Order F24-45

TOWN OF QUALICUM BEACH

Erika Syrotuck
Adjudicator

May 30, 2024

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Summary: An applicant made a request to the Town of Qualicum Beach (Town) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for communications between the Town and a local airline. The Town withheld some information in dispute under ss. 13(1) (advice or recommendations), 21(1) (harm to third party business interests) and 22(1) (unreasonable invasion of a third party's personal privacy). The adjudicator found that ss. 13(1) and 22(1) applied to some information in dispute but that s. 21(1) did not apply to any information in dispute. The adjudicator ordered the Town to disclose to the applicant the information it was not authorized or required to withhold.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 13(1), 21(1), 22(1), 22(2)(a), 22(2)(f), 22(3)(i), 22(4)(e), Schedule 1 (definitions of "contact information" and "personal information").

INTRODUCTION

[1] An applicant made a request to the Town of Qualicum Beach (Town) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for communications between the Town's staff, Councillors, or Mayor and a local airline (Airline) over a period of about two months.

[2] In response, the Town provided 130 pages of records, withholding some information under ss. 17(1) (harm to a public body's financial or economic interests), 21(1) (harm to a third party's business interests) and 22(1) (unreasonable invasion of a third party's personal privacy) of FIPPA.

[3] The applicant requested that the OIPC review the Town's decision to withhold information on specific pages.

[4] Subsequently, the Town reconsidered its decision and released additional information to the applicant. It also added s. 13(1) (advice or recommendations) as a basis to withhold some of the information it had already withheld under other exceptions.

[5] I infer from the Investigator's Fact Report, which is the document that summarizes how the issues progressed to inquiry, that s. 17(1) was resolved at mediation.[1]

[6] Mediation did not resolve the remaining issues in dispute and the matter proceeded to inquiry.

[7] During the inquiry, the OIPC invited the Airline representative who was involved in the communications at issue (Third Party) to the inquiry as an appropriate person under s. 54(b) of FIPPA. The Third Party indicated that she wanted to participate but ultimately did not make submissions.

ISSUES

[8] At this inquiry, I must decide:

1. Is the Town authorized to withhold information in dispute under s. 13(1)?

2. Is the Town required to withhold information in dispute under ss. 21(1) or 22(1)?

[9] Under s. 57(1), it is up to the public body to prove that the applicant has no right of access to the information in dispute under ss. 13(1) and 21(1).

[10] Section 57(2) specifies that the applicant has the burden of proving that disclosure of the information in dispute would not be an unreasonable invasion of a third party's personal privacy under s. 22(1). However, the public body has the initial burden of proving that the information in dispute is "personal information" within the meaning of FIPPA.[2]

DISCUSSION

Information at issue

[11] The information at issue is portions of three emails between the Third Party and representatives of the Town.[3] For each of the emails in dispute, the

[1] This is because s. 17(1) is not listed as an issue that the adjudicator will consider at the inquiry.
[2] Order 03-41, 2003 CanLII 49220 (BCIPC) at paras 10-11.
[3] The records at issue contain duplicates, which the Town acknowledged in its November 22, 2022, reconsideration response.

Town disclosed the sender, recipient(s), subject line, date, signature block and opening and closing remarks. What remains in dispute is the substantive information in the body of the emails.

[12] Very broadly speaking, the records relate to air service to the Town.

Section 13 – advice or recommendations

[13] Under s. 13(1), a public body may refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to prevent the harm that would occur if a public body's deliberative process was exposed to public scrutiny.[4]

[14] The Town withheld a portion of one email sent from a Town councillor (Councillor) to the Third Party under s. 13(1).

[15] The first step in the s. 13(1) analysis is to determine whether the information in dispute is "advice or recommendations developed by or for a public body or a minister."

[16] "Recommendations" include material relating to a suggested course of action that will ultimately be accepted or rejected by the person being advised.[5] The term "advice" is broader than "recommendations"[6] and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.[7] Section 13(1) also encompasses information that would allow an individual to make accurate inferences about any advice or recommendations.[8]

[17] If the information is "advice" or "recommendations", the next step is to determine whether any of the circumstances in ss. 13(2) or (3) apply. These provisions exclude some types of records and/or information from s. 13(1). This means that, if information falls within ss. 13(2) or (3) the public body may not refuse to disclose it, even if it is "advice" or "recommendations" within the meaning of s. 13(1).

Is the information "advice" or "recommendations"?

[18] The Town says the email it withheld clearly contains advice or recommendations developed by the Town for the Airline. It did not elaborate. The applicant did not make submissions on s. 13(1).

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[4] *Insurance Corporation of British Columbia v. Automotive Retailers Association* 2013 BCSC 2025 at para 52.
[5] *John Doe v Ontario (Finance)* 2014 SCC 36 at para 23.
[6] *Ibid* at para 24.
[7] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para 113.
[8] Order F19-28, 2019 BCIPC 30 at para 14.

[19] I find that the portion of the email in dispute in which the Councillor sets out their opinion on a course of future action is "advice" developed by a public body within the meaning of s. 13(1).

[20] However, I find that disclosure of the remaining portions would not reveal advice or recommendations. For example, part of the email sets out a general thought not related to a specific decision about future action.

[21] In summary, I find that some, but not all of the information at issue is "advice" or "recommendations" within the meaning of s. 13(1).

Sections 13(2) and (3)

[22] Section 13(2) says that a public body must not refuse to disclose the types of records or information set out in ss. 13(2)(a) through (n). Section 13(3) says that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years.

[23] The Town says that none of the circumstances in s. 13(2) apply.

[24] I find that none of the circumstances in s. 13(2) apply. In addition, the information is not 10 years or older, so s. 13(3) also does not apply.

Conclusion, s. 13(1)

[25] I find that s. 13(1) applies to some, but not all, of the information in dispute.

Section 21(1) – harm to third party business interests

[26] Section 21(1) requires the head of a public body to refuse to disclose to an applicant information that could reasonably be expected to harm the business interests of a third party.

[27] The Town withheld portions of two emails under s. 21(1). One of the emails is from the Third Party to the Town's Chief Administrative Officer. The other is from the Third Party to the Chief Administrative Officer, the Councillor, and other Town representatives whose roles were not explained to me and are not evident from the records.[9]

[28] Section 21(1) has three parts: ss. 21(1)(a), (b) and (c). The Town must show that all three requirements apply to the information in dispute. I will begin with s. 21(1)(c).

[9] I can tell that the other recipients are representatives of the Town because they have Town email addresses.

Section 21(1)(c) – reasonable expectation of harm

[29] Section 21(1)(c) requires that the disclosure of the information at issue could reasonably be expected to:

> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[30] It is well-established that, when the language "could reasonably be expected to" appears in access to information statutes, the standard of proof is a "reasonable expectation of probable harm". This means that a public body must show that the likelihood of the harm occurring is "well beyond" or "considerably above" a mere possibility.[10] The amount and quality of the evidence required to meet this standard depends on the nature of the issue and the "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[11]

[31] In addition, there must be a clear and direct connection between disclosure of the information at issue and the harms alleged.[12]

[32] The Town said the following about s. 21(1)(c):

> Disclosing the Records in this case could reasonably be expected to harm the competitive position of [the Airline] or result in undue financial loss or gain to [the Airline]. As noted above, the information withheld in the Records directly addresses [the Airline's] position in the aviation market in relation to a competitor.

[33] I do not see the connection between disclosure of the information at issue and the harms alleged. The public body provided me with little context for its argument and it is not evident to me from the information in dispute how disclosure could reasonably be expected to result in undue loss or gain to the

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[10] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)* 2014 SCC 31 at para 54 citing *Merck Frosst v Canada (Health)* 2012 SCC 3 at paras 197 and 199.
[11] *Ibid* citing *FH v McDougall,* 2008 SCC 53 at para 40.
[12] Order F07-15, 2007 CanLII 35476 (BCIPC) at para 17.

Airline or harm its competitive position. Without more, I am not persuaded that any of the harms listed in ss. 21(1)(c) apply.

[34] In light of my conclusion that the Town has not discharged its burden with respect to s. 21(1)(c), it is not necessary for me to address ss. 21(1)(a) or (b).

Section 22 – unreasonable invasion of a third party's personal privacy

[35] 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.

[36] The Town withheld portions of the following three emails under s. 22(1):

- An email from the Councillor to the Third Party;
- An email from the Third Party to the Town's Chief Administrative Officer; and
- An email from the Third Party to the Chief Administrative Officer, the Councillor, and other Town representatives whose roles were not explained to me and are not evident from the records.[13]

[37] I found above that s. 13(1) applied to a portion of the email in dispute from the Councillor to the Third Party. I will only consider whether s. 22(1) applies to the remaining information in dispute in this email.

[38] The analysis under s. 22(1) has four parts, starting with whether the information in dispute is "personal information" within the meaning of FIPPA.

Is the information "personal information"?

[39] Since s. 22(1) only applies to personal information, the first step in the s. 22 analysis is to determine whether the information in dispute is "personal information" within the meaning of FIPPA. Schedule 1 of FIPPA says that "personal information" means recorded information about an identifiable individual other than contact information. Information is about an identifiable individual when it is reasonably capable of identifying an individual alone or when combined with other sources of information.[14]

[40] FIPPA also says that "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. Past OIPC orders have repeatedly said

[13] I can tell that the other recipients are representatives of the Town because they have Town email addresses.
[14] Order F18-11, 2018 BCIPC 14 (CanLII) at para 32.

that whether information is "contact information" depends on the context in which it appears.[15]

[41] The emails from the Third Party clearly contain information about identifiable individuals and are not contact information. I am satisfied that the information in these emails is personal information.

[42] The portion of the email in dispute from the Councillor to the Third Party contains identifiable information about the Councillor. Again, this information is clearly not contact information. I find that the information in this email is the Councillor's personal information.

[43] In summary, I find that all the information in dispute under s. 22(1) is "personal information" within the meaning set out in Schedule 1 of FIPPA.

Section 22(4) – not an unreasonable invasion of privacy

[44] The next step in the s. 22 analysis is to consider s. 22(4). Section 22(4) sets out circumstances where disclosure is not an unreasonable invasion of a third party's personal privacy. If any of the circumstances in s. 22(4) apply, the public body may not withhold the personal information under s. 22(1). No party made submissions about s. 22(4), but I have considered whether any circumstances apply, in particular s. 22(4)(e).[16]

[45] Section 22(4)(e) says that it is not an unreasonable invasion of a third party's personal privacy to disclose information about a third party's positions, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[46] It is well-established that s. 22(4)(e) applies to what a third party did or said in the normal course of discharging their job duties as an officer, employee or member of a public body.[17]

[47] First, as an elected office holder, the Councillor is an "officer" within the meaning of s. 22(4)(e). The BC Court of Appeal previously found that a municipal councillor is an "officer" for the purpose of s. 30.4 (now repealed) of FIPPA.[18] I find that the Court of Appeal's analysis applies equally to s. 22(4)(e). I also note that past orders have found that s. 22(4)(e) applies to municipal Councillors.[19]

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[15] Order F22-62, 2022 BCIPC 70 (CanLII) at para 18; Order F20-13, 2020 BCIPC 15 (CanLII) at para 42.
[16] In *British Columbia Hydro and Power Authority v British Columbia (Information and Privacy Commissioner),* 2019 BCSC 2128 (CanLII) at para 58, the BC Supreme Court confirmed that an adjudicator is obliged to consider s. 22(4) because it is mandatory.
[17] Order 01-53, 2001 CanLII 21607 (BCIPC) at para 40.
[18] *R v Skakun*, 2014 BCCA 223 (CanLII).
[19] For example, Order F23-05, 2023 BCIPC 6 (CanLII) at paras 34-36.

[48] It seems to me that the Councillor sent the email to the Third Party in the normal course of performing their duties as a Councillor. I find that s. 22(4)(e) applies to the information in this email. As a result, the Town cannot withhold this information under s. 22(1).

[49] The remainder of my s. 22 analysis will be with respect to the two emails sent by the Third Party only.

Section 22(3) – presumptions

[50] The next step in the s. 22 analysis is to consider whether any circumstances in s. 22(3) apply. Section 22(3) sets out circumstances where disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[51] The Town argued that s. 22(3)(i) applies.

[52] Section 22(3)(i) says that the disclosure of personal information that indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations is presumed to be an unreasonable invasion of that third party's personal privacy.

[53] I find that this provision clearly applies to part of one email. I cannot say more.

[54] Section 22(3)(i) does not apply to the rest of the information in dispute. I find that no other circumstances in s. 22(3) apply.

Section 22(2) – relevant circumstances

[55] The next step in the s. 22(1) analysis is to consider all the relevant circumstances, including those listed in s. 22(2)(a) through (i). Based on the parties' submissions, I have addressed ss. 22(2)(a) and (f). In addition, I considered the capacity in which the Third Party was acting.

Section 22(2)(a) – public scrutiny

[56] Section 22(2)(a) lists as a relevant circumstance 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. It is well-established that the purpose of s. 22(2)(a) is to foster accountability of a public body, not individual third parties.[20] If it applies, this circumstance weighs in favour of disclosure.

