OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 01-54

THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 44 (NORTH VANCOUVER)

David Loukidelis, Information and Privacy Commissioner
December 21, 2001

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Summary: The applicant requested copies of communications about herself, dating from 1989, that the School District had in its custody. The School District properly refused access on the basis that it had received the applicant's personal information, and third-party personal information, in confidence and disclosure would unreasonably invade third-party personal privacy. The applicant has not shown that the information is relevant to fair determination of her rights or that other relevant circumstances favour disclosure. As it is not possible to sever or summarize the records without disclosing third-party personal information and unreasonably invading third-party personal privacy, the School District must withhold the entire communications.

Key Words: personal information – supplied in confidence – fair determination of rights – unreasonable invasion of personal privacy – severing – summary of personal information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(c), 22(2)(f), 22(5).

Authorities Considered: B.C.: Order No. 89-1996, [1996] B.C.I.P.C.D. No. 15; Order No. 275-1998, [1998] B.C.I.P.C.D. No. 70; Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

1.0 INTRODUCTION

[1] In August 2000, the applicant in this case wrote to the public body, The Board of School Trustees of School District No. 44 (North Vancouver) ("School District") and requested, under the *Freedom of Information and Protection of Privacy Act* ("Act"),

copies of unsolicited "communications from various parties in the community" that the School District had told the applicant, in a 1993 letter to her, had been received by the School District in 1989. The School District responded in early November 2000 by refusing access to the requested records under s. 22 of the Act. The applicant then requested a review of that decision. Mediation was not successful, so I held a written inquiry under s. 56 of the Act.

2.0 ISSUES

[2] The main issue in this case is whether the School District is required by s. 22 of the Act to refuse to disclose communications dating from 1989 about the applicant. Section 57(2) of the Act provides that the applicant has the burden of proving that disclosure would not result in an unreasonable invasion of the privacy of third parties.

[3] The School District says there is a second issue, *i.e.*, whether or not it is required to create a summary of personal information under s. 22(5) of the Act. This issue was not mentioned as an issue in the Notice of Written Inquiry issued by this Office, but in light of the mandatory nature of s. 22 (including s. 22(5)), I have considered it.

3.0 DISCUSSION

[4] **3.1 Background** – The School District says the applicant worked for it from 1986 to 1994, but it terminated the applicant's employment in 1994. It did so, it says, because she would not cease writing and distributing letters to the public containing "allegations that could have damaged the reputation of various employees and the reputation of the School Board" and kept entering School District premises while she was suspended from her duties. The School District also says that its co-ordinator of student services received the records in dispute in 1989, before the applicant's letter-writing campaign against the School District and its officials began. Last, the School District says the applicant learned of the existence of these records during a 1993 investigation into allegations the applicant had made against a School District official, although the applicant did not request copies of the records until 2000 (paras. 2-6).

[5] **3.2 Whose Personal Information is Involved?** – The School District acknowledges that the disputed records contain the applicant's personal information. It describes this information as her name, information on her marital status, health care history, employment history, opinions about the applicant and the applicant's own views and opinions. It also says the records contain personal information of others, including the author or authors of the communications, *i.e.*, names and addresses, information about third parties' health care and the opinions or views of third parties (paras. 19 and 20, initial submission).

[6] I agree with the School District that the records contain the applicant's personal information. The personal information in the records is principally the applicant's. The School District argues – without explaining in any great detail why – that s. 22(1) applies to the records in their entirety. I infer from its submissions and evidence as a whole (including as regards s. 22(5)) – and from the submissions of the third-party author or

authors of the communications – that the School District believes that simply revealing the identity or identities of third parties would unreasonably invade their privacy. I return to this issue below.

[7] **3.3 How Section 22 is Applied** – I have discussed the process for applying s. 22 in many orders, most recently in Order 01-53, [2001] B.C.I.P.C.D. No. 56. Without repeating that discussion here, I will take the same approach in applying s. 22 in this case.

[8] The School District says that s. 22(1) applies to the entirety of the records and that, in reaching this conclusion, it considered the relevant circumstances set out in ss. 22(2)(c) and (f) of the Act. It also says that it is not possible to create a summary of the records under s. 22(5) without disclosing the identity of the third party or parties who supplied information about the applicant in confidence. The relevant parts of s. 22 read as follows:

> **Disclosure harmful to personal privacy**
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
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> …
>
> (f) the personal information has been supplied in confidence, … .
>
> …
>
> (5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

[9] The School District says that neither s. 22(3) nor s. 22(4) applies to the records (para. 22, initial submission). I agree. In the case of s. 22(3), none of the third-party personal information in the records falls under any of the presumed unreasonable invasions of personal privacy created by that section. This does not end the matter, however, because disclosure may still be an unreasonable invasion of personal privacy under s. 22(1).

[10] **3.4 Relevant Circumstances** – I will now consider, as contemplated by s. 22(2) of the Act, the circumstances relevant to whether disclosure would unreasonably invade third-party personal privacy.

