ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 72-1995
December 20, 1995

INQUIRY RE: A decision to withhold from the Vancouver Province portions of a report concerning document handling and security within the Office of the Premier

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 604-387-5629
Facsimile: 604-387-1696
Web Site: http://www.cafe.net/gvc/foi

1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry on October 6, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review made by Donald James Hauka, a reporter with the Vancouver Province, (the applicant), of a decision of the Office of the Premier (the public body) to sever material from a 20-page report, dated April 10, 1995, from James McIlvenna to Alan Barnard, Comptroller General, entitled "A Review of the Executive Council Documentation Process." This report describes the mandate of the review, the review's action plan, and the writer's findings and recommendations.

2. Issues under review at this inquiry

This inquiry concerns the Office of the Premier's application of sections 13(1) and 15(1)(k) of the Act to the report prepared by James McIlvenna concerning document handling and security within government. The relevant sections of the Act read as follows:

Policy advice, recommendations or draft regulations

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, or recommendations developed by or for a public body or a minister.

13(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

...

(g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,

...

(j) a report on the results of field research undertaken before a policy proposal is formulated,

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

...

(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or

...

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(k) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

Information must be disclosed if in the public interest

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

...

(b) the disclosure of which is, for any other reason, clearly in the public interest.

3. Burden of proof

At an inquiry to refuse an applicant access to all or part of a record, the head of the public body must prove that the applicant has no right of access (section 57(1)). Thus the Office of the Premier, in this case, has to prove that the Vancouver Province has no right of access to the severed records.

4. The Vancouver Province's case

Between February 10 and April 10, 1995, James McIlvenna, a retired RCMP officer, prepared a report on Cabinet confidentiality and security. His recommendations went to Cabinet on May 3, 1995. The media claim that the Premier promised to make the report public once it had cleared Cabinet. (Submission of the Applicant, paragraphs 1.2, 1.3, and 1.4)

The applicant argues that the Office of the Premier has engaged in censorship to such an extent that it is impossible for the public to know whether the report's recommendations "have any foundation in logic or expertise." (Paragraph 1.7) It suggests that the released parts of the report have "a superficial flavour" and "the look and feel of a preliminary, unofficial, and non-scientific investigation." (Paragraphs 1.8, 1.10; see also 6.4) The government has even censored newspaper clippings that are in the public domain.

The writer for the Vancouver Province wishes to "write accurate and newsworthy reports of public interest" concerning the efficacy of Cabinet confidentiality, the usefulness of the report in dispute, and the level of performance and quality of work of its author. (Paragraph 1.13) The applicant argues that the entire report can be disclosed without threatening Cabinet secrecy. (Paragraph 6.2) The government is making it impossible to assess the overall quality of its investigator's work. (Paragraphs 6.5, 6.6)

The applicant commented in detail on the section 13(1) severances adopted by the Office of the Premier and made various assumptions, comments, and suggestions about what has been omitted and why. (Paragraphs 5.5, 5.6) It did the same for the section 15(1)(k) severances. (Paragraphs 5.7, 5.8)

The applicant further claims that the Office of the Premier has severed information that should be disclosed under various categories of section 13(2) of the Act. (See paragraphs 6.9-6.19)

It also contests the Office of the Premier's application of the section 15(1)(k) exception to the severed records, including an argument to the effect that the "system" in question must relate to law enforcement to be protectible under this section: "only an investigative procedure that carries the threat of penalty in the context of a police or quasi-judicial proceeding will constitute a 'system' for purposes of subparagraph 15(1)(k)."

> The System identified by the Government is exclusively a set of policies and procedures for preparing and processing documents. It is not an investigative apparatus, and it bears no relation to police or quasi-judicial proceedings. For this reason, the System is not a "system" within the meaning of subparagraph 15(1)(k). (See paragraphs 6.20-6.31, esp. 6.30)

Even if the report is found to be about a system, the applicant's view is that its disclosure cannot reasonably be expected to cause harm, especially since the Office of the Premier has presented no evidence to support its allegation of harm. (Paragraphs 6.32, 6.46)

From a comparative perspective, the applicant described what it claims is greater openness with respect to reports about security and confidentiality of Cabinet records in the United Kingdom and the United States. (See paragraphs 6.35-6.41)

The applicant is especially exercised about the severance of pages 11 to 15 of the report in dispute, since they concern fifteen media reports that the author "speculates may have involved unlawful disclosure of Cabinet confidences ..... Because each of these incidents

involved media coverage, details of the supposed leaks are by definition in the public domain and their disclosure could not harm the System." (Paragraph 6.50) The author did not contact the newspaper reporters to learn from them whether unauthorized leaks to them indeed occurred, as opposed to "deliberate, 'tactical' leaks by government itself ..." (Paragraph 6.53)

Finally, the applicant seeks to argue that the Office of the Premier should have ordered disclosure of the unsevered report on the basis of section 25, the public-interest override:

> ... an acute public interest exists that policies designed to preserve government secrecy be based on adequate advice from competent advisors ....
>
> In this case, the Government appears to have received superficial advice from an advisor not qualified for the task ....
>
> The inadequacy of the McIlvenna Report is again apparent from the fact that it makes no reference to acoustic intelligence, communications security, electronic surveillance, or computer-database security. The disclosed text deals exclusively with a "hard copy" environment ....
>
> More importantly, the McIlvenna Report seems to omit discussion of even familiar security strategies [followed by a listing of 15 techniques that may not be discussed in the severed portion of the report] ... (paragraphs 6.54-6.59)

5. The Office of the Premier's case

The overriding concern of the Office of the Premier is that "sensitive information respecting the security of Cabinet records must be protected from disclosure." (Submission of the Office of the Premier, paragraph 2) It argues that the recommendations that it has severed under section 13 are located throughout the report and their release "would clearly undermine the entire process and leave the process open to further intrusions or breaches of security." (Paragraphs 8, 9) In its submission, none of the factors listed in section 13(2) apply, including subsection (g). (Paragraph 11)

The Office of the Premier claims that the severed records fall under the law enforcement aspects of section 15 of the Act, especially section 15(1)(k): "A government should be permitted to examine its security systems knowing that such an examination will not be a public record ... the release of apparent weaknesses in a system could be exploited by those seeking to do so (Paragraphs 15-30)."

> The security consists of secrecy in the operation of Cabinet. The report deals with the strengths and weaknesses of such an operation. Any release of the workings of this system necessarily compromises the system itself. (Paragraph 30)

6. The reply submission of the Vancouver Province

The applicant essentially argues that the Office of the Premier has tendered no evidence to support its burden of proof in this inquiry:

> Rather than produce evidence, the Office of the Premier invites the Commission and the Applicant to bow to the Government's alleged wisdom in security matters. The Premier's Submission, in essence, says merely: "*We believe bad things might happen if an unexpurgated McIlvenna Report is released. Trust us on this one."* This familiar refrain from Government became obsolete with passage of the Act. An applicant is now entitled to say to Government, 'Prove it.' (Reply Submission of the Applicant, paragraph 2.2)

The applicant rejects any claims that the McIlvenna Report concerns law enforcement within the meaning of section 15: "The theoretical possibility that a report given to government might lead to a real 'law enforcement' investigation does not trigger the s. 15 exception. A prima facie case for punishment must result from the investigation report to which access is sought." (Paragraph 6.4 and, generally, paragraphs 2.3, 2.4, 6.1-6.6)

The applicant also pointed out that in October 1995 the House of Commons Standing Committee on Justice and Legal Affairs, Subcommittee on National Security, tabled in Parliament its Report on Documentary and Personnel Security, which investigates how documents prepared by the Canadian Security Intelligence Service were leaked in August 1994. (Supplementary Affidavit of Donald James Hauka, Exhibit A, tab 1) This report also refers publicly to the federal government's security policy, "a public document, which details all aspects of security organization and administration, information technology security, and personnel security training." (Paragraph 2.7; see also Treasury Board Secretariat of Canada, Administrative Policy Branch, Security (Minister of Supply and Services Canada, 1994) in Affidavit of Editha Corrales, tab. a))

The applicant has also reviewed a series of material facts that it claims the Office of the Premier has misstated in its submission. (Paragraphs 3.1-3.5; 5.3)

The applicant argues that the McIlvenna Report falls squarely within the compass of section 13(2)(g) of the Act and must be disclosed. (Paragraph 5.5)

7. The reply submission of the Office of the Premier

The Office of the Premier objects to the applicant's reply submission on the grounds that it is a critique of the McIlvenna report rather than an argument for disclosure based on the Act. Disclosure "would jeopardize the already weakened security system at issue in the McIlvenna report," and the Office of the Premier has "provided detailed and convincing evidence for the expectation of harm."

> The system being protected deals with highly confidential documents that have in the past been improperly released. Further intrusions into the system through an examination of how the deficiencies were corrected would render the system useless. The public interest in maintaining this system overrides any public interest in seeking the exact recommendations. (Reply Submission of the Office of the Premier, paragraphs 1, 3, 6)

The Office of the Premier believed on October 6, 1995 that "release of this report would be less damaging to the system if it were released some months from now. This would ensure any security adjustments made were in place and operating to a satisfactory standard." (paragraph 7)

The Office of the Premier also stated that avoiding embarrassment is not an issue in its decisions on what to disclose in this matter: "Nothing in the Report embarrasses the Public Body in terms of the functioning of the system. Any embarrassment factor has long since passed with the earlier breaches of security." (paragraph 11)

8. The Freedom of Information and Privacy Association (FIPA)'s case as an intervenor

David F. Sutherland of Killam, Whitelaw & Twining, Barristers & Solicitors in Vancouver, made the submission for FIPA. FIPA adopted the extensive argument of the applicant.

FIPA argued that, based on British and U.S. examples, "secrecy about the system of secrecy is not necessary. That type of secrecy is particularly abhorrent to FOI core values." The fact that there have been fifteen known breaches of security of Cabinet documents, as noted in the media, argues for release of the full report in the public interest, since there may have been even more such breaches that have not been reported: "Very powerful interest groups - far more potentially damaging to the public interest - may have received leaks, if the media has." Continued suppression leaves serious questions about the quality and scope of the recent investigation itself.

FIPA argues that section 15(1)(k) has no appropriate application to the disputed record, since there is no reasonable expectation of harm to a system. Furthermore, under section 13(2), FIPA is of the view that the report can be construed as an "audit" and 13(2)(g) applies to favour disclosure, as does 13(2)(k).

> ... FIPA argues that the information sought is necessary to the adequate and appropriate functioning of a democracy. Confidence in that functioning is also necessary. Short-term, political and partisan interests must step aside and defer to the interests of the public. Acknowledging (as does the Act), that Cabinet security is necessary, FIPA submits that scrutiny of the adequacy of the system is necessary, not only to the adequacy, but also to confidence in that adequacy.

9. Discussion

Detailed review of the severed records

When an applicant disputes the severances made by a public body, as in the present case, my only recourse is to review the severances in detail, as I now propose to do. The severed copy of the report contains nine almost completely blank pages and another two that are more than

half blank. Thus the Office of the Premier has withheld about one-half of the 20 page report. (Affidavit of Donald James Hauka, tab 3)

For reasons explained further below, I am accepting only some of the severances under sections 13 and 15 of the Act, and re-severing the material when I find that section 15(1)(k) in particular does not apply. Except for a few sentences specifically noted below, I find that disclosure of the severed information "will not harm the security of any property or system, including a building ...."

The applicant argued that section 13(2)(g) favours disclosure of the portions of the report severed under section 13(1), because the report in dispute is "a final report ... on the performance or efficiency of a public body ...." The applicant asserted this point; the Office of the Premier simply rejected it. On the basis of such limited submissions from the parties, and the fact that some of the information in the whole report does concern the security of property and a system, I am reluctant to conclude, in this case, that the language of section 13(2)(g) should prevail to force disclosure of the entire report.

I also do not accept the argument of the Freedom of Information and Privacy Association with respect to section 13(2)(k), because the report in dispute is not "a report of a task force, ... or similar body that has been established to consider any matter and make reports or recommendations to a public body."

Severances on page 5:

The Office of the Premier has appropriately severed two specific recommendations under section 13 of the Act. In my view, it inappropriately withheld all of the two preceding sentences, which describe the investigator's understanding of what officials knew about the coverage of Cabinet confidences by the *Freedom of Information and Protection of Privacy Act*. All except the last clause of these sentences cannot be excepted from disclosure under section 13, because they are factual information. Thus section 13(2)(a) applies.

First severance on page 6:

The Office of the Premier has inappropriately withheld a descriptive paragraph under section 15 of the Act. I find that section 15(1)(k) does not apply to this information, because disclosure will not harm the security of any property or system.

Second severance on page 6:

The Office of the Premier has inappropriately withheld two descriptive paragraphs under section 15 of the Act. I find that section 15(1)(k) does not apply to this information, because disclosure will not harm the security of any property or system. They simply describe what the investigator found in factual terms.

Severances on page 7:

The Office of the Premier has appropriately severed a number of specific recommendations on this page under section 13. The two top sentences, however, follow from the paragraphs on the bottom of page 6 (ordered released) and should be released along with them, since I find that section 15(1)(k) does not apply to this information, nor to the recommendations, because disclosure will not harm the security of any property or system.

Severances on page 9:

The Office of the Premier has appropriately severed two specific recommendations under section 13 of the Act. However, as above, I find that section 15(1)(k) does not apply to them.

Severances on page 10:

The Office of the Premier retained two severances on this page in which the investigator engaged in self-criticism of his research methods and assumptions. The only material that should not be disclosed is the last sentence of the second paragraph, which refers to a recommendation and should be protected under section 13. What has been omitted, here and above, may be embarrassing to government and to the author of its report, but cannot be protected under section 15(1)(k) of the Act.

Severances on pages 11 to 15 concerning some media reports

The Office of the Premier seeks to except all of this material under section 15(1)(k), which, in my view, it cannot do, since its disclosure will not harm the security of any property or system. It is in fact overwhelmingly factual, descriptive information of events within government sometime before known or alleged leaks of "Cabinet confidences" appeared in the media. The events seem to describe incompetent, careless, and perhaps illegal or unethical behaviour that remains an embarrassment to government and also makes for interesting reading to an interested taxpayer, since it seems evident that vaunted Cabinet confidentiality was being breached on a regular basis by means and persons seemingly unknown, including the possibility of "strategic leaks." An unkind reader might conclude that the government's investigator found out nothing about what actually happened as opposed to what might have happened. I note that the Office of the Premier did not claim the protection of section 12 for any of this material, or indeed, for any part of the report.

Remaining severances on pages 15 to 17:

These 2.5 pages present some actual findings of the investigator when he visited several offices of the Premier in the legislative precinct. The Office of the Premier has excepted them under section 15(1)(k). I find that most of the text is simply descriptive. I have re-severed these pages, severing only those sentences or parts thereof that actually describe conditions that might indeed "harm the security of any property or system, including a building, a vehicle, a computer system or a communications system." Thus I accept this aspect of the Office of the Premier's argument under section 15(1)(k).

Severances on pages 18 and 19:

The Office of the Premier has appropriately severed the list of recommendations under section 13 of the Act (but not under section 15(1)(k)). However, it has inappropriately withheld a one paragraph descriptive comment by the investigator as to his qualifications with respect to computer system access and control. Sections 13 and 15(1)(k) of the Act do not apply to this information.

Severance on page 20:

The Office of the Premier has inappropriately withheld two descriptive sentences of "conclusion" by its investigator under section 15(1)(k) of the Act. These should now be disclosed, because disclosure will not harm the security of any property or system.

Disclosure of the recommendations

The Office of the Premier has withheld the text of the fourteen recommendations in this report under sections 13 and 15. I conclude that section 15(1)(k) has no application, but I agree that the Office of the Premier has the authority to refuse access to this information under section 13(1). I would like to point out, however, that the specific recommendations do not appear to me to be controversial and, in light of my conclusions about the applicability of section 15, release of the recommendations may provide further context to the document.

10. Order

I find that the Office of the Premier is not authorized to refuse access, under sections 13 and 15, to parts of the record described in this Order. I also find that the Office of the Premier is authorized to refuse access, under section 13(1), to other parts of the record described in this Order.

Under section 58(2)(a) of the Act, I require the Office of the Premier to give the applicant access to those parts of the record which were inappropriately severed, as described in this Order.

Under section 58(2)(b), I require the Office of the Premier to reconsider its decision to refuse access to those parts of the record which may be protected under section 13(1).

_____

David H. Flaherty
Commissioner

December 20, 1995