



Order F23-74

PUBLIC SERVICE AGENCY

Carol Pakkala
Adjudicator

September 18, 2023

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Summary: An applicant requested access to records relating to his employment held by the Public Service Agency (PSA). PSA disclosed the responsive records to the applicant but withheld some information in them under several exceptions to disclosure under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found PSA was authorized to refuse to disclose some, but not all, of the information withheld under s. 13 (advice or recommendations). The adjudicator also found PSA was required to refuse the applicant access to some, but not all, of the information withheld under s. 22 (harm to personal privacy). The adjudicator ordered PSA to disclose the remainder to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, 13(1), 22(1), 22(2)(f), 22(3)(d), 22(3)(g), 22(3)(h), 22(4)(a), and 22(5).

INTRODUCTION

[1] This inquiry is about the Public Service Agency's (PSA) response to an applicant's access request for information relating to his employment. The request included access to information about a workplace incident and its investigation, as well as to the applicant's own personal information. Specifically, the applicant requested notes, a contract, reports, transcripts, written correspondence, text messages, and information from his own employment record.¹

[2] In response to the applicant's access request, PSA provided some records, but withheld some information under ss. 14 (solicitor-client privilege)

¹ The applicant made four separate requests and PSA consolidated them into one.

and 22 (harm to personal privacy), under the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review PSA's decision. During mediation, PSA reconsidered its decision and added s. 13 (advice or recommendations) and s. 17 (harm to financial or economic interests) as the basis for withholding some information. Mediation by the OIPC resolved the s. 17 issue. However, the other issues were still in dispute, so the matter proceeded to this inquiry.

[4] The applicant and PSA each provided written submissions and evidence in the inquiry. In its initial inquiry submission, PSA said that it was no longer relying on s. 14 to withhold information, so that is no longer an issue to be decided here.²

Preliminary Issues/Matters

[5] I will begin with a number of preliminary matters which arose during this inquiry.

Applicant's Request to Make Additional Submissions

[6] The applicant requested permission to make additional submissions in response to PSA's reply submission.³ The applicant wanted to make additional submissions about outstanding legal proceedings and perceived personal attacks on him by PSA.

[7] On the matter of outstanding legal proceedings, to the limited extent they are relevant to this inquiry, I find there is already sufficient evidence before me about those proceedings. On the perceived personal attacks, I find that any such attacks, even if proven, are not relevant to what I must decide in this inquiry. For these reasons, I find that additional submissions are unnecessary.

Public Interest

[8] In their respective submissions, both PSA and the applicant refer to the level of public interest in the facts of this case.⁴ Disclosure of records in the public interest is governed by s. 25 of FIPPA. The applicant's request for records and

² PSA's initial submission at para 5.

³ OIPC's registrar denied this request and said the request would be brought to the attention of the assigned adjudicator. In denying the applicant's request, the registrar correctly pointed out that this inquiry is not judging the applicant's underlying employment dispute or the court disputes.

⁴ See for example Applicant's reply submissions, para 37 and PSA reply submissions, para 51.

request for review do not mention s. 25. There is no indication that s. 25 arose as an issue during mediation and it is not listed as an issue in the notice for this inquiry or in the fact report.

[9] Past OIPC orders have consistently said that parties may only add new issues into the inquiry if permitted to do so by the OIPC.⁵ The OIPC's notice of inquiry and its *Instructions for Written Inquiries*⁶ clearly explain the process for adding new issues to an inquiry. The applicant did not seek prior approval to add s. 25. I am not persuaded by the record before me that it would be fair to add this new issue or that there is any exceptional circumstance to warrant adding s. 25. Therefore, I decline to add, or consider, s. 25.

Duty to Assist

[10] The applicant submits the PSA has not made an honest effort to separate information and meet its duty to assist the applicant in exercising his information rights.⁷ The duty to assist applicants is governed by s. 6 of FIPPA. The applicant's request for records and request for review do not mention s. 6. There is no indication that s. 6 arose as an issue during mediation and it is not listed as an issue in the notice for this inquiry or in the fact report.

[11] As noted above, past OIPC Orders have consistently said parties must request and receive permission from the OIPC to introduce new issues at an inquiry. The applicant did not seek prior approval to add s. 6. I am not persuaded by the record before me that it would be fair to add this new issue or that there is any exceptional circumstance to warrant adding s. 6. Therefore, I decline to add, or consider, s. 6.

Constabulary Principles/Policing Records

[12] The applicant submits that constabulary principles are binding on the OIPC.⁸ The applicant does not identify which principles or how they apply except to say this inquiry is about his own disciplinary records generated through internal means as an office holder (presumably constabulary). He does acknowledge that this case is primarily about information access rights on the

⁵ 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).

⁶ Available online: <https://www.oipc.bc.ca/guidance-documents/1744>.

⁷ Applicant's submissions, para 34.

⁸ Applicant's submissions, para 3.

existing record.⁹ In fact, this inquiry is entirely about information access rights on the existing record.

[13] From the entire record in this inquiry, I conclude the applicant's position is that his employment relationship with PSA, including discipline, should have followed constabulary, rather than labour (union) law principles. I decline to consider this position and its associated submissions,¹⁰ as being outside of my jurisdiction, except insofar as it relates directly to my decision on the FIPPA issues in dispute.¹¹

ISSUES

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

1. Is PSA authorized to refuse to disclose the information in dispute under s. 13(1)?
2. Is PSA required to refuse to disclose the information in dispute under s. 22(1)?

[15] Section 57(1) says that it is up to PSA to prove the applicant has no right to access the information in dispute under s. 13(1).

[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, past OIPC orders have said that the public body bears the initial burden of showing that the information in dispute is "personal information" as defined in Schedule 1.¹²

DISCUSSION

Background

[17] The applicant was a conservation officer (CO) with the Ministry of Environment. In July 2015, he responded to a human/wildlife conflict involving a mother bear and two cubs. He assessed the situation and euthanized the mother

⁹ Applicant's submissions, para 1.

¹⁰ For example, on the constabulary versus unionized workplace issue, the applicant addresses Orders F15-05, 2015 BCIPC 5 (CanLII) and F15-12, 2015 BCIPC 12 (CanLII) and PSA responds.

¹¹ For example, at para 10, the applicant says that in unionized constabulary settings, collective bargaining members are not necessarily third parties. I will address this in my s. 22 analysis.

¹² For example, Order F22-56, 2022 BCIPC 63 at para 7; Order F20-18, 2020 BCIPC 20 (CanLII) at para 4.

bear but not the cubs.¹³ This decision resulted in a workplace investigation into the applicant and ultimately, his transfer out of the CO position to a different position in a different Ministry.

[18] The applicant, through his union, grieved the transfer. A settlement agreement was reached in February 2016 and was signed by the applicant.¹⁴ There have been numerous reviews and applications in the grievance matter before the Labour Relations Board, BC Supreme Court, BC Court of Appeal, and Supreme Court of Canada.¹⁵ I will not review those proceedings here. For the purposes of this inquiry, the record shows that settlement agreement has not been set aside and is binding.¹⁶

[19] The applicant continued his employment with a different Ministry until 2019.

Information in Dispute

[20] There are 402 pages of records relating to the above noted workplace investigation. I find there to be 106 pages in these records where information has been withheld pursuant to ss. 13 and 22. Most of the information in dispute is found in interview transcripts and the rest in two reports.

Advice or recommendations, s.13

[21] Section 13(1) allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. However, s. 13(1) does not apply to certain types of records listed in s. 13(2) or to records in existence for more than 10 years under s. 13(3).

¹³ The applicant says he was acting within his authority while MOE says he disobeyed a direct order to euthanize the cubs. MOE further says this refusal was part of a pattern of behaviour which the applicant denies. The issue of whether he was dismissed or transferred and whether union or constabulary rules should govern the end of the employment relationship is not pertinent to this inquiry.

¹⁴ Settlement Agreement attached to the affidavit of PSA's Director of Employment Relations, PSA reply submissions.

¹⁵ For the history of legal proceedings: PSA's initial submissions at paras 21-26 and reply submissions at paras 16-21; Applicant's submissions at paras 1, 3, 4, 9, and 22-23.

¹⁶ *Casavant v British Columbia (Minister of Environment and Climate Change Strategy)*, 2022 BCSC 1573 (CanLII) at para 43 as referenced in PSA's initial submissions at para 26 and reply submissions at paras 20-21 and applicant's submissions at para 1.

[22] Past OIPC orders and court decisions have established the following principles for the interpretation of s. 13(1) and I adopt these principles in making my decision:

- The s. 13 exception is meant to protect a public body’s internal decision making and policy making processes while considering a given issue by encouraging the free and frank flow of advice or recommendations.¹⁷
- To “reveal” advice or recommendations means that s. 13 does not apply to information that has already been disclosed.¹⁸
- Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.¹⁹
- “Recommendations” include material relating to a suggested course of action that will ultimately be accepted or rejected by the decision maker.²⁰
- “Advice” is broader than “recommendations”²¹ and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.²² Advice can be an opinion about an existing set of circumstances and does not have to be a communication about future action.²³
- “Advice” also includes factual information “compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.”²⁴ This compilation of factual information and weighing the significance of matters of fact is an integral component of an expert’s advice and informs the decision-making process.

[23] The first step in the s. 13 analysis is to determine whether the information withheld would reveal advice or recommendations developed by or for a public

¹⁷ Order 01-15, 2001 CanLII 21569 (BC IPC) at para 22.

¹⁸ See for examples: Order F23-51 2023 BCIPC 59 at para 96; Order F20-32, 2020 BCIPC 38 at para 36; Order F13-24, 2013 BCIPC 31 at para 19; Order F12-15, 2012 BCIPC 21 at para 19.

¹⁹ See for example Order F19-28, 2018 BCIPC 30 at para 24.

²⁰ *John Doe v Ontario (Finance)*, 2014 SCC 36 at para 23.

²¹ *Ibid* at para 24.

²² *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 113.

²³ *Ibid* at para 103.

²⁴ *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 94.

body or minister. If it would, then I must decide whether it falls into any of the categories listed in s. 13(2) which a public body must not refuse to disclose under s. 13(1).

Analysis, s. 13(1)

[24] PSA has completely withheld several complete pages in a “Confidential Workplace Assessment Report” under s. 13.²⁵ PSA says the withheld information is advice prepared for a public body in relation to how to respond to a specific situation and to how to proceed.²⁶ The entire report was not withheld, only certain parts.

[25] PSA says revealing some portions of the report would enable an individual to draw accurate inferences about advice or recommendations²⁷ and the other portions would reveal the actual advice or recommendations.²⁸

[26] The applicant did not specifically comment on whether the information is advice or recommendations, but his submissions indicate that he disagrees with how PSA applied this exception. Further, the applicant suggests s.13 has either been waived or rebutted.

[27] For the reasons that follow, I am satisfied that disclosing some, but not all, of the information in dispute in the report would reveal advice or recommendations within the meaning of s. 13(1).

[28] First, my review shows the report was clearly developed for a public body. I find that some of the information in the report is advice about how to respond to a workplace incident which PSA was free to accept or reject. This information includes some of the sub-headings because revealing them would enable an individual to draw accurate inferences about a recommended course of action. I find that this information reveals advice.

[29] Other information withheld from the report under s. 13 does not reveal advice or recommendations, such as the title and some headings. Further, other

²⁵ Table of Records and Records, pp. 4-6. Note that on p. 6, a portion was withheld pursuant to s. 17 and that issue was resolved prior to this inquiry.

²⁶ OIPC email to applicant dated October 26, 2022 outlining PSA’s position.

²⁷ PSA’s initial submissions at para 42.

²⁸ PSA’s initial submissions at para 43.

information that was withheld would not “reveal” anything if disclosed because the same information has already been disclosed elsewhere in the same report.²⁹

[30] I do not accept the applicant’s “waiver” argument. The concept of “waiver” relates to information protected by privilege and has no place in a s. 13 analysis. The applicant does not identify where in the OIPC’s extensive s. 13 caselaw the concept of a waiver was ever said to apply, and I do not think it is applicable. Previous orders have rejected the waiver argument in a s. 13(1) analysis.³⁰ Similarly, I do not accept the applicant’s “rebuttal” argument as s. 13 has no presumptions to rebut.

[31] For the reasons above, I am satisfied that disclosing some of the information in dispute under s. 13(1) would reveal advice or recommendations within the meaning of that provision.

