



Order F21-42

## ARCHITECTURAL INSTITUTE OF BRITISH COLUMBIA

Celia Francis  
Adjudicator

September 7, 2021

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**Summary:** An applicant requested access to the record of members of the Architectural Institute of British Columbia (AIBC) who voted in its 2019 council election, together with information showing for whom the members voted. The AIBC denied access to the information under s. 22(1) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator confirmed the AIBC's decision to refuse access to the information.

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

### INTRODUCTION

[1] This order concerns a request for access to voting records in the custody of the Architectural Institute of British Columbia (AIBC). The applicant, a member of the AIBC, requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to a record of all persons who cast votes in the 2019 council election, together with the names of those for whom they had voted. The AIBC responded by refusing access to the records in their entirety under s. 22(1) of FIPPA (unreasonable invasion of third-party privacy).

[2] The applicant requested a review of the AIBC's decision by the Office of the Information and Privacy Commissioner (OIPC). Mediation by the OIPC did not resolve the matter and it proceeded to inquiry. The OIPC received submissions from the AIBC and the applicant.

### ISSUE

[3] The issue to be decided in this inquiry is whether s. 22(1) of FIPPA requires the AIBC to withhold the information in dispute.

[4] Under s. 57(2) of FIPPA, the applicant has the burden of proving that disclosure of the information in dispute would not be an unreasonable invasion of third-party privacy.

## **DISCUSSION**

### ***Information in dispute***

[5] Part of the information in dispute is a 17-page list of the names of eligible members who cast a vote in the 2019 AIBC council election.<sup>1</sup> The AIBC said that this record does not indicate how these members cast their ballots. The AIBC said it does not obtain such information from its third-party electronic voting service provider,<sup>2</sup> although “[s]uch information could presumably be sought, through the legal process/court direction identified in Section 11 of the *Architects Act*, in relation to an election dispute.”<sup>3</sup>

[6] The AIBC did not explicitly state if a record related to the second part of the applicant’s request exists. This is also not clear from the submissions. I have, however, dealt with this matter on the premise that such a record either exists or existed (or could be produced) at the time of the request. I have decided I do not need to see it, though, as the parties’ submissions suffice to give me an understanding of its nature and contents.

[7] Thus, the information in dispute is the information that the AIBC withheld under s. 22(1), that is, the 17-page list of eligible members who cast ballots in the 2019 AIBC council election and information showing the names of those for whom they voted.

### ***Unreasonable invasion of third-party personal privacy – s. 22(1)***

[8] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03, where the adjudicator said this:

Numerous orders have considered the approach to s. 22 of FIPPA, which states that a “public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.” This section only applies to “personal information” as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of

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<sup>1</sup> The AIBC attached a copy of the list to its initial submission.

<sup>2</sup> AIBC’s initial submission, para. 7.

<sup>3</sup> AIBC’s August 1, 2019 letter to the OIPC enclosing the list of voters in its 2019 council election. Section 11 of the *Architects Act* allows a person 30 days to dispute a council election. Article 2.10 of the AIBC’s rules states “ ... All Voting Data related to an electronic vote for council election must be deleted from service provider and institute servers or other storage media within 48 hours of the statutory election dispute period lapsing or longer as otherwise may be required by law.”

personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.<sup>4</sup>

*Is it personal information?*

[9] FIPPA defines “personal information” as recorded information about an identifiable individual, other than contact information.<sup>5</sup>

[10] The AIBC argued that the information in dispute is personal information.<sup>6</sup> The applicant said that the votes of AIBC members are not personal information as, in his view, they are not voting in their personal capacity but “as a functionary or officer ... under certain obligations to serve the public interest”.<sup>7</sup>

[11] The information in dispute is about named individuals and is not contact information. It indicates which AIBC members voted and for whom they voted. The AIBC's submission indicates, and I accept, that its members do not have to cast a vote but make a personal choice to do so. I disagree with the applicant's characterization of the information in dispute. I find that it is personal information.

*Does s. 22(4) apply?*

[12] Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy.

[13] The AIBC said that s. 22(4) does not apply.<sup>8</sup> The applicant said that, since the information in dispute is not personal information, “an exception is not required”.<sup>9</sup>

[14] I agree with the AIBC that there is no basis for finding that s. 22(4) applies here. The personal information at issue does not, for example, relate to any third party's position, functions or remuneration as an officer, employee or member of a public body (s. 22(4)(e)).

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<sup>4</sup> Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.

<sup>5</sup> “Contact information” is defined in Schedule 1 of FIPPA 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.”

<sup>6</sup> AIBC's initial submission, para. 8.

<sup>7</sup> Applicant's response, page 1.

<sup>8</sup> AIBC's initial submission, para. 9.

<sup>9</sup> Applicant's response, page 3.

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

[15] Section 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[16] The AIBC said that the information in dispute does not fall under any of the s. 22(3) categories.<sup>10</sup> The applicant said he had no comment on this issue.<sup>11</sup>

[17] I agree with the AIBC that the information in dispute does not fall squarely into any of the s. 22(3) categories.

*Relevant circumstances – s. 22(2)*

[18] Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.

[19] The parties raised the following s. 22(2) circumstances:

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

(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,

...

[20] **Public scrutiny – s. 22(2)(a):** The applicant's submission appears to suggest that disclosure of the information in dispute is desirable for subjecting the AIBC to public scrutiny:

Members vote according to a collective duty to govern the institute in the public interest. A Member's participation in governance is fiduciary and therefore such actions must be disclosed.<sup>12</sup>

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<sup>10</sup> AIBC's initial submission, para. 10.

<sup>11</sup> Applicant's response, page 3.

<sup>12</sup> Applicant's response, page 2.

[21] He also suggested that, in the absence of transparency, “these elections are vulnerable to covert interference by special interests.”<sup>13</sup> He did not explain what these “special interests” are nor how they might interfere covertly.

[22] The AIBC acknowledged that it has a duty to protect the public and that its council members have a fiduciary duty to the AIBC. However, it said, its individual members do not. It added that its members are free to choose whether and how to vote.<sup>14</sup>

[23] I accept the AIBC’s submissions on this point. There is also no evidence of any untoward activity in AIBC council elections that might raise issues respecting the AIBC’s accountability. The applicant has not persuaded me that disclosure of information showing whether and how AIBC’s members voted in council elections is desirable for subjecting the AIBC to public scrutiny. I find that s. 22(2)(a) does not apply here.

[24] **Supplied in confidence – s. 22(2)(f):** The AIBC said that s. 22(2)(f) applies in this case, as the council election is conducted by means of what it called a “secret ballot”, under the terms of its bylaws. In the AIBC’s submission, its members have an expectation that their choice to vote and their choice of for whom they vote are private and supplied in confidence.<sup>15</sup>

[25] The applicant disputed this argument, saying the bylaws are not relevant. He argued that there are no statutory requirements that council elections be conducted by secret ballot. In his view, the fact that the AIBC has established “voting procedures intended to reflect an expectation that votes are cast in confidence, does not establish that such vote is cast in confidence, does not establish that such vote is legitimately kept secret”.<sup>16</sup>

[26] The *Architects Act* allows the AIBC to make bylaws regarding the nomination and election of its council (s. 24(2)(b)). Its bylaws require it to establish rules for the conduct of its council elections (s. 22). Under s. 2.0 of its rules, in turn, the AIBC must do the following: ensure confidentiality of its council elections; ensure the security and confidentiality of its voting data; and address concerns related to breach of secrecy.

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<sup>13</sup> Applicant’s response, page 6.

<sup>14</sup> AIBC’s reply paras. 2-4. The AIBC also argued that there is no public interest in disclosure under s. 25 of FIPPA. AIBC’s initial submission, para. 15. The applicant argued that s. 25 is not required as the information in dispute is not personal information; (applicant’s response, page 5). Section 25, known as the public interest override, requires disclosure of information where it is clearly in the public interest. It was not listed as an issue in the notice for this inquiry. In any case, AIBC’s argument on this point appears to relate more to s. 22(2)(a).

<sup>15</sup> AIBC’s initial submission, paras. 11-14; AIBC’s reply, para. 3.

<sup>16</sup> Applicant’s response, pages 3 and 6.

[27] I am satisfied from these provisions that the AIBC is obliged to, and does, conduct its council elections in a secure and confidential manner. I also accept the AIBC's submission that its council elections are not conducted in public (e.g., by a show of hands) but are done electronically by a secret ballot, and that its members have an expectation of confidentiality in voting.<sup>17</sup>

[28] It follows that I do not agree with the applicant's arguments on this point. I find that s. 22(2)(f) applies here, favouring non-disclosure of the information in dispute.

[29] **Other factor:** The AIBC noted that, under the *Architects Act*, a register of its registrants is publicly available. It also said that s. 11 of this Act provides a mechanism for members to dispute the results of council elections and that this might lead to a court order for disclosure of voters' names and for whom they voted. The AIBC said it told the applicant of his right to pursue this option in May 2019 but he did not do so.<sup>18</sup> The applicant disagreed generally that this argument was relevant.<sup>19</sup>

[30] I acknowledge the applicant could have disputed the AIBC council election and might thereby have obtained the information he wants. I note, however, that s. 2(2) of FIPPA states that FIPPA does not replace other procedures for access to information. In my view, therefore, this factor is not relevant here.

*Conclusion on s. 22(1)*

[31] I found above that the information in dispute is personal information and that ss. 22(3) and 22(4) do not apply. I also found that s. 22(2)(a) does not apply but that s. 22(2)(f) does apply, favouring withholding the information in dispute.

[32] The applicant has not met his burden of proof in this case. I find that disclosure of the information in dispute would be an unreasonable invasion of third-party privacy. I find that s. 22(1) applies to the information in dispute.

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<sup>17</sup> AIBC's initial submission, para. 12.

<sup>18</sup> AIBC's initial submission, paras. 16-25.

<sup>19</sup> Applicant's response, page 4.

**CONCLUSION**

[33] For the reasons given above, under s. 58 of FIPPA, I confirm that the AIBC is required to withhold the information in dispute under s. 22(1).

September 7, 2021

**ORIGINAL SIGNED BY**

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Celia Francis, Adjudicator

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