OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-13

INQUIRY REGARDING WEST VANCOUVER POLICE DEPARTMENT

David Loukidelis, Information and Privacy Commissioner
May 23, 2000

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Summary: Applicant not entitled to third party personal information relating to disciplinary investigation of police officer. Applicant entitled to personal information revealing identity of Chief Constable administering part of process and police officer presiding over process. Applicant entitled to information disclosing identity of police force involved, date and other general information.

Key Words: Personal information – unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 22.

Authorities Considered: B.C.: Order No. 62-1995; Order No. 70-1995; Order No. 81-1996; Order No. 139-1996.

1.0 INTRODUCTION

This order results from the inquiry conducted by the Executive Director of the Office of the Information and Privacy Commissioner ("Executive Director") concerning a request for review of a decision of the West Vancouver Police Department ("WVPD") to refuse access to an unsevered copy of a record called "Notice of Results of Investigation".

2.0 DISCUSSION

I disqualified myself from this inquiry because of a personal interest. On August 16, 1999, I delegated the authority to conduct inquiries to the Executive Director pursuant to s. 49 of the *Freedom of Information and Protection of Privacy Act* ("Act"). Although

s. 49 authorizes delegation of authority to conduct inquiries under s. 56 of the Act, it does not authorize delegation of my authority to make orders under s. 58.

The Executive Director conducted the inquiry in this matter. I took no part in the inquiry. The Executive Director prepared a report respecting the inquiry, a copy of which is appended to this order. After receiving the Executive Director's report, I reviewed the filed material and the record in dispute. I have adopted the Executive Director's recommendations, without variation, in this order and this order executes those findings and recommendations.

3.0 CONCLUSION

For the reasons given in the Executive Director's report, under s. 58(2)(b) of the Act, I require the WVPD to give the applicant access to the parts of the record as indicated on the copy of it delivered to the WVPD along with its copy of this order and, under s. 58(2)(c) of the Act, I require the WVPD to refuse access to the parts of the record as indicated on the copy of it delivered to the WVPD along with its copy of this order.

May 23, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia

APPENDIX TO ORDER 00-13

INQUIRY REGARDING WEST VANCOUVER POLICE DEPARTMENT RECORDS

REPORT OF THE EXECUTIVE DIRECTOR OF THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

1.0 PROCEDURAL OBJECTION

The applicant objected to the Commissioner's delegation to me of the powers, duties and functions for this inquiry. He objected on the basis that I am in a conflict of interest because the Commissioner has disqualified himself from this matter, yet I am a subordinate of the Commissioner and work with him on a daily basis. The applicant also stated that he had had "problems" dealing with me in the past, and believes that these factors together undercut my ability to render, and to be seen to render, a fair and impartial decision in the matter.

The Commissioner declined to sustain the applicant's objection by delegating this inquiry to someone other than me. I, too, considered the applicant's objection and declined to disqualify myself. The Commissioner's disqualification from this matter was individual to him. It turned on the fact that the law firm of which he was a partner until August of 1999 represents the public body. The Commissioner's disqualification was not for any reason systemic to his Office or otherwise relevant to me. The fact that I am an official in the Commissioner's Office does not create a reasonable apprehension of bias in relation to my conduct of the inquiry. The task has been delegated to me and the statutory responsibility is now mine – it is not the Commissioner's. Similarly, no reasonable apprehension of bias is established by the applicant's desire to have this matter dealt with by someone outside of this Office, or his belief that someone else will decide it more fairly than I will because the applicant has not been satisfied with past decisions I may have made in respect of matters he has brought to this Office in other cases. There being no reasonable apprehension of bias concerning my involvement, the applicant's personal opinions and desires do not dictate an apprehension of bias.

2.0 INTRODUCTION

Using the authority delegated to me by the Information and Privacy Commissioner under s. 49 of the *Freedom of Information and Protection of Privacy Act* ("Act"), I conducted an inquiry under s. 56 of the Act on December 23, 1999. This inquiry was in respect of a decision by the West Vancouver Police Department "WVPD" to refuse access to an unsevered copy of a record called "Notice of Results of Investigation".

2.1 Background – This inquiry results from a request by the applicant to the West Vancouver Police Department for, as the applicant put it in his September 7, 1999 access request,

> "an unsevered copy of the document attached hereto (Notice of Results of Investigation). This document, which is dated March 15, 1996, originated from the West Vancouver Police Department. I am making this request under section 5 of the Act." (Initial request for information of the applicant, dated September 7, 1999)

The public body responded, on September 10, 1999, stating it was "declining pursuant to section 22 of the Act to release an unsevered copy of the one page document you sent with your faxed request."

