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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 34-1995
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INQUIRY RE: A Request for Access to a Record held by the Ministry of Transportation and Highways, being a Letter of Complaint about the Applicant written by the Applicant's Neighbour

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry that concluded on December 15, 1994 at the Office of the Information and Privacy Commissioner in Victoria. This inquiry was held under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). The inquiry arose out of a request for review dated September 19, 1994 by the applicant, who on July 5, 1994 had sought access to a letter of complaint about him or his activities, written by his neighbour (the third party) to the Ministry of Transportation and Highways (the Ministry).

The Ministry refused to give the applicant access to the letter of complaint, on the basis that it was submitted in confidence, and that the release of the information in the letter would be an unreasonable violation of the third party's personal privacy, contrary to section 22 of the Act.

2. Documentation of the inquiry process

Under section 56(3) of the Act, the Office invited written representations from the applicant, the third party, and the Ministry. Initial submissions were due not later than December 9, 1994 and were exchanged among the parties by the Office. Replies were to be submitted by December 15, 1994; however, no replies were submitted in this instance.

The Office provided all parties to this inquiry with a one-page fact report (the Portfolio Officer's fact report), which was accepted by the parties as accurate for the purpose of conducting the inquiry.

3. Issue under review at the inquiry

The issue to be examined in this inquiry is the extent to which a public body covered by the Act is obligated to disclose a letter of complaint about an individual, even if submitted in confidence by a third party. In this instance, the Ministry chose to withhold the letter in its entirety. The issue of protecting the identity of the writer of the letter was rendered moot by the fact that the applicant requested the information in the complaint file about him, written by the third party, whom he identified by name. The third party acknowledges having written a letter of complaint but refuses to consent to its disclosure.

The third party is supported in her decision by the Ministry, which has refused access to the complaint letter on the basis of section 22 of the Act. The relevant portions of section 22 read as follows:

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.

22(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

...

- (e) the third party will be exposed unfairly to financial or other harm,
- (f) the personal information has been supplied in confidence,
- (g) the personal information is likely to be inaccurate or unreliable, and
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
- (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,
 - ...
 - (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
 - (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
 - (g.1) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,
 - (h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or
 - ...
- 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
- (a) the third party has, in writing, consented to or requested the disclosure,....
- 22(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.
- 22(6) The head of the public body may allow the third party to prepare the summary of personal information under subsection (5).

Under section 57(2) of the Act, the applicant bears the burden of proof in establishing that the disclosure of the information sought would not be an unreasonable invasion of the third party's personal privacy.

4. The record in dispute

The record in dispute is a three-page, typed letter written by the third party to the Ministry, which makes reference to activities of the applicant that the third party believes are under the regulatory jurisdiction of the Ministry.

5. The applicant's case

The applicant began his case by citing from my previous Order No. 17-1994, July 11, 1994, which upheld a decision of the Ministry of Education to disclose a letter written by a third party to an applicant. I wrote: "While issues of fairness and due process are not the primary concern of the *Freedom of Information and Protection of Privacy Act*, I note in passing that, whatever the standards of the particular school district in 1973, the idea that persons complained against should not receive copies of written allegations made against them does not accord with the standards of the 1990s." (p. 6)

The applicant claims that the third party is engaged in a "personal vendetta to stop" him and others from parking in front of the applicant's own house, which they have been doing for many years. He believes that "the information, allegations and charges that [third party] has put forth is unwarranted and full of untruths."

In the applicant's view, "[t]he Freedom of Information Act is protecting the wrong party and any reasons they give to you for not disclosing the information is as bogus as the allegation against us." By obtaining access to the letter, he wishes to commence legal action for his losses without delay.

6. The third party's case

The third party states that she provided her letter to the Ministry "with the expectation of confidentiality." She adds, under section 22(3)(b) and 15(1)(a) of the Act, that the information she supplied "was in no way intended to be a personal attack against the applicant." She states that the information was forwarded to the Ministry to help in the enforcement of the *Motor Vehicle Act*, section 190(1). It is her argument that "Confidentiality should be assured when information is voluntarily provided by citizens to assist a ministry in examining a possible violation of law."

The third party states that disclosure of the letter would be an unreasonable invasion of her privacy, since "the contents of this letter was supplied with the expectation of confidentiality and is my personal evaluation, recommendations and character references compiled to assist the Ministry of Transportation and Highways in their investigation into this possible violation of law."

The third party simply refuses to authorize disclosure of the letter in dispute.

7. The Ministry's case

In supporting its decision not to disclose the letter in dispute, the Ministry has relied in particular on sections 22(3)(g) and 22(3)(g.1) of the Act, which are quoted above. In its view, the letter:

... reveals the third party's personal evaluation of the dispute between the parties....

... contains explanatory details of the progression of the dispute between the parties. Its contents are reflective of the author's assessment and evaluation of the cause of the difficulties and of previous attempts to resolve the disputes.

The Ministry has also relied on section 22(2)(f) of the Act, as quoted above, to argue that the letter was supplied in confidence.

8. Discussion

The context of this inquiry is a neighbourhood squabble that has no consequences for society at large. My office has no role to play in settling such matters. I simply have to decide whether the applicant can receive a copy of a letter of complaint to a public body against him.

