Order 02-02

CENTRAL SAANICH POLICE SERVICE

David Loukidelis, Information and Privacy Commissioner
January 23, 2002

Quicklaw Cite: [2002] B.C.I.P.C.D. No. 2
Order URL: http://www.oipcbc.org/orders/Order02-02.pdf
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: The applicant requested the name of an individual who had approached police about distributing posters about the applicant in the community. Police refused access to third party's name, first under s. 19(1)(a) and later also under s. 22. Section 19(1)(a) found not to apply, but police found to have withheld name correctly under s. 22.

Key Words: personal privacy – unreasonable invasion – submitted in confidence – unfair exposure to harm – threaten – mental or physical health – safety – reasonable expectation.

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

Authorities Considered: B.C.: Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 00-11, [2000] B.C.I.P.C.D. No. 13; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 01-26, [2001] B.C.I.P.C.D. No. 27; Order 01-48, [2001] B.C.I.P.C.D. No. 50; Order 01-54, [2001] B.C.I.P.C.D. No. 57.

1.0 INTRODUCTION

[1] This order results from the inquiry under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("Act") that Celia Francis conducted under the authority I delegated to her, on August 27, 2001, under s. 49(1) of the Act.

[2] Celia Francis conducted the inquiry delegated to her and prepared a report, dated January 22, 2002, of her findings and her recommendation for an order under s. 58 of the Act. A copy of that report is appended to this order. I have read her report and make this order on the basis of, and without variation from, the findings and recommendation in that report.

2.0 CONCLUSION

[3] As recommended by Celia Francis, by order under s. 58(2)(c) of the Act, I require the head of the Central Saanich Police Service to refuse the applicant access to the third party's name.

January 23, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

APPENDIX TO ORDER 02-02

**INQUIRY REGARDING THE REQUEST FOR REVIEW
BETWEEN AN APPLICANT AND
THE CENTRAL SAANICH POLICE SERVICE (PUBLIC BODY)**

***REPORT OF THE DELEGATE
OF THE INFORMATION AND PRIVACY COMMISSIONER***

1.0 INTRODUCTION

[1] The applicant in this case made a request under the *Freedom of Information and Protection of Privacy Act* ("Act"), in late December 2000, to the Central Saanich Police Service ("CSPS"), for the name of the individual who spoke to police regarding a poster about the applicant, a copy of which he attached to his request. The CSPS replied in mid-January 2001, telling the applicant that he was asking for personal information about another individual and that it was refusing the applicant access to the information under s. 19(1)(a) of the Act.

[2] Soon after, the applicant requested a review by this Office of the CSPS's decision. He said he believed that someone had approached the CSPS in December to inform them of the intention to distribute a poster about the applicant in his area. The applicant said that he had then contacted the CSPS about the poster. He said he had received a visit from a CSPS officer, Constable Dillon Sahota, who said he was aware that someone was distributing pamphlets about the applicant, that this person had approached the CSPS about this and that he, Constable Sahota, had told the individual that it was a civil, not a criminal matter, and the police would not get involved.

[3] The applicant said that Constable Sahota told him that he could pursue this as a civil matter through the courts. The applicant acknowledged in his request for review that he had "in the heat of the moment ... made some threats towards the said individual in front of" Constable Sahota. The applicant said he believed that this was why the CSPS had rejected his request for the individual's name. He concluded his request for review by saying that he needed this individual's name "so that I can pursue this matter in civil court".

[4] Mediation was not successful and so the matter proceeded to an inquiry under s. 56 of the Act. The Office then adjourned the inquiry so that the third party, that is, the person who had approached the CSPS about the poster and whose name the applicant had requested under the Act, might make representations in the inquiry.

[5] After the Office had received submissions from the three parties (the applicant, the CSPS and the third party), the CSPS then requested the opportunity to make further submissions should the Commissioner determine that he needed them. The Commissioner responded that the notice of written inquiry listed s. 19(1)(a) of the Act as

the only issue in dispute, whereas the CSPS's initial submission, a briefly worded fax, had raised personal privacy concerns. The Commissioner said that this raised the issue of whether the CSPS was required by s. 22(1) of the Act to refuse to disclose the third party's personal information to the applicant.

[6] Because s. 22(1) is a mandatory exception and third-party interests are involved under both that section and s. 19(1)(a), the Commissioner said he said had decided to re-open submissions in the inquiry. He therefore invited the CSPS to provide further evidence and submissions. The CSPS made a further submission on both sections and the applicant and the third party were given the opportunity to comment on that further submission. Only the applicant responded, by reiterating his three-line reply submission.

[7] The Commissioner at that point decided that he could not hear this matter and delegated the matter to me under s. 49(1) of the Act.

2.0 ISSUES

[8] The issues in this case are whether the CSPS is required by s. 22 and authorized by s. 19 of Act to refuse to disclose the third party's name to the applicant. Section 57(1) of the Act places the burden of proof with respect to s. 19 on the public body. Section 57(2) of the Act places the burden on the applicant regarding s. 22.

[9] I have dealt here only with the third party's name as that is the only item the applicant requested. The record which the CSPS provided as containing the information in dispute is a CSPS occurrence report which, I note, contains identifying and other personal information on both the third party and the applicant.

3.0 DISCUSSION

[10] **3.1 Harm to third-party safety or mental or physical health** – 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:

> **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, … .

Applicable principles

[11] Commissioner Loukidelis has addressed s. 19(1)(a) in a number of orders, for example, at paras. 57-60 of Order 01-15, [2001] B.C.I.P.C.D. No. 16. I will not repeat that discussion, but adopt the same approach here.

Does s. 19(1)(a) apply?

[12] The applicant devoted the bulk of his one-page initial submission to providing background information on his request and his initial encounters with the CSPS over the poster. For the most part, it repeated his request for review and did not address the s. 19 issue at all. His reply submission simply stated that he wanted his initial submissions accepted and that he continued to ask for the third party's name so that he could pursue this "as a civil matter in court".

[13] The third party did not address the s. 19(1)(a) issues in her/his *in camera* initial and reply submissions.

[14] The CSPS argued that s. 19(1)(a) applies to the third party's identity in the record in dispute in this case, the one-page document entitled "Occurrence Report" mentioned above. It says that this is not mere speculation and that there is a rational connection between the requested information and harm under s. 19(1)(a), given the statements that the applicant made to Constable Sahota, particularly the applicant's "death threats towards the third party".

[15] The CSPS goes on to argue that it is reasonable to conclude that harm may result to the individual who approached the CSPS about putting up posters, because of the nature of the incident underlying the applicant's request. It continues:

> Furthermore, the fact that the CSPS did not pursue charges against the Applicant at the time he made the death threats does not mean that he may not be a threat in the future to the Third Party if the name of the Third Party is disclosed to him. The CSPS has also taken into account the Applicant's criminal record.

[16] The CSPS provided a few lines of further argument on this point on an *in camera* basis (paras. 22-24, further initial submission).

[17] The CSPS also supplied open and *in camera* affidavit evidence in support of its arguments on s. 19(1)(a). Constable Dillon Sahota deposed, in the open part of his affidavit, as to his dealings with the applicant, after the applicant learned that someone had put up posters about him in the community and he had called the CSPS:

> 8. [The applicant] was extremely irate over the posters. [The applicant] immediately began to make death threats towards the individual who had put up the posters. He indicated that he wanted to kill this person, and that the police had better find this individual before he does, otherwise we would never see this individual again. [The applicant] ranted on about these threats for over five minutes. He demanded that I tell him who this individual was.
>
> 9. I decided not to pursue charges against [the applicant]. The subject was on probation at the time for sexual assault. He was advised to calm down, and take the necessary action through the proper channels. He was told that the

> proper remedy might be of a civil nature. I did not provide the identity of the individual to [the applicant].

[18] Constable Sahota also provided brief additional evidence on this point on an *in camera* basis and then concluded in an open part of his affidavit by expressing the opinion that it is not in the public interest to provide the third party's identity to the applicant. He said that doing so could, in his view, result in harm to the third party or others known to that person. He based his opinion, he said, on the applicant's criminal record, the death threats the applicant had made and his conversation with the individual who put up the posters (paras. 11 and 12, Sahota affidavit).

[19] The issues and arguments in this case overlap, in my view, with those discussed at paras. 21-27 on s. 15(1)(f) and paras. 32-35 on s. 19(1)(a) in Order 01-48, [2001] B.C.I.P.C.D. No. 50. That order dealt with a case involving long-standing bad relations between an applicant and a third party, where the applicant and third party knew each other's identity. The public body considered the situation to be "volatile and potentially dangerous" and one of "animosity and violence". Relations between the two men included unpleasant verbal exchanges and the public body referred to an incident, supposedly a "physical altercation", in which the RCMP were called in. The third party expressed concern in his inquiry submission that the applicant might harm him if the applicant received his letters. However, the public body provided no details or records to support the allegation of "violence" nor the physical nature of the incident in which the RCMP were called in. Commissioner Loukidelis found that "the evidence before me does not support the conclusion that disclosure of the letters could reasonably be expected to 'endanger' anyone's life or safety … ", in the case of s. 15(1)(f), and that the public body was also not entitled to rely on s. 19(1)(a).

[20] Similarly, at paras. 61-76 of Order 01-15, [2001], B.C.I.P.C.D. No. 16, Commissioner Loukidelis found that s. 19(1)(a) did not apply. The applicant in that case was considered by employees of the public body to be "angry, verbally abusive and unpredictable". Some of those employees had expressed concerns for their mental and physical health should the applicant receive their names in the records. The public body provided no details of the applicant's supposed "threatening" behaviour or "abusive" language, nor why it considered him to be "unpredictable. The Commissioner said that the upset or unpleasantness of dealing with a difficult or unreasonable person did not suffice. He was not persuaded by the public body's arguments and found that s. 19(1)(a) did not apply in that case.

[21] Returning to this case, I found the third party's submissions particularly telling. I am unable to discuss them in any detail, as to do so would reveal that person's identifying and other personal information. However, I find it noteworthy that the third party expressed no concern whatsoever for her/his safety or physical or mental health and volunteered no argument, evidence or other support for a s. 19(1)(a) case, even after receiving the applicant's and public body's submissions containing the information on the "death threats".

[22] I also considered the factors that the CSPS said that it took into account in applying s. 19(1)(a), principally, the applicant's "death threats" against the third party and the applicant's criminal record. The CSPS did not provide any details of the "death threats", which the applicant admits making. It did not say if it considered the "death threats" serious enough to warn the third party, although it does say it did not charge the applicant for making the threats. Based on the various parties' submissions (some of which I cannot discuss here), however, it does not, in my view, follow that disclosure of the third party's name to the applicant could reasonably be expected to lead to harm as contemplated by s. 19(1)(a).

[23] The CSPS also provided no information on the nature of the applicant's record, beyond saying it was for "Indecent Assault of a Female". It evidently believes that the applicant's criminal record in itself helps to establish its s. 19(1)(a) case. It provides no argument, however, as to how one might draw such a conclusion. I therefore do not consider the applicant's criminal record assists the CSPS's s. 19(1)(a) case.

[24] The CSPS also seems to have relied on Constable Sahota's conversation with the third party, which he deposed had helped him conclude that release of the third party's name might lead to harm to the third party or others. Constable Sahota did not specify, however, what part of that conversation assisted him in arriving at this conclusion.

[25] Beyond these points just discussed, the CSPS did not provide any other argument or evidence, such as details of the applicant's past behaviour or actions, or any other information that would allow a reasonable person, unconnected with this matter, to conclude that release of the information could reasonably be expected to result in the harm described in s. 19(1)(a). In arriving at this view, I have considered the matter carefully, as indicated by Order 00-02, [2000] B.C.I.P.C.D. No. 2.

[26] For all of these reasons, I find that s. 19(1)(a) does not apply to the information in dispute.

[27] **3.2 Personal privacy** – The Commissioner has discussed the process for applying s. 22 in many orders, for example, at paras. 22-25 of Order 01-53, [2001] B.C.I.P.C.D. No. 56. I see no need to repeat that discussion, but adopt the same approach in applying s. 22 here. To begin, there is no doubt that the third party's name is personal information.

[28] The CSPS argues that ss. 22(1) and 22(3) apply to the record in dispute. It says that it considered the relevant factors in sections 22(2)(c), (e) and (f). I reproduce these sections below:

> **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
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> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
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> …
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> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence, … .
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation, … .

Investigation into a possible violation of law

[29] The CSPS argues (at para. 27, further initial submission) that the information in dispute in this case falls under s. 22(3)(b), as

> … a preliminary investigation in relation to the Applicant was started by Constable Sahota in response to the inquiry by the Third Party about the matter at issue. This preliminary investigation into a possible violation of law by the Applicant could lead to evidence that the Applicant had breached his probation and could have led to the swearing of an Information seeking a Recognizance.

[30] The CSPS provided affidavit evidence to support this argument from the Deputy Chief Constable of the CSPS, Clayton Pecknold, who deposed that he had reviewed the relevant police files. He also deposed that Canadian Police Information Centre ("CPIC") records revealed that the applicant had been convicted in 2000 of "Indecent Assault of a Female contrary to Section 149(1) of the *Criminal Code*" (para. 4, Pecknold affidavit). He further deposed as follows:

> 5. The information and record in dispute pertain to a December 2000 inquiry by a member of the public. That member of the public sought consultation and advice from Constable Sahota of the Central Saanich Police Service. Though no lengthy criminal investigation resulted from this consultation, Constable Sahota embarked on upon a preliminary investigation into a possible violation of the law by the Applicant in this Inquiry. He investigated the Applicant's background through computer queries and otherwise to satisfy himself as to the need for further action and investigation in the public interest.

> 6. Constable Sahota's preliminary investigation could have resulted in a number of outcomes. Had he found evidence that the Applicant had breached his probation he could have sworn a charge of Breach of Probation contrary to Section 733.1(1) of the *Criminal Code*. As well, Sections 810, 810.1 and 810.2 of the *Criminal Code* permit the swearing of an information seeking a Recognizance with conditions against a possible offender in order to proactively protect the public and circumscribe the conduct of a possible offender.

[31] The CSPS provided further affidavit evidence, including brief *in camera* evidence, in support of this argument from Constable Sahota himself (paras. 4, 9 and 12, Sahota affidavit).

[32] Having considered the argument and evidence, including *in camera* evidence, I find that s. 22(3)(b) of the Act applies to the third party's name.

Fair determination of the applicant's rights

[33] The CSPS acknowledges that the fact that the applicant wants to know the name of the third party so that he can pursue a civil action is a relevant circumstance to take into consideration in this case. This does not, the CSPS argues, necessarily overcome the presumption in favor of non-disclosure set out in s. 22(3)(b). It points out that the applicant can still use procedures under the *Rules of Court* to seek disclosure of records relevant to the court process. The CSPS will not, as a general rule, take a position in such a case, it says (para. 30, further initial submission; para. 11, Pecknold affidavit).

[34] The Commissioner has considered this type of argument in a number of orders, for example, Order 01-54, [2001] B.C.I.P.C.D. No. 57. The Commissioner has generally found that disclosure is not relevant to a fair determination of the applicant's rights, which he has found to mean "legal rights". In Order 01-54, the Commissioner quotes from Order 00-02 as follows:

> This is not to say that the availability of document discovery in civil litigation displaces the Act and does not allow it to be used by applicants. I am only saying that s. 22(2)(c) does not, in this particular case, favour disclosure. Whether the applicant will fare any better in a lawsuit he might see fit to commence is another matter.

[35] The applicant's submission to this inquiry contained very little that was relevant to the issues before me, except in the last sentence of his initial submission. He says there that he needs to know the third party's name in order to proceed with a civil matter. The third party does not address this aspect of the matter at all.

[36] In my view, it is open to the applicant in this case to seek the third party's name through the court process. For reasons similar to the Commissioner's in Orders 00-02 and 01-54, therefore, I conclude that disclosure of the information in dispute in this case

is not relevant to a fair determination of any legal rights the applicant may have. I find that s. 22(2)(c) of the Act does not apply here.

Unfair exposure to harm

[37] The CSPS also argues that s. 22(2)(e) applies in this case, for much the same reasons as s. 19(1)(a) applies (para. 32, further initial submission). I earlier discussed the CSPS's arguments regarding s. 19(1)(a) and reject them here for the same reasons.

[38] Again, the third party does not address this aspect of the CSPS's case and offers no comment about any harm to which she/he might be unfairly exposed on disclosure of her/his name to the applicant.

[39] The CSPS and the third party do not say if they consider the possibility of a legal action by the applicant against the third party to be unfair exposure to harm as contemplated by s. 22(2)(e). Even if they do, however, I am not persuaded that the applicant's pursuit of this matter through the courts would expose the third party unfairly to harm.

[40] For these reasons, I find that s. 22(2)(e) is not a relevant circumstance in this case.

Confidential supply

[41] The CSPS argues, finally, that the third party had supplied the information in dispute in confidence. It goes on to say that police officers are subject to rules regarding disclosure of information and it is common police procedure not to release the identity of victims, witnesses, complainants and other members of the public, unless necessary to further law-enforcement investigation. The CSPS argues that the affidavit evidence it submitted permits one to conclude that the information was supplied implicitly in confidence. It says that the Commissioner acknowledged in Order 00-02 that findings of confidential supply depend on the facts of the case and that is possible to make a finding of confidential supply even where there are no "explicit markers". Deputy Chief Constable Pecknold supported these arguments in his affidavit. He also stated that the CSPS is subject to confidentiality conditions as part of subscribing to the Police Information Retrieval System ("PIRS"), a records management system that the RCMP administers (paras. 21 and 33-36, further initial submission; paras. 7-9, Pecknold affidavit).

[42] As was apparently the case in Order 00-02, the record here bears no markers of confidential supply, explicit or implicit. I note that in Order 00-02, Commissioner Loukidelis said that he had the benefit of affidavit evidence that "clearly permits one to conclude that the information was implicitly supplied in confidence … ". Such affidavit or other evidence in this case is, in my view, not as clear.

[43] With affidavit support from Deputy Chief Constable Pecknold, the CSPS simply points out that police officers are subject to rules regarding the disclosure of information and says that it is "common police procedure not to release the identity of victims,

witnesses, complainants and other members of the public, unless it is necessary to further a law enforcement investigation" (paras. 33-34, further initial submission; paras, 7-9, Pecknold affidavit). This is not enough, in my view, to support the argument that the third party supplied the information in dispute in confidence.

[44] Moreover, Constable Sahota says nothing in his affidavit about any assurances he may have given the third party when speaking with that person about the posters, nor does the third party directly address this issue. The third party did, however, express concern about disclosure of any identifying information and I infer from the general tenor of the third party's submissions that this individual approached the CSPS in confidence about the intention to distribute posters about the applicant in the community. On this basis, I am therefore satisfied that the third party supplied the information in the record in dispute implicitly in confidence. I find that the relevant circumstance in s. 22(2)(f) applies in this case and that it favours withholding the third party's name.

The CSPS's chilling argument

[45] As part of its argument on confidential supply, the CSPS argues that there would be a chilling effect on victims of crime and other members of public if the identity of individuals such as the third party (who, it acknowledged, was not a victim of crime) were released, and that they would not therefore approach the police for assistance. This is particularly important, it said, in dealing with matters of sexual abuse or relationship violence where victims are often reluctant to ask the police for assistance. It supplied *in camera* argument and open and *in camera* affidavit evidence on this point (para. 35, initial submission; paras. 9 and 10, Pecknold affidavit; paras. 4 and 12, Sahota affidavit).

[46] Commissioner Loukidelis has rejected this type of argument in a number of orders, for example, Order 00-11, [2000] B.C.I.P.C.D. No. 13, and Order 01-26, [2001] B.C.I.P.C.D. No. 27. He did so most recently in Order 01-54. The CSPS's argument on this point is again speculative. It has provided no evidence to back up its assertion that disclosure of the third party's identifying information would discourage others from coming to the police for assistance. I note also that the third party does not directly address this issue in her/his submission. I am not convinced in this case that there would be any such "chilling effect" and find that there is no such relevant circumstance for the purposes of s. 22(2) of the Act.

Does s. 22(1) apply?

[47] The CSPS argues generally that this section applied to the third party's name, although it does not elaborate on this point. The applicant says very little on s. 22, as mentioned above, even though he had the burden of proof regarding s. 22, and provided nothing to counter the presumed invasion of privacy in s. 22(3)(b). The applicant has not, in my view, met his burden regarding s. 22 and has not rebutted the presumed invasion of privacy in s. 22(3)(b). Section 22 requires the CSPS to withhold the third party's name in this case.

4.0 CONCLUSION

[48] For the reasons given above, I recommend that the Information and Privacy Commissioner make an order under s. 58(2)(c) of the Act confirming the decision of the CSPS to refuse, under s. 22 of the Act, to give the applicant access to the third party's name.

January 22, 2002

ORIGINAL SIGNED BY

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Celia Francis