ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 23-1994
September 16, 1994

INQUIRY RE: A Request for Access to Records of the Criminal Justice Branch of the Ministry of Attorney General

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 604-387-5629
Facsimile: 604-387-1696

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria, British Columbia on September 12, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arises out of requests for review from three separate parties. However, as the subject matter of the requests for review involved the same records, I dealt with all matters at one hearing.

The requests for review concern the background records used by a special prosecutor, Mr. Richard Peck, Q.C., in his investigation of the Attorney General of British Columbia, the Honourable Colin Gabelmann. On April 5, 1994, Mr. Gordon Watson sought to initiate criminal proceedings against the Attorney General for swearing a false affidavit and attempting to obstruct justice. The Criminal Justice Branch of the Ministry of Attorney General appointed Mr. Peck as a special prosecutor on April 7. He was assisted in his investigation by Sgt. Mike Barnard of the Vancouver Police Department, who conducted a series of interviews to collect evidence.

Mr. Peck's sixteen-page report was submitted to the Criminal Justice Branch on April 22, 1994. In a departure from usual practice, but as recommended by the special prosecutor, the report was made public "to maintain public confidence in the administration of criminal justice." (Affidavit of Harold Neil Yacowar, Criminal Justice Branch, August 18, 1994, pp. 3-4) Mr. Peck recommended a stay of proceedings in connection with the perjury and attempt to obstruct justice charges, since, in his opinion, there was no substantial likelihood of conviction.

Mr. Peck subsequently supplied the Criminal Justice Branch with his investigative file containing "all the witness statements and documents taken by Sgt. Barnard, and

some notes and documents obtained by myself." In addition to witness statements and interview notes taken by Sgt. Barnard, the investigative file also includes memoranda of law concerning obstruction of justice and perjury and a witness list.

The requesters for this latter material are Mr. Steve Vanagas (a journalist) and B.C. Report magazine (represented in this matter by Mr. Michael R. Sporer), Mr. Ted Gerk, and Mr. Gordon Watson. All three applicants asked for approximately the same material. Mr. Vanagas and Mr. Watson asked for the material as a package; Mr. Gerk requested an itemized list of information.

The Criminal Justice Branch withheld these background investigative records under sections 14 and 15 of the Act, which allows the head of a public body to refuse to disclose information subject to solicitor-client privilege (section 14), or if disclosure could be harmful to law enforcement (section 15).

2. Documentation of the inquiry process

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a three-page statement of facts (the Portfolio Officer's Fact Report).

Mr. Sporer and Mr. Gerk requested a postponement of the hearing, as they desired more time to prepare their case. The hearing was scheduled for September 7, 1994, then changed to September 12, 1994. The same parties also requested that the format of the hearing be changed to an oral inquiry. All parties were canvassed on this issue; responses were received from Mr. Sporer and from the Criminal Justice Branch. I am now satisfied that the written submissions have given me sufficient information to make a decision on the specific matters at issue in under this Act. No material facts relevant to the request for review are in dispute, the issues are clearly defined, and each party was able to prepare a written submission. As I have noted in previous orders (Order No. 20-1994 page 7, Order No. 21-1994, page 5) a number of matters that applicants wish me to deal with are beyond my jurisdiction. After reviewing these materials, I decided to proceed with a written inquiry with the option of adding an oral inquiry at a later date, if it proved useful or necessary to do so.

Under section 56(4)(b), the initial submissions were exchanged, and the parties were asked to respond by September 9, 1994. In reaching my decision, I have carefully considered these submissions.

3. Issues under review

The focus of the inquiry was the applicants' request to access the background records withheld by the Criminal Justice Branch. The issues under review pertain to the applicability of section 14 and section 15(1)(f) to the records in dispute.

The position of the Criminal Justice Branch is that it acted within its authority in denying the applicants' request for the background documents to the Peck report. The Criminal Justice Branch is of the opinion that the records fall properly within section 14 or section 15(1)(f), which read as follows:

> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.
>
> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> ...
>
> (f) reveal any information relating to or used in the exercise of prosecutorial discretion.

4. The Records in dispute

The records in dispute are:

- Statements and interview notes
- Legal opinions
- Briefing notes
- Correspondence, memos, and printouts of schedules
- Meeting agendas and minutes
- Policy statements of the Ministry of Attorney General
- Various newspaper clippings
- Vancouver City Police reports

For ease of discussion, I will refer to these materials below as the background documents to the Peck report.

