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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 70-1995
December 14, 1995

INQUIRY RE: A request for the release of all records relating to the resignation of the Executive Director of the Nanaimo Regional General Hospital

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1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry on September 25, 1995 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 Nanaimo Regional General Hospital (the Hospital) to withhold records relating to the resignation of its Executive Director.

Michael Munro, a reporter for the Nanaimo Bulletin, made his original request to the Community Relations Officer at the Nanaimo Regional General Hospital. He requested "all transcripts, memos, faxes, letters and any and all other information regarding the resignation of the [Executive Director] including his letter of resignation. That includes any information regarding sexual harassment allegations or complaints made to the Employers Relations Department, RCMP, or whomever." He did not seek the name of the complainant.

The Hospital provided the applicant with the Executive Director's letter of resignation and confirmation that he "received six months salary ($60,000), one half of his accumulated sick leave ($19,385) and benefits continuation for a six month period." The Hospital confirmed that this formula for severance had been in place since the Executive Director joined the Hospital in 1987.

On March 17, 1995 the applicant and his employer requested that this Office review the decision of the Nanaimo Regional General Hospital. The inquiry was adjourned a number of times with the consent of the parties and was eventually convened on September 25, 1995.

2. The records in dispute

Through the mediation process, the applicant received a number of documents. The remaining records in dispute are listed below. I am relying on the numbering and document descriptions in the initial submission of the public body.

Withheld in their entirety

1. A letter dated December 12, 1994 to the Chairman, Board of Trustees of Nanaimo Regional General Hospital.

4. An Investigative Report published February 2, 1995, pursuant to a policy of Nanaimo Regional General Hospital.

Severed for eventual release

10. Letter dated February 5, 1995, from the Executive Director to the Chairman, Board of Trustees of Nanaimo Regional General Hospital.

11. Letter dated February 6, 1995, from the Executive Director to a third party.

13. Minutes of an *in camera* meeting of the Executive Committee of the Board of Trustees of Nanaimo Regional General Hospital, held February 8, 1995.

16. Minutes of the *in camera* meeting of the Executive Committee of the Board of Trustees of Nanaimo Regional General Hospital, held February 24, 1995.

17. Letter dated February 27, 1995, from the Chairman, Board of Trustees, to the Executive Director requesting his presence at a meeting to be held on March 3, 1995 with the Executive Committee of the Board.

19. Notes prepared by the Chairman, Board of Trustees, based on legal advice for the *in camera* meeting of the Board scheduled for March 9, 1995.

20. Motions passed at the special *in camera* meeting of the Board of Nanaimo Regional General Hospital on March 9, 1995.

21. Letter dated March 9, 1995 from the Chairman, Board of Trustees, to the Executive Director.

3. Issues under review at the inquiry

The main issues in this inquiry concern the applicability of sections 13, 14, and 22 of the Act to the records in dispute. The relevant portions of these sections follow.

Policy advice or recommendations

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.

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

...

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

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

...

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

...

(d) the personal information relates to employment, occupational or educational history,

....

22(4)(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,

...

(j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in subsection (3)(c).

4. The applicant's case

The applicant is of the view that it is in the public interest to know the facts respecting the resignation of the Executive Director, his contract, his severance remuneration, and allegations of sexual harassment made against him. (Submission of the Applicant, p. 2)

The applicant argues that the records in dispute should be disclosed on the basis of sections 22(4)(e) and (j) of the Act, if they concern employment contracts, correspondence about severance payments, allegations of sexual harassment, "if they relate to his resignation and severance remuneration, or, if they do not, simply because they outweigh the personal privacy interest of one who is a public official." He relies in this connection on my Order No. 46-1995, July 5, 1995, p. 4.

> In particular, our client [the applicant] submits that, if the severance remuneration was paid to [the Executive Director] in exchange for his resignation, in order to keep the issue quiet and not embarrass anyone, that should be disclosed, as well. Our client points out that there have been many layoffs at the Nanaimo Regional General Hospital in the past three weeks; if jobs cannot be spared due to mismanagement of public monies (i.e. paying unfounded and improvident severance amounts), then the public interest in knowing that information is very strong. (Submission of the Applicant, pp. 7, 8)

The applicant has emphasized that he does not seek disclosure of the names of the complainants.

The applicant further involved section 25 of the Act to force the Hospital to disclose the information requested, because of the public's right to know how public money is being spent in the face of allegations of mismanagement, for example, "in order to protect the reputation of one who is the subject of sexual harassment allegations." (Submission of the Applicant, pp. 9, 10)

5. The Nanaimo Regional General Hospital's case

The Hospital made a series of submissions covering a narrowing number of records in dispute. I am only addressing the arguments pertaining to the remaining records. I will discuss specific arguments about each record as I review them below on an individual basis.

6. The third parties' cases

The former Executive Director of the Hospital objects to the release of the information requested by the applicant, because it would be an unreasonable invasion of his personal privacy. He emphasizes "the confidential nature of personnel files and matters relating to employee evaluations."

The complainant in this case objects to the disclosure of her name as an invasion of her privacy and argues that such an action would stop other individuals in similar circumstances from coming forward in order to stop unwarranted behaviour.

7. Discussion

The applicant has gone to considerable lengths to berate the Hospital for various alleged failures in complying with his access request, including an initial failure to inform him which sections of the Act it was relying on to prevent disclosure of certain information. (Submission of the Applicant, pp. 2-5) As I have said before, I am inclined to be tolerant of the good faith efforts of public bodies, especially those recently covered under Tier 2 of the Act, as they learn how to comply with a reasonably complicated new piece of legislation in a period of budgetary restraint. See Order No. 55-1995, September 20, 1995, pp. 4, 5. However, it is important that public bodies provide applicants with a list of the exceptions applied, if any, when responding to requests for records.

Reasonable Expectations of Confidentiality

On December 21, 1994 the Hospital distributed to all of its employees its draft policies on harassment as "the official 'interim policy.'" Section 2.5.16 in particular states that:

> Confidentiality of the names of the principals, the nature of the allegations, the conduct and content of the investigation, the recommended outcome and final action taken shall be strictly maintained on a "need to know" basis.
> (Documentary Submissions of the Hospital, tab 7)

While I am prepared to interpret the intent of this statement as a promise of confidentiality, it is highly desirable for the language of such a policy of any public body to specify that such personal information will be treated as "supplied in confidence" for purposes of compliance with section 22(2)(f) of the Act and then indicate that the information, as noted above, will be maintained on a need-to-know basis. I strongly recommend this policy statement to all public bodies covered by the Act. I am pleased, in this connection, with the language of the government's draft "Policy and Procedures on Discrimination and Harassment in the Workplace," because it couples an expectation of "strictest confidence" with an acknowledgment of subsequent distribution of pertinent information on a "need-to-know" basis.

Detailed review of the records in dispute

My decision in inquiries like the present one depends in large measure on my detailed review of the records in dispute. Concern for the privacy interests of the individuals involved in this specific matter makes it almost impossible for me to provide much descriptive information about the nature of the issues involved.

I disagree with the applicant's submission that the records can be characterized as concerning the third party's position, functions, or remunerations as an employee of the Hospital within the meaning of section 22(4)(e), or that disclosure would reveal details of a discretionary benefit of a financial nature within the meaning of section 22(4)(j). Thus I have concluded that section 22(4) does not apply to the records in dispute.

I have concluded that the Hospital appropriately refused to disclose all or part of records 1, 4, 10, 13, 16, 17, 19, and 21 under section 22(3) and record 11 under section 22(1), since disclosure would, in my view, constitute an unreasonable invasion of the third party's personal privacy. I have also concluded that the Hospital was authorized to refuse to disclose parts of records 13, 16, and 19 under sections 13 and 14, and record 20 under section 13. My reasons follow.

Records 1 and 4: A complaint and the accompanying investigation report

The Hospital argues that these records should not be disclosed on the basis of sections 22(2)(f) and (h) and 22(3)(b) and (d). The report, which is strictly factual in nature and contains no recommendations (although it includes findings), implements the personnel harassment policy of the Hospital. The Hospital argues that it is in the public interest to encourage justifiable complaints, and that release of any portion of these records "would have a chilling and detrimental effect on potential future complaints." (Submission of the Hospital, pp. 1, 2; *In camera* Submission of the Hospital, August 4, 1995, pp. 4, 5). As noted above, Hospital policy provides that such information will be used on a need-to-know basis.

Based on my review of the records, I find that records 1 and 4 were appropriately withheld in their entirety under section 22(3)(b) and (d) of the Act. I agree with the Hospital's application of the factors contained in section 22(2)(f) and (h).

Records 10 and 11: Two letters written by the Executive Director

Based on a review of these records, I find that the Hospital appropriately withheld the severed portions of record 11 under sections 22(2)(h) of the Act. With respect to record 10, I find that the Hospital appropriately withheld certain parts of this record under sections 22(2)(f), (h), 22(3)(b) and (d) of the Act.

The Executive Director has agreed to the release of these two records in their severed form.

Records 13 and 16: Minutes of in camera meetings of the Executive Committee

The Hospital has proposed to release portions of these records in severed form on the basis of the protections offered by sections 13 and 14 of the Act (policy and legal advice developed strictly for the Board). It also now relies on sections 22(2)(f), (2)(h), and 22(3) of the Act.

On the basis of my review of these records, I find that the Hospital appropriately severed these two records under sections 13, 14, 22(2)(h), and 23(3)(b) and (d) of the Act.

Record 17: A letter to the Executive Director

The Hospital relied on sections 22(2)(f), 22(2)(h), and 22(3)(g) of the Act to sever this record.