With respect to the alleged expectation of confidentiality on the part of the letter writer, there is no explicit evidence of this in the body of the letter. For example, the letter is marked "hand delivered" but there is no notation about its confidentiality. There is simply an after-the-fact assertion by the third party. For its part, the Ministry simply noted that it was the third party's submission that she supplied the information in confidence. (Argument for the Ministry, p. 7) I prefer evidence that there were mutual expectations of confidentiality at the time of information collection and, furthermore, that public bodies had good reasons for accepting such information in confidence.

With respect to the third party's argument that she wrote the letter for law enforcement purposes, I note simply that this concern is not reflected in the contents of the original letter, and I have some trouble regarding this particular complaint about parking of cars and trucks as a "law enforcement" matter. The contents of the letter suggest that both the Ministry and the RCMP regarded the dispute as a fight between neighbours that should and could be solved informally. It is also relevant that the Ministry did not advance a law enforcement argument in its submission.

An unusual aspect of the current applicant is that he requested the letter in dispute by the author's name. So the identity of the writer is not an issue; the debate is over the substance of the letter. The information in the letter/record is largely about the applicant. I conclude that he has the right to know what has been said about him. My decision in this debate over essentially private matters is full disclosure of a record, where the information is about the person making the application. My decision leaves open the question of whether a public body may withhold the identity of a complainant or letter writer, when a public body, for example, has sought input from the public on a matter of public interest.

Section 22(3)(g) and (g.1)

I regard the Ministry's reliance on these sections of the Act to uphold non-disclosure of the letter as unpersuasive. Under section 23(3)(g.1) it would require a stretch for me to conclude that the contents of the letter in dispute fall under the normal understanding of personal recommendations or evaluations, character references or personnel evaluations. It seems clear to me that these clauses were intended to cover what are often referred to as letters of recommendation. I am supported in this conclusion by the *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual* (1994) (the Manual), Section C.4.13, pp. 31-32.

In the absence of compelling circumstances to the contrary under section 22 of the Act, which are not present in this case, I am of the opinion that individuals have, and should have, full rights of access to communications made about them to public bodies for the purposes of making a complaint, where those communications do not fall, for example, under the law enforcement exception. This is in accordance with my Order No. 17-1994, July 11, 1994, as cited above, and my Order No. 14-1994, June 27, 1994, which directed disclosure of the substance of letters of complaint made against municipal police officers. Order No. 28-1994, November 8, 1994 can be readily distinguished because it dealt with a letter written by a physician about a person believed to be a danger to others on the highway.

I acknowledge that there will be complaints that involve allegations of criminal or other unlawful conduct that result in law enforcement investigations, operations, or proceedings, and complaints where the complainant may be at risk of retaliation for coming forward about a matter of public interest, but there is no evidence of this sort in the present case.

Section 22(3)

The Ministry argues that the applicant "must show clear and compelling reasons why the presumption of privacy contained in section 22(3) of the Act is rebutted." (Argument for the Ministry, p. 6) I said in my Order No. 17-1994, July 11, 1994 (at page 6) that it is almost impossible for an applicant to meet such a heavy burden of proof. After an applicant has made what case he or she can, it is my role to make a final determination on the basis of the actual contents of the record in dispute (as I have done below).

I note especially in the present case that the neighbours have been and are engaged in an ongoing dispute over what might strike most outsiders as a relatively minor problem. Release of this letter may serve to escalate the conflict, as the Ministry has suggested, but at least it will level the playing field. The Ministry submitted that the third party believes "that the dispute has been the source of considerable stress and anxiety in her life and is eager to minimize the impact of the conflict on her life." But she wrote the

letter of her own free will, and the evidence indicates that the applicant has strong feelings about the matter as well.

Further, the Ministry described the third party's assertion "that she would not have submitted the complaint had she known that it would later be shared with the applicant." (Argument for the Ministry, p. 8) In my view, writers of letters of complaint should prepare their contents with a normal and realistic expectation that their views may become known to the persons they are complaining about. This clearly is in accord with the principles of openness and accountability in governmental affairs that are the underpinnings of this Act. It is unrealistic for persons who complain to a public body to expect that their identities and the substance of their complaints will be kept confidential forever. Thus this Ministry's past practice of refusing to disclose copies of letters of complaint to individuals now needs to be reconsidered. Public bodies should also be careful not to state or imply that identities will be kept confidential, unless they have reasonable expectations of being able to do so under the Act. The domains of law enforcement and whistleblowing are clear exceptions to this general statement of the principle of openness.

The highly-localized and personalized nature of the complaint in the present case also militates in favour of disclosure and significantly reduces any possible arguments about keeping personal information confidential. The letter in dispute is about descriptions of events (parking cars, the location of a mailbox) involving the applicant, the letter-writer, and a few neighbours. The author describes her efforts to settle the controversy and her attempts to involve public bodies, like the Ministry. One might argue in favour of severing a few sentences that refer to neighbours, but the information is so innocuous as not to be worth the effort.

As part of this inquiry, the third party has now received a two-page "information fact sheet" from the applicant setting forth his (and his wife's) view of the dispute. It seems eminently fair that the applicant should now see what has been written to the Ministry about him.

9. Order

Under section 58(2)(a) of the Act, I find that the Ministry of Transportation and Highways is not authorized or required to refuse access to the record sought by the applicant. Therefore, I order the Ministry of Transportation and Highways to disclose the record in dispute to the applicant.

David H. Flaherty
Commissioner

February 3, 1995