



OFFICE OF THE
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Order F16-41

NEW WESTMINSTER POLICE SERVICE

Chelsea Lott
Adjudicator

September 14, 2016

CanLII Cite: 2016 BCIPC 45
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Summary: The New Westminster Police Service investigated the applicant for a potential criminal offence. The applicant sought a memorandum prepared by Crown counsel regarding its decision to decline to lay charges against the applicant. The New Westminster Police Service withheld the memorandum in its entirety pursuant to s. 15(1)(g) (exercise of prosecutorial discretion). The adjudicator confirmed New Westminster Police Service's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 15(1)(g), 15(4).

Authorities Considered: B.C.: Order F15-30, 2015 BCIPC 33 (CanLII); Order No. 325-1999, 1999 CanLII 4017 (BC IPC); Order F16-11, 2016 BCIPC 13 (CanLII); Order 02-38, 2002 CanLII 42472 (BC IPC); Order 00-02, 2000 CanLII 8819 (BC IPC); Order F10-37, 2010 BCIPC 55 (CanLII).

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36; *R. v. Stinchcombe*, 1991 CanLII 45 (SCC).

INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the New Westminster Police Service ("NWPS") for records in which he was named. The applicant had been the subject of a criminal investigation conducted by NWPS.

[2] In response to the request, NWPS provided responsive records withholding some information pursuant to s. 22(1) (disclosure harmful to personal privacy) of FIPPA and s. 182 of the *Police Act*. The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review NWPS’s decision to withhold records.

[3] As a result of mediation, NWPS released additional records. The mediation process was put on hold pending the outcome of an inquiry regarding an identical set of records that were within the custody of the Delta Police Department. That inquiry resulted in Order F15-30¹ which held that s. 182 of the *Police Act* did not apply to a majority of the records. As a result of this outcome, NWPS released records previously withheld under s. 182 of the *Police Act*.

[4] The only record which remains in issue in this case is a memorandum prepared by Crown counsel (the “Memorandum”). During the review and mediation process, NWPS reconsidered its decision several times and changed the exceptions it was relying on to withhold the Memorandum.² For his part, the applicant withdrew his request for the information being withheld under s. 22. Ultimately, the only issues remaining in dispute relate to ss. 14 and 15(1)(g). Mediation was unsuccessful in resolving the matter and it proceeded to inquiry on ss. 14 and 15(1)(g).

ISSUES

[5] In its initial submission, NWPS said it was no longer relying on s. 14, so this exception is no longer in issue. The sole issue in this inquiry is whether NWPS is authorized by s. 15(1)(g) to refuse disclosure of the Memorandum.

[6] Under s. 57(1), NWPS has the burden of proof regarding s. 15(1)(g).

DISCUSSION

[7] **Preliminary Matters** – The applicant refers to s. 13(2)(n) of FIPPA as a relevant consideration for this inquiry. However, NWPS is not withholding information under s. 13(1). Therefore, I will not consider s. 13(2)(n).

[8] In his submissions, the applicant also has asked me to consider s. 22 (disclosure harmful to personal privacy). NWPS had relied on s. 22 during the review process. However, the applicant advised the OIPC Investigator that he was not interested in receiving the information withheld under s. 22.³ Accordingly, s. 22 was not included in the Notice of Inquiry and NWPS has not provided submissions on the applicability of s. 22. However, based on my findings with

¹ Order F15-30, 2015 BCIPC 33 (CanLII).

² At various times NWPS relied on ss. 3(1)(b), 14, 15(1)(g) and 22.

³ Investigator’s Fact Report at para. 10; applicant’s submissions at para. 10.

regards to s. 15(1)(g), I do not consider it necessary to further adjourn the inquiry to provide NWPS an opportunity to address s. 22.

[9] **Background** – The applicant’s family member was involved in a motor vehicle accident in November 2008. The Delta Police investigated the accident, eventually issuing the applicant’s family member a violation ticket pursuant to the *Motor Vehicle Act*. At the time, the applicant was a member of another municipal police force. The applicant, on behalf of his family member, had communications with the Delta Police about their investigation. The Delta Police became concerned about the applicant’s behaviour and requested NWPS investigate the applicant for potential criminal charges. Following the investigation, the Crown declined to lay any charges against the applicant.

[10] NWPS provided the applicant with a five paragraph summary of the reasons Crown counsel did not recommend proceeding with a charge against the applicant.

[11] **Records** – The record at issue in this inquiry is a 14-page memorandum dated February 7, 2011 which has been withheld in its entirety.

Exercise of Prosecutorial Discretion – s. 15(1)(g)

[12] Section 15(1)(g) of FIPPA provides:

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

...

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

...

[13] Schedule 1 of FIPPA defines “exercise of prosecutorial discretion” in part 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,

...

[14] NWPS argues the Memorandum is solely comprised of information used by the Crown in the exercise of its discretion not to approve a prosecution of the applicant.

[15] The applicant denies prosecutorial discretion is of any significance to this inquiry. The applicant submits that he was the subject of malicious allegations by the Delta Police and NWPS, and he wants to clear his name. He further submits that the NWPS obtained false, inaccurate and biased evidence from Delta Police members when it investigated him. He argues that when the Crown declined to approve charges, he lost the opportunity to challenge the allegations, and those allegations now form part of the PRIME police database⁴ and his permanent record as a law enforcement officer.⁵

[16] I will first consider whether the Memorandum could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion.

[17] Although the document is in the possession of NWPS, NWPS has submitted a letter from a Crown counsel and Information Access and Privacy Coordinator for the the Criminal Justice Branch. The letter states the Memorandum is an internal Crown counsel document and that a copy was provided to NWPS solely to advise the police of the reasons for the “no charge” decision.⁶

[18] I have reviewed the Memorandum and on its face it is clearly a written analysis of the Crown’s decision not to lay criminal charges against the applicant. I am satisfied from my review of the record and the NWPS evidence that the Memorandum constitutes information which relates to or was used in the exercise of prosecutorial discretion.

Exercise of discretion

[19] Having found that the disputed information relates to or was used in the exercise of prosecutorial discretion, I will now address the issue of NWPS’s exercise of discretion in deciding to apply s. 15(1)(g). Even where information is technically covered by a discretionary exception, a public body must establish that it has considered in all of the circumstances whether information should be released.⁷ My role is to ensure the public body has not exercised its discretion in bad faith, or based on irrelevant or extraneous grounds.⁸ It is not my role to substitute the decision I might have reached for that of the public body.⁹

⁴ Police Records Information Management Environment – British Columbia’s police records management system.

⁵ Although not explicitly stated, my understanding is that the applicant wants access to the Memorandum in order to exercise his right under s. 29 of FIPPA to request NWPS correct his personal information in the Memorandum.

⁶ Mitchell Affidavit, Exhibit M.

⁷ Order No. 325-1999, 1999 CanLII 4017 (BC IPC) at p. 4.

⁸ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52; Order F16-11, 2016 BCIPC 13 (CanLII) at para. 30.

⁹ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 147.

[20] NWPS argues it exercised its discretion properly when it decided not to disclose the Memorandum. It says it took into consideration the fact that Crown counsel does not consent to its disclosure and the Memorandum was provided in confidence to NWPS. NWPS provided evidence to support these assertions.¹⁰ NWPS also points out that as the applicant was not charged with a criminal offence, there was no need for NWPS to consider whether there had been previous disclosure of the Memorandum to the applicant in accordance with disclosure obligations under *R. v. Stinchcombe*.^{11,12}

[21] The applicant submits that NWPS did not properly exercise its discretion. The applicant relies on Order F10-37¹³ and argues that the same circumstances considered relevant in that order should have been applied here. The relevant circumstances the applicant says NWPS failed to consider were:

- a. the withheld information is similar in content and character to information that NWPS has already disclosed;
- b. some of the withheld information is not personal information, but rather factual descriptions of legal processes and elements;
- c. the passage of time – all criminal and *Police Act* complaints are long over;
- d. no one was charged criminally;
- e. the applicant has a legitimate interest in knowing what was before Crown counsel when deciding not to approve charges;
- f. disclosure would promote public confidence in the NWPS and its investigative processes;
- g. the applicant is not a third party in these proceedings and is requesting his own personal information;
- h. the purpose of the legislation;

[22] The facts of the case before me differ significantly from those in Order F10-37 in which the applicants, a widow and the union of a worker killed in a workplace incident, requested the records of a police investigation into the incident. Therefore, the fact that NWPS did not give consideration to the identical circumstances here as in Order F10-37, does not lead me to conclude that they exercised their discretion in bad faith or based on irrelevant grounds, or that NWPS ignored relevant considerations.

¹⁰ Mitchell affidavit at para. 11 and Exhibit M.

¹¹ *R. v. Stinchcombe*, 1991 CanLII 45 (SCC) imposes a duty on Crown counsel to disclose relevant material to the defence.

¹² In Order 00-02, 2000 CanLII 8819 (BC IPC) former Commissioner Loukidelis stated that 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 under *Stinchcombe* in a prosecution (at p. 5).

¹³ Order F10-37, 2010 BCIPC 55 (CanLII).

[23] It is not my function to interfere with NWPS's discretion to withhold information under s. 15(1)(g), except in the limited circumstances previously discussed. Based on the submissions and evidence of NWPS, I am satisfied that NWPS appropriately exercised its discretion in this case.

Reasons for decision not to prosecute – s. 15(4)

[24] Section 15(4) of FIPPA provides:

15(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.

[25] The applicant argues that s. 15(4) requires NWPS to disclose the Memorandum to him in its entirety. I disagree that this is what s. 15(4) requires. Section 15(4) prohibits a public body from relying on s. 15 to refuse to disclose the reasons for a decision not to prosecute after a police investigation is complete.

[26] The NWPS has already provided the applicant with a five paragraph summary of the reasons Crown counsel did not recommend proceeding with a charge against the applicant. I am not persuaded that s. 15(4) requires NWPS to disclose the type of information contained in the Memorandum and I am satisfied that the general summary provided by NWPS of reasons for not proceeding with the prosecution complies with the requirements of s.15(4) of FIPPA.

CONCLUSION

[27] For the reasons above, under s. 58(2) of FIPPA, I confirm NWPS's decision to refuse to give the applicant access to the information it withheld under s. 15(1)(g) of FIPPA.

September 14, 2016

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator