



Order F23-26

## CITY OF BURNABY

Erika Syrotuck  
Adjudicator

March 31, 2023

CanLII Cite: 2023 BCIPC 30  
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 30

**Summary:** An applicant made two requests under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the City of Burnaby (City) for records relating to the end of the former Fire Chief's employment with the City. The City withheld some information under common law settlement privilege and some under s. 22(1) of FIPPA. The adjudicator found that the City could withhold the information under settlement privilege and some but not all of the information in dispute under s. 22(1). The adjudicator ordered the City to disclose some of the information it sought to withhold under s. 22(1).

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, s. 22(1), 22(2)(a), 22(2)(b), 22(2)(f), 22(2)(h), 22(2)(i), 22(3)(a), 22(3)(c), 22(3)(d), 22(4)(a), and 22(4)(e).

## INTRODUCTION

[1] The applicant made two access requests under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the City of Burnaby (City) for records relating to the end of the former Fire Chief's employment with the City.<sup>1</sup>

[2] In response to both requests combined, the City identified 139 pages of responsive records and disclosed some of the information to the applicant. It withheld some of the remaining information under s. 22(1) (unreasonable invasion of a third party's personal privacy) and a small amount under s. 13(1) (advice or recommendations).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision.

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<sup>1</sup> References to the 'Fire Chief' in this order are to the former Fire Chief who is the subject of the access requests.

[4] Mediation did not resolve the issues and the matter proceeded to inquiry.

[5] At the inquiry, the public body indicated that it had decided to exercise its discretion to release the information it had previously withheld under s. 13(1). As a result, s. 13(1) is no longer at issue in this inquiry.

[6] However, the City requested permission to add settlement privilege to the inquiry. It proposed to apply settlement privilege to some of the information in dispute under s. 22(1). I approved this request.

[7] The City also asked permission for the OIPC to receive and keep some information in its submissions *in camera* (that is, only for the Commissioner to see). I reviewed the City's request and accepted some information *in camera*.

[8] Finally, the OIPC invited the Fire Chief to participate in the inquiry. After the Fire Chief made an initial submission, he said he no longer wanted to participate in the inquiry. To be clear, I still considered his initial submission, which I discuss below.

### **Preliminary issue – excluding evidence**

[9] In general, the OIPC does not limit what a party says in its submissions. This is because excluding a party's submissions or evidence restricts a party's ability to fully present its case. However, there may be circumstances where excluding evidence is warranted. Therefore, the OIPC considers these types of requests on a case-by-case basis.

[10] In this case, the City submits that the applicant should not be permitted to refer to or rely on a document attached to her submissions because the document is protected by a sealing order.<sup>2</sup> The City's evidence is that it is prohibited from distributing documents in the court file, including the sealing order itself, to any other party outside of the litigation.<sup>3</sup>

[11] The applicant refers to the sealing order in her response submissions. Specifically, the applicant says that the "case may be sealed, but the unanswered questions remain."<sup>4</sup>

[12] I have decided not to exclude the document as evidence in this inquiry. The applicant acknowledges the court file to which the document relates is sealed. However, based on what the City has said, it appears that the sealing order prevents the parties to the litigation from distributing the document outside

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<sup>2</sup> See City's reply submissions, para 20.

<sup>3</sup> Affidavit #2 of the City's Director of Labour Relations, para 14.

<sup>4</sup> Applicant's further response submissions, page 3.

of the litigation. As far as I can tell, the applicant is not a party to the litigation and so it is unclear whether the sealing order would prevent her from submitting, and me considering, the document as evidence in this inquiry.

[13] Since I cannot see the terms of the sealing order, it is impossible for me to draw any conclusions on whether terms of the sealing order prevent me from considering the document as evidence in this inquiry. Further, the City did not refer me to any law supporting its position that I must not permit the applicant to rely on the document in this inquiry.

[14] In summary, I am not satisfied that I should prohibit the applicant from relying on or referring to the document in this inquiry.

## ISSUES

[15] At this inquiry, I must decide the following issues:

1. Does s. 22(1) require the City to withhold the information in dispute?
2. Is the City authorized under common law settlement privilege to withhold the information in dispute?

[16] Under s. 57(2), the applicant has the burden of showing that disclosure of the information in dispute under s. 22(1) is not an unreasonable invasion of a third party's personal privacy. However, the City bears the initial burden of showing that the information in dispute is personal information.<sup>5</sup>

[17] The party seeking to rely on settlement privilege has the burden of proving its claim.<sup>6</sup> In this case, that means the City bears the burden.

## DISCUSSION

### *Information at issue*

[18] The information at issue is in various records such as emails, text messages and memos. In most cases, the records have been partially disclosed; however, the City withheld some records in their entirety.

[19] I note that, the City indicates that it is "prepared to release" some of the information in dispute, but "defers to the OIPC" to decide whether s. 22(1) applies.<sup>7</sup> For clarity, I find that this information is still in dispute.

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<sup>5</sup> For example, Order F20-18, 2020 BCIPC 20 (CanLII) at para 4.

<sup>6</sup> Order F18-06, 2018 BCIPC 8 (CanLII) at para 9 citing *Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Association*, 2009 BCSC 1498 at para. 9, leave to appeal dismissed at 2009 BCCA 452 (CanLII).

<sup>7</sup> City's initial submissions, para 4.

### **Settlement Privilege**

[20] Settlement privilege is a common law privilege that protects communications made for the purpose of settling a dispute.

[21] Settlement privilege is not an exception to disclosure set out in Part 2 of FIPPA. However, the BC Supreme Court found that FIPPA contains no clear legislative intent to abrogate it; therefore, parties are entitled to rely on settlement privilege to refuse to disclose information responsive to an access request under FIPPA.<sup>8</sup>

[22] Settlement privilege is a class privilege and applies to communications that meet the following three criteria:

1. A litigious dispute must be in existence or within contemplation;
2. The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
3. The purpose of the communication must be to attempt to effect a settlement.<sup>9</sup>

[23] It is important to note that settlement privilege applies to negotiations, whether or not the parties reach an agreement.<sup>10</sup> Settlement privilege also applies to communications that are reasonably connected to the parties' negotiations.<sup>11</sup>

[24] Even if the above requirements are met, settlement privilege can be set aside if there is a competing public interest. I will discuss this more below.

[25] The City argued that settlement privilege applies to some of the information in dispute, including some information in emails, text messages and other records. Much of its submissions are *in camera*, so I am limited in what I can say about them.

[26] The applicant does not comment directly on whether the above elements of settlement privilege are met. Rather, the applicant says there is a competing public interest that outweighs the public interest in encouraging settlement.

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<sup>8</sup> *Richmond (City) v Campbell*, 2017 BCSC 331 (CanLII) at paras 71-72.

<sup>9</sup> Order F21-11, 2021 BCIPC 15 (CanLII) at para 11; Order F18-06, 2018 BCIPC 8 (CanLII) at para 60.

<sup>10</sup> *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 [*Sable*] at para 17.

<sup>11</sup> *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.* 2013 ABCA 10 at para 26.

*Analysis – settlement privilege*

[27] I am satisfied that the above test is met with regards to the information to which the City has applied settlement privilege.

[28] After reviewing the records, I am satisfied that there was a litigious dispute. I am also satisfied that the purpose of the communications was to effect a settlement. For example, much of the information in dispute communicates the parties' interests for the purpose of resolving the dispute. Finally, it is clear to me that the communications at issue were intended to be confidential.

[29] As a result, I am satisfied that the information in dispute meets the criteria for settlement privilege. I cannot say any more without revealing the *in camera* information.

*Is there a competing public interest?*

[30] The Supreme Court of Canada said that settlement privilege can be set aside where “on balance, a competing public interest outweighs the public interest in encouraging settlement.”<sup>12</sup> The Supreme Court went on to say that “[t]hese countervailing interests include allegations of misrepresentation, fraud, or undue influence”.<sup>13</sup> In addition, communications protected by settlement privilege can be disclosed where the existence or scope of a settlement is in issue.<sup>14</sup>

[31] However, recognizing that the public policy underlying settlement privilege is compelling, Courts have also cautioned that the threshold for setting aside settlement privilege should not be too low.<sup>15</sup> An exception should only be found where the documents at issue are both relevant and necessary to achieve either the agreement of the parties or another compelling or overriding interest of justice.<sup>16</sup>

[32] The applicant says there is a competing public interest that justifies an exception to settlement privilege in this case. Specifically, the applicant says that the purpose of the access request was to shed light on the City's dealings with the Fire Chief and on its escalating practice of paying large sums of money to get rid of employees for reasons unknown to the public. The applicant says that the Fire Chief was not the only costly and unexplained departure of a senior employee from the City since the 2018 election of a new mayor and council.

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<sup>12</sup> *Sable supra* note 10 2013 SCC 37 at para 19 quoting *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para 20.

<sup>13</sup> *Ibid* citing *Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. Civ. Div.) and *Underwood v. Cox* (1912), 1912 CanLII 582 (ON SCDC), 26 O.L.R. 303 (Div. Ct.).

<sup>14</sup> *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at para 35.

<sup>15</sup> *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para 19.

<sup>16</sup> *Ibid* at para 20.

[33] The applicant says that there is a public interest in ensuring the City has not become “too comfortable paying large sums of taxpayer money to take care of its HR problems.”<sup>17</sup> The applicant also mentions the impact on the community and the City’s treatment of its employees, more generally.

[34] The City says that the applicant’s argument that the City ought to reveal settlement agreements for the purpose of scrutinizing its spending is flawed. It says that not every settlement results in a monetary payment, but, even if there is a payment, it can be more expensive to proceed in litigation rather than to engage in early resolution. Therefore, requiring a public body to “open the books” on settlements is likely to result in increased costs and would not be in the public interest.<sup>18</sup> Overall, the City says that the applicant has not made any persuasive argument that there is an interest that overrides settlement privilege.

[35] In my view, the applicant has not identified a competing public interest that outweighs the public interest in encouraging settlement.

[36] I accept that the applicant has a genuine interest in the information at issue for the purpose of shedding light on the City’s dealings with the Fire Chief. However, I am not persuaded that this is a compelling or overriding interest of justice that warrants an exception to settlement privilege. Nothing indicates that there is fraud, undue influence or misrepresentation. This is also not a situation where the disclosure of the information is necessary to effect a settlement. In my view, finding an exception to settlement privilege in this case would undermine the very purpose of settlement privilege, which is to encourage parties to attempt to settle a dispute without the time and expense of litigation.

[37] I conclude that an exception to settlement privilege is not warranted in this case. As a result, I find that settlement privilege applies to the information in dispute.

### **Section 22(1) – unreasonable invasion of a third party’s personal privacy**

[38] Section 22(1) requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.

[39] The City has applied s. 22(1) to all of the information in dispute in this inquiry. However, I will not consider whether s. 22(1) applies to the information that I found was protected by settlement privilege, above.

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<sup>17</sup> Applicant’s further response submissions, page 2.

<sup>18</sup> City’s reply submissions, para 19.

*Is the information “personal information” under FIPPA?*

[40] Since s. 22(1) only applies to personal information, the first step in the s. 22(1) analysis is to determine whether the information in dispute is “personal information” within the meaning of FIPPA.

[41] FIPPA defines “personal information” and “contact information” in the following way:

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

"contact information" means 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;

[42] Under the above definitions, information that is “contact information” is not “personal information” for the purpose of FIPPA. Whether information is “contact information” depends on the context in which it appears.<sup>19</sup>

[43] The City submits that all of the information in dispute is “personal information” because it relates to the Fire Chief as well as other City employees and third parties. The City says the information includes:

- information about the Fire Chief’s employment;
- employment information about other City employees such as information about vacation days and statements the Fire Chief made about other employees;
- personal passwords;
- personal contact information;
- medical information;
- information about employees’ family members; and
- information about the death of an employee.<sup>20</sup>

[44] The applicant did not specifically comment on whether the information in dispute is “personal information” under FIPPA.

[45] With a few exceptions, I find that the information in dispute is “personal information” as FIPPA defines that term.

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<sup>19</sup> Order F20-13, 2020 BCIPC 15 (CanLII) at para 42.

<sup>20</sup> See Affidavit of the City’s Director of Labour Relations at paras 21 and 36.

[46] I am satisfied that most of the information in dispute is about an identifiable individual. This is because the individuals to whom the information relates are named in the records.

[47] However, I find that some information in an email is not about an identifiable individual. For example, some of the information is too vague to be about an identifiable person.<sup>21</sup> Also, some information in dispute describes how the City handled some matters and it is not clear to me how it is about an identifiable individual.<sup>22</sup> Therefore, the City cannot withhold the information because it is not “personal information.”

[48] With regards to whether the information is “contact information,” some of the information in dispute is individuals’ email addresses and phone numbers. In the context which they appear, I am satisfied that the email addresses are not “information to enable an individual at a place of business to be contacted.” Rather, they appear in the context of communicating about various internal workplace matters. As a result, I find they are “personal information” rather than “contact information.”

[49] However, I find that some of the phone numbers the City has described as “personal contact information” are “contact information” within the meaning set out in FIPPA. For example, one record shows that the City provided the mayor with the names, work and cell phone numbers of employees who were temporarily acting as fire chief.<sup>23</sup> The City has disclosed the names and work phone numbers, but withheld the cell phone numbers under s. 22(1). In my view, the purpose of the email was to tell the mayor who to communicate with and how to contact them in their acting capacity. I find that the cell phone numbers, in this context were provided in order to enable the mayor to contact these employees, as acting fire chiefs, at their place of business. Similarly, I find that an employee’s cell phone number given for the purpose of contacting them about a work-related matter is “contact information.”<sup>24</sup> Therefore, this information is not “personal information” as set out in FIPPA and so the City cannot withhold it under s. 22(1).

[50] I turn now to whether disclosure of the personal information is an unreasonable invasion of the third parties’ personal privacy.

*Section 22(4) – circumstances where disclosure is not an unreasonable invasion of a third party’s personal privacy*

[51] Section 22(4) sets out circumstances where disclosure is not an unreasonable invasion of a third party’s personal privacy. If information falls into

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<sup>21</sup> Page 35 of the records in dispute.

<sup>22</sup> For example, pages 24, 28, 65, 66 and 68 of the records in dispute.

<sup>23</sup> Pages 19 and 55 of the records in dispute.

<sup>24</sup> Page 67 of the records in dispute, for example.

one of the enumerated circumstances, s. 22(1) does not apply and the public body must disclose the information.

[52] The parties made arguments about ss. 22(4)(a) and (e).

Section 22(4)(a) – consent to disclose

[53] Section 22(4)(a) says that disclosure is not an unreasonable invasion of a third party's personal privacy if, the third party has, in writing, consented to or requested the disclosure.

[54] As I mentioned above, the Fire Chief was invited to and did make a submission in this inquiry. At first, the Fire Chief consented, in writing, to the disclosure of his personal information. However, he subsequently wrote to the OIPC to withdraw consent. Both the City and the applicant seem to agree that the City is not required to disclose the Fire Chief's personal information under s. 22(4)(a).

[55] I conclude that, because the Fire Chief withdrew consent, he did not consent for the purpose of s. 22(4)(a). Therefore, I conclude that s. 22(4)(a) does not require the City to disclose the Fire Chief's personal information.

Section 22(4)(e) – position, functions or remuneration

[56] Under s. 22(4)(e), it is not an unreasonable invasion of a third party's personal privacy to disclose personal information 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.

[57] It is well-established that s. 22(4)(e) applies to "objective, factual statements about what the third party did or said in the normal course of discharging [their] job duties, but not qualitative assessments of those actions."<sup>25</sup> Past orders have found that "remuneration" includes the components of an employee's pay, not just the total amount.<sup>26</sup>

[58] The applicant argues that s. 22(4)(e) applies to the information in dispute because the records relate to the position, functions or remuneration of the Fire Chief and other City employees. Specifically, the applicant says that s. 22(4)(e) applies to any records related to any severance agreement or severance payments. The applicant says that numerous OIPC orders have found that severance payments or agreements should be construed as remuneration.<sup>27</sup>

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<sup>25</sup> Order 01-53, 2001 CanLII 21607 (BCIPC) at para 40.

<sup>26</sup> Order F15-17, 2015 BCIPC 18 (CanLII) at paras 20-27.

<sup>27</sup> Orders No. 46-1995, No. 24-1994, No. 173-1994, F17-24, F09-15.

[59] The City says that s. 22(4)(e) does not apply to any information in dispute. Specifically, it says that settlement funds are not considered to be remuneration under s. 22(4)(e) because they do not constitute salary, benefits, severance, retirement or another type of remuneration. In support of this argument, the City relies on Order F10-44.<sup>28</sup> However, the City says that the terms of a settlement, including a payment, if any, are protected by common law settlement privilege.

[60] I find that some of the remaining personal information in dispute (i.e. other than the information to which I found settlement privilege applies) is about City employees' positions, functions or remuneration. I find that s. 22(4)(e) applies to:

- a record that was fully withheld;<sup>29</sup>
- subject lines and portions of the body of emails;<sup>30</sup> and
- portions of memos.<sup>31</sup>

[61] Broadly speaking, the above information is about who was in what position and when, and in some cases, information relating to an employee's remuneration.

[62] I also find that s. 22(4)(e) applies to the names of City employees in the context of performing their job duties.<sup>32</sup> This is the kind of objective factual information to which s. 22(4)(e) applies.

[63] The City is not entitled to withhold this information under s. 22(1). I will not consider it any further.

*Section 22(3) – disclosure presumed to be an unreasonable invasion of a third party's personal privacy*

[64] Section 22(3) lists circumstances where disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[65] The City argues that the presumptions in ss. 22(3)(a), (c), and (d) apply. The applicant did not specifically comment on whether any of these, or any other presumptions under s. 22(3), apply.

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<sup>28</sup> 2010 CanLII 77329 (BCIPC).

<sup>29</sup> Page 54 of the records in dispute.

<sup>30</sup> For example, pages 8, 14, 15, 45, 52 (top), 86, 88, and 92 of the records in dispute.

<sup>31</sup> For example, pages 51, 56, and 89 of the records in dispute.

<sup>32</sup> For example, pages 50, 71, 74, 81, 98, and 99 of the records in dispute.

Section 22(3)(a) – medical, psychiatric or psychological history

[66] Section 22(3)(a) creates a presumption that it is an unreasonable invasion of a third party's personal privacy to disclose personal information that relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

[67] The City says that the records contain sensitive medical information about third parties that, if released, would be an unreasonable invasion of those third parties' personal privacy.<sup>33</sup> The City cites various OIPC orders that say that s. 22(3)(a) applies to:

- an employee's medical leave;<sup>34</sup>
- information revealing whether or not a third party has a disability and whether or not they require an accommodation;<sup>35</sup> and
- surgical procedures.<sup>36</sup>

[68] Some of the personal information at issue contains specific details relating to several third parties' medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.<sup>37</sup> I find that s. 22(3)(a) applies to this information. However, I do not think that s. 22(3)(a) applies where the personal information is only a general reference to a third party's health.<sup>38</sup> This is because this information is too vague to constitute a third party's "history, diagnosis, condition, treatment or evaluation."

Section 22(3)(c) – income assistance or social service benefits

[69] Under s. 22(3)(c), disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels.

[70] The City says that s. 22(3)(c) applies to some information in dispute because it relates to a third party's eligibility for certain benefits. Further details are *in camera* so I cannot discuss them.

[71] After reviewing the information, I find that some of the personal information in dispute relates to the determination of social service benefit levels

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<sup>33</sup> City's initial submissions, para 61.

<sup>34</sup> Order F15-60, 2015 BCIPC 64 (CanLII) at para 31.

<sup>35</sup> Order F21-68, 2021 BCIPC 79 at paras 60-62.

<sup>36</sup> Order F10-41, 2010 BCIPCD No. 61 at para 13.

<sup>37</sup> For example, pages 4-7, 13, 60, 66-67, 81-83 of the records in dispute.

<sup>38</sup> For a similar finding see Order F22-34, 2022 BCIPC 38 at para 200.

and therefore that s. 22(3)(c) applies. I cannot discuss the information further, including the nature of the benefits, without revealing the information in dispute.

Section 22(3)(d) – employment history

[72] Section 22(3)(d) says that 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.

[73] The City says that s. 22(3)(d) applies because it relates to the employment history of the Fire Chief and other City employees. For example, the City says the records contain statements and opinions of employees about other employees. It also says some information is about employee vacation days and personal passwords.

[74] I find that much of the personal information in dispute relates to the employment history of City employees, including the Fire Chief. For example, I find that some of the information relates to the City employees' workplace behaviour or workplace performance, such as statements or opinions about them.<sup>39</sup> In my view, this personal information is the employment history of those employees.

[75] Also, some of the information in dispute is personal information about leaves to which a third party was entitled, such as annual vacation.<sup>40</sup> Past orders have found that this type of information is a third party's employment history within the meaning of s. 22(3)(d).<sup>41</sup> Where the information in dispute discloses details about a third party's leave from work, I find that s. 22(3)(d) applies.

[76] However, some of the personal information is not "employment history" within the meaning of s. 22(3)(d). For example, I am not satisfied that in this instance, the personal passwords are the employment history of the third party to whom they relate. It is unclear to me what the passwords are for but from the context I can tell they are work-related. The City did not make specific arguments about why these passwords should be considered "employment history" and I do not see any principled basis to accept them as such.

[77] In addition, some information is not a third party's employment history because it does not appear to be work-related.<sup>42</sup>

[78] In conclusion, s. 22(3)(d) applies to some personal information in dispute.

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<sup>39</sup> For example, pages 3, 48-49, 63-64, 65, 66 of the records in dispute.

<sup>40</sup> For example, pages 2, 14, 16-17 of the records in dispute.

<sup>41</sup> Order F22-34, 2022 BCIPC 38 at para 205.

<sup>42</sup> For example, pages 13 (in part) and 138 of the records in dispute.

*Section 22(2) – relevant circumstances*

[79] The next step in the s. 22 analysis is to consider all of the relevant circumstances, including those listed in s. 22(2). Some factors weigh for disclosure and some weigh against. The parties made submissions about a number of circumstances and I will consider each in turn.

Section 22(2)(a) – public scrutiny of a public body

[80] Section 22(2)(a) asks a public body to consider whether the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. The purpose of s. 22(2)(a) is to foster accountability of a public body.<sup>43</sup> It is not about scrutinizing the actions of individual third parties.<sup>44</sup> If it applies, s. 22(2)(a) weighs in favour of disclosure.

[81] The applicant argues that the information at issue is desirable for subjecting the City's activities to public scrutiny. Specifically, the applicant says that there has been a dramatic increase in the number of costly severance agreements that the City has signed with executives who have departed the City in recent years. In particular, the applicant says that the Fire Chief's departure is not the only costly and unexplained departure since the election of a new mayor and council in 2018. The applicant says that, according to the City's statement of financial information, the number of severance agreements signed by the City increased from two in 2018 to six in 2020. However, the applicant explains that those numbers do not involve settlement agreements.

[82] The applicant says that the taxpayers should know where and how that money is spent. The applicant cites previous OIPC orders, such as Order No. 24-1994 in support of this argument. The applicant also references a report of BC's Auditor General called "Executive Severance Practices: Government Ministries and Crown Corporations."<sup>45</sup> The applicant says that, while the report is about provincial government ministries and Crown Corporations, the same public-interest argument applies.

[83] The applicant also says that disclosure of the information in dispute is desirable for the purpose of subjecting the City (and a specific employee's) actions to public scrutiny in order to maintain public trust in the leadership. The applicant says that an external report indicates that the Fire Chief's absence had a negative impact on the City's fire department.<sup>46</sup>

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<sup>43</sup> 2005 CanLII 24734 (BCIPC) at para 49.

<sup>44</sup> See, for example, Order F16-14, 2016 BCIPC 16 (CanLII) at para 40.

<sup>45</sup> The applicant attached a full copy of the report to their initial submissions.

<sup>46</sup> The applicant attached a copy of the report entitled "BFD Needs Assessment Final Report – March 12, 2020).

[84] The City disagrees that the information in dispute is desirable for the purpose of subjecting its activities to public scrutiny. It says that it understands the applicant is interested in writing further news stories about the City and the Fire Chief. The City says that six departures does not warrant public scrutiny, given that the City has 3,853 employees.

[85] I find that disclosure of the remaining personal information in dispute (i.e. other than the information to which I found settlement privilege or s. 22(4)(e) applies) would not assist the applicant in scrutinizing the actions of the City with regards to how it spends taxpayer money on departing employees.

[86] I am also not persuaded that disclosure of the information in dispute is desirable for maintaining public trust in the leadership. The information is about individual employees and their individual circumstances. In my view, disclosure of the information in dispute may result in scrutiny of individual third parties, but I am not satisfied it is desirable for scrutinizing the City's activities.

[87] As a result, I find that s. 22(2)(a) does not apply.

Section 22(2)(b) – public safety

[88] Section 22(2)(b) identifies as a relevant circumstance whether the disclosure is likely to promote public health and safety or promote the protection of the environment. If it applies, this circumstance weighs in favour of disclosure.

[89] The applicant says that the City failed to consider whether the disclosure was likely to promote safety in the City as is required by this provision. The City says it did consider all circumstances, including this one, in making its decision under s. 22(1).

[90] It is not evident to me that this circumstance applies. In a very general way, I accept that a fire service relates to public safety, but I do not see how the specific information in dispute, if disclosed, would promote health and safety.

Section 22(2)(f) – supplied in confidence

[91] Section 22(2)(f) lists as a relevant circumstance whether the personal information was supplied in confidence. If it applies, it weighs in favour of withholding the information in dispute.

[92] The City says that the information in dispute contains information that was supplied in confidence. For example, it says that some medical information was supplied in confidence. It also says s. 22(2)(f) applies to information provided in relation to internal workplace investigations.

[93] I am satisfied that the third parties supplied medical information and information relating to various workplace matters in confidence.<sup>47</sup> This information is sensitive and I have no trouble concluding that the third parties who supplied the personal information did so with the expectation that the information would not be shared beyond those who needed to know. As a result, I find that s. 22(2)(f) is a relevant circumstance.

Section 22(2)(h) – disclosure may unfairly damage reputation

[94] Section 22(2)(h) asks a public body to consider whether the disclosure may unfairly damage the reputation of any party referred to in the records. If it applies, it weighs in favour of withholding the information in dispute.

[95] The City submits that some of the information in dispute contains personal information which, if disclosed, could unfairly damage the reputation of one of its employees. More specifically, the City says that disclosing the information would likely cause harm to the employee's career. It also says that the disclosure is unfair because it contains allegations that are unproven and statements that are unreliable.

[96] In my view, some of the information, if disclosed, would unfairly damage the reputation of a City employee.<sup>48</sup> First, if the information were to be disclosed, I think it could damage the employee's reputation. This is because, if true, the information would reflect negatively on the employee in a meaningful way (i.e. the personal information is not about a trivial matter). Second, I find the disclosure would be unfair. The information in dispute is presented as fact but it is unclear whether the employee whom the information is about had an opportunity to comment or provide an explanation.

[97] For these reasons, I find that s. 22(2)(h) applies to some of the information in dispute.

Section 22(2)(i) – information about a deceased person

[98] Section 22(2)(i) asks a public body to consider whether the information is about a deceased person, and if so, whether the length of time the person has been deceased indicates that the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

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<sup>47</sup> For example, pages 3, 4-7, 10, 16, 17, 25-27, 48-49, 50 (bottom), 62, 63-64, 65, 66, 67, 68, 72, 75, 76, 78, 79, 81-83, 90, and 100 of the records in dispute.

<sup>48</sup> For example, page 62 of the records in dispute.

[99] Past orders indicate that disclosure is typically not an unreasonable invasion of the deceased person's privacy after the individual has been dead for 20-30 years.<sup>49</sup>

[100] The City says that the deceased passed away three years ago. It says that not enough time has elapsed to weigh in favour of disclosure.

[101] There is some information in dispute that is about a deceased person and it is evident from the records that this person died less than four years ago.<sup>50</sup> This is far less than the 20-30-year timeframe set out in past orders. I find that, based on the length of time the third party has been deceased, s. 22(2)(i) favours withholding the information.

### Sensitivity

[102] While not raised by the parties, I have decided to take sensitivity of the information into account. Many past orders have considered whether information is sensitive.<sup>51</sup> Where information is sensitive, this factor can weigh in favour of withholding a third party's personal information. Conversely, if information is not sensitive, this can weigh in favour of disclosing the information in dispute.

[103] In my opinion, some of the information is not sensitive at all. For example, some of the information describes how a third party did their job, but it is the kind of high-level information that one would expect to be shared with a wide audience.<sup>52</sup> In addition, the City withheld the name of a third party on the emails, which from context, appears to be the name of the City employee who gathered the emails in response to the access requests. This information is not at all sensitive. In my view, the non-sensitivity of this information weighs in favour of disclosure.

### *Conclusion - s. 22(1)*

[104] I found that most of the information in dispute is personal information and that the City was required to disclose some of it under s. 22(4)(e).

[105] I conclude that the City is required to withhold most of the remaining personal information in dispute under s. 22(1).

[106] I found above that disclosure of some of the information in dispute is presumed to be an unreasonable invasion of a third party's personal privacy under ss. 22(3)(a), (c) and (d). In addition, I found that the circumstances in

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<sup>49</sup> Order F18-08 2018 BCIPC 10 at paras 31-32; Order F14-32, 2014 BCIPC 35 at paras 34-37.

<sup>50</sup> For example, pages 126, 128, 130, 132, 134, 136 of the records in dispute.

<sup>51</sup> See, for example, Order F20-13, 2020 BCIPC 15 (CanLII) at para 74.

<sup>52</sup> Page 21 of the records in dispute, for example.

ss. 22(2)(f), (g) and (i) each weighed in favour of withholding some of the information in dispute. The only factor weighing in favour of disclosure is the fact that some of the information is not sensitive.

[107] Where there are no circumstances that weigh in favour of disclosure, I find that disclosure would result in an unreasonable invasion of third parties' personal privacy. Section 22(1) applies to this information and the City must withhold it.

[108] However, where the personal information is not sensitive, I find that this is a circumstance that rebuts the presumption in s. 22(3)(d). I find that it would not be an unreasonable invasion of a third party's personal privacy to disclose the non-sensitive personal information. The City cannot withhold this information under s. 22(1).

## **CONCLUSION**

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

1. I confirm that the City is authorized to refuse access to the information in dispute under common law settlement privilege.
2. Subject to 3, below, the public body is required, in part, to withhold the information in dispute under s. 22(1).
3. The public body is required to give the applicant access to the information I have highlighted in the copy of the records provided to the public body with this order.
4. The public body must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records/pages described at item 3 above.

[110] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **May 17, 2023**.

March 31, 2023

## **ORIGINAL SIGNED BY**

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Erika Syrotuck, Adjudicator

OIPC File No.: F20-83077 & F20-83078