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

Order 02-23

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

David Loukidelis, Information and Privacy Commissioner
May 22, 2002

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Summary: The applicants obtained an arbitrator's award, under the *Residential Tenancy Act*, for rent and utilities owed by their former tenant. They asked the Ministry for her new address to collect the money owed under the award, but the Ministry refused under s. 22(1). None of the s. 22(3) presumed unreasonable invasions of personal privacy applies here. It is relevant that the address was supplied in confidence to the arbitrator, but it is also relevant to a fair determination of the applicants' legal rights. The Ministry is not required to refuse access, there being no unreasonable invasion of privacy in this case.

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

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(2), 22(1), 22(2)(c) and (f), 22(3)(b); *Freedom of Information and Protection of Privacy Amendment Act, 2002*, s. 19(b).

Authorities Considered: B.C.: Order No. 161-1997, [1997] B.C.I.P.C.D. No. 19; Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-54, [2001] B.C.I.P.C.D. No. 57; Order 02-02, [2002] B.C.I.P.C.D. No. 2. **Ontario:** Order M-39, [1992] O.I.P.C. No. 127; Order P-454, [1993] O.I.P.C. No. 112; Order P-523, [1993] O.I.P.C. No. 230; Order P-539, [1993] O.I.P.C. No. 258; Order P-559, [1993] O.I.P.C. No. 289.

1.0 INTRODUCTION

[1] The applicants in this inquiry are landlords. In February of 2001, they asked the Residential Tenancy Office – at that time part of the Ministry of Attorney General and now under the Ministry of Public Safety and Solicitor General ("Ministry") – for the

current "mail address" of a former tenant. They said they needed her address so they could serve her with certain legal process documents relating a residential tenancy arbitration matter. The Ministry refused, in a March 2001 letter, to provide the tenant's address, citing s. 22 of the *Freedom of Information and Protection of Privacy Act* ("Act").

[2] The applicants requested a review of that decision by my Office, under Part 5 of the Act, later in March 2001. They argued that they are legally required to serve their former tenant with the arbitrator's decision, which was made following a hearing, under the *Residential Tenancy Act* ("RTA"), involving the applicants and their former tenant. They said this was necessary in order for the court to enforce the order if the tenant did not comply with the order, by paying the money she owed under the arbitration award. They said that their former tenant had given her address to the arbitrator who heard the matter, but refused to give her address to them. In addition, they had discovered some thousands of dollars damage to the apartment vacated by the former tenant and therefore wished to apply for another hearing under the RTA about the damage. They needed her address, they said, to serve her with notice of that application as well.

[3] Mediation did not resolve the matter, so I held an inquiry under s. 56 of the Act. The applicants, the Ministry and the former tenant ("third party") all received copies of the Notice of Written Inquiry, although only the applicants and Ministry provided submissions to me.

2.0 ISSUE

[4] The issue in this case is whether the Ministry is required by s. 22 of the Act to refuse to give the applicants access to the third party's mailing address, on the ground that the disclosure would unreasonably invade the personal privacy of the third party. Section 57(2) of the Act places the burden on the applicants of establishing that the information can be disclosed without unreasonably invading third-party personal privacy.

3.0 DISCUSSION

[5] **3.1 Application of Section 22** – This section requires public bodies to withhold personal information where its disclosure would be an unreasonable invasion of a third party's privacy. The relevant portions of s. 22 follow:

> **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,
>
> …
>
> (f) the personal information has been supplied in confidence, … .
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation, … .

[6] I have discussed the application of s. 22 in many orders – *e.g.*, at paras. 22-24 of Order 01-53, [2001] B.C.I.P.C.D. No. 56 – and will not repeat that discussion here.

[7] **3.2 Is An Address Personal Information?** – The home address of the third party is clearly her personal information – it is recorded information about an identifiable individual. At the time the Ministry made its decision here, the Act's definition of the term "personal information" expressly provided that an individual's address is personal information. I will note here that, although the definition of personal information was amended, effective April 11, 2002, so that it no longer lists examples of types of personal information, the former definition's list of some types of personal information remains useful in identifying some kinds of personal information. (The amendment was made by s. 19(b) of the *Freedom of Information and Protection of Privacy Amendment Act, 2002*.)

[8] **3.3 No Presumed Unreasonable Privacy Invasions** – The Ministry argues that I should find disclosure of this information to the applicants would be an unreasonable invasion of the third party's privacy (para. 4.04, initial submission). The applicants acknowledge that disclosure of home address information in other cases might well cause an unreasonable invasion of third-party privacy, but say their case is different. They argue that s. 22 was not meant to assist people in evading due process, in this case, a legal obligation to pay money under the arbitrator's award (para. 2, reply submission).

[9] The applicants argue that the RTA, the legislation for which the Ministry is responsible, requires people in their position to serve documents on third parties. They argue, with some force, that the Ministry should not then stand in the way of their fulfilling this requirement. They argue that this "only aids and abets the third party in failing to account for its [*sic*] conduct". They are of the view that s. 22(3)(b) applies to their situation, arguing that "disclosure is necessary to prosecute the violation or continue the investigation", presumably meaning the violation of, or an investigation under, the RTA.

[10] The Ministry argues that s. 22(3)(b) does not apply, on the basis that the personal information was not compiled, and is not identifiable, as part of any investigation into a possible violation of law. I agree with the Ministry that s. 22(3)(b) does not apply. The arbitration of rent and other landlord-tenant disputes under the RTA is not, in my view, an "investigation" into a possible violation of law. It is an adjudicative process, not an investigative process as intended by s. 22(3)(b). As is discussed below, the applicants' arguments do, however, relate to the circumstance in s. 22(2)(c).

[11] I see no basis on which the third party's home address information could be said to fall within any of the other presumed unreasonable invasions of privacy in s. 22(3). As I have indicated in some cases, however, this does not mean third-party home addresses can, under s. 22(1), be disclosed without unreasonably invading the personal privacy of a third party. The outcome depends entirely on the circumstances of a given case. The question I must decide here is whether any relevant circumstances in this case, including those listed in s. 22(2), apply such that there is no unreasonable invasion of the third-party tenant's privacy in disclosing her address to her former landlords.

[12] **3.4 Relevant Circumstances** – In deciding whether s. 22(1) requires the Ministry to refuse to disclose the third party's address to the applicants, it is necessary to consider all relevant circumstances, including those set out in s. 22(2).

Fair determination of the applicants' rights

[13] In their initial submission, the applicants again recount the difficulties they had experienced in trying to obtain their former tenant's new address in order to serve her with the arbitrator's decision from the first RTA hearing. They say that, by other means, they learned where the former tenant was living and were able to serve her with notice of the new hearing, regarding the damage she caused to their property. That further RTA hearing was held, the applicants say, but they had further difficulties in serving the third party with the order for damages that they obtained. In the end, they say, they were forced to obtain a court order for substitutional service of the damage award, which involved taping the order to the tenant's door.

[14] The Ministry counters the applicants' arguments about the difficulties of serving orders by saying that an arbitrator's order is binding on the parties regardless of whether or not it is served. It argues that the appropriate avenue for ensuring that judicial service requirements are met is through the courts, not the Act. It outlined ways of accomplishing alternative methods of service, through the courts, that it says were open to the applicants. The Ministry says s. 22(2)(c) does not, therefore, weigh in favour of disclosure in this case.

[15] This argument comes perilously close, in my view, to saying that, if an applicant has another method of obtaining information, the Act does not apply. The Ministry is apparently attempting, without saying so, to argue that s. 2(2) of the Act prevents the applicants from using the Act to obtain information. I have rejected this type of argument a number of times in the past. Section 2(2) reads as follows:

> 2(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

[16] In Order 00-07, [2000] B.C.I.P.C.D. No. 7, after describing a similar argument on s. 2(2) by the Ministry of Attorney General, I rejected it, saying, at p. 15:

> The Ministry wishes effectively to turn s. 2(2) on its head – in effect, to ignore ss. 2 and 4 [which creates the right of access under the Act] – so that existence of other actual or possible avenues of access to information renders the Act inapplicable.

[17] I am no more persuaded by the Ministry's argument in this case than I was by the argument in Order 00-07.

[18] It should be noted that the finding of my delegate, in Order 02-02, [2002] B.C.I.P.C.D. No. 2, at para. 36, that the applicant in that case could use the court process to get personal information appears to have turned on the fact that, in the particular circumstances of that case, the right of discovery under the *Rules of Court* could be used if the applicants sued the third party. I found much the same thing in Order 00-02, [2000] B.C.I.P.C.D. No. 2, where I noted that the right of discovery under the *Rules of Court* was available. In Order 01-54, [2001] B.C.I.P.C.D. No. 57, the applicant in that case had conceded that s. 22(2)(c) did not apply. In all of these cases, the outcome under s. 22(2)(c) has turned on the particular circumstances. Further, I have, in the past, explicitly rejected the notion that discovery under the *Rules of Court* or some other process displaces the right of access under the Act or should prevent it from operating.

[19] In Order 01-07, [2001] B.C.I.P.C.D. No. 7, I set out the test for applying s. 22(2)(c) as follows:

> [31] In Ontario Order P-651, [1994] O.I.P.C. No. 104, the equivalent of s. 22(2)(c) was held to apply only where *all* of the following circumstances exist:
>
> 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.
>
> [32] I agree with this formulation. I also note that, in *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and*

> *Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.), at paras. 85-89, Lynn Smith J. concluded that a complainant's "fairness" concerns, related to the conduct of a complaint investigation, did not activate s. 22(2)(c).

[20] Having found, in that case, that there was no live legal issue regarding past investigations undertaken by the public body involved, I went on to say the following:

> [34] The situation may differ, of course, where an applicant seeks information that is relevant to, and necessary for, an existing or pending arbitration or other legal proceeding in which that applicant's legal rights are being determined. An example is where an employer has refused to disclose information from an investigation that is needed by the applicant to defend herself in legal proceedings arising from, or related to, the investigation.

[21] In my view, the necessary elements of s. 22(2)(c) are all present here. First, the right in question is a legal right arising under the RTA, *i.e.*, the award of damages and the right to enforce it by legal process. Second, that legal right is related to a proceeding that was underway or contemplated at the time of the request, *i.e.*, the process of enforcing the arbitration award as provided in the RTA. Third, the personal information in question – again, only the third party's address – has significance for the determination, or implementation, of the legal right to damages. Fourth, the personal information is necessary for the applicants to be able to serve their former tenant with notice of an RTA hearing and to enforce their damages award.

[22] The Ministry argues the applicants do not need to register any award in court, which would give it the force of a court order and offer enforcement methods not otherwise available to them. It says, at para. 1 of its reply submission, that even if the applicants do not register any award as a court order, s. 57 of the RTA provides the award is "binding" on the third party. Even if it is true that an award is in some sense "binding" even if not registered in court – and it is not clear how much an unregistered award would mean – I fail to see how this is relevant. Section 57 clearly allows the applicants to register an award as a court order and they clearly wish to do that. As I have already said, I consider that s. 22(2)(c) is a relevant circumstance and I find that it favours disclosure of the third party's address to her former landlords, so they can collect the damages she owes them.

Supplied in confidence

[23] The Ministry says the factor found in s. 22(2)(f) applies here, as the third party provided her address to the arbitrator in confidence. The Ministry says that, where a party does not wish to have her or his address disclosed, it is the practice of the arbitrator involved to ask the party to indicate that she or he is providing the address in confidence. The Ministry says that the arbitrator who handled the RTA matter involving the applicants and the third party has a policy of refusing to disclose contact information if an individual indicates that she or he wishes confidentiality. The Ministry did not provide me with any evidence of Residential Tenancy Branch policy, only evidence as to the policy, or preference, of a single arbitrator.

[24] The record in which the address was communicated – a telephone message the third party left for the arbitrator – is marked "confidential". The Ministry admits, it should be noted, that no one knows who wrote "confidential" on the message, *i.e.*, the Ministry admits it is not clear beyond doubt that the third party stipulated confidentiality in this way. It was not the employee who took the message, the Ministry says. The Ministry argues, nonetheless, that it is reasonable to conclude the third party in this case supplied the information in confidence. This factor, in its view, favours withholding the information.

[25] The Ministry has provided an affidavit in support of this argument from the information and privacy analyst who handled the applicants' request. The affidavit contains evidence to the effect that the person who recorded the third party's address said she understands that tenants generally provide their addresses to arbitrators in confidence. This person has no memory of taking the message in this case, however. The affidavit also contains evidence to the effect that someone in the arbitrator's office had spoken with the arbitrator, who confirmed her practice of taking tenants' addresses in the manner described above.

[26] The evidence of confidentiality is not as compelling as it might be, but I accept the Ministry's contention that the third party provided her address in confidence. This means that s. 22(2)(f) is a relevant circumstance in this case. In my view, however, the Ministry's reliance on the confidentiality of supply comes close to treating confidentiality as a trump card, overcoming all other factors in this case. It is necessary, as I have already said, to take into account all relevant circumstances, including the circumstance that the information is relevant to the fair determination of the applicant's legal rights, as contemplated by s. 22(2)(c). Further, I consider that, as is discussed below, other circumstances exist that, in addition to that in s. 22(2)(c), favour disclosure in this case.

Other relevant circumstances

[27] The Ministry has also supplied an *in camera* argument in its reply, outlining a factor which it acknowledges favoured disclosure, although it still feels s. 22(2)(f) outweighs this other factor. I cannot, of course, discuss the additional factor cited by the Ministry in its *in camera* argument (which I consider was properly submitted *in camera*). I agree that the factor the Ministry mentions *in camera* favours disclosure, and that it is not determinative here, but I do not agree with the Ministry that the s. 22(2)(f) continues to prevail over this, and other, relevant circumstances.

[28] It is also a relevant consideration that the applicants are only after the "mail address" of someone who is, in effect, their debtor as a result of a binding arbitration award under the RTA. In the context of this case, certainly, one's mailing address is not a particularly sensitive kind of personal information. Certainly, the Ministry has not attempted to argue that any of the presumed unreasonable invasions of personal privacy under s. 22(3) exists in this case.

Other decisions about addresses

[29] At para. 4.06 of its initial submission, the Ministry relies on Order No. 161-1997, [1997] B.C.I.P.C.D. No. 19, a decision of my predecessor. The Ministry argues that home addresses of third parties who are not public body employees should "similarly be protected from disclosure under s. 22." That decision does not advance the Ministry's position. My predecessor only said that home addresses of public body employees should not routinely be released under s. 22. He did not say they should, as the Ministry puts it, "be protected from disclosure under section 22." Each case in which an individual's home address is sought must be decided in the circumstances of the case.

[30] The Ministry also says that "numerous" decisions under Ontario's version of s. 22 "have held that disclosure of third party address information" would be, using Ontario's legislative terminology, "an unjustified invasion of personal privacy" (para. 4.07, initial submission). It cites five Ontario decisions as supporting examples. I do not propose to review those cases here in any detail. Suffice it to say that the Ontario position on release of address information is not as clear as the Ministry suggests, as is demonstrated by the examples on which the Ministry relies: Order M-39, [1992] O.I.P.C. No. 127; Order P-454, [1993] O.I.P.C. No. 112; Order P-523, [1993] O.I.P.C. No. 230; Order P-539, [1993] O.I.P.C. No. 258; Order P-559, [1993] O.I.P.C. No. 289. In Ontario, as in British Columbia, the approach that the Ministry urges on me – which taken to its logical end would take home address information, as a class, outside the Act's ambit – cannot be sustained.

[31] For the reasons given above, I have concluded that disclosure of the third party's address to these applicants would not, in the circumstances, be an unreasonable invasion of the third party's personal privacy. In reaching this conclusion, I have kept in mind the fact that s. 22 guards against only "unreasonable" invasions of personal privacy, not all invasions of personal privacy.

4.0 CONCLUSION

[32] For the reasons given above, I find that the the relevant circumstances tip the balance in favour of disclosure. The Ministry is not required by s. 22(1) to refuse to disclose the third party's address to these applicants for the purpose for which they seek it. Under s. 58(2)(a) of the Act, I order the Ministry to disclose the third party's address to the applicants.

May 22, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia