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Order F12-16

BRITISH COLUMBIA RAPID TRANSIT COMPANY

Elizabeth Barker, Adjudicator

October 30, 2012

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Summary: The applicant requested a copy of a violence risk assessment report which examined his interactions with a co-worker. The adjudicator found that BCRTC is authorized to withhold portions of the report on the basis that it reveals advice and recommendations under s. 13(1). However, the adjudicator found that the evidence does not support BCRTC's claim that disclosure of the remainder of the information could reasonably be expected to threaten the safety or mental or physical health of others under s. 19(1)(a).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 19(1)(a), 22(1).

Authorities Considered: Order No. 323-1999, [1999] B.C.I.P.C.D. No. 36; Order 00-28, [2000] B.C.I.P.C.D. No. 28; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order F06-16, [2006] B.C.I.P.C.D. No. 23; Order F10-15, [2010] B.C.I.P.C.D. No. 24.

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* [2002] BCCA 665.

INTRODUCTION

[1] This inquiry concerns a violence risk assessment report ("Report") prepared for the British Columbia Rapid Transit Company ("BCRTC") about two of its employees. BCRTC operates SkyTrain services in Metro Vancouver and is an operating subsidiary of South Coast British Columbia Transportation Authority, commonly known as TransLink. The applicant is an employee of BCRTC, and it is his ongoing conflict with a co-worker that was the subject of the Report.

[2] BCRTC provided the applicant with a severed copy of the Report withholding portions of it pursuant to sections 13(1), 19(1)(a), and 22(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[3] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review BCRTC's decision to withhold information. During the mediation process, the applicant clarified that he was not seeking access to any third party information and therefore s. 22 was no longer at issue. Mediation was unsuccessful in resolving the ss. 13(1) and 19(1)(a) issues, and those were forwarded to inquiry under Part 5 of FIPPA.

ISSUES

[4] The questions I must decide are:

1. Whether BCRTC is authorized by s. 13(1) to refuse access to information in the Report.

2. Whether BCRTC is authorized by s. 19(1)(a) to refuse access to information in the Report.

DISCUSSION

[5] **Background**—The applicant, who works at BCRTC, has had a difficult relationship with a co-worker dating back to 2009. When management's efforts to resolve the conflict proved unsuccessful, BCRTC retained a security consultant to conduct a violence risk assessment. The consultant's report was submitted to BCRTC at the end of October 2010.

[6] **Preliminary Matter**—The OIPC Investigator's Fact Report states that during the mediation process, the applicant explained that he was not seeking access to any third party personal information; therefore, as noted above, issues related to the public body's severing decisions under s. 22 of FIPPA were removed from the review.

[7] While the applicant acknowledges that BCRTC's decision regarding its severing of information under s. 22 is not part of this review, he nevertheless goes on to raise arguments about s. 22 as well as ss. 26, 27, 28, 31 and 33 of FIPPA. In its reply, BCRTC objects to the applicant's attempt to expand the scope of the inquiry beyond ss. 13(1) and 19(1)(a).

[8] I conclude, based on the Investigator's Fact Report and the applicant's own submissions, that the s. 22 issues were resolved at mediation. Therefore, I have excluded from consideration all information where s. 22 has been applied.

[9] Further, I will not address the issues the applicant raises about the collection and use of his personal information under ss. 26, 27, 28, 31 and 33 of FIPPA for two reasons. First, they constitute a complaint under Part 3 of FIPPA that is unrelated to the disposition of the matters at issue in this inquiry. Second, past orders and decisions of the OIPC have ruled that parties may raise new issues at the inquiry stage only if permitted to do so. The applicant did not ask permission of the OIPC to raise these additional issues prior to the inquiry, and he has provided no rationale as to why he seeks to raise them at this late date. For these reasons I decline to permit him to do so now.

[10] **The Record at Issue**—The record consists of a thirteen page violence risk assessment report containing an introduction, background information, a risk assessment analysis and recommendations.

[11] **Advice or Recommendations**—BCRTC has severed a large portion of the Report under s. 13(1) of FIPPA. That section reads as follows:

> 13(1) 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 a minister.

[12] This section has been the subject of many orders, for example Order 01-15[1] where Former Commissioner Loukidelis said:

> This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.

[13] These orders have also found that a public body is authorized to refuse access to information which would allow an individual to draw accurate inferences about advice or recommendations.[2]

[14] I apply the reasoning in these orders to the facts before me in this case.

[15] BCRTC explains that although it believes that it would have been justified in withholding the entire Report under s. 13(1), it conducted a line-by-line analysis and released as much information as possible.[3] The information that it withheld under s. 13(1) consists of the consultant's discussion and conclusions regarding the level and type of risk that exists; his ratings of the employees based on a risk assessment tool; his key findings and his recommendations.

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[1] [2001] B.C.I.P.C.D. No. 16, para. 22.

[2] Order F10-15, [2010] B.C.I.P.C.D. No. 24; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order F06-16, [2006] B.C.I.P.C.D. No. 23; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [2002] BCCA 665.

[3] BCRTC's submission, para. 31.

[16] The applicant argues that BCRTC's explanation for withholding information is "insufficient as per s. 13(2)(n) which says that the head of a public body must not refuse to disclose a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant."[4]

[17] I have reviewed the Report and considered the affidavit evidence and submissions of both parties regarding s. 13(1). I have also considered the application of s. 13(2). Information that falls within the ambit of s. 13(2) is expressly excluded from s. 13(1). The following two subsections are relevant here:

> 13(2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
>
> …
>
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

[18] I find that the consultant's analysis, opinion and conclusions amount to "advice" for the purposes of s. 13(1), and therefore have been properly withheld by BCRTC on this basis. In considering this information, I followed the reasoning in the BC Court of Appeal in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*[5] where The Honourable Madam Justice Levine wrote the following about the meaning of the term "advice":

> [113] ...In my view, it should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact. In my opinion, "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action.

[19] I also find that the information severed on pages 000012-000013 is properly withheld under s. 13(1) as it is clearly the consultant's recommendations and is labelled as such.

[20] However, I find the remaining information withheld under this section is factual material to which s. 13(2)(a) applies. It is information in the form of statements about the methodology used by the consultant (pp. 000007 and 000008), titles or headings (pp. 000007 and 000008), purely factual statements (pp. 000005, 000008) and a risk assessment table from which a very small amount of personal information can be readily severed (p. 000010). The information described in this paragraph would not reveal the consultant's advice or recommendations, so does not fall within the scope of s. 13(1).

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[4] Applicant's submission, para. 2.
[5] 2002 BCCA 665.

[21] **Threat to Safety or Mental or Physical Health**—BCRTC has relied on s. 19(1)(a) to withhold much of the record because of its concern that disclosure gives rise to "a reasonable expectation of harm to the emotional, mental and/or physical well-being of others in the workplace."[6]

[22] The relevant portion of s. 19 is as follows:

> 19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
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> (a) threaten anyone else's safety or mental or physical health.

[23] I have considered related orders dealing with this section, in particular the approach taken by Former Commissioner Loukidelis in Order No. 323-1999,[7] where he wrote:

> Section 19(1) requires the head of a public body to be satisfied there is a reasonable expectation that disclosure of the requested information will threaten anyone else's mental or physical health or their safety or interfere with public safety. A reasonable expectation of a threat to health or safety requires something more than mere speculation. By importing into s. 19(1) the concept of 'reasonable expectation', the Legislature signalled its intention that speculation will not suffice to justify withholding of information. When faced with the reasonable expectation criterion - wherever it appears in the Act - the head of a public body must decide if a reasonable person who is unconnected with the matter would conclude that release of the information is more likely than not to result in the harm described in the relevant section of the Act. There must be a rational connection between the requested information and the harm contemplated by the Act, in this case as set out in s. 19(1).

[24] He further articulated his reasoning on this point in Order 01-15:[8]

> The question under s. 19(1)(a), moreover, is whether disclosure of the information actually in dispute could, in light of the relevant circumstances (including respecting an applicant's statements or behaviour), reasonably be expected to threaten anyone's safety or mental or physical health. I note, first, that it is not enough that disclosure of information could reasonably be expected to lead to someone being upset and therefore troublesome, difficult and unpleasant to deal with. It is not enough that the disclosure could reasonably be expected to cause a third party (in this case Ministry employees or others) to be upset. The section clearly requires more, since it explicitly refers to a reasonable expectation by someone's unpleasant behaviour of a threat to "safety" or to the mental or physical "health" of others. A threat to "mental … health" is not raised merely by the prospect of someone being made upset. In Order 00-02, I spoke of

[6] BCRTC submission, para. 38.
[7] [1999] B.C.I.P.C.D. No. 36, pp. 3-4.
[8] [2001] B.C.I.P.C.D. No. 16, para. 74.

> "serious mental distress or anguish" (pp. 5-6), *i.e.*, at least something approaching a clinical issue. The inconvenience, upset or unpleasantness of dealing with a difficult or unreasonable person does not suffice.

[25] And, in Order 00-28,[9] he said the following about the burden that rests on a public body seeking to apply s. 19(1)(a):

> As I have said in previous orders, a public body is entitled to, and should, act with deliberation and care in assessing – based on the evidence available to it – whether a reasonable expectation of harm exists as contemplated by the section. In an inquiry, a public body must provide evidence the clarity and cogency of which is commensurate with a reasonable person's expectation that disclosure of the information could threaten the safety, or mental or physical health, of anyone else. In determining whether the objective test created by s. 19(1)(a) has been met, evidence of speculative harm will not suffice. The threshold of whether disclosure could reasonably be expected to result in the harm identified in s. 19(1)(a) calls for the establishment of a rational connection between the feared harm and disclosure of the specific information in dispute.

[26] I take the same approach in this case.

[27] There remain only a few passages of information in dispute not otherwise properly withheld under s. 13(1) or which have not been removed from the scope of this inquiry due to the application of s. 22. I have carefully reviewed the affidavit evidence and submissions in deciding whether disclosure of these remaining passages could reasonably be expected to threaten anyone else's safety or mental or physical health.

[28] The applicant's submissions deal almost entirely with his concerns over the way BCRTC has treated him. Very little of what he provides is germane to the s. 19 issue, and he voices no opinion on the allegation that he would pose a threat to the safety or health of others.

[29] Significant portions of BCRTC's submission and supporting affidavit evidence were accepted *in camera*, so I am constrained in how much detail I can provide in these reasons. What I can say is that BCRTC's affidavit evidence consists of opinions and speculation on how the applicant will react if he receives the Report. I am not persuaded by these opinions or speculative assertions. The way in which BCRTC speculates the applicant will respond to the disclosure of the disputed information is insufficient, on its own, for me to conclude that disclosure could threaten the safety or mental or physical health of others. I looked at what the evidence reveals about the applicant's actual behaviour in relation to others at work. I did not find any credible and persuasive evidence that he used threatening or aggressive language or behaviour against others. Rather, what the evidence reveals is that the applicant's behaviour has been

[9] [2000] B.C.I.P.C.D. No. 31, p. 2.

frustrating and taxing to management and his co-workers. However, the fact that disclosure could cause the applicant to be upset and feel hard done by, and therefore behave in a manner that is challenging or unpleasant to deal with, is not sufficient to trigger the s. 19(1)(a) exception. The section clearly requires more since it explicitly refers to a reasonable expectation that someone's behaviour is a threat to "safety" or to the mental or physical "health" of others. I do not find that disclosure of the Report could reasonably be expected to threaten anyone else's safety or mental or physical health. In conclusion, BCRTC has not proven that s. 19(1)(a) applies.

CONCLUSION

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

1. Section 19(1)(a) of FIPPA does not authorize BCRTC to withhold information in the Report.

2. Subject to para. 3, s. 13(1) of FIPPA authorizes BCRTC to withhold some information in the Report.

3. I require that BCRTC give the applicant access to the information on pp. 000004, 000005, 000007, 000008 and 000010 which I have highlighted in the copy of the report which accompanies BCRTC's copy of this decision. BCRTC must give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before December 12, 2012. BCRTC must concurrently copy me on its cover letter to the applicant, together with a copy of the records.

October 30, 2012

ORIGINAL SIGNED BY

Elizabeth Barker, Adjudicator

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