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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 205-1997
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INQUIRY RE: An applicant's request for access to audiotapes of his own appeal to the Public Service Appeal Board

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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 September 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 the response by the Public Service Appeal Board (the Board) to the applicant's request for access to audiotapes which recorded his May 6, 1997 appeal to the Board.

2. Documentation of the inquiry process

The applicant wrote to the Board on May 22, 1997 to ask for access to "notes taken by staff and members...records created and/or received with respect to the Hearing held on May 6, 1997...this request includes the audiotapes taken by you on May 6, 1997." The Board replied on June 5, 1997 by disclosing some records, denying access to other records, and denying access to the audiotapes. During mediation, the applicant accepted the decision to withhold some paper records.

3. Issue under review and the burden of proof

The issue under review is the application of the Act to audio recordings of a Board hearing. The sections of the Act referred to by the applicant and/or the Board are as follows:

Purposes of this Act

2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records,

(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,

(c) specifying limited exceptions to the rights of access,

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act.

(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

Information rights

4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

....

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.

...

(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) 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, which establishes the burden of proof on parties in an inquiry, is silent with respect to a request for review about the duty to assist under section 6 of the Act. I decided in Order No. 110-1996, June 5, 1996, that the burden of proof to demonstrate a discharge of its duty to assist applicants under section 6 of the Act is on the public body. Where section 22 is relied on to refuse disclosure of all or part of a record, the onus is on the applicant to prove that disclosure would not be an unreasonable invasion of the personal privacy of a third party.

4. The records in dispute

The records in dispute are three ninety-minute audio cassettes described by the Board as containing approximately 3.75 recorded hours of proceedings before it.

5. The applicant's case

The applicant and his counsel participated fully in a hearing of his own appeal before the Public Service Appeal Board on May 6, 1997. It concerned three competitions for positions in the Ministry of Agriculture, Fisheries and Food under the *Public Service*

Act. The applicant states that staff of the Board personally tape recorded all oral evidence and submissions at the hearing after obtaining consent from all of the parties involved. According to the applicant:

> The mandate of the Board is to determine if the merit principle as required under the *Public Service Act* has been applied by reviewing the selection process. Given this specific framework for the Hearing, it is not unreasonable to suggest at least 90+% of the content of the audiotapes relates to presentations on the recruitment process by the parties involved. (Submission of the Applicant, p. 1)

The applicant argues that he should be granted access to the audiotapes on the basis of sections 2 and 6 of the Act, which set out requirements to grant access to records, to sever what should not be released, and to make every reasonable effort to help an applicant. (Submission of the Applicant, pp. 2-4) The applicant relies in particular on Ontario Order P-820, December 20, 1994, which granted an applicant access to approximately five hours of tape recordings, which contained the personal information of that applicant.

I have discussed further below the applicant's submissions on various sections of the Act.

6. The Public Service Appeal Board's case

The Board is a specialized appellate tribunal established under the *Public Service Act*. Its staff consist of three permanent full-time employees, all of whom perform a support role. (Submission of the Board, paragraphs 6, 8) Board members generally sit alone. Normally, no other Board staff are present; the Registrar was present in the current matter. The Board submits that even "if other Board personnel are present at an appeal, they do not transcribe a record of the proceedings or create notes of the proceedings. There is no court reporter or stenographer present at appeals and no official audio recording is created." (Submission of the Board, paragraphs 8, 9)

Because Board members usually hear appeals without any administrative back-up, it has followed the practice of tape recording appeals, using a store-bought audio cassette tape recorder. Typically, the tape recorder is operated by the Board member, and the tape is for Board uses only: "Appeals are taped by Board members themselves as an informal backup, to assist them - if necessary - in interpreting their own notes of the proceedings or to refresh their memory of an appeal. Appeal tapes are no more than an *aide memoire* for the personal use of board members. They are a personal record if not a 'note.'" (Submission of the Board, p. 13) The applicant submits that in his proceeding the Registrar of the Board was the "*only* person involved in setting up the audio recording equipment and changing tapes." (Reply Submission of the Applicant, p. 3)

I have discussed below the Board's detailed submissions on the application of various sections of the Act to the records in dispute.

7. Discussion

Scope of this Act

> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following.
>
> ...
>
> (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity;
>
> ....

The Board refers to this section for the following purpose:

> Although a personal appeal tape does not qualify as a 'personal note' within the meaning of s. 3(1)(b), it is relevant that, but for use of the word 'note' in the section, these personal records of Board members would be excluded from the Act. This is a relevant consideration in determining whether or not, on the facts at hand, it is reasonably possible to sever these tapes within the meaning of section 4(2) of the Act. (Submission of the Board, paragraph 14)

In my view, the applicant is on solid ground when he states in his reply submission:

> The audiotapes are records as defined under the Act and must [be] subject to the same rules of public scrutiny as any other records of a public body.

The applicant further argues that the audiotapes contain records of a public process. "They do not contain personal notes, advise [*sic*], decision or personal view of a judicial or quasi-judicial nature." (Reply Submission of the Applicant, p. 5) I agree with the applicant that the audiotapes are records under the Act. I also agree with him that section 3(1)(b) of the Act does not apply to these records.

Section 22: Disclosure harmful to personal privacy

The applicant emphasizes that the hearing in question focused on selection procedures and criteria:

> As such, the contents of the audiotapes at issue contain information primarily related to government's selection processes - a case involving specifically administrative procedure, **not** comparing candidates'

> qualifications. They may contain a minute amount of third-party personal information, depending on the interpretation of the 'third party personal information.' (Submission of the Applicant, p. 6)

In the applicant's opinion, none of the information in the tapes can be withheld on the basis of any part of section 22(3). In his view, the only third-party information revealed at the hearing was the names of the successful candidates, which he describes as being "public information" when the Ministry of Agriculture, Fisheries and Food announces the appointments. (Submission of the Applicant, p. 6)

The Board relies on section 22(3) of the Act and says that the third party information on the tapes requires severing: "The tapes in question record personal information of third parties, including information regarding their employment histories, educational histories, employment experience, qualifications and suitability for the public service position in issue." (Submission of the Board, paragraph 17) The Board also argues that "oral disclosure of this personal information during the applicant's May 6 appeal does not mean the personal information has been disclosed, or that the applicant's request for access to information should result in disclosure of that third party personal information." (Submission of the Board, paragraph 18)

To buttress its reliance on section 22(3) of the Act to prevent disclosure of this personal information, the Board also depends on section 9 of the *Public Service Appeal Regulation*, B.C. Reg. 133/94, which provides that a party to an appeal, including the applicant in this case, "must keep in confidence all information about any applicant or competition that he or she obtains during an appeal." (Submission of the Board, paragraph 19) The Board relies on this regulation to reinforce its reliance on section 22(3) and to make the reverse argument as well. The Regulation "does not, by contrast, favour disclosure of that unsevered personal information to the applicant. The Board's responsibility under the Act to guard against unreasonable invasions of personal privacy is not attenuated by an independent confidentiality obligation resting on the applicant under these regulations." (Submission of the Board, paragraph 19)

In any event, I conclude, based on my review of the tapes, that section 22(3) does not apply to the third-party personal information. None of the other job candidates are identified. There is some personal information concerning the applicant which he is entitled to receive: see section 22(4)(a) of the Act. Finally, there is a small amount of personal information about other employees of the Ministry and the Board, but it concerns their job, duties, or functions, not their employment, occupational, or educational history. Section 22(4)(e) of the Act expressly provides that disclosure of this type of information "is not an unreasonable invasion of a third party's personal privacy." For all of these reasons, I have concluded that the Board is not required to refuse to disclose the audiotapes under section 22 of the Act.

Section 28: Accuracy of personal information
Section 29: Right to request correction of personal information

The applicant also relies on section 28 and 29 of the Act in support of his position. Section 28 deals with the accuracy of personal information:

> 28. If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must make every reasonable effort to ensure that the information is accurate and complete.

Section 29 deals with the right of an applicant 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.

The applicant argues that since the Board used the information presented at the hearing for a decision that affected him, it must make every reasonable effort to ensure that the information is accurate and complete: "This 'reasonable effort' extends to the provision of the audiotapes as requested by me." He suggests by means of an example that he has reason to think that some of the personal information in the control and custody of the Board is incorrect and he wishes to exercise his rights to correct it. This necessitates his access to the audiotapes "to aid my memory and as evidence in support of my subsequent request to the Board to correct the information." (Submission of the Applicant, p. 5)

The Board's response is that section 28 "was not - at least primarily - intended by the Legislature to address quasi-judicial tribunal proceedings such as those conducted by the Board in this case." (Reply Submission of the Board, paragraph 10) Because I have concluded that the audiotapes are not properly withheld by the Board under section 22 of the Act, I do not need to decide whether section 28 and 29 apply. If it had been necessary for me to do so, however, I agree with the Board that these sections cannot reasonably be interpreted as applying to the applicant's request for review of the Board's decision about access to the audiotapes.

Section 4(2): Information Rights and the requirements of severing

The Board submits that the language of this subsection incorporates the standard of reasonableness for severing for either technical or financial reasons. It argues that a public body may be entitled to withhold an entire record, "because it is not reasonably possible, technically, to sever excepted information from the record and disclose the remainder without disclosing protected information." (Submission of the Board, paragraphs, 21, 22) Furthermore, it argues on the basis of affidavit evidence that the financial and administrative burden on the Board of such severing is unreasonable, and

thus severance is not required. (Submission of the Board, paragraphs 23, 24; see, especially, the affidavit of Joy Leach, paragraph 12) It also cannot charge the applicant under section 75(3) of the Act for access to his own personal information. (Submission of the Board, paragraph 31) The Board concludes:

> ...judged from the perspective of financial reasonableness and practicability, the personal information in question cannot reasonably be severed from the record, and the Board should not be required to do so. (Submission of the Board, paragraph 25)

In response to the Board's arguments, the applicant relies on Ontario Order P-820. In that case, the Ontario Criminal Code Review Board had been asked to provide an applicant with copies of tape recordings of Review Board proceedings involving the applicant. The Review Board made arguments similar to those advanced by the Board in the present inquiry. The Inquiry Officer for the Ontario Information and Privacy Commissioner treated the record as the personal information of the applicant. The Inquiry Officer further concluded that the Review Board had the technical capability to reproduce the tapes for disclosure. The B.C. Board concludes, however, as follows about its tapes:

> Because the tapes contain third party personal information that must be severed from the tapes before they can be released, Order P-820 is *not* persuasive on this point. It is one thing to ask a public body simply to reproduce a tape in its entirety, without severance, and quite another to require it to incur significant and unreasonable financial and practical costs in severing tapes using the technology and process set out in the Board's affidavits in this case. (Submission of the Board, paragraph. 29)

I have some sympathy for the position advanced by the Board because I am interested in reaching pragmatic decisions under the Act. While financial, practical, and technical considerations may be relevant to deciding whether excepted information can reasonably be severed from a particular record, I must be careful not to interpret section 4(2) of the Act in a manner which would undermine the Act's stated purpose of promoting more open and accountable public bodies. In the particular circumstances of this application, and having regard to both the affidavit evidence and submissions before me, I am not persuaded that, had it been necessary for the Board to do so, any third-party personal information could not, for financial, practical, or technical reasons, be "reasonably severed from" the tapes. I might conclude otherwise in some extraordinary cases but this is not such a case.

Review of the Records in Dispute

It seems to me very important in the present case, and in an earlier Order, No. 204-1997, December 15, 1997, that the applicant was a full participant in the oral hearing before the Board. I find it problematic to deny this individual access to

audiotapes of the very same proceedings, subject to the various exceptions in the Act. The applicant submits that there "are no reasonable expectations of harm to any parties nor financial interests by me or any parties from disclosing the audiotapes." (Submission of the Applicant, p. 7)

The Board indicates that the tapes in dispute contain some personal information of identifiable third parties, "including information as to their employment histories, educational histories, employment experience, qualifications and suitability for the public service position in issue." (Affidavit of J. Leach, paragraph 19) The applicant's response is that the tapes contain "very minimal, if any, third party personal information because the central issue facing the Board on May 6, 1997 was more related to the process/procedure of why I was not interviewed, not why I was not successful in a competition. The significant difference is that the latter would require substantial disclosure of third party information." (Reply Submission of the Applicant, p. 3)

The applicant's recollection of the content of the tapes is correct. Most of the information on the tapes concerns the processes and procedures related to arranging an interview for the applicant and the creation of an eligibility list for a related position. None of the other job candidates are identified. There is some personal information regarding specific employees of the Ministry and the Board but, in my opinion, this information concerns their jobs, functions, or duties (section 22(4)(e)) not their employment, educational, or occupational history (section 22(3)(d)).

I accept the Board's submission that severing the tapes in this case, if severing indeed had to be done, requires somewhat specialized technical expertise in order to sever and reproduce in compliance with the Act. (Reply Submission of the Board, paragraph 6) But the burden would not have been, in the circumstances of this case and having regard to the length of audiotapes, unreasonably "complex and time-consuming," "costly and administratively burdensome."

The Necessity for Taping

This Order and an associated one involving the University of Victoria raise basic questions about the extent to which tape recording should occur at various kinds of proceedings and for what specific purposes. For example, the chair of the Public Service Appeal Board states:

> Any requirement that the Board prepare and sever these appeal tapes, and create a new record for the applicant, would almost certainly force the Board to cease recording appeals. Appeal tapes are intended to be personal records of Board members, to assist them if absolutely necessary [in] deliberating on, and deciding, an appeal. It would be extremely unfortunate if these tapes no longer were created. (Affidavit of Joy Leach, paragraph 14)

I have several comments. First, the Board should examine its rationale for taping these proceedings. It should address such questions as how often the tapes are in fact used (there have been 120 appeals heard within an unspecified time period). Is there any actual need for them? In essence, the Board should review its procedures on taping to ensure compliance with the Act and to meet its operational needs.

8. Order

I find that the Public Service Appeal Board is not required to refuse access to the audiotapes requested by the applicant under sections 3(1)(b) and 22 of the Act. Under section 58(2)(a) of the Act, I require the Public Service Appeal Board to disclose the records in dispute to the applicant.

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David H. Flaherty
Commissioner

December 18, 1997