



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

Order F10-37

NEW WESTMINSTER POLICE BOARD

Celia Francis, Senior Adjudicator

November 3, 2010

Quicklaw Cite: [2010] B.C.I.P.C.D. No. 55

CanLII Cite: 2010 BCIPC 55

Document URL: <http://www.oipc.bc.ca/orders/2010/OrderF10-37.pdf>

Summary: Widow and union of a worker killed in a workplace incident requested the records of the NWPB investigation into the incident. NWPB disclosed much of the information. Section 22(1) found not to apply to most of the information withheld under that exception and NWPB ordered to disclose it, subject to reconsideration of s. 15(1)(g). Third parties found not to be “confidential sources of law enforcement information” and s. 15(1)(d) therefore does not apply. Some information relates to or was used in the “exercise of prosecutorial discretion”. However New Westminster Police Board found not to have exercised discretion properly in applying s.15(1)(g) and is ordered to reconsider its decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(d), 15(1)(g), 22(1), 22(2)(a), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(b), 22(3)(d), 22(4)(a).

Authorities Considered: B.C.: F10-36, [2010] B.C.I.P.C.D. No. 54; Decision F07-03, [2007] B.C.I.P.C.D. No. 14; Decision F08-02, [2008] B.C.I.P.C.D. No. 4; Order 00-18, [2000] B.C.I.P.C.D. No. 21, Order 00-02, [2000] B.C.I.P.C.D. No.2; Order No. 325-1999, [1999] B.C.I.P.C.D. No.38; Order 02-38, [2000] B.C.I.P.C.D. No. 2; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-19 [2001] B.C.I.P.C.D. No. 20.

1.0 INTRODUCTION

[1] The applicant in this case is a union representing itself and the widow of a lumber mill worker who died on the job in November 2004. The New Westminster Police Board (“NWPB”) received two requests from the union in May 2008 under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) for records of its investigation of this fatality. One flowed from a partial

transfer by WorkSafeBC of the union's request to that public body¹ and the other was the union's direct request to the NWPB. The NWPB responded to the two requests in phases from July 2008 to August 2009, disclosing a number of records in complete or severed form. This Order deals with the NWPB's collective responses.

[2] The NWPB initially applied ss. 16(1)(b) and 22(3)(b) of FIPPA to the severed information in the records, which included witness statements and a Report to Crown Counsel.² The union requested a review of the NWPB's decision by this Office ("OIPC") in August 2008. The union argued for disclosure of the severed information because, it said, most of the information was factual, rather than personal. In several stages throughout mediation, the NWPB disclosed the witness statements or personal information of seven third parties who had consented to this disclosure, as well as more information from the Report to Crown Counsel. In August 2009, the NWPB told the union that it was adding ss. 15(1)(d) and (g) as exceptions to disclosure of the withheld information it had withheld under s. 22(1). The union said it would not pursue information withheld under s. 16(1)(b)³ and certain information withheld under s. 22.⁴

[3] Mediation did not resolve the remaining issues⁵ and so an inquiry took place under Part 5 of FIPPA. The OIPC invited representations from the union, the NWPB and seventeen of the eighteen third parties.⁶ The union and NWPB both made submissions. Four of the third parties made a joint submission through legal counsel. The remaining thirteen third parties made no submissions.

2.0 ISSUES

[4] The issues before me are these:

1. Whether the NWPB is authorized to refuse access to information under ss. 15(1)(d) and (g) of FIPPA.
2. Whether the NWPB is required to refuse access to information under s. 22(1) of FIPPA.

¹ WorkSafeBC's response to the union's request for its records is the subject of Order F10-36, B.C.I.P.C.D. No. 54, which I am issuing concurrently.

² The NWPB first disclosed a severed copy of this report in July 2008, applying only s. 22(3)(b) to the withheld information.

³ CPIC printouts, Emergency Health Services records and BC Coroners Service records. I do not consider this information here as a result.

⁴ A memorandum of understanding and the names of employees of an engineering firm. I do not consider this information either.

⁵ Information withheld under ss. 15(1)(d) and (g) and the rest of the information withheld under s. 22.

⁶ One of the third parties has died since the NWPB did its investigation.

[5] Section 57 of FIPPA sets out the burden of proof in an inquiry. Under s. 57(1), the NWPB has the burden respecting ss. 15(1)(d) and (g), while under s. 57(2) the union has the burden of showing that disclosure of third-party personal information would not be an unreasonable invasion of third-party privacy.

3.0 DISCUSSION

[6] **3.1 Preliminary Issues**—The union raised two matters in its initial submission which I will deal with first.

Objection to application of discretionary exceptions to both files

[7] The union complained that it was not until August 2009 that the NWPB said it was also applying ss. 15(1)(d) and (g) to information in one of the two files. The union argued that the NWPB should not now be allowed to argue the application of ss. 15(1)(d) and (g) regarding the other file as well.⁷

[8] My review of the material before me indicates that the NWPB applied ss. 15(1)(d) and (g) only to records in the file to which the NWPB originally referred and not to both files. I therefore see no need to deal with the union's complaint here.

Public interest override

[9] The union argued briefly in its initial submission that disclosure of the withheld information is clearly in the public interest and that s. 25 of FIPPA therefore applies in this case. This was the first time the union raised this issue.

[10] Past orders and decisions of the OIPC have said parties may raise new issues at the inquiry stage only if permitted to do so.⁸ The union had over a year of mediation in which to raise s. 25. It did not explain why it did not do so until its initial submission, why it should be permitted to raise s. 25 at this late stage nor why it believes s. 25 applies. I have therefore decided not to permit the union to raise s. 25 in this inquiry.

[11] **3.2 Records in Dispute**—There are approximately 1,100 pages of responsive records. The union described the records in dispute as follows:

- Report to Crown Counsel of September 2006, which includes a summary of WorkSafeBC's investigation into the worker's death, summaries of interviews WorkSafeBC conducted, a summary of "Company

⁷ Paras. 76-78, union's initial submission.

⁸ See for example Decision F07-03, [2007] B.C.I.P.C.D. No. 14, and Decision F08-02, [2008] B.C.I.P.C.D. No. 4.

- correspondence” relating to safety issues and summaries of interviews the NWPB investigating officer conducted
- search warrant request by the NWPB
 - summary of “Company correspondence” on safety and equipment issues
 - the NWPB investigating officer’s handwritten notes on his investigation of the fatality⁹
 - list of “persons of interest” in the NWPB’s investigation
 - list of “employee witnesses” in the NWPB’s investigation
 - transcripts of interviews the NWPB conducted with “persons of interest” and witnesses¹⁰

[12] The union noted that the NWPB withheld information in the records as follows:

- WorkSafeBC’s chronology and summary of Company correspondence: the names of some employees of the lumber mill who witnessed or were involved in the incident which led to the worker’s death and had information about the incident, or who had general information about the operations of the company, its machinery and its health and safety practices
- witness interview summaries in the Report to Crown Counsel: some summaries in their entirety; some information in other summaries, including names of some employees
- other records: names of employees in the search warrant request, in company correspondence regarding safety, in the handwritten notes, in the lists of persons of interest and witnesses,¹¹ in emails and work orders on safety and equipment issues dated before and after the incident
- transcripts of witness interviews: some transcripts in their entirety; some information in other transcripts, including names of some employees¹²

[13] **3.3 Confidential Source**—The NWPB applied s. 15(1)(d) to the severed portions of the Report to Crown Counsel and to the severed portions of the interview transcripts.

⁹ The Report to Crown Counsel states that these notes were attached to it.

¹⁰ Para. 15, union’s initial submission.

¹¹ My review of these two items shows that the NWPB disclosed the names, occupations and “will says” on the list of “persons of interest” and severed their home addresses and telephone numbers. It disclosed the list of “witnesses” in severed form, withholding some names and all home addresses and telephone numbers. However, it disclosed names of the other witnesses and also disclosed the occupations and “will says” of all the witnesses.

¹² Paras. 16-18, union’s initial submission.

[14] The relevant provisions read as follows:

Disclosure harmful to law enforcement

15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(d) reveal the identity of a confidential source of law enforcement information,

“law enforcement” means

- (a) policing, including criminal intelligence operations,
- (b) investigations that lead or could lead to a penalty or sanction being imposed, or
- (c) proceedings that lead or could lead to a penalty or sanction being imposed;

[15] Section 15(1)(d) has been the subject of a number of orders. In order for this exception to apply, it is necessary for the public body to establish these things:

- the information in dispute must be “law enforcement information”
- the individual who provided the information must be a “confidential source”, *i.e.*, have provided the information under conditions of confidentiality
- disclosure of the information must reveal the identity of the source¹³

[16] I apply these criteria here.

[17] The NWPB blended its submissions on s. 15(1)(d) and s. 15(1)(g), as follows:

In applying section 15(1)(d) and (g) the New Westminster Police Service again relies on the fact that the matter was appropriately investigated as a criminal investigation and that this section provides for the protection of information that may be seen, or viewed, as being harmful to law enforcement and its investigations. The key factor in considering the application of this section(s) is in that fact that any witness interviewed, or who provided information to the NWPS, would have been doing so a[s] part of a criminal investigation. The information provided was being gathered for the potential prosecution of any individual(s), and that the information was not being gathered for administrative purposes.

¹³ See Order 00-18, [2000] B.C.I.P.C.D. No. 21.

The eventual decision of the Criminal Justice Branch not to lay any formal criminal charges, are part of the process of prosecutorial discretion and would be formed on the basis of the information contained within the police report submitted, for charge approval consideration. This would include witness statements and other potential witness information.¹⁴

[18] The union argued that the witness statements and other records were not supplied in confidence, referring to its argument and evidence on s. 22(2)(f) for support. If there was no confidentiality in providing the information, the union continued, disclosure could not reveal any confidential sources. It also argued that the NWPB has provided no evidence of any kind to show that the information in question was supplied in confidence. Moreover, the union argued, it has established that it is aware of the identities of the third parties who provided statements and documents to the NWPB and WorkSafeBC and the sources are thus already revealed. The union also suggested that the NWPB did not exercise its discretion properly in applying s. 15(1)(d).¹⁵

Analysis

[19] The information in dispute flows from investigations under the *Criminal Code* and the WCA. Both types of investigations can lead to the imposition of penalties or sanctions and thus qualify as “law enforcement” as defined in Schedule 1. I am therefore satisfied that the information in dispute is “law enforcement information” for the purposes of s. 15(1)(d).

[20] I do not however agree that the third parties are “confidential sources”. While the third parties provided the information and thus could be considered “sources”, the interview summaries and transcripts do not, as the union pointed out, show that the third parties requested or received assurances of confidentiality. The union’s evidence also indicates that the witnesses neither asked for nor received assurances of confidentiality.¹⁶ Nor is there any evidence that the other records (emails, work orders and other items) were provided in confidence. As noted below in the discussion of s. 22(2)(f), the third parties themselves did not claim that they provided information in confidence. Certainly, neither the NWPB nor the third parties provided any evidence of this. I find that s. 15(1)(d) does not apply to the information in dispute.

[21] **3.4 Exercise of Prosecutorial Discretion**—The relevant provisions say this:

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

¹⁴ Page 4, NWPB’s initial submission.

¹⁵ Paras. 79-81 & 83-93, union’s initial submission; para. 15, union’s reply submission.

¹⁶ Para. 7, union representative’s affidavit.

...

- (g) reveal any information relating to or used in the exercise of prosecutorial discretion,

“exercise of prosecutorial discretion” means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power

- (a) to approve or not to approve a prosecution,
- (b) to stay a proceeding,
- (c) to prepare for a hearing or trial,
- (d) to conduct a hearing or trial,
- (e) to take a position on sentence, and
- (f) to initiate an appeal;

[22] Several orders have considered the application of s. 15(1)(g). These orders establish that this exception applies to information relating to, or used in, the exercise of duties or powers under the *Crown Counsel Act*.¹⁷ I take the same approach here.

[23] I reproduced the NWPB’s submission on s. 15(1)(g) above and so will not repeat it here. The NWPB’s submission suggests that Crown counsel considered “witness statements” in deciding not to approve charges. The NWPB also annotated the severed portions of both the NWPB’s interview transcripts and the 74 page Report to Crown Counsel narrative with s. 15(1)(g). I therefore take it that the NWPB considers that the severed information in these two sets of records falls under s. 15(1)(g).

[24] The union disagreed that s. 15(1)(g) applies in this case. It argued that the NWPB had provided no evidence of any kind that the disputed information was used in the exercise of prosecutorial discretion. It also suggested that the NWPB had not exercised its discretion properly in applying this exception, pointing out that the NWPB did not consider this exception until over a year after the union made its requests. The NWPB did not, in the union’s view, consider factors such as these: the widow and union’s legitimate interest in knowing what happened; promoting accountability and confidence of the public in the NWPB; some of the withheld information likely pertains to the deceased worker.¹⁸

Analysis

[25] The NWPB’s brief submission argument on s. 15(1)(g) included no evidence in support of its position on this issue. An affidavit from the Crown

¹⁷ See for example Order 00-02, [2000] B.C.I.P.C.D. No.2.

¹⁸ Paras. 82-93, union’s initial submission; paras, 15-19, union’s reply submission.

counsel involved would for example have been helpful. However, I was able to glean useful information from other sources.

[26] First, the NWPB “occurrence report (narrative)” describes a telephone conversation in October 2006 between the NWPB investigating officer and Ronald Kockx, Administrative Crown Counsel.¹⁹ In this conversation, Mr Kockx told the officer that he and other Crown counsel had reviewed the Report to Crown Counsel and, together with their supervisors, had decided there was insufficient evidence to charge the employer or any of its management employees with criminal negligence causing death in relation to the worker’s death.²⁰

[27] I am thus satisfied that Crown counsel used the Report to Crown Counsel in deciding whether or not to approve a prosecution. This activity is explicitly included in the definition of the “exercise of prosecutorial discretion”. I find that s. 15(1)(g) applies to the severed information in the Report to Crown Counsel.

[28] Second, a letter of November 21, 2007 from Mr Kockx to the worker’s widow indicates that Crown counsel reviewed “witness statements” in deciding not to approve charges:

As I stated in our meeting last year, two other senior prosecutors, including the head of Special Prosecutions, were involved in the charge approval process. This process included a thorough review of a multitude of documents and witness statements provided by the police investigator. We were satisfied that we had everything we needed to make a proper and informed decision.²¹

[29] I take “witness statements” to refer to the transcripts of the NWPB’s interviews with the third parties as witnesses or persons of interest, as these are stand-alone records. Apart from the Report to Crown Counsel, it is not clear from the material before me what else the “multitude of documents” may have comprised. However, based on Mr Kockx’s letter, I am satisfied that Crown Counsel used the transcripts of the NWPB’s interviews with the third parties in the exercise of prosecutorial discretion and that s. 15(1)(g) applies to the severed information in these pages.

¹⁹ See page 4 of the records in dispute in OIPC File F08-36125. The NWPB disclosed this occurrence report in full.

²⁰ While the Report to Crown Counsel states that the investigating officer’s handwritten notes were attached to the Report to Crown Counsel, the NWPB disclosed these notes with only minor severing under s. 22. The NWPB did not also later apply s. 15(1)(g) to the severed information in these notes.

²¹ Exhibit “A” to widow’s affidavit, union’s initial submission. The purpose of this letter was to explain why Crown counsel had not approved charges of criminal negligence against the employer or any of its employees.

Exercise of discretion

[30] This is not the end of the matter, however, as there is still the issue of the NWPB's exercise of discretion in deciding to apply s. 15(1)(g). Public bodies should, as many orders have said, consider all relevant circumstances in applying discretionary exceptions like s. 15(1)(g). They should also explain, in an inquiry such as this, what factors they considered in applying these exceptions.²²

[31] In Order 00-02,²³ Commissioner Loukidelis discussed factors public bodies should consider in applying s. 15(1)(g):

There is no indication in the material before me whether the Crown disclosed this material to the applicant or his lawyer in connection with the applicant's guilty plea in 1995. The Crown is legally bound to disclose relevant material to the defence: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.). Section 15(1)(g) is a discretionary exception. A public body may disclose material that is technically covered by the section if it wishes to do so. In an appropriate case, a public body should consider exercising its discretion in favour of disclosure, if material sought by an applicant is technically covered by s. 15(1)(g) but has previously been disclosed to the applicant, under *Stinchcombe*, in a prosecution. ...

[32] The NWPB offered no explanation for its decision, so late in mediation, to apply s. 15(1)(g). The NWPB also did not say what, if any, factors it considered in deciding to invoke this exception.

[33] There is a hint in the NWPB's submission that refusal or absence of consent by the third parties was a factor but this is not clear. A third party's consent or lack of consent to disclosure may be a relevant circumstance in the exercise of discretion in appropriate cases, although I am not persuaded that it was necessarily a relevant circumstance in this case, given the purpose of s. 15(1)(g). In any event, consent should not have been the only factor and determinative of the public body's decision to apply s. 15(1)(g), as appears to have been the case here.

[34] Without more, it is difficult to understand what could have motivated the NWPB to apply a new discretionary decision to the withheld information so late in the day. Given that the NWPB had already disclosed large portions of the Report to Crown Counsel and witness statements to the union, the benefit of applying s. 15(1)(g) would seem to have been largely lost by this time.

²² See Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, for example.

²³ [2000] B.C.I.P.C.D. No. 02, at p. 5.

[35] I am also troubled by the NWPB's apparent failure to consider relevant circumstances such as these:

- the withheld information is similar, both in content and character, to information the NWPB has already disclosed²⁴
- much of the withheld information is not personal information, but rather factual descriptions of mill processes and procedures
- some of the withheld information is the personal information of the deceased worker
- the passage of time — both the WorkSafeBC and NWPB investigations are long over
- no one was charged criminally
- the worker's widow and the union were acting together in making the request and had a legitimate interest in knowing what was before Crown counsel in deciding not to approve charges
- disclosure would promote public confidence in the NWPB and its investigation processes
- the purpose of the legislation²⁵

[36] In failing to consider the relevant circumstances, I conclude that the NWPB has not exercised its discretion properly in deciding to withhold information under s. 15(1)(g). I therefore order it below to reconsider its decision to withhold the information that I found falls under this exception, taking into account the relevant circumstances I list here and those in past orders. In exercising its discretion regarding s. 15(1)(g), the NWPB should also consider my findings that s. 15(1)(d) does not apply and that s. 22(1) does not apply to most of the information the NWPB withheld under this exception.

²⁴ See for example, the Report to Crown Counsel and Appendix "A" to the "Information" the NWPB investigating officer swore to obtain a search warrant. Both items provide a detailed account of the incident and the role the deceased worker's co-workers and supervisors played. They also give the names and/or occupations of many of the third parties. Both also describe and summarize documents such as emails and work orders the officer reviewed and, with the exception of a handful of individuals, name the third parties who sent and received the emails, submitted or dealt with the work orders. In addition, the disclosed interview summaries and transcripts contain information that is similar both in character and content to information the NWPB withheld in other summaries and transcripts.

²⁵ Order 02-38, [2002] B.C.I.P.C.D. No. 38, at para. 149, and F09-02, [2009] B.C.I.P.C.D. No. 2, at para. 31, list other relevant circumstances public bodies should consider in applying discretionary exceptions.

[37] **3.5 Application of Section 22(1)**—The relevant provisions are these:

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
- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
...
 - (e) the third party will be exposed unfairly to financial or other harm,
...
 - (f) the personal information has been supplied in confidence,
...
 - (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant
- (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,
...
 - (d) the personal information relates to employment, occupational or educational history, ...
- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
- (a) the third party has, in writing, consented to or requested the disclosure

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

[38] Numerous orders have considered the application of s. 22, for example, Order 01-53.²⁶ First, the public body must determine if the information in dispute is personal information. Then, it must consider whether disclosure of any of the information is not an unreasonable invasion of third-party privacy under s. 22(4). Then the public body must determine whether disclosure of the information is presumed to be an unreasonable invasion of third-party privacy under s. 22(3). Finally, it must consider all relevant circumstances, including those listed in s. 22(2), in deciding whether disclosure of the information in dispute would be an unreasonable invasion of third-party privacy. I take the same approach here.

Is the information in dispute “personal information”?

[39] The NWPB did not explicitly address this issue. Its submissions suggest however that it considers all of the withheld information to be the personal information of the third parties. The third parties also appear to take this position, although they refer only to their names and occupations.²⁷

[40] The union “concedes” that individual names appearing in the witness statements and any statements in those records by the third parties about what they or others did in the workplace are personal information. However, it argued that much of the withheld information is factual information and not the personal information of the third parties, as Commissioner Loukidelis found in Order 01-19.²⁸ In the union’s view, the witness statements and summaries are “factual accounts about the circumstances” which gave rise to the worker’s death and include information about the operations of the employer (the “Company” that owned the lumber mill), its machinery and its health and safety practices, including another workplace accident which occurred in 2003.²⁹

[41] The records in the first file (OIPC F08-36125; 356 pages) include these items: occurrence and continuation reports; the “information” sworn for obtaining a search warrant; work orders and emails associated with the hog³⁰ before the fatal incident; engineering records and emails associated with work done on the hog after the fatal incident; an autopsy report; emails and reports about the deceased worker’s work performance; photographs and drawings of the mill and hog; confined space policies and procedures; emails about mill procedures and previous incidents.

[42] The NWPB disclosed most of the records in this file, withholding only these types of information: the names of third parties such as the deceased worker’s co-workers, supervisors and trainers; home telephone numbers and

²⁶ [2001] B.C.I.P.C.D. No. 56.

²⁷ Paras. 18, 23-27, third parties’ initial submission.

²⁸ [2001] B.C.I.P.C.D. No. 20

²⁹ Paras. 23-28, union’s initial submission.

³⁰ A hog is a machine used to chip waste wood in a lumber mill. The deceased worker died while working on unplugging the hog.

dates of birth of some third parties; information about a few third parties' work performance. All of the withheld information in this first file is recorded information about identifiable individuals and thus "personal information" as defined in Schedule 1 of FIPPA.

[43] The records in the second file (OIPC F08-36126; 761 pages) consist of the Report to Crown Counsel, some photographs and transcripts of the NWPB interviews. The NWPB disclosed the photographs and much of the Report to Crown Counsel, including most of the investigating officer's handwritten notes. It also disclosed a number of interview summaries in the Report to Crown Counsel, together with the corresponding NWPB interview transcripts. It withheld or severed other interview summaries and NWPB interview transcripts.

[44] Where it had the consent of third parties, the NWPB disclosed the following types of information in this second file: the names, occupations and duties at the mill of witnesses³¹ and others; their past employment in the mill and elsewhere; their experience with different types of machinery and equipment in the mill; their actions and roles before, during and after the fatal incident; comments about the deceased worker; accounts of a previous incident in 2003 involving another worker; the third parties' opinions of mill processes or procedures and of safety issues in the mill. This disclosed information is all "personal information".

[45] Where it did not have third-party consent, the NWPB withheld the same types of information in the second file as it disclosed in cases where it did have consent (see description in previous paragraph). I am satisfied that all these types of withheld information in the second file are "personal information".³²

Some withheld information is not "personal information"

[46] As noted just above, some withheld information in the second file (OIPC F08-36126) is "personal information". However, much of the withheld information in the second file is not "about" identifiable individuals and is thus not "personal information". Rather, it consists of factual accounts of mill processes and procedures or other factual information, as follows: the NWPB investigating officer's introductory and subsequent comments on his investigation process; his descriptions of procedural information he obtained; procedures for unplugging the hog; millwrights' procedures for opening the hog; the process for submitting and dealing with work orders, including a series of work orders associated with the hog and discussions with witnesses of emails on this topic; discussions with witnesses of work done on the hog after the fatal incident; the process for creating "Job Safety Breakdowns" (JSBs), both in general and for the hog;³³ safety issues and concerns associated with the hog; the process for designating

³¹ I include here the persons of interest for ease of reading.

³² See Order 01-19, at para. 27, for a similar finding.

³³ The JSB in this case was a description of the tasks associated with unplugging the hog.

a confined space and whether the hog had been so designated; the labour-management atmosphere at the mill; lockout procedures; process for conducting safety tours; descriptions of the mill's Behaviour Based System ("BBS"); training procedures for workers to unplug the hog; information on maintenance and running of the hog; ownership of the mill. Section 22(1) does not apply to these types of non-personal information.³⁴

[47] The parties did not argue that s. 22(4) applies to any of the withheld information and I see no basis for this section to apply. I therefore consider below whether s. 22(1) applies to the withheld information that I found, in paras. 42 and 45 above, is "personal information".

[48] **3.6 Presumed unreasonable invasion of third-party privacy**—The NWPB said it applied s. 22(3)(b) to the withheld information. It argued that this section

... does not have any "affirmative action" required by the investigating police member, to advise the third party of this protection, but instead offers the protection to all individuals who cooperate and provide information regarding an investigation. This section can be seen as providing protection to witnesses who may otherwise have concerns over their cooperation with an investigation, for fear that their personal information or statement may be used in another forum other than which they have been provided or intended for.³⁵

[49] The union "concedes" that s. 22(3)(b) applies to any personal information in the records, as the NWPB compiled it as part of an investigation into a possible violation of law.³⁶

[50] The third parties are of the view that, in addition to s. 22(3)(b), s. 22(3)(d) applies to the withheld information. They referred to a number of orders in support of their position.³⁷ As noted above, their submissions dwelt only on the desirability of withholding their names and occupations, although much more personal information is in issue here.

Analysis

[51] It is clear from the responsive records that the NWPB compiled the personal information in the course of investigating a possible violation of the *Criminal Code*, that is, possible criminal negligence on the part of the employer. Much of the personal information also arises out of WorkSafeBC's investigation

³⁴ Again, I note that Commissioner Loukidelis made a similar finding in Order 01-19, at paras. 24-26.

³⁵ Page 3, NWPB's initial submission.

³⁶ Para. 27, union's initial submission.

³⁷ Paras. 1-32, third parties' initial submission.

of possible violations of the *Workers Compensation Act*.³⁸ On both counts, therefore, I am satisfied that s. 22(3)(b) applies to the third-party personal information in the responsive records.³⁹

[52] I also agree with the third parties that the third-party personal information in the records falls under s. 22(3)(d). It relates to investigations of incidents in the workplace in which the third parties were involved, including the incident which the worker died. It also relates to the third parties' activities in the workplace and things they said and did in their workplace. These types of personal information all constitute the employment history of the third parties.⁴⁰

[53] **3.7 Relevant Circumstances**—The union argued that the relevant circumstances favour disclosure, while the NWPB and the third parties argued the opposite. For reasons I discuss below, I have concluded that the relevant circumstances favouring disclosure rebut the presumed unreasonable invasion of third-party privacy, with some minor exceptions.

Consent

[54] The NWPB said that it sent out “contact letters” to the third parties requesting their permission to disclose their statements and personal information to the applicant. It said it received some replies giving permission and others denying it. In still other cases, it received no reply. The NWPB said it disclosed statements or personal information where third parties had consented. In cases where the third parties had denied consent or had not replied, the NWPB said it withheld all information,

... as it is viewed by the NWPS that permission needs to be granted, when requested, for the information to be released. This process was done in compliance with the *Freedom of Information and Protection of Privacy Act*, demonstrating that a consistent approach and application of the Act was followed.

The fact that several individuals opposed the release of their information and statements provides some potential insight into the thoughts of those individuals who participated in the police investigation, and their expectations for their own personal privacy. The matter was investigated by the NWPS as a criminal investigation, with the final report to be provided to the Criminal Justice Branch for a charge approval review. That process was followed and completed by the NWPS investigators(s) upon conclusion of their investigation.

[55] The union noted that seven individuals gave consent to disclosure. In its view, there is insufficient evidence that most of the affected third parties actively oppose the release of their personal information. It also argued that the NWPB

³⁸ See Order F10-36, para. 20.

³⁹ See paras. 29-30, Order 01-19, for a similar finding.

⁴⁰ See para. 28, Order 01-19, for a similar finding.

severed the records inconsistently. For example, the union said, the NWPB disclosed names or occupations of some individuals and most or all of the transcripts of interviews with three supervisory employees, even though the individuals in question had refused consent to disclosure. This undermines the NWPB's position that it only disclosed with consent, the union argued.⁴¹

[56] The NWPB appears to take the position that consent or lack thereof was determinative of its decision on s. 22 on some personal information, although in some cases, as the union pointed out, the NWPB apparently disclosed personal information and statements without consent. Under s. 22(4)(a), a third party's consent to disclosure of her or his personal information means that s. 22(1) does not apply to this information. By contrast, lack or refusal of consent may be a relevant circumstance that public bodies should consider when deciding whether s. 22(1) applies, but it is not, contrary to what the NWPB argued, determinative. Public bodies must consider all relevant circumstances in making this decision.

[57] The NWPB did not say which third parties had refused consent to disclosure and which ones had simply not replied to its "contact letters". It also did not say what, if any, reasons the non-consenting third parties gave for refusing consent. The third parties who made submissions did not expressly address this issue. I do not have the benefit of any comments on this or any other issues from the majority of the third parties, as they did not make submissions. I therefore attach little if any significance to the lack or refusal of third-party consent in this case.

Supply in confidence

[58] The NWPB submitted that s. 22(2)(f), in combination with s. 22(3)(b), results in the protection of information provided by any potential witness. In its view, this is fundamental to obtaining witness co-operation in an investigation:

Section (2)(f) states that information that has been provided for "in confidence" must not be disclosed. A potential test for how an individual may view the information that they have provided an investigator would be to request permission from that individual for the release of their information. In this instance the NWPS Privacy coordinator requested the permission from each individual witness, with some clearly indicating that they oppose the release of their information or statement. It is not often clearly identified within an investigation report that manner in which a statement or information has been obtained.⁴²

[59] The third parties agreed with the public body, saying a witness has a reasonable expectation of privacy when giving a statement to the police.⁴³

⁴¹ Paras. 71-73, union's initial submission para. 2 union's reply submission.

⁴² Pages 3-4, NWPB's initial submission.

⁴³ Paras. 18-19, third parties' reply submission.

[60] The union disputed the notion that the witnesses provided information and documents in confidence. Given that the investigation could have led to the laying of criminal charges, the union argued, the witnesses could have had no reasonable expectation that their statements would remain confidential. Moreover, it said, a review of seven witness statements and the evidence of its representative, who attended many of the interviews, shows that the NWPB gave no assurances of confidentiality to witnesses and indeed told witnesses they did not have to give a statement. Similarly, the union argued, there is no evidence that records such as emails, work orders, notes or a search warrant request were provided in confidence to the NWPB. By extension, it continued, there is no evidence that information in the Report to Crown Counsel derived from statements and other records was supplied in confidence.⁴⁴ Moreover, the union argued, the third parties themselves did not claim that they supplied their statements and personal information in confidence and provided no evidence of this.⁴⁵

[61] The union also argued that the application of s. 22(3)(b) to information does not establish that the information was supplied in confidence and does not “wrap” the information “in a cloak of confidentiality”. The union further disputed the NWPB’s argument that the third parties’ opposition to disclosure provides “insight” into their thoughts⁴⁶ and supports an argument of confidential supply. In its view, this is “mere supposition--unsupported by any evidence whatsoever”.⁴⁷

[62] I agree with the union, for the reasons it gives, that there is no evidence that the third parties provided personal information in confidence. Rather, the transcripts, the other records and the union’s own evidence support the conclusion that the third parties did not supply information in confidence. For these reasons, I find that s. 22(2)(f) does not apply here.

Other factors: “legitimate interest”, applicant’s knowledge, health and safety

[63] The union argued that the following relevant circumstances favour disclosure:

- the information is “factual and non-evaluative in nature”
- the third parties who provided the information were mainly the deceased worker’s co-workers and supervisors and thus the context in which the information appears is relevant

⁴⁴ Paras. 58-65, union’s initial submission; para. 7, union representative’s affidavit.

⁴⁵ Para. 7, union’s reply submission.

⁴⁶ See quote above from the NWPB’s argument about the relevant circumstances.

⁴⁷ Paras. 1-21, union’s reply submission.

- the union and the widow have a “legitimate interest” in disclosure of the information and it is also important to the widow “to know and understand the exact circumstances under which her husband died”
- the widow has concerns arising from the Crown counsel’s decision not to lay charges of criminal negligence against the worker’s employer, when the NWPB concluded there were reasonable grounds to do so
- the *Workers Compensation Act* imposes duties on employers, supervisors and employees to maintain safe and healthy workplaces and the *Criminal Code* imposes a scheme of criminal liability on corporations for failing to take reasonable steps to prevent bodily injury to workers
- in light of this, it is necessary for the union, as an advocate for better workplace safety, to understand how this particular incident occurred
- disclosure of the withheld information would thus also promote health and safety, as contemplated by s. 22(2)(b)⁴⁸
- the widow is aware of the identities of her late husband’s co-workers and this, together with the union’s own knowledge of the third parties’ names and occupations, favours disclosure of the information in dispute⁴⁹
- the NWPB severed the records inconsistently and disclosed names and occupations of some individuals and most or all of the transcripts of interviews with three supervisory employees, even though the individuals in question had refused consent to disclosure
- the “wholesale withholding or severance of statements and summaries” raises the possibility that the NWPB withheld the worker’s personal information⁵⁰

[64] The third parties disagreed with the union on all these points⁵¹ but did not elaborate.

[65] From the records the NWPB has already disclosed, the union has received a fair amount of information about the incident, how it happened and, to some extent, the roles of those involved. This information also includes discussions of safety issues and concerns surrounding the worker’s death. However, disclosure of the withheld information would in my view provide a fuller picture of the incident. It would also add meaningfully to the understanding of the union and the widow about the health and safety issues surrounding this tragedy. I therefore find that s. 22(2)(b) applies here, weighing in favour of disclosure.

[66] As I have already noted, the withheld information is similar in content and character to the information already disclosed. It consists of straightforward

⁴⁸ Paras. 32-41 & 51-57, union’s initial submission.

⁴⁹ Paras. 42-50, union’s initial submission.

⁵⁰ Paras. 68-73, union’s initial submission.

⁵¹ Paras. 11-16, third parties’ reply submission.

accounts of the witnesses' current occupations and duties, and of things they said and did before, during and after the incident. It contains no evaluative comments regarding the third parties' actions or work performance. I acknowledge that the NWPB has disclosed a good deal of information. However, in my view, the withholding of large portions of the disputed records and the inconsistent severing mean that the window and union have an incomplete, perhaps even unbalanced, picture of the NWPB's investigation and the information that was before Crown counsel when they decided not to approve charges. I also take into account that the widow has a legitimate interest in receiving the complete details of the NWPB's investigation into her husband's death.⁵² I am also mindful that the third parties were all co-workers and supervisors or managers of the deceased worker and that much of the information they provide about their work duties is routine. I note as well that some of the withheld information pertains to the deceased worker's supervisors and managers, who were in a position of authority over him. It is also clear that the union is aware of the names and occupations of the witnesses. All of these factors weigh heavily in favour of disclosure of the withheld information.

[67] I note further that some of the withheld information is the deceased worker's personal information in the form of his co-workers' and supervisors' comments about him. This favours disclosure of these portions.

Unfair harm and damage to reputation

[68] The third parties argued briefly that disclosure of the information in dispute "may unfairly damage their reputations"⁵³ although they did not explain how. The union argued that the third parties pointed to no relevant circumstances and provided no evidence that disclosure would expose them to financial or other harm.⁵⁴

[69] I agree with the union on these points. In addition, as noted, the information about the third parties is straightforward and contains no evaluative information about them. The third parties did not give me any assistance in this area. Without more, in light of the disclosures to date and the similarities between the withheld and disclosed information, I do not see how disclosing the withheld information could result in harm to the third parties or damage to their reputations or, if it did, how this harm or damage would be "unfair". I find that ss. 22(2)(e) and (h) do not apply here.

⁵² See para. 44 of Order 01-19 for similar findings.

⁵³ Para. 2, third parties' reply submission.

⁵⁴ Paras .23-24, union's reply submission.

Inaccurate or unreliable information

[70] Only the union raised this factor, arguing that it does not apply as it is unlikely that the names and occupations are inaccurate and unreliable.⁵⁵ I agree. There is no evidence that the withheld personal information, including third-party names and occupations and statements, is inaccurate or unreliable. I find that s. 22(2)(g) is not relevant here.

Public scrutiny

[71] None of the parties raised the factor in s. 22(2)(a). It is however relevant in my view. One of the prime purposes of FIPPA is to make public bodies more accountable. The police are in a position of authority and power in relation to the public and there is a considerable public interest in subjecting them to public scrutiny. The widow lost her husband because of a workplace incident. At present, she does not have a complete picture of what the NWPB learned during its investigation. She also does not know everything that was before Crown counsel.

[72] The widow and the union should in my view have the opportunity of scrutinizing the NWPB's investigation in order to gain a better understanding of what the NWPB did and how they arrived at their recommendation to Crown counsel to approve charges. Disclosure would also shed light on what influenced Crown counsel in their decision not to approve charges. The union and the widow cannot assess these things with the incomplete information they have received to date. In my view the factor in s. 22(2)(a) is relevant here, weighing heavily in favour of disclosure.

Conclusion on s. 22(1)

[73] I found above that much of the withheld information is not personal information and that s. 22(1) does not apply to it. I also found that some withheld information is personal information to which ss. 22(3)(b) and (d) apply.

[74] As for the relevant circumstances, I found that the refusal or lack of consent by some third parties is of little or no relevance. I also found that ss. 22(e), (f), (g) and (h) do not apply.

[75] I further found that s. 22(2)(a) applies, weighing heavily in favour of disclosure. I also found that the "other factors", including s. 22(2)(b), the applicant's knowledge and "legitimate interest" weigh heavily in favour of disclosure.

⁵⁵ Para. 66, union's initial submission.

[76] I conclude that the relevant circumstances weighing in favour of disclosure rebut the presumed invasion of third-party privacy in ss. 22(3)(b) and (d) respecting the vast majority of the withheld personal information. With some minor exceptions, I find that s. 22(1) does not apply to the withheld information.

[77] The exceptions, to which I find that s. 22(1) does apply, are these: third-party home addresses, home telephone numbers and dates of birth; names of witnesses' family members; information on witnesses' past jobs at the mill and elsewhere; any information on consequences to third parties' employment arising out of the incident; the names and employment history information of the deceased worker's co-workers in a handful of records dating from the early 2000s (in the first file, OIPC F08-36125: names on pp. 257-260, 263-268, 270, 272; all of pp. 261, 269, 271); and some information in the detective's handwritten notes on one witness (in the second file, OIPC F08-36126: pp. 119-120). The union may well not be interested in these details but it has in any case not persuaded me that it is entitled to this information.

4.0 CONCLUSION

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

1. Subject to paras. 2 and 4 below, I require the head of the NWPB to give the applicant access to the information to which I found s. 15(1)(d) does not apply.
2. I require the head of the NWPB to reconsider its decision to apply s. 15(1)(g), taking into account the relevant circumstances listed in paras. 35-36 above, and to provide the applicant and me with its decision, together with an account of the factors it considered in exercising its discretion.
3. Subject to para. 2 above, I require the head of the NWPB to disclose information to which I found at paras. 46 and 76 above that s. 22(1) does not apply.
4. I require the head of the NWPB to withhold the information to which I found at para. 77 above that s. 22(1) applies.
5. As a condition under s. 58(4), I specify that, no later than five days before compliance with this order is due, as FIPPA defines "day", that is, on or before December 9, 2010, the head of the NWPB is to provide me with copies of the records it will be disclosing in accordance with my orders under paras. 2 and 3 above, for my approval.

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6. I require the head of the NWPB to provide the applicant and me with evidence of its compliance with this order within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before December 16, 2010.

November 3, 2010

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File Nos.: F08-36125 & F08-36126