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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 175-1997
July 21, 1997

INQUIRY RE: A decision by the Ministry of Attorney General to withhold records relating to an applicant's previous request for records from the Residential Tenancy Branch

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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 April 30, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of an applicant's request for review of a decision by the Ministry of Attorney General to withhold records related to the processing of an earlier request from the applicant for records at the Residential Tenancy Branch.

2. Documentation of the inquiry process

On June 5, 1996 the applicant submitted a request for records to the Ministry. On August 23, 1996 the Ministry replied by partially disclosing records and by withholding and severing others under sections 13, 19, and 22 of the Act. The Ministry also excluded records, pursuant to section 3(1)(c) of the Act, as being records relating to communications with the Office of the Information and Privacy Commissioner.

On August 25, 1996 the applicant requested a review of the Ministry's decision.

On November 5, 1996 the Ministry sent a second disclosure package to the applicant with records that had previously been withheld or severed under sections 13(1), 19(1), and 22(1) of the Act.

On April 15, 1997 the Ministry sent a third disclosure package to the applicant with records that had previously been excluded pursuant to section 3(1)(c) of the Act. As a result, section 3(1)(c) is not an issue in this inquiry. By consent of the parties, the written inquiry was scheduled for April 30, 1997.

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

The issue under review at this inquiry is whether the Ministry has correctly applied sections 13(1) and 22(1) of the Act to the information in dispute. These sections read as follows:

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.

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.

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

...

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

....

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 section 13, it is up to the public body, in this case the Ministry of Attorney General, 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 of the record 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 applicant requested: "...all notes, correspondence, any and all materials which dealt with my request under the FOI Act." The applicant was referring to records which the Ministry generated while processing his request for records to the Residential Tenancy Branch dated February 18, 1996. This is the first inquiry that has considered a

request for records generated by a public body when processing an applicant's earlier request for other records.

5. The applicant's case

The essence of the applicant's approximately 44-page submission is that sections 13 and 17 of the Act do not apply to the records in dispute.

6. The Ministry of Attorney General's case

The Ministry submits that the issue in this review is that it has refused to disclose information to the applicant "that would reveal advice and recommendations developed by the Public Body in the processing of an earlier request made by the Applicant under the Act. The Public Body also refused to disclose to the applicant the personal information of the Third Party which was collected in the processing of the Applicant's earlier request." (Submission of the Ministry, paragraph 1.02) The applicant is a landlord and the third party is his former tenant. His earlier request for records from the Ministry's Residential Tenancy Branch was successfully mediated; it is the records of the processing of that request that he is evidently now requesting. (Submission of the Ministry, paragraphs 1.03-1.06)

I have presented below the Ministry's detailed submissions on the application of sections 13(1) and 22(1) of the Act.

7. Discussion

I have had occasion already to comment on how inappropriately this particular applicant treats public servants; in the context of the present inquiry, I wish to extend this comment to his treatment of my own staff. (See Order No. 157-1997, March 20, 1997, p. 4) I am also satisfied, with respect to the present inquiry, that my staff and that of the Ministry of Attorney General have gone to extraordinary lengths to assist this applicant. (See Submission of the Ministry, 1.06-1.12)

The applicant has raised a series of concerns and allegations of harassment of him by the third party and gender bias on the part of the Ministry and my Office. In my view, the applicant's allegations are not relevant to my decision-making under the Act in this inquiry. (See Reply Submission of the Applicant). None of the allegations of bias against Ministry staff and the staff of my Office are founded.

Section 13: Policy advice, recommendations or draft regulations

The Ministry submits that disclosing the information it has withheld from the records in dispute "would reveal, either explicitly or implicitly, advice or recommendations developed by or for the Public Body." (Submission of the Ministry, paragraphs 4.01, 4.08, 4.09) It further submits that none of the information it has

withheld falls within the section 13(2) list of information that must be disclosed. (Submission of the Ministry, paragraph 4.05)

In its submission, the Ministry cited Ontario Order P-537 (Ministry of Health, September 20, 1993, Inquiry Officer Anita Fineberg) which considered the approach to be taken in dealing with collateral or derivative requests for records. (Submission of the Ministry, paragraphs 4.06-4.07) I agree with the Ontario approach to this matter, which holds that public bodies may apply exceptions to disclosure to the internal records generated during the processing of requests for records. This applies to records prepared during the processing of original requests, and to records produced within public bodies during preparations for mediation and inquiries involving my Office. For example, internal briefing notes may contain recommendations for the disclosure or withholding of information in the requested records; section 13 (policy advice and recommendations) may apply to such briefing notes, among other exceptions.

Section 22: Disclosure harmful to personal privacy

The Ministry has refused to disclose the third party's unlisted telephone number and her personal views or opinions on whether the disclosure of her personal information to the applicant would be an invasion of her privacy. (Submission of the Ministry, paragraph 4.11) I agree that section 22(2)(f) of the Act is directly relevant in this regard: "Given the very nature of this consultation process, it is only reasonable for a third party to expect that the personal information they supply to the Public Body will be held in confidence." (Submission of the Ministry, paragraph 4.13; see also paragraphs 4.14, 4.15)

I agree with the Ministry that it is required to keep confidential the personal information of the third party on the basis of section 22(1) of the Act.

The records in dispute

On the basis of my detailed review of specific severances on thirteen pages of records actually in dispute, I find that the Ministry has appropriately applied sections 13 and 22 of the Act to them. I agree with the Ministry that the applicant has not met his burden of proof under section 22 of the Act. I further agree that the Ministry has met its burden of proof under section 13. (Reply Submission of the Ministry)

Procedural objections by the applicant

In this inquiry and in my next Order, the applicant has submitted hundreds of pages of argument and assertion to this Office. I have reviewed all of the paper submitted by him, including his numerous objections on procedural grounds and in relation to irrelevant issues, including genocide. I would like to respond to a number of the applicant's concerns and objections that were not resolved during the scheduling process for the inquiry.

(1) The applicant objected to the completeness and accuracy of the fact report prepared by the Portfolio Officer who mediated this file. In two recent Orders I have commented on the role of fact reports in the inquiry process:

> The District has devoted considerable efforts to debating various words set out by a Portfolio Officer in his fact report as somehow prejudicing the presentation of the issues in this inquiry. With respect, these disputes are irrelevant to my determination of the matters at issue in this inquiry. A fact report is background information and a chronology of events to assist the parties in the preparation of these submissions by attempting to isolate the matter in dispute. Given that I am guided in my deliberations by the submissions of the parties, fact report contents may be amended by the parties, but are not binding on me. (Order No. 173-1997, District of Campbell River, July 14, 1997, p. 6)

> Fact reports are intended to summarize salient information, especially as to relevant dates and issues, for my use and for the use of the parties to an inquiry. Fact reports can be amended, but the contents are not binding on me or on the parties, who are entitled to raise any objections they might have, as the applicant did in this matter. (Order No. 174-1997, Greater Vancouver Regional District, July 14, 1997, p. 9)

(2) The applicant objected to the absence of his and the third party's name in the Notice of Inquiry and related inquiry documents. It is the practice of my Office not to include the names of individual applicants and third parties in order to preserve their personal privacy as much as possible. It may be that both the applicant and the third party know each other's identity. However, the publicly-available Order that results from the inquiry does not normally include their names. Exceptions to this rule are made where the applicant is a journalist acting in his or her professional capacity and for corporate bodies that do not have personal privacy rights under the Act.

(3) The applicant objected to the Policy and Procedures of my Office that prevent the parties to an inquiry from including mediation records in their submissions to the Commissioner. The applicant wrote:

> I object to your refusal to allow records of mediation or any records related to mediation; you have no authority under the act to restrict evidence which an applicant may wish to enter. It is far too broad of a definition as well and restrict my right to enter voice recordings of portfolio officers and other public officials. (Objection by the Applicant, April 9, 1997)

In Order No. 171-1997 (Cariboo Regional District, June 26, 1997, pp. 4, 5), I commented on the need to separate the mediation process and inquiries:

> I wish to assure applicants that I am not involved in mediation activities, and that I have approached the decision in the present inquiry with a fresh mind. Any prior involvement of a Portfolio Officer, including his or her professional or personal views on a matter in dispute, are not disclosed to me as the decision-maker on the issue. In this sense, my Office operates with a 'firewall' in place for requests for review in order to ensure my neutrality and objectivity.

(4) The applicant objected to the adequacy of the Ministry's labelling of severed portions of the records. In response, the Ministry provided the applicant with another set of the records. In my opinion, the Ministry's initial written submission (paragraph 1.12) shows that the Ministry made every reasonable effort to satisfy the applicant's request for a clearly-marked set of the records:

> On April 15, 1997, the Public Body in response to the Applicant's request for a consolidated set of records provided the Applicant with another set of the severed records. The Applicant had previously been sent copies of the same records on August 23, 1996 and on November 5, 1996. On April 16 & 17, 1997, the Applicant sent further faxes to the Commissioner stating that he had not received a consolidated set of records, but only new copies of pages where severing has been done. On April 18, 1997, in an effort to be as responsive to the Applicant as possible, the Public Body sent by rush courier a further set of records to the Applicant which included records which had previously been released unsevered to the Applicant and which are not in dispute in this inquiry. The Public Body also forwarded to the Applicant, as a further courtesy, a severed copy of the Public Body's internal detail review sheets so that the Applicant could more easily reference the documents. On April 21, 1997, the Applicant again wrote to the Commissioner and stated that he had not received a consolidated set of records, and that he is unable to make a proper submission without a consolidated set of records, and that he needs 14 days to respond to the Public Body's initial submission. The Applicant states, 'I now have five separate sets of records, its [sic] a mess.'

