ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 173-1997
July 14, 1997

INQUIRY RE: A decision by the District of Campbell River to withhold records relating to a former employee from a media applicant

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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 (the Office) on April 10, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of the District of Campbell River (the District) to withhold records relating to a former employee.

2. Documentation of the inquiry process

Dan MacLennan, a reporter with the Courier-Islander in Campbell River (the applicant), made a written request to the District on August 2, 1996 for "details of the city's severance agreement with former Fire Chief [the third party]." The District replied on August 9, 1996 to acknowledge receipt of the request and to inform the applicant that it had given notice to a third party under section 23 of the Act. The District also indicated that it would advise the applicant in September if there would be any delay in responding within the thirty days allowed by the Act.

The District responded to the applicant on December 18, 1996 by refusing access to the requested records. The District indicated that the request "does not refer to a specific record but rather to details of the city's severance agreement with former Fire Chief [the third party]." The District told the applicant that, while the requested record did not exist, it was meeting its obligation to assist applicants by confirming that it did have a record in the nature of a Final Release between the District and the third party.

The applicant requested a review of this decision on January 10, 1997. Mediation was not successful and an inquiry was scheduled for April 2, 1997. This date was changed to April 10, 1997 at the request of the public body.

3. Issue under review at the inquiry

The issue under review in this inquiry is the District's decision to apply sections 14 and 22 of the Act to the records in dispute. These sections read as follows:

Legal advice

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

Disclosure harmful to personal privacy

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,

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

....

(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,

...

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,

....

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

> ...
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,
> ....

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to the information in the record has been refused under section 14, it is up to the public body, in this case the District, to prove that the applicant has no right of access to the record or part of the record. Under section 57(2), where access to information in a record has been refused under section 22, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

4. The records in dispute

The District provided me with five pages of records relating to the applicant's request for records pertaining to the third party: two one-page letters from a law firm; a two-page "Final Release" setting out the terms of an agreement between the District and the third party; and a one-page Schedule summarizing the salary and benefits paid to the third party for a specified period of time. A covering letter to this Office is numbered one and the documents in dispute are numbered two to six. The District has asked me to describe the record "simply as a Final Release with supporting documentation."

5. The applicant's case

The applicant wants access to the District's severance agreement with its former Fire Chief, whom it terminated early in 1995, shortly after a consultant completed an apparently "oral" review of the management of the Fire Department. According to the applicant, "no reason was given for [the Fire Chief's] termination." The applicant's view is that the District "has to date been able to prevent any public examination of what transpired" between it, the fire department, and the then Fire Chief:

> The District was therefore able to completely avoid any public accounting of circumstances surrounding a publicly-funded emergency response agency upon which all Campbell River citizens and taxpayers depend for the protection of their lives and property.

I have presented below, as I deemed it appropriate to do so, the applicant's submission on specific sections of the Act.

6. The District of Campbell River's case

The District indicated in its December 18, 1996 response that the record at issue (the Final Release) was withheld under section 14 because it "was prepared by and with

the advice of legal counsel and disclosure of the record is not consistent with the District's right to claim solicitor client privilege in deciding to proceed with the release." The District also stated that the record was withheld under section 22 of the Act, because "[d]isclosure of the record would be an unreasonable invasion of the [the third party's] personal privacy and the Final Release does not relate to [the third party's] position, function or remuneration as former Fire Chief for the District."

I have presented below, as I deemed it necessary to do so, specific submissions of the District on the application of sections of the Act to the records in dispute.

7. The third party's case

I received an *in camera* submission from the third party, which I have carefully reviewed.

8. Discussion

Sections 4 and 6: Information rights / duty to assist applicants

I agree with the applicant that the District's attempt to argue that it has no records pertaining to the severance arrangement with the departed Fire Chief is "an attempt to obfuscate rather than to assist." I deem the District's argument unworthy of further discussion in the circumstances of this inquiry. I also agree with the applicant that the District has not assisted him in a timely fashion that meets the accountability goals set out in section 2 of the Act. He would have been well advised to complain to my Office about the delays that he encountered. I strongly encourage the District to assist future applicants, including the present one, with greater diligence. (See Submission of the District, paragraphs 4.25-4.27)

Section 14: Legal advice

The District submits that the terms and conditions for the Fire Chief's leaving its employ were the subject of legal advice sought by the District as reflected in two one-page letters involving a law firm. (Submission of the District, paragraphs 4.06-4.24) Based on the contents, I agree with the District's submission regarding these letters.

In terms of the accountability goals set out in section 2 of the Act, I reject the District's submission that disclosure of the record known as the Final Release would have the effect of increasing costs to the taxpayers, since "third parties would be less inclined to settle these matters if there was no assurance of confidentiality resulting in greater litigation costs, and the possibility of a larger amount being awarded at trial." The public has a fundamental right to know how its money is being spent, especially with respect to severance agreements. If a third party wishes to proceed to a trial, then full disclosure will result in any event. (Submission of the District, paragraph 4.10)

There is, further, a significant difference between the correspondence that passed between the District and its legal counsel (records 2 and 3 as withheld above) and the Final Release with schedule (records 4, 5, and 6) that was executed by the former Fire Chief.

Section 22: Disclosure harmful to personal privacy

The applicant argues that disclosure of the information in dispute will not be an unreasonable invasion of the privacy of the Fire Chief, not least because of the language of section 22(2)(a). Furthermore:

> I believe that the long overdue need for public scrutiny, and District accountability, easily constitutes a reasonable invasion of a third party's privacy. [The Fire Chief] was an employee of the District and the taxpayers of Campbell River. The taxpayers have every right to know details of [his] termination, because they paid for it and because they were denied any public accounting of the events leading up to his termination.

The District seeks to argue that the payments to the departed Fire Chief did not constitute "remuneration" within the meaning of section 22(4)(e) of the Act and thus cannot be disclosed under section 22(1). (Submission of the District, paragraphs 4.11-4.24) This is contrary to my finding in Order No. 46-1995, July 5, 1995, p. 4, as follows, from which I find no persuasive reason to deviate:

> Severance payments or agreements, whenever made, can and should be construed as 'remuneration.' These are payments customarily made 'in lieu of notice' for services that would have been performed during the notice period had the employer required the employee to continue work during that period. In my view, such payments constitute 'remuneration' under the Act whether an agreement is reached while the employee is still employed or after he or she has left, and whether an agreement is reached before or after litigation has been commenced.

I agree with the submission of the applicant that the key fact is that "the Third Party left the employ of the District with some form of compensation, severance, buy-out, pension, or other such agreement which came as a direct result of his employment with the District." In my view, the Final Release accomplishes the purpose of a severance agreement; there is no substantial difference.

Severance agreements

I have made several previous Orders to the effect that severance agreements should be disclosed in the public interest. In my view, these have precedential value in the present matter, in particular Order No. 24-1994, September 27, 1994, p. 12:

> My Order will result in some invasion of the privacy of those who received severance payments. But, I have concluded, under section 22(2)(a), that the public interest in knowing how public money has been spent should prevail for those non-unionized staff affected by the closing of Shaughnessy Hospital....
>
> The key variables in this inquiry, in my view, remain the fact that public money was being spent in supplying certain employees with a benefit, the government of British Columbia and the Ministry were instrumental in the appointment of the Public Administrator to close the hospital, and influential, at least, in the Public Administrator's exercise of the powers of the hospital board to effect the closure by negotiating the severance packages with its employees.

In the context of the present inquiry, I fully endorse the summary statement of the applicant to the effect that "I feel the taxpayers have a right to know how much they paid and what they paid for." (Reply Submission of the Applicant)

Review of the records in dispute

There are five pages in dispute in this inquiry. For reasons discussed above, I find that the two-page "Final Release" must be disclosed to the applicant, because it is essentially a severance agreement and must be disclosed under the Act. The page headed "salary and benefits" of the former Fire Chief for a specific time period must be disclosed except to the limited extent that it reveals information unique to him as opposed to other employees of the District.

Procedural objections

The District objects to the timelines set for submissions in this inquiry and requested various adjournments. My basic response is that my Office has an established set of rules and procedures that apply to all parties; in particular, they require speedy action in order to prevent the kinds of delays in processing an access request that have characterized the present inquiry.

The District has devoted considerable efforts to debating various words set out by a Portfolio Officer in his fact report as somehow prejudicing the presentation of the issues in this inquiry. With respect, these disputes are irrelevant to my determination of the matters at issue in this inquiry. A fact report is background information and a chronology of events to assist the parties in the preparation of these submissions by attempting to isolate the matter in dispute. Given that I am guided in my deliberations by the submissions of the parties, fact report contents may be amended by the parties, but are not binding on me.

9. Order

I find that the District of Campbell River is authorized to refuse access to certain records in dispute under section 14 of the Act. Under section 58(2)(b) I confirm the decision of the head of the District of Campbell River to refuse access to the records numbered 2 and 3.

I also find that the District of Campbell River is required to refuse access to certain portions of the records in dispute under section 22. Under section 58(2)(c) I require the head of the District of Campbell River to refuse access to portions of the record
numbered 6.

I also find that the District of Campbell River was not required to refuse access to all of the information in the records in dispute under sections 14 and 22(1) of the Act. Under section 58(2)(a) I order the District of Campbell River to disclose the Final Release and attached schedule, with severances to the schedule in accordance with the notations that I have made on that record.

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David H. Flaherty July 14, 1997
Commissioner