5. The Ministry's case

The Ministry submitted to me, and I have reviewed, the following documents:

- Mr. Peck's report of April 22, 1994;
- The letter of appointment of Mr. Peck as special prosecutor;
- The press release that accompanied the disclosure of the Peck report;
- The contract for payment of Mr. Peck's services.

Under section 57(1) of the Act, the Ministry has the burden of proof in this matter. In its written submission, the Ministry argues that denial of disclosure of the background documents should occur on the basis of sections 14, 15, and 22 (disclosures harmful to the privacy interests of third parties). The latter is its alternative argument, if its sequential claims under the other sections fail.

The relevant parts of section 22 are as follows:

> 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(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,....

The Ministry argues that all of the background investigative information is properly kept from release under section 14 of the Act with the Criminal Justice Branch as the client in this particular context.

In the alternative, the Ministry argues that section 15(1)(f) of the Act applies to the records because their release would reveal information related to or used in the exercise of prosecutorial discretion:

> It is submitted that unlike many of the other exceptions in the Act, section 15(1)(f) is not harms-based, all that is necessary is for the public body to adduce some evidence that a prosecutor or a 'special prosecutor' used the requested records during the course of the charge approval process. Mr. Peck used the records which are the subject of this review in determining that the charges in the private information do not meet the required charge approval standard, and that a stay of proceedings should be entered.

The Ministry suggests that its interpretation of section 15 is supported by the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, Section C.4.6, page 20.

Finally, the Ministry reminds me that the section 22 exceptions for disclosure of personal information are mandated: "Any written statements and/or oral statements given by those persons interviewed by Sgt. Barnard concerning his investigation includes: 'personal information' of the nature described in paragraph (a) and (i) in the definition of 'personal information.'"

6. The case of Steve Vanagas and B.C. Report Magazine

Dealing first with the section 14 argument, this applicant argues that solicitor-client privilege cannot apply to the relationship between the Mr. Peck and the Ministry of

Attorney General, because the person under investigation was the head of that Ministry. The applicant suggests that the real client in this case is the general public of British Columbia.

With respect to the section 15 argument, this applicant also reminded me that this section is discretionary: "The applicant submits that any interpretation of the exceptions to the general principle of right of access must take into account the remedial purpose of the FOI Act and must follow the intent, meaning and spirit of the FOI Act." (paragraph 47) Thus, "the public should have the right of access to information that might reasonably be used in the exercise of prosecutorial discretion unless some harm to law enforcement might reasonably be expected to result." The public body has the burden of demonstrating such specific harm under section 57 of the Act.

The applicant further suggests that the wording of section 15(1)(f) "indicates that the legislature is not particularly concerned with information relating to prosecutorial discretion when there has been a firm and final decision not to prosecute a matter." The applicant noted that Bill 50, the original version of the Act, included a phrase referring to "a decision not to prosecute," but that this was removed after criticism by the Freedom of Information and Privacy Association (FIPA). Professor Murray Rankin, who advised Attorney General Gabelmann on improving Bill 50, agreed with FIPA that the wording of this section was too broad and that the public should have access to more information. The applicant interprets Mr. Rankin's statement to mean that "the background information in its totality or entirety should be accessible to the public."

The applicant further relies on section 25 of the Act, the public interest override, to obtain disclosure of the background documents on the grounds that it is in the public interest to do so, especially since the Attorney General is the head of the public body refusing to disclose the information in dispute. The applicant thus has a reasonable apprehension of bias: "[t]he Commission can ensure that justice is seen to be done in this matter by granting the applicant's request for information."

In his answering submission, applicant Vanagas argued that it was unfair of the Ministry to add a section 22 argument at a late stage in these proceedings, since "it creates a serious imbalance in the access to information process."

7. The case of Gordon Watson

I begin by noting that Mr. Watson's submissions to this inquiry are abusive of me, my role as Commissioner, and of my previous orders. I regret that this applicant regards me as "so badly compromised [that] you cannot possibly make a fair decision at all because the information I am after will show your own obstruction of Justice, your own collusion in contempt of court and other criminal activity."

In terms of matters directly relevant to this request for review, this applicant claims to have material that was not available to Mr. Peck that would support the original

charges against the Attorney General. He believes that he now has to compare his new material against what was available for use in the Peck report: "The only remedy for this poisonous affair is a good purgative ... open the files of the Peck Report background and let's get started hosing the whole rotten stinking moral pollution out of our halls of Justice."

Finally, Mr. Watson states that "[i]f you do not make an order directing access to the material at issue, there is only one reason and it will be more than obvious to everyone in the Province ... because you are an NDP puppet who is in on the fix."

8. The case of Ted Gerk

Mr. Gerk believes that his request for access to the background documents should be granted under section 25 of the Act as a matter of public interest, because there are allegations that senior officials of the Ministry of Attorney General have met with pro-abortion groups. Furthermore, "[m]edia accounts and comments from Members of the Legislature have repeatedly shown that a cloud has hung over the administration of Justice in the province of British Columbia. It is clearly in the public interest, and would settle this issue once and for all, if the air were cleared in this matter."

9. Discussion

Since sections 14 and 15 of the Act are discretionary, the actual contents of the background material to the Peck report are most important to determining the relevancy of the Ministry's arguments and its exercise of discretion not to release the information in dispute. I have done a comprehensive review of the background material to the Peck report. This material was prepared by a special prosecutor for the Criminal Justice Branch of the Ministry of Attorney General. I note, from evidence submitted to me, that this Branch operates independently from the Ministry in the conduct of criminal prosecutions. The work that Mr. Peck did was no different from the normal activities of a Crown prosecutor. The files in dispute were prepared by Mr. Peck and his police investigator and used as the basis for the decision not to prosecute the Attorney General.

Section 14

I am persuaded that at least some of the background information in dispute is "information that is subject to solicitor-client privilege" under section 14 of the Act. I do not agree, however, that solicitor-client privilege applies to all of these records. Mr. Peck was not retained by the Criminal Justice Branch to give legal advice in the normal sense. He was retained as a special prosecutor to exercise delegated powers of the Attorney General in accordance with the provisions of the *Crown Counsel Act*. Mr. Peck does not merely give advice; he has final decision-making authority under section 7(5) of that Act.

Section 15

I do not accept the statement by Mr. Vanagas that section 15(1)(f) does not apply when a "firm and final decision" not to prosecute a matter has been made and that "background information in its totality" should then be disclosed. The legislation does not support such a liberal interpretation. Section 15(1)(f) refers to information "relating to" or "used" in the exercise of prosecutorial discretion, which is the current situation with respect to the background material. Schedule 1 of the Act defines "exercise of prosecutorial discretion" as "the exercise by a special prosecutor, of a duty or power under the *Crown Counsel Act,* including the duty or power to stay a proceeding."

With respect to such prosecutions, the legislation provides a specific mechanism for accountability in section 15(4). Under this section, a public body is required to disclose the reasons for a decision not to prosecute in certain circumstances. I am satisfied that the Ministry acted in accordance with sections 15(1)(f) and 15(4) of the Act. Section 15(4) requires a public body to release the "reasons" for a decision to prosecute or not to prosecute to interested persons or parties publicly if the fact of the investigation was made public. There is no statutory obligation to release the kind of background information at stake in this request for review.

Since section 15 is discretionary, there is no obligation on the public body to disclose the background information. However, I applaud the Criminal Justice Branch's decision to release the full text of the Peck report. Mr. Peck had wisely recommended in his report that "[i]t is important that the public know the process that was engaged in, how the process works, and how the conclusions were reached." His reporting letter contains a great deal of information that is not normally disclosed to the public and essentially dismisses the attempted prosecution of the Attorney General for lack of evidence.

I thus agree with the Ministry that section 15(1)(f) of the Act applies to the records in dispute because their release would reveal information related to or used in the exercise of prosecutorial discretion; I can see no other way to describe what is actually in the background documentation. The disputed records were clearly used during the charge approval process.

Other Issues

Since the Ministry's arguments under section 15 are conclusive in this matter, I see no need to address the issues that might arise under sections 22 and 25 of the Act, beyond stating that I am not at all moved by the applicant's attempt to use the public interest override in this case, considering the disclosure that has already been made.

With respect to section 22, the burden of proof shifts to the applicants to prove that disclosure of the information would not be an unreasonable invasion of personal privacy. In the interests of administrative fairness, public bodies intending to advance

section 22 arguments must give adequate notice to applicants. The issue of notice did not prejudice the applicants in this case, since I have not relied upon section 22 in reach my conclusions.

10. Order

Under section 58(2) of the Act, I confirm the decision of the Criminal Justice Branch of the Ministry of Attorney General not to disclose the background information in dispute in this case.

_____

David H. Flaherty
Commissioner

September 16, 1994