed *Guaranteed Job Offer Form(s)* in the possession or control of the British Columbia Provincial Nominee Program, for the period from January 1, 2005 to present."[8]

[11] The Guaranteed Job Offer Form ("GJOF") is a two-page Ministry form that employers fill in to nominate a skilled worker for immigration under the program. Employers must include with the GJOF a detailed position description, the qualifications required for the position and a job offer made by the employer and accepted by the employee.

[12] Through discussion with the Ministry, the applicant narrowed its request to the GJOFs related to the construction industry. The Ministry disclosed one hundred GJOFs and the related position descriptions and accepted job offers, being 502 pages of records. It withheld certain information in those records.

[13] Mediation through this Office resulted in the Ministry agreeing to disclose the position descriptions and the applicant agreeing to narrow the scope of the review.[9] Through an oversight, the Ministry did not release that information until

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[2] Ministry initial submission, para. 4.08.
[3] Initial submission, Appendix A–Ministry website for the program.
[4] Ministry initial submission, Don Fast affidavit, para. 12.
[5] Ministry initial submission, para. 4.25.
[6] Ministry initial submission, para. 4.03.
[7] "Individuals who are nominated through the Program can expect to have their applications for permanent residence processed in 8 to 10 months, compared with 5 to 6 years under the federal Skilled Worker Program." Ian Mellor affidavit, para. 54.
[8] May 3, 2006, letter requesting access.
[9] Portfolio Officer's Amended Fact Report, para. 7. For example, the applicant does not want the prospective foreign employees' names or addresses, the employers' websites and the names,

August and September 2007. The Ministry provided me a copy of the records on July 4, 2008, that it said correctly shows what information it released to the applicant and what information it continued to withhold as of September 2007. That is the copy of the records that I considered in this inquiry.

Description of the records

The Guaranteed Job Offer Forms

[14] The GJOFs consist of six main boxes, labelled "A" through "F". Box A has information about the program for the employer. It does not require the employer to fill in any information and is not in issue in this inquiry. Boxes B through F require the employer to fill in information.

[15] Box B is titled "Employer Information." The Ministry withheld the "Employer Name" and all employer contact information. For the question "Do you provide relocation and/or settlement assistance to foreign workers? (Please check type of assistance provided)", it withheld the answer box headings and the employers' answers.[10] The Ministry disclosed the question "Total # of employees" and the employers' answers.

[16] Box C is titled "Position Information." The Ministry disclosed all of the headings from the form that I set out below, and all of the employers' answers to them, with the one exception that it withheld the employers' answers to the "Type of Worksite" where they showed the workplace location:

- Position Title.
- Type of Worksite.
- Is this a union position? Yes/No.
- No. of Employees Laid Off from this Type of Position, in Last 24 Months.
- No. of Employees Working in this Type of Position.
- Local Recruitment Activity
    1. Is this a new position? Yes/No.
    2. How long has this position been vacant? (Please insert number of months position vacant.)
    3. Have you actively recruited in British Columbia for this position? Yes/No.

[17] Box D is titled "Prospective Employee Information." The Ministry disclosed all the main headings that ask for information. It withheld the

positions and contact information of the individuals who filled in the GJOFs and signed the job offer letters on behalf of the employers.

[10] Employer A in its submission set out the answer box headings. Employer A's Field Personnel Coordinator affidavit, para. 10.

employers' answers to all of the questions. It also withheld some of the headings that are answer boxes. The headings are as follows:

- Employee Family Name
- Employee Given Name
- Does the Employee Have an Employment Authorization?*
- Is the employee fully qualified to work in the position?*
- Licensing/Accreditation requirement met.*
- Fluent in English.*
- Specialized training.*
- Describe any Specialized Training That the Employee has Completed.
- Does the Employee Have Sufficient Resources to Relocate and Settle Successfully in British Columbia?*
- Proposed Annual Salary?

* Answer box headings withheld.

[18] Box E is titled "British Columbia Provincial Nominee Program." The Ministry disclosed all of the headings and the employers' answers, except for a few instances where the answers gave third-party personal information. The headings are as follows:

- How did you learn about the Provincial Nominee Program? (Please check all boxes that apply).
  - BC Promotional Material
  - PNP Website
  - Industry Association
  - Other (Please specify)

- How did you learn about this employee? (Please check all boxes that apply)
  - Employer Recruiting Activities
  - Lawyer
  - Immigration Consultant
  - Employee Initiated Contact with Employer
  - Other (e.g. Health Match, please specify)

[19] Box F is titled "Authorization Signature." The Ministry withheld the names, titles and signatures of the person signing for the employer. It disclosed the date the GJOF was signed.

The position descriptions

[20] The employers' position descriptions were mostly on their letterhead and were in a variety of formats. The Ministry released all the information that described the positions, the required qualifications for the positions where those

appear in the position descriptions and the date the position description was signed where that was included. It withheld all the information that described the employers, such as the name, description of type of business, services provided, memberships, logo, address and other contact information, and the name, title and signature of the person signing for the employer where the position description included that.

The accepted job offers

[21] The Ministry withheld information in the job offer letters that identified the employer and the employee, and most of the information about the financial terms of the offer such as salary, amount of vacation, overtime rates and benefits such as pension and medical plans. It was inconsistent in its severing of certain information such as length of probationary period, length of the contract and vacation pay. In a few cases it withheld other bits of information that it decided were third-party personal information. It disclosed the rest of the information in the letters, including the dates they were signed. The Ministry severed the job offer letters in a way that showed the character of the information it withheld. For example, in a job offer letter the sentence appears, "Your starting salary will be (information severed)." In another job offer letter the sentence appears, "You will receive (information severed) paid vacation per year."

The parties' description of the withheld information

[22] The Ministry submitted the information it withheld in the records *in camera*. The Ministry's submission listed the information it withheld under s. 21 by category, for example, "Name of employer" and "Information about subsidiaries".[11] It summarized the withheld information as follows:

> …information which would identify the fact that the employer applied to the Program, information relating to that employer's recruitment of the employees in question and information concerning the employer's operations and business.[12]

[23] The Ministry described the information it withheld under s. 22 by category, for example, "Proposed annual salary" and "Information about health or dental plans as well as other benefits for employee".[13] It said much of the severed information was the educational and employment history of the employees.[14]

[24] Employer A described the information the Ministry withheld in the applications it submitted to the program as employment and educational history of the employees, salary and benefit package, bonuses and other benefits.[15]

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[11] Initial submission, para. 4.30.
[12] Initial submission, para. 4.54.
[13] Initial submission, para. 4.81.
[14] Initial submission, para. 4.79. The Ministry withheld information about employees who accepted jobs and those who declined jobs. Throughout this Order, I use the term employees to include both groups.
[15] Employer A initial submission, para. 47.

It also submitted its "typical offer of employment letter" and described the information the letter contained as including "salary, vacation and the like, but [the letter] also addresses such matters as deferred compensation profit-sharing bonuses, share ownership, long-term bonuses, benefits and pension and education matters."[16]

Information in dispute

[25] To determine what information remains in issue, I reviewed the following:

- In the Ministry's initial submission, paragraph 4.30 lists information it withheld under s. 21 and paragraph 4.81 lists information it withheld under s. 22,
- The information that was severed and the information that was disclosed in the copy of the records the Ministry provided to me July 4, 2008,
- The Amended Portfolio Officer's Fact Report, para. 7, which describes the information the applicant wanted at the end of mediation,
- Employer A's submission on this point; and
- The following statement from the applicant:

> To reiterate, the Applicant has no interest in obtaining any information which might personally identify any individual person. The Applicant does, however, want to know the name of the Employer who has made the job offer, as well as the details of the job offer, and the qualifications held by the individual applicants – information which, since the individuals in question are not identified, could not be construed as personal information under Schedule 1.[17]

[26] I find that the information that remains in issue that the Ministry withheld under s. 21, which I describe using the Ministry's language in paragraph 4.30 of its submission, is as follows:

- Name of employer;
- Whether relocation and/or settlement assistance was provided to foreign workers, and, if so, the type of assistance provided;
- Type of worksite(s), workplaces;
- Information about employer programs and services;
- Information about subsidiaries.

[27] I take from the parties' submissions and the severing in the records that

- "information about employer programs and services" means information that shows what services the employers provided to their customers; and

[16] Field Personnel Coordinator affidavit, at para. 16.
[17] Initial submission, para. 9.

- the "type of worksite(s), workplaces" information that remains in issue is those few cases where the Ministry withheld that information because it showed the location of the workplace.

[28] I find that the information that remains in issue that the Ministry withheld under s. 22, which I describe using the Ministry's language in paragraph 4.81 of its submission, is as follows:[18]

- Whether the employee has an employment authorization;
- Whether the employee is fully qualified to work in the position;
- Whether the licensing/accreditation requirement is met in relation to the employee or whether such a requirement is not met;
- Whether the employee is fluent in English or whether that is not required;
- Whether the employee has specialized training or whether that is a requirement, as well as details of such specialized training;
- Whether the employee has sufficient resources to relocate and settle successfully in British Columbia;
- Proposed annual salary;
- Name of the employee's union;
- Information concerning any specialized training that the prospective employee has completed;
- Information concerning the employee's employment history;
- Information found in an offer of employment to the employee, including the employer's name, salary/wage information, information about health or dental plans as well as other benefits for employee;
- Personal information concerning third parties who turned down the employment in question.[19]

[29] The Ministry's list of s. 22 information included the item "[I]nformation concerning employment conditions." I cannot tell from the parties' submissions and the severing in the records what the Ministry meant by that. All the information that the Ministry severed under s. 22 is adequately described by the other terms that I have set out above from the Ministry's list. Therefore I need not consider "[I]nformation concerning employment conditions" as a separate item.

[30] Some of the information that the Ministry originally severed, for example, the employers' websites and the employees' names, is not responsive to the access request because the applicant has narrowed its request and no longer wants that information. I therefore need not consider that information in this inquiry.

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[18] The Ministry's descriptions disclose some of the answer box headings that it severed in the records such as whether the employee is fluent in English or whether that is not required.

[19] As set out above, the applicant does not seek information that would identify these people, and there were very few records with this type of information.

[31] During the request and mediation processes, the Ministry disclosed some of the information that Employer A argued should be withheld, for example, the position titles, detailed position descriptions and the employers' answers to the question in the GJOF "How did you learn about this employee?"[20] I therefore need not consider that information in this inquiry.

The parties' evidence

[32] The Ministry submitted affidavits from presidents of two construction associations. The British Columbia Construction Association ("BCCA") president, Manley McLachlan, said that his province-wide association represents approximately 1,700 companies actively engaged in the British Columbia construction industry.[21] The Vancouver Regional Construction Association ("VRCA") president, Keith Sashaw, said that his association represents approximately 680 construction industry general contractors in the Lower Mainland and Fraser Valley.[22]

[33] The Ministry also submitted affidavits from Don Fast, Deputy Minister, Ministry of Economic Development, and Ian Mellor, Director, Economic Immigration Programs in the Ministry, who had significant responsibility for the program.

[34] The applicant submitted an affidavit from its Business Manager, James Leland. Employer A submitted an affidavit from its Field Personnel Coordinator. Employer B did not submit affidavit evidence but made some assertions of fact in its brief submission.

[35] **3.2 Third-Party Personal Privacy**—The Ministry argued that it was required to withhold certain information under s. 22(1). It said the information it withheld was "personal information."[23]

[36] The relevant parts of s. 22 read as follows:

> **Disclosure harmful to personal privacy**
>
> 22(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…

[20] Employer A submission, para. 31 and Field Personnel Coordinator affidavit, paras. 10 and 15.
[21] McLachlin affidavit, para. 2.
[22] Sashaw affidavit, para. 2.
[23] Initial submission, para. 4.81.

> (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 …
>
> (d) the personal information relates to employment, occupational or educational history, …

[37] Many previous orders have dealt with the interpretation and application of s. 22, including Order 01-53,[24] and Order 02-56.[25] I have applied the principles in previous orders in this case.

Do the records contain personal information, including information that could identify individuals?

[38] Schedule 1 of FIPPA defines "personal information" as follows:

> "**personal information**" means recorded information about an identifiable individual other than contact information;

[39] The applicant said it does not want "any information which might personally identify any individual person."[26] It argued that, if the employees' names and addresses are not disclosed, the other information about them (such as wages and qualifications) loses its character as personal information because it is not about an "identifiable individual."[27] If it is not personal information, the applicant argued, s. 22 does not apply. The applicant's position is that releasing the information it wants would not lead to identifying the employees.[28]

[40] The Ministry referred to its duties under FIPPA. It must not disclose personal information if that would be an unreasonable invasion of third-party personal privacy. It referred to a previous FIPPA definition of "personal information" which included information about an individual's educational and employment history. It argued that the information it withheld was of that nature and was personal information.[29]

[41] The Ministry said it is concerned that if the requested information is disclosed the employees could be identified. It referred to the Commissioner's comments in Order 03-41,[30] on the risk of re-identification and the relevance of the "mosaic effect" in deciding whether seemingly anonymized information could be used to identify someone.

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[24] [2001] B.C.I.P.C.D. No. 56.
[25] [2002] B.C.I.P.C.D. No. 58.
[26] Initial submission, para. 9.
[27] Initial submission, para. 9.
[28] Initial submission, paras. 9, 23 and 24.
[29] Initial submission, para. 4.79.
[30] [2003] B.C.I.P.C.D. No. 41.

[42] The Ministry submitted:

> … that any disclosure of the information mentioned in paragraph 4.101 [*sic*][31] above would lead to the identification of the employees and would thereby unreasonably interfere with their personal privacy.
>
> …
>
> The Ministry is concerned that the release of any seemingly anonymized information about the employees, in conjunction with the name of their employer, could enable someone to the [*sic*] identify the employees involved.[32]

[43] The BCCA president's affidavit included the following statements:

> I believe that any public release of the skill sets and locations of skilled employees, as well as the name of the company that employs them, would interfere with the fair competition that now exists for skilled trades-people because it would allow competing companies to target those employees with a review [*sic*] to recruiting them for employment purposes.
>
> ….
>
> If the identify [*sic*] of a contractor is released, in the context of their nominating a skilled foreign worker, that would allow their competitors to try and poach that person,[33]

[44] The BCCA president made those statements in support of the argument by the Ministry and Employer A that the employers who used the program would suffer harm if their identities were disclosed. However, I also infer from them that he also believes that, if the information he notes is disclosed, people could use it to identify the employees.

[45] Employer B agreed with the Ministry's position that all the information should be withheld to protect the employees' anonymity. It also made the following statement:

> Should the Commissioner not agree with the Ministry's interpretation, we would like the Commissioner to consider limiting the information provided to the applicant by removing any reference not only to the employee's name but also to the company name, address or employees' [*sic*] of the company. It is our opinion that by releasing this information the anonymity of the employee is jeopardized.[34]

[46] I take from this that Employer B believes the information it mentions could be used to identify the employees.

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[31] I take the Ministry's reference to be to para. 4.81, the list of information it withheld under s. 22.
[32] Initial submission, paras. 4.83 and 4.85.
[33] McLachlan affidavit, from the first of two paragraphs numbered 13, and para. 16.
[34] Initial submission page 1.

Analysis

[47] The employees' names and addresses are clearly their personal information. I accept that with the names and addresses withheld the remaining information in the records does not, on its face, identify the employees. I also accept that the applicant does not want to identify the employees and I do not suggest it would try to do so. However, in my view, the volume and nature of the information in the records provides considerable scope for a person to use the requested information, in combination with information from other sources, to identify the employees and thus lead to disclosure of their personal information. The Commissioner described this risk in Order 03-41[35] as follows:

> As for the balance of the records, the VCHA stresses the risk of re-identification – the so-called 'mosaic effect' – which arises where disclosure of what might appear to be non-personal information should be treated as a disclosure of personal information because the seemingly non-identifiable information can be combined with information from other sources to re-identify the disclosed information.

