ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 197-1997
November 14, 1997

INQUIRY RE: A decision by the Ministry of Environment, Lands and Parks to refuse access to portions of a *Wildlife Act* investigation file and to correspondence with the Office of the Ombudsman

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

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on August 22, 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 by the two applicants of a decision by the Ministry of Environment, Lands and Parks (the Ministry) to refuse access to portions of a Conservation Officer's file and to four pages of correspondence with the Office of the Ombudsman.

2. Documentation of the inquiry process

On January 10, 1997 the applicants requested that the Ministry provide access to "all records and phone calls and correspondence and internal management notes and all other material on file" regarding an investigation of the two applicants under the *Wildlife Act*. The Ministry responded in mid-February 1997 by providing severed copies of the Conservation Officer's investigation file into the illegal trafficking of elk meat. The Ministry indicated that it was applying sections 14, 15, and 22 of the Act to portions of the records. It also told the applicants that four pages of correspondence with the Office of the Ombudsman were excluded on the basis that they fall outside the scope of the Act under section 3(1)(c).

At the end of February 1997 the applicants requested that the Office review the Ministry's decision. At the end of April 1997 the applicants asked that the matter be resolved through an inquiry before the Information and Privacy Commissioner. In early May 1997 the Office issued a notice of written inquiry to the applicants, the Ministry, and the Office of the Ombudsman as intervenor (later changed to third party). The Ministry

informed the applicants on May 8, 1997 that it was no longer relying on section 14 of the Act for the one item it had withheld under this section but that it was applying section 15 of the Act to the same information. After two extensions of the deadline, the inquiry took place on August 22, 1997.

3. Issue under review and burden of proof

This inquiry examines the Ministry's application of sections 15(1)(a), (d), (f), and (g), sections 22(1), 22(2)(e), (f), and (h) and section 22(3)(b) to portions of a Conservation Officer's file of an investigation of the two applicants. Also at issue is the Ministry's use of section 3(1)(c) to exclude four pages of correspondence with the Office of the Ombudsman. These sections read as follows:

Scope of this Act

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(c) a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

....

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,

...

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

(g) reveal any information relating to or used in the exercise of prosecutorial discretion,

....

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

...

(e) the third party will be exposed unfairly to financial or other harm,

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

...

(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

...

(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,

....

Section 57 of the Act establishes the burden of proof on the parties in an inquiry. Section 57(1) places the burden on the Ministry in this case to establish that the applicants have no right of access to the information withheld under section 15 of the Act.

Under section 57(2) of the Act, where the Ministry has withheld information under section 22 of the Act, it is up to the applicants to establish that disclosure of the third parties' personal information would not be an unreasonable invasion of the privacy of those third parties.

Section 57 is silent with respect to an inquiry regarding the application of section 3 to records in the custody or under the control of a public body. In Order No. 170-1997, June 12, 1997, I decided that since the public body, in this case, the Ministry of Environment, Lands and Parks, is asserting that section 3 applies in these circumstance, it bears the burden of proof.

4. The records in dispute

The records in dispute in this case consist of 38 pages of notes and correspondence from a Conservation Officer's investigation file compiled during an investigation of the two applicants under the *Wildlife Act*. They include four pages of

correspondence with the Office of the Ombudsman concerning an investigation by that Office of a complaint by one of the applicants.

5. The applicants' case

The applicants allege that the Ministry is intentionally infringing their Aboriginal hunting rights by creating investigative files under the *Wildlife Act*. Since criminal charges were never filed against them, they claim entitlement to their complete files. The applicants emphasize that they have not "signed for treaty negotiations and have not abandoned our Aboriginal Rights." They contend that Ministry staff have been harassing and intimidating them: "The peoples under investigation are not aware of the investigation and are not advised of the investigation and have no resources to level the field of investigation or democracy or justice." No specific submissions were made in relation to section 3(1)(c), section 15, or section 22 beyond suggesting that the Ministry initiated a false investigation and that the "paid for informants" did not provide evidence, since no charges were ever filed.

6. The Ministry's case

Each district office of the Ministry has one or more conservation officers to carry out law enforcement within that district under the *Wildlife Act*. They are appointed special provincial constables by the Attorney General. (Submission of the Ministry, Paragraphs 1.03, 1.04) The evidence collected by the conservation officers is provided to Crown Counsel for the purposes of determining whether charges should be laid.

On the basis of an anonymous call in the spring of 1995, the Conservation Officer Service for the Kelowna District began investigating whether the applicants and other named persons were killing elk and selling the meat. This investigation is now closed and did not result in any criminal charges. (Submission of the Ministry, Paragraphs 1.05, 1.06)

The applicants have received approximately 34 pages of records "with the exception of a small amount of information which had been severed under sections 14, 15, and 22." Four pages of correspondence to and from the Office of the Ombudsman were also withheld. (Submission of the Ministry, Paragraph 1.08) The amount of severing on 10 pages out of the initial 34 amounts to approximately 1.5 pages. (Submission of the Ministry, Paragraph 4.01)

I have presented below the more detailed submissions of the Ministry on the application of various sections of the Act to the records in dispute.

7. The Office of the Ombudsman's case

As an independent Officer of the Legislature, the Ombudsman submits that she performs a unique role in investigating, settling, reporting on, and making

recommendations with respect to complaints of citizens regarding governmental administration. Confidentiality is a critical element of this role, because parties must be able to prepare positions and communicate openly and freely with her office in attempting to resolve complaints. This principle is recognized in section 9 of the *Ombudsman Act*, R.S.B.C. 1996, c. 340.

For this reason, the Ombudsman submits that a broad and purposive interpretation must be given to section 3(1)(c) of the Act, since that section is clearly designed to respect both the independence and autonomy of the Ombudsman and to facilitate her work pursuant to her constituent legislation. On this approach, the Ombudsman submits that section 3(1)(c) encompasses all records that the Ombudsman causes to come into existence as part of an investigation, or that relate to her work or that of her delegates.

8. Discussion

Disclosure harmful to law enforcement

Section 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,

The first issue is whether disclosure of the severed information could reasonably be expected to harm a law enforcement matter under section 15(1)(a) of the Act.

"Law enforcement" is defined in Schedule 1 of the Act as:

> (a) policing, including criminal intelligence operations,
> (b) investigations that lead or could lead to a penalty or sanctions being imposed, or
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

Since the investigation, which has concluded, did not result in any criminal charges, the Ministry does not suggest that disclosure of this information could harm a current investigation or proceeding that could lead to a penalty or sanction being imposed. The Ministry does suggest, however, that disclosure could reasonably be expected to harm "policing" by the Public Body since conservation officers play a critical role in the prevention of offences and the enforcement of laws dealing with the environment. As the Ministry points out, conservation officers are designated as special provincial constables pursuant to section 9 of the *Police Act*. The Ministry submits:

> The intelligence information on the Third Parties which was gathered in the course of the investigation is of crucial importance for the purposes of future investigations into the illegal selling of wildlife meat and for the purposes of monitoring illegal activity. Not only will disclosure of this

> information tip-off individuals who have been identified as possibly participating in the illegal trafficking of wildlife meat, it will serve to identify the source of the law enforcement information. This could reasonably be expected to harm policing in this area of the law in this district of the Province. (Submission of the Ministry, Paragraph 5.07)

I am satisfied on the basis of the *in camera* evidence that the Ministry has discharged its burden of establishing that disclosure of intelligence information on the third party(ies) gathered during the course of this investigation could reasonably be expected to harm the Ministry's policing function with regard to both future investigations into the illegal selling of wildlife meat and to the monitoring of illegal activity.

Section 15(1)(d): reveal the identity of a confidential source of law enforcement information,

With respect to the application of section 15(1)(d), the Ministry is seeking to protect the identities of anonymous or named informer(s). The Ministry relies on the concept of informer privilege for any information, no matter how innocuous, that could permit identification of such persons. See Leipert *v.* Canada and Greater Vancouver Crime Stoppers Association, February 6, 1997. (Submission of the Ministry, Paragraphs 5.09-5.12)

On the basis of the *in camera* evidence filed by the Ministry, I am satisfied that it has met the burden of establishing that disclosure of the severed information could reasonably be expected to reveal the identity of a confidential source of law enforcement information. In particular, it is significant that the applicants are part of a small community and only certain persons would have had access to the information, which was reported anonymously to the Conservation Officer. Disclosure of any information could lead to the identification of the anonymous informer(s).

Section 15(1)(f): endanger the life or physical safety of a law enforcement officer or any other person,

With respect to the application of section 15(1)(f), the Ministry submits that the information severed relates in part to police informer(s) and other confidential sources of law enforcement information. (Submission to the Ministry, Paragraphs 5.13, 5.14) I agree the phrase "or any other person" is sufficiently broad to encompass any individuals who assist law enforcement interests such as police informers.

For the same reasons outlined in relation to section 15(1)(d), I conclude that the Ministry has discharged its burden of establishing through *in camera* evidence that the disclosure of the severed information could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person who is a source of law enforcement information.

Section 15(1)(g): reveal any information relating to or used in the exercise of prosecutorial discretion

With respect to the application of section 15(1)(g), the Ministry submits that a single line of information in the records in dispute pertains to the exercise of prosecutorial discretion as defined in Schedule 1 of the Act. See Order No. 20-1994, August 2, 1994. (Submission to the Ministry, Paragraphs 5.15-5.17)

Schedule 1 defines "exercise of prosecutorial discretion" as the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power

(a) to approve or not to approve a prosecution,
(b) to stay a proceeding,
(c) to prepare for a hearing or trial,
(d) to conduct a hearing or trial,
(e) to take a position on sentence, and
(f) to initiate an appeal.

I am satisfied that disclosure of the statement at issue which has been severed from the documents would reveal a statement from Crown Counsel to the Conservation Officer relating to whether charges against the applicants would be approved for prosecution. This is clearly the type of information which section 15(1)(g) is intended to protect from disclosure.

Disclosure harmful to personal privacy

Section 22 of the Act requires the head of a public body to refuse to disclose information to an applicant if the disclosure would be an unreasonable invasion of the third party's(ies') personal privacy. Subsection (2) outlines some of the relevant considerations in making this determination, and subsection (3) provides that disclosure is presumed to be an unreasonable invasion of a third party's personal privacy in the circumstances enumerated therein. The Ministry relies particularly on sections 22(2)(e), (f), (h), and, especially, the presumption against disclosure in section 22(3)(b).

I accept that the factors set out in section 22(2)(e), (f), and (h) are particularly relevant in this case. Based on the *in camera* evidence, I must have particular regard to the fact that the third party(ies) will be exposed unfairly to harm under section 22(2)(e), since there is information in the records which is likely to identify the anonymous informer(s), and information in the records which specifically names the informer(s). I consider section 22(2)(f) to be particularly relevant because information obtained from the informer(s) was part of an undercover investigation into the trafficking of elk meat. As part of an undercover investigation, such information was necessarily required to be supplied in confidence. The evidence indicates that the informer(s) were given

assurances that the information provided and their identities (if known) would be held in confidence. Section 22(2)(h) is also particularly relevant because disclosure of the records would reveal the identities of third parties who were alleged to have participated in the trafficking of elk meat. Since these third parties have not been charged, it would unfairly damage their reputations if they were identified as subjects of an investigation into the illegal trafficking of elk meat.

In my view, the factors set out in section 22(2)(a), (b), (c), (d) and (g) do not advance the applicants' case. In particular, there is no evidence to establish that disclosure of the records in issue would assist in researching or validating the claims, disputes, or grievances of aboriginal people under section 22(2)(d). Disclosure is not only unlikely to promote the protection of the environment under section 22(2)(b), it is likely to have an adverse effect by harming future investigations into the illegal trafficking of elk meat.

Section 22(3)(b) provides that disclosure of personal information is presumed to be an unreasonable invasion of the personal privacy of a third party, if 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 applicants have failed to discharge their burden of rebutting this presumption on the facts of this case. In particular, the applicants have not established that disclosure of the third party(ies) personal information would not constitute an unreasonable invasion of the privacy of the third party(ies).

Section 3(1)(c): Records of an Officer of the Legislature

Section 3(1)(c) provides that the Act does not apply to a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act. The Ombudsman is an Officer of the Legislature (as defined in Schedule 1 of the Act and section 2(1) of the *Ombudsman Act*). The Ombudsman may delegate any of her powers or duties under her constituent legislation to any person or class or persons.

The Ministry has refused to disclose correspondence to it from an Ombudsman officer dealing with an investigation conducted into a complaint by one of the applicants. The Ministry has also refused to disclose correspondence to the Ombudsman officer with respect to this complaint investigation. I am satisfied that the correspondence relates to the Ombudsman's functions under the *Ombudsman Act* and therefore falls outside the scope of the Act by virtue of section 3(1)(c).

Review of the Records in Dispute

On the basis of a table provided by the Ministry, I have reviewed each of the severances done by the Ministry and find that they are in accordance with sections 15, 22, or 3 of the Act.

9. Order

Under section 58(2)(b), I confirm the decision of the head of the Ministry of Environment, Lands and Parks to refuse access to the records in dispute withheld under section 15 of the Act.

Under section 58(2)(c), I require the head of the Ministry to refuse access to the records in dispute under section 22(1) of the Act.

Under section 58(2)(b), I confirm the decision of the head of the Ministry to refuse access to the records in dispute which fall outside the scope of the Act under section 3(1)(c).

_____

David H. Flaherty
Commissioner

November 14, 1997