On September 23, 1999, the applicant requested a review of the West Vancouver Police Department's decision to refuse access.

Mediation was not successful and the inquiry was set for December 23, 1999.

2.2 Record in dispute – There is a one-page record in dispute. The applicant received a severed copy of the record in dispute from another source. The copy provided by the WVPD to the applicant is not identical to the copy provided by the applicant to the public body, as the applicant's copy has handwritten notes on the top and bottom of the page. The original copy, held by the public body, has no handwritten notes on it.

The document itself is called "Notice of Results of Investigation". The applicant's copy has had severed the name of the police force, the month and day, all identifying information about the peace officer involved (i.e., rank, Personal Identification Number) and the name and location of the presiding officer, as well as descriptions of the counts and punishment against the peace officer involved.

3.0 ISSUES

The only issue before me in this inquiry is if the public body correctly applied section 22 of the Act to the record in dispute. Section 22 states:

> 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

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(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.

(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,

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

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

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax,

(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,

(h) 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,

(i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or

(j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(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,

(b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,

(c) an enactment of British Columbia or Canada authorizes the disclosure,

(d) the disclosure is for a research or statistical purpose and is in accordance with section 35,

(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,

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

(g) public access to the information is provided under the Financial Information Act,

(h) the information is about expenses incurred by the third party while travelling at the expense of a public body,

(i) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit, or

> (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).
>
> (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.
>
> (6) The head of the public body may allow the third party to prepare the summary of personal information under subsection (5).

4.0 BURDEN OF PROOF

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(2), if the record or part of the record 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.

Thus, the burden of proof in this inquiry is on the applicant.

5.0 DISCUSSION

5.1 Arguments of Applicant – The applicant states in his initial submission that he believes the public body erred in applying section 22 of the Act to a British Columbia *Police Act* Notice of Results of Investigation (the "Notice") dated March 15, 1996. He states that he received a severed copy of the Notice from the BC Police Commission. The applicant said the following:

> The severed information includes the name of a police force, dates when various actions were taken by the Chief Constable of WVPD as the disciplinary authority, names of the Presiding Officer, Chief Constable, and the police officer who was disciplined, and so on. Most of this information is not "personal information" within the meaning of s. 22 of the Act. Therefore, the disclosure of this information would not constitute an unjustified invasion of anyone's personal privacy.
>
> Further, it appears that the WVPD is oblivious to the fact that the names of individual police officers (including that of the Chief Constable) are releasable under section 22(4) of the Act. The very essence of s. 22(4) is the fact that it is, statutorily, not an unreasonable invasion of a third party's personal privacy if the information is about that person's position and functions as an officer or employee of a public body. "Personal information" is, by definition, "recorded information about an identifiable individual." In short s. 22(4) deals with

> information that by definition includes private information of a police officer relating to the listed subjects. (Initial submission of the applicant, paragraphs 6.02, 6.03)

5.2 Arguments of the Public Body – The public body states in its initial submission that the Notice contains information regarding a disciplinary matter related to the employment of a third party. The presumption under section 22(3) of the Act against disclosure is rebuttable and all of the relevant circumstances must be considered in each case to determine whether this presumption in favour of non-disclosure is overcome. (Paragraph 13 of the public body's initial submission)

Various orders under the Act make it clear that personal information about a third party relating to disciplinary matters falls within section 22(3)(d). In Order No. 62-1995, the Commissioner found that the employer was authorized to refuse access to records disclosing the nature of disciplinary actions taken against a third party employee. The Commissioner stated that a discipline record is significant information about an employee's performance and agreed with the following submission of the third party:

> One can think of little which most persons would wish to keep [more] private than their discipline records.

Accordingly, the Commissioner concluded that a discipline record falls within section 22(3)(d) of the Act. (Initial submission of the public body paragraph 14)

Furthermore, the Commissioner concluded, in Order No. 81-1996, that events occurring throughout the duration of a person's employment are part of a personnel file and as such are covered by section 22(3)(d) of the Act. (Paragraph 15, of the public body's initial submission)

The public body submitted that it is clear the Notice contains personal information relating to employment, occupational or educational history pursuant to section 22(3)(d) of the Act, given that it is related to the discipline of a third party as an employee. The public body argues that the Notice contains information which is a personnel evaluation pursuant to section 22(3)(g). The Notice is a form of performance appraisal in that it contains details relating to a discipline record of the third party. In Order No. 139-1996, the Commissioner confirmed that the particular details in the disciplinary file and the contents of a performance appraisal are protected pursuant to section 22(3)(d) of the Act. As the Commissioner stated,

> The public has a right to know about job descriptions and job qualifications in general terms, not the private information of a public servant with respect to these topics.

In determining whether the presumption against disclosure under sections 22(3)(d) and (g) of the Act was rebutted in this case, the public body states that it concluded that the information should not be disclosed in the circumstances and because of concerns

relating to the factors set out in section 22(2)(e), (g) and (h) of the Act. The public body argues that the disclosure of the severed portions of the Notice would clearly unfairly damage the reputation of the third party pursuant to section 22(2)(h), given that it relates to the discipline of the third party as an employee. The disclosure of the severed portions of the Notice could negatively affect the third party's current employment and/or future employment opportunities, thereby causing financial or other harm to the third party pursuant to section 22(2)(e). In Order No. 70-1995, the Commissioner stated that he was of the view that public bodies should not disclose personal information that may unfairly damage the reputation of any person referred to in a record requested by an applicant. (Section C, paragraphs 17-19 of the public body's initial submission)

In his reply submission the applicant raises section 15(4)(b) of the Act. Section 15(4)(b) reads as follows:

> 15(4) The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute
>
> (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or
>
> (b) to any other member of the public, if the fact of the investigation was made public.

The applicant argues that this is a police investigation and that the fact of the investigation was made public when the record at issue was disclosed to him and the Vancouver Police Department "VPD". (Reply submission of the applicant) He goes on to argue that it is important to note that, while section 15(4) is about disclosure of reasons for a decision not to prosecute, the record at issue contains far less sensitive information, namely, the punishment awarded to a WVPD police office after an investigation, and a declaration by the Chief Constable of the WVPD to carry out the punishment. (Reply submission of the applicant)

5.3 Findings – The information that has been withheld from the Notice includes the police force, the date of the notice, the name of the police officer, the date of the hearing, the presiding officer, the counts and punishment and the chief constable's name. I do not find that section 22(3) covers the police force's name, or the names of the Chief Constable or the presiding officer. The fact that the West Vancouver Police Department has responded to the request and participated in the inquiry clearly suggests the applicant was correct in approaching it as the public body. The names of the Chief Constable and the presiding officer do fall under section 22(4) of the Act, for this clearly relates to their functions as employees of a public body. For this reason, I find that this information should be released.

The date is more problematic, and I find that section 22(3) does apply. The release of the date of the hearing and notice, in conjunction with the name of the police force, could

disclose information about which officer had a hearing on or about that date. That alone could result in the unintended disclosure of section 22(3) information, leading to the identification of the third party.

The Notice contains personal information about an employment-related matter. The Notice is about the discipline of a police officer. The severed information would disclose disciplinary action taken against the individual. This is clearly information that relates to employment history. I do not find that this information falls within the scope of section 22(4) of the Act, as I do not find it to be information about a third party's "position", "functions", or "remuneration" as an employee of a public body. I find that the personal information about the third party falls within section 22(3)(d) of the Act and to release it would be an unreasonable invasion of the third party's personal privacy.

I do not find that section 15(4)(b) of the Act has any application to this inquiry. This was not a police investigation which led to a decision not to prosecute. A plain language interpretation of "police investigation" suggests the investigation of a matter that could lead to criminal charges and not an internal disciplinary matter. This is confirmed by the use of the word "prosecution" which is defined in Schedule 1 of the Act in relation to criminal or quasi-criminal offence proceedings. There are sound public policy reasons for section 15(4)(b) in the context of the criminal justice system, but they do not apply to an employee's disciplinary record.

6.0 RECOMMENDATIONS

For the above reasons, I find that section 22(1) applies only to the portions of the record as indicated on the copy of the record I have delivered to the Information and Privacy Commissioner with this report and I recommend that the Commissioner require the WVPD to refuse access to the portions covered by s. 22(1) and that he require the WVPD to give the applicant access to the rest of the record.

May 23, 2000

Lorrainne A. Dixon
Executive Director
Office of the Information and Privacy Commissioner