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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 110-1996
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INQUIRY RE: Various decisions of the Vancouver School Board with respect to an applicant's access requests

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner on April 19, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of requests for review of various decisions of the Vancouver School Board with respect to an applicant.

2. Documentation of the inquiry process

The applicant made a series of requests for access to records between August and October 1995. His requests for review were made through early November 1995. Mediation led to a resolution of some issues but, since the remaining issues had various statutory deadlines and included a complaint about the public body's distribution of the applicant's personal information, they were consolidated in this inquiry.

3. Issues under review at the inquiry and the burden of proof

The issues in this inquiry have been numbered consecutively as follows:

Issue 1: Should the Vancouver School Board be required to create a record in the format(s) requested by an applicant?

Issue 2: What steps must the Vancouver School Board take after it has stated that it has disclosed the only version of a record, but the applicant disagrees?

Issue 3: Should a Vancouver School Board employee be required to create and circulate a supplementary memo changing information as requested by the applicant?

Issue 4: Is the Vancouver School Board entitled to claim solicitor-client privilege with respect to the records identified as responsive to a request?

Issue 5: Should the Vancouver School Board be required to confirm or deny the existence of records responsive to the applicant's request?

The relevant sections of the Act are as follows:

Duty to assist applicants

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

(2) Moreover, the head of a public body must create a record for an applicant if

(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

Contents of response

8(1) In a response under section 7, the head of the public body must tell the applicant

(a) whether or not the applicant is entitled to access to the record or to part of the record,

(b) if the applicant is entitled to access, where, when and how access will be given, and

(c) if access to the record or to part of the record is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review under section 53 or 63.

(2) Despite subsection (1)(c)(i), the head of a public body may refuse in a response to confirm or deny the existence of

...

(b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of that party's personal privacy.

Legal advice

14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

Right to request correction of personal information

29(1) An applicant who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

(2) If no correction is made in response to a request under subsection (1), the head of the public body must annotate the information with the correction that was requested but not made.

(3) On correcting or annotating personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year period before the correction was requested.

(4) On being notified under subsection (3) of a correction or annotation of personal information, a public body must make the correction or annotation on any record of that information in its custody or under its control.

Section 57 of the Act establishes the burden of proof. Under section 57(1), where access to information in a record is refused, 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. However, the Act is silent as to the burden of proof with respect to the creation of records in the form requested by the applicant, with respect to the extent of a public body's duty to assist, and with respect to the correction of personal information. Because the public body is in a better position to prove such matters, I have determined that the burden of proof with respect to these issues is on the public body, in this case the Vancouver School Board.

4. The issues in dispute

The applicant made a series of requests for access to information to the Vancouver School Board. It identified eighteen separate requests. As noted above, the issues in review in this case arise with respect to what the applicant did and did not receive in response to these

various requests. I am of the view that it is unnecessary to describe each of these requests in order to respond to the related issues.

5. The applicant's case

The applicant states that for approximately six months in 1994-95 he was the educational programmer for the Carnegie Community Centre, the home of the Carnegie Adult Learning Centre. During this time period, he carried out a study of the latter and identified what he regards as various deficiencies and financial consequences for the school system as a whole. He subsequently "decided to use the Freedom of Information and Protection of Privacy Act to expose the 'Carnegie scandal' and to make the Vancouver School Board more accountable to both the people of Downtown Eastside and the taxpayers of this land." (Submission of the Applicant, paragraph 7) This led to his series of requests for access to records and interviews with him in the media about his findings. According to media stories which the applicant submitted to me, he was fired by the City of Vancouver (which employed him) after he prepared his initial report about the Carnegie Adult Learning Centre. (Exhibit 2)

The applicant is unhappy with what he has and has not received from the School Board in response to his access requests. In particular, he is concerned about whether it has been open with him and whether its responses have been accurate and complete with respect to such matters as student enrollment data. (Submission of the Applicant, paragraph 17) He suggests that the lack of openness with him indicates that the School Board has something to hide and is being "economical with the truth." (Submission of the Applicant, paragraphs 19 and 20)

I have discussed below some of the more specific aspects of the issues raised by the applicant about the handling of his access requests.

6. The Vancouver School Board's case

The applicant made 21 of the 34 formal requests that the Vancouver School Board received under the Act in 1995.

I have found it most convenient to present below the most relevant parts of the School Board's submissions in connection with the five issues in dispute.

7. The Schools Protection Program's case as an intervenor

The Schools Protection Program of the Risk Management Branch of the Ministry of Finance and Corporate Relations is a self-insured program for schools and school districts across the province. It operates on behalf of, and is funded by, the Ministry of Education. The Schools Protection Program limited its submissions to the issue of solicitor-client privilege. I have discussed its submission below.

8. Discussion

The applicant clearly believes that there are substantial problems in the operation of the Carnegie Adult Learning Centre. I am not concerned with the details of his allegations as presented in considerable detail in his many hundreds of pages of submissions to this inquiry. Under the Act, I only have jurisdiction to review the substantive and procedural issues that he claims need to be resolved in connection with his access requests. (See Order No. 42-1995, June 9, 1995, p. 4; and Order No. 49-1995, July 7, 1995, p. 4) Thus I cannot determine whether adult learning centres are in fact "cash cows" for the general educational activities of the Vancouver School Board, whether the registration of students in non-existent courses and multiple counting of students to boost block funding constitute "fraudulent and criminal conduct," and whether there should be a full investigation into the School Board's operation of adult learning centres (Submission of the Applicant, paragraphs 36, 38, 39) Similarly, I am not in a position to comment on the applicant's view that his "career has been destroyed by mere allegations to which I have had no formal chance to respond." (Submission of the applicant, Vancouver School Board file 9512, paragraph 12)

Although I have read all of the voluminous submissions of the applicant, I am of the view that most of his material has little relevance to the specific issues before me that I have jurisdiction to deal with under the Act. In this connection, I note the School Board's strenuous objections to the applicant's various statements. (See Reply Submission of the Vancouver School Board, p. 2, 3)

Section 43: Responsible use of the Act

In responding to the applicant's submissions, the Superintendent of Schools for School District No. 39 (Vancouver) made a very considerable understatement when he said that the extent of the submissions on both sides indicates that "this has been a very time-consuming and complex series of requests." He estimated that the School Board has spent ninety hours of staff time in preparing its submission and its reply to the applicant's submission and over 100 hours responding to the applicant's twenty-one requests in 1995, plus hours spent on mediation of issues with my Office. The submissions and records for this inquiry fill three large binders; my rough estimate is that the submissions themselves and exhibits or affidavits total at least a thousand pages.

I agree with the School Board in the present matter that this applicant is not using the Act for the purposes for which it was intended and that he is not, indeed, acting in good faith. (Reply Submission of the Vancouver School Board, pp. 1, 2) The fundamental problem is that the applicant is trying to use the Act to prove that his original report about the Carnegie Adult Learning Centre is correct and that the Vancouver School Board is engaged in at least illicit activities that the applicant wants to expose to the public.

I have several reactions to the nature of this particular inquiry. I am sympathetic to the plight of the School Board in this particular instance. I think that its efforts to help this applicant have been excessive in light of its other responsibilities to students and the taxpayers. A statutory scheme of access to general and personal information is only going to work for

innumerable public bodies and applicants if common sense and responsible behaviour prevail on both sides. This is not the first applicant whom I have come to regard as making excessive, indeed almost irrational, demands on a public body. The most problematic applicants are those who are using the Act as a weapon against a public body after an unrelated episode that has left them unhappy or contemplating litigation or, as in this case, preparing to arbitrate a claim of unjust dismissal. After several years of experience in implementation of the Act, such problem applicants are becoming increasingly visible to me, and I realize that I only see the tip of the iceberg of access requests across public bodies. I deal directly with only about five percent of the requests for review brought to my Office, and my Office deals with less than ten percent of the total number of access requests to all public bodies.

I am well aware that a new government in Ontario has chosen to impose up-front charges for access to information under the Ontario *Freedom of Information and Protection of Privacy Act*. My concern is that politicians in this province will be encouraged to move in a similar direction unless applicants act reasonably in making requests for access to information and requests for review. The Act must not become a weapon for disgruntled individuals to use against a public body for reasons that have nothing to do with the Act.

There is one statutory solution to the problem of certain kinds of repetitious applicants that I would urge public bodies to consider, that is, an application to my Office under section 43 of the Act, which gives me the power to authorize a public body to disregard requests in certain limited circumstances. It reads:

> If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.

To date, I have granted two such requests. I am pleased that public bodies have exercised considerable restraint in this regard, despite what could be viewed as considerable provocation from certain applicants. I would prefer a more liberal application of section 43 to "repetitious or systematic" requests that "unreasonably interfere with the operations" of a public body rather than a perceived need to impose user fees on the entire population of potential users.

With respect to the issue of abuse of process by persons making frivolous and vexatious requests, which is the specific language of the Ontario but not the B.C. Act, I recommend to readers the decision of Tom Wright, Ontario's Information and Privacy Commissioner in Order M-618, October 18, 1995, involving the London Police Services Board.

The status of confidential records in the possession of the applicant

The Vancouver School Board is concerned, because of statements made by the applicant in his submissions, that he is in possession of student registration information in identifying form: "Whatever the Applicant's original reason for obtaining these records, and however he obtained them, there is no reason for him to retain them. These records must be returned immediately to the Vancouver School Board for proper confidential storage or destruction."

(Reply Submission of the Vancouver School Board, p. 1) It asks my Office for assistance in this matter.

I can confirm that the applicant does have such student records in his possession, some of which contain sensitive personal information. I strongly encourage the applicant to return his copies of these records to the Vancouver School Board. The copies submitted to me will be kept secure and confidential. It is possible that the applicant has sent me the "originals" of the records in his possession; that is something that I cannot determine from the copies in my possession.

Issue 1: Should the Vancouver School Board be required to create a record in the format(s) requested by an applicant? (Section 6)

The applicant objects to the fact that the School Board did not present information to him in the format that he requested. (Submission of the Applicant, paragraph 22) He also says that the information is inaccurate and incomplete. (Submission of the Applicant, paragraphs 25-32) He contests the School Board's alleged inability to produce the data that he wants, and in the format that he wants it, from machine-readable records in its custody.

The Vancouver School Board has reviewed for me the impressive steps that it took to seek to be responsive to the applicant's requests for data. (Submission of the Applicant, pp. 16-26) I am persuaded that preparing additional data for responding to requests by the applicant would consume an inordinate amount of Vancouver School Board resources that is far beyond the requirements of section 6. I find that the Vancouver School Board is not required to create records in a format requested by the applicant.

Issue 2: What steps must a public body take after it has stated that it has disclosed the only version of a record, but the applicant disagrees?

The Vancouver School Board described to me in considerable detail the "reasonable" efforts that it has made to respond openly, accurately, and completely to the applicant. It has provided him with copies of all of the requested records that it has found, including four versions of a single memo. I find that the Vancouver School Board has done everything possible to assist the applicant in its response to Request No. 9512. (Submission of the Vancouver School Board, pp. 26-33; and Reply submission of the Vancouver School Board, p. 8)

Issue 3: The Correction of an Electronic Mail Record (section 29)

The applicant wishes me to order the School Board to destroy a record because his "privacy and reputation were damaged and to replace it with a supplementary memo containing an unconditional apology and a correction of personal and other information." (Submission of the Applicant, Vancouver School Board file 9513a, paragraph 1) He did "identify some of the errors in personal and factual information in the poisonous e-mail." (paragraph 10) A new e-mail evidently corrected a factual error in the original. (paragraph 12)

The applicant furnished me with a line-by-line analysis of the errors, omissions, and alleged falsities in the original offending e-mail. (paragraph 15-32) He concludes that I should

order destruction of this record. I see no reason to do so in the present case, where it is plain that the applicant has had every opportunity to file his side of the story with the public body, which is only required under the Act to attach it to the original record.

The Vancouver School Board's response is that it has given the applicant the two e-mail records in their entirety. It has also sent his corrections of his own personal information, which it did not contest, to appropriate persons who received the originals: "The remaining statements in the Email message are statements of fact or accurate descriptions that do not contain personal information that is subject to correction under section 29 of the Act." (Submission of the Vancouver School Board, p. 12)

I find that the Vancouver School Board acted in accordance with the requirements of section 29 with respect to the electronic mail records in dispute.

Issue 4: Solicitor-Client Privilege (section 14)

The applicant contests the withholding by the School Board of about a dozen records for which solicitor-client privilege was claimed. He has significant concerns as to whether solicitor-client protection actually exists among or between the School Board, the Ministry of Finance and Corporate Relations, and a law firm. (Submission of the Applicant, Vancouver School Board file 9515, paragraphs 1-21) Many of the same issues arose in Order No. 107-1996, May 29, 1996, p. 4, involving the same applicant, and my response to them here is the same as in the earlier inquiry. In particular, the applicant believes that solicitor-client privilege should not prevail over "the importance of protecting the privacy and reputation of a third party like myself ...." Whatever the merits of this statement, it does not reflect the language of the Act. Further, it is another example of an issue for which I cannot fashion a solution under the Act.

I have reviewed the arguments and affidavits of the Vancouver School Board with respect to section 14 and the records in dispute. Much of this material was submitted on an *in camera* basis. All of the records withheld by the Vancouver School Board are associated with its request for, or receipt of, legal advice and are thus protected under this section.

As an intervenor, the Schools Protection Program similarly argued that "all materials forwarded by the Vancouver School Board to the School Protection Program for the purpose of obtaining advice in relation to demands and threats of legal action made by [the applicant], are privileged within the meaning of s. 14 of the Act, as well as at common law, and that in any event as a matter of policy they ought not to be disclosed." (Submission of the Intervenor, paragraph 10) I am in agreement with its detailed submission on this matter. (Submission of the Intervenor, paragraphs 11-31) In particular, I accept that section 14 protects from disclosure in this particular case the documents that the School Board "chose to forward to its legal advisor/insurer for the purpose of obtaining advice, and in contemplation of litigation then in reasonable prospect." (Submission of the intervenor, paragraphs 21, 22, 29) (See Order No. 92-1996, March 15, 1996) The Vancouver School Board sent what it deemed relevant documents to the legal advisor to the Schools Protection Program, which in due course retained a Vancouver law firm to assist with the matter. (Affidavit of Graham Sanderson, Risk Management Branch, Ministry of Finance and Corporate Relations)

I find that the information in the records in dispute is covered by solicitor-client privilege and is thus excepted from disclosure under section 14 of the Act.

Issue 5: Should the Vancouver School Board be required to confirm or deny the existence of records responsive to the applicant's request? (section 8(2)(b))

The applicant requested a record containing information about a female employee of the Vancouver School Board, who worked at the Carnegie Adult Learning Centre. The School Board refused to confirm or deny the existence of such a record. He wishes me to order the School Board to acknowledge its existence, because he claims that he saw such a record while employed by the City of Vancouver at the Carnegie Adult Learning Centre. He says that he was subsequently charged with harassing her and was then fired, a matter allegedly awaiting arbitration. The applicant claims that he needs the records he is requesting for this latter purpose. (Submission of the Applicant, Vancouver School Board File 9517, paragraphs 1-12)

The Vancouver School Board generally argues that section 22 of the Act precludes disclosure of a third party's personal information to an applicant, especially under circumstances, such as this inquiry, where the rules of arbitration should furnish him with access to necessary documentation. It further points out that this applicant can utilize the summons powers afforded to the arbitrator appointed to hear a case under section 93(1) of the *Labour Relations Code*. (Reply Submission of the Vancouver School Board, p. 11) According to the School Board, section 22(2)(c) of the Act has inadequate probative force in the circumstances of this inquiry to justify disclosure of the information requested by the applicant.

The Vancouver School Board essentially refuses to disclose the extent of any personal information it may have about the employment history of the third party on the grounds that it would be an unreasonable invasion of her privacy under section 22(3)(d) of the Act, referring to Order No. 81-1996, January 1, 1996; Order No. 70-1995, December 14, 1995; and Order No. 62-1995, November 2, 1995. (Submission of the Vancouver School Board, pp. 12, 13)

I find that the Vancouver School Board may refuse in its response to the applicant to confirm or deny the existence of a record containing personal information of a third party, because disclosure of the existence of the information would be an unreasonable invasion of that party's privacy.

The Vancouver School Board made other *in camera* submissions with respect to the relevance of section 19 of the Act to Issue 5, which I have not accepted because the intention to argue this section was not set out in the Notice of the Written Inquiry and this section is not a mandatory exception. (See Order No. 106-1996, May 28, 1996, p. 3)

I find that disclosure of the existence of the personal information of a third party would be an unreasonable invasion of that party's personal privacy, and thus the Vancouver School Board is entitled to refuse in its response to confirm or deny the existence of a record containing personal information of a third party under section 8(2)(b) of the Act.

Post-inquiry submissions

After the completion of this inquiry in terms of submissions received, the applicant continued to send materials to my Office. Six late submissions were received in connection with this and another inquiry. At my direction, my Office subsequently informed the applicant that he should stop sending them and that additional ones would not be accepted. The Vancouver School Board objected to the receipt of more submissions as contrary to the policies and procedures established by my Office.

I agree with the Vancouver School Board that submissions should not be accepted after the close of an inquiry, except perhaps in extraordinary circumstances. The Legislature has provided direction that matters under review should be dealt with quickly. The Act requires that reviews under Part 5 be resolved, either by settlement or by an inquiry, within ninety days after receiving the request for review. Thus I discourage any re-opening of inquiries after this period of time, unless all parties consent and the circumstances are extraordinary enough to justify such an extension. In this case, the applicant wished to submit a rebuttal to the intervenor's submission, and he also wished to bring to my attention other documents which "recently became available."

I have reviewed the late materials submitted by the applicant. Under my Office's policies and procedures, there is no right to make rebuttal arguments to a reply. The documents he says have recently become available are not, in my view, central to the issues raised in this inquiry. Thus I have not considered these late materials in this inquiry.

I find that the Vancouver School Board has met its burden of proof of demonstrating that it has made reasonable efforts to assist this applicant under section 6 of the Act with respect to all of the issues raised in this inquiry.

9. Order and resolution of issues

Issue 1: I find that the Vancouver School Board is not required to create records in a format requested by the applicant.

Issue 2: I find that the Vancouver School Board has done everything possible to assist the applicant in its response to Request No. 9512.

Issue 3: I find that the Vancouver School Board acted in accordance with the requirements of section 29 with respect to the electronic mail records in dispute.

Issue 4: I find that the information in the records in dispute is subject to solicitor-client privilege and is thus excepted from disclosure under section 14 of the Act.

Issue 5: I find that disclosure of the existence of the personal information of a third party would be an unreasonable invasion of that party's personal privacy, and thus the Vancouver School Board is entitled to refuse in its response to confirm or deny the existence of a record containing personal information of a third party under section 8(2)(b) of the Act.

Thus I find, in all of the circumstances of this inquiry, that the head of the Vancouver School Board is authorized to refuse access to the records. Under section 58(2)(b) of the Act, I confirm the decision of the head of the Vancouver School Board to refuse access to the records in dispute to the applicant.

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David H. Flaherty
Commissioner

June 5, 1996