OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 03-40

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

James Burrows, Adjudicator
October 30, 2003

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Summary: Applicant requested records related to himself. Ministry provided records to the applicant but severed some information and withheld other records. Section 22 requires the Ministry to refuse access to third-party personal information. Ministry found to have applied s. 22 properly to the severed and withheld records and to have complied with s. 6(1) duty in searching for records.

Key Words: duty to assist – adequacy of search – personal privacy – unreasonable invasion – workplace investigation – supplied in confidence – employment history – violation of law – recommendations or evaluations – unfair exposure to harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 22(1), 22(2)(e) and (f) and 22(3)(b), (d) and (h).

Authorities Considered: B.C.: Order 00-26, [2000] B.C.I.P.C.D. No. 29; Order 01-30, [2001] B.C.I.P.C.D. No. 31; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

1.0 INTRODUCTION

[1] On May 12, 2000, the applicant made a request for records to the Ministry of Attorney General. On May 24, 2002, the applicant narrowed the request to records which involve workplace allegations, complaints, harassment or similar employment issues related to the applicant. The Ministry of Attorney General responded on June 16, 2000 and August 24, 2000 to the original request. On January 29, 2003, the Ministry of Public Safety and Solicitor General ("Ministry"), by then the appropriate public body, responded to the narrowed request, providing records with some severing and withholding others under ss. 15 and 22 of the *Freedom of Information and Protection of Privacy Act* ("Act").

[2] On August 29, 2000, the applicant requested a review of the Ministry's decision to withhold and sever records. Further, the applicant requested that this Office review whether the Ministry conducted an adequate search for records as required by s. 6(1) of the Act. As mediation by this Office was not successful, a written inquiry was held under Part 5 of the Act.

[3] 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.

2.0 ISSUES

[4] The issues that I must consider here are:

1. Did the Ministry conduct an adequate search for records as required by s. 6(1) of the Act?

2. Is the Ministry required by s. 22(1) of the Act to refuse to disclose information?

3. Is the Ministry authorized by s. 15(1) of the Act to refuse to disclose information?

[5] Section 57 establishes the burden of proof for inquiries. Under s. 57(1), the Ministry has the burden regarding s. 15 while, under s. 57(2), the applicant has the burden regarding s. 22.

[6] Previous orders have established that the burden of proof in a matter related to s. 6(1) rests with the public body.

3.0 DISCUSSION

[7] **3.1 Adequacy of Search by the Ministry –** Section 6(1) of the Act reads 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.

[8] In a number of orders, the Commissioner has dealt with the issue of what is an adequate search for records. The public body must undertake such search efforts as a fair and rational person would find acceptable in all the circumstances. This does not impose a standard of perfection. See, for example, Order 00-26, [2000] B.C.I.P.D. No. 29. I will not repeat that discussion here but have applied the same principles in this decision.

[9] The Ministry has submitted a number of affidavits to detail the searches its staff conducted to identify and retrieve responsive records. The original request and the narrowed request passed through a number of information analysts of the Ministry in

their efforts to fully respond to the requests. The affidavits show that the analysts approached the Investigation, Inspection and Standards Office ("IISO"), the Corrections Branch and the Human Resources Division of the Ministry, as well as the offices of the Deputy Attorney General, Deputy Solicitor General and Assistant Deputy Minister, Corrections Branch to obtain responsive records. These were, as it happens, all of the agencies identified by the applicant as being possible locations for records.

[10] In their efforts, the Ministry analysts approached the IISO and the Corrections Branch three times each and the Human Resources Branch twice to confirm that all the responsive records had been produced. The remaining source of records identified by the applicant was from what the applicant referred to as the Korbin Arbitration Panel. The Ministry advised that it had no records of the panel and further that the records of the panel were not under the custody or control of the Ministry.

[11] Based on the Ministry's description of its search process, I find that the Ministry conducted an adequate search for records.

[12] **3.2 Presumed Unreasonable Invasion of Third-Party Privacy** – Section 22(1) requires a public body to withhold personal information where its disclosure would be an unreasonable invasion of a third party's privacy. The relevant parts of s. 22 are the following:

> **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
>
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence.
>
> … .
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (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,
>
> …

> (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.
>
> … .

[13] The records at issue have been presented to me in a binder tabbed as A through M. In this order, I will use that identification to refer to the records. I have reviewed the records provided by the Ministry and I agree that the information severed from records A through L is third-party personal information. I also agree that record M contains third-party personal information. Unfortunately the nature of the information is such that I cannot describe it as fulsomely as I would like.

[14] As I noted earlier, under s. 57(2) of the Act, the applicant bears the burden of proof respecting third-party personal information. In his initial submission, the applicant has provided a history of the circumstances which led to his original request. However, he has not offered specific information as to why disclosure of the third party personal information would not be an unreasonable invasion of third party privacy. In his reply submission, the applicant speaks to his previous knowledge of the identities of persons named in the records, and I will discuss that circumstance below.

[15] In its submission, the Ministry has relied on s. 22(3)(b), (d) and (h) to establish that release of this information would result in an unreasonable invasion of a third party's personal privacy.

Investigation into possible violation of law

[16] The Ministry has argued that the workplace investigations were also investigations into possible violations of law. It provided a minimal amount of further information *in camera*, but it did not provide me with any substantial evidence that these investigations actually examined possible violations of law. I am unable to conclude that s. 22(3)(b) applies to personal information in the records.

Employment history

[17] The Commissioner dealt with the specific use of s. 22(3)(d) in Order 01-53, [2001] B.C.I.P.C.D. No. 56, in which he mentioned the applicable cases and principles. I have applied the approach taken in Order 01-53 without repeating it here.

[18] Having reviewed the records, I agree with the Ministry that records A-L do contain personal information falling under s. 22(3)(d). The Ministry has released the majority of the information, only severing names and information which could reasonably identify the third parties, and records A-L contain employment history information of third parties.

Third party personal evaluations

[19] In its initial submission, the Ministry has also argued that s. 22(3)(h) applies to the withheld information. The Commissioner found in Order 01-53 that statements made by third parties are not records to which s. 22 (3)(h) applies:

> [44] At all events, consistent with what I said in Order 00-44 and Order 01-07, the disputed records do not, in my view, contain performance evaluations of the third party or the applicant as contemplated by s. 22(3)(g) of the Act. They contain, rather, various parties' statements, or evidence, as to facts relevant to the applicant's specific allegations against the third party in relation to a complaint under the collective agreement. They are along the lines of 'she said this' or 'she did that', and are not the kind of evaluative material or recommendations contemplated by s. 22(3)(g).
>
> …
>
> [47] The third party did not develop the s. 22(3)(h) theme. That section does not, in any case, apply. Section 22(3)(h) is intended to protect the identity of anyone who has, in confidence, provided recommendations or evaluations contemplated by s. 22(3)(g). The material just described does not fall under s. 22(3)(g), so s. 22(3)(h) does not apply.

[20] I find that this information does not provide evaluations that fall under s. 22(3)(h).

[21] **3.3 The Relevant Circumstances –** The remaining task is to consider any relevant circumstances, as required by s. 22(2).

Unfair exposure to harm

[22] The Ministry says that disclosure of information from the records would unfairly expose a third party to harm. This argument specifically refers to record M. The Ministry refers to an *in camera* affidavit in support of this argument. I consider that this part of the submission was properly received *in camera*. As I am not able to go into detail about the argument of the Ministry, suffice it to say that I am convinced that release of third-party personal information in record M could result in a third party being exposed to harm.

Supplied in confidence

[23] The Ministry argues that s. 22(2)(f) favours withholding the information (paras. 6.51-6.54, initial submission). It argues that there is a reasonable inference that both the investigations that were undertaken by the Ministry and the records resulting from them would be held in confidence. This is not a persuasive argument in itself. Rather, I would expect that if the issue of confidentiality was important to investigators, they would tell interviewees of the Ministry's position on confidentiality at the start of each interview. I have no evidence of this before me.

[24] Although not all interviewees were advised about confidentiality, the issue was clearly addressed a number of times. In his affidavit, Allan Anderson, who headed the IISO investigation, deposes (at para. 8 of his affidavit) that interviewees who asked about confidentiality were told that IISO "generally hold[s] in confidence any information they [the interviewees] supply, subject to provincial statutes and the need for the information to be used in a disciplinary proceeding." In this case, a number of interviewees asked for confidentiality.

[25] Some records also indicate that the information was to be held in confidence. In addition, the withheld information in the records provides a sufficient basis for me to conclude that the individuals interviewed considered they were supplying information in confidence. I therefore find that s. 22(2)(f) applies to the records and favours withholding the information in them.

Applicant's knowledge of information

[26] In some situations, the Information and Privacy Commissioner has found that an applicant's knowledge of withheld information favours disclosure (see, for example, Order 01-53, at para. 80). However, this is only a relevant circumstance and not a deciding factor, as the Commissioner has also found in Order 01-30, [2001] B.C.I.P.C.D. No. 31. In that order, for example, he considered this issue in relation to s. 22(2)(f) and said, at para. 19, that the fact that the applicant was aware of certain information was important but did not override the application of s. 22(2)(f) or s. 22(3)(d).

[27] The applicant argues in his reply submission that he is already aware of the individuals whose identities have been withheld. However, he has not supplied me with evidence to show whether or not the applicant already knew how the withheld information relates to names and other personal information the Ministry withheld in the records. Given the balance of circumstances and the lack of evidence confirming that the applicant is aware of the identities of the authors of the specific records, I find that the applicant has not shown that he knows the identities. In any case, I would not be inclined to find, even if he does actually know them, that this is a sufficient circumstance in the context of this workplace investigation case to favour disclosure of the severed information and the withheld records.

[28] From my examination of the records, I have concluded that s. 22(4) does not apply to the information or records.

[29] For the above reasons, I find the Ministry is required to refuse to disclose the information that it has severed from records A-L and withheld as record M under s. 22 of the Act.

[30] **3.4 Disclosure Harmful to Law Enforcement** – The Ministry has argued that ss. 15(1)(d) and (f) apply to the records. These sections read as follows:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> …
>
> (d) reveal the identity of a confidential source of law enforcement information,
>
> …
>
> (f) endanger the life or physical safety of a law enforcement officer or any other person
>
> … .

[31] As I have determined that s. 22 permits the withholding of the same information to which the Ministry applied s. 15(1), I have not considered the application of s. 15(1) in this matter.

4.0 CONCLUSION

[32] For the reasons given above, under s. 58 of the Act, I make the following orders:

1. I require the Ministry to refuse to disclose the information that it has severed under s. 22 of the Act; and

2. I confirm that the Ministry has performed its duty under s. 6(1) to assist the applicant by conducting an adequate search for records.

[33] For the reasons given above, it is not necessary for me to make an order respecting s. 15.

October 30, 2003

ORIGINAL SIGNED BY

James Burrows
Adjudicator