Fair Determination of Rights

[11] In my view, the applicant has not established that, as contemplated by s. 22(2)(c), she the information in the records is relevant to a fair determination of her rights. The reasons for this conclusion follow.

[12] First, I agree with the School District that the reference in s. 22(2)(c) to "rights" means legal rights. This is the accepted interpretation of the word "rights" in this context. See, for example, Order 01-53. The School District argues that the applicant has no legal rights at stake here, such that s. 22(2)(c) does not apply. The applicant has not, the School District says, started any legal action against the School District with respect to her various complaints and allegations against the School District or its officials. The records are therefore not needed for such an action.

[13] The School District, in its open and *in camera* reply submissions, suggests that, where it is possible to obtain records through discovery for litigation purposes, it is not appropriate for an applicant to try to obtain them through the Act. While it acknowledges, at para. 10 of its reply submission, that

> … the existence of other procedures for obtaining the Records in Dispute does not preclude the Applicant from obtaining the information under the *Act*, it is submitted that when the records are the very subject matter of the legal action (i.e. the alleged libel is contained in the records), the matter should be left for a court of law to determine.

[14] The School District cites two of my predecessor's decisions in support of this position – Order No. 89-1996, [1996] B.C.I.P.C.D. No. 15 and Order No. 275-1998, [1998] B.C.I.P.C.D. No. 70. Neither of these decisions supports the School District's argument. Order No. 89-1996 comes closest to doing so, but even that decision does not go as far as the School District contends. At all events, I do not find the School District's argument persuasive. I dealt with such an argument in Order 00-02, [2000] B.C.I.P.C.D. No. 2, as follows, at pp. 7-8:

> … there is nothing to stop the applicant from suing the government and seeking disclosure of the records through the discovery process provided for in the *Rules of Court*. Section 2(2) of the Act says the Act "does not replace other procedures for access to information". This is not to say the availability of document discovery in civil litigation displaces the Act and does not allow it to be used by applicants. I am only saying that s. 22(2)(c) does not, in this particular case, favour disclosure. Whether the applicant will fare any better in a lawsuit he might see fit to commence is another matter.

[15] As this passage indicates, the availability of other means of getting access to personal information may be a relevant circumstance, but that depends on the

circumstances of each case and no general presumption against disclosure under the Act can be applied as suggested by the School District. As the following discussion indicates, the material before me does not support a finding that the disputed information is relevant to a fair determination of the applicant's legal rights. But that view does not depend on a presumption that the Act is somehow supplanted because a record may contain a libel or solely because the record may be available through other processes.

[16] Turning to the merits of that issue, the School District says the applicant has not shown that the records are relevant to any issues relating to termination of her employment more than seven years ago, in 1994. The School District's evidence is that the applicant's former union has "withdrawn any grievance procedures with respect to that termination" and that the applicant has not begun any legal action respecting that termination. In any case, the School District says, the disputed records did not result in any investigation or disciplinary action against the applicant by the School District and they could not, given their nature and contents, assist her in any legal action against the School District. It says the applicant has not, on this basis as well, demonstrated that any of her legal rights are at issue here or that any issue of a fair determination of rights exists (paras. 37-43, initial submission).

[17] The applicant's submissions, and the many attachments to her submissions, contain little that is relevant to the issues before me in this inquiry. To the extent her submissions and supporting material are relevant to s. 22(2)(c), I infer she believes she has been defamed and that she lost her job because she made allegations of child abuse against various individuals. She believes that disclosure of the records will "promote public health and safety to the utmost" (pp. 3 and 4, initial submission) and says she requires them for "determination of vital and true medical intervention for my rapidly deteriorating health" (p. 6, reply submission). As the School District points out, at para. 5 of its reply submission, the applicant has provided no evidence to support the connection between disclosure and improvements to her health. No such connection is evident from the records' contents, or the other material before me. Even if such a connection were established, the applicant's claims regarding her health would not activate s. 22(2)(c) (although such a connection might be a relevant circumstance, generally, for the purposes of s. 22(2)).

[18] As was the case in Order 01-07, I find that s. 22(2)(c) is not a relevant circumstance in this case, something the applicant herself essentially admits in her reply submission (at pp. 1, 5, 6 and 7):

> The disclosure of the records was never a matter to secure my legal rights to my employment with the NVSD but to ensure the unconditional clearance of all defamation of my character and now the protection of my life. … the disclosure of records in dispute were [*sic*] never intended for any legal rights I may have … The disclosures of the records were never intended for an action for defamation against the North Vancouver School Board.

Confidential Supply

[19] The School District argues that s. 22(2)(f) applies and supports its withholding all of the records. It says it received the records in confidence from an outside source. It contends that the "confidential" stamp on the records and the circumstances under which the records were supplied to the School District indicate the confidential and "highly sensitive and personal nature of their contents" (paras. 23-25, initial submission).

[20] The School District has submitted – appropriately, I find – *in camera* argument and affidavit evidence describing the circumstances under which it received the records and supporting its conclusion that their contents were supplied in confidence. I also have the benefit of *in camera* submissions from the author or authors of the communications, in which evidence is given that the communications were supplied in confidence, that it was expected they would be kept confidential and that the communications are still regarded as confidential.

