Order 04-13

# MINISTRY OF ATTORNEY GENERAL

Mark Grady, Adjudicator
May 3, 2004

Quicklaw Cite: [2004] B.C.I.P.C.D. No. 13
Document URL: http://www.oipc.bc.ca/orders/Order04-13.pdf
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

**Summary**: The applicant made an access request to the Ministry for records pertaining to a motor vehicle accident that resulted in the death of the applicant's mother. The Ministry released one record but withheld witness statements related to the accident. The Ministry is authorized to withhold all information under s. 15(1)(g).

**Key Words:** information relating to or used in the exercise of prosecutorial discretion.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 15(1)(g).

**Authorities Considered:** **B.C.:** Order 00-02, [2000] B.C.I.P.C.D. No. 2.

## 1.0 INTRODUCTION

[1] On January 17, 2003, the applicant submitted a request to Criminal Justice Branch, Ministry of Attorney General ("Ministry") under the *Freedom of Information and Protection of Privacy Act* ("Act") for information regarding the November 2000 motor vehicle accident that resulted in the death of the applicant's mother, a pedestrian struck by the vehicle. The applicant specifically requested access to the written statements made by the vehicle driver and another witness, and the concluding report by Crown Counsel.

[2] In its February 24, 2003 response, the Ministry disclosed a severed version of a memorandum that had been prepared by its Crown Counsel Office for the Royal Canadian Mounted Police ("RCMP"). This record included information about Crown Counsel's reasons for not proceeding with a prosecution and it appears that decision was

made in late 2001. The applicant accepts the Ministry's decision about disclosure of this record.

[3] The Ministry also confirmed in its response that it was withholding the written statements of the vehicle driver and the other witness under s. 22 of the Act, as it believed disclosure would be an unreasonable invasion of third-party privacy.

[4] The applicant requested a review of this decision under Part 5 of the Act. As mediation was not successful in resolving the issue, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

[5] The disputed records are the statements made by the vehicle driver and another witness to the RCMP, who had investigated the accident. During mediation by this Office, the Ministry told the applicant that it was applying ss. 15(1)(g) and 22 of the Act to all of the information in question.

## 2.0 ISSUES

[6] The issues to be considered in this inquiry are whether or not the Ministry is authorized under s. 15(1)(g) to refuse access to information and whether or not the Ministry is required to withhold personal information under s. 22 of the Act.

[7] Under s. 57(1), the Ministry bears the burden of establishing that it is authorized to withhold information under s. 15. Section 57(2) of the Act places the burden on the applicant where "personal information about a third party" is in issue.

## 3.0 DISCUSSION

[8] **3.1 Does the Information Relate to the Exercise of Prosecutorial Discretion?** – Section 15(1)(g) of the Act authorizes a public body to refuse to disclose information "relating to or used in the exercise of prosecutorial discretion".

[9] In Order 00-02, [2000] B.C.I.P.C.D. No. 2, the Commissioner said the following, at pp. 3-5, about s. 15(1)(g):

> **3.2 Information Used In the Exercise of Prosecutorial Discretion** – The Ministry withheld a number of records comprising a police report that had been delivered to Crown counsel for the purpose of determining whether the applicant should be charged criminally. The police report comprises records numbered 10 through 125. The Ministry also refused to disclose certain notes made by Crown

counsel related to the Crown's conduct of the criminal charges against the applicant. This was record 9 of the disputed records.

The Ministry argued that it was authorized by s. 15(1)(g) of the Act to refuse to disclose information in these records. That section states a public body may refuse to disclose information if the disclosure "could reasonably be expected to ... reveal any information relating to or used in the exercise of prosecutorial discretion". Schedule 1 to the Act defines the term "exercise of prosecutorial discretion" as follows:

> **"exercise of prosecutorial discretion"** means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power
>
> (a) to approve or not to approve a prosecution,
> (b) to stay a proceeding,
> (c) to prepare for a hearing or trial,
> (d) to conduct a hearing or trial,
> (e) to take a position on sentence, and
> (f) to initiate an appeal

The Ministry said the Crown used the information in the police report to Crown counsel in deciding whether to approve the criminal charges against the applicant. The Ministry provided an affidavit sworn by the Crown counsel who had approved the charges against the applicant. She swore that she had a "general recollection" of having reviewed the report to Crown counsel with respect to the matter involving the applicant. She also swore that her practice was and is to review such reports in deciding whether to approve charges.

As the Ministry noted in its initial submission in this inquiry, the charge approval process in British Columbia involves the supply of information regarding possible charges to Crown counsel by the relevant police agency. The Crown then decides, based on policy and legal criteria, whether to lay charges. The information provided to Crown counsel comes in the form of a report to Crown counsel, although other information may be provided separately.

In this case, the report to Crown counsel was also used to prepare the applicant's pre-sentence report after he pleaded guilty to one of the charges against him.

The Ministry was clearly authorized to apply s. 15(1)(g) to records 9 through 125 of the disputed records. This section covers record 9 because it contains information related to the activities of Crown counsel in preparing for or conducting a trial or in taking a position on sentencing. See, for example, Order No. 244-1998. The rest of the records are covered because they comprise the police report to Crown counsel – and associated material given to Crown counsel – and the evidence clearly supports the conclusion that Crown counsel reviewed that material and considered it in exercising the discretion to lay criminal charges.

There is no indication in the material before me whether the Crown disclosed this material to the applicant or his lawyer in connection with the applicant's guilty plea

> in 1995. The Crown is legally bound to disclose relevant material to the defence: *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.). Section 15(1)(g) is a discretionary exception. A public body may disclose material that is technically covered by the section if it wishes to do so. In an appropriate case, a public body should consider exercising its discretion in favour of disclosure, if material sought by an applicant is technically covered by s. 15(1)(g) but has previously been disclosed to the applicant, under *Stinchcombe*, in a prosecution. Based on the evidence in this case, however, there are clearly factors warranting non-disclosure even if the applicant has received some or all of this material before under *Stinchcombe*. I am thinking here of the s. 19(1)(a) and s. 22(1) findings made below. In this case, discretionary disclosure is not warranted because of concerns about the health or safety, and recognized privacy interests, of others (including the applicant's victim).

[10] In its initial submission, the Ministry provided a brief description of the charge approval process that the Commissioner addressed in Order 00-02 above. The Ministry's submission confirms that the records in dispute are statements made by the vehicle driver and a witness to the fatal motor vehicle accident. The Ministry has withheld the statements in their entirety under s. 15(1)(g).

[11] The Ministry says that it is not required to show any expectation or threat of harm flowing from disclosure of information described in s. 15(1)(g). The Ministry believes it is only required to show that the information was used in or otherwise relates to the exercise of prosecutorial discretion.

[12] The Administrative Crown Counsel responsible for the relevant Crown Counsel Office provided an affidavit that forms part of the Ministry's initial submission. She swore that it is standard practice for Crown Counsel to read and consider all witness statements contained in a report to Crown Counsel from the police when deciding whether or not a potential charge meets the charge approval standard. Crown Counsel also continually assess whether cases are meeting the charge approval standard, even after the charges have been laid. She confirmed seeing the two witness statements in dispute in this inquiry. She also deposed that, in this case, charges were laid pursuant to the *Motor Vehicle Act* but later were stayed. Finally, she confirmed that she was involved in both the initial decision to lay charges and the subsequent decision to stay the charges, and that the witness statements were reviewed and considered in exercising Crown Counsel's discretion in reaching both those decisions.

[13] In her initial submission, the applicant says that she knows the identity of the vehicle driver and the other witness to the accident. She says her access request is motivated by the need to understand how the fatal accident happened. She also says that, in the event of a death, openness is essential. She alleges that Crown Counsel had assured her that she would have access to the witness statements but only after the case was closed by the Crown in December 2001. The Ministry did not respond to this allegation.

[14] In her reply submission, the applicant writes that by taking advantage of the permission given in this section (s. 15) to withhold statements from her, accountability and openness are compromised and the exercise of justice does not inspire confidence.

[15] There is no evidence to show that the witness statements have already been disclosed to the applicant. Also, the affidavit evidence clearly supports the conclusion that Crown Counsel reviewed the witness statements and used them in both the initial decision to lay criminal charges and the subsequent decision to stay the charges. Accordingly, there is no course but to find that s. 15(1)(g) applies to the information in the two witness statements.

[16] **3.2 Would Disclosure Cause an Unreasonable Invasion of Personal Privacy?** – As I have found that the Ministry was authorized to withhold the witness statements under s. 15(1)(g), it is not necessary to address the Ministry's decision to withhold information under s. 22(1).

## 4.0 CONCLUSION

[17] For the reasons given above, I make the following order:

> Having found the Ministry is authorized by s. 15(1)(g) of the Act to refuse to disclose the disputed records to the applicant, under s. 58(2)(b) of the Act, I confirm the decision of the Ministry to refuse to disclose the records to the applicant.

May 3, 2004

**ORIGINAL SIGNED BY**

Mark Grady
Adjudicator