The Executive Director has agreed to the release of this record in its severed form.

On the basis of my review of this record, I find that the Hospital severed it appropriately under sections 22(2)(f), 22(2)(h), and 22(3)(g) of the Act.

Record 19: Notes prepared on legal advice for the Chairman, Board of Trustees

The Hospital has relied on sections 13, 14, 22(2)(f), 22(2)(h), and 23(3)(g) of the Act for its severances to this record of legal and policy advice.

Based on my review of this record, I find that the Hospital severed the record appropriately under sections 13, 14, 22(2)(f), 22(2)(h), and 23(3)(g).

Record 20: Motions passed at special in camera meeting of the Board

The Hospital states that it has relied on sections 13, 22(2)(f), 22(2)(h), and 23(3)(d) for its severance of this record.

The Executive Director has agreed to the release of this record in its severed form.

Based on my review of this record, I agree that the Hospital acted appropriately in severing the record on the basis of section 13 of the Act.

Record 21: Letter to the Executive Director

The Hospital states that it has relied on sections 22(2)(f), 22(2)(h), and 23(3)(d) for its severance of this record.

The Executive Director has agreed to the release of this record in its severed form.

Based on my review of this record, I agree that the Hospital acted appropriately in severing the record on the basis of sections 22(2)(h) and 23(3)(d) of the Act.

A set of rules for disclosure of information to the public in harassment cases

It seems to me that there are certain bright lines that can be drawn with respect to the disclosure of sexual or personal harassment information to the general public by public bodies covered by the Act. I think that the fundamental concern is to protect the integrity of the process that a complainant sets in motion. A complainant is entitled under section 22 of the Act to confidentiality for both his or her name and the substance of the complaint. The substance of the subsequent investigative report should also be protected from disclosure, as well as the substance of meetings held by those in authority to make a decision on what to do about a complaint that is either substantiated or unsubstantiated. Generally, sections 13, 14, and 22 are relevant in this connection. I think that the written policies of any public body should state that this kind of information is collected in confidence for purposes of section 22(2)(f) and will not be disclosed

to third parties in particular. I am not concerned in this inquiry with rights of access to such records on the part of either the complainant or the person complained against. Nor am I addressing the handling of complaints with respect to complaints that are found to be frivolous, vexatious, or, indeed, malicious.

With respect to the application section 22(2)(h) of the Act, I am also of the view that public bodies should not disclose personal information that may unfairly damage the reputation of any person(s) referred to in the record requested by an applicant. The goal of the investigative process is to secure justice for the complainant, the alleged harasser, and those asked to provide evidence, and then to facilitate the reintegration of the "offender" into the work force as a productive member of society. The process is highly invasive for any parties involved in such a matter without subjecting them to invidious attention in public that will not serve the purposes of such procedures.

Under sections 13 and 14 of the Act, I am persuaded that specific policy advice and legal opinions and advice received by a public body in connection with a harassment episode need not be disclosed. It is self-evident that decisions in such matters are ultimately made by such lay groups as Boards of Directors, who require, and are entitled to, professional advice on a confidential basis so that they can best protect the broad public interest and the interests of the persons involved, including complainants, offenders, and witnesses.

The Hospital's press release of March 14, 1995

On the above date, the Hospital announced the resignation of its Executive Director "for personal reasons." The public was given no further information about the reasons for the departure, except for the statement that the Executive Director "will be missed by all." This particular document does raise issues of how much the public needs to be told about this kind of situation. The press release made no mention of severance payments of any sort.

The Hospital feels that it cannot explain the apparent incongruity between reasons for the resignation and the payment of severance pay without disclosing personal information, policy, and legal advice. (*In camera* Submission, August 4, 1995, p. 4) I accept the Hospital's resolution of this dilemma in the present inquiry and am of the view that the additional information that will now be disclosed to the applicant will go some way to satisfy legitimate public interest.

It seems to be that in cases of harassment the balancing of competing interests between openness and accountability and the protection of personal privacy should be struck on the privacy side of the equation.

8. Order

I find that the head of the Nanaimo Regional General Hospital is required to refuse access to all of records 1 and 4 and part of records 10, 11, 13, 16, 17, 19, and 21 under section 22 of the Act. Under section 58(2)(c), I require the head of the Nanaimo Regional General Hospital to

refuse access to all of records 1 and 4 and parts of records 10, 11, 13, 16, 17, 19, and 21 as described in these reasons.

I also find that the head of the Nanaimo Regional General Hospital is authorized to refuse access to parts of records 13, 16, and 19 under sections 13 and 14 of the Act and parts of record 20 under section 13. Under section 58(2)(b), I confirm the decision of the head of the Nanaimo Regional General Hospital to disclose records 13, 16, 19, and 20 to the applicant in their severed form.

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David H. Flaherty
Commissioner

December 14, 1995