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Order F16-21

## VANCOUVER POLICE DEPARTMENT

Wade Raaflaub, Adjudicator

April 19, 2016

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**Summary:** The applicant requested witness statements, interview summaries and transcripts from the Vancouver Police Department (“VPD”) under FIPPA. The VPD withheld all of the records. The adjudicator found that the VPD was authorized to refuse access, on the basis that the records revealed information relating to or used in the exercise of prosecutorial discretion under s. 15(1)(g) of FIPPA.

**Statute Considered:** **B.C.:** *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 6(1), 8(2), 15, 15(1), 15(1)(f), 15(1)(g), 15(3), 15(4), 16(1), 19, 19(1), 22, 22(1), 57(1), 57(2), 58(2)(b) and Schedule 1 (definition of “exercise of prosecutorial discretion”).

**Authorities Considered:** **B.C.:** Order 00-02, 2000 CanLII 8819 (BC IPC); Order F04-13, 2004 CanLII 23112 (BC IPC); Order F10-37, 2010 BCIPC 55 (CanLII).

## INTRODUCTION

[1] The applicant, who was involved in various police matters, made a request to the Vancouver Police Department (“VPD”) under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) for information related to those matters. The VPD refused to give access to some of the information under ss. 15(1) (disclosure harmful to law enforcement), 16(1) (disclosure harmful to intergovernmental relations), 19(1) (disclosure harmful to individual or public safety) and 22(1) (disclosure harmful to personal privacy). It also refused to confirm or deny the existence of other records under s. 8(2).

[2] The applicant asked the Office of the Information and Privacy Commissioner (“OIPC”) to review the VPD’s decision. As investigation and mediation did not resolve the matter, the applicant asked for an inquiry.

[3] After the matter came to inquiry, the applicant significantly narrowed what he was seeking to statements made to the VPD by three specific witnesses in his trial, and to the transcript of an interview that the VPD conducted with a specific physician. In turn, the VPD reduced the exceptions to disclosure to only ss. 15, 19 and 22. It adds that it primarily relies on s. 15(1)(g) to withhold the statements, summaries and transcripts, with ss. 15(1)(f), 19(1) and 22(1) being used in the alternative.

## ISSUES

[4] The issues in this inquiry are whether the VPD is authorized to refuse access to the information at issue under ss. 15(1) and 19(1) of FIPPA, and whether it is required to refuse to disclose it under s. 22(1).

[5] In accordance with s. 57(1), the VPD has the burden of proving that the applicant has no right of access to the information at issue under ss. 15(1) and 19(1). In accordance with s. 57(2), the applicant has the burden of proving that disclosure of the information at issue would not be an unreasonable invasion of any third party’s personal privacy under s. 22(1), and should therefore be released to him.

## DISCUSSION

[6] **Information at Issue** - The information at issue is found on 35 pages, withheld in their entirety. The records consist of statement forms completed by the three witnesses, along with summaries and transcripts of interviews that the VPD conducted with them. The records also include a half-page summary of a telephone interview that the VPD conducted with the physician.

[7] The applicant had a related matter before the OIPC, which addressed the adequacy of the VPD’s search for records in response to his initial access request (OIPC File No. F13-54377). That matter was closed by the OIPC investigator who determined that an adequate search had been conducted by VPD for all responsive records.

[8] The matter of the VPD’s compliance with its duty under s. 6(1) of FIPPA to conduct an adequate search for responsive records is not listed as an issue in the Notice of Inquiry or in the investigator’s Fact Report. Despite this, the applicant alleges, in his submissions in this inquiry, that the VPD’s search for records was inadequate. Specifically, he believes that the information at issue should include a two-page transcript or set of notes of an interview with the

physician, which he recalls reading at some point in the past (presumably in the course of the proceedings against him).

[9] The records before me do not include a two-page transcript or set of notes of the physician's interview, only a half-page summary. Although the adequacy of the VPD's search for responsive records was not set down as an issue in this inquiry, I wrote to the VPD in the interests of bringing to an end any uncertainty as to whether additional records exist. I specifically asked if there is an additional transcript or set of notes of the interview with the physician. The VPD replied that it had searched more than once for a transcript or set of notes, that no additional records were located, and that all records of the interview with the physician have been provided to the OIPC. Based on these assurances, I am satisfied that the records before me in this inquiry are all of the existing records responsive to the applicant's access request.

### **Disclosure harmful to law enforcement – s. 15**

[10] Section 15 of FIPPA reads, in part, as follows:

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

...

(f) endanger the life or physical safety of a law enforcement officer or any other person,

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

...

[11] As noted earlier, the VPD primarily relies on s. 15(1)(g) to withhold the information at issue, relying on s. 15(1)(f) in the alternative. I will therefore address the application of s. 15(1)(g) first.

#### *Information used in the exercise of prosecutorial discretion – s. 15(1)(g)*

[12] Schedule 1 of FIPPA defines "exercise of prosecutorial discretion" as follows:

"exercise of prosecutorial discretion" means the exercise by

(a) Crown counsel, or a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power

(i) to approve or not to approve a prosecution,

(ii) to stay a proceeding,

- (iii) to prepare for a hearing or trial,
- (iv) to conduct a hearing or trial,
- (v) to take a position on sentence, and
- (vi) to initiate an appeal, or...

[13] The applicant was charged and convicted of certain criminal offences in the course of a trial. The question is whether the records requested by him are part of the information relating to or used in the exercise of the prosecutor's discretion to approve the prosecution, to prepare for and conduct the trial, or to take a position on sentence.

[14] The VPD does not clearly state in its submissions that the 35 pages at issue were provided to the prosecution in order for it to decide whether to lay charges against the applicant, or to take any further steps. However, the VPD provides a letter from an Information Access and Privacy Coordinator/Crown Counsel with the Ministry of Justice's Criminal Justice Branch, who writes that "the information contained within these 35 pages matches the information contained within the Criminal Justice Branch prosecution file". The Crown counsel goes on to assert that the 35 pages therefore relate to and were used in the exercise of prosecutorial discretion.

[15] The Crown counsel does not state that copies of the 35 pages actually appear in the prosecution file, only that the information on the pages "matches" what is in the prosecution file. I take this to mean that the two sets of information are very similar or significantly overlap, although it is possible that the identical pages do appear in the prosecution file. In any event, the fact that the information at issue is the same or substantively similar to the information in the prosecution file is sufficient for me to find that the information at issue would reveal the information in the prosecution file. The contents of the witness statements and the interview summaries and transcripts requested by the applicant would permit him to ascertain the information appearing in the prosecution file.

[16] Having found that the information at issue would reveal the information in the prosecution file, I now turn to whether the information in the prosecution file relates to or was used in the exercise of prosecutorial discretion. The Crown counsel who wrote the letter to the VPD does not state that he or she was the prosecutor who prosecuted the applicant, so as to be in a position to definitively say what information was used in deciding whether and how to prosecute the applicant. It is possible that this Crown counsel was the prosecutor, in which case I would accept his or her assertion that the information appearing in the file was used in or relates to the exercise of prosecutorial discretion.

[17] However, even if a different Crown counsel prosecuted the applicant, it is common practice for prosecutors to review the information that the police provide to them when determining the approach to take in a criminal matter.<sup>1</sup> It is also common practice for prosecutors to consider witness statements and information gathered from police interviews when deciding whether or not a potential charge meets the charge approval standard and when preparing for trial.<sup>2</sup> Given this common practice, I find that the information in the applicant's prosecution file was used by the prosecuting Crown counsel in the exercise of prosecutorial discretion, or relates to the exercise of that discretion.

[18] As the information at issue would reveal the information in the applicant's prosecution file, and the information in the file was used in or relates to the exercise of prosecutorial discretion, I find that the information at issue falls within the terms of s. 15(1)(g). It is not necessary for me to consider the VPD's alternative submission that s. 15(1)(f) applies.

*Information that may not be withheld under s. 15(1) – ss. 15(3) and (4)*

[19] Sections 15(3) and (4) of FIPPA preclude a public body from withholding certain types of information under s. 15(1). They state:

- (3) The head of a public body must not refuse to disclose under this section
  - (a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act,
  - (b) a report, including statistical analysis, on the degree of success achieved in a law enforcement program or activity unless disclosure of the report could reasonably be expected to interfere with or harm any of the matters referred to in subsection (1) or (2), or
  - (c) statistical information on decisions under the *Crown Counsel Act* to approve or not to approve prosecutions.
- (4) The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute
  - (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or
  - (b) to any other member of the public, if the fact of the investigation was made public.

<sup>1</sup> See, e.g., Order 00-02, 2000 CanLII 8819 (BC IPC) at para. 17.

<sup>2</sup> See, e.g., Order F04-13, 2004 CanLII 23112 (BC IPC) at para. 12; Order F10-37, 2010 BCIPC 55 (CanLII) at paras. 28-29.

[20] I considered whether any of the foregoing types of information are present in the records before me, but find that none of them are.

*Exercise of discretion – s. 15(1)(g)*

[21] Because s. 15(1)(g) sets out a discretionary exception to disclosure, a public body must properly exercise its discretion when refusing to give access to information under it.

[22] The applicant explains that the records that he is seeking were initially disclosed to his lawyer in the course of the proceedings against him. The applicant says that he had an opportunity to read full versions of the witness statements and the interview summaries and transcripts, but later received only “trimmed” or abridged versions.

[23] In an appropriate case, a public body should consider exercising its discretion in favour of disclosure under s. 15(1)(g) if material sought by an applicant has previously been disclosed to him or her in accordance with the Crown’s obligation to disclose relevant material to the defence in a prosecution; however, this may be offset by factors weighing against disclosure, such as concerns about the safety of victims and witnesses, as well as their privacy interests.<sup>3</sup>

[24] The VPD raises the factors regarding both safety and privacy. It explains that the charges against the applicant related to abuse and intimidation of his former girlfriend, being the victim and one of the witnesses in his trial. It notes that the requested records contain a great deal of the personal information of all three witnesses. As the VPD turned its mind to appropriate factors when determining whether to disclose information to the applicant, I find that it properly exercised its discretion under section 15(1)(g) to withhold the information pertaining to these three individuals.

[25] As for the physician, the applicant recalls, from the summary of the physician’s interview that he has seen, that the physician told the VPD that he had not been threatened by the applicant. This suggests that the factor regarding safety has no applicability to the information provided by the physician. However, the VPD not only referred to safety as one of its considerations, but also noted privacy interests. As this factor is relevant to the information pertaining to the physician, I find that the VPD also properly exercised its discretion to withhold the information pertaining to him when responding to the applicant’s access request.

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<sup>3</sup> See Order 00-02, 2000 CanLII 8819 (BC IPC) at para. 20.

*Conclusion – s. 15(1)*

[26] I conclude that the VPD is authorized to withhold the information at issue under s. 15(1)(g).

**Disclosure harmful to individual or public safety – s. 19**

[27] Given my conclusion regarding the application of s. 15(1), it is not necessary for to decide whether the VPD is also authorized to withhold the information at issue under s. 19(1).

**Disclosure harmful to personal privacy – s. 22**

[28] Because I have found that the VPD is authorized to withhold the information at issue under s. 15(1), it is not necessary for me to decide whether it is also required to do so under s. 22(1).

**CONCLUSION**

[29] For the reasons given above, I find that the Vancouver Police Department is authorized to refuse the applicant access to the information at issue, on the basis that it reveals information relating to or used in the exercise of prosecutorial discretion under s. 15(1)(g) of FIPPA. Under s. 58(2)(b), I confirm the VPD's decision to refuse access.

April 19, 2016

**ORIGINAL SIGNED BY**

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Wade Raaflaub, Adjudicator

OIPC File No.: F13-53501