OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F22-38

MINISTRY OF HEALTH

D. Hans Hwang
Adjudicator

August 17, 2022

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Summary:
An applicant requested the Ministry of Health (Ministry) provide access to information relating to hearing panel members of an audit established under the *Medicare Protection Act*. In response, the Ministry refused access under s. 22 (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that s. 22(1) applied to most of the information in dispute and confirmed the Ministry's s. 22 decision and ordered the Ministry to disclose the information it was not authorized to refuse to disclose under s. 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2), 22(2)(a), 22(2)(c), 22(2)(e), 22(2)(f), 22(2)(h), 22(4), 22(4)(c), 22(4)(e), 22(4)(f), 22(3)(d), 22(3)(g), 22(3)(h), 22(5), 25(1), 56, and 74 and Schedule 1.

INTRODUCTION

[1] An individual (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Health (Ministry), Legal Service Branch, and the Ministry of Attorney General for access to records relating to hearing panels under the *Medicare Protection Act*.[1] The access request relates to declaration of any conflicts of interest addressed by two panel members of an audit hearing the Ministry and the Medical Services Commission conducted regarding the applicant's MSP billings.[2] I will refer to these individuals as panel members 1 and 2.

[1] R.S.B.C. 1996, c. 286.
[2] Access request document, November 16, 2019.

[2] In response, the Ministry withheld the records in their entirety under ss. 14 (solicitor-client privilege) and 22 (disclosure harmful to personal privacy).[3]

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's ss. 14 and 22 decision. Mediation did not resolve the matter and the applicant requested that it procced to an inquiry. Before the notice of inquiry was issued, the Ministry said it no longer relies on s. 14, so s. 14 is not an issue in this inquiry.[4]

[4] The OIPC invited two third parties to participate in the inquiry as appropriate persons under s. 54(b) of FIPPA. However, during the inquiry they confirmed that they did not want to participate in the inquiry or make submissions and they were removed as parties.

PRELIMINARY MATTERS

Applicant's objection to in camera material

[5] Prior to filing its submissions in this inquiry, the Ministry requested permission from the OIPC to submit parts of its evidence and submissions *in camera* (i.e., material that a party submits for the OIPC to see, but not the opposing party). The OIPC considered the request and granted the Ministry permission to submit some of its evidence and submissions *in camera* under s. 56.

[6] The applicant raises concerns with the Ministry's *in camera* material. He says if a party provides information *in camera* that removes another party's ability to form a proper submission, the *in camera* material should be provided to him. He also says once he receives the *in camera* material, he has to have an opportunity to provide a further submission. [5]

[7] I decline to reconsider the *in camera* decision. I note that the courts have expressly recognized the commissioner's power under s. 56(4)(b) to accept inquiry material *in camera*.[6] The OIPC decides *in camera* requests in accordance with the principles of procedural fairness and aims to strike an appropriate

[3] Access request document, March 12, 2020.
[4] Investigator's Draft Fact Report at para 7.
[5] Applicant's submission at p. 27.
[6] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, 1999 CanLII 6922 (BC SC) at paras. 90-92.

balance between a public body's ability to fully argue its case and an opposing party's right to understand that case and respond to it.[7] I find that the Adjudicator who reviewed the application for the *in camera* submission took that approach in this case.

Issues and allegations outside the scope of this inquiry

[8] In his submission, the applicant raises various allegations. Many of the allegations are about the merits and legitimacy of an audit and hearing the Ministry and the Medical Services Commission conducted regarding the applicant's MSP billings (audit).[8]

[9] In reply, the Ministry submits that the applicant's allegations are "unfounded, inflammatory, unwarranted, unsubstantiated, and, for the purposes of adjudicating the matters at issue in this inquiry, should be disregarded."[9]

[10] I have reviewed the applicant's submissions and can see that he strongly objects to various aspects of the audit and hearing process and the Ministry's conduct in general. In this inquiry, however, my task is to dispose of the issues stated in the OIPC Investigator's Fact Report (fact report)[10] and the Notice of Inquiry (notice)[11]. Those issues are limited to whether certain FIPPA exceptions to disclosure apply to the information in dispute. In my view, the issues the applicant raises as to the audit go beyond those stated in the fact report and the notice. In any case, I do not have jurisdiction over the applicant's various complaints regarding the audit process.[12] Therefore, I decline to consider those issues.

Section 74

[11] In his submission, the applicant alleges that the Ministry and the Ministry of Attorney General's Legal Services Branch breached s. 74 of FIPPA.[13] (Section 74 was recently repealed and replaced by s. 65.2, which contains the same offence provision, although the wording differs somewhat). Section 74 said that it

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[7] See the OIPC's *Instructions for Written Inquiries*, available online: https://www.oipc.bc.ca/guidance-documents/1744.
[8] Applicant's submission at pp. 16-19.
[9] Ministry's reply submission at para. 4.
[10] Investigator's Draft Fact Report at para 8.
[11] Notice of Written Inquiry, April 21, 2022.
[12] *White v. The Roxy Cabaret Ltd.*, 2011 BCSC 374 at paras. 40-41.
[13] Applicant's submission at p. 54.

is an offence to willfully make a false statement, mislead, attempt to mislead or obstruct the commissioner or another person in the performance of the duties, powers or functions of the commissioner under FIPPA. If the commissioner believes that an offence has been committed, the commissioner may refer the matter to the Attorney General. I do not see this is the case here. I find no evidence to suggest that s. 74 (now s. 65.2) is engaged.[14]

Section 25

[12] In his inquiry submission, the applicant raises issues not set out in the fact report and notice. Specifically, the applicant raises concerns about s. 25.[15] Section 25 imposes a duty on a public body to disclose information when it is in the public interest to do so.

[13] As described in the notice received by both parties, the fact report sets out the issues for the inquiry.[16] The fact report expressly says that s. 25 is not at issue in this inquiry and the notice of inquiry does not list s. 25.The notice of inquiry also clearly states that parties may not add new issues into the inquiry without the OIPC's prior consent.[17] Previous orders have said that if a party wants to add a new inquiry issue, it must request and receive permission from the OIPC to do so.[18] To allow otherwise would undermine the effectiveness of the mediation process which exists, in part, to assist the parties in identifying, defining and crystallizing the issues prior to inquiry.[19]

[14] The applicant did not request permission to add s. 25 or point to any exceptional circumstances that would justify doing so at this stage. Therefore, I will not consider s. 25.

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[14] I also do not have jurisdiction to address s. 74 of FIPPA. The Attorney General prosecutes offences under that section and the courts decide those matters: Order F21-04, 2021 BCIPC 4 (CanLII) at para. 7. Should the applicant wants, he can pursue it through the OIPC complaint process, which is a different procedure than this inquiry.
[15] Applicant's submission at pp. 2-3.
[16] Investigator's Draft Fact Report.
[17] Notice of Written Inquiry, April 21, 2022.
[18] For example, see Order F12-07, 2012 BCIPC 10 at para. 6; Order F10-27, 2010 BCIPC 55 at para. 10; Decision F07-03, 2007 CanLII 30393 (BC IPC) at paras. 6-11; and Decision F08-02, 2008 CanLII 1647 (BC IPC).
[19] Order F15-15, 2015 BCIPC 16 at para. 10; Decision F08-02, 2008 CanLII 1647 (BC IPC) at paras. 28-30.

Applicant's request to make a further submission

[15] After the submission phase of this inquiry was closed, the applicant requested to make a further submission in response to the Ministry's reply submission. I have reviewed both parties' positions and decided not to allow the applicant to make such a further submission.[20]

ISSUE AND BURDEN OF PROOF

[16] At this inquiry, I must decide if the Ministry is required to withhold the information in dispute under s. 22(1) of FIPPA.

[17] Section 57(2) of FIPPA places the burden of proof on the applicant to prove that disclosure of any personal information in the records would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).[21] The applicant asserts that the Ministry and the third parties have to prove the applicant has no right of access.[22] This is incorrect. The burden of proof is clearly set by s. 57(2) and I do not find any exceptional circumstances to justify reversing it.

BACKGROUND

[18] The Ministry is responsible for health care services in British Columbia. As part of this responsibility, the Ministry established the Medical Services Plan (MSP). MSP is a public health insurance program under which enrolled practitioners provide services to eligible beneficiaries and can bill the government directly for those services.[23]

[19] The Medical Services Commission (Commission) manages MSP on behalf of the government of British Columbia in accordance with the *Medicare Protection Act*[24] and related regulations. The Commission has the legislated authority to audit a practitioner's MSP billings. The Commission's administrative operations are supported by staff in the Ministry.

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[20] Adjudicator's letter, July 11, 2022.
[21] FIPPA, s. 57(2). However, the Ministry has the initial burden to show that the information it is withholding under s. 22(1) is personal information: Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.
[22] Applicant's submission at p. 44.
[23] The information in this background section is based on the evidence, which I accept, in Affidavit #1 of the Ministry's Executive Director of the Audit and Investigations at paras. 4-9 and 15-17.
[24] *Medicare Protection Act*, R.S.B.C. 1996, c. 286.

[20] The Commission conducts audits through the Ministry's Billing Integrity Program and the Commission's committees, including the Audit and Inspection Committee. The Billing Integrity Program is part of the Ministry and provides audit services to MSP and the Commission. The Audit and Inspection Committee receives and considers recommendations from the Billing Integrity Program about whether a physician should be audited. The Committee decides whether an audit is appropriate in the circumstances.

[21] The Billing Integrity Program administers the Heath Care Practitioners Special Committee for Audit Hearings which conducts hearings to decide whether health care practitioner claims are appropriately billed to MSP. For the audit hearings, the hearing panels consist of one government representative, one beneficiary representative, and one to three professional members to hear the matter, review evidence, deliberate and make a decision.[25]

[22] Before an audit hearing is undertaken, the Commission's hearing coordinator determines the availability of the hearing panel members and confirms that they are free from any possible conflicts of interest.

[23] The applicant was a physician enrolled with MSP. In 2014, the Billing Integrity Program recommended to the Audit and Inspection Committee that the applicant be audited. In 2017, a team from the Billing Integrity Program audited the applicant's billings. The team produced an audit report in 2018, concluding that the applicant made significant billing errors (the applicant disputes this).[26]

[24] In late 2018, the Commission commenced proceedings against the applicant under the *Medicare Protection Act* seeking, among other things, to recover funds. A hearing commenced in 2019. During the course of the hearing, the applicant made claims of conflict of interest, bias or lack of independence against the hearing panel members. The panel considered the matter and ruled that there was no actual, apparent or perceived conflict of interest between the applicant and the panel members. The hearing resumed, and in March 2021 the hearing panel ordered that the applicant pay back hundreds of thousand of dollars and that he be de-enrolled from MSP for at least three years.[27]

[25] Affidavit #1 of the Ministry's Executive Director of the Audit and Investigations at paras. 9-10.
[26] Affidavit #1 of the Ministry's Executive Director of the Audit and Investigations at paras. 18-19.
[27] Affidavit #1 of the Ministry's Executive Director of the Audit and Investigations at paras. 20-22.

[25] In late 2019, the applicant made the FIPPA access request at issue in this inquiry. He said:

> I request the following information:
>
> > - CABRO [the Crown Agencies and Board Resourcing Office] took applications of appointment from both [panel member 1] of Richmond, BC, and [panel member 2] of Victoria, BC.
> >
> > - relating to this same issue, I duly understand that both [panel member 1 and 2] above were appointed in September, 2019 to a Hearing Panel through the Billing Integrity program or its hearing panel subsidiary. I wish to know whether either candidate declared any conflicts of interest to the Ministry of Health at any level and the Ministry of the Attorney General at any level including the Legal Services Branch in regard to the Hearing Panel.[28]

[26] In May 2021, the applicant appealed the Commission's order but he did so outside the limitation period prescribed in the *Medicare Protection Act*. The Commission applied for an order from the British Columbia Supreme Court striking out and dismissing the applicant's appeal. The Court struck the applicant's appeal in March 2022.[29]

RECORDS IN DISPUTE

[27] There are four pages of records in dispute before me. Pages 1-2 are an email that panel member 2 sent to the hearing coordinator. Pages 3-4 are an email that panel member 1 sent to the hearing coordinator.[30]

SECTION 22(1) – THIRD PARTY PERSONAL PRIVACY

[28] The Ministry is withholding the records in their entirety under s. 22(1). That section 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.

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[28] Access request document, November 16, 2019.
[29] Ministry's reply submission at para. 40.
[30] The Ministry's initial submissions at para. 13 disclose that panel members 1 and 2 are the people who sent the emails.

[29] The analytical approach to s. 22 is well established[31], which I apply below.

Is the disputed information "personal information"?

[30] Section 22(1) only applies to personal information, so the first step is to determine whether the disputed information is personal information.

[31] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information".[32] Information is "about an identifiable individual" when it is "reasonably capable of identifying an individual, either alone or when combined with other available sources of information."[33] Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."

[32] The Ministry submits that the disputed information is personal information since it consists of identifiable information about the third parties such as employment history, personal activities, and opinions.[34] The applicant does not dispute that the information in dispute is personal information.[35]

[33] In my view, some of the disputed information is not personal information because it is not about an identifiable individual, specifically dates and times of the emails.

[34] I also find the hearing coordinator's email address and panel member 2's email address and signature block on pages 1-2 of the records are contact information. Given the context, I conclude that information is provided to enable the hearing coordinator and panel member 2 to contact each other for business purposes

[35] I also think that the hearing coordinator's email address and panel member 1's email address in the "to" and "from" lines on page 3 are also contact

[31] See, for example, Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58.
[32] Schedule 1 of FIPPA for the definitions of personal information and contact information.
[33] Order F19-13, 2019 BCIPC 15 (CanLII) at para. 16 citing Order F18-11, 2018 BCIPC 14 (CanLII) at para. 32.
[34] Ministry's initial submission at para. 55.
[35] Applicant's submission at pp. 43-44.

information. That information is clearly provided to enable the hearing coordinator and panel member 1 to contact each other for business purposes.

[36] I find that the rest of the disputed information is the personal information of panel members 1 and 2 and other third parties. Some of panel member 2's personal information is also simultaneously the applicant's personal information because it is about both of them.

Not an unreasonable invasion of privacy – s. 22(4)

[37] The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If so, then its disclosure is deemed not to be an unreasonable invasion of a third party's personal privacy.

[38] The Ministry submits that none of the exceptions in s. 22(4) apply.[36] The applicant says that ss. 22(4)(c), (e), and (f) apply.

> Enactment of British Columbia or Canada authorizes the disclosure – s. 22(4)(c)

[39] Section 22(4)(c) states that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if "an enactment of British Columbia or Canada authorizes the disclosure".

[40] The applicant's submission about this exception is as follows:

> It is also held that s.22(4), disclosure is not unreasonable if, s.22(4)(c), it is required to be released under an enactment of law or government binding agreements. The latter requirement is clearly met in that both the Medicare Protection Act and Physician Master Agreement mandate full and relevant disclosure. That [panel members 1 and 2] portray their roles as members of a putative quasi-judicial hearing which has a high burden for propriety, any such conflicts are equally inherent to be disclosed as per s. 22(4)(c).[37]

[41] The Ministry says that s. 22(4)(c) does not apply to situations where an enactment of law or the rules of administrative fairness provide a person with a right of access to records at the material time for the purpose of participating in

[36] Ministry's initial submission at para. 60.
[37] Applicant's submission at p. 44.

proceedings under another enactment.[38] The requirement to provide information to the applicant during proceedings under the *Medicare Protection Act* has already been discharged, the Ministry says, and now it is only the requirements of FIPPA that apply to the applicant's access request.

[42] I have reviewed the *Medical Protection Act* the applicant relied on. I am unable to identify any provision that explicitly authorizes the disclosure of the information in dispute in this inquiry to the applicant. While there is a provision permitting disclosure of "prescribed information" to a practitioner subject to an audit, the applicant did not demonstrate that the information at issue meets the criteria of prescribed information. It also is clear from *Medical Protection Act* that such disclosure occurs as part of a process authorized under that statute, which means audits. It does not explicitly permit disclosure generally, such as in response to a FIPPA request. Further, I am not persuaded by the applicant's suggestion that what the Physician Master Agreement says about document disclosure requirements for Commission hearings engages s. 22(4)(c) and overrides s. 22(1). Therefore, I conclude s. 22(4)(c) does not apply.

> Positions, functions and remuneration of an officer, employee or member of a public body – s. 22(4)(e)

[43] Section 22(4)(e) states that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if "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".

[44] The applicant's submission about this exception is as follows:

> As per s.22(4)(e), "the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body". The contracts and payments firmly establish [panel member 1 and 2] as Ministry of Health employees. The information is certainly about their positions and functions. This favours release.[39]

[45] The Ministry replies that the information in dispute is about a declaration of conflicts of interest and it is not about an individual's position and function as a public body employee. The Ministry says, "A declaration as to whether a conflict

[38] Ministry's reply submission at paras. 32-34.
[39] Applicant's submission at p. 45.

of interest exists is not objective factual information about what was done or said as part of a job, instead it is akin to a qualitative assessment or evaluation which is explicitly not covered by s. 22(4)(e) of *FIPPA."*.[40]

[46] Past orders establish that s. 22(4)(e) applies 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."[41] I am not persuaded by what the applicant says that the information in dispute is that type of information about panel members 1 and 2. Instead, I find it is information about *how* they performed their duties (i.e., whether they were in conflict of interest while carrying out their duties). This is not the type of information that past OIPC orders have found s. 22(4)(e) applies to.[42]

> Financial and other details of a contract to supply goods or services to a public body – s. 22(4)(f)

[47] Section 22(4)(f) states that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if "the disclosure reveals financial and other details of a contract to supply goods or services to a public body".

[48] The applicant argues "declarations and dispositions of conflict statement" are other details of a contract.[43] His submission about this exception is as follows:

> In addition, s.22(4)(f), disclosure is also not unreasonable if it relates to the financial details of a contract to supply services to a public body. I highlight the latter word since it directly implies that the information released is intended to be detailed as required not pointedly generic or summarized.[44]

[49] In its reply, the Ministry submits s. 22(4)(f) does not apply because declarations of conflicts of interest have nothing to do with the financial details of a contract.[45]

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[40] Ministry's reply submission at para. 35.
[41] Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 40. See also Order 02-57, 2002 CanLII 42494 (BC IPC) at para. 36; Order F10-21, 2010 BCIPC 32 (CanLII) at paras. 22-24.
[42] For example, Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 40; Order F18-31, 2018 BCIPC 34 at para 77; Order F22-
[43] Applicant's submission at p. 45.
[44] Applicant's submission at p. 44.
[45] Ministry's reply submission at para. 36.

[50] Reviewing the records before me, I do not find any of the information in dispute reveals financial and other details of a contract to supply services to the Ministry. I conclude that s. 22(4)(f) does not apply.

[51] The parties did not raise any of the other circumstances listed in s. 22(4), and I am satisfied that none apply.

Presumptions of unreasonable invasion of privacy – s. 22(3)

[52] The third step in the s. 22 analysis is to determine whether s. 22(3) applies to the personal information. If so, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[53] The Ministry submits that ss. 22(3)(d), (g), and (h) apply to all of the information it is refusing to disclose under s. 22. While the applicant does not specifically address s. 22(3), I have reviewed his submission and identified the relevant arguments to consider in my analysis.

Employment history – s. 22(3)(d)

[54] Section 22(3)(d) states that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history. Past orders have said that descriptive information about a third party's behaviour or actions in the course of a complaint investigation or disciplinary matter is information that relates to that third party's employment history.[46]

[55] The Ministry withheld the personal information saying that the context of the information is akin to a complaint investigation or disciplinary matter. It also argues that disclosing the information at issue would reveal the employment roles outside of their contracted employment to the Ministry.[47] The applicant submits that s. 22(3)(d) does not apply because employment history of the third parties is publicly posted and information about their work history has been provided.[48]

[46] Order F22-10, 2022 BCIPC 10 at para. 96; Order F20-13, 2020 BCIPC 15 at para. 52; Order 01-53, 2001 CanLII 21607 at paras. 32-33.
[47] Ministry's initial submission at paras 75-77.
[48] Applicant's submission at p. 26.

[56] I am satisfied that s. 22(3)(d) applies to the personal information about panel members 1 and 2. The Ministry's evidence satisfactorily demonstrates that the panel members provided this information because the hearing coordinator was looking into the applicant's allegations that they were biased, had engaged in misconduct and had conflicts of interest. Therefore, I conclude this information qualifies as the panel members' employment history under s. 22(3)(d).

Personal recommendations or evaluations about a third party – s. 23(3)(g)

[57] Section 22(3)(g) applies to personal information that consists of personal recommendations or evaluations, character references or personnel evaluations about a third party.

[58] Previous orders have stated that s. 22(3)(g) applies to an investigator's evaluative statements of a third party's performance in the workplace.[49] However, factual statements and evidence relating to allegations against a third party, including the allegations themselves, are not the kind of evaluative material covered by s. 22(3)(g).[50]

[59] The Ministry submits that there is information in panel member 1's email which contains what a third party had to say about panel member 1's conduct. The Ministry says "the circumstances in which [third party's] comments arose are akin to those of the investigation of a complaint or disciplinary investigation and thus, they fall within s. 22(3)(g)."[51]

[60] I find that s. 22(3)(g) applies to some of the information on pages 3-4 of the records. That is because it is information about how panel member 1's actions were evaluated and assessed in a work context. Disclosing that information is presumed to be an unreasonable invasion of panel member 1's personal privacy under s. 22(3)(g).

Disclosure would reveal the identity of a third party – s. 23(3)(h)

[61] Section 22(3)(h) says that disclosure is presumed to be an unreasonable invasion of third-party personal privacy if it could reasonably be expected to

[49] Order 01-07, 2001 CanLII 21561 at para. 21; Order F05-30, 2005 CanLII 32547 (BC IPC) at paras. 41-42; Order F14-10, 2014 BCIPC 12 (CanLII) at para. 19; Order F16-12, 2016 BCIPC 14 at para. 28.
[50] Order 01-53, 2001 CanLII 21607 (BCIPC) at paras. 44-45.
[51] Ministry's initial submission at para. 79.

reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party. The purpose of s. 22(3)(h) is to protect the identity of a third party who has provided evaluative or similar material, in confidence, about an individual. It has generally been found to apply in the context of a formal workplace investigation or in human resources matters.[52]

[62] The Ministry submits that disclosing the information at issue is presumed to be an unreasonable invasion of third-party privacy because it relates to the contents of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by a third party in confidence under s. 22(3)(h).[53] The applicant does not make specific submissions about application of s. 22(3)(h). I understand from the general tenor of the applicant's submission that he claims that the third parties consented to the disclosure of personal information.[54]

[63] I found above that s. 22(3)(g) applies to the evaluation of panel member 1 on pages 3-4. However, there is no information that reveals the identity of the individual(s) who actually evaluated panel member 1's actions. All that is revealed is the identity of the person who *relayed* the evaluation, in the sense of being the messenger. It is clear based on what the person delivering the message says, that they did not personally do the evaluation. Therefore, I am not persuaded that disclosing the evaluation information that I find s. 22(3)(g) applies to on pages 3-4 would reveal the identity of the individual(s) who provided the evaluation. For that reason, I find that the s. 22(3)(h) presumption does not apply.

All relevant circumstances – s. 22(2)

[64] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). It is at this step that the s. 22(3)(d) and (g) presumptions may be rebutted after considering the relevant circumstances.

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[52] Corporations and companies do not have personal privacy rights under s. 22 of FIPPA: Order F10-08, 2010 BCIPC 12 at para. 33 and Order 01-53, 2001 CanLII 21607 (BCIPC) at para. 47.
[53] Ministry's initial submission at paras. 80-82.
[54] Applicant's submission at p. 27.

[65] The Ministry submits that ss. 22(2)(a), (e), (f), and (h) are relevant circumstances.[55] It also says the applicant's pre-existing knowledge and the sensitivity of the personal information are relevant circumstances to consider. The applicant submits that ss. 22(2)(a) and (c) apply.[56] I will consider all of these circumstances in my s. 22(2) analysis. I will also consider whether there are any other circumstances that may apply.

Public scrutiny of a public body – s. 22(2)(a)

[66] Section 22(2)(a) asks whether disclosure of personal information is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. Section 22(2)(a) recognizes that where disclosure of the information in dispute would foster accountability of a public body, this may provide a foundation for finding that disclosure would not constitute an unreasonable invasion of a third party's personal privacy.[57]

[67] The applicant says that disclosure is required under s. 22(2)(a) "for the purpose of subjecting the activities of the government of British Columbia to scrutiny for any such appointments."[58]

[68] The Ministry submits that there is no evidence that disclosing the personal information at issue would subject the activities of the provincial government or any of its public bodies to public scrutiny.[59] It points out that the information is only about two panel members from the Health Care Practitioner Special Committee for Audit Hearings, so it does not allow an assessment of whether CABRO or the Commission are properly addressing potential perceived conflicts of interests of board, tribunal, or committee members as a whole.[60] The Ministry also says:

> Furthermore, there are already mechanisms in place to address potential perceived conflicts of interest of board, tribunal, or committee members so release of the information at issue in this inquiry is not needed to ensure public accountability. CABRO is responsible for vetting applicants to the Committee. CABRO already requires all appointees to the Committee, like all other appointees to public boards and tribunals, to disclose any potential

[55] Ministry's initial submission at paras. 84, 93, 102 and 110.
[56] Applicant's submission at p. 44.
[57] Order F05-18, 2005 CanLII 24734 (BC IPC) at para. 49.
[58] Applicant's submission at p. 44.
[59] Ministry's initial submission at para. 85.
[60] Ministry's initial submission at para. 88.

> conflicts of interest at the time of their application for a position on the Committee. CABRO also imposes a continuing obligation on appointees to disclose any potential perceived conflicts of interest and consult with their chair or registrar if they are in doubt. Furthermore, the MSC Hearing Coordinator always asks a potential audit hearing panel member whether there could be any potential conflict of interest with the practitioner that is the subject of the hearing in advance of assigning the individual to a specific audit hearing panel. [61]

[69] I find that s. 22(2)(a) does not weigh in favour of disclosure. I accept the Ministry's evidence about how the CABRO process works for screening and appointing panel members. I view that panel members 1 and 2's personal information is very specific to their employment and evaluation, so its disclosure would provide no value in allowing the public to scrutinize the CABRO process as a government activity. I am not persuaded that disclosing panel members 1 and 2's personal information is desirable for the purpose of subjecting the government of British Columbia's activities to public scrutiny.

Fair determination of the applicant's rights – s. 22(2)(c)

[70] Section 22(2)(c) says that it is relevant to consider whether the personal information is relevant to a fair determination of the applicants' rights. The following four criteria must be met in order for this circumstance to apply:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[62]

[71] The applicant submits that the information "is necessary in regards to preparation for any future proceeding and to allow for fair hearing and indeed accounting." [63]

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[61] Ministry's initial submission at para. 89.
[62] Order 01-07, 2001 CanLII 21561 (BCIPC) at para. 31.
[63] Applicant's submission at p. 44.

[72] The Ministry says:

> The Ministry submits that as the audit hearing was held on September 14, 2020 and the Applicant declined to participate, any purported right that he has is not related to a proceeding that is either underway or contemplated. Furthermore, the personal information sought by the Applicant no longer has any bearing on the determination of the right in question. In addition, as the Applicant was provided with unredacted disclosure of records pursuant to the MSC hearing process, the personal information sought is not necessary to prepare for any proceeding or to ensure a fair hearing. Any judicial review would be a hearing on the record submitted to the MSC hearing panel with no new material admissible.[64]

[73] I find no evidence to suggest how the specific information at issue would help in a "fair determination" of the applicant's rights. The applicant submits that the records are necessary in preparing any future proceeding.[65] However, he does not explain what proceeding he means. I am not persuaded that the applicant has any proceeding either underway or contemplated. Further, the applicant has not adequately explained how panel members 1 and 2's personal information would have any significance in determining his rights or why it is necessary to prepare for a particular proceeding. Therefore, I conclude s. 22(2)(c) does not weigh in favour of disclosure.

Unfair exposure to financial or other harm – s. 22(2)(e)

[74] Section 22(2)(e) requires a public body to consider whether disclosure of a third party's personal information will unfairly expose the third party to financial or other harm. Past orders have interpreted "other harm" as serious mental distress, anguish or harassment.[66] However, embarrassment, upset or having a negative reaction do not rise to the level of mental harm.[67]

[75] The Ministry says that the applicant has a long-standing documented pattern of abusing the civil and administrative law process to harass and punish individuals.[68] It provides *in camera* evidence which it submits shows that disclosure of the information at issue would unfairly expose anyone he targets to

[64] Ministry's reply submission at paras. 39-40.
[65] Applicant's submission at p. 44.
[66] Order 01-37, 2001 CanLII 21591 (BC IPC) at para. 42.
[67] Order 01-15, 2001 CanLII 21569 (BC IPC) at paras. 49-50; Order 01-37, 2001 CanLII 21591 (BCIPC) at para. 42; Order F21-19, 2021 CanLII (BC IPC) at para. 34.
[68] Ministry's initial submission at para. 97.

serious mental distress, anguish or harassment. The Ministry also mentions two previous OIPC orders that dealt with the applicant's access requests for records related to the audit and hearing process. It cites Order F21-04 where the adjudicator said, "by 2019, it is apparent that he is using access requests as a weapon in the underlying dispute about his MSP billings."[69] and Order F22-08 where the adjudicator said the applicant "has routinely targeted individuals who appear to be related to the hearing process".[70]

[76] In its reply submission, the Ministry says that the applicant manipulates facts and information to establish his points and make unsubstantiated allegations against the panel members and others.[71]

[77] Based on the materials before me, I am not persuaded that disclosing the withheld information will unfairly expose a third party to serious mental distress, anguish or harassment as the previous orders interpreted. I accept the Ministry's evidence that the applicant has a previous history of commencing a multitude of civil and administrative law processes. The *in camera* evidence sets out some incidents that third parties became concerned about. However, I do not believe that it was a sufficient explanation or evidence for me to conclude that disclosing the withheld information will unfairly expose a third party to the type of harm s. 22(2)(e) addresses. The argument and evidence about the possible harm that the Ministry submits are insufficient to establish that s. 22(2)(e) applies.

Information supplied in confidence – s. 22(2)(f)

[78] Section 22(2)(f) requires considering whether personal information has been supplied in confidence when determining whether disclosure would be an unreasonable invasion of personal privacy.

[79] The Ministry submits panel members 1 and 2 would not have expected that the information they provided to the hearing coordinator about their personal involvements and employment history would be shared with anyone else or be the subject of a freedom of information access request or disclosed publicly.[72] It also provides *in camera* evidence to show the personal information was supplied in confidence.

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[69] Ministry's initial submission at para. 99, quoting Order F21-04, 2021 BCIPC 04 at para. 76.
[70] Ministry's initial submission at paras. 99-101, quoting Order F22-08, 2022 BCIPC 08 at para. 54.
[71] Ministry's initial submission at paras. 54-56.
[72] Ministry's initial submission at para. 104.

[80] I can see that the email on page two of the records has a template confidentiality proviso in the signature block. There is no other express statement of confidentiality in the disputed emails.

[81] In Order F18-19, the adjudicator said that, on its own, template confidentiality proviso in a signature block is insufficient to establish the contents of the email were supplied in confidence. That is because such template language is part of the email signature and is automatically inserted without any specific action required on the part of the person sending the email. The adjudicator said, "An objective view of the nature and content of the information or communication that accompanies such a proviso must also indicate that the information was supplied in confidence." [73]

[82] I agree with the approach in Order F18-19 and find that, on its own, the confidentiality proviso in this case is not determinative. Therefore, I also considered the context and content of the emails and whether there is any basis to suggest that the supplier and receiver of the emails mutually understood that the information was being supplied in confidence. Considering the context of the information and the content of these emails, I find it reasonable to conclude that panel members 1 and 2 provided the comments in confidence. The information in the emails is what panel members 1 and 2 shared with the hearing coordinator about the applicant's allegations about their conflict of interest, bias and lack of independence. I am satisfied that s. 22(2)(f) applies weighing against disclosure of panel members 1 and 2's personal information.

Unfair damage to reputation – s. 22(2)(h)

[83] Section 22(2)(h) requires a public body to consider whether disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant. If it applies, this is a circumstance weighing in favour of withholding the information in dispute.

[84] The Ministry submits that s. 22(2)(h) applies to some of the information in dispute.[74] It says that the records at issue contain unflattering and serious allegations about third parties' professional conduct. The Ministry also asserts that "because of the realistic prospect supported by the *in camera* evidence that

[73] Order F18-19, 2018 BCIPC 22 at para. 67.
[74] Ministry's initial submission at paras. 110 and 113.

the Applicant would then use or manipulate the information at issue in this inquiry to further his baseless allegations."[75]

[85] Past orders have interpreted that disclosing the third-party personal information that consists of third parties' involvement in an unproven allegation about their professional conduct may unfairly damage their reputations.[76]

[86] I agree with the approach in the past orders and find that disclosing panel members 1 and 2's personal information would unfairly damage their reputations. I can see that panel members 1 and 2's personal information is what panel members 1 and 2 provided to the hearing coordinator as to the applicant's allegations about their conflicts of interests, bias and lack of independence. I accept the Ministry's evidence that the applicant is continuing to unfairly circulate unfounded allegations against panel members 1 and 2. Therefore, I am satisfied s. 22(2)(h) is a relevant factor that weighs against disclosure of panel members 1 and 2's personal information.

Privacy Waiver

[87] The applicant submits that because panel members 1 and 2 did not file submissions in this inquiry they have waived their privacy rights.[77]

[88] He also says that the Ministry's contracts with panel members 1 and 2 have already been disclosed, and "once a certain point of disclosure occurs, the fairness principle requires that the privilege of secrecy shall cease whether intended or not… Waiver to part of a communication will be held to be waiver for the entire communication(s)."[78]

[89] The applicant also points out that hearing panel members have an ongoing obligation to declare any conflicts of interest to CABRO.[79] He suggests that this obligation to disclose conflicts to CABRO means panel members have waived all privacy rights with regards to their personal information about conflict of interest matters.

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[75] Ministry's initial submission at para. 114.
[76] See, for example, Orders F15-54, 2015 BCIPC 56 (CanLII); F14-10, 2014 BCIPC 12 (CanLII); and F20-37, 2020 BCIPC 43 at para. 132.
[77] Applicant's submission at pp. 26-27.
[78] Applicant's submission at p. 45.
[79] Applicant's submission at p. 12.

[90] The applicant's arguments about waiver of privacy rights are not persuasive. I am not aware of any legal authorities that support what he says about waiver of privacy, and he did not cite any case law. Furthermore, I do not interpret the fact that an individual has not filed a submission in an inquiry to mean that they consent to the disclosure of their personal information or that they waive their privacy rights under s. 22. Nothing in the inquiry materials provided by either party suggests that third parties have consented to the disclosure of their personal information or waived their privacy rights.

[91] In conclusion, I find that what the applicant says about waiver is not a relevant circumstance in this case.

Applicant's existing knowledge

[92] Previous orders have found that the fact that an applicant is aware of, or already knows, the third-party personal information in dispute is a relevant circumstance in favour of disclosure.[80]

[93] The Ministry submits "While the Applicant likely has some existing knowledge of the particular information which has been withheld, he does not know the particular information which has been withheld, and it would be inappropriate to assume that he does."[81] The applicant submits "It is then, as history has it and then repeating itself, that the 'Email chain' includes copy to include [counsel of the Legal Services Branch] and perhaps several others. That is, the likelihood that such an e-mail chain includes only a to-and-fro between [the hearing coordinator and panel member 1 and 2] is rather small and not worth betting on (*sic*)".[82]

[94] In my view, the applicant was aware of panel members 1 and 2's identities and broadly assumed that panel members 1 and 2's personal information may relate to the conflicts of interest allegations against them. However, I cannot see that panel members 1 and 2's personal information, in part or in its entirety, had been disclosed to the applicant. I am not persuaded that the applicant was aware of or already knew the information in dispute. Therefore, I conclude that the

[80] See, for example, Orders F18-19, 2018 BCIPC 22; F17-02, 2017 BCIPC 2; F17-06 2017 BCIPC 7; F15-42, 2015 BCIPC 45; F15-29, 2015 BCIPC 32; F15-14, 2015 BCIPC 14; F11-06, 2011 BCIPC 7; F10-41, 2010 BCIPC No. 61 and 03-24, 2005 CanLII 11964 (BC IPC).
[81] Ministry's initial submission, at para. 116.
[82] Applicant's submission at p. 2.

applicant's existing knowledge of the third-party personal information is not a relevant circumstance here.

Sensitivity

[95] Past orders have treated the sensitivity of the personal information at issue as a relevant circumstance. They have found that where information is sensitive, it is a circumstance weighing in favour of withholding the information.[83] Conversely, where information is not sensitive, past orders have found that this weighs in favour of disclosure.[84]

[96] The Ministry submits that the sensitivity of the information in dispute, in particular the allegations against third parties, weighs against disclosure.[85] The applicant says "Declarations of conflict are inherently about sensitive information for the most part. The sensitivity factor does not deny the obligation to report."[86]

[97] I have considered whether the personal information is sensitive. I find the information is what panel members 1 and 2 said or did in response to the conflict of interest allegations made by the applicant. Also, some of the information consists of the assessment and evaluative statements about panel member 1. In my view, the information at issue is of a sensitive nature because it is about allegations of professional misconduct. Therefore, I conclude the sensitive nature of this information weighs against disclosure.

[98] Based on my review of the information in dispute, I find there are no other relevant circumstances for consideration.

Summary and Conclusion on s. 22

[99] I find that some of the information in dispute is not personal information because it is dates and times of emails and contact information. Section 22(1) does not apply to that information.

[100] I find that the rest of the information at issue is third-party "personal information" under FIPPA. In addition, some of panel member 2's personal

[83] See, for example, Order F19-15, 2019 BCIPC 17 at para. 99.
[84] See, for example, Order F16-52, 2016 BCIPC 58 at para. 91.
[85] Ministry's initial submission at para. 120.
[86] Applicant's submission at p. 31.

information is simultaneously the applicant's personal information because it is what panel member 2 said about their interactions with the applicant.

[101] I find the personal information does not fall into any of the s. 22(4) circumstances. I find that s. 22(4)(c) does not apply because the disclosure is not authorized by any enactment. I also find s. 22(4)(e) does not apply here because the personal information is not about a third party's position, functions or remuneration as an officer, employee or member of a public body. As for s. 22(4)(f), I find that it does not apply because there is nothing to suggest the personal information reveals financial and other details of a contract to supply services to a public body.

[102] Then, I find that there are s. 22(3) presumptions applicable to the withheld information. I find s. 22(3)(d) applies to pages 1-4 of the withheld information since it describes what panel members 1 and 2 said or did in the context of an investigation into a claim of conflict of interest, bias, or lack of independence related to their work. That personal information is, therefore, about their employment history. I conclude that s. 22(3)(g) applies to pages 3-4 of the withheld information because it is about how panel member 1's actions were evaluated and assessed in a work-related context. Lastly, I find s. 22(3)(h) does not apply because there is no information that reveals the identity of the individual(s) who actually conducted an evaluation of the panel member 1.

[103] Considering the enumerated circumstances in s. 22(2) that may rebut s. 22(3) presumptions, I find s. 22(2)(a) is not a factor weighing for disclosure because there is no evidence that disclosing the disputed information would foster accountability of a public body. I also do not see s. 22(2)(c) as a factor weighing in favour of disclosure because the applicant has not established that the disputed information is relevant to a fair determination of the applicant's rights. Further, s. 22(2)(f) weighs against disclosure of the information because the context and content of the information suggests that the information was supplied in confidence. I also find that s. 22(2)(h) weighs against disclosure because it is likely that panel members 1 and 2's personal information, if disclosed, can be used to unfairly damage their reputations. However, s. 22(2)(e) is not a factor that weighs against disclosure, as the Ministry submitted. There is insufficient explanation or evidence that disclosing the withheld information will unfairly expose panel members 1 and 2 to the type of financial or other harm s. 22(2)(e) addresses.

[104] Considering the factors that are not enumerated in s. 22(2), I find that none of them weigh in favour of disclosure, I find there is no evidence that panel members 1 and 2 waived their privacy rights. I also find that there is no evidence that the applicant has any existing knowledge of the specific third-party personal information at issue. Lastly, I can see that the information is of sensitive nature because it is about what panel members 1 and 2 said or did in response to the conflict of interest allegations.

[105] To summarize, after weighing all relevant circumstances as a whole, I find the ss. 22(3)(d) and (g) presumptions are not rebutted.

[106] In conclusion, in light of all the relevant circumstances, I find it would be an unreasonable invasion of third-party personal privacy to disclose the disputed personal information.

Severing under s. 4(2)

[107] Section 4(2) requires a public body to provide access to part of a record, if the information in the record that is properly excepted from disclosure can reasonably be severed from the record. I can see panel member 2's personal information in pages 1-2 is also simultaneously the applicant's personal information because it is about both of them. I find the applicant's personal information cannot be reasonably severed and disclosed without also disclosing panel member 2's personal information that I find must be withheld under s. 22(1).

Section 22(5) summary

[108] Under s. 22(5), a public body must give an applicant a summary of their personal information that was supplied in confidence by third parties, but only if the summary can be prepared without identifying the third party who supplied the personal information. The applicant submits that the Ministry must provide a summary of the disputed information.[87] The Ministry says it cannot provide a summary of the information without disclosing the identities of third parties who provided the information.[88] In my view, such a summary is not possible in this case. I find that the information in dispute is contextually specific and would reveal the identity of the third party providing the information. Therefore, I

[87] Applicant's submission at p. 44.
[88] Ministry' initial submissions at paras. 122-123.

conclude there is no obligation on the Ministry to provide a summary under s. 22(5).

CONCLUSION

[109] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. Subject to item 2 below, I confirm, in part, the Ministry's decision to refuse to disclose the information to the applicant under s. 22(1) of FIPPA.

2. The Ministry is not required by s. 22(1) to withhold the information that is highlighted in a copy of the records that is being sent to the Ministry with this order. The Ministry is required to give the applicant access to the highlighted information.

3. The Ministry must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter to the applicant and a copy of the records described in item 2 above.

[110] Under s. 59(1) of FIPPA, the Ministry is required to comply with this order by September 29, 2022.

August 17, 2022

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File: F20-82673