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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 204-1997
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INQUIRY RE: A decision by the University of Victoria to withhold from an applicant the audio tapes of an harassment hearing at which she was the respondent

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on May 5, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the University of Victoria (the University) to refuse to disclose to an applicant the audio tapes of the proceedings at an oral hearing concerning an harassment complaint against her and two others.

2. Documentation of the inquiry process

This inquiry derives from a complaint of harassment filed by the Lesbian, Gay, and Bisexual Alliance (LGBA) of the University of Victoria against three individuals (the respondents), one of whom is the applicant in this inquiry.

On October 25, 1996 the applicant asked the University for a copy of the audio tapes of an arbitration hearing that had been conducted to determine the merits of a complaint made under the University's harassment policy and procedures. The applicant was a respondent to the complaint.

On December 16, 1996 the University notified the applicant that after considering all relevant factors, including representations from the third parties whose interests could be affected by the disclosure of the tapes, it was refusing access to the tapes under sections 19 and 22 of the Act.

On February 4, 1997 the applicant requested a review of the University's decision by my Office. The matter was not resolved during the mediation process.

3. Issue under review and the burden of proof

The issue under review is whether the University properly applied sections 19 and 22 of the Act to the records withheld from the applicant.

The relevant sections of the Act are as follows:

Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

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

(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,

...

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

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

...

(i) 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

...

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

...

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

....

Schedule 1 - Definitions

"personal information" means recorded information about an identifiable individual, including

(a) the individual's name, address or telephone number,

(b) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,

(c) the individual's age, sex, sexual orientation, marital status or family status,

(d) an identifying number, symbol or other particular assigned to the individual,

(e) the individual's fingerprints, blood type or inheritable characteristics,

(f) information about the individual's health care history, including a physical or mental disability,

(g) information about the individual's educational, financial, criminal or employment history,

(h) anyone else's opinions about the individual, and

(i) the individual's personal views or opinions, except if they are about someone else;

Section 57 of the Act establishes the burden of proof on the parties in an inquiry. Under section 57(1), if access to information in a record has been refused under section 19, it is up to the public body, in this case the University of Victoria, to prove that the applicant has no right of access to the record or part of the record.

Under section 57(2), if the record the applicant is refused access to under section 22 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.

4. The records in dispute

The records in dispute consist of two audio tapes, about eight hours in total, of the proceedings of an arbitration hearing conducted under the University of Victoria's Harassment Policy and Procedures.

5. The applicant's case

The applicant's initial submission indicates that a letter falsely attributed to her was published in the campus newspaper in the fall of 1995; it resulted in what she calls "character assassination," especially from fellow students in her faculty. She now wants access to the records in dispute in order to have her experiences at the University, including the harm to her reputation, properly investigated by outside persons, including: the Ministry of Education, Skills and Training; the Ombudsman; the Workers' Compensation Board; her MLA; and the Official Opposition in the Legislature. She "hopes that these tapes will encourage them to conduct an investigation."

The applicant did not make a reply submission in this inquiry.

6. The University of Victoria's case

The University decided not to release the records in dispute on the basis of sections 19 and 22 of the Act for reasons that I have set out below. The fundamental underlying reason for non-disclosure was described in the University's submission in this way:

> The subject matter of the Arbitration Panel concerned allegations of harassment of individuals because of their sexual orientation. The oral testimony and written evidence before the Panel contained many references to the sexual orientation of individuals, some of whom have not disclosed their sexual orientation to family and friends. (Submission of the University, Paragraph 11)

7. The third parties' case

The third parties in this inquiry were the complainants before the Arbitration Panel at the University. They also rely on sections 19 and 22 of the Act to justify non-disclosure of the records in dispute to the applicant. I have presented below aspects of their specific submissions.

I have also reviewed an *in camera* submission from the third parties with an accompanying affidavit.

8. Discussion

The applicant has made various allegations concerning other participants in the arbitration and what they may, or may not, have done with respect to matters affecting her. These issues are not directly relevant to the decision that I have to make about disclosure of the records in dispute under the Act.

Section 19: Disclosure harmful to individual or public safety

The applicant's position is "that all parties involved in this matter have publicly declared their positions and personal motivations." To establish this point, she has submitted various letters and publications apparently involving some of the complainants in this case at the University.

Both the University and the third parties rely on section 19(1) to refuse disclosure. The support for that position from the University depends in turn on submissions from the complainants at the original inquiry, who discuss such sensitive issues as the risks of "gay bashing," and on the focus at the Arbitration Panel on the personal safety of individuals on the university campus. (Submission of the University, Paragraphs 13, 16)

The University further submits that its concern for the public safety of the complainants and other third parties "was exacerbated by the Applicant's demonstrated propensity for involving the media in these types of disputes." (Submission of the University, Paragraph 14; and Affidavit of Sheila Sheldon Collyer, Paragraphs 10-12; and Submission of the Third Parties, Paragraphs 15, 16) However, on the basis of reading the submissions of the applicant, including the newspaper stories, and listening to her oral submissions at the Arbitration Panel, I much more fully appreciate her recourse to available media. None of her activities or language, in the context of this inquiry, poses a threat to any value protected by section 19 of the Act.

I have established in previous Orders that I believe public bodies should act "prudently" where the health and safety of others are at issue in connection with the possible release of records. (See Order No. 133-1996, November 29, 1996, p. 3; Order No. 89-1996, March 4, 1996, pp. 4, 5; Order No. 28-1994, November 8, 1994, p. 8) (Submission of the University, Paragraph 15) However, in my view, the present inquiry deals primarily with much more generalized, unspecific allegations of risk. I am not satisfied that the University has met its burden of proof under section 19 in respect of most of the information in the audio tapes.

In making my decision on the application of this section, I have also carefully considered the *in camera* submission from the third parties with an accompanying affidavit.

I find that only a very few lines of oral testimony can be withheld on the basis of section 19(1) of the Act. In each case, the testimony focused on how the complainants felt about what they perceived as attacks on themselves as individuals.

Section 22: Disclosure harmful to personal privacy

The applicant's position is "that all parties involved in this matter have publicly declared their positions and personal motivations." The University contests this point, which I nevertheless regard as relevant to a determination of whether the records in dispute should be disclosed under the Act. (See Reply Submission of the University, Paragraphs 3-6) It is also important that the complainants have been, and are, publicly associated with the LGBA as staff, officers, or directors.

I confirm the University's decision with respect to a small amount of sensitive personal information that deals with "sexual orientation" on the basis of section 22(3)(i) and a small amount of sensitive personal information about the employment, occupational or educational history of the complainants on the basis of section 22(3)(d). I also confirm the University's decision with respect to a small amount of other particularly sensitive personal information dealing with the complainants' individual opinions and feelings and, in one case, personal information relating to one of the respondents.

Section 22(2)(f): the personal information has been supplied in confidence

The University submits that the relevant circumstance in section 22(2)(f) about personal information having been supplied in confidence clearly applies in this case, especially when it comes to the oral disclosures of the personal information that is at stake in the records in dispute. (Submission of the University, Paragraph 20) The University further pointed out that section 12 of the University of Victoria's Harassment Policy and Procedures contains explicit provisions for confidentiality. Thus, for example, only a "public summary" will be released to the general public, and "the evidence and the identity of the parties and witnesses" are to be maintained in confidence. Finally, section 20.1 stipulates that "[e]xcept as otherwise provided by these procedures, all records kept under these procedures will be maintained in confidence." (Submission of the University, Paragraph 21, and Exhibit M.)

I have found in previous harassment matters that the principal concern respecting disclosure to the public is the protection of the "integrity of the process that a complainant sets in motion." (See Order No. 70-1995, December 14, 1995, pp. 6-8; Order No. 71-1995, December 15, 1995, p. 5) (Submission of the University, Paragraph 22) But this inquiry involves disclosure of records to a participant in a proceeding, not to the public.

It also involves disclosure of the records of that proceeding, not the records of an investigation.

The third parties submit that my previous Orders have established "that where information, particularly personal information, has been provided under a promise or an expectation of confidentiality that is an 'important factor' which should be taken into account by a public body in considering the possible release of that information to those requesting access to it and in assessing whether or not those seeking access to the information have met the test set out in section 22 of the Act." (Submission of the Third Parties, Paragraph 26) I agree with this as a statement of general principle.

The applicant places considerable emphasis on the fact that counsel for the Arbitration Panel informed her that a copy of the audio tape of the proceedings would be made available to her for a fee in the event its decision was subjected to review under the *Judicial Review Procedure Act*. This suggests to me that the complainants' expectations of confidentiality were not absolute.

While I agree with the University that section 22(2)(f) was a relevant circumstance for it to consider in making its initial decision, it is my view that the complainants' reliance on section 22(2)(f) is somewhat diluted by the fact that the audio tapes would be disclosed if the applicant appealed the Arbitration Panel's decision. I am also of the view that section 22(2)(a) and 22(2)(c) are relevant circumstances favouring disclosure to the applicant in the circumstances of this case.

In making my decision below, I have also relied on an *in camera* submission from the third parties with an accompanying affidavit.

I find that the applicant has met her burden of proof in this inquiry to the extent that release of most of the personal information in the records in dispute would not be an unreasonable invasion of the personal privacy of the third parties. (See Reply Submission of the University, Paragraph 2)

Review of the records in dispute

The Act defines "record" to include "books, documents, maps, drawings, photographs, letters, vouchers, papers, and any other thing on which information is recorded or stored by graphic, electronic, mechanical, or other means, but does not include a computer program or any other mechanism that produces records." It is clear from this definition that the audio tapes at issue in this inquiry are "records" under the Act.

Having listened to the audio tapes, I find that they contain a modest amount of highly sensitive personal information concerning the complainants that should not be disclosed on the basis of both sections 19 and 22 of the Act, and a small amount of personal information about one of the respondents that should not be disclosed on the

basis of section 22(1) of the Act. I find that disclosure of the remainder of the personal information would not constitute an unreasonable invasion of the third parties' privacy under section 22(1) of the Act. Most of the oral hearing is conducted at a fairly high level of generality and is far removed from direct personal experiences of, for example, homophobia.

The tapes contain personal information including personal information relating to the third party complainants' sexual orientation, their employment history and their personal feelings and opinions. The tapes also contain personal information relating to the applicant and the other two respondents. The information which I have withheld under section 22(3)(d) and (i) of the Act is of a particularly sensitive nature. Because of this, I find that the University was justified in withholding it under section 22(1) of the Act. I find that most of this information is also properly withheld by the University under section 19 of the Act.

I have decided to release most of the personal information contained on the audio tapes, even though the release of some of it is presumed to constitute an unreasonable invasion of a third-party's personal privacy under section 22(3)(d) and (i) of the Act. I find that, in the particular circumstances of this case, the presumption has been overcome. As the information on the tapes makes clear (and, in particular, the testimony of the complainants), the latter have been and are publicly associated with the LGBA as staff, officers, and directors, and one lectures, leads discussion groups, and has published articles on the subjects of homosexuality and homophobia. In my view, the public disclosure by the third party complainants of both their sexual orientation and their association with the LGBA is a relevant factor to be taken into account under section 22(2) of the Act and is sufficient to overcome the section 22(3) presumption with respect to the information I have released. I have identified a number of other relevant factors elsewhere in this Order. Of those other relevant factors, I find that section 22(2)(a) is particularly important in this case, as is the fact that the applicant was a participant in the proceedings before the Arbitration Panel.

Although the Chair of the Arbitration Panel had counsel, who was quite active in the proceedings, there was no recorded discussion of confidentiality during what took place at the outset of the panel. There was no warning, for example, that the oral testimony in the proceedings had to be kept confidential, nor, in fact, any explanation of who else was present in the hearing room. The applicant simply asked for a copy of the tape during the hearing; counsel told her to wait.

This is a case of alleged personal, or perhaps political, harassment for the most part, not sexual harassment, although the sexual orientation of the complainants was a matter of evidence. The complainants all appeared as former staff, officers, or current directors of the Lesbian, Gay, and Bisexual Alliance. They were quite vocal about their sexual orientation and, in some cases, activism in this regard. They felt that the disputed letter to the editor of a campus newspaper had targeted them and the LGBA.

The applicant in this inquiry was quite active at the panel hearing from its opening to its close. She too feels herself to have been a victim of persecution and harassment at the hands of others, including the LGBA. She obviously has a right of access to her own information, personal and otherwise, introduced at the hearing, which was primarily in the form of questions to the complainants, in addition to an actual statement by her. This right is dependent on section 4 of the Act. The applicant should also have a right of access to the responses that she received to her questions, subject to the application of sections 19 and 22 of the Act.

The third parties argue that they have been poorly treated, or were harassed, or felt afraid, on the basis of their declared sexual orientation. There are almost no details offered of any sort, beyond very simple descriptive or declarative statements, nor were any details asked for, especially since the respondents spent most of their time trying to establish why they had been summoned before the panel. Yet, out of an abundance of caution, I have severed some highly sensitive statements about how the complainants felt at various times because disclosure would be an unreasonable invasion of their privacy.

This is the first case from the University of Victoria to reach the inquiry stage before me. It is also the first harassment case from a university that I have dealt with directly. While I am very pleased that the University of Victoria has harassment policies and procedures, it is now my responsibility to test them under the Act in terms of both their sensitivity to confidentiality and privacy but also to the interests of accountability to the public established by section 2(1) of the Act. I was reminded, in listening to the tapes, of the expenditure of public funds that had occurred, and was occurring, in the processing of this complaint against the respondents. This was also a matter that concerned the respondents. At the end of the day, harassment policies and procedures have to withstand some degree of public scrutiny.

This complaint was brought before a hearing on the basis of a letter to the editor ostensibly signed by at least one of the respondents, who denies ever having written, signed, or submitted it. For this respondent, who is the applicant in the case, the panel hearing was her first opportunity to speak about the matters in dispute. It is thus not surprising that she would seek access to its records. Her own testimony, and responses in cross-examination by counsel for the complainants, are in my view much more sensitive in terms of content than most of the evidence of the complainants.

With respect to the application of section 19 to the records in dispute, I find that there is little in the tapes to justify the University's application of this section. Based on my review of the contents of the tapes, there is no reasonable prospect that, with the exception of a few lines which I have severed from the tapes, disclosure could threaten anyone else's safety or mental or physical health or interfere with public safety.

The Taping of Proceedings

This is my first Order that has addressed the release of audio tapes to an applicant and the treatment of such records under the Act. The problem is largely a practical one of severing tapes that have been the subject of access requests, as I have had to do in this inquiry.

I encourage public bodies to examine the necessity for making audiotapes of proceedings in light of this decision. If there is no real need to create a taped record, public bodies may be well advised not to do so. Taping of proceedings should occur on the basis of a full understanding that records are being created that may be the subject of access requests under the Act.

Public bodies should, ideally, have clear guidelines in place about the accessibility of tapes of proceedings and under what circumstances. It is arguable that it will be very difficult to refuse access to audio or videotapes to someone who was a full participant in an inquiry, as in the present case. Different conclusions may be appropriate with respect to access requests from the general public or the media.

9. Order

I find that the University of Victoria is authorized by section 19 of the Act to withhold some, but not all, of the information contained on the audio tapes, and I have severed the audio tapes accordingly. I confirm the University's decision to withhold access to the information which I have severed under section 58(2)(b) of the Act.

I also find that the University of Victoria is required by section 22 of the Act to withhold some, but not all, of the information contained on the audio tapes and I have severed the audio tapes accordingly. Under section 58(2)(b) of the Act, I confirm the University's decision to withhold access to the information which I have severed from the audio tapes under section 19**.**

I also find that the University of Victoria is required by section 22 of the Act to withhold some, but not all, of the personal information contained on the audio tapes and I have severed the audio tapes accordingly. Under section 58(2)(c) of the Act, I require the University to refuse access to the personal information which I have severed from the audio tapes under section 22**.**

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David H. Flaherty December 15, 1997
Commissioner