

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 186B-1997
December 12, 1997**

INQUIRY RE: The Public Service Employee Relations Commission's decision to withhold records relating to a classification review of employees of Crown Victim Witness Services (Part 2)

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.oipcbc.org>**

1. Description of the review

This is the continuation of an inquiry which arose out of a request for review of a decision by the Public Service Employee Relations Commission (PSERC) to withhold all records relating to a reclassification review of employees of the Crown Victim Witness Services, Criminal Justice Branch, Ministry of Attorney General. In Order No. 186-1997, which I issued on August 20, 1997, I indicated that I retained jurisdiction over this matter and would subsequently determine whether PSERC is authorized to refuse access to certain records under section 17 of the *Freedom of Information and Protection of Privacy Act* (the Act).

2. Documentation of the inquiry process

In Order No. 186-1997, I required PSERC to review the records in dispute to determine whether there was information excepted from disclosure that could reasonably be severed from any of the records in dispute. I required PSERC to complete its review within fourteen days and to provide me with copies of the records, indicating what exceptions it was applying and what information it had severed from any records to be disclosed. When PSERC complied with my Order and provided me with copies of the records in dispute, with information severed under section 17, it also indicated that some information should be withheld under the mandatory exception provided by section 22.

In order to ensure that the applicant is treated fairly, I directed PSERC to provide the applicant with the records it proposed to disclose and then to allow both parties to make initial and reply submissions with respect to the records then withheld from the applicant. All submissions were filed with me on October 7, 1997 for the conclusion of this inquiry, which I am treating as a separate, successive Order for purposes of convenience.

3. Issue under review at the inquiry

The issues in this inquiry are whether PSERC was authorized to withhold certain information under section 17 of the Act and whether it was required to withhold personal information under section 22 of the Act. The relevant portions of both sections read as follows:

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:
- ...
- (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;
 - (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
 - (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 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,
 - (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,

- (c) the personal information is relevant to a fair determination of the applicant's rights,
 - ...
 - (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.
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
- ...
 - (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,
 - (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,
 -

Section 57 of the Act establishes the burden of proof on parties in an inquiry. Under section 57(1), where access to records has been refused under section 17, it is up to the public body, in this case PSERC, to prove that the applicant has no right of access to the records or parts of the records. Under section 57(2), if the record or part that the applicant is refused access 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 still in dispute consist of approximately 32 pages that have been completely severed and 32 pages that have been partially severed on the basis of sections 17 and 22 of the Act out of a total of 371 pages originally at issue.

5. The applicant's case

The applicant generally submits that PSERC has failed to make its case for not releasing the records in dispute to him. In his view, an opposite "finding would imply that any initiative to ensure that a provincial employee be compensated equitably, relative to a group as a whole, constitutes a threat to the financial or economic interests of the Province; that release of any information detailing the findings of the provincial classification/compensation experts is likely

to lead to some mythical scenario wherein a magician will twist the facts and the assessment of merit upon which those findings are supposedly based and thereby **force** the public body to part with more money or other valuable consideration than that wretched thieving employee could possibly deserve....” (Submission of the Applicant, p. 1)

The applicant continues to seek “every shred of information available.” His view is that PSERC is primarily seeking to avoid public scrutiny of its activities with respect to classification and compensation policy. In his opinion, the 1993 Korbin Report stands for more accountability in human resources practice in the provincial public service. (Reply Submission of the Applicant, p. 1)

The applicant contrasts PSERC’s role with the efforts of his clients to represent themselves and their interests with respect to classification and compensation matters; they want to ensure “the integrity of the process and a fair result.” (Reply Submission of the Applicant, pp. 1-2)

6. Public Service Employee Relations Commission’s case

PSERC has relied on section 17(1)(b) through (e) of the Act to refuse to disclose records that “relate principally to personnel matters as yet to be implemented; information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal, and which may form the basis of negotiations with the Union.” It also relies on section 22 to protect the privacy of third parties.

PSERC emphasizes that:

The Employer does not have the unilateral right to move positions into a jointly negotiated classification series. If the Employer opted to go forward with a proposal to move Crown Victim Witness Services positions into the Social Program Officer series, we would be required to negotiate their inclusion and classification levels with the Union.

... classification and compensation are very often fundamental determinants to whether or not master bargaining is successful.

Premature release of records revealing information the substance of which is both formative, with respect to future negotiations and, during analytical information exchanges, a proposal, is detrimental to both the ongoing bargaining relationship with the Union and the Employer’s relationship with public service employees. The harm anticipated by the release of undisclosed formulations or proposals made at a particular point in time can be used inappropriately in subsequent activity involving the exchange of proposals or future negotiations concerning the present classification issue.

PSERC's view is that premature release of information "can lead to a protracted process involving more expense to government than would otherwise occur if the information were not released."

7. Discussion

The background to this inquiry can be found in Order No. 186-1997.

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

The applicant questions PSERC's additional reliance on sections 17(1)(b) and (d) in addition to those used initially and fails to see how this might aid its case when considered within the overall context of section 17. He points out that the Act does not exclude human resources / labour relations issues from its scope; thus reliance on the language of section 17 to prevent disclosure must be "capable of convincing detailed proof...."

On the basis of his perceptive outline of PSERC's position on the application of section 17, the applicant suggests that its "scenario is a bit of a stretch." He submits that the union is unlikely to object to moving employees into a classification series with a greater salary range, especially with respect to a matter about which it has appeared disinterested to date. The applicant further argues that disclosure "would tend to shorten the negotiation process." He notes that PSERC offers no examples of past negative experience. Even prolonged negotiations, the applicant argues, could hardly be "interpreted as constituting harm in accordance with Section 17." (Reply submission of the applicant, pp. 2-3)

PSERC has relied on sections 17(1)(b), (c), (d) and (e) of the Act to refuse disclosure of records that relate primarily to personnel matters that have yet to be implemented. The applicant contends that section 17(1)(b) and (d) do not advance PSERC's case. I agree with the applicant's observation that section 17(1)(b) does not apply but I accept that there is a basis for invoking sections 17(1)(c) and (d) on the facts of this case.

The applicant contends that reliance on section 17 must be "capable of convincing detailed proof." That standard, which was reflected in Order No. 1-1994, January 11, 1994, has been moderated in later Orders to a reasonable expectation of harm. (See Order No. 159-1997, April 17, 1997) Under section 17(1), a public body need only establish that disclosure of the information in dispute could reasonably be expected to harm its financial or economic interests.

Section 17 is designed, among other things, to protect information about ongoing or completed negotiations with unionized employees in the public service. PSERC contends that the records which have been withheld relate primarily to personnel matters which have yet to be implemented, which could result in the premature disclosure of a proposal, which may form the basis of negotiations with the union. It maintains that premature release of information of this nature is detrimental to the ongoing bargaining relationship with the union and the employer's relationship with public service employees.

Based on my review of the records withheld on the basis of sections 17 and 22, I accept PSERC's characterization of these records. I am satisfied that the records do relate to personnel matters which have yet to be implemented and which may form the basis of negotiations with the union at a subsequent time. I also accept that disclosure of some of these records could result in the premature disclosure of a proposal concerning management of personnel. Based on the nature of these records, I am satisfied that disclosure could reasonably be expected to harm the financial or economic interests of the government of British Columbia by adversely affecting its bargaining position. However, I find that disclosure of certain personal information in the disputed records would not constitute an unreasonable invasion of the privacy of third parties as such information relates to their positions, functions or remuneration as employees of a public body under section 22(4) of the Act.

Review of the Records in Dispute

With respect to the PSERC's severances of the records in dispute, the applicant submits that it "has done a reasonably thorough job of purging the package of any material which might be of real interest. The only revelation of value is that, as suspected, the process was moving smoothly, if slowly, toward the goal of a fair resolution until it entered the Black Hole of Michigan St. in December 1996." (Submission of the applicant, p 2)

8. Order

I find that the Public Service Employee Relations Commission was authorized under section 17(1)(c), (d) and (e) of the Act to refuse access to the records withheld under that section. Under section 58(2)(b) of the Act, I confirm the decision of PSERC to refuse access to the records withheld on the basis of section 17(1)(c), (d) and (e).

I also find that the Public Service Employee Relations Commission was not required under section 22 of the Act to refuse access to the records withheld under that section. Under section 58(2)(a) of the Act, I order PSERC to disclose all the records withheld on the basis of section 22.

David H. Flaherty
Commissioner

December 12, 1997