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**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 141-1996  
December 20, 1996**

**INQUIRY RE: A decision of the Vancouver Police Department to sever and withhold records from an applicant relating to a hiring application, and the adequacy of its search for records**

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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 November 14, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of the Vancouver Police Department (the public body) based on the adequacy of a search and its decision to sever and withhold records in response to an applicant's request.

**2. Documentation of the inquiry process**

On June 17, 1996 the applicant requested access to "any and all documents ... regarding his past employment with the Department ... including all personnel, recruiting and internal investigation records pertaining to personal conduct and work habits ...."

The Vancouver Police Department located 945 pages of records that responded to the applicant's request. The Department disclosed approximately 632 pages (374 pages in full, and approximately 258 pages severed) to the applicant on July 15, 1996.

The Police Department withheld or severed records under section 16(1)(b) (harm to intergovernmental relations), and section 22, with particular emphasis on section 22(3)(b) (personal information compiled ... as part of an investigation into a possible violation of law). Since the applicant was able to identify categories of records that were not released and were not reflected in the file, he raised the issue of whether the search for records was adequate.

On October 18, 1996 the Office of the Information and Privacy Commissioner received the applicant's request for review of the Police Department's decisions and the adequacy of the Police Department's search for records.

### **3. Issues under review at the inquiry**

The specific issues to be examined in this inquiry are the Police Department's application of section 22, particularly section 22(3)(b), to withhold and sever records, and section 6 (1) related to an adequate search.

The relevant sections are as follows:

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant, openly, accurately and completely.

....

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.

22(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.

22(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

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

....

22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure,

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. If the record or part of the record that the applicant is refused access to contains personal

information about a third party, it is up to the applicant to prove that disclosure would not be an unreasonable invasion of a third party's personal privacy under section 22 of the Act. In the present case, the burden under this section is on the applicant.

Section 57 is silent with respect to the duty to assist under section 6 of the Act. Since public bodies are in a better position to address the issue of an adequate search, the burden of proof under this section will be on the public body.

#### **4. The records in dispute**

The relevant records in this inquiry arise from the applicant's past employment with the Vancouver Police Department and an application to rejoin the Department. In addition, there are categories of records requested that have not been located.

The records in dispute include:

- a. Background Interview Reports with various persons - (withheld under section 22) (documents 6-50)
- b. Note to file - July 95 - (withheld under section 22)(document 84)
- c. Report to P.A. Battershill, from J. Downing - (withheld under section 22) (documents 87-88, 93-94)
- d. Evaluation for re-engagement (withheld under section 22)(documents 109-112).

#### **5. The applicant's case**

The applicant was employed by the Vancouver Police Department from the mid-1980s until his resignation in 1995. He has recently been attempting (unsuccessfully) to re-join the Police Department and made this request for his personnel file in this connection. He is seeking his personal documents "relating to my work performance and personal conduct while I was employed with the Vancouver Police."

As it stands now, the personnel file that I now possess is incomplete and its overall impression of my work performance is inaccurate. Hence my performance and conduct appears barely average according to my files, quite understandably 'not competitive' to any persons viewing my file. I cannot understand why the number of documents describing my work performance for my last 8.5 years is so grossly misrepresented.

With respect to the records in dispute, the applicant believes that their disclosure will not be an unreasonable invasion of any third party's personal privacy. He suggests that one motive for non-disclosure is that the Vancouver Police Department is trying to protect its decision not to re-hire him. Although he accepts this decision, it is his view

that he needs access to his complete personnel file in order to seek employment with another police department.

## **6. The Vancouver Police Department's case**

With respect to the section 6 issue, the position of the Vancouver Police Department is that it and its appropriate employees made “every reasonable effort to locate all records” and ensure that the applicant received complete copies of them. It submitted four affidavits from those who either conducted the searches for various categories of records or supervised them. The Vancouver Police Department relied in particular for this purpose on my Order No. 30-1995, January 12, 1995, *passim*.

I have discussed below the Vancouver Police Department's submission on the application of section 22.

## **7. The submissions of third parties**

My Office made contact with 21 persons who are third parties in this case. Seven consented to the disclosure of their opinions about the applicant to him; 4 opposed release; and 10 did not express an opinion on the matter. Third parties were contacted when the Notice of Inquiry was issued and were provided with a severed copy of the request for review (which excluded personal information presented by the applicant).

## **8. Discussion**

### ***Section 22: Disclosure harmful to personal privacy of third parties***

As noted above, the applicant made a detailed argument to the effect that the records in dispute concern him and should be released to him, which would not be an unreasonable invasion of the privacy of any third party.

The Vancouver Police Department submits as follows:

... that the real issue in this Inquiry is the greater societal interest in protecting the hiring process for sworn municipal constables pursuant to s. 26 of the Police Act, S.B.C. 1998, c. 53 (‘police officers’) as opposed to the Applicant's rights to access information pursuant to the Freedom of Information and Protection of Privacy Act. (Reply Submission, paragraph 3)

Whatever the ultimate merits of this argument, it is obviously not one that moved the Legislature of this Province when it enacted the *Freedom of Information and Protection of Privacy Act* in 1992 and 1993 or in subsequent amendments. There is no “notwithstanding clause” in the Act that makes it subordinate in any way to the *Police Act*. Thus the real issue in this inquiry is the application of section 22 to the records in dispute.

With respect to the application of section 22, the Vancouver Police Department made a relatively lengthy submission describing the recruiting process for police officers and its importance to the public. The final stage is a background investigation, which “employs police investigative techniques used in criminal investigations .... in order to surface any issues reflecting negatively upon the Applicant’s reliability and integrity.” (Reply Submission, paragraph 8; see also paragraphs 22, 23) Although I acknowledge the importance of this process and the possibility that “people will not be as forthcoming with negative information about applicants where there is a risk that the information will later be disclosed to the applicant,” section 4(1) of the Act establishes the following “information rights,” subject only to the application of exceptions like section 22:

- 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

I note that “resulting obvious risks to public safety and public confidence in the police” from disclosure of personal records to an applicant are not exceptions under the Act, nor has the Vancouver Police Department attempted to make such arguments under the Act. (Reply Submission of the Vancouver Police Department, paragraphs. 17, 18) Similarly, it has not substantiated the broad assertion that the recruitment process for police officers is a “law enforcement investigation.” (Reply Submission of the Vancouver Police Department, paragraph 24)

***Section 22(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, ....***

In addition to some very general arguments that I have discussed above, the Vancouver Police Department has relied essentially on this section of the Act to prevent disclosure of the records in dispute. It also submits that its reliance on this section overcomes the consents of various third parties to the disclosure of certain records in dispute, “because of the Vancouver Police Department’s greater interest in maintaining the confidence of the public in the recruiting process ....” (Reply Submission of the Vancouver Police Department, paragraph 25) I do not find this argument persuasive in the face of such explicit consents, and section 22(4)(a) of the Act, in addition to other relevant arguments that follow below.

Section 22(4)(a) of the Act precludes public bodies from withholding personal information under section 22(1) or 22(3) where the third parties have consented to the disclosure of their personal information. I find support for this in the Government of British Columbia’s *Freedom of Information and Protection of Privacy Act Policy and*

Procedures Manual, Section C.4.13, page 35 (September 1994 edition), which is helpful but not binding on my decision:

If the requested personal information falls within one of the [categories in section 22(4)], its **disclosure is not an unreasonable invasion of a third party's personal privacy**. In contrast to subsection 22(3), subsection 22(4) does not create a presumption. Rather, subsection 22(4) states that the disclosure of included personal information is not an unreasonable invasion of personal privacy. [bold in original]

The Vancouver Police Department simply asserted the application of section 22(3)(b) without detailed or relevant arguments. I have had a number of occasions to discuss the meaning and application of this section. (See Order No. 66-1995, November 27, 1995, p. 6; Order No. 81-1996, January 25, 1996, pp. 6, 8; Order No. 97-1996, April 18, 1996, p. 7; Order No. 125-1996, September 17, 1996, p. 4) I emphasize, in particular, that the several records in dispute were not even remotely compiled "as part of an investigation into a possible violation of law ...." Therefore, this section cannot be relied upon to withhold the records in dispute.

***Review of the records in dispute***

***Records 5(a) and (c): Background investigation of the applicant (45 documents)***

The Vancouver Police Department states that because of the applicant's lengthy former employment with it, "most of the people contacted in the background investigation were (and remain) employees of the Vancouver Police Board." (Affidavit of Sergeant Valerie L. Harrison, paragraph 27)

I have reviewed all of the pages in dispute under this category. I am struck in particular that most of the interview notes (12) are quite positive about the applicant, further enhancing my view that he has a right to his personal information supplied by others in response to a standard set of questions. Only four interviews offer information about the applicant that can be construed as somewhat negative. One in particular describes an apparent incident in the mid-career of the applicant, which is in my view a relevant circumstance suggesting disclosure under section 22(2)(c) of the Act. Two of this latter category of interviews are based on observations from the applicant's pre-recruit days with the police department. In my view, the balancing factor under section 22(2)(c) overcomes section 22(2)(f).

Of the four critical interviews, all are with current or former police officers, who should be especially capable of accepting responsibility for what they have said about the applicant.

***Record 5(b): Note to File, July 1995 (1 document)***

This is a single-page note to file prepared by a police supervisor concerning an incident involving the applicant and a civilian employee of the Vancouver Police Department around the time of the former's departure from the force. It contains a description of what happened and some value judgments about the applicant. This is personal information about the applicant, which must be disclosed to him in the absence of exceptions to the contrary (none exists).

***Record 5(c): Reports (4 documents)***

There are two copies of a two-page record in this category, containing a summary of the results of the interviews described in Record 5(a). It was prepared by the Recruiting Section. The summary highlights any negative information that surfaced about the applicant, which again motivates me to order disclosure of this record to him, especially given the absence of any relevant exceptions to the contrary under the Act, including the balancing factor in section 22(2)(f).

***Record 5(d): Exit interview recommendations (4 documents)***

There are four single-page interviews about the applicant carried out at the time of his resignation from the Vancouver Police Department. I find it quite informative that all of these records are very positive about him. These records are the personal information of the applicant and must be disclosed to him.

I find that the applicant has met his burden of proof under section 22 of the Act.

***Section 6: Adequacy of the search***

The applicant has described, in considerable detail, episodes in his pre-recruit and police officer days for which he believes records must exist. He has also requested specific documents which were not included in the materials previously released to him, especially including work performance evaluations for the past few years (which the applicant had reviewed and signed with his supervisors). The applicant has also requested specific performance evaluations and recommendations for re-engagement that existed and were reviewed by him at the time of his exit interview. He also is seeking additional third party opinions that he has not been made aware of that were collected during a background investigation related to his re-engagement. The records already accounted for by the Police Department do not include what the applicant is still seeking.

I am not impressed by the fact that the Vancouver Police Department's reply submission made no effort whatsoever to explain either why such records did or do not exist or why they should not be released to the applicant, beyond the very general arguments, reviewed above about the need to protect the integrity of the recruitment process.

With respect to two of the four affidavits submitted by the Vancouver Police Department, I am concerned that the lay staff who conducted the actual original searches are now not with the Police Department for one reason or another, so I received no detailed information about the extent of the original searches. With respect as well to three of the four affidavits, there is no evidence before me that the relevant records specialists undertook any additional searches in response to the complaint of the applicant.

In one case, the Information Manager did explain to me where administrative records relating to employees and former employees are typically found in terms of relevant Departments. She also explained that she has no archived files relating to the applicant derived from selected administrative records from the Human Resources Division and the Recruiting Section. (Affidavit of Hilary Hannigan, paragraphs 3, 4)

The applicant is of the view that it is highly unlikely that the Internal Investigation Section of the Vancouver Police Department would have any further records concerning him. But he is concerned about the fact that he has received only three pages concerning the last eight and one-half years of his career as an officer: “Where are all my recent annual performance appraisals from my supervisors? Shouldn’t these important documented evaluations also be included in my file?”

I am of the view that the Vancouver Police Department did not meet its burden of proof under section 6(1) and should conduct another search for relevant records concerning the applicant in the Internal Investigation Section, the Recruiting files, and the Human Resources Division. See Order No. 30-1995, pp. 4, 11, where I stated:

Where records have not been located, the requester’s obvious concern will be what efforts were made. Accordingly, public bodies should automatically include a description of those efforts, consisting of the hours expended, the manner of searching, and any other potential sources and the reason that they were not searched.

...

I am not satisfied that the Ministry of Attorney General made every reasonable effort to assist this applicant. Its written documentation of its search techniques were inadequate to meet the broad search criteria set forth by the applicant.

(See also Order No. 84-1996, February 22, 1996 p. 4; Order No. 118-1996 August 27, 1996, p. 4)

## **8. Order**

I find that the head of the Vancouver Police Department is not required to refuse access to the records in dispute under section 22 of the Act. Under section 58(2)(c), I require the Vancouver Police Department to disclose the records requested by the applicant.

I find that the Vancouver Police Department did not fully comply with its duty under section 6(1) of the Act to make a reasonable effort to assist the applicant. It did not conduct an adequate search for records responsive to the applicant's request. Under section 58(3)(a), I require the Vancouver Police Department to conduct another search for records previously requested by the applicant and not located. Under section 58(4), I require the Vancouver Police Department to complete this search within thirty days of the date of this Order and further, to submit to me, within ten days after it completes this search, appropriate documentation describing its search efforts and the results.

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David H. Flaherty  
Commissioner

December 20, 1996