[20] Order F18-47, 2018 BCIPC 50 at paras 29 and 32.

[57] The applicant says that the purpose of the access request is to seek information regarding the decision to terminate another airline's airport lease and replace it with the Airline. The applicant makes several assertions about specific events relating to the Town's interactions with both airlines. While the applicant did not explicitly say so, I have determined that this is an argument about s. 22(2)(a).

[58] The Town says that none of the applicant's assertions are relevant to the issues in the inquiry.

[59] It is not clear to me whether the applicant's assertions are accurate. Regardless, I am persuaded that disclosure of the personal information in dispute is desirable for understanding the Town's activities with respect to air service to the Town. I find that s. 22(2)(a) weighs in favour of disclosure of the personal information in dispute.

[60] I say this without confirming or denying any of the applicant's specific allegations about what the information in dispute may contain.

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

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

[62] The Town says that the Third Party intended for the information to be confidential. In support of this, the Town provided an affidavit from the Town's Deputy Corporate Administrator (Administrator) who says the following:

> The Town's lawyer has informed me, and I verily believe it to be true that the [Third Party] relayed to her that she had intended for her emails to be confidential and that she opposes the release of the information at issue.

[63] I note that this evidence is double hearsay. That is, it is a statement initially made by one person (in this case the Third Party) to another person (the Town's lawyer) and then repeated by the affiant (the Administrator). The concern about double hearsay is that the affiant has no direct knowledge of the accuracy of the information.[21]

[64] It is well-established that the strict rules of evidence generally do not apply to administrative proceedings, such as this inquiry. Hearsay evidence is

[21] *R v Martin,* 1997 CanLII 9717 (SKCA).

admissible if it is relevant and can be fairly regarded as reliable.[22] I can determine the weight to give to such evidence.[23]

[65] I also note that the Town did not provide other evidence or argument that adequately addresses the circumstances surrounding receipt of the emails in dispute, such as the Town's expectations when it received the emails from the Third Party.

[66] Because the Town's evidence and argument consists only of a double hearsay statement, and is lacking context, I find that s. 22(2)(f) is a factor weighing in favour of withholding the personal information, but that it is relatively weak in this case.

Professional capacity

[67] While not an enumerated circumstance in s. 22(2), past OIPC orders have considered whether a third party was acting in a professional capacity. Where this is the case, this is a factor weighing in favour of disclosure.[24]

[68] I find that the Third Party wrote the emails in her professional capacity as a representative of the Airline, rather than in an exclusively personal capacity. As a result, I find that this is a circumstance weighing in favour of disclosure.

Section 22(1) - conclusion

[69] I found that all of the information in dispute under s. 22(1) is personal information.

[70] I found that s. 22(4)(e) applies to the portion of the email in dispute from the Councillor to the Third Party. Consequently, s. 22(1) does not apply to this information.

[71] I found that disclosure of part of one email is presumed to be an unreasonable invasion of a third party's personal privacy because it indicates a third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations. With respect to this personal information, I find that this presumption is not outweighed by the circumstances weighing in favour of disclosure, especially given that I found that the fact that information was supplied in confidence weighs in favour of withholding the information, albeit weakly. I find that s. 22(1) applies to this information.

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[22] *Cambie Hotel (Nanaimo) Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch),* 2006 BCCA 119 (CanLII) at paras 28 and 30. See also Order F20-48, 2020 BCIPC 57 (CanLII) at para 34.
[23] *Ibid.*
[24] See for example, Order F23-05, 2023 BCIPC 6 (CanLII) at paras 57-58.

[72] With respect to the remaining personal information, I find that the fact that the information is desirable for scrutinizing the activities of the Town with respect to air service to the Town and the fact that the Third Party was acting in a professional capacity outweigh the fact that the personal information was supplied in confidence, particularly because I found that this was a weak factor. I find that s. 22(1) does not apply to this information.

CONCLUSION

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

1. I require the Town to refuse to disclose the information in dispute under s. 22(1) that I have highlighted in orange on pages 82 and 104 in the copy of the records provided to the Town along with this order.

2. I confirm the Town's decision under s. 13(1) to refuse to disclose the information in dispute that I have highlighted in orange on page 81 in the copy of the records provided to the Town along with this order.

3. I require the Town to give the applicant access to the remaining information in dispute.

4. The Town must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described above.

[74] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by July 12, 2024.

May 30, 2024

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F22-89224