[21] To discuss this part of the case in any more detail would reveal third-party personal information. I am satisfied that the records' contents were supplied to the School District in confidence and that it received and treated them in confidence from the outset (paras. 11-19, *in camera* initial submission; paras. 6-14, *in camera* affidavit "B"; paras. 8-13, *in camera* affidavit "C"). Accordingly, I find that the relevant circumstance in s. 22(2)(f) applies in this case, as regards both the applicant's and third-party personal information, and that the s. 22(2)(f) circumstance favours withholding third-party personal information.

School District's 'Chilling' Argument

[22] It appears the purpose of providing the School District with the records in the first place was to alert it to, as the School District puts it, "concerns in the community regarding the applicant." The School District's co-ordinator of student services deposed (in para. 9 of his affidavit) that, at the time, he had discussed the records' contents with the assistant superintendent of student services "to determine what, if any, communication would be made with the principal of [the school] where the Applicant was currently employed."

[23] The co-ordinator also deposed that the School District relies on members of the public to provide "information regarding situations and persons that could have a negative effect on the health, safety and well-being of the students." He also deposed, at para. 14, that he believes the School District would not receive such reports if identifying information of those providing the information were disclosed. The School District provided further evidence on this aspect of the matter at para. 8 of *in camera* affidavit "B" and in *in camera* affidavit "C". However, the School District did not, apparently, take any other steps with regard to the applicant as a consequence of receiving these communications. As noted elsewhere, the applicant's termination in 1994 had nothing to do with these records.

[24] The School District is essentially arguing that disclosure of the identifying information would have a chilling effect on the public's willingness to come forward with concerns. I have rejected such arguments in the past – see, for example, Order 00-08, [2000] B.C.I.P.C.D. No. 8 – and am unconvinced by the School District's argument in this case.

[25] **3.5 Unreasonable Invasion of Third-party privacy** – I have decided that s. 22 of the Act requires the School District to refuse to disclose third-party personal information to the applicant. First, as I indicated above, the third-party personal information, and the applicant's personal information, were supplied in confidence and s. 22(2)(f) favours the School District's decision to refuse disclosure. Second, the applicant has not shown that the third-party personal information, or her own personal information, is relevant to a fair determination of her legal rights. This means that s. 22(2)(c) does not apply to favour disclosure. On this basis, I conclude that the third-party personal information must be withheld from the applicant. The School District says, however, that the applicant's own personal information must be withheld from her, in order to protect third-party privacy.

[26] As I acknowledged in Order 01-53, an applicant will rarely be denied access to her or his own personal information in order to protect third-party personal privacy. There will, however, be exceptional cases where disclosure to an applicant of his or her own personal information would unreasonably invade third-party personal privacy. In this case, there is no dispute that the records contain the applicant's personal information. The records also contain third-party personal information, principally identifying information. The question is, can the applicant have access to her own personal information without unreasonably invading the privacy of others? I have concluded that, as the School District has argued, this is one of the exceptional cases in which the applicant must be denied access to her own personal information in the records. The reasons for this conclusion follow.

[27] Section 4(2) of the Act reads as follows:

> The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[28] Ordinarily, therefore, a public body must sever and withhold protected information, while disclosing information that is not protected. In the usual case, the public body would have to sever protected third-party personal information and disclose to the applicant her own personal information. Here, the School District says, it is not possible to sever third-party information from the records, or prepare a summary under s. 22(5) of the Act, without identifying the third party or third parties and thus unreasonably invading third-party personal privacy. This is, the School District says, because the applicant could, even if third-party identifying information were severed from the records, still use the records' remaining contents to identify the third party or third parties who authored the records.

[29] The School District says (at para. 47 of its initial submission) has already provided the applicant with "the most forthcoming summary" it can, in the form of a 1993 letter to the applicant that described the records in dispute as

> … unsolicited, copies of communications from various parties in the community which raised concerns about your mental and emotional condition. The concerns arose from communications you had had with those parties on various, previous occasions.

[30] Having reviewed the records, and other material before me with care, I am driven to agree with the School District that the records cannot reasonably be severed to protect third-party personal information while disclosing the applicant's own personal information. Nor is it possible to prepare a summary of the applicant's personal information, under s. 22(5), without "disclosing the identity of a third party who supplied the personal information". I am constrained by the contents of the records themselves from saying more, as to do so would risk disclosing the very third-party information in dispute. I find that the School District is not required to sever the records nor is it required to create a summary under s. 22(5). The School District is required by s. 22 to refuse to disclose the entirety of the disputed records.

[31] I will note, in closing, that the School District did not seek to apply s. 19(1)(a) in this case. The material before me suggests that, had it done so, its position may have succeeded.

4.0 CONCLUSION

[32] For reasons given above, under s. 58(2)(c) of the Act, I require the School District to refuse access to the disputed records. Because a s. 22(5) summary cannot be prepared in this case, I need not make an order, under s. 58(3)(a), requiring the School District to perform its duty under that section.

December 21, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia