OIPC File: F12-50727

IN THE MATTER OF THE INQUIRY

between

BC Freedom of Information and Privacy Association
(Applicant)

and

the Ministry of Health
(Public Body)

and
the University of Victoria and
the University of British Columbia
(Third Parties)

March 4, 2014

Initial Submissions of the Ministry

***In Camera* Portions Severed**

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1. Description of the Inquiry

1.01 This is an inquiry under the *Freedom of Information and Protection of Privacy Act* (the "Act").

1.02 This inquiry arose out of a request for review by the Applicant of decision by the Ministry of Health (the "Ministry") to deny access to information in the requested records.

2. Documentation of the Inquiry

2.01 The Ministry accepts the facts as set out in the Investigation Report as accurate for the purposes of this inquiry.

3. Issues under Review in the Inquiry and the Burden of Proof

3.01 The Ministry has been advised by the University of Victoria and the University of British Columbia that, upon further review of the records and upon further consultation with the researchers involved in this matter, they have decided not to take a position with respect to the disclosure of the portions of the records that were previously withheld under s. 3(1)(e) of the Act. As a result, the Ministry will be issuing a new decision wherein it will withdraw its reliance on s. 3(1)(e) and release the information previously withheld under that provision, with the exception of information that was also severed (in the alternative) under one of the exceptions in Part 2 of the Act.

3.02 In light of the Ministry's reconsideration, the Ministry will be making submissions on the following issues:

- Whether the Ministry was authorized to withhold the information that it continues to withhold under section 13(1) of the Act;

- Whether the Ministry was authorized to withhold the information that it continues to withhold under section 15(1)(a) of the Act;
- Whether the Ministry was authorized to withhold the information that it continues to withhold under section 15(1)(l) of the Act; and
- Whether the Ministry was required to withhold the information that it withheld under section 22 of the Act.

The Ministry is no longer relying on ss. 15(1)(f) and 17 of the Act. As such, the Ministry will not be making submissions on those sections.

3.03 Section 57 of the Act establishes the burden of proof on the parties in an inquiry.

3.04 Under section 57(1), at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the public body to prove that the applicant has no right of access to the record or part of the record. In this case, the Ministry must prove that it was authorized to withhold the information in dispute under sections 13, 15 and 17 of the Act.

3.05 Under s. 57(2), the Applicant has the burden of demonstrating that the discourse of the personal information withheld under section 22 would not be an unreasonable invasion of third party personal privacy.

3.06 Previous decisions have established that the public body bears the burden of establishing that the records are excluded from the scope of FIPPA. The Ministry accepts that burden in this case.

4. Argument

(a) The Records at Issue

4.01 The Applicant made the following request on August 2, 2012 for records under the Act (hereinafter referred to as the "Request"):

> Copies of "all data sharing and other agreements between January 1, 2011 and present involving MoHS" and named individuals. The applicant also requested "all correspondence between these individuals and the ministry related to these agreements, particularly discussions of delays or other impediments to access to data for research purposes", and "any e-mails, memos or other notices to staff from the ADM, IM/IT Division regarding delays or other impediments to release of data to researchers during the same period, along with any policy changes relating to release of data to researchers."

4.02 The records responsive to the Request are attached and marked as *In Camera* Appendix "A" to these submissions (the "Records"). The Ministry notes that there are many pages where it says "redact page" in the upper left hand corner of the page. That means that all of the information in that page has been withheld under the exception listed in the table of records attached to the affidavit of Wendy Taylor.

4.03 The Ministry refers the Commissioner to the records at issue in these inquiries. The Ministry submits that those records at issue are a form of evidence supporting its positions in this inquiry. That information is directly probative of facts at issue in the inquiry; see Order No. 00-39 at page 4. An adjudicator is entitled to reply on what was before her, including the records at issue and the submissions; *Architectural Institute* [2004] B.C.J. No. 465 (BCSC). The Ministry therefore refers the Commissioner to the records at issue in support of the application of the sections of the Act at issue in this inquiry.

(b) Section 13 of the Act

4.04 Section 13(1) of the Act reads as follows:

> The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or minister.

4.05 Section 13 is intended to allow full and frank discussion of advice or recommendations within the public service, preventing the harm that would occur if the deliberative process of government decision and policy making was subject to excessive scrutiny (Order 212-1998, page 3).

4.06 There is no legal requirement in section 13(1) to prove that harm may result if the severed information is disclosed (see Order 175-1997, page 7).

4.07 If disclosing information would permit an individual to draw accurate inferences about advice or recommendations developed by or for a public body such information may be withheld under s. 13.[1]

4.08 Section 13 can properly be applied to advice and recommendations relating to potential or suggested courses of action.[2]

4.09 Advice can apply to a communication by an individual whose advice is sought, to the recipient of the advice, as to which courses of action are preferred or desirable.[3] The Ministry submits that all of the Information falls into that category.

4.10 The Oxford Dictionary defines "advice" as follows, in part;

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[1] See Order 02-38, paragraph 131, and Order 03-25, paragraph 21. The meaning of "reveal" is described in this way in, for example, Order 48-1995. See also Order 93-1996, page 2, Order 123-1996, page 4, Order 184-1997, page 5, Order 187-1997, pages 7 to 8, and Order 193-1997, page 7.

[2] See Order F05-27, paragraph 14.

[3] See Order 00-08, paragraph 22.

> "The way in which a matter is looked at; opinion, judgment… consideration, consultation, reckoning. An opinion given or offered as to action; counsel. The result of consultation; determination, plan. Information given, news.."

4.11 Commissioner has applied the BCCA decision in *The College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, in a number of cases. Those decisions have found that information concerning options, implications of options, and recommendations concerning a decision are protected under s. 13(1). See for example BC Order F13-01.

4.12 A necessary component of giving advice about a range of options is giving guidance as to the implications or consequences of such options. Some of the information severed under section 13 consists of the implications or consequences of various options. As recognized by the Commissioner in Order No. 02-38 (see previous paragraph), the Ministry submits that such information qualifies as advice under section 13.

4.13 The Ministry submits that the information withheld under s. 13(1) constitutes "advice or recommendations" for the purposes of that section. The information severed under that section includes advice and recommendations developed by and for the Ministry. That information consists of an option developed by and for the Ministry relating to a briefing note (see page 254).

4.14 Section 13(2) contains a list of types of records or information that public bodies are not permitted to withhold under section 13(1). The Ministry submits that none of the Information falls in the section 13(2) list.

4.15 The effect of section 13(3) is that public bodies may not withhold information that would otherwise fall in section 13(1) if that information is more than 10 years old. The requested records are not more than 10 years old. As such, the application of section 13(1) is not affected by section 13(3) in this case.

4.16 For the above reasons, the Ministry submits that the disclosure of the information severed under s. 13(1) would reveal advice and recommendations developed by a public body. As such, the Ministry submits that it is authorized to withhold such information under section 13(1) of the Act.

(b) Section 15(1)(a) of the Act

4.17 Section 15(1)(a) of the Act provides that the head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm a law enforcement matter.

4.18 The Act provides, in Schedule 1, the following definition of "law enforcement"

> "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;

4.19 The Ministry refers the Commissioner to the **affidavits of Stacy Johnson and Wendy Taylor** in support of its application of s. 15(1)(a) of the Act.

4.20 In 2012 the Ministry was advised of several serious concerns regarding the Pharmaceutical Services Division ("PSD") of the Ministry. The concerns included inappropriate data access, standard of conduct violations, inappropriate procurement practices and contracting irregularities including suspected conflicts of interest. Wendy Taylor was responsible for conducting the Ministry investigation to deal with those concerns (the "Ministry Investigation"). That investigation started in approximately June 2012.

4.21 On or about May 2012, the Ministry advised the Office of the Comptroller General (OCG) that it had commenced an internal investigation regarding several serious concerns involving the PSD. Based on the results of a preliminary assessment of the allegations, the Ministry requested that the OCG examine suspected financial improprieties in the procurement and contracting practices of the PSD.

4.22 The Comptroller General has statutory responsibilities under section 9(e) of the *Financial Administration Act.* The Comptroller General must evaluate financial management throughout the government and recommend to the Treasury Board improvements considered necessary. Accordingly, the OCG initiated a comprehensive examination of financial and accounting matters related to the PSD of the Ministry and certain persons with which the PSD and/or the Ministry has dealt (the "OCG Investigation"). The OCG Investigation relates, but is not limited, to alleged contraventions of government financial policy, conflicts of interest and misuse of public funds.

4.23 The objectives of the Ministry Investigation were as follows:

- Ensure Government's contracting, research grant practices, data access arrangements and approval processes were in place and being followed by the relevant section of the PSD.
- Provide all findings and facts relating to allegations being reviewed.
- Identify opportunities to improve government and ministries information contracting, granting, research and data access practices in the relevant section of the PSD.

4.24 The Ministry initially applied s. 15(1)(a) to the records at issue on the basis that the disclosure of the information could reasonably be expected to harm the

ongoing Ministry Investigation as well as the ongoing OCG and RCMP investigations. The Ministry Investigation has concluded. However, the OCG and RCMP investigations continue. Based upon input from the OCG and the RCMP, the Ministry continues to take the position that the disclosure of the information severed under s. 15(1)(a) (the "Section 15 Information") could reasonably be excepted to harm the ongoing law enforcement investigations being conducted by the OCG and RCMP.

4.25 The Ministry has been advised by the OCG that the Section 15 Information is being considered by the OCG as part of the OCG Investigation.

4.26 The types of harm that could reasonably be expected to occur in relation to the public release of the Section 15 Information are as follows:

- Access to such information by potential witnesses could reasonably lead to those individuals altering their responses to questions asked in interviews conducted for the purposes of the investigation. This would hamper the ability of investigators to get at the truth.
- Access to such information by potential witnesses or other individuals could reasonably lead to those individuals destroying evidence, including emails, database data and hard copy records. This would hamper the ability of an investigator to get at the truth.
- Access to such information by potential witnesses or other individuals could result in potential witnesses being less inclined to cooperate with an ongoing investigation.
- Access to such information would reveal information to the targets of the investigation, which could enable them to take steps to adversely affect or thwart the course of the ongoing investigations.
- Disclosure would identify anticipated witnesses, thus alerting those individuals that they might be interviewed, thus resulting in the potential for those individuals to thwart the ongoing investigation.

The Table of Records attached and marked as *In Camera* Exhibit "A" to the affidavit of Wendy Taylor refers to the categories of harm that could reasonably be expected to if the Section 15 Information was released. Those categories are described in the body of Ms. Taylor's affidavit.

4.27 Access to the Section 15 Information to any witnesses and/or targets of the Ministry investigation could assist those individuals in adversely affecting or thwarting the course of the ongoing OCG or RCMP investigations.

4.28 The release of the Section 15 Information, which is also relevant to the OCG Investigation, would assist the Applicant and/or other targets of the OCG investigation in thwarting that investigation. The disclosure of that information would enable those individuals to learn of the focus of Ministry investigation (meaning the issues dealt with) and, by accurate inference, the OCG Investigation, given that the latter investigation will be dealing with many of the same issues.

4.29 The release of the Section 15 Information would alert the targets of the PSD investigation that certain issues, allegations, agreements and/or other source documents were being considered by the Ministry and, by accurate inference, the OCG for the purposes of the OCG Investigation. Such individuals may or may not be unaware that the investigation was focusing on such issues and/or material. In other words, the disclosure of the Section 13 Information would reveal new information that someone could use to try to attempt to thwart the ongoing OCG Investigation, including potentially altering their responses to questions asked in future interviews and/or potentially destroying or creating documentation that is relevant to the issues identified in the severed information. The OCG plans on conducting interviews in the future with relevant witnesses.

4.30 The Ministry notes that the OCG investigation, which is still ongoing, could result in one or more of the following sanctions or penalties and, therefore, qualifies as a "law enforcement investigation" for the purposes of the Act:

- Penalties and sanctions under the Province of British Columbia's Standard of Conduct, including discipline up to and including dismissal of government employees; and
- Penalties and sanctions under the *Criminal Code* that may be of relevance to this investigation, including the following:
    - Section 121, dealing with frauds on the government;
    - Section 122, dealing with fraud or a breach of trust; and
    - Section 380 dealing with fraud.

4.31 In Order 00-01, the Commissioner outlined the nature of the evidence required to meet a harms based test such as that set out in s. 15(1):

> "…a public body must adduce sufficient evidence to show that a specific harm is likelier than not to flow from disclosure of the requested information. There must be evidence of a connection between disclosure of the information and the anticipated harm. The connection must be rational or logical. The harm feared from disclosure must not be fanciful, imaginary or contrived."

4.32 In assessing whether or not harm could reasonably be expected to result in harm under the Act, a public body is entitled to assume access under the Act is effectively access to the world at large. The Ministry's affidavit evidence therefore makes such an assumption. The Ministry refers the Commissioner to Order 01-52, which provides as follows:

> [73] It seems from the McCrory affidavit that there are credible scientists, within and outside government, who strongly disapprove of the government's performance with respect to the management of grizzly bears. Indeed, this disapproval is a strong undercurrent of the access requests behind this inquiry. Nonetheless, the quality of the government's management of the grizzly bear is not an issue to be determined in this inquiry. Further, despite the good faith and legitimacy of the applicants' intentions, I consider that, as in Order 01-11, the s. 18(b) analysis should be approached on the working assumption that disclosure to the applicants amounts to public disclosure. With the exception of access by individuals to their own personal information, Part 2 of the Act is an instrument

> for public access to information and is not an instrument for selective or restricted disclosure. The idea of an applicant being bound to make only restricted use of non-personal information disclosed through an access request under the Act is inconsistent with the objective of public access articulated in s. 2(1) of the Act.

4.33 The Ministry has withheld the following types of information under section 15(1)(a) of the Act from the Records:

- Source materials, or parts thereof and references to, relevant to the Ministry Investigation that were considered by investigators, including research agreements, research proposals, including data fields requested (see, for instance, pages 39 to 59, 165,166, 190 to 243). The Ministry understands that the OCG investigators will be reviewing the same materials for the purpose of the ongoing OCG Investigation;
- Ministry communications, both internal and communications to and from third parties, dealing with requests for data access issues (see, for instance, pages 60 to 76, 141 to 143, 246 to 268, 272 to 282, 284, 285, 289 to 291, 294 to 303, 306 to 327, 330 to 333, 340, 341 to 346, 349, 354).

4.34 The Ministry submits that the evidence in this inquiry demonstrates that the Ministry was authorized to withhold under s. 15(1)(a) of the Act the information that was severed under that exception.

(b) Section 15(1)(l) of the Act

4.35 Section 15(1)(l) of the Act provides that the head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

4.36 The Ministry refers the Commissioner to the Table of Records, attached as Exhibit "A" to the Taylor affidavit, for references to the information that has been withheld under s. 15(1)(l) in the Records.

4.37 The Ministry also refers the Commissioner to the **affidavit of Ken Madden**. The Ministry submits that its evidence establishes a clear and direct connection between the disclosure of the information withheld under s. 15(1)(l) and the harm referred to in s. 15(1)(l) of the Act. The Ministry submits that its evidence is detailed and convincing and establishes clearly that disclosing that information could reasonably expected to harm the security of computer systems owned and operated by the Province of British Columbia.

4.38 The Commissioner has conducted many investigations concerning whether a public body has complied with its privacy obligations under Part 3 of the Act. Many of those investigations have been conducted in response to complaints made by third parties. These investigations often result in formal Investigation Reports. The Commissioner has issued the following Investigation Reports that deal with the obligations of public bodies under section 30 of the Act to make reasonable security arrangements against the risk of unauthorized access to personal information:

- *Investigation Report F06-01*, which dealt with the sale of government computer tapes which contained personal information. The Commissioner referred at paragraph 47 to a previous report that held that the nature of the personal information involved and the seriousness of the consequences of its unauthorized disclosure are factors to be taken into account in assessing the reasonableness of security arrangements. Reference was made to a self-governing body need not, in creating a list of members' names and addresses, take the same measures for the privacy and security of that limited personal information as a hospital would have to take respecting patients' personal medical information.

- *Investigation Report F06-02*, wherein the Commissioner investigated the security of personal information held by the Vancouver Coastal Health Authority's Employee and Family Assistance Program. At paragraph 82 of that report, the Commissioner's delegate confirmed that all public bodies must plan for and take tangible steps to secure personal information in their custody or under their control. The delegate further held that in protecting personal information, steps involved in meeting the reasonable security measures standard under s. 30 of the Act include the requirement to "implement defensive measures to guard against unauthorized data access, both external and internal, and whether resulting from a hardware theft, employee misconduct or system intrusion by hackers". The delegate further held that, in considering the possible range of measures to implement, public bodies may wish to seek guidance from ISO 17799 (Code of Practice for Information Security Management) or comparable generally-accepted information security standards.
- *Investigation Report F10-02*, wherein the Acting Commissioner reviewed Vancouver Coastal Health Authority's Electronic Health Information System known as the Primary Access Regional Information System. The Acting Commissioner stated, at paragraph 135, that in addition to applying industry security standards, any eHealth system should include a security strategy wherein "multiple layers of defense are placed throughout the system to address security vulnerabilities". Such defenses were needed to prevent security breaches.
- *Investigation Report F11-01,* wherein the Commissioner's Office and the Ministry involved retained the services of a consultant, Deloitte & Touche LLP, to assist with an investigation into the security of personal information held by the British Columbia Lottery Corporation.
- *Investigation Report F11-03*, wherein the Commissioner examined the privacy and security impacts of BC Hydro's Smart Meter and Infrastructure Initiative and the resulting increase in the organization's ability to collect

information about the household activities of British Columbians. This investigation focused on BC Hydro's obligations under the Act, including its obligations under s. 30, the provision dealing with reasonable security requirements. At paragraph 84 the Commissioner referred to "the ever-increasing sophistication of hackers, all public bodies and organizations need to exercise due diligence in protecting the security of personal information in their custody or under their control".

4.39 It is a fundamental and widely accepted principle of system security that the less system information an attacker has about a system, the harder it will be for him or her to attack or otherwise compromise the security of a system.

4.40 Attached and marked as Exhibit "A" to the Madden affidavit is a copy of a document issued by the Office of the Information and Privacy Commissioner of British Columbia entitled *"Securing Personal Information: A Self-Assessment Tool for Organizations"*. Point 2.14 provides as follows:

> Does the network security policy require that system security documentation be protected from unauthorized access?

That document advises public bodies that in order to comply with s. 30 of the Act they must have security policies that require that system security documentation be kept confidential. This is consistent with the reality that it is a truism in the security field that it is imperative, for security purposes, to maintain the confidentiality of system security documentation. The information withheld under s. 15(1)(l) in this case constitutes system security documentation.

4.41 The Supreme Court of Canada provided the following guidance on interpreting statutes in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601. For the Court, Chief Justice McLachlin and Justice Major held, at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act,

> and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

4.42 As per *Canada Trustco Mortgage Co. v. Canada,* the Ministry submits that the Commissioner must seek to read the provisions of an Act as a harmonious whole. The Ministry submits that that includes interpreting sections 15(1)(l) and s. 30 of the Act harmoniously. The Ministry submits that if a public body must maintain the confidentiality of security documents, as per the *"Securing Personal Information: A Self-Assessment Tool for Organizations,* given its obligations under s. 30, then it must be the case that a public body be able to protect such information under s. 15(1)(l). Both sections seek to achieve the same legislative objective, that is, ensuring the security of public body systems.

4.43 The Ministry submits that the evidence in this inquiry demonstrates that the Ministry was authorized to withhold under s. 15(1)(l) of the Act the information that was severed under that exception.

Section 22 of the Act

4.44 One of the purposes of the Act is to prevent the unauthorized disclosure of personal information (section 2(1)(c) of the Act).

4.45 Section 22 of the Act requires public bodies to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. Section 22 of the Act reads as follows, in relevant part;

> 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,
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> ....
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and
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> ....
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (d) the personal information relates to employment, occupational or educational history,
>
> ...

Is the information at issue personal information?

4.46 The Ministry refers the Commissioner to the records at issue in support of its position concerning the application of s. 22(1) of the Act.

4.47 Section 22 of the Act applies to "personal information".

4.48 Schedule 1 to the Act defines "personal information" as "recorded information about an identifiable individual".

4.49 The Ministry submits that the information severed under section 22 of the Act (the "Section 22 Information") qualifies as recorded information about identifiable individuals. As such, that information is "personal information" for the purposes of the Act. The Ministry refers the Commissioner to the Table of Records,

attached to the Taylor affidavit, which refers to the pages containing severing under s. 22 of the Act. The Ministry refers the Commissioner to that information. The Ministry submits that that information clearly qualifies as "personal information" for the purposes of the Act.

4.50 Section 22(1) has also been applied to personal information about employees and/or service providers (see page 312 and 325), including home email addresses (page 81, 109, 116 and 140). The Ministry submits that such information clearly constitutes personal information for the purposes of the Act.

Presumed Unreasonable Invasion

4.51 Subsection 22(3) of the Act sets out a number of types of personal information the disclosure of which is presumed to be an unreasonable invasion of a third party's personal privacy. The Commissioner has held that where a presumption under section 22(3) applies "an applicant must provide a specific reason - based on evidence, as appropriate – to conclude that the presumption is rebutted.[4]

Section 22(3)(d)

4.52 Section 22(3)(d) of the Act provides that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history. The Ministry submits that much of the Section 22 Information relates to the employment history of the third parties. That personal information was collected by the Ministry for the purpose of an internal investigation. From the outset, it was recognized that there was the potential for penalties or sanctions to be imposed on Ministry employees. The Ministry Investigation dealt with serious allegations against third parties . The Commissioner has held in many orders that

[4] Order 01-07, at page 5.

such information is subject to section 22(3)(d) of the Act. For instance, in Order No. 01-53 Commissioner Loukidelis said as follows:

> 32 As in Order 01-07 and Order 00-44, [2000] B.C.I.P.C.D. No. 48, I agree that information created in the course of a complaint investigation and disciplinary matter in the workplace that consists of evidence or statements by witnesses or a complainant about an individual's workplace behaviour or actions is information that "relates to" the third party's "employment history". I also consider that an investigator's observations or findings, in the investigator's interview notes and in an investigation report itself, about an individual's workplace behaviour or actions are part of the third party's employment history. All of this information will be personal information that is subject to the presumed unreasonable invasion of personal privacy created by s. 22(3)(d).

Section 22(2)(a)

4.53 The Ministry was unable to conclude that the disclosure of the personal information at issue, being personal information about third parties mentioned in paragraph 4.66 of these submissions, including their identities, was desirable for the purpose of subjecting the activities of the Ministry to public scrutiny.

4.54 In Order F05-18, Adjudicator Austin-Olsen found:

> What lies behind s. 22(2)(a) of the Act is the notion that, where disclosure of records would foster accountability of a public body, this may in some circumstances provide the foundation for a finding that the release of third party personal information would not constitute an unreasonable invasion of personal privacy. While I agree with the applicant that the College, and any other self-regulating professional body, is kept accountable in part through public scrutiny of its activities, the records in dispute in this case are not ones that, if disclosed, would enhance this goal. Records 111 and 114 are more directly related to the conduct and, indirectly, the accountability of the psychologist, not the College, something which s. 22(2)(a) is not intended to address.

4.55 In Order 12-10 Adjudicator Jay Fedorak referred to the importance of determining whether disclosure of the personal information at issue would enhance public understanding of the decision of a public body to the extent that it would warrant the level of invasion of personal privacy that it would entail. The Ministry was

unable to conclude that the disclosure of the personal information at issue would enhance public understanding to the extent that it would warrant invading the personal privacy of the third parties.

Section 22(2)(h)

4.56 **(In camera information in bold - this information is at issue in the inquiry)** The Ministry severed the names of third parties in relation to whom concerns were raised during the course of the investigation

Only the latter two third parties are currently Ministry employees. The allegations raised about the third parties in the records were serious.

4.57 The Ministry has also severed the remaining names, being third parties who were named as investigators or researchers in relation to agreements at issue or otherwise identified in the records but who were not themselves "targets" of the investigation. The Ministry concluded that s. 22(2)(h) was a relevant factor in relation to such identifying information given that the disclosure of the fact that those third parties were connected with the records reviewed by the Ministry as part of its investigation, could unfairly damage their reputations. The concern was that such third parties might be assumed to be guilty by virtue of their involvement with the records that were reviewed during the course of the Ministry Investigation. In other works, the concern was that those individuals might be deemed, rightly or wrongly, as guilty by association in the event of the public release of their names.

4.58 For the above reasons, the Ministry concluded that the disclosure of the personal information at issue might unfairly damage the reputation of the third parties. The Ministry therefore concluded that s. 22(2)(h) was a relevant factor in this case that weighed in favour of withholding that personal information.

Conclusion

4.59 The Ministry was unable to conclude that any of the factors in s. 22(2) of the Act rebutted the s. 22(3)(d) presumption that applied in this case. The Ministry

submits that it was therefore required to withhold the personal information that it withheld under section 22(1) of the Act.

Non Responsive Records

4.60 Some information in the records has been withheld on the basis that it was unresponsive to the Request (see, for instance, pages 287 and 288). The Commissioner has held in previous orders that a public body may withhold information on the basis that it is outside the scope of the Applicant's access request.

5. Relief Sought

5.01 The Ministry asks the Commissioner to confirm its application of sections 13(1), 15(1)(a), 15(1)(l) and 22(1) of the Act.

All of which is Respectfully Submitted.

Dated this 4th day of March, 2014
Victoria, British Columbia.

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Barrister and Solicitor
Legal Services Branch