Exceptions, 13(2) or 13(3)

[32] The next step is to determine whether any of the provisions in ss. 13(2) or (3) apply to the information properly withheld under s. 13(1).

[33] PSA says the information withheld pursuant to s.13 does not fall into any of the listed categories in s. 13(2).

[34] The applicant did not specifically address whether any of the provisions in s. 13(2) apply.

[35] After reviewing the information in dispute, I am satisfied that none of the provisions in s. 13(2) apply.

[36] Section 13(3) says s. 3(1) does not apply to information in a record that has been in existence for 10 or more years. After reviewing the information in dispute, I am satisfied that it is not more than 10 years old, so s. 13(3) does not apply.

Conclusion, s. 13

[37] For the reasons above, I find that s. 13(1) authorizes PSA to withhold some of the information it withheld under that exception.

²⁹ Records, p. 4.

³⁰ For example: Order F22-11, 2022 BCIPC 11 (CanLII) at para 69.

Disclosure harmful to personal privacy, s. 22

[38] PSA withheld much of the information in dispute under s. 22. This information relates to PSA's investigation of the workplace incident and is found primarily in the interview transcripts. There was some overlap between PSA's application of ss. 13 and 22 and I will only consider whether s. 22 applies to the information that I have not already determined was properly withheld under s. 13.

[39] 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. Numerous orders have considered the application of s. 22 and I will apply those same principles here.

Personal Information, s. 22(1)

[40] Section 22(1) only applies to personal information, so the first step in a s. 22 analysis is to decide if the information in dispute is personal information.

[41] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information." FIPPA defines contact information as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."³¹ Under these definitions, information that is "contact information" is not "personal information."

[42] Whether information is "contact information" depends on the context in which it appears.³² Some of the information withheld here is job titles and location of work. However, I find that in the context in which it appears, the information is not provided for the purpose of enabling the person to be contacted and is therefore not contact information.³³

[43] Some information withheld from the reports are generic descriptors that do not identify anyone. I find these descriptors are not personal information.³⁴

[44] The bulk of the information withheld under s. 22(1) is found in the interview transcripts. I have reviewed these transcripts and I find the transcripts

³¹ FIPPA, Schedule 1.

³² Order F20-13, 2020 BCIPC 15 (CanLII) at para 42.

³³ Records, pp. 1-2 (repeated on pp.235-236) and p. 244.

³⁴ Records, pp. 2-3 (repeated on pp. 236-237).

contain personal information about the third parties' involvement, observations, and thoughts about the incident under investigation. I further find the transcripts contain the interviewees' opinions on, and interpretations of, workplace policies and procedures. Given the context and interview questions as a whole, the individuals interviewed would be identifiable to the applicant and to others. I find that this information is the personal information of the third parties.

[45] There is also some information in the transcripts which I find is both third party personal information as well as the applicant's personal information. Specifically, it is what the third parties said about their interactions with the applicant as well as their opinions about the applicant and his behaviour.

Third parties

[46] The applicant suggests that s. 22(1) does not apply to the personal information of those who were interviewed because they "are not third parties but rather collective bargaining partners and public service staff who acted unlawfully and in concert to secure [his] dismissal."³⁵ I reject this submission. Schedule 1 of FIPPA defines "third party" as anyone other than the applicant or the public body. I find the interviewees are third parties under FIPPA.

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

[47] The next step in a s. 22 analysis is to assess whether the personal information falls into any of the types of information listed in s. 22(4). If so, then its disclosure is not an unreasonable invasion of third party personal privacy. PSA submits that none of the exceptions in s. 22(4) apply. The applicant submits that s. 22(4)(a) is engaged.³⁶

[48] Section 22(4)(a) says that disclosure of personal information 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.

[49] The applicant points to the following, presumably as evidence of third party consent:

- the witnesses showed up at the arbitration hearing for his grievance to speak ill of him;³⁷

³⁵ Applicant's submissions, paras 10 and 37.

³⁶ Applicant's submissions, para 12.

³⁷ Applicant's submissions, para 18.

- PSA submitted a written argument in the grievance proceedings identifying the witnesses and what they would say;³⁸ and
- the transcript of one witness was shown to him by his union in the grievance proceedings.³⁹

[50] I understand the applicant's submission to be that I can imply consent from the above factors.⁴⁰ I reject this submission. Section 22(4)(a) requires consent to the disclosure, **in writing**, by the **third party**. I find there is no evidence before me that the third party interviewees gave their consent in writing to the disclosure of their personal information.

[51] I have reviewed the third party personal information in dispute here and I find that it is not the type of information listed in s. 22(4)(a) or any of the other subsections of s. 22(4).

Presumed invasion of privacy, s. 22(3)

[52] Section 22(3) sets out circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. PSA says ss. 22(3)(d), (g), and (h) apply and that together they create a robust presumption in favour of withholding the third party personal information.⁴¹ I will consider whether these or any other presumptions apply.

Employment, educational or occupational history, s. 22(3)(d)

[53] Section 22(3)(d) says 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.

[54] Past orders have found the term "employment history" includes descriptive information about a third party's workplace behaviours or actions in the context of a workplace complaint investigation or disciplinary matter.⁴² This history includes information that clearly reveals the identity of subjects or witnesses that were interviewed as part of an investigation, such as what the witnesses said to

³⁸ Applicant's submissions, para 19.

³⁹ Applicant's submissions, para 20.

⁴⁰ See applicant's submissions, para 20 where he refers to the PSA's submission in the union grievance at pp. 108-109 of the records and to one of the transcripts, he says was given to him to review in the union grievance.

⁴¹ PSA's initial submissions, para 67.

⁴² Order 01-53, 2001 CanLII 21607 (BC IPC) at paras 32-33; Order F20-13, 2020 BCIPC 15 (CanLII) at para 52; Order F15-52, 2015 BCIPC 55 (CanLII) at para 40.

investigators about the role that they and others played in the matter under investigation.⁴³

[55] Past orders have found that personal information related to a workplace investigation, such as statements by witnesses, a complaint about an individual's workplace behaviour or an investigator's findings, is information that relates to the employment history of the person being investigated (here, the applicant).⁴⁴

[56] PSA says s. 22(3)(d) applies because the information in dispute consists of evidence or statements by witnesses about an individual's workplace behaviour or actions. The applicant does not comment directly on s. 22(3)(d) but points out that this case pertains to complaints and allegations filed against the applicant, not complaints the applicant has filed against others.⁴⁵

[57] My review of the interview transcripts indicates there is information about the interviewees' training, experience level, work assignments, interpretation of workplace policies, and how well they perform their duties. I find this information is their personal information and is part of their employment history. I find the presumption in s. 22(3)(d) applies to this information.

[58] My review of the interview transcripts also indicates that some of what was said is factual information about what the third parties observed, said and did in the context of their interactions with the applicant. This information is undoubtedly their personal information. However, it is not information about the third parties in the context of an investigation into the third parties' workplace conduct, so it is not about their employment, occupational or educational history.⁴⁶ I find the presumption in s. 22(3)(d) does not apply to this information. I further find this presumption does not apply to the information within the reports identifying the names of the witnesses.

[59] Therefore, I find that disclosure of some of the information in the interview transcripts is presumed to be an unreasonable invasion of that third party's personal privacy under s. 22(3)(d).

⁴³ Order F21-08, 2021 BCIPC 12 (CanLII) at para 137.

⁴⁴ Order 01-53, 2001 CanLII 21607 (BCIPC) at paras 32 and 41; Order F20-13, 2020 BCIPC 15 (CanLII) at para 55.

⁴⁵ Applicant's submissions, paras 4 and 8.

⁴⁶ For example: Order F19-41, 2019 BCIPC 46 (CanLII) at para 62; Order F17-02, 2017 BCIPC 2 (CanLII) at paras 19-21; and Order F14-22, 2014 BCIPC 25 (CanLII) at para 63.

Recommendations, evaluations, or references, s. 22(3)(g)

[60] Section 22(3)(g) creates a presumption that it is an unreasonable invasion of a third party's personal privacy to disclose personal information consisting of personal recommendations or evaluations, character references or personnel evaluations about the third party.

[61] Past orders say that s. 22(3)(g) applies to formal evaluations of a third party such as a formal performance review, job reference, or an investigator's findings about an employee's behaviour in the context of a workplace investigation.⁴⁷ Past orders have also said that s. 22(3)(g) does not apply to witness or complainant statements in workplace investigations.⁴⁸ Consistent with these orders, I find that the presumption in s. 22(3)(g) does not apply to the interview transcripts. I further find this presumption does not apply to the information within the reports identifying the names of the witnesses or times of their interviews.

[62] As I mentioned above, past orders have found that s. 22(3)(g) applies to an investigator's evaluative comments about a third party's behaviour in the workplace.⁴⁹ Consistent with these orders, I find that the investigator's conclusions about the credibility of the witnesses interviewed in the investigation reports fall under s. 22(3)(g).⁵⁰

[63] Therefore, I find that disclosure of some of the information is presumed to be an unreasonable invasion of that third party's personal privacy under s. 22(3)(g).

Identity of supplier, s. 22(3)(h)

[64] Section 22(3)(h) protects the identity of the third party who supplied the kind of information covered by s. 22(3)(g) in confidence.⁵¹

[65] In this case, I have found that s. 22(3)(g) applies to the investigator's conclusions about the credibility of the third party witnesses. The identity of the

⁴⁷ For example: Order F21-08, 2021 BCIPC 12 (CanLII) at para 138.

⁴⁸ Order 01-07, 2001 CanLII 21561 (BC IPC) at para 21.

⁴⁹ For example: Order F16-28, 2016 BCIPC 30 (CanLII) at para 96.

⁵⁰ Records, p. 245 (duplicate p. 379).

⁵¹ Order F16-46, 2016 BCIPC 51 (CanLII) at para 36. Section 22(3)(h) was amended in November 2021. This statement applies to both versions.

investigator who provided this evaluation is already known to the applicant, so I find s. 22(3)(h) does not apply.⁵²

Conclusion on s. 22(3)

[66] I find that disclosure of some of the personal information of the third parties' is presumed to be an invasion of their privacy under ss. 22(3)(d) and (g).

Relevant circumstances, s. 22(2)

[67] The final step in a 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). These circumstances can weigh either in favour or against disclosure. It is at this step, after considering all relevant circumstances, that any presumptions under s. 22(3) presumption may be rebutted.

[68] The parties submit one or more of the following s. 22(2) circumstances or other factors are relevant in this case:

- Subjecting a public body's activities to public scrutiny – s. 22(2)(a).
- A fair determination of the applicant's rights – s. 22(2)(c).
- Information supplied in confidence – s. 22(2)(f).
- The applicant's existing knowledge of the information at issue.
- The sensitivity of the personal information.

[69] I will discuss these circumstances below as well as the fact that some of the information at issue is the applicant's personal information.

Public scrutiny, s. 22(2)(a)

[70] Section 22(2)(a) requires a public body to consider whether disclosing the personal information is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. Where disclosure would foster the accountability of a public body, this may be a relevant circumstance that weighs in favour of disclosing the information at issue.

[71] PSA says any media interest in the applicant's actions back in 2015 is waning and points to a lack of media coverage of the applicant's loss in the most recent court case.⁵³

⁵² For a similar finding see Order F16-46, 2016 BCIPC 51 (CanLII) at para 36.

⁵³ PSA's reply submissions at para 45.

[72] The applicant says the public has an extensive interest in his dismissal that weighs heavily in favour of the release of information. He identifies his concerns with how the workplace investigation was conducted. He says the investigation was conducted in an unlawful labour process and was selective and highly inappropriate. He further says the witnesses advanced disparaging narratives and inaccurate information about his personal values, beliefs, opinions, and personality. The applicant maintains he has a right to correct the records within PSA custody and control.

[73] In my view, disclosing the third party personal information in this case is not desirable for the purpose of subjecting PSA's activities to public scrutiny. This case is very clearly about one person's employment dispute with his employer. PSA investigated an employee's conduct and took disciplinary action. There is a grievance process and an appeal mechanism available, and the applicant pursued that recourse. The applicant clearly believes it was the wrong process to follow. Regardless of whether that process was properly invoked, about which I make no finding, I find that process did already subject the PSA's activities to public scrutiny back in 2015. This scrutiny is evident in the submissions of both parties in their references to the initial public interest⁵⁴ in the facts surrounding the workplace incident.

[74] Disclosing the withheld personal information could potentially reveal some information that the PSA relied on in making its decisions following the workplace investigation. However, the withheld information is more directly related to the conduct and accountability of the applicant and third parties rather than the conduct and accountability of the PSA. Past orders have recognized this distinction⁵⁵ and found that this is insufficient for s. 22(2)(a) to apply.

[75] I find that the witness names and the details contained in the transcripts would not add anything further to the public's understanding of PSA's activities. What the applicant says in his submissions does not persuade me that disclosing the third party personal information in this case is desirable for the purpose of subjecting PSA's workplace incident investigation activities to public scrutiny.

⁵⁴ The parties differ on whether or not there is ongoing interest in the bear rehabilitation issues raised in the facts.

⁵⁵ Order F23-13, 2023 BCIPC 15 (CanLII) at para 119; Order F05-18, 2005 CanLII 24734 (BC IPC) at para 49; and Order F16-50, 2016 BCIPC 55 (CanLII) at para 48.

[76] For the reasons above, I am not satisfied that disclosing the personal information at issue in this case is desirable for the purpose of subjecting PSA's activities to public scrutiny under s. 22(2)(a).

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

[77] Section 22(2)(c) requires a public body to consider whether disclosing the personal information is desirable because it is relevant to a fair determination of an applicant's rights. Past orders have found that s. 22(2)(c) applies where all of the following four criteria are met:

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.⁵⁶

[78] PSA says the applicant settled and released any legal rights he had in relation to his employment. PSA further says that any non-legal right he asserts is based on his sense that he has been disrespected by the public body is not relevant to the determination of the application of s. 22.

[79] The applicant says the investigation was not handled properly, that wrongful accusations were levied against him, and that the third party witnesses publicly committed to speak ill of him at the request of the PSA and their counsel. The applicant says he is actively contemplating other avenues to challenge the wrongful accusations, for instance to the Human Rights Tribunal and the Ombudsperson.

[80] It is not disputed that there has never been a hearing looking at the merits of the decision to transfer the applicant to a different ministry following the

⁵⁶ Order 01-07, 2001 CanLII 21561 (BC IPC) at para 31; Order F19-41, *supra* note 46 at para 70.

workplace investigation.⁵⁷ As noted previously, the workplace incident involved in this inquiry happened in July 2015 and a settlement agreement was reached in February 2016. More than eight years have passed since the workplace incident, so even in the absence of a finding regarding the status of the settlement agreement, it is likely the applicant is time barred from pursuing any other actions. The applicant has not explained how he would still be in time to pursue such actions.

[81] I find the applicant, through his union, did pursue a fair determination of his legal rights under the collective agreement governing his workplace and that pursuit resulted in a settlement agreement. The applicant benefited from that settlement agreement, particularly with ongoing employment.

[82] The applicant applied, unsuccessfully, to set aside the settlement agreement. The BC Supreme Court upheld the settlement agreement wherein the applicant released any legal rights he had in relation to his employment. Specifically, he released any and all claims under the *Employment Standards Act*, the *Labour Relations Code*, the *Human Rights Code*, the *Workers Compensation Act*, other statutes or at common law.⁵⁸

[83] For the reasons above, I am satisfied that both the first and second parts of the test under s. 22(2)(c) have not been met. There is no need for me to consider the remaining parts of the s. 22(2)(c) test and I decline to do so. I find that the applicant has not established that the personal information is relevant to a fair determination of his rights.

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

[84] Section 22(2)(f) says that a relevant circumstance to consider is whether the personal information was supplied in confidence. Section 22(2)(f) requires evidence that an individual supplied the information under an objectively reasonable expectation of confidentiality at the time they supplied the information.⁵⁹

⁵⁷ PSA's reply submissions, para 11. The applicant views the transfer as a dismissal.

⁵⁸ Settlement Agreement attached to the Affidavit of PSA's Director of Employment Relations at para 14, PSA's reply submissions.

⁵⁹ Order F23-66, 2023 BCIPC 77 (CanLII) at para 69 citing Order F11-05, 2011 BCIPC 5 (CanLII) at para 41, citing Order 01-36, 2001 CanLII 21590 (BCIPC) at paras 23-26.

[85] PSA says that the investigator advised the interviewees that the process was confidential at the outset of the interviews and again at the end.

[86] I have reviewed the interview transcripts and am satisfied the interviewees were advised at several points that the investigation was confidential. I am also satisfied the interviewees were encouraged to speak openly and honestly. For these reasons, I find the interviewees supplied the personal information in confidence.

[87] The applicant does not dispute that at the time the personal information was supplied by the interviewees, it was supplied in confidence. Rather, he argues the information should now not be treated as confidential based on his beliefs about the witnesses. He says the witnesses were prepared to speak publicly, had improper motives (trying to secure his dismissal), and coordinated with each other in advance.⁶⁰ He further says that the witness information cannot be treated as confidential because PSA's lawyer revealed the names of the witnesses who would testify and what they would say in PSA's written submissions for the labour arbitration hearing. None of what the applicant believes about the witnesses changes the fact that the information was supplied in confidence in the first place.

[88] For the reasons above, I find that s. 22(2)(f) applies to all of the personal information that was supplied by third parties in the records at issue and this factor favours withholding the information.

Applicant's knowledge

[89] From the record before me, I am satisfied that the applicant is already familiar with the general subject matter and some of the specific content of the withheld information. This knowledge is a factor in favour of disclosure.

Sensitivity of the information

[90] I find that some of the personal information is sensitive because it relates to the emotions or feelings of third parties. Other personal information is sensitive, albeit to a lesser degree, because it contains evaluative comments or opinions about the quality of third parties' work, qualifications, and temperament.

⁶⁰ Applicant's submissions, paras 18, 19, 30, and 37.

[91] The rest of the third party personal information is not sensitive as it is factual information with no emotional or evaluative tone about what was said and done in the workplace.

Applicant's personal information

[92] Another factor that supports disclosure⁶¹ is that some of the information in the interview transcripts is the personal employment history of the applicant. However, as noted above the personal information of the applicant is also the personal information of third parties, which means that this factor has diminished weight.

Conclusion on s. 22(1)

[93] I found that most of the information PSA withheld under s. 22 was personal information. The only exception were the generic descriptors that did not identify any individuals.⁶² I found that s. 22(4) did not apply at all to the personal information. I found that the majority of the personal information in the transcripts was subject to the presumptions against disclosure in s. 22(3)(d). I also found that some of the information in the transcripts, such as what the witnesses said about their interactions with the applicant, were not subject to the presumption against disclosure in s. 22(3)(d). I found the investigator's conclusions about the credibility of the witnesses interviewed in the investigation reports is subject to the presumption against disclosure in s. 22(3)(g). Finally, I found the presumption in s. 22(3)(h) does not apply.

[94] I considered all of the relevant circumstances under s. 22(2) and, after weighing them all, I find that the presumptions against disclosure have not been rebutted and that disclosure of any of the third party personal information constitutes an unreasonable invasion of their personal privacy.

Summary of applicant's personal information, 22(5)

[95] Whenever there is information that was supplied in confidence about an applicant, a public body must consider whether it can prepare a summary of the information under s. 22(5). Under s. 22(5)(a), the public body must give a summary of personal information supplied in confidence about the applicant unless the summary cannot be prepared without disclosing the identity of the third party who supplied the information.

⁶¹ Order F14-47, 2014 BCIPC 51 (CanLII) at para 36, for example.

⁶² See note 34.

[96] I have decided that, given the small number of third parties involved in the investigation and the small size of the workplace teams, it would not be possible for PSA to summarize the information supplied in confidence about the applicant without disclosing the identity of the third parties who supplied the information. It is my view that, given that the applicant clearly knows the identities of some of the third parties involved, PSA could not summarize the information in a way that would not allow the applicant to identify the third parties.

CONCLUSION

[97] 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, PSA's decision that it is authorized under s. 13(1) and required under s. 22(1) to refuse to disclose information to the applicant.
2. PSA is not authorized or required under ss. 13(1) and 22(1) to refuse the applicant access to the information I have highlighted on the pages of the records that have been sent to PSA with this order.
3. PSA is required to give the applicant access to the highlighted information described in item 2 immediately above.
4. PSA must concurrently provide the OIPC's registrar of inquiries with a copy of the PSA's cover letter to the applicant and the relevant pages sent to him.

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

September 18, 2023

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

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