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

Order 01-15

MINISTRY OF AGRICULTURE AND FOOD

David Loukidelis, Information and Privacy Commissioner
April 20, 2001

Quicklaw Cite: [2001] B.C.I.P.C.D. No. 16
Order URL: http://www.oipcbc.org/orders/Order01-15.html
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: Ministry not entitled to withhold information from internal e-mails and other records under s. 13(1), as information does not consist of advice or recommendations. Section 19(1)(a) does not apply to information withheld under that section, but s. 22(1) applies, in part on the basis of s. 22(3)(a), to some of the same information. Section 22(3)(d) does not apply to information about ministry employees' work-related actions, so s. 22(1) does not apply to that information. Ministry found to have fulfilled its s. 6(1) duty in searching for responsive records.

Key Words: every reasonable effort – advice or recommendations – unreasonable invasion – personal privacy – medical information – employment history – functions of public body employees – harm to safety or mental or physical health.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 6(1), 13(1), 19(1)(a), 22(1), 22(2)(a), (c), (e), (f) and (g), 22(3)(a) and (d), 22(4)(e).

Authorities Considered: B.C.: Order No. 62-1995, [1995] B.C.I.P.C.D. No. 35; Order No. 324-1999, [1999] B.C.I.P.C.D. No. 37; Order 00-01, [2000] B.C.I.P.C.D. No. 1; Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-13, [2000] B.C.I.P.C.D. No. 16; Order 00-26, [2000] B.C.I.P.C.D. No. 29; Order 00-28, [2000] B.C.I.P.C.D. No. 31; Order 00-42, [2000] B.C.I.P.C.D. No. 46; Order 00-53, [2000] B.C.I.P.C.D. No. 57.

Cases Considered: *Mazhero* v. *British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1539 (S.C.); *R.* v. *Dyment*, [1988] 2 S.C.R. 417 (S.C.C.).

1.0 INTRODUCTION

[1] This decision has its origins in the applicant's concerns over his treatment by employees of the Ministry of Agriculture and Food ("Ministry") and by various levels of a volunteer agricultural association. (I refer below to that organization as the

"association".) Following what appears to have been a period of strained relations within the association, in which he attempted to involve Ministry employees, the applicant made a request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Ministry for any records about himself in its association and other files.

[2] The Ministry responded by providing a number of records to the applicant – described here as records 1-14 – from which it severed information under ss. 13, 19 and 22 of the Act. The applicant requested a review of the Ministry's decision and the adequacy of its search for records, since he believed that records were missing from the response. Mediation by this Office led to disclosure by the Ministry of a summary of comments made by Ministry employees about the applicant. The Ministry had withheld the records themselves under s. 19.

[3] Because mediation was otherwise unsuccessful, my Office scheduled a written inquiry under s. 56 of the Act. The inquiry was re-scheduled a number of times at the applicant's request. The Ministry issued new decisions during this period. It disclosed some information that it had previously withheld under s. 13(1) and revised its ss. 19 and 22 decisions.

[4] In response to the applicant's clarification that he also wished copies of his own correspondence, the Ministry disclosed some records and denied access under ss. 19 and 22 to one record in a new decision. The applicant disputed this decision as well. This led to a continuation of the inquiry, to accommodate an exchange of submissions on this one record only, which I refer to in this decision as record 15.

[5] The applicant raised the issue of missing records in his initial request for review. During the inquiry process that addressed that request for review, the applicant indicated that he still believed records were missing. The parties therefore addressed the s. 6(1) issue in a second inquiry, which dealt solely with the Ministry's compliance with its duty under s. 6(1) of the Act in searching for records relevant to the request. This decision deals with the issues raised in both inquiries.

2.0 ISSUES

[6] The issues before me are as follows:

1. Was the Ministry authorized to withhold information under ss. 13(1) and 19(1)(a) of the Act?
2. Was the Ministry required to withhold information under s. 22(1) of the Act?
3. Did the Ministry fulfil its duty to assist the applicant under s. 6(1) of the Act in searching for records?

[7] Under s. 57(1) of the Act, the Ministry has the burden of proof regarding the application of ss. 13(1) and 19(1)(a), while under s. 57(2), the applicant has the burden of proving that s. 22(1) does not apply. Previous orders have established that the Ministry has the burden of proof on the s. 6(1) issue.

3.0 DISCUSSION

[8] **3.1 Procedural Matters** – I will first dispose of a number of preliminary procedural issues.

Ministry's Late Addition of Exceptions

[9] In its initial submission, the Ministry said that it was adding s. 19 to information it had previously withheld under s. 22. It did this, it said, to correct an earlier oversight, which caused it to neglect to apply s. 19 to the same information it had withheld elsewhere under s. 19. It also added s. 22 to information it had earlier withheld under s. 19 alone.

[10] The applicant objected to these late additions. I have decided to accept them, however, as public bodies are required to apply s. 22 if they have reason to believe that disclosure would cause an unreasonable invasion of third-party privacy, and because the Ministry added s. 19 simply to correct an obvious oversight.

Ministry's Request to Make A Further Reply

[11] The Ministry sought permission to make a further submission in response to points the applicant had raised in his reply submission. The Ministry argued the applicant could have made these points in his initial submission. The issues raised are that Ministry employees are not third parties, that s. 13(2) applies to information for which s. 13(1) is claimed and that ss. 22(2)(a), (c) and (g) apply. The applicant objected to the Ministry being granted an extension to make a further submission, saying he had not made new arguments, but rebuttals to the Ministry's arguments in its initial submission.

[12] This Office's policies and procedures for inquiries allow a party to submit a further reply if another party raises new issues or allegations in its reply submission that require a response. In this case, the Executive Director of my Office granted the Ministry's request for additional time to submit a further reply and told the parties that I would decide whether to consider the issues just described. The Ministry then submitted its further reply and the applicant sent in an objection, suggesting that the Ministry's further reply in turn contained new issues.

[13] The applicant did make arguments in his reply that, in my view, could and should have been made in his initial submission, as clearly contemplated by the Notice of Written Inquiry that this Office sent to the parties. I have decided not to consider the applicant's new s. 22 arguments or the Ministry's responses to them in its further reply. In view of my finding on s. 13(1), I do not need to decide whether to accept the applicant's new arguments on s. 13(2).

Request to Re-Open First Inquiry and for An Oral Inquiry

[14] When this Office set the s. 6(1) matter down for an inquiry, the applicant asked that I re-open the first inquiry. He also asked that I conduct an oral inquiry on both files,

so that he might have an opportunity to "get beyond the defensive and inflammatory allegations of the Public Body, and the hiding behind words spoken through a lawyer".

[15] The Ministry objected to this request, saying that the first inquiry was closed and that, in light of this Office's inquiry policies and procedures, the issues in neither review warranted an oral inquiry. It said that the applicant's goal in re-opening the first inquiry – "to flush out some serious offenders and once and for all get to the bottom of this unacceptable mess" – was to pursue issues that had nothing to do with the inquiry before me. It further argued that a written inquiry was an adequate forum in which to address the remaining issues under the Act.

[16] I decided not to grant either of the applicant's requests, as I was not persuaded that there was any reason to re-open the first inquiry. Nor did I consider that the issue in the second inquiry merited an oral inquiry. No material facts were in dispute, credibility was not in issue, the issues were not complex (on the contrary, they are quite straightforward), no significant policy issues arise and the applicant does not have a limited ability to read and write.

Applicant's Request Regarding Correction and Destruction of Records

[17] In some of his filed materials, the applicant asks me to order the Ministry to correct personal information about him in its files and to order the Ministry to destroy records on him. As the Ministry points out in reply, these issues are not properly before me and I have not considered them. These are matters that can only properly be raised once the applicant has asked the Ministry to correct his personal information.

[18] **3.2 Records in Dispute** – The 15 records involved here comprise 21 pages, consisting of lists of the members and leaders of the association, a registration form for the association's council, two letters, a series of e-mail messages between Ministry employees, a briefing note on the conflict within the association and a note which, according to the Ministry's submission, the applicant authored.

[19] Under ss. 19(1)(a) and 22(1), the Ministry withheld in full the record authored by the applicant. In the case of the other records, it severed, under ss. 13(1), 19(1)(a) and 22(1), a number of sentences and paragraphs, which the Ministry said included comments by Ministry employees about their dealings with the applicant, as well as identifying information and other personal information of Ministry employees and others.

[20] **3.3 Advice and Recommendations** – The Ministry applied s. 13(1) to portions of three paragraphs on page 1 of record 14, a three-page briefing note on the association's internal conflict, dated October 29, 1998. The Ministry also applied ss. 19 and 22 to this same information.

[21] Section 13(1) is a discretionary exception that protects advice or recommendations prepared by or for a public body or minister. It says that 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.

[22] This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations. I have considered s. 13(1) in a number of orders. For example, in Order 00-08, [2000] B.C.I.P.C.D. No. 8, I said the following:

> In my view, the word "advice" in s. 13(1) embraces more than 'information'. Of course, ordinary statutory interpretation principles dictate that the word 'advice' has meaning and does not merely duplicate 'recommendations'. Still, 'advice' usually involves a communication, by an individual whose advice has been sought, to the recipient of the advice, as to which courses of action are preferred or desirable. The adviser in such cases will say 'In light of all the facts, here are some possibilities, but the one I think you should pursue is as follows.'

[23] The Ministry says, in para. 8.05 of its initial submission, that Ministry staff prepared the briefing note to apprise an assistant deputy minister of the situation involving the applicant, so that he could decide what approach to take with the applicant. The Ministry argued that the withheld items would thus reveal advice to the assistant deputy minister on how to deal with the applicant.

[24] The Ministry also says, at para. 8.06, that it properly exercised its discretion in deciding whether or not to apply s. 13(1). It says it considered material that was properly advice or recommendations in other parts of the records (it did not specify which parts) and that it had disclosed those items. In the case of the portions still withheld under s. 13(1), it had considered that harm could result from disclosure, in the form of threats to physical or mental health or unreasonable invasion of personal privacy to third parties, and had decided to withhold the information. Such considerations more properly relate to ss. 19 and 22, not to s.13(1).

[25] In his initial submission, the applicant says he at first accepted that s. 13(1) was appropriate. He later reversed himself:

> Since that initial release and the numerous indignities and manipulations heaped upon us by the public body, as well as their distancing themselves from any responsibility for internal … [association] matters I question how they can initiate investigations into individuals, become involved in the day to day activities of the organization or pass on personal information in the form of opinion or hearsay as advice or recommendations hide behind this section. [*sic*]

[26] In his reply submission, the applicant says, in effect, that the remaining s. 13(1) information is not advice or recommendations, but gossip, opinions or attempts to smear him.

[27] There is no advice or recommendation, explicit or implicit, on a particular course of action in the disputed record. Nor is there any implicit or explicit advice or recommendation on a policy choice or the exercise of a power, duty or function, such as I discussed in Order No. 324-1999, [1999] B.C.I.P.C.D. No. 37. The withheld information consists, rather, of views about, or reactions to, the applicant as voiced by

others. These are not in any sense "advice or recommendations" and do not reveal advice or recommendations. I conclude that s. 13(1) does not apply to the three items in record 14 to which the Ministry applied that section.

[28] **3.4 Unreasonable Invasion of Personal Privacy** – The Ministry argues in paras. 7.04-7.07 of its initial submission that, if disclosure of personal information, either about the applicant or about third parties, results in the unreasonable invasion of the personal privacy of third parties, it must withhold that information under s. 22(1). If disclosure of information would identify a third party and disclosure would lead to an unreasonable invasion of the third party's personal privacy, a public body must withhold that information under s. 22(1) as well. I agree with these general propositions.

[29] The Ministry points out, in para. 7.09 of its initial submission, that disclosure of certain information – including that listed in s. 22(3) – is presumed to be an unreasonable invasion of a third party's privacy. It also points out that a public body must consider all relevant circumstances, including those listed in s. 22(2) of the Act, in deciding whether s. 22(1) or (3) applies to information in a record (para. 7.12, initial submission).

Is Personal Information Involved Here?

[30] The Ministry describes the information withheld under s. 22(1) as names, addresses and telephone numbers of third parties (including Ministry employees), their views or comments, dates on some e-mail messages, medical information of third parties, information that would identify third parties (for example, a person's position within the association), details of interactions between the applicant and Ministry employees and others and, finally, a record authored by the applicant. It acknowledges, at para. 7.08 of its initial submission, that some of the withheld information is the applicant's own personal information.

[31] As regards the applicant's own personal information in the records, I note here that, in *Mazhero* v. *British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1539 (S.C.), Tysoe J. said the following, at paras. 21 and 22:

> It makes eminent sense to have more restrictions on access to general information than on access to personal information. In dealing with general information, the Act must balance the objective of giving the public access to records of public bodies against other legitimate objectives, such as the privacy of personal information of other persons and confidentiality of governmental or business interests. These latter objectives do not generally apply to personal information about the applicant because there are no privacy or confidentiality concerns in releasing to an applicant personal information of that applicant.
>
> In addition, an applicant has a right akin to an ownership right in personal information about himself or herself, but no such right can be asserted in general information. This was recognized by the Supreme Court of Canada in *R.* v. *Dyment*, [[1988] 2 S.C.R. 417 (S.C.C.), at p. 429]:
>
> > Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it

> (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit."

[32] Tysoe J. acknowledged, as I do, that s. 19 of the Act may prevent an individual, in the appropriate circumstances, from gaining access to her or his own personal information. I note, all the same, the distinction he drew between the right of access to one's own personal information and the right of access to general information.

[33] The definition of personal information in Schedule 1 to the Act reads as follows:

> **"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.

[34] I agree that most of the information withheld under s. 22(1) in this case fits this definition, the exception being the dates withheld on various e-mails. I fail to see how they constitute any third party's personal information or how they could identify a third party. The Ministry did not attempt to show me how either might be the case.

Information About the Functions of Ministry Employees

[35] The Ministry argues that s. 22(1) applies to the names of Ministry employees and descriptions of their actions. As I noted in Order 00-53, [2000] B.C.I.P.C.D. No. 57, public body employees are third parties for the purposes of s. 22. This does not mean, however, that all recorded information about them must be withheld under s. 22(1). The information in records 4-9 as to Ministry employees' names and actions appears in the context of work-related activities and relates to their functions as employees of a public body. It therefore falls under s. 22(4)(e), in my view, such that disclosure of that information would not result in an unreasonable invasion of the employees' personal privacy. See Order 00-53. I return to this issue below in the discussion of s. 22(3)(d).

Third-Party Medical Information

[36] The Ministry argues, in para. 7.10 of its initial submission, that some of the disputed information falls under s. 22(3)(a), which provides that disclosure of a third party's medical information is presumed to be an unreasonable invasion of that individual's personal privacy. The Ministry says portions of records 4, 6 and 10 contain this type of information.

[37] The withheld portions of record 4, an e-mail between Ministry employees, do not contain any third party's medical information. They include, in fact, an account of a meeting with the applicant and comments about the applicant. Three of the withheld portions of record 6, an exchange of e-mail messages between two Ministry employees, contain medical information related to two Ministry employees. The Ministry is correct in saying that s. 22(3)(a) applies to this information. The applicant has, in any case, indicated that he does not want this information and has not attempted to rebut the presumption in s. 22(3)(a).

[38] The Ministry also correctly applied s. 22(3)(a) to a small amount of third-party medical information – about an individual who is not a Ministry employee – in the seventh withheld line of record 10 (an e-mail from one Ministry employee to another). That third-party medical information is in issue here because the e-mail's author chose to comment in passing on a colleague's medical information.

Employment History

[39] The Ministry argues, at para. 7.11 of its initial submission, that some of the withheld information in records 5 and 7 relates to the employment of a third party, and therefore falls under s. 22(3)(d) of the Act. It says that the information

> … consists of comments from the Manager of Youth Development Programs about the actions taken by a Youth Development Program staff member. The Public Body submits that disclosure of the information is a presumed unreasonable invasion of the personal privacy of the third party.

[40] In his reply submission, the applicant argues that s. 22(3)(d) does not apply if the withheld information indicates an inability on the part of the Ministry to carry out its responsibilities. He also suggests that it might reveal the source of more of his problems with the Ministry.

[41] Section 22(3)(d), in relevant part, protects information related to the "employment history" of a third party. In my view, someone's "employment history" includes information about her or his work record and reasons for leaving a job (see, for example, Order 00-53). It also includes information about disciplinary action taken against an employee (see, for example, Order No. 62-1995, [1995] B.C.I.P.C.D. No. 35; and Order 00-13, [2000] B.C.I.P.C.D. No. 16). I see nothing in the withheld portions of records 5 and 7 that could even remotely be construed as information "that relates to employment … history" of any third party.

[42] The only withheld item in record 5 which is connected to anyone's employment in any way is the first severed line, a comment on a Ministry employee's efforts in dealing with the applicant. It does not relate to the employee's work history. It merely records action taken by that employee – information as to what was done and by whom. Section 22(3)(d) does not apply to it. The withheld information in the middle of record 7 describes a Ministry employee's telephone call with the applicant and another employee's comment on a work-related decision by the first employee. This information does not relate to a third party's employment history. I find that it also does not fall under s. 22(3)(d).

Other Personal Information

[43] The Ministry made general arguments, in para. 7.08 of its initial submission, that s. 22(1) applies to the home addresses, telephone numbers, birthdates and other information withheld in the lists of the association's members and leaders and in the association's council registration form (records 1 and 2). I note that it also withheld names, positions and telephone numbers of members of the association on page 3 of record 14. The applicant has not attempted to rebut the Ministry's s. 22(1) arguments with respect to all of this information. I find that s. 22(1) applies to the withheld information in records 1 and 2 and to the telephone numbers withheld on page 3 of record 14, but not to the names and positions on this page, as the applicant is clearly already aware of this information. (See for example, Order 00-42, [2000] B.C.I.P.C.D. No. 46.) I also find that s. 22(1) applies to two lines in record 6, one line in record 7 and the same line in record 8, which set out an employee's personal views of her own situation.

[44] I do not, however, agree that s. 22(1) applies, in the circumstances of this case, to the names of individuals who are not Ministry employees nor to any other information generally withheld under s. 22(1) in records 3, 4, 5, 6, 7, 8, 9, 12 and 13 and pp. 1 and 2 of record 14. In the case of records 12 and 13 and pages 1 and 2 of record 14, for example, the third parties are not identifiable. It is thus difficult to see how disclosure of such information would be an unreasonable invasion of third-party privacy.

[45] There is almost no mention of individuals other than the applicant in the withheld portions of records 3-9. Where others are mentioned, the individuals are known to the applicant (for example, in record 3) and I do not agree that disclosure of their names in this context would be an unreasonable invasion of their privacy. In the case of the other information in dispute, much of it concerns the applicant himself in the form of comments and opinions made about him by others and he is entitled to have access to it. The Ministry did not establish that any of these comments or opinions fall under s. 22(3)(h).

[46] As for records 10, 11 and 15, the Ministry referred to the arguments in its initial, reply and further reply submission, as support for the application of s. 22(1) to record 15 (the applicant's own note) and, by extension, to records 10 and 11. Record 10 contains some information to which s. 22(3)(a) applies, as discussed above. In my view, however, the rest of the withheld information in record 10, the withheld information in record 11 and all of record 15 contain no third-party personal information, except a name known to

the applicant. I note that record 15 consists mainly of the applicant's own personal information.

[47] In any case, the applicant has demonstrated in his submissions that he is aware of certain actions on the part of Ministry employees and others which the Ministry did not wish him to learn, on the basis that disclosure would unreasonably invade the privacy of third parties. Given the applicant's knowledge of these actions, I do not consider that disclosure of this information could unreasonably invade the privacy of any third party mentioned in record 15 and in the withheld portions of record 10 and 11 (except the s. 22(3)(a) information previously noted in record 10). The Ministry's arguments about third-party privacy do not, in any case, relate to informational privacy as contemplated by the Act. I find that s. 22(1) does not apply to information in these records.

[48] The Ministry argues in paras. 7.12-7.19 of its initial submission that ss. 22(2)(e) and (f) are relevant to determining if disclosure of the information withheld under s. 22 in records 4-14 would unreasonably invade third-party personal privacy. These sections require a public body to consider if disclosure would expose a third party unfairly to financial or other harm and if the personal information was provided in confidence, respectively. The applicant counters, and I agree, that ss. 22(2)(e) and (f) are not relevant circumstances, as I discuss below.

Unfair Exposure to Harm

[49] The Ministry says that I found in Order 00-02, [2000] B.C.I.P.C.D. No. 2, that exposure to mental harm falls into s. 22(2)(e). In that order, I found that s. 22(2)(e) was a relevant circumstance in a case involving a man who had requested records related to a woman whom he had criminally harassed. The requested records related to the harasser's probation (including interviews with the victim, police arrest records and probation and forensic psychiatric assessment records). I agreed that s. 22(2)(e) was a relevant circumstance for the same reasons that I had found that s. 19(1)(a) applied. In that case, however, the mental harm referred to went beyond embarrassment, upset or a negative reaction to someone's behaviour. It clearly referred to "serious mental distress or anguish" to the victim of the harassment, which disclosure of the records could have brought about.

[50] The majority of the withheld information in records 4-14 in this case is either the applicant's own personal information (comments about him by Ministry employees or others) or a combination of personal information about him and Ministry employees (accounts of interactions with him). Much of the former type of information consists of comments by Ministry employees about the applicant's health, state of mind, actions and behaviour, or views about the applicant held by his fellow association volunteers. It is questionable whether it was necessary for some of this information to have been recorded. At all events, to the extent that any of this personal information relates to Ministry employees, it consists of information about their work-related activities and falls under s. 22(4)(e). While disclosure of some of this information might be embarrassing or upsetting to Ministry employees or others, I agree with the applicant's suggestion in his reply submission that it would not expose a third party *unfairly* to harm. I therefore find that s. 22(2)(e) is not a relevant circumstance in this case.

Supplied in Confidence

[51] The Ministry argued in para. 7.18 of its initial submission that its employees had an expectation of confidentiality in sending their e-mail messages:

> It can be inferred from the information in the Records, and from the concerns of the Public Body employees about disclosure, that Public Body employees put the information about the Applicant on the Public Body's email system with an expectation of confidentiality. The Public Body therefore submits that the information was "supplied in confidence".

[52] A public body employee should not, in my view, expect unqualified confidentiality in using her or his employer's e-mail system. These systems are for use in carrying out work-related activities. Even in cases where personal use of e-mail is permitted by an employer, an employee should not expect confidentiality, at least in any unqualified way. Certainly, an employee generally cannot suppose that, when she or he records information about everyday work activities, the information is personal information or that it is supplied in confidence.

[53] In this case, the Ministry employees were recording their everyday work activities and interactions with a member of the public. They were not, in my view, supplying their own personal information, much less were they supplying such personal information in confidence to the Ministry. In my view, an assessment of the relevant circumstances in s. 22(2) does not even arise with respect to these parts of the records. The employees also recorded their own and others' comments and views about the applicant, again in a work context. They were not, in my view, supplying this information in confidence to a public body and s. 22(2)(f) does not apply to this information.

[54] It should be noted, in passing, that the ease of e-mail often invites incautious remarks and an informal style that would likely not occur in paper communications. This can result in embarrassment, or worse, when such e-mails are disclosed, under the Act or otherwise.

Other Relevant Circumstances?

[55] As I noted above, the applicant argues in his reply submission that ss. 22(2)(a), (c) and (g) apply in this case. He says he has presented enough information "to bring these concerns into scrutiny." Again, I decided not to permit the applicant to raise these matters, since he could have raised them in his initial submission. If it had been appropriate for me to consider ss. 22(2)(a), (c) and (g), however, I would have found that the circumstances described in those sections are not relevant here.

[56] **3.5 Third-Party Safety or Mental or Physical Health** – The Ministry has applied s. 19(1)(a) to much of the information that it also withheld under s. 22 in records 4-15. The Ministry divides this information into categories similar to those discussed above – names and dates in e-mail messages, identifying information of people, others' views or opinions about the applicant and information about the applicant's interactions with Ministry employees and others. As with s. 22, the Ministry withheld the

applicant's own personal information (comments or opinions about the applicant), as well as the personal information of others. This information also includes accounts of interactions with the applicant.

Applicable Principles

[57] Section 19(1)(a) permits a public body to withhold information where its disclosure could reasonably be expected to threaten anyone else's safety or mental or physical health. That section reads as follows:

> 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
>
> … .

[58] I have addressed s. 19(1) in a number of orders and have upheld public bodies' reliance on s. 19(1) in a number of cases. Most recently, in Order 01-01, [2001] B.C.I.P.C.D. No. 1, I confirmed observations I made in earlier orders, including the following passage from Order 00-02, [2000] B.C.I.P.C.D. No. 2, at p. 5:

> Although s. 19(1) involves the same standard of proof as other sections of the Act, the importance of protecting third parties from threats to their health or safety means public bodies in the Ministry's position should act with care and deliberation in assessing the application of this section. A public body must provide sufficient evidence to support the conclusion that disclosure of the information can reasonably be expected to cause a threat to one of the interests identified in the section. There must be a rational connection between the disclosure and the threat. See Order No. 323-1999.

[59] In Order 00-28, [2000] B.C.I.P.C.D. No. 31, at p. 3, I said the following:

> As I have said in previous orders, a public body is entitled to, and should, act with deliberation and care in assessing – based on the evidence available to it – whether a reasonable expectation of harm exists as contemplated by the section. In an inquiry, a public body must provide evidence the clarity and cogency of which is commensurate with a reasonable person's expectation that disclosure of the information could threaten the safety, or mental or physical health, of anyone else. In determining whether the objective test created by s. 19(1)(a) has been met, evidence of speculative harm will not suffice. The threshold of whether disclosure could reasonably be expected to result in the harm identified in s. 19(1)(a) calls for the establishment of a rational connection between the feared harm and disclosure of the specific information in dispute.
>
> It is not necessary to establish certainty of harm or a specific degree of probability of harm. The probability of the harm occurring is relevant to assessing whether there is a reasonable expectation of harm, but mathematical likelihood is not decisive where other contextual factors are at work. Section 19(1)(a), specifically, is aimed at protecting the health and safety of others. This consideration focusses

> on the reasonableness of an expectation of any threat to mental or physical health, or to safety, and not on mathematically or otherwise articulated probabilities of harm. See Order 00-10.

[60] As these passages indicate, s. 19(1)(a) is triggered only where there is a reasonable expectation that disclosure of information could threaten the safety or mental or physical health of someone other than the applicant. There must be a rational connection between the disclosure and the feared harm – speculation will not suffice.

Analysis of Section 19 Case

[61] The applicant's submissions deal almost entirely with his concerns over the way the association and the Ministry have, he says, treated him. Very little of what he says is germane to the s. 19 issue before me. As the applicant himself says in his initial submission:

> I have given you a considerable background to consider. Most I recognize is out of the purview of your office, however, I feel it is necessary to provide the context in which this unfortunate episode is taking place.

[62] As the Ministry points out, however, the proper venue for the applicant to address his concerns is through the association and not through this process.

[63] In his initial submission, the applicant says he has met with only three Ministry employees on only a few occasions and that no one has been at risk because of him. He says he has not had recent contact with the Ministry and that his earlier contacts were "simple requests for answers". If anyone has been hurt, he says, it is himself, as he has suffered from health problems directly attributable to his issues with the association.

[64] In his reply submission, the applicant maintains that, while he has asked embarrassing questions and expressed concerns over association issues, no one has been put at risk by any of his actions. He suggests that the real reason Ministry employees have concerns over the disclosure of their comments is that they know these comments have "no foundation in truth". He generally rejects the Ministry's s. 19(1)(a) case as speculation, saying the following:

> … I cannot imagine any disclosure that would send me running up to [one of the Ministry's offices] to do premeditated harm to [three named Ministry employees]. It is a vile suggestion. … It would seem that their fear originate[s] from the fact that I am willing to stand up for my rights and those of our members by trying to use due process such as this inquiry. … If the implications were not so serious, the suggestions of their fears of me as a human being would be laughable. It is the justice I seek that they fear.
>
> The Public Body's concern for volunteers, while laudable, is once again totally specious. No one at any time has been put at any personal risk due to my actions despite numerous provocations. In fact quite the opposite is true, a fact that must be on record in the Public Body's files. …

> If I am a danger to anyone, it is surely primarily to myself. It is very hard on a person when one cares very deeply and is faced with doing the honourable thing against the weight of bureaucracy. …

[65] The Ministry acknowledges that it is not aware of any history of violence on the part of the applicant. The Ministry says, however, that the health of Ministry employees has suffered as a result of their dealing with the applicant. It argues that the applicant's behaviour causes employees to fear that their safety would be jeopardized if the applicant received the information that has been withheld under s. 19(1)(a). The Ministry says the record reveals unwelcome visits and abusive language from the applicant, as recorded in the summary of information the Ministry provided to the applicant. Various unidentified association volunteers have also, the Ministry says, expressed concern for their health and safety if the information is disclosed. The Ministry says these concerns should be taken seriously (paras. 6.08 - 6.12 of its initial submission).

[66] The Ministry also says that the applicant does not seem to appreciate the impact his behaviour has on others and that this further supports its case under s. 19(1)(a). In support of this, the Ministry quotes from a portion of record 4 that was disclosed to the applicant, in which an employee says he spent time with the applicant discussing his role in the conflict with the association. The disclosed portion relates that employee's perception that the applicant did not see that he had a role in the conflict, as the applicant believed everyone had been against him from the beginning. This does not, in my view, support the Ministry's argument that the applicant does not appreciate the effect he has on others (para. 6.13, initial submission and para. 8.01, reply submission).

[67] The Ministry supports its arguments on s. 19(1)(a) with an affidavit sworn by the Ministry's Information and Privacy Director, Peter Smith. In his affidavit, Peter Smith deposed to conversations he had with Ministry employees – some named and others not named – during (it appears) the request- processing phase. He deposed that the employees recounted their dealings with the applicant, describing him as angry, verbally abusive and unpredictable. He deposed that he was told employees have modified the ways in which they interact with the applicant. He deposed that he was told by someone at the Ministry that other employees will not deal with the applicant at all and that Ministry staff have taken steps to deal with the effects the applicant has had on the workplace.

[68] Peter Smith also deposed that Ministry employees feel the applicant will "aggressively pursue" his case with any person whose identifying information he receives from these records. Ministry employees are said to have spoken with others outside the Ministry who also have health and safety concerns. These others were not identified. Peter Smith described a record related to another matter as containing specific information on how the applicant has affected one person's health. He described other unrelated records as showing how the applicant attempts to promote his cause and gather support. He also deposed as to his own conversation with an association member, who provided general information about the situation with the applicant and the concerns of association volunteers. Peter Smith deposed that he did not contact any other individuals whose names, views and other information appear in the records.

[69] Based on the disputed records – and the comments of Ministry staff and the association member to whom he spoke – Peter Smith determined that s. 19(1)(a) applied to some of the information in records 4-14. Accordingly, he told the head of the Ministry that, in his opinion, s. 19(1)(a) applied. As regards record 15, the Ministry relied on the same s. 19(1)(a) arguments.

[70] The Ministry acknowledges, in a footnote to para. 6.07 of its initial submission, that its evidence on s. 19(1)(a) is hearsay. It says that I supported use of hearsay evidence in Order 00-01, [2000] B.C.I.P.C.D. No. 1, at p. 6. In that order, which involved s. 19(1)(a), I said (at p. 7) that hearsay evidence should be treated with caution, but that I could give some weight to it in that case. I did so based on the material before me and decided that the public body had proved a reasonable expectation of harm. The Ministry offered no explanation in this case as to why it has provided no direct evidence, even on an *in camera* basis, from Ministry employees or other third parties who the Ministry says would be adversely affected by disclosure of the disputed information. There is no reason to suppose, certainly, that it was impracticable to reach these third parties. They are either employees of the Ministry or others who are known to Ministry employees.

[71] Order 00-01 does not give *carte blanche* for hearsay evidence. Absent any acceptable reason for not providing direct evidence, it is not clear to me why it was not offered here. Nonetheless, despite the fact that Peter Smith's affidavit consists of hearsay (in some cases, double hearsay) – and his own speculation, opinions and conclusions on the very issue before me – I am prepared to give some weight to the parts of it that are evidence and not argument. But it must be emphasized that direct evidence should be offered unless there is good reason for not offering it.

[72] Returning to the evidence before me, the Ministry says the applicant is likely to behave in what it says would be a "threatening" way. The Ministry argues, at para. 8.02 of its reply submission, that various individuals continue to feel that their health or safety, or both, are affected by the applicant and that disclosure of the withheld information would threaten their health or safety. It has not provided specific examples of the applicant's "threatening" behaviour or his "abusive language", although the labels "threatening" and "abusive" have been offered. The Ministry also argues – and Peter Smith deposed – that the applicant will "aggressively pursue" his interests or case. The Ministry did not elaborate on what this means, although it is clearly intended to be negative. The applicant is said to be "unpredictable", but details are not given about what that means. The records themselves refer to his having been "verbally abusive" in at least one telephone conversation, and in meetings, but no details are given as to what the applicant said or how he said it. It is also said that if any personal identifiers are disclosed, the applicant will seize on any identified Ministry employee as "an additional avenue through which to aggressively pursue his case."

[73] It is clear Ministry employees and others perceive the applicant to be difficult and challenging to deal with, as regards issues involving the association at any rate. The applicant does appear to be, at times, intense in his feelings about issues involving the association and about the Ministry's perceived role in those issues. He is frank in expressing his views – in writing, certainly – about what he believes to be the injustice of

his situation. It does not follow from this alone, however, that there is a reasonable expectation that the applicant is, in a general sense, a threat to the safety or mental or physical health of others.

[74] The question under s. 19(1)(a), moreover, is whether disclosure of the information actually in dispute could, in light of the relevant circumstances (including respecting an applicant's statements or behaviour), reasonably be expected to threaten anyone's safety or mental or physical health. I note, first, that it is not enough that disclosure of information could reasonably be expected to lead to someone being upset and therefore troublesome, difficult and unpleasant to deal with. It is not enough that the disclosure could reasonably be expected to cause a third party (in this case Ministry employees or others) to be upset. The section clearly requires more, since it explicitly refers to a reasonable expectation by someone's unpleasant behaviour of a threat to "safety" or to the mental or physical "health" of others. A threat to "mental … health" is not raised merely by the prospect of someone being made upset. In Order 00-02, I spoke of "serious mental distress or anguish" (pp. 5-6), *i.e.*, at least something approaching a clinical issue. The inconvenience, upset or unpleasantness of dealing with a difficult or unreasonable person does not suffice.

[75] After careful consideration, I have decided that the material does not, in this case, support a reasonable expectation that disclosure of the severed information could threaten the mental or physical health of anyone. Nor am I persuaded that disclosure of the withheld information could reasonably be expected to threaten anyone's safety. Among other things, the applicant already knows the identities and office addresses of the Ministry employees involved. Disclosure of that specific information does not create the necessary reasonable expectation under s. 19(1)(a). Further, much of the disputed information is innocuous factual material and a good deal of it is already known to the applicant. I am not persuaded that disclosure of this factual information could reasonably be expected to threaten the safety or mental or physical health of anyone. Nor does the evidence of the applicant's behaviour change this conclusion.

[76] I find that s. 19(1)(a) does not apply to the information withheld under s. 19(1)(a). It should be noted, for clarity, that some of the information I have found cannot be withheld under s. 19(1)(a) must, in any case, be withheld under s. 22(1) for the reasons given above.

[77] **3.6 Search for Records** – I have discussed in many orders the principles that apply to search efforts by public bodies in seeking records that respond to a request. I will apply the principles set out in Order 00-26, [2000] B.C.I.P.C.D. No. 29, without repeating the discussion there.

[78] The Ministry described in some detail its search for records in response to the applicant's request at para. 5.04 of its initial submission for the second inquiry:

> The parameters within which the Public Body conducted its search for the requested records were entirely consistent with the scope of the Applicant's request. The Applicant's request itself was faxed by the Public Body's Freedom of Information Branch to the program area concerned, and within the program area a

> search was largely conducted by the person to whom the request was faxed. In addition, that person directed others on where to search, and in doing so told others that they were to search for any and all records they had relating to the Applicant, and/or relating to the Applicant and the [conflict]. In one case an individual was asked to search for a particular record, but a copy of the request was also faxed to her.

[79] The Ministry supplied an affidavit sworn by Gordon Bryant, its Manager of Youth Development Programs. He deposed that he has overall responsibility for program matters involving the association within the Ministry and that he is familiar with the issues the applicant has raised and who within the Ministry has dealt with the applicant. He himself has also been involved in correspondence with the applicant. As a result, he was generally aware of the location of records which would be responsive to the request, as he had previously retrieved them in order to deal with the correspondence.

[80] He deposed further that, on receiving the request from the Ministry's Freedom of Information Branch, he sorted the items listed in the applicant's request into two groups, Youth Development Branch files and association program files, the first group being Ministry records and the second consisting of records that the association had copied to the Ministry for some reason. He also deposed that, as far as he knew, the applicant had corresponded only with certain offices, which he named, and that he himself searched all of the relevant files, both hard copy and electronic, in the Youth Development Programs office in which he works, except one. He said he had also asked five other named individuals to search their files (this included the file in his office which he had not searched himself). He also explained that he had asked these other employees to search their files because he knew that they had also corresponded or otherwise dealt with the applicant. In one case he knew of a report that a Ministry employee had written about his interview with the applicant. He also asked two other Ministry staff if they had records regarding the applicant.

[81] Gordon Bryant's affidavit set out the records and responses he had received from these staff members. He deposed that he alone had spent more than 20 hours searching for responsive records. He said he later found two other peripheral records, one while searching for records in response to a later request from the applicant and the other while reviewing a file for an unrelated matter. Exhibit "B" to his affidavit lists files that were searched for responsive records. He deposed, last, that all Ministry files he believed were relevant had been searched and that he was not aware of anywhere else within the Ministry to search.

[82] The Ministry submitted, in this light, that it had made every reasonable effort in its search for responsive records and that it had explored all areas within the Ministry that could reasonably be expected to contain responsive records. It also reminded me that both my predecessor and I had found in previous orders that it is not necessary to prove that records do not exist.

[83] The bulk of the applicant's initial and reply submissions in this inquiry again centre on his concerns over various association issues. He does say in his initial submission, however, that he thought there were additional documents in the form of

e-mails, briefing notes and other communications between various Ministry staff, whom he names. He also claims to have copies of documents, and to have seen others, that the Ministry has not produced.

[84] The Ministry suggests in its reply that the applicant is confusing records that post-date the request at issue with records that respond to that request. It also argues that the applicant appears to be confusing association records – which are not under the Ministry's custody or control – with Ministry records. It points out that the applicant has not supplied copies of the records he claims to possess but which he has not received from the Ministry. The Ministry cannot, therefore, search for them, it says. This inquiry concluded with a flurry of further submissions from both sides on this issue, which I have not considered.

[85] The Ministry very thoroughly explained how its staff searched for records. Among other things, it supplied me with direct affidavit evidence from the person principally responsible for the searches. Based on the evidence before me, I find that the Ministry fulfilled its duty under s. 6(1) to undertake a reasonable search for responsive records.

4.0 CONCLUSION

[86] For the reasons given above, I make the following orders:

1. Under s. 58(2)(a) of the Act, subject to the order in paragraph 2, below, I require the Ministry to give the applicant access to all of the information it withheld under ss. 13(1), 19(1)(a) and 22(1), and

2. Under s. 58(2)(c) of the Act, I require the Ministry to refuse access under s. 22(1) to the information I have marked in the copy of the records attached to the Ministry's copy of this order.

[87] In light of my finding on s. 6(1), no order is called for under s. 58(3) of the Act.

April 20, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

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

Order 01-15

CORRECTION

MINISTRY OF AGRICULTURE AND FOOD

David Loukidelis, Information and Privacy Commissioner

April 27, 2001

To the parties:

It has come to my attention that Order 01-15 does not correctly state my finding in respect of one item of information. At para. 37 of the order, I indicated that the "withheld portions of record 4, an e-mail between Ministry employees, do not contain any third party's medical information." The order should in fact state that the last two sentences in the second full paragraph on page 2 of record 4 do contain medical information of a third party who is not a Ministry employee. The finding in para. 38 of the order – that third party medical information cannot be disclosed to the applicant by virtue of s. 22(3)(a) of the *Freedom of Information and Protection of Privacy Act* ("Act") – applies also to that third party medical information. The Ministry is required by s. 22(1) of the Act to withhold the two sentences in record 4 that are described above.

This replaces the Correction issued yesterday, April 26, 2001.

April 27, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia