**Office of the Information and Privacy Commissioner**
**Province of British Columbia**
**Order No. 1-1994**
**January 11, 1994**

**INQUIRY RE: Ministry of Finance and Corporate Relations/ Public Service Employee Relations Commission**

**Fourth Floor**
**1675 Douglas Street**
**Victoria, B.C. V8V 1X4**
**Telephone: 604-387-5629**
**Facsimile: 604-387-1696**

## 1. Description of the Review

An inquiry was held at the office of the Information and Privacy Commissioner in Victoria, B.C. on Friday, January 7, 1994 between the hours of 1 and 3 p.m. It concerned a request for review, received by the Commissioner on October 12, 1993, from Mr. Chris Shelton (the applicant), a severed British Columbia government employee, under section 52 of the Freedom of Information and Protection of Privacy Act (the Act).

On September 22, 1993 the Deputy Minister of the Ministry of Finance and Corporate Relations (the Ministry of Finance), Michael Costello, decided to withhold access to certain records requested by Mr. Chris Shelton. This decision was subsequently reconfirmed by Jo Surich, Acting Commissioner, Public Service Employee Relations Commission (PSERC) after October 4, 1993.

The records at issue in this review are 1) a severance directive (the Directive) and severance grid (the Grid) for excluded (non-union) public service employees and 2) records in Mr. Shelton's severance file that relate to the application of the Grid to the negotiations between PSERC and Mr. Shelton.

Access to these records was denied pursuant to section 17 of the Act. This concerns reasonable expectation of harm to the economic interests of the province from a proposed disclosure.

## 2. Documentation of the Review Process

On January 6, 1994 the Office of the Information and Privacy Commissioner sent to all parties a two-page description of the "inquiry process" that would be followed at the inquiry. The applicant and the Ministry of Finance reviewed this document at the start of the inquiry and agreed to the procedures described.

The Information and Privacy Commissioner added that in camera discussions of sensitive matters could occur in the absence of the applicant and the general public (section 56(4) of the Act), but that the in camera proceedings would be recorded and subsequently released to the applicant, if the Commissioner determined that an in camera portion of the inquiry had not been justified. No in camera discussions occurred on January 7, 1994.

The government provided the Commissioner's office with a two-page "Severance Directive Backgrounder", which was entered as Exhibit 1.

Lorrainne Dixon, a Portfolio Officer in the Office of the Information and Privacy Commissioner, provided all parties involved in the inquiry with a two-page statement of facts (the fact report). The Ministry of Finance added two pieces of information to this statement before the inquiry occurred. At the outset of the inquiry on January 7, 1994, the applicant, the Ministry of Finance, and the Commissioner accepted the fact report as accurate for purposes of conducting the inquiry. It was entered as Exhibit 2.

The Ministry of Finance introduced a one-page affidavit of Jo Surich, dated January 7, 1994, which was entered as Exhibit 3.

Copies of all documents reviewed, as well as those marked as exhibits were provided to the applicant and to the Ministry of Finance before or at the inquiry.

Under section 56(3) of the Act the Commissioner gave notice of the inquiry to the Information and Privacy Branch of the Ministry of Government Services (which declined to intervene) and the B.C. Freedom of Information and Privacy Association (FIPA), which provided the Commissioner with a four-page submission dated January 5, 1994. The FIPA submission was provided to all of the parties and discussed at the inquiry.

The applicant appeared for himself and was affirmed to give evidence at the inquiry. The Ministry of Finance's case was presented by Catherine L. Hunt, a barrister and solicitor with the Legal Services Branch, Ministry of the Attorney General. With her was Mr. Philip M. Topalian, Labour Relations Officer, Labour Relations Branch, of PSERC, and Mr. David Young, the Director of Information and Privacy for the Ministry of Finance. Both Mr. Topalian and Mr. Young were affirmed to give evidence in the case.

The applicant did not provide the Commissioner with any written materials as part of his submission. At the end of the inquiry, the Ministry of Finance provided the Commissioner with a ten-page "Outline of Argument."

## 3. Issues under Review at the Inquiry

The focus of the inquiry was the applicant's request to review the Directive and Grid as a part of his ongoing negotiations with PSERC for a severance payment for

himself. The applicant is also seeking those parts of his severance file that have been withheld.

The position of the Ministry of Finance is that the head of the public body acted correctly in denying the applicant's request to obtain these records on the basis of section 17 of the Act, which states in subsection (1) that

> the head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia ...

A non-exhaustive list of such information includes in subsection (1)(e):

> information about negotiations carried on by or for a public body or the government of British Columbia.

A basic summary of the Ministry of Finance's position on financial harm appeared in a list of factors considered by Jo Surich in making the decision not to release the records. These are listed in item 6 of his affidavit:

> ... the extent of the financial harm that could result from disclosure; the cost to litigate wrongful dismissal actions and the likelihood that publication of the guidelines would result in a significant increase in such litigation; the fact that the records are current and are being applied in both Mr. Shelton's negotiations and other ongoing negotiations; and the alternative avenues of accountability of government for negotiated severance settlements.

The position of the Ministry of Finance is that disclosure of the records in question would detrimentally affect the government's financial situation and it sought a decision from the Commissioner to uphold the decision of the head of the public body not to disclose.

The Ministry of Finance accepted that, under section 57(1) of the Act, it had the burden to prove that the applicant has no right of access to the record or parts thereof.

**4. The Severance Directive and Grid**

The Directive and Grid is an eight-page document dated June 20, 1989. It is headlined "Personnel Management Policies and Procedures," chapter "Pay and Benefits," section "Severance Administration," and is noted as "Uncirculated." The Directive is four pages. The Commissioner has reviewed a copy of these documents.

The Directive only applies to government employees who are excluded from the provisions of a collective agreement. Mr. Topalian testified that there are approximately 5,000 persons in this category (about 18% of the provincial workforce).

The Grid is four additional pages of schedules appended to the Directive. Schedule A concerns the calculation of severance pay for deputy ministers and associate deputy ministers, which fully adopts the 1989 recommendations to the government of the day by former Chief Justice of British Columbia, Nathan Nemetz (see below, "The Nemetz Report"). This schedule is made available to these senior public servants as part of their terms and conditions of employment and is thus regarded by PSERC as public information. Mr. Topalian was unable to state whether the Directive itself is also provided to deputy ministers and associate deputy ministers.

Schedule A determines that the severance pay of such senior officials is based on their total time in the public service in British Columbia and other Canadian jurisdictions up to a maximum severance package of 24 months in equivalent salary and benefits after 8 or more years of such public service. Contrary to the treatment of other non-union severed employees, the payments based on Schedule A are automatic and not negotiable.

Schedules B and C apply to excluded (non-union) employees who are not aged 55 or over and eligible for a pension. Schedule D applies to the latter.

The Exhibit 1 describes the Directive as "a tool used in establishing the negotiating position of government with respect to severance settlements with excluded (non-union) employees." Such settlements are lump sum payments made in lieu of notice when the employer terminates an employment relationship.

Unionized employees can only be involuntarily severed in case of redundancy, and their severance payments are based solely on years of service. The position of the Ministry of Finance is that such arrangements are "negotiated" as part of a collective agreement and then automatically applied (Exhibit 1). Thus, in contrast, non-union employees have to engage in ongoing negotiations at the time of their severance on the basis of a document that they did not negotiate and are not shown. Since such negotiations are ongoing, seemingly at the rate of between 50 and 80 per year, the Directive and Grid are never released as a matter of PSERC policy, since there are always negotiations underway with one employee or another.

The Ministry of Finance testified that there have been 28 negotiated severances during the 8 months between April and November 1993, with 17 outstanding severances still under negotiation. In fiscal 1992-93, 79 severances of excluded employees were negotiated.

The only dollar amounts offered by the Ministry of Finance at the inquiry were for the fiscal year 1991-1992, when $4.8 million was paid out in severance payments to both

union and excluded public servants. The Ministry of Finance offered no evidence as to what percentage of this total amount went to non-union members. Thus the specific amounts of financial harm at issue in this inquiry remain speculative.

No evidence was presented at the inquiry about past, current, or anticipated dollar costs to the Ministry of Finance of severance negotiations with non-union employees. What is known for non-senior public servants is that the amounts in dispute in specific severance negotiations are relatively small, such as the difference between an initial government offer of $15,000 as a settlement versus an individual's maximum expectation of perhaps $30,000, based on what other individuals may be known to have received and knowledge of court awards in wrongful dismissal suits. Another case, for a more senior or more experienced person, might involve the difference between a minimum of $30,000 and a maximum of $60,000. It seems likely from Schedule A that only settlements for deputy ministers and associate deputy ministers would reach sums above $100,000 in specific cases.

There are less than 100 severances negotiated each year with non-union employees. The amounts in dispute in individual severance negotiations are significant for the employee. The government bears the costs of negotiations in each specific case of a non-union employee who contests its initial offer of a settlement.

The Ministry of Finance testified that excluded employees may be severed for a variety of reasons, thus justifying the need for a grid to establish minimum, maximum, below minimum, and above maximum severance payments. Sometimes severance is used as an alternative for termination for just cause. Sometimes an employee makes no request for severance pay. In other cases, PSERC believes that an employee attracted from another province and then terminated should be given a severance payment above the maximum indicated by the severance grid. It is thus clear that the severance policy for non-union employees is applied to a wide range of deserving and undeserving cases, further clouding the analysis of economic harm that the data make possible.

Evidence presented by the Ministry of Finance indicates that the small number of PSERC officials charged with the negotiation of non-union severances are hard bargainers. Less than 30% of 28 excluded severances settled in the first eight months of fiscal 1993-94 were at or above the discretionary maximum on the grid. Thirty-nine percent were below 100% on the grid, and 33.5% were at or below the minimum on the grid. Actual payments for this time period apparently equalled 72% of the amount set out on the grid, an amount perhaps inflated by the inclusions of two deputy ministers severed in this same period. Admittedly, the current system does provide PSERC with considerable flexibility and discretion in dealing with severed employees who are not unionized.

The position of the Ministry of Finance is that the Directive and Grid are responsive to the Nemetz Report on government severance policy, dated May 1, 1989, which recommended that government severance policy should "take into account Court

ordered awards and should balance the need for public accountability with the necessity of permitting the government and the severed employee to negotiate an agreement in the *interests of both* (Exhibit 1, emphasis added by the government)

The Commissioner is grateful to the applicant in this case for providing him with a copy of the Nemetz Report. The Ministry of Finance told the Commissioner at the inquiry that Justice Nemetz did not recommend publication of severance directives and grids. However, the principal concern of the Nemetz Report was the highest level of public servants, which includes deputy ministers (pp. 5, 14). His principal substantive concern was the lack of definitive overall Cabinet-approved guidelines to settle procedures for those leaving the public service (p. 6). Although he advocated public accountability by means of a reasonable annual reporting system, the Justice did not directly address issues concerning the public availability of severance guidelines and grids.

The only Cabinet approved severance policy that Justice Nemetz could locate in 1988-89 was a 1976 order-in-council directing that severance pay was to be an amount equal to two months salary for those employed less than 2 years and one more month for each additional year to a maximum of 6 months (p. 6). Since orders-in-council are normally public documents, it seems likely that severance policy and practice were publicly known to all public servants between 1976 and 1989, when the present Directive and Grid were developed. Thus the 1989 directive seemingly changed the rules of the road for non-union employees. A publicly-available formula became a confidential formula for "negotiations" between the government and each individual.

Although the Nemetz Report did recommend that government severance policy "should carefully balance the need for public accountability with the necessity of the two parties being able to negotiate an agreement which is [in] the best interests of both," (pp. 12-13) he was not addressing the issue of whether such policies should be fully public. His recommending of an annual report to the legislature on severance arrangements completed was intended to promote accountability while protecting the privacy of specific individuals who had been severed (pp. 12-13). In fact, Justice Nemetz's further recommendation for the preparation of Treasury Board "guidelines" on severance could be interpreted as intending public guidelines (p. 13), especially since that was the only formally-approved system in place for the previous thirteen years. (The only guidelines that he found to have been approved at the appropriate level were those made in 1976.)

Justice Nemetz further recommended the preparation of "similar authoritative guidelines for other public servants excluded from collective bargaining." (p. 14) He also recommended that the Government Personnel Services Division (now PSERC) "should have the responsibility for executing those guidelines i.e. negotiating all severance agreements." (p. 14) It is clear that Justice Nemetz intended the treatment of deputy ministers to be based on a fixed schedule; it is not clear what he thought most appropriate for other non-union employees in terms of whether the Cabinet-approved guidelines should be publicly-available records. What is clear is that the policies developed in 1989

and approved on August 31, 1989 have been kept confidential since that time (they have also not been reviewed after the first three years as the Directive requires and Justice Nemetz recommended [p. 14 and Ministry of Finance testimony at the inquiry, January 7, 1994]).

Data and testimony at the inquiry indicate that PSERC's actual use of the Directive and Grid is a complicated matter. It testified that "numerous other factors are included in determining a settlement offer reflecting the individual circumstances of each case." (Exhibit 1, p. 2) In a letter sent to the applicant in this case, dated May 20, 1992, the Government Personnel Services Division informed him that the severance guidelines "encompass the above factors of job responsibility, age, service, and other relevant factors."

PSERC emphasizes that although the Directive is "referred to in all severance negotiations involving non-union employees ... the Directive does not determine severance but only the parameters within which wrongful dismissal suits may be settled without going to the Courts." (Exhibit 1, p. 2) In the event an agreement is not reached, an employee will generally resort to a wrongful dismissal action. Mr. Topalian testified that the Grid was a "tool of convenience."

I draw several conclusions from the information presented in the previous paragraphs. Even though the Directive and Grid exist, they do not determine the actual offer of a settlement in a particular case but only minimums and maximums and above maximums that do not require special approval by a committee established under the Directive. Thus even if a severed employee knew about such specific information, he or she could not depend on receiving the amount proposed from the Grid. If the severed employee in question refused to settle for less than the maximum, as the Ministry of Finance contends that he or she would then do, his or her only recourse would be to the courts, as is currently the case for persons unwilling to accept government offers of severance. The severed employee, like the Ministry of Finance, would also have to bear the costs of litigation. Given the settlement amounts that appear to be common, the dissuasive power on the individual employee of litigation costs would likely be greater than on the Ministry of Finance, which employs salaried lawyers for such purposes.

The Ministry of Finance contends that release of the Directive and Grid would increase the amount of such litigation over wrongful dismissals and the costs of litigating such actions, especially including the legal fees of lawyers representing the government (Affidavit of Jo Surich and Ministry of Finance testimony at the inquiry). I note that the Ministry of Finance simply asserted this point (as part of its argument about potential harm to the economic interests of the province) and did not offer any specifics based on current or past experience.

Justice Nemetz recommended and the government indicated that the government's guidelines on severance payments to non-union employees should and do reflect the amounts awarded by the courts in wrongful dismissal cases (Nemetz Report, p. 14). Thus

it seems to me that the expectation of increased litigation presumes that the courts will for some reason change the levels of court-awarded settlements in wrongful dismissal cases, which appears unlikely if the government's severance guidelines continue to reflect what the severed persons receive. The latter would be ill-advised to pursue litigation if the prospect of receiving more than the amount suggested by the Grid and other relevant factors were in fact remote.

**5. The Public Body's Burden of Proof**

The Freedom of Information and Privacy Association made a helpful submission with respect to the burden of proof which applies to the exception in section 17 of the Act in this case. FIPA argued that

> PSERC bears the significant burden of adducing detailed and persuasive evidence that access may reasonably be expected to cause a specific harm of the kind adumbrated in s. 17. There must be evidence of a specific, real harm.

The Ministry of Finance's oral response to the previous sentence at the inquiry referred simply to the "financial costs" of releasing the Directive and Grid.

FIPA also emphasized in its submission that the Act contemplated a regime of openness for non-personal information to promote the accountability of public bodies to the populace at large. Moreover, "the public interest in accountability can, as contemplated by s. 17, only be defeated by clear evidence of an apprehended harm to PSERC's or the government's economic or financial interests that justifies secrecy overcoming accountability."

FIPA also wisely referred to decisions of the Information and Privacy Commissioner/Ontario to the effect that public bodies seeking to rely on an exception such as section 17, must adduce "detailed and convincing" evidence to support their case. See Information and Privacy Commissioner/Ontario, Order 141, RE: Stadium Corporation of Ontario, January 23, 1990 (Order of Commissioner Sidney B. Linden). See also Information and Privacy Commissioner/Ontario, Order 203, RE: Stadium Corporation of Ontario, November 5, 1990 (Order of Assistant Commissioner Tom A. Wright).

For further understanding of the burden of proof that the Ministry of Finance has to meet to claim the exception in section 17 successfully, I have relied on the language of the government's own Freedom of Information and Protection of Privacy Act Policy and Procedures Manual (1993) (the Manual), which was prepared for the government by its own Information and Privacy Branch in the Ministry of Government Services.

The Manual specifically discusses the section 17 exception of the Act and instructs government personnel contemplating the release of a record to conduct a line by line review of the requested record

> to determine whether a reasonable person would expect that releasing the record would result in harm to the financial or economic interests of a public body or the government of British Columbia. (Manual, section C.4.8, p. 3)

I am not persuaded from the Ministry of Finance's argument and evidence that a reasonable person would consider the potential for economic harm to be significant enough in the overall context of the finances of the government to justify secrecy.

In terms of exercising its discretion to release or not to release a requested record, the Manual states that the "head must consider all relevant factors affecting the particular case," including "the historical practice of the public body with respect to the release of similar types of records;" [this record has been kept confidential since 1989 and its predecessor arrangement appears to have been a public record], "whether the disclosure of the information will increase public confidence in the operation of the public body," and "whether there is a sympathetic or compelling need to release the record." (Manual, section C.4.8, p. 4) It is arguable, again, that both of the last questions can be answered in the affirmative in specific severance cases. The applicant in this instance made a strong case for the fairness of allowing him access to the requested record. Although fairness is not a specific consideration under this Act, it is a matter for the government to consider under all provincial legislation and policy.

The Manual is especially strong in setting the standards that must be met for the head of a public body to claim that a disclosure can reasonably be expected to cause harm, and I quote liberally from it:

> There must be objective grounds to believe that disclosure will likely result in the harm contemplated by this exception ...
>
> In each case, the public body must be able to provide facts to support a claim that it is reasonable to expect harm.
>
> In an inquiry into a decision not to allow access to information under this exception, the Commissioner will require the public body to present detailed and convincing evidence of the facts or rationale that led to the expectation that harm would occur if the information were disclosed. There must be a link between the disclosure of specific information and the harm which is expected from the release. (Manual, section C.4.8, p. 6)
>
> ...the head of a public body must have reasonable grounds to expect harm in order to apply the exception." (Manual, section C.4.8, p. 9)

The Ministry of Finance argued that the listing of the types of information in section 17(1)(a) to (e) indicates that, if records are disclosed, the harm described in the introductory wording of section 17 is implicit. It also submitted that the standard of evidence of harm is such that it is not necessary for the head of a public body to demonstrate that actual harm will result from disclosure, or that actual harm did result from a similar disclosure in the past.

I do not agree with this submission. Section 17(1) is a discretionary exception which allows the head of a public body to refuse to disclose information which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia. The information listed in paragraphs (a) to (e) are examples of the kind of information which the head of a public body may refuse to disclose. The fact that the type of information may fall under one of these categories does not in and of itself establish grounds to deny a request for disclosure. There must be detailed and convincing evidence of harm.

In my judgment, the Ministry of Finance has not satisfactorily met the standard of proof (a balance of probabilities) established by its own Manual in responding to this request for access to a record. Although the final text of the Manual was not published when the Ministry of Finance made its original decision, a substantial draft was available, and the published version was in existence when PSERC reconfirmed the original decision of the Deputy Minister not to release the documents (government testimony at the inquiry). Although the language of the Manual is not binding on the head of the public body or the Commissioner in the interpretation and application of the Act, I find it supportive in this specific instance, especially absent a body of Commissioner's orders to guide interpretation.

In my judgment, the facts advanced by the Ministry of Finance to support its position in this case are not detailed and convincing or detailed and persuasive. The facts relied upon by the Ministry to prove specific, real harm are not conclusive. I especially regret that the Ministry did not offer specific financial information concerning the dollar costs of severances of non-union employees that have been successfully negotiated since the summer of 1989. Thus the Ministry of Finance has asserted its case rather than proven it.

In my view, the Ministry of Finance has not overcome the presumption of openness and accountability for governmental processes and non-personal information that a unanimous legislature built into the Act.

**6. Mr. Shelton's Severance File**

The applicant also sought access to portions of his severance file that were not released to him. Mr. Topalian reported to Lorrainne Dixon of this office on January 7, 1994 that most of the documents not released to Mr. Shelton consisted of facsimile transmission sheets or drafts of letters which were, in fact, released in their final form. He added that only the four sheets headed "severance calculation" and "severance disbursements" were not released in their entirety.

My own review of this severance file persuades me that Mr. Topalian's description of its contents is essentially correct. What the applicant also did not receive was handwritten comments on draft letters which reveal PSERC's negotiating strategy in dealing with this specific case. I am of the opinion that matters in Mr. Shelton's

severance file specifically dealing with PSERC's negotiations with the applicant can be withheld under section 17(e) of the Act, since it forms parts of a specific, ongoing negotiation with him about his severance. It is clear that release of a negotiating strategy in a particular case could reasonably be expected to harm the financial or economic interests of the Ministry of Finance.

At the inquiry Mr. Shelton did not emphasize or even discuss his request for access to his severance file. One of the reasons is that someone obtained a copy of Mr. Shelton's file and conveyed it to him privately. The applicant returned this document to the Commissioner during the inquiry, and I undertook to return it to the Ministry of Finance after I made an order in this case (as required by section 44(5) of the Act).

The file that the applicant received surreptitiously came from the Information Access and Records Services Branch of the Ministry of Finance. It appears to be a full file of the handling of his case through August 18, 1993. It does not contain the actual severance calculations that have been withheld from him.

I agree with the Ministry of Finance's position that the remaining portions of Mr. Shelton's severance file kept by PSERC should not be released to him.

## 7. Orders

Under section 58(2)(a) of the Act, I order the Ministry of Finance and the Public Service Employee Relations Commission to release the 1989 Directive and Grid to the applicant in their entirety.

Under section 58(2)(b), I confirm the decision of the Ministry of Finance and the Public Service Employee Relations Commission to refuse access to the remaining portions of Mr. Shelton's severance file.

Within 30 days of receipt of this order, the Ministry of Finance and the Public Service Employee Relations Commission must comply with this order and furnish me with evidence that the appropriate records have been released to the applicant. Such evidence should be sent to my direct attention at the Office of the Information and Privacy Commissioner, Fourth Floor, 1675 Douglas Street, Victoria, B.C.

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David H. Flaherty
Commissioner

January 11, 1994