[48] In reaching my conclusions about the risk of re-identification my considerations included the following:

- all the information that the Ministry disclosed in each of the records, including position description and date of application or hire,[36] the information that I will order the Ministry to disclose, including the employees' qualifications, how that information could be used to gather further information, and whether any of the information could be severed so that other meaningful information could be disclosed
- what other information someone would have to get, to be able to identify each of the employees in the records
- available sources of that other information, such as employer websites, employers and other employees, union representatives, industry contacts such as sales representatives, industry associations and publications, and other publicly available sources
- how much effort someone would have to make to get the information
- that an observer with modest knowledge of construction tasks can identify the tasks being performed, and many of the jobs are done at worksites in view of the public
- that a curious person, acting with or without a pretext, could craft questions using the information to discover the employee's name

[35] [2003], B.C.I.P.C.D. No. 41, para. 44. And see also the Commissioner's comments on the mosaic effect in Order 01-01, [2001] B.C.I.P.C.D. No. 1.

[36] Some start dates were for the permanent position, some were for a temporary job the employee had with the employer prior to the program application. All the GJOF application dates were disclosed.

- that without the records, although someone could identify an employer's individual employees using other sources of information, they would not be able to connect the individual to the information in the records
- if an employee named in the records did not in fact take up employment with the employer, the risk that he or she could be identified using the information from the records is reduced but not eliminated, and the Ministry does not know to whom that might apply.

[49] While none of the parties discussed the relative number of employees in a particular position, the total number of employees an employer has, or the size of the community in which the employer is located, I am of the view that these factors are relevant and as such have considered them.[37]

[50] Many of the employers are small and have few employees working in the positions described. That makes it easier to discover names by questioning or observing who is performing a job. Many of the employers are located in smaller communities, where there are fewer businesses in each industry and people are more likely to know who is who. I have given particular consideration to the few cases where the employers have more than 60 employees in total, and to where there are more than 10 employees in the positions applied for.

[51] I conclude that if the information that identifies the employers is disclosed in conjunction with the rest of the withheld information, the sum of that information can reasonably be expected to identify the employees, when used in combination with other readily available information.

[52] I also conclude that if the Ministry withholds the information that identifies the employers it is not reasonable to expect that someone could use the rest of the withheld information in combination with information from other sources to identify the employees.

[53] There are a few instances where I will provide the Ministry a copy of pages showing items of information it must continue to withhold as personal information, but those are exceptions to my conclusion.[38] For example, there are some cases where an employee's particular qualifications, combined with country of origin and previous employers' names must be withheld.

[54] The Ministry must also withhold the requested information in the program applications made by Employers A and B. The applicant knows which program

[37] The Ministry released the employers' answers to "Total # of Employees" and "Number of employees working in this type of position." I cannot disclose information about what communities the employers are in or the total number of employers who applied to the program because that information was provided *in camera.* From information that is disclosed, by my count, approximately 50% of the employers have fewer than 20 employees in total, about 25% have 5 or fewer, and all but 11 have fewer than 60. Over half the positions applied for have 5 or fewer employees in them, over 70% have 10 or fewer.

[38] The pages are 99, 135, 144, 154, 185, 279, 366, 415, 420, 534 and 553 of the records.

applications Employer A made because the "typical offer of employment letter" in Employer A's submission links the letter to that employer's program applications. The employee Employer B applied for through the program has unique qualifications, and the applicant knows Employer B's location. Taking into account information already disclosed, the type and number of positions and number of employees in them, in my view it is reasonable to expect that the withheld information could be used with other available information to find out the employees' names in the applications made by Employers A and B.

[55] Therefore, the information that identifies the employers, the few specific instances of employee information that I will point out to the Ministry and the withheld information in the program applications of Employers A and B is, in the context of these records, personal information of the employees. It is, as the Ministry asserted, information about the employees' employment or occupational history.[39] Under s. 22(3)(d) its disclosure is presumed to be an unreasonable invasion of the employees' personal privacy. The applicant did not attempt to rebut that presumption because it did not seek personal information.

Relevant circumstances

[56] The Ministry said that s. 22(2)(f) applied. In its view, the employees supplied their personal information in confidence, as shown by the contents of the "Information Release Form" they signed.[40] It argued that the employers also supplied the information to the Ministry in confidence. It pointed to a written Ministry policy about confidentiality of program information that was in place at the relevant time, the Ministry's past practice under that policy, the "Authorized Representative Letter" that the employers signed,[41] and its experience that employers have been reluctant to participate in promoting the program.[42] Referring to Order 02-04,[43] the Ministry argued that the employees supplied their information in confidence to the employers, and that when the employers supplied that information to the Ministry, the confidentiality continued for the purposes of s. 22(2)(f). The Ministry said there was no suggestion that s. 22(2)(e) applied in the circumstances.

[57] Employer A argued that it supplied the information in confidence to the Ministry, based on its understanding of the Ministry's policy, the Ministry's past practice, what Ministry personnel told the Field Personnel Coordinator at meetings and Employer A's own personnel policy of keeping such information strictly confidential within the workplace. Employer B stated that release of the information would be "a breach of the confidential relationship under which this information was submitted."[44]

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[39] Initial submission para. 4.93 and 4.94.
[40] The form is at Ministry initial submission Tab C.
[41] The written policy is at Mellor affidavit Exhibit B; the letter is at Ministry initial submission Tab B.
[42] Initial submission, paras. 4.36 and following, and 4.87 and following.
[43] [2002] B.C.I.P.C.D. No. 4, at para. 15.
[44] At p. 1.

[58] The applicant disputed that the employers or the employees supplied the information in confidence, and argued that the terms for information sharing in the "Information Release Form" were so broad that employees could not expect confidentiality. The applicant, while not referring to a particular section, clearly believes that disclosure is desirable for the purpose of subjecting the activities of the Ministry to public scrutiny [s. 22(2)(a)]. [45]

[59] In my view the "Information Release Form" that the employees signed contains language that authorizes considerable but certainly not unfettered sharing of information. The "Authorized Representative Letter" does not assist the Ministry's argument that the employers supplied the employees' personal information in confidence. It is a document that allows a representative, like a lawyer, to deal with the Ministry on the employer's behalf. I do however accept that when the employers supplied the employees' personal information to the Ministry they did so in confidence. That is based on the evidence of the Ministry policy which clearly sets out that program information is received and treated confidentially, the Ministry's evidence that it did in fact treat the information confidentially, and the Field Personnel Coordinator's evidence of his interactions with the Ministry over time—he said the Ministry consistently treated the information confidentially and told the employers it would do so. Taking account of all of these factors, s. 22(2)(f) is a relevant circumstance and on balance it favours refusing access.

[60] I agree with the applicant that being able to scrutinize the Ministry's operation of the program according to its requirements is a factor that favours disclosure. However, the nature and amount of non-personal information that I will order the Ministry to disclose will allow for adequate public scrutiny. None of the other relevant circumstances listed in s. 22(2) is applicable in this case. I find that the presumption raised under s. 22(3) is not rebutted, and disclosing the information that I have determined is personal information of the employees would be an unreasonable invasion of their privacy.

[61] The balance of the withheld information is not personal information, because it is not about an identifiable individual, and s. 22 does not apply to it. I will, however, consider it below under my analysis of the application of s. 21.

[62] **3.3 Third-Party Business Interests**—The Ministry argued that s. 21 required it to withhold some of the information. Section 21 contains a three-part test, all three parts of which must be satisfied before a public body is required to withhold information. The information must be of a specified type, it must have been supplied implicitly or explicitly in confidence and its disclosure must reasonably be expected to result in one of the specified outcomes listed in the section. The relevant parts of s. 21 read as follows:

[45] Reply submission, paras. 5, 12 and 13.

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal…

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or …

[63] I adopt the Commissioner's discussion on the purpose and purview of s. 21 in Order F08-03.[46] Many previous orders have decided that to establish a reasonable expectation of harm, the threshold requires more than speculation or generalization. There must be a confident belief founded on a clear and direct connection between disclosure of the specific information and the harm that is alleged.[47]

[64] The applicant and Employer A did not distinguish between the information the Ministry withheld under each of s. 21 and s. 22.[48] I take from Employer A's submission that it meant to include in its arguments about s. 21 all the information the Ministry withheld, whether the Ministry withheld the information under s. 21 or s. 22. Section 21 is mandatory. I will therefore consider whether the Ministry should have applied it to all the information it withheld.

[65] With respect to the first part of the s. 21 test, the Ministry referred to previous orders where information that related to a commercial enterprise and to the buying and selling of goods and services, qualified as "commercial" information for s. 21, whether or not it was proprietary in nature. It argued that the information in this case is about securing employment services and the services the employers provide and would reveal part of the employers' "commercial strategy." It simply asserted, without argument, that the information was "financial" and "labour relations" information.[49]

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[46] [2008] B.C.I.P.C.D. No. 6.

[47] For example Order 04-06, [2004] B.C.I.P.C.D. No. 6 and Order F05-29, [2005] B.C.I.P.C.D. No. 39.

[48] Employer B's only submission on s. 21 was to adopt the Ministry's position. The substance of Employer B's submission was squarely directed at protecting the privacy of its employee, not harm to its business interests.

[49] Initial submission, paras. 4.31–4.35.

[66] Employer A said the information was about buying and selling labour services which it argued is analogous to information about buying and selling of other services that previous orders have accepted as "commercial information." It argued that the information is "financial" because it is about the price of labour, and that it is "labour relations" because it is about the impact of collective agreements, personnel policies and human resource issues.[50]

[67] With respect to the second part of the s. 21 test, the Ministry and Employer A said the employers supplied the information, and did so confidentially. In support of that they referred to (as noted above under s. 22)

- the Information Release Form that the employees signed
- an Authorized Representative Letter that the employers signed
- a written Ministry policy about confidentiality of program information
- the Ministry's past practice, and
- the Field Personnel Coordinator's experience with that practice and his belief that the information was supplied confidentially.

[68] The applicant said that, except for the employers' names, the information was commercial, financial, labour relations, scientific or technical information of a third party but did not distinguish between those terms. It did not dispute that the employers supplied the information but disagreed that the information was supplied in confidence.

[69] I note that the GJOF answer box headings that the Ministry withheld are simply printed terms on a form and could not be said to be "about" a third party under s. 21. Neither were they "supplied" to the Ministry. Therefore, s. 21 does not apply to them and they must be disclosed.

[70] I need not decide if the remaining information is commercial, financial or labour relations information of or about a third party, or if it was supplied confidentially for the purposes of s. 21, because I find below that the third part of the test is not met.

Similar information would no longer be supplied [s. 21(1)(c)(ii)]

[71] The Ministry argued that if the information were disclosed, employers would no longer participate in the program and would therefore no longer supply information to the program. It said that the labour shortage is harmful to the province's economic development, the program is central to its effort to deal with the labour shortage and it is in the public interest that the employers continue to supply information to the program by participating in it.

[50] Initial submission, paras. 8–18.

[72] The Deputy Ministry and the Director provided background materials and reviewed the predictions for economic growth and the shortage of workers. The Director described the program's contribution to the economy, the numbers of employees nominated in the program, its expected growth and its unique position, as follows.

> Based on estimates of the duration of unfilled job vacancies in British Columbia, and the associated loss of potential economic output, it is estimated that the Program contributed at least $25 million to the provincial economy in the [*sic*] 2006/07 by helping reduce employment vacancies. The cost of operating the Program in that year was $1.1 million. As the Program continues to expand, this net contribution will increase accordingly.[51]
>
> In 2006/07, 1,254 foreign skilled workers were nominated in the Strategic Occupations category of the Program, compared with 721 in 2006/07 [*sic*], and 383 in 2005/06. The Ministry's Service Plan targets for nominations in the Strategic Occupations category are 1,600 in 2007/08 and 2,000 in 2008/09....[52]
>
> …
>
> If the Program was not able to function, or its ability to function was diminished, there is no other existing program that would replace the value lost to the British Columbia economy.[53]

[73] In the Director's opinion, the program, while well structured and useful, is more beneficial to the province and the employee than to the employer. That is because seventy-five percent of the employees who are nominated through the Program are already working in the province on temporary work permits with only 6 to 10 months remaining under those permits. Once they become permanent residents, they are able to work for any employer. As a result, although the employer gains a chance to retain that worker, there is no guarantee it will be able to do so. The Ministry said that even though the employers have some financial incentive to use the program "employers will perceive that that benefit will be outweighed by the harm to them" that would result from disclosure of the information.[54]

[74] The Deputy Minister and the Director predicted significant impairment to the provincial economy through the loss of workers the program brings in if the

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[51] Mellor affidavit, para. 53.
[52] Mellor affidavit, para. 54.
[53] Mellor affidavit, para. 51.
[54] Initial submission, para. 4.59.

employers stopped using it.[55] In their view that would result in significant impairment of the provincial government's ability to manage the economy.[56]

[75] The Ministry said the evidence showed that a "significant percentage" of employers would stop using the program if the information were disclosed.[57] Employer A's Field Personnel Coordinator said that Employer A would stop participating in the program if the Ministry disclosed the information it supplied, including its identity, because it would suffer harms. The Ministry agreed with and brought its own arguments to support Employer A's assertions that it would suffer harms, set out in the discussion of s. 21(1)(c)(i) and (iii) below.

Harms to the employers' business interests under s. 21(1)(c)(i) and (iii)

[76] Employer A and the Ministry argued that the employers who participated in the program will potentially suffer harm to their competitive position, interference with their negotiating position and undue financial loss if the information is disclosed. I summarize Employer A's and the Ministry's arguments as follows:

- The media, the public and unions will accuse them of hiring foreign, unskilled workers at substandard wages. Negative media attention will in general negatively affect their ability to attract workers and business.
- The harm will occur because the public already holds the erroneous view that the employers employ unskilled foreign workers for substandard wages, whereas the reality is that they bring in workers because they cannot find Canadian workers with similar skills,[58] and the Ministry checks that the job offers reflect the market wage in the province and that the employees are qualified.[59]
- Potential customers will not hire the employers to do construction jobs because of fear that the particular employer is not able to maintain a sufficient, skilled labour force.

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[55] Fast affidavit, para. 18. Mellor affidavit, para. 55. However, Ministry reply submission footnote 1 included the following: "Numbers entering through the federal temporary foreign worker program & foreign skilled worker program, and the PNP [the program], by any reasonable estimate of these program's [*sic*] capacities, would only be able to meet a fraction of this [the province's future workforce] need."

[56] In Decision F07-03 [2007] B.C.I.P.C.D. No. 14, the Commissioner refused the Ministry's request to rely on s. 17 for withholding information in the records before me. Section 17 addresses harm to the government's ability to manage the economy. While I accept that the government's ability to manage the economy is in the public interest and thereby related to s. 21(1)(c)(ii) I have kept in mind the Commissioner's restriction on the Ministry in this case.

[57] Initial submission, para. 4.62.

[58] Sashaw affidavit, para. 11.

[59] Mellor affidavit, paras. 6 and 45.

- Existing workers will fear their jobs are in jeopardy because the employer might replace them with cheaper foreign labour, so they will leave and go to other jobs.[60]
- Other employers in other provinces and other parts of the world who are competing for the same limited pool of labour will benefit at these employers' expense.
- The employers' competitiveness within the industry will be compromised because
    - their competitors will learn their recruiting techniques and use those techniques to gain workers they might otherwise have hired
    - their competitors will "poach" the workers they went to considerable time and expense to recruit through the program, and will use the information, also obtained through time and expense, about where such workers can be found[61]
    - if competitors know the wages and benefits offered, they might undercut, resulting in the employer being less competitive with costs, or offer more or some other benefits, resulting in the employer being less competitive because it was not able to hire the worker
    - competitors will learn standards or required qualifications and thereby identify a niche of workers that the employers are attracting.
- There will be increased discord with unions, because they will be more informed, and that will lead to problems such as
    - unions might be better able to organize workers, for example, they could identify the employees and approach them
    - the employers' existing unions may face more competition from competing unions
    - unions will have better information about wages, benefits and standards or required qualifications for types of work and this will disadvantage the employers in bargaining.

[77] In support of these arguments the Ministry brought affidavit evidence of the Director, the Deputy Ministry, and the VRCA and BCCA presidents, and Employer A brought affidavit evidence of its Field Personnel Coordinator. The affiants stated their opinions and beliefs about what harms would occur and why, based on their experience and knowledge of the construction industry. They opined that if employers knew they would be publicly identified as program

[60] Sashaw affidavit, para. 9.
[61] McLachlan affidavit, para. 16.

participants, a significant percentage of them would not participate in the program in future based on the potential for those harms.[62]

[78] The VRCA President gave one specific example. He asked a number of employers if they would participate in a recent media interview he was going to give about the program. He said "[H]owever, none of those companies was willing to be interviewed by the media outlet for fear that they would be portrayed by the public as turning their backs on Canadian workers."[63] One company representative he spoke to did not want to participate in case that caused its existing employees to fear for their employment and look for other work.[64]

[79] The Ministry's Director gave two specific examples. The first was this:

> The Ministry recently considered obtaining testimonials from past employer/applicants for the purpose of promoting the Program, but was unsuccessful in finding any employers who were willing to participate. That unwillingness to participate in that initiative was, I believe, due to a desire on the part of employers to keep their own hiring practices, including even the fact that they used the Program, confidential.[65]

[80] As the second example he submitted four media articles about the use of foreign workers on particular construction projects in the province. In his opinion the articles inaccurately allege that foreign workers are paid sub-standard wages, but he said that such media reports "create a negative image of the practice of hiring foreign workers by the companies concerned."[66]

[81] The applicant's position was that disclosing the information would not result in any harm or interference for the employers, or at least, that if any harm or interference did result it would not be significant. Its argument included these points:

- employers' discomfort, fear of scrutiny of their hiring practices and fear of potential negative public reaction are not valid reasons to deny access to the program information,
- secrecy will not lessen scrutiny or media attention,
- scrutiny and debate about government programs, based on facts, strengthens democracy,
- disclosing the information would dispel public misconceptions about employers hiring foreign workers for below market wages,

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[62] Fast affidavit, para. 17, Mellor affidavit, para. 43, McLachlan affidavit, para. 7, Sashaw affidavit, para. 15.
[63] Sashaw affidavit, para. 8.
[64] Sashaw affidavit, para. 9.
[65] Mellor affidavit, para. 59.
[66] Mellor affidavit, para. 45. The articles are at Exhibit D and are from *CBC News* June 1 2006, CNW Group September 22, 2006, the *Vancouver Sun* September 21 and October 3 2006.

- disclosing the information would allow the applicant, in its own interests and in the public interest, to confirm that the Ministry is ensuring that the job offers are for market wages and the employees are qualified.

[82] The applicant argued that, if the program is of benefit to the province, it ought to be able to withstand scrutiny. It said that the federal government releases similar information from its Temporary Foreign Worker program. It also pointed to provincial laws that require some employers to provide public access to collective agreement wage and benefit information.[67]

[83] In reply the Ministry said the federal program which the applicant referred to is different from the program in this case and subject to a different access to information law. In its view the provincial wage and benefit disclosure laws the applicant referred to are not relevant to the question of whether or not the Ministry applied FIPPA properly.

Analysis

[84] The Ministry argued that it is in the public interest that the program continues to function. That does not translate directly into a public interest in the Ministry continuing to receive similar information or into Ministry reliance on the program as the source of supply for that information.

[85] Moreover, even if it is in the public interest that the Ministry continue to receive information from the program, the evidence does not establish a reasonable expectation that so many employers will quit using the program that the Ministry will no longer receive the information from the program that it needs. The Ministry argued that employers are faced with an acute labour shortage and the program is the Ministry's main avenue to help them find labour. It also argued that the employers' use of the program has increased, it predicts further increases and it wants to promote the program. Employer A's evidence that "[T]he BC PNP is vital in meeting our employment needs" and that its dependence on the program is increasing, supports the Ministry's prediction that program use will increase.[68]

[86] The Ministry's prediction that a significant percentage of employers might not participate as a result of certain information being disclosed is based on

- 100 applications made over 16 months from employers in one of thirteen industries that use one of the two program categories,
- direct evidence from one employer,
- the four media articles, and

[67] Initial submission paras. 15 and 16. The applicant referred to the wage and benefit information that unions and employers report to the BC Collective Agreement Arbitration Bureau.
[68] Field Personnel Coordinator affidavit, para. 6.

- the experience of the Director and the VRCA president that employers would not promote the program.

[87] The Ministry's prediction of damage to the program, and thereby to the economy, is based on the program as a whole, which includes another category about which there is no significant information before me.[69]

[88] That evidence is insufficient and too speculative to meet the requirements of s. 21.

[89] With respect to the other harm arguments in this case I accept that the information about what employers offered for pay and benefits, for performing what duties, and the skills and experience they accepted could be considered information about the employers' recruiting techniques. Other than that, there is no information about recruiting techniques or about the time and expense employers put into finding employees through the program.

[90] I accept that some construction industry employers, such as Employer A and some employers whose views the BCCA and VRCA presidents know, would be uncomfortable with having it known publicly that they bring in foreign labour, through the program or otherwise. I accept that the Director was not able to find employers who were willing to provide testimonials to promote the program. I have kept in mind the Director's assessment that the program is relatively more beneficial to the province and the employee than to the employer.

[91] However, the evidence in my view fails to establish any of the following:

- that a significant portion of construction industry employers do not want it to be publicly known that they employ foreign labour
- except for Employer A, what portion if any of the employers who used the program do not want people to know that they participated in it
- except for Employer A, what portion of the employers who used the program, or employers generally, want their hiring practices kept confidential
- that the media creates a negative image of the practice of hiring foreign workers
- what portion if any of the public, media, unions, existing workers or customers can reasonably be expected to react negatively to an employer hiring foreign labour
- that competing employers and unions have so little other access to information about compensation in the industry and sources of foreign workers that disclosing the withheld information would be the reason they could better their position against employers who used the program

[69] From initial submission, paras. 4.07, 4.12 and Appendix A—there are two main categories in the program—Strategic Occupations and Business. The construction industry is one of 13 industries in the Strategic Occupations category.

- that foreign competitors for labourers could use the information to the detriment of the employers who used the program. [70]

[92] The Ministry and Employer A described all the harms as potential. The Ministry's witnesses made predictions and stated opinions and beliefs about the harms, based in large part on their perceptions of what others would perceive or how they might react.

[93] The media articles do report allegations that particular companies were hiring foreign workers at less than market wages in spite of qualified Canadians being available to do the jobs. Three of the four articles include employers' responses to those allegations. The articles report other information about the acute labour shortage and the need for workers, including foreign workers, what industries employ foreign workers and some information about how many foreign workers are in the province.

[94] Taken as a whole, the evidence that the employers would suffer harm to their competitive position or undue financial loss is speculative. There is no clear and direct connection between disclosing the information and the alleged harm. The evidence does not establish a reasonable expectation that harm would occur, nor that it would occur to the extent of being significant or undue. Nor does the evidence explain how the employers could be harmed if the disclosed information were to have the effect of correcting a public misperception that employers hire foreign workers at substandard wages.

[95] Regarding interference with negotiating position, Employer A argued that if the compensation information is disclosed its management employees and its union will get information that it tries to keep confidential. Employer A's compensation information will not be disclosed because of my conclusions under s. 22. However, as concerns Employer A and the employers generally, I conclude that interference with the employers' negotiating positions could not reasonably be expected to occur even if the information were disclosed, and, even if interference could be reasonably expected, it would not be significant. The applicant brought evidence demonstrating that some wage and benefit information is already publicly available. There is insufficient evidence before me that disclosure of this information, through this process, would be the cause of significant interference under s. 21. Nor is there any evidence to explain how knowledge of the withheld information would result in significant interference with unspecified future negotiations.[71]

[96] Common to all of the arguments made by the Ministry and Employer A under s. 21 is that employers will face harm if they are individually identified as

[70] This applies to competing private sector employers and other governments, such as Alberta, which the Ministry says is a significant competitor.

[71] In Order F07-15, [2007] B.C.I.P.C.D. No. 21, at para. 43, the Commissioner acknowledged that disclosing existing contract pricing and related terms where the contractor had a unionized workforce did provide the union information, but in that case did not result in unfair or undue financial loss or gain.

program participants. Those arguments fail because, in the circumstances of this access request, I require the Ministry to continue to withhold under s. 22 the information that identifies the employers. However, with or without the information being tied to a particular employer, I conclude that the evidence does not show how any harm to competitive position or interference with negotiating position or undue financial loss can reasonably be expected to result for any employer, for the reasons set out above.

4.0 CONCLUSION

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

[98] Each of my references to "information" means the specified withheld information that remains in issue in this inquiry.

1. I require the Ministry to refuse access under s. 22 to the employers' names, the type of worksite(s)/workplaces, information about employer programs and services and information about subsidiaries.

2. I require the Ministry to refuse access under s. 22 to the all information it withheld in the records submitted to the program by Employers A and B.

3. I require the Ministry to refuse access under s. 22 to specific items of information about the employees that are found in 11 pages of the records that are referred to in footnote 38 and that I will mark using a highlighter pen and copy to the Ministry with this order.

4. I require the Ministry to give the applicant access to any other information it withheld under ss. 21 and 22.

5. Where I have required the Ministry to give access it is to provide that access within 30 days of the date of this order, as FIPPA defines "day", that is, on or before February 3, 2009 and, concurrently, to provide me a copy of its cover letter to the applicant together with a copy of the records showing the information it has released that it previously withheld.

December 18, 2008

ORIGINAL SIGNED BY

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Gale L. Prestash
Adjudicator