Based on my review of the records and the above exchange between the parties, I find that the applicant's objection in relation to the production and labelling of records is unfounded.

(5) The applicant objected to the time limits for responding to the Ministry's initial submission. I received written submissions from both the applicant and the Ministry on this issue and then decided that no extra time was required for the inquiry. On April 16, 1997, I wrote to the parties:

> Our policies and procedures are set by my Office and are consistent from inquiry to inquiry. The Notice of Inquiry sets out a schedule for

> submissions. The schedule for submissions is the same from inquiry to inquiry, and it is my view that these are reasonable time frames for all parties to file their submissions. Since no submissions have been filed at this point in the inquiry, I find there is no justification for allowing extra time to file a reply submission to the submission of the public body at this time.

(6) The applicant accused the lawyer for the Ministry of willfully misleading the Commissioner in respect of the third party's dealings with the applicant. On April 23, 1997, the applicant wrote that the Ministry's lawyer

> ...mislead [the Commissioner] and in my opinion did so knowingly, 'The Third Party denied the Applicant's claim, and stated that the Applicant had a history of violence and harassment towards her....'
> ...
> In my opinion [the Ministry's lawyer] has knowingly attempted to mislead the commissioner and has also insulted the third party by suggesting that she said I had ever had a history of violence towards her.

The Ministry responded to the applicant on this issue on April 30, 1997 in its reply to the applicant's reply submission. The Ministry wrote, at paragraph 5 and footnote 2:

> ...what is relevant to a determination under section 22(1) is that fact that the Applicant and the Third Party have made very serious allegations against each other, and the relationship between them is clearly very hostile. The Applicant acknowledges that the Third Party has alleged that the Applicant is violent and has a history of violence against her.
> ...
> The Applicant is inconsistent in his submissions. In parts of his submission he states that the Third Party has not alleged that the Applicant has a history of violence against her. However, in other parts, he acknowledges, at least on January 17, 1997, that the Third Party made these allegations.

(7) The applicant further alleged that the Ministry's lawyer misled the Commissioner by incorrectly describing a series of events in relation to a Residential Tenancy Branch arbitration hearing scheduled to be held in January 1996 (complaint letter from the Applicant, April 23, 1997; Reply Submission of the Applicant, May 3, 1997). When the applicant noted that it was the arbitrator who changed the hearing from a telephone conference call to a face-to-face meeting, the Ministry's lawyer acknowledged his incorrect description in a letter to the Commissioner dated May 8, 1997.

In my opinion, the applicant has not established that the Ministry's lawyer willfully or intentionally attempted to mislead me in this inquiry. There is no credible

evidence to demonstrate that the Ministry's lawyer had such an intention. If the applicant has continuing concerns that fall within the offences and penalties provision in section 74(1) of the Act, he may wish to contact the Office of the Attorney General of British Columbia to request an investigation. I therefore decline to pursue the applicant's allegations against the Ministry's lawyer.

(8) The applicant has alleged that the Ministry must prove that disclosure would cause "harm" when it applies section 13(1) to sever information from records (Applicant's Post-inquiry Submission, May 18, 1997). The applicant further alleges that the Ministry is bound by the Government of British Columbia *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual. Neither of these allegations is correct, because section 13(1) is not a harm-based exception. While public bodies should disclose as much information as possible without applying section 13(1), I encourage them to look for possible harm before applying section 13(1) to sever information. However, there is no legal requirement in section 13(1) to prove that harm may result if the severed information is disclosed. This contrasts with the requirement to demonstrate harm under section 17(1) (disclosure harmful to the financial or economic interests of a public body). In relation to the Policy and Procedures Manual, it is up to public bodies and the Commissioner to use or disregard this often helpful source of non-binding policy advice.

8. Order

I find that the Ministry of Attorney General is authorized to refuse access to information in the records in dispute under section 13 of the Act. Under section 58(2)(b), I confirm the decision of the Ministry to refuse access to these records.

I also find that the Ministry of Attorney General is required to refuse access to personal information of the third party in the records in dispute under section 22 of the Act. Under section 58(2)(c), I require the Ministry to refuse access to these records.

_____

David H. Flaherty July 21, 1997
Commissioner