

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 81-1996
January 25, 1996**

INQUIRY RE: A decision by the Cowichan Valley Regional District to refuse the media access to records relating to a former employee

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner on November 17, 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 P. Brian LePine, Editor of the Cowichan Valley News Leader-Pictorial (the applicant) of the decision of the Cowichan Valley Regional District (CVRD) to refuse access, under sections 12.1, 17, 21, and 22 of the Act, to information respecting a former employee (the third party).

2. Documentation of the inquiry process

The applicant submitted a request by letter dated June 30, 1995. It was framed as a series of questions about the circumstances of the termination of the third party's employment, especially as to the terms of any monetary settlement reached between the CVRD and the third party on June 14, 1995. The applicant also wanted to know whether the third party was fired or resigned and the details of any conflict of interest allegations.

The CVRD refused access to all relevant records by letter dated August 4, 1995. The applicant's request for review was received at my office on August 31, 1995. The CVRD did not want to attempt a mediated settlement of the matter (as is our usual practice) and asked, through its Counsel, that the matter proceed directly to an inquiry. On October 2, 1995, Mr. Michael Woodward, as Counsel, provided my office with a copy of the records, together with *in camera* arguments against disclosure.

Subsequently, following the issue to all parties of a Notice of Inquiry, Mr. Woodward asked that his earlier submissions be the CVRD's arguments for the purposes of the inquiry. Thereafter, he provided two sets of submissions, one *in camera* and the other for the applicant

and the third party. At that time, Mr. Woodward added section 14 as an additional exception for one 3-page document.

3. Issue under review at the inquiry and the burden of proof

The issues under review in this inquiry are the application of sections 12.1, 14, 17, 21, and 22 of the Act to information contained in 33 pages of records.

Under section 57(1), it is up to the CVRD to prove that the applicant has no right of access to the records under sections 12.1, 14, 17, and 21. However, since the CVRD has claimed the exception provided by section 22 for some information contained in the records, it is up to the applicant, under section 57(2), to prove that disclosure of that information would not be an unreasonable invasion of the third party's personal privacy.

Local public body confidences

12.1(1) The head of a local public body may refuse to disclose to an applicant information that would reveal

...

- (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

....

Legal advice

14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

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:

....

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

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

- (a) that would reveal
...
- (ii) commercial, financial, labour relations, scientific or technical information of a third party,

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

...
(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,
...

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

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

(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,
....

4. The records in dispute

There are 33 consecutively-numbered pages of records made up of 12 separate documents, further numbered 1 through 12. They are described below. I note, however, that

records 5 and 6 (pages 8 to 10) are in fact either public records, or records which the public body is willing to disclose, and are not at issue in this inquiry.

5. The News Leader-Pictorial's case as the applicant

The applicant's argument is that the public has a right to know the conditions of any settlement between the CVRD and its former employee and that disclosure of the information would not amount to an unreasonable invasion of the third party's personal privacy, because the third party was employed by the CVRD and compensated with public funds.

6. The Cowichan Valley Regional District's case as the public body

Since the submissions of the CVRD were organized around each separate record and applied specific sections of the Act to each, I have chosen to discuss each argument below in the context of a review of each record. The CVRD primarily relied upon six different parts of section 22. In each instance, it made approximately the same argument as to why each section should apply to the document in dispute.

From a more general perspective, the CVRD did argue as follows, on the basis of my Order No. 62-1995, November 3, 1995:

[W]e submit that it is not, in the context of bargaining unit employees, possible to distinguish the case where any disciplinary step short of dismissal has occurred (such as the reprimand or suspension that one infers happened in the Delta School Board case) and the case of a dismissal. Similarly, we submit that the public is not to be given access to events occurring during the course of a grievance procedure which, in any given case, may result in a resolution of the disciplinary grievance. We submit that such items are intended under the FOIPPA to remain personal information, and to remain exempt from disclosure under the Act. (Submission of November 15, 1995, p. 2)

The CVRD added, more generally, that it is "an ordinary and fundamental component of successful labour relations that memoranda pertaining to an investigation, which has the potential to result in disciplinary action (up to and including dismissal) is generated and received on the basis that it will remain in confidence." Although the CVRD made this submission to me on an in-camera basis with respect to several of the records in dispute, it is my view that its general argument must be on the record, because of its direct relevance to the issues under inquiry. Further, this aspect of the submission does not reveal the contents of the records in dispute or contain information that may be subject to an exception under the Act.

7. The third party's case

The third party is opposed to disclosure but did not make any submissions, since he or she was content to let the CVRD argue the matter.

8. Discussion

The importance of mediation

This is the first case before me where a public body has essentially refused to mediate a matter. Section 55 of the Act authorizes me to appoint “a mediator to investigate and to try to settle a matter under review.” That is the ongoing, primary obligation of the Intake Officers and Portfolio Officers who handle all requests for review that come to my office. There have been more than 1,800 such requests for review in the past two years. One of the considerable achievements of my colleagues has been a settlement rate for such cases of more than ninety percent. That high rate is in fact almost the only way that my office can implement the Act in a cost effective manner that produces results for applicants and taxpayers.

Applicants and public bodies should make full use of the mediation services offered by my office.

What is publicly known about this matter

Document No. 5, which is not in dispute, is a copy of a draft press release concerning the third party and the CVRD (which was not in fact released). It indicates that “[b]oth parties have agreed to resolve this matter to their mutual satisfaction. Due to the length of time it has taken to get to the arbitration stage, [the third party] has chosen to move on to other areas of interest.” The clear implication is that there has been a dispute and that it has been settled short of arbitration with an employee leaving the employ of the CVRD on terms that are not announced.

The issue now in dispute becomes the right of the public, including the media, to learn what happened and the extent to which any expenditure of public funds was involved.

Section 12.1(1)(b): the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes holding that meeting in the absence of the public

In interpreting this section, I rely on my Order No. 48-1995, July 7, 1995 in which I stated with respect to section 12(1), that:

In my view, the ‘substance of deliberations’ includes records of what was said at Cabinet, what was discussed, and recorded opinions and votes of individual ministers, if taken its scope includes a range of records which would reveal what happened in Cabinet. The operative word is ‘deliberations.’

What is meant to be protected is the ‘substance’ of Cabinet deliberations, meaning recorded information that reveals the oral arguments pro and con for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision

I agree that disclosure of a record would ‘reveal’ the substance of deliberations if it would permit the drawing of accurate inferences with respect to the substance of those deliberations

I have applied this distinction below to documents 2 to 4 in the context of a municipal *in camera* meeting.

Section 21(1)(a)(ii): disclosure harmful to business interests of a third party

The CVRD has sought to apply this specific part of section 21 to documents 1, 2, 3, 4, 7, 8, 9, 10, 11, and 12 on the grounds that the information in dispute is “labour relations information of a third party.” All of these arguments are of no relevance in the context of this section, since it includes a three-part test, each component of which has to be met if a record is going to be excepted from disclosure under the Act. The CVRD cannot meet the three-part test by arguing only one.

Given this situation, I have not addressed the claimed application of this section to various documents in dispute.

Section 22(3)(b): the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation

The CVRD has applied this section to records 8 to 12. Based upon my review of these records and the submissions made on this point, I conclude that the personal information in dispute is “part of an investigation into a possible violation of law.” Accordingly, this section creates a presumption against disclosure, which can be applied to four of these documents (as noted below) in the way that the CVRD has done.

Section 22(3)(d): the personal information relates to employment, occupational or educational history

Disclosure of information that fits into this category is also presumed to be an unreasonable invasion of a third party’s personal privacy. The CVRD has applied this section to each of the ten records actually in dispute. In Order No. 52-1995, September 15, 1995, p.6, I stated: “Once a person has been hired, I am inclined to view what is put in his or her personnel file about his or her hiring as then being covered by section 22(3)(d).” I now find that what happens up until a person’s employment ends is also part of the personnel file and is thus also covered by this section.

The Policy and Procedures Manual of the Information and Privacy Branch of the Ministry of Government Services defines employment and occupational history as follows at C.4.13, p. 28:

‘Employment history’ refers to any information regarding an individual’s work record. This includes the name of her or his employer, the term of employment, the duties associated with the position, the salary and the reasons for leaving.

‘Occupational history’ refers to any information on a person’s profession, business or calling, temporary or regular employment, and includes details of how a person spends their time.

Documents 1 and 7 to 12 in this case do concern information relating to the employment history of the third party, which means that there is a presumption under the Act that their disclosure would be an unreasonable invasion of the third party’s personal privacy. I apply this presumption to the specific records below.

Section 22(3)(g): the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party

Disclosure of information that fits into this category is again presumed to be an unreasonable invasion of a third party’s personal privacy. As noted further below, the CVRD has applied this section to six of the ten records actually in dispute (7 to 12).

The Policy and Procedures Manual of the Information and Privacy Branch of the Ministry of Government Services defines “personnel evaluations” in this context to include “job performance appraisals.” (C.4.13 at p. 31) I apply this definition below to certain of the records in dispute.

Detailed review of the records in dispute

Counsel for the CVRD argues that full description of certain records could disclose sensitive information. Thus I have relied on the identifiers for each document presented to me in an open submission rather than the actual titles for certain of them. And I have identified the contents of the records only to the extent that it is plausible for the applicant and interested members of the public to already know or infer the broad outlines of what happened in this matter.

Document No. 1 (Page 1): A Form

This form indicates the nature of the dispute that underlies this inquiry. It is my understanding that such information is normally withheld from disclosure and treated confidentially in standard labour law practice. As per my discussion above, I also find that the document in dispute concerns employment and occupational history of the third party under the Act and thus falls under section 22(3)(d).

Document No. 2 (Pages 2-5): In Camera Meeting Minutes

Slightly more than one page of this record of a meeting concerns the third party and the CVRD in connection with a specific matter. The descriptive information in these paragraphs

generally discloses the “substance of deliberations” as discussed above and as revealed in the records in dispute and thus may be withheld under section 12.1(1)(b). Section 783(7) of the *Municipal Act* authorizes the holding of such a meeting on an *in camera* basis.

Document No. 3 (Page 6): Document

I find that disclosure of this record would reveal the substance of deliberations under section 12.1(1)(b) and may thus be withheld. I cannot further describe it without revealing sensitive personal information of the third party and the substance of deliberations of the CVRD.

Document No. 4 (Page 7): Letter

I find that disclosure of this record would reveal the substance of deliberations under section 12.1(1)(b) and may thus be withheld. I cannot further describe it without revealing sensitive personal information of the third party and the substance of deliberations of the CVRD.

Document No. 7 (Pages 11-12): November 24, 1994 Letter

This is a two-page letter from senior management of the CVRD to the third party.

Section 22(3)(d) concerns personal information that relates to employment, occupational, or educational history. I find that this record falls into this category, since it concerns the activities of the third party as an employee of the CVRD. Thus disclosure of this information would be an unreasonable invasion of the privacy of the third party under section 22(1).

Section 22(3)(g) contains the presumption against disclosure of personal information that consists of personal recommendations or evaluations, character references or personnel evaluations about the third party. On the basis of the discussion above, I find that document no. 7 falls into the category of personnel evaluations and that its disclosure, under the Act, would be an unreasonable invasion of the privacy of the third party.

Document No. 8 (Pages 13-16): November 14, 1994 Memorandum

This is a four-page memorandum from the third party to senior management of the CVRD in response to document no. 9; it has the same characteristics as documents 10 and 12.

Section 22(3)(b) is relevant, because the memorandum concerns information compiled for an investigation into a possible violation of law. In this limited sense, such information supplied by a third party to a public body can be construed as falling into this category of exempt record. In this case, the third party was supplying information to his superiors that they had requested from him.

Section 22(3)(g) contains the presumption against disclosure of personal information that consists of personal recommendations or evaluations, character references or personnel evaluations about the third party. Since the third party provided this information to management of the CVRD, I do not see any way in which it could be found to fall into this category of

excepted record. For this exception to be activated, the personal information about a third party must be provided by someone other than the third party himself or herself.

Section 22(3)(d) concerns personal information that relates to employment, occupational, or educational history. I find that the substance of this record falls into this category, since it describes the work-related activities of the third party as an employee of the CVRD. Thus disclosure of this information would be an unreasonable invasion of the privacy of the third party under section 22(1).

Document No. 9 (Pages 17-19): November 9, 1994 Memorandum

This is a memorandum, with supporting documentation, from senior management of the CVRD to the third party. As per my discussion above and below of these separate sections, I find that sections 22(3)(b) and (d) create a presumption that disclosure of this personal information would be an unreasonable invasion of the third party's personal privacy under section 22(1).

Document No. 10 (Pages 20-24): October 4, 1994 Memorandum

This memorandum, with supporting documentation, is a response by the third party to a request for information from management of the CVRD. It is very similar to Document No. 12 in this respect and, in my judgment, the same conclusions can be drawn about the CVRD's attempted use of exceptions.

Section 22(2)(f) weighs against disclosure, because there is implicit evidence that the information in this record was supplied in confidence.

Section 22(3)(b) is relevant, because the memorandum concerns information compiled for an investigation into a possible violation of law. In this limited sense, such information supplied by a third party to a public body can be construed as falling into this category of exempt record. In this case, the third party was supplying information to his superiors that they had requested from him.

Section 22(3)(g) contains the presumption against disclosure of personal information that consists of personal recommendations or evaluations, character references or personnel evaluations about the third party. Since the third party provided this information to management of the CVRD, I do not see any way in which it could fall into this category of excepted record. For this exception to be activated, the personal information about a third party must be provided by someone other than the third party himself or herself.

Section 22(3)(d) concerns personal information that relates to employment, occupational, or educational history. I find that the substance of these records falls into this category, since it describes the work-related activities of the third party as an employee of the CVRD. Thus disclosure of this information would be an unreasonable invasion of the privacy of the third party.

Document No. 11 (Page 25): October 3, 1994 Memorandum

This one-page letter largely concerns the handling of a process then underway. The CVRD has claimed that five separate sections of the Act prevent disclosure. Because of the nature of the document, it is difficult to see how any of these exceptions have generic application to this record. However, there is a mosaic effect at work in this inquiry where the disclosure of one piece of the puzzle may disclose everything. Thus, I find that this record must be withheld under section 22(3)(d).

Document No. 12 (Pages 26-33): September 30, 1994 Memorandum

This two-page memorandum is about the work activities of the third party with accompanying documentation. The CVRD has sought to apply five separate exemptions to this record. Section 22(2)(f) weighs against disclosure, because there is implicit evidence that the information in this record was being supplied in confidence.

Section 22(3)(b) is relevant, because the memorandum concerns information compiled for an investigation into a possible violation of law. In this limited sense, information supplied by a third party to a public body can be construed as falling into this category of exempt record. In this case, the third party was supplying information to his superiors that they had requested from him.

Section 22(3)(g) contains the presumption against disclosure of personal information that consists of personal recommendations or evaluations, character references or personnel evaluations about the third party. Since the third party provided this information to management of the CVRD, I do not see any way in which it could fall into this category of excepted record. For this exception to be activated, the personal information about a third party must be provided by someone other than the third party himself or herself.

Section 22(3)(d) concerns personal information that relates to employment, occupational, or educational history. I find that the substance of these records falls into this category, since it describes the work-related activities of the third party as an employee of the CVRD. Thus disclosure of this information would be an unreasonable invasion of the privacy of the third party.

The burden of proof

The applicant had the burden of proof in this inquiry to establish that disclosure of the personal information involved would not be an unreasonable invasion of the personal privacy of the third party. Since the applicant simply asserted that this would not be the case, I find that he did not meet his burden of proof. In particular, the applicant has not rebutted the presumption against disclosure established under various parts of section 22(3) of the Act. Having read the records myself, I do not see how he could have done so under section 22. Thus I find that disclosure of the information contained in documents 1, 7, 8, 9, 10, 11, and 12 would be an unreasonable invasion of the third party's personal privacy under section 22(1) of the Act.

I am satisfied that the Cowichan Valley Regional District has met its burden of proof to establish that disclosure of the information in documents 2 to 4 would reveal the substance of deliberations of a *in camera* meeting, as contemplated in section 12.1(1)(b).

9. Order

I find that the Cowichan Valley Regional District is required under section 22 of the Act to refuse access to documents 1 and 7 to 12. I also find that the CVRD is authorized, under section 12.1, to refuse access to documents 2 to 4. Under section 58(2)(c), I require the head of the CVRD to refuse to give the applicant access to documents 1 and 7 to 12. Under section 58(2)(b), I confirm the decision of the head of the CVRD to refuse to give the applicant access to documents 2 to 4.

David H. Flaherty
Commissioner

January 25, 1996