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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 63-1995
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INQUIRY RE: A decision by the City of Vancouver to refuse access by the NDP Caucus to all fax, telephone, and cellular telephone logs for three separate time periods

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1. Introduction

As Information and Privacy Commissioner, I conducted an inquiry on August 4, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by Mary O'Donoghue (the applicant), Director, Government Caucus Research, for the New Democrat Government Caucus (NDP) of a refusal by the City of Vancouver (the public body) to disclose records of fax, telephone, and cellular telephone records for the following three time periods: January 31, 1993 to September 30, 1993; December 1, 1993 to February 28, 1994; and July 31, 1994 to September 30, 1994.

The statutory ninety-day time limit for this review began on May 9, 1995 and expired on August 7, 1995.

2. Issues

The issues to be resolved in this case are whether the records in dispute were properly withheld under sections 15, 16, 17, 19, and 22 of the Act.

These sections read in appropriate part as follows:

Disclosure harmful to law enforcement

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

(a) harm a law enforcement matter,

...

(d) reveal the identity of a confidential source of law enforcement information,

(d.1) reveal criminal intelligence that has a reasonable connection with the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities,

(e) endanger the life or physical safety of a law enforcement officer or any other person,

....

Section 16: Disclosure harmful to intergovernmental relations or negotiations

16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
(i) the government of Canada or a province of Canada;
(ii) the council of a municipality or the board of a regional district;
(iii) an aboriginal government;
(iv) the government of a foreign state;
(v) an international organization of states,

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

....

Disclosure harmful to the financial or economic interests of a public body

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

(a) trade secrets of a public body or the government of British Columbia;

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

....

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

(e) information about negotiations carried on by or for a public body or the government of British Columbia.

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,

...

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

(g) the personal information is likely to be inaccurate or unreliable, and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

....

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

....

3. Burden of proof

At an inquiry into a decision to refuse an applicant access to all or part of a record, the head of the public body must prove that the applicant has no right of access (section 57(1)). However, under section 57(2), if the record or part to which the applicant is refused access contains personal information about a third party, it is up to the applicant to prove that disclosure of the personal information would not be an unreasonable invasion of the third party's personal privacy. In this case, the City has the burden of proving that the exceptions in sections 15, 16, 17, and 19 apply. The applicant has the burden of proving that the exception in section 22 does not apply.

4. The New Democrat Government Caucus's (NDP) case

The NDP submits that the list provided to it by the City is meaningless, because all of the outgoing call numbers and destinations were severed. (Submission of the NDP, paragraph 3) It wants access to the full records in dispute.

I have found it more appropriate to use the detailed submissions of the NDP on specific sections below.

5. The City of Vancouver's case

The Standing Committee of Council on City Services and Budgets, acting as head of the public body, rejected the application for the records in dispute on two occasions under sections 15, 16, 17, 19, and 22 of the Act. I discuss the specific arguments under each section below, as appropriate. Corporation Counsel for the City and the City Clerk both recommended to the Standing Committee on City Services that the numbers called not be released.

6. Discussion

The records in dispute

Logs for dedicated telephone and facsimile lines for the Mayor's office exist only from June 1994 to date. They are only required for a monthly audit of telephone use. It is apparently accidental that the logs exist prior to February 1995, since the storage disks are normally reused by staff. Billing records for cellular telephones exist for the entire time period. (Submission of the City, p. 2)

The telephone logs record, for incoming calls, the local called, time, and duration of the call. The City chose to disclose them to the applicant. For outgoing calls, the records include the local doing the calling, the outside number called, the name of the city called, and the time

and duration of the call. (Submission of the City, p. 2) The outside numbers called have not been disclosed to the applicant.

Thus the records in dispute consist of the severed portions of telephone and fax logs for the period July 31, 1994 to September 30, 1994 and cellular phone records for the period from September 1993 to September 1994.

Record retention schedules

The City claims that computerized telephone and facsimile logs are transient information and are not scheduled as records of the City. (Submission of the City, pp. 2, 3) Since the logs are clearly "records" under Schedule 1 of the Act and are in the custody and control of the City under section 3(1) of the Act, the City is rather casual in making this assertion about their transiency. Records that are in fact retained, for whatever reason, lose their transitory character and must be treated like any other record under the Act. In my view, such records that facilitate surveillance of a particular population should be kept for the minimum feasible period, absent powerful arguments to the contrary.

Under certain circumstances, for example, a log of the occurrence of a particular phone call, or series of phone calls, might not in fact be transitory records. It might be decided that the phone logs of the Mayor himself or herself should be preserved for historical purposes. Public bodies should have explicit policies on these matters of record retention and destruction and should follow them.

Section 15: Disclosure harmful to law enforcement

The City's argument is as follows:

> The Mayor, Council and City staff are sometimes involved in issues where they make telephone calls to individuals involved in by-law and criminal investigations. Were these telephone numbers to be released, it is possible a confidential source of intelligence may be jeopardised. While the issue discussed is not disclosed in the log, independent information relating to a law enforcement matter and giving the date thereof, could provide the basis to link the telephone number to the incident. (Submission of the City, p. 2)

The NDP's position is that the City has not even attempted to demonstrate specifically, as opposed to hypothetically, that the records in dispute raise law enforcement issues. It suggests that this might only occur on "extremely rare occasions," especially since the data do not disclose the name associated with the phone number or the substance of a phone call. (Submission of the NDP, pp. 3, 4)

The NDP quotes the Information and Privacy Branch's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, Section C.4.6, p. 9, to the effect that the harms test under section 15, as well with respect to the other discretionary sections claimed,

must include objective, detailed, and convincing evidence of the facts that led to the expectation of harm. (Submission of the NDP, p. 4)

The City's claim of potential harm to a law enforcement matter is much too general to be persuasive. The City has not met the burden of proving that disclosure of the records in dispute in this case could reasonably be expected to harm a law enforcement matter.

Section 16: Disclosure harmful to intergovernmental relations or negotiations

The City's argument is as follows:

> The Mayor, Council and senior City Staff are regularly engaged in negotiations with the Provincial Government. The release of these calls could jeopardize these negotiations and cast unreasonable doubts upon city staff as to their future ability to undertake such negotiations. It is reasonable to expect that staff at one level of government should be able to speak with staff at another level of government, in confidence, to explore public policy issues and that these issues should be able to be explored competently. (Submission of the City, p. 2)

The NDP again suggests that the City has made no effort to demonstrate how this section applies specifically to the records, nor has it supported its claims of potential harm. (Submission of the City, p. 4) It further suggests that the vast bulk of such calls are routine.

Since one would expect the Mayor's office to be in regular contact with the Office of the Premier and other government bodies, including ministers, it is hard to imagine how knowledge of a series of phone calls to one party could or would harm intergovernmental relations or negotiations. Unfortunately, the City did not provide some examples, using some of the telephone numbers in the record, to show the kind of harm it was referring to. It is necessary to provide a detailed enough rationale to demonstrate the expectation of harm.

The City has not met the burden of proving that disclosure of the records in dispute could reasonably be expected to result in the harm described in this section.

Section 17: Disclosure harmful to the financial or economic interests of a public body

The City's argument is that:

> When Council or staff are party to intergovernmental negotiations on a variety of subjects, the publicity of calls made to one or more of the parties could jeopardize the negotiations and harm the public body. (Submission of the City, p. 2)

The NDP makes the same objections to the City's attempts to invoke this exception as it did for the previous two. It further relies on my Order No. 1-1994, January 11, 1994, requiring the demonstration of "specific harm" by the presentation of "detailed and convincing evidence of harm" to invoke this exception. (Reply Submission for the NDP, p. 3) I find that the City simply has not done so.

It is also self-evident that the claim of jeopardizing negotiations has less merit if, as in this case, the records are older. Since one would expect the Mayor's office to be in regular contact with the Office of the Premier and other public bodies, including ministerial offices, it is hard to imagine how knowledge of a series of telephone calls to one party, disclosed some time after the fact, would harm the financial or economic interests of a public body.

The City has not met the burden of proving that disclosure of the records in dispute could reasonably be expected to result in the harm described in this section.

Section 19: Disclosure harmful to individual or public safety

According to the City, "[i]ssues of concern here are telephone calls made between Council, staff and members of the public regarding property and by-law complaints or the reporting of criminal activity." (Submission of the City, p. 3)

In addition to commenting on the lack of evidence adduced by the City to rely on this section, the NDP states that "it is difficult to see how a person could be harmed by information merely showing that a call was placed from the Mayor's office to a number." (Submission of the City, p. 5)

On the basis of the limited evidence of harm submitted to me, I find that the City has not met the burden of proving that disclosure of the records could reasonably be expected to harm individual or public safety.

Section 22: Are the records in dispute personal information?

The NDP suggests that the phone logs are not "personal information" under schedule 1 of the Act, because they do not contain names of called parties: "A telephone number, in and of itself, is not 'personal information.'" (Submission of the NDP, p. 6) I disagree. I find that a telephone number, even by itself, is personal information under the Act, because it is specifically mentioned in the schedule. The definition in the schedule also includes "an identifying number, symbol or other particular assigned to the individual." With the exception of the approximately ten percent of telephone numbers in the province that are unlisted, a telephone number identifies subscribers uniquely, although it cannot establish who actually made or received a particular telephone call.

It is an easy matter to use reverse directories to identify the names of subscribers associated with listed phone numbers. Thus I find it disingenuous for the NDP to suggest that the records sought "do not identify any individuals. There are no names attached to the records." (Reply Submission of the NDP, p. 5) But it also argues that a listed phone number is not private information. In my view, the fact that someone has called a phone number listed in the records in dispute is in fact a private matter, if the listing is for a person and not a business. A person calling or being called by the Mayor's office, who has his or her phone number recorded by an automated system, may not in fact be consenting to the disclosure of that private information to a third party.

Section 22: Disclosure harmful to personal privacy [of third parties]

The City notes that this is the only mandatory exception that it relies on, the rest being discretionary. In its view, section 22 in its entirety compels it to refuse the applicant's request on the grounds that disclosure would be an unreasonable invasion of the personal privacy of third parties. It emphasizes that telephone conversations are "widely considered to be among the most sensitive and private of interpersonal contacts." (Submission of the City, p. 3; Reply Submission of the City, p. 1) In fact, the applicant is seeking the records of numbers called, not the substance or contents of conversations.

The City also submits that a phone call from a business line "could be personal in nature, whether to a private or to a business number." (Submission of the City, p. 3) I agree with the City's description on this point.

The NDP notes that the City has not cited any of the presumptions against disclosure in section 22(3) as grounds for exercising an exception, as one would expect. It argues that disclosure of the phone numbers would not in fact be an unreasonable invasion of privacy. (Submission of the NDP, p. 6)

Since sections 22(3) and 22(4) do not apply in this case, I must consider whether the disclosure of the personal information in this case constitutes an unreasonable invasion of privacy under section 22(1). In doing so, I am required to consider the factors set out in section 22(2) and any other factors that I consider to be relevant in the circumstances.

Section 22(2)(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

Both the City and the NDP recognize that this section is an obvious argument for disclosure of the records in dispute. (Reply Submission of the NDP, p. 5) In general, I accept the fact that disclosure of telephone toll records might indeed be desirable for the purposes of public scrutiny covered by this section, if the expectation of not invading personal privacy can be overcome. This factor also needs to be considered in conjunction with the other factors in section 22(2).

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

The City argues that the personal information in the records in dispute was supplied in confidence and, indeed, "the record was collected without the knowledge of the third parties. This compels the City to believe that the Act requires that the record should not be collected in future and must not be released." (Reply Submission of the City, p. 2) This argument cuts both ways, since the City is in fact in possession of personal information about both its own elected leadership and staff and persons (or at least telephone numbers) called. Since the City admits that the data on its telephone logs are used for monthly verification purposes, it is hard to agree that its personnel supplied the information in confidence in the usual sense of that word. In fact, the kind of automatic recording at work in this kind of situation may not even fit the definition of

being "supplied." The Information and Privacy Branch's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, C.4.13, p. 20, says that "supplied in confidence" applies to information that one person "entrusts to another," which is not how the information about telephone calls was collected in the present inquiry.

I find that the records in dispute were not supplied in confidence under the meaning of this section, since the persons being tracked may not have been aware that a record was being created. If public bodies wish to regard telephone toll records as being supplied in confidence by individual employees, they should have formal, written policies to this effect. In particular, employees should be made fully aware of any electronic prints they are creating for themselves in their daily work. Thus, for example, cellular phone users need to know that both local and long distance numbers called are being recorded.

Section 22(2)(g): The accuracy and reliability of the records in dispute

One of the factors under the Act that a public body must keep in mind is whether the disclosure of inaccurate or unreliable records might in other ways unreasonably invade the privacy of third parties. The City argues that multiple telephone lines, call forwarding, other telephone management options, and the availability of lines to other staff and members of the public make it difficult to establish the origins of the record. This is especially true, the City argues, since the applicant seeks to "establish relationships between telephone calls and individuals. The record is not capable of providing such information." (Submission of the City, p. 3) The NDP says that its application does not state that it seeks to establish such a relationship. (Reply Submission for the NDP, p. 4)

I am of the view that any specific information that might be disclosed in this inquiry would likely be "accurate" within the meaning of this section, in the sense that someone from the Mayor's office most likely did call a particular phone number. But it would not be reliable enough to subject the City to public scrutiny.

Section 22(2)(h): The disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant

The City suggests that disclosure will allow the applicant to unfairly harm reputations of individuals who may have been called by the Mayor's office: "As the record will be used to impute actions that the record cannot provide the data to support, its release will unfairly cause damage to individuals' reputations." (Reply Submission of the City, p. 2)

Because persons identified as having been called by the Mayor's office may not have wanted or indeed invited such an approach, and may in fact have rejected it, I find that disclosure of the records in dispute may indeed unfairly damage the reputation of persons identifiable from the record as being the subscriber at a number called.

I make a similar finding with respect to the potential harm from disclosure to the reputations of individual employees. The latter could be unfairly stigmatized for calling a

particular type of help line, 1-800 or 1-900 services, therapists, counselling services for alcoholism or narcotics, or employee assistance plans.

Section 22(4)(e): Information about a third party's position, functions or remuneration as an officer, employee or member of a public body

The NDP argues that this section justifies disclosure of the information in dispute as concerning the functions of employees. (Submission of the City, p. 6) I find that disclosure of telephone records is not required by this section of the Act, because they do not concern the position, functions, or remuneration of an employee of a public body.

Release of telephone toll records by public bodies

The City claims to be aware that other public bodies, including the Office of the Premier, have released business or corporate telephone numbers with personal (home) numbers severed: "The City is also aware of the suspect nature of the record, questionable experience at the provincial level[,] and the serious concerns that staff at the provincial DMIP [Director or Manager, Information and Privacy] level have with the release of this record." (Submission of the City, p. 3) The NDP also states that the Office of the Premier has released similar records without significant exceptions. (Reply Submission of the NDP, p. 5) I should emphasize that I have no knowledge of these matters, since this is a case of first instance for me. If such disclosures have in fact been taking place, it may be necessary for public bodies to re-examine their practices in the light of this order. The Act permits public bodies to exercise considerable discretion with respect to the disclosure of such records.

Section 57: The burden of proof

The City argues that it is unreasonable for it to bear the burden of proof with respect to the application of particular exceptions to individual calls. It states that its reliance on all of the exceptions has led it to predict a reasonable expectation of harm. It argues that it is unfair to expect it to bear the burden of proof "as to personal nature, or validity of other Sections of the Act cited." (Submission of the City, pp. 3, 4)

The NDP notes that the City has the burden of proof in this case and argues that it has not met it for the various sections invoked. (Reply Submission of the NDP, p. 3)

The Act clearly gives the City the burden of proof for sections 15, 16, 17, and 19 of the Act. I note that the applicant bears the burden of proving that disclosure does not constitute an unreasonable invasion of personal privacy under section 22. I discuss the practical aspects of this in the next section.

The pragmatics of severing

The City states that there are 3,264 specific items in the record in dispute. It would be an "impossible burden" to query staff members as to the nature of each call. It also argues that it would be "impossible" to distinguish personal calls on a corporate line. (Submission of the City,

p. 4) Doing this would infringe on privacy rights and "would compromise the ability of the public body to function normally." In its view, there is no practical way to review or sever the record. (Reply Submission of the City, p. 1) Moreover:

> It is clearly unfair to force anyone to reconsider their routine work habits and frustrate their ability to function normally as an employee of a public body because basic privacy rights and fundamental confidences could be compromised by the release of telephone logs. The record was created without the knowledge of staff and the calls made by staff were made in the expectation of complete confidentiality. It is unfair to revoke this expectation of confidentiality. (Submission of the City, p. 4)

The NDP suggests that the City confuses the concept of harm contemplated in the Act with a more general notion of interference when it made this statement. Furthermore, it is the intent of the Act that "it is unfair to the public for staff to continue to conduct business in the old, hidden, ways unless specific exemptions delineated by the Act can be shown to apply in identifiable instances." (Reply Submission of the NDP, pp. 3, 4)

In fact, many public bodies have had to change routine practices in response to the advent of the Act. Records containing personal information should not be created without the knowledge of staff except in unusual circumstances, such as surveillance for disciplinary and/or law enforcement purposes. Staff in practice also have limited legal expectations of confidentiality when they are using means of communication controlled and paid for by a public body and creating records under the Act. But there is a substantial difference between a public body deciding to use telephone toll logs in a review of an employee's performance and my decision to order disclosure of telephone toll records to the public.

Public bodies need to develop written policies concerning the collection, disclosure, linkage, and destruction of personal information in the form of electronic prints created in the workplace. If a legitimate claim can be made that a certain type of data is indeed transitory, then it should be erased automatically at fixed intervals, subject to rational schedules for record retention. Such telephone toll records may be used to monitor the appropriateness of the telephone use. In my view, detailed telephone records should be destroyed once they are no longer needed for verification, audit, or payment purposes. I would like to see the Administrative Records Classification System (B.C. Archives ad Records Service, 1993 edition) updated to reflect shorter retention schedules, where appropriate.

On a related issue, the NDP further argues that the City has failed to show how particular exceptions apply to each item in the records requested. (Submission of the City, pp. 2, 3) I have to say that my staff and I clearly prefer a form of severing that applies specific exceptions to severed information on a line-by-line basis. But in records that I have reviewed in detail during inquiries, I have been accepting of the broader type of application of exceptions followed by the City in this case. In the present inquiry, the City's shotgun approach to the application of many exceptions in the Act has not been effective.

This Order is limited to the circumstances of this case and the submissions presented to me. It may well be that in future some party will be able to present a particular set of facts which create a compelling case for disclosure of telephone toll records on the grounds of, for example, the need for governmental or fiscal accountability. I will address each such matter on its merits, as public bodies should indeed do themselves.

Expectations of confidentiality

I am of the view that employees of public bodies have reasonable expectations of confidentiality in the fact of their creating local and long distance telephone toll records when this information is recorded by automated or manual systems of either the telephone company or the public body. Employees may be making such calls to physicians, family members, child care workers, bankers, or therapists, for example. It appears to be customary for employers to tolerate a reasonable amount of personal telephone use during the work day, as personnel seek to manage their personal lives during normal business hours. Just as staff would expect confidentiality for local numbers dialed, so I think that they are entitled to non-disclosure of long distance toll records to anyone outside of a public body, at least in the circumstances of the present case. The public body has the responsibility of policing telephone use and, indeed, having a policy of charging staff for any personal calls.

I find, under section 22(1) of the Act, that it would be an unreasonable invasion of personal privacy of third parties for the City of Vancouver to disclose the toll records in dispute to the applicant. Thus the City is required to refuse access.

7. Order

Under section 58(2)(c) of the Act, I require the City of Vancouver to refuse access to the records in dispute to the applicant.

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David H. Flaherty
Commissioner

November 21, 1995