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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 184-1997
August 15, 1997

INQUIRY RE: A request by an applicant for records relating to her former employment with the Ministry of Health and Ministry Responsible for Seniors

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on June 30, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review in which the applicant seeks information from the Ministry of Health and Ministry Responsible for Seniors (the Ministry) for records relating to her former employment with that Ministry. Certain information, and certain records, have been withheld by the Ministry on the grounds that release will harm its interests, particularly as they relate to the conduct of a forthcoming arbitration between the applicant and the Ministry.

2. Documentation of the inquiry process

On August 9, 1996 the applicant requested from the Ministry "a copy of all documents on file in the [a particular] Health Unit offices and in the [a particular] Human Resources Office which pertain to my employment with the Ministry of Health, including all pertinent meeting notes, performance evaluations or notes thereto, and other notes regarding my employment or personnel issues regarding me." On October 31, 1996 the Ministry provided the applicant with severed copies of the requested records. Severances were initially made under sections 13, 14, 15(1)(a), 17(1), and 22(1) of the Act.

On November 15, 1996 the applicant wrote to my Office to request a review of the decision by the Ministry to withhold the severed information.

Mediation by the Office resulted in the disclosure of newly-severed copies of the records to the applicant on January 7, 1997. The Ministry also withdrew its application of

section 14 of the Act to the records. Additional records were subsequently disclosed to the applicant on February 4, 1997.

The ninety-day review period expired on February 17, 1997. However, on February 7, 1997 both parties gave consent to extend the original deadline to April 17, 1997. On March 25, 1997 my Office gave notice to the applicant and the Ministry of the written inquiry to be held on April 17, 1997. On April 3, 1997 the applicant and the Ministry agreed to a further extension of time and extended the amended deadline of April 17, 1997 to a new inquiry date of not later than May 30, 1997. On April 10, further records were disclosed to the applicant and, on April 24, 1997, another package of records was disclosed to the applicant. Subsequently, on May 6, 1997, the applicant and the Ministry agreed to further amend the inquiry deadline by extending it to June 30, 1997.

3. Issue under review and the burden of proof

The issue under review is the Ministry's application of sections 13, 17(1), and 22 of the Act to the records requested by the applicant. The relevant portions of the Act are:

Policy advice or recommendations

13(1) The head of 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.

(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

...

(d) an appraisal,

...

(l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,

...

(n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

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:
> ...
> (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;
> ....

Disclosure harmful to personal privacy

> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
> ...
> (c) the personal information is relevant to a fair determination of the applicant's rights,
> ...
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> (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.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under sections 13 and 17 it is up to the public body, in this case the Ministry, to prove that the applicant has no right of access to the record or part of the record.

Under section 57(2), if the record or part that the applicant is refused access to under section 22 contains personal information about a third party, it is up to the applicant

to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

4. The records in dispute

The records in dispute consist of fourteen pages from which there has been minimal severing. The greatest single amount of severing is one page from a letter directed to the Acting Deputy Minister containing a recommendation that the applicant be rejected on probation.

The balance consists of 177 pages, most of which have been provided to the applicant. However, the Ministry has chosen to withhold these records on the basis that they form the contents of a binder prepared by the Public Service Employee Relations Commission (PSERC), containing the substance of the Ministry's case, in anticipation of the grievance arbitration at which the applicant's substantive employment concerns will be adjudicated.

5. The applicant's case

As the circumstances in this Order are identical to those outlined in Order No. 183-1997, August 14, 1997, I am not repeating similar information by way of background. I have presented below submissions made on the application of specific sections of the Act for purposes of severing.

6. The Ministry's case

The Ministry has relied on my Order No. 158-1997, April 10, 1997, p. 8, with respect to the disclosure of information about labour relations in this inquiry: "The Public Body has only refused access to a relatively small amount of information which would explicitly or implicitly reveal advice or recommendations regarding the 'rejection on probation' of [the applicant]." (Submission of the Ministry, paragraphs 5.03, 5.04)

I have discussed below aspects of the Ministry's submissions on the application of specific exceptions to the records in dispute.

7. Discussion

Since this Order follows directly on my last Order (Order No. 183-1997, August 14, 1997), dealing essentially with the same factual issues, I am not repeating information about context. The Ministry has informed me that the applicant has not been "dismissed" by it but was offered an opportunity to return to her previous position, an offer to which she did not respond. (Submission of the Ministry, paragraph 1.03) The applicant contests this claim. (Reply Submission of the Applicant, pp. 2, 3)

I note that the applicant and her spouse, acting as her representative, chose to make one submission for both inquiries. This has not facilitated my understanding of the general drift or specifics of the submission, since various sections of the Act and different records are at stake in each.

One of the applicant's concerns is to "make recommendations to improve the Ministry's human resources system." For this purpose, she seeks "access to all pertinent records involving human resources staff." However laudable this purpose or goal, it does not convey upon the applicant, or her representative, any rights to access information not set out in the Act, including the various exceptions discussed below. I make the same comment about "sympathetic or compelling need to release materials." This must be done in accordance with the provisions of the Act, subject to the ability of the head of the Ministry to waive any exception but a mandatory one. (See also Reply Submission of the Applicant, p. 6; and the Reply Submission of the Ministry, p. 3)

The Ministry points out that the applicant has made a variety of allegations about the treatment of his spouse that are not matters for me to decide. I fully agree that these "issues are more appropriately dealt with in the context of the numerous proceedings which have been initiated by the Applicant against the Public Body...." (Reply Submission of the Ministry, p. 1) (See Order No. 49-1995, July 7, 1995)

Section 13: Policy advice, recommendations or draft regulations

The applicant submits that section 13(2), especially 13(2)(n), trumps the application of section 13(1). The Ministry argues that it does not do so in circumstances where disclosure would permit an individual to draw accurate inferences about advice or recommendations. (Submission of the Ministry, paragraph 5.06)

I agree with the submissions of the Ministry to the effect that it is permitted "a zone of confidentiality" with respect to the management of issues of human resources and labour relations. It has also usefully pointed out the applicability of this principle to the severance of information which would otherwise reveal advice. (Submission of the Ministry, paragraphs 5.06-5.12)

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

The applicant submits that this section has nothing to do with the records of her employment and dismissal. For its part, the Ministry is relying on section 17(1). (Submission of the Ministry, paragraphs 2.01, and 5.13 to 5.18) On the basis of its *in camera* submission, I agree that the disclosure of a limited amount of severed information could reasonably be expected to harm the financial interests of the Ministry.

The Ministry submits that the so-called PSERC binder, prepared for purposes of an arbitration with the applicant, can be withheld on the basis of section 17(1), especially 17(1)(e). Such arbitrations occur on the basis of article 9 of the BCGEU Agreement and

sections 84 and 89 of the *Labour Relations Code*. However, negotiation between the parties "is still a real prospect and remains an ongoing part of the process of bringing a dispute to arbitration... Only around one percent of grievances filed at arbitration actually proceed to a hearing." (Submission of the Ministry, paragraph 5.23; and affidavit of Philip M. Topalian, paragraph 5) In the Ministry's view, "[p]remature disclosure of documents and strategy is harmful to the negotiation process, in as much as it detracts from the equality necessary for effective negotiation and resolution of disputes." (Submission of the Ministry, paragraph 5.24) In this connection, it is inappropriate for the applicant to argue that section 17 has no application, since neither "negotiations nor arbitration were underway at the date of the subject request for access to information." (Reply Submission of the Ministry, p. 6)

The Ministry has generally relied, in its arguments for the application of this section, on my Orders No. 75-1996, January 4, 1996; Order No. 6-1994, March 31, 1994; and Order No. 130-1996, November 12, 1996. (Submission of the Ministry, paragraphs 5.26-5.28)

The Public Body "submits that the only reason the Applicants are interested in the PSERC Binder is so they can have advance knowledge of the Public Body's case and thus precipitating the very harm the Public Body is attempting to prevent." (Submission of the Ministry, paragraph 5.31) I agree with the Ministry that disclosure of any such records should be in the hands of the arbitrator appointed by the parties under the *Labour Relations Code*. (Submission of the Ministry, paragraph 5.33)

Section 22(1): Disclosure harmful to personal privacy

As noted further below, I have reviewed the identifying information about third parties severed by the Ministry on six pages and agree that it must not be disclosed on the basis of section 22. I appreciate the fact that the Ministry has now explained to the applicant, in general terms, the specific reasons for the severances. (Submission of the Ministry, paragraphs 5.34-5.36) See Order No. 158-1997.

I agree with the Ministry that the applicant has not met her burden of proof under the Act. (Reply Submission of the Ministry, p. 1)

Review of the Records in Dispute

The Ministry has helpfully supplied the applicant and me with a table of severances, including a description of the record, the amount of severing, and the exception(s) that it has relied on. Less than three pages have been severed, except with respect to the binder of PSERC records in dispute.

I have reviewed each of the severances outlined in the table, reviewed copies of the actual unsevered records, and concluded that they were appropriately withheld on the basis of sections 13, 17, and 22 of the Act.

With respect to the PSERC binder, the Ministry indicates that the applicant has already received a copy of these records, except for 19 pages which, the Ministry submits, reflect advice and recommendations by PSERC as to how the Ministry's case should be presented at arbitration. Disclosure "could reasonably be expected to disclose the Public Body's negotiating position, prolong or interfere with the arbitration, and weaken the Public Body's case." (Submission of the Ministry, paragraphs 4.01, 5.19-5.33)

Procedural Objections

The applicant objected to my receipt of *in camera* submissions from the Ministry: "The Public Body must not be permitted to talk behind closed doors about the reasons for keeping a matter behind closed doors, when the matter so deeply affects the rights of an individual." (See also the Reply Submission of the Applicant, pp. 6-8) I accept the explanation of the Ministry that the "reason for presenting *in camera* information is that the disclosure of this information will disclose the contents of the records in dispute." I can assure the applicant that the Ministry is not using the Act "in trying to hide improper, unprofessional, and non-diligent human resources practices, at all levels of government."

8. Order

I find that the Ministry of Health and Ministry Responsible for Seniors was authorized to refuse access to information in the records in dispute under section 13 and 17 of the Act. Under section 58(2)(b), I confirm the decision of the head of the Ministry of Health and Ministry Responsible for Seniors to refuse access to information in the records in dispute which have been withheld or severed under sections 13 and 17 of the Act.

I find that the Ministry of Health and Ministry Responsible for Seniors was required to refuse access to information in the records in dispute under section 22(1) of the Act. Under section 58(2)(c), I require the head of the Ministry of Health and Ministry Responsible for Seniors to refuse access to information in the records in dispute that have been withheld or severed under section 22 of the Act.

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David H. Flaherty
Commissioner

August 15, 1997