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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 211-1998
January 15, 1998

INQUIRY RE: Whether the City of Vancouver properly withheld personal information and whether the City was obligated to create a record in response to an applicant's request.

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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 October 18, 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 by an applicant of the decision by the City of Vancouver to sever information from records disclosed to him under section 22 of the Act. The applicant also requested a review of the City's refusal to create a record under section 6(2).

2. Documentation of the inquiry process

On June 16, 1997 the applicant requested records pertaining to his labour grievance, including "a copy of the terms of the settlement offer" made to the Canadian Union of Public Employees (CUPE). On June 25, 1997 the City disclosed records which it believed to be responsive to the applicant's request. The City severed information from one record dated July 4, 1997 under section 22 of the Act. The severed information also fell outside the scope of the applicant's request, because it referred to the names of other grievors and arbitrators.

On June 30, 1997 the applicant advised the City that the records received were not responsive to his request; he also requested that a record concerning the settlement offer be created in response to his request. On the same date, the applicant requested a review of the City's response. On July 2, 1997 the City advised the applicant that it was not required to create a record in response to his request. On August 18, 1997 the City re-severed the document in dispute and provided the applicant with the names of arbitrators but continued to withhold the names of the grievors.

3. Issues under review and the burden of proof

The issues under review are (a) whether the City appropriately withheld the names of other grievors under section 22 of the Act; and (b) whether the City is required under section 6 to create a record in response to the applicant's request for a copy of the terms of the settlement offer.

Section 57 of the Act establishes the burden of proof on parties in this inquiry. Under section 57(2), if the record or part that the applicant is refused access to contains personal information about a third party, 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.

With respect to whether the City is obliged to create a record in response to the applicant's request, the burden of proof rests with the City. (Order No. 106-1996, May 28, 1996)

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.

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

...

(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

...

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

....

4. Procedural objections

On October 1, 1997 the applicant requested the opportunity to file a surreply to the City's reply submission and sought an extension to October 17, 1997 to prepare it. On October 2, 1997 the City indicated that it had no objections to the surreply, nor to the date for filing a further reply submission and requested a right to file a further reply to the applicant's surreply. On October 3, 1997 the applicant sent a response stating his objections to granting a reply to the City. After reviewing this correspondence, I decided to grant both parties the right to file a further reply by October 17, 1997. On October 16, 1997 the applicant requested a further time extension to prepare his submission. The City objected to this request. I decided to accept the letter from the applicant dated October 16, 1997 as his surreply and did not grant a further extension.

5. The record in dispute

The record in dispute is a one-page letter from an Employee Relations Advisor for the City to the legal representative of CUPE, dated July 4, 1996 confirming the City's agreement to specific arbitrators for a number of arbitrations. Information concerning the applicant's arbitration has now been disclosed: "The only remaining information ... not provided to the applicant consists of the names of other employees who filed grievances." (Submission of the City, p. 2)

6. The applicant's case

The applicant appears to suggest that the severance under section 22 of the Act is no longer an issue in this inquiry. (Reply Submission of the applicant, paragraphs 1 and 2) The applicant contends, however, that there is a record in existence outlining the terms of the settlement offer made by the City and submits that it is under an obligation to create that record under section 6 if it is not in writing. (Submission of the applicant, paragraph 6)

7. The City of Vancouver's case

The City submits that section 22 is still an issue because the applicant has not withdrawn his request for a review of the information severed. It argues that disclosure of the severed information, which relates to grievances involving third parties, would constitute an unreasonable invasion of their personal privacy. In terms of section 6, the City maintains that it is under no legal obligation to create a record where it cannot be created from a machine readable record. The City submits that there is no record of an offer being made, although it acknowledges that there may have been an oral offer.

8. Discussion

Section 22: Disclosure harmful to personal privacy

I propose to address the section 22 issue to ensure that all matters are dealt with. The City, as noted above, has severed the names of other employees who have filed grievances against the City through their union (CUPE, Local 15) and the causes of their grievances. I agree fully with the City that this personal information forms part of the employment history of these third parties, disclosure of which is presumed to be an unreasonable invasion of their privacy under section 22(3)(d). See Order No. 62-1995, November 2, 1995, p. 12. (Submission of the City, pp. 2-3) This presumption has not been rebutted in this inquiry.

I also agree with the City's submission that sections 22(2)(f) and (h) of the Act are particularly relevant in the present case. I find the two following statements particularly persuasive on these specific points:

> The information in question forms part of the grievance records of the third parties. It is an established practice that all grievance information, including the very existence of the grievance, is considered confidential by both the union and the employer. Therefore, it is submitted that the information in question should be treated as confidential.
>
> Secondly, it is submitted that disclosure of the information on the filing of grievances and their causes could unfairly damage the reputation of the third parties. The record reveals that the employer considered it necessary to discipline the third parties and that the parties chose to dispute this decision. This is clearly sensitive personal information which could affect the third parties' reputation. (Submission of the City, p. 4)

Finally, the City submits, and I agree, that disclosure of the information in dispute would not serve the public interest or even any segment of the public.

Since the applicant made no submission on the section 22 issue, he has not met his burden of proof for disclosure.

Section 6: Duty to assist applicants

The City has indicated that there is no record of an offer being made by the City to the Union, although it acknowledges that there may have been an "oral" offer. The City submits that it is under no obligation to create a record specifying terms of the alleged settlement offer, since no written record exists:

> It is further submitted that the applicant does not have a right of access under the Act to unrecorded information about any such offer.
> ...
> The Act does not, therefore, apply to, and there is no right of access to, records which do not exist. (Submission of the City, p. 5)

The applicant contends that the City is required to create a record, because "creating the record would not unreasonably interfere with the operations of the public body" under section 6(2)(b). However, as the City points out, it must be possible under section 6(2)(a) for a public body to create the records 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." Since there is no record of an offer being made, there is no requirement to create such a record under section 6(2) of the Act.

9. Order

I find that the City of Vancouver was required to refuse access to the severed personal information under section 22(1) of the Act. Under section 58(2)(c), I require the City of Vancouver to refuse access to the personal information withheld from the applicant on the basis of section 22(1).

I find that the City was not required to create a record under section 6(2) of the Act and thus was authorized to refuse access to the record requested by the applicant. Under section 58(2)(b), I confirm the decision of the City to refuse access to the record requested by the applicant.

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David H. Flaherty
Commissioner

January 15, 1998