

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 71-1995
December 15, 1995**

INQUIRY RE: A decision by the Office of the Premier to refuse access to records relating to allegations of sexual harassment against a former Cabinet Minister

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1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry on October 2, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review made by Russ Francis, then of the Kitsilano News (the applicant), of a decision of the Office of the Premier (the public body) not to release records relating to allegations of sexual harassment against a former Cabinet Minister.

On April 17, 1995 the Office of the Premier received a request from the applicant for “records relating to sexual harassment complaints against [the former Cabinet Minister].” In his request the applicant acknowledged that the information sought was personal but he asserted a belief in an overriding public interest in disclosure.

On May 18, 1995 the Office of the Premier replied to the applicant by identifying the records that relate to the request. Of the five records identified by the Office of the Premier, two were released to the applicant. The remaining three were withheld in their entirety under sections 13, 15, and 22 of the Act. The Office of the Premier subsequently withdrew any section 13 exceptions to disclosure relating to the applicant’s request.

On May 26, 1995 the applicant requested a review by the Office of the Information and Privacy Commissioner of the decision of the Office of the Premier to refuse access. He further indicated that he was willing to accept the records with the names of the complainants severed.

The Office of the Premier was represented by Catherine Hunt, Barrister and Solicitor, with the Ministry of Attorney General, Legal Services Branch. The Office of the Premier submitted *in camera* representations along with its other submissions. The former Cabinet Minister was represented by Joseph J. Arvay, Barrister and Solicitor, of the firm Arvay Finlay.

A third party complainant, represented by an agent, submitted an *in camera* submission. The applicant represented himself.

2. Issues under review at the inquiry and the burden of proof

This inquiry is solely concerned with the applicability of sections 15 and 22 of the Act to two sets of interview notes written by members of the Office of the Premier's staff. These interviews were both in person and by telephone and included a number of persons who related their personal experiences respecting alleged sexual harassment by the former Cabinet Minister.

For the purposes of section 15, section 57(1) of the Act places the burden of proof on the Office of the Premier to establish that the disclosure of the records in question could reasonably be expected to harm a law enforcement matter.

For the purposes of section 22, section 57(2) of the Act places the burden of proof on the applicant to establish that the disclosure of the records in question would not be an unreasonable invasion of the third parties' personal privacy.

The relevant portions of each section are as follows:

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,
 - ...
 - (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
 - (d) reveal the identity of a confidential source of law enforcement information,
 - ...
 - (g) deprive a person of the right to a fair trial or impartial adjudication,
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Disclosure harmful to personal privacy [of a third party]

- 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,
- ...
- (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.

(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,

...

- (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,

- (g.1) 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,

...

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

...

- (e) the information is about the third party's position, functions or remunerations as an officer, employee or member of a public body or as a member of a minister's staff,

....

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

...

- (b) the disclosure of which is, for any other reason, clearly in the public interest

....

3. The records in dispute

The public body prepared the following description of the records in dispute:

1. Fifteen pages of handwritten notes taken by Doug McArthur, Deputy Minister to the Premier, in separate interviews both in person and by telephone, held with a number of persons who related their personal experiences respecting alleged sexual harassment by the former Cabinet Minister.

2. Eight pages of handwritten notes taken by Maureen Nicholls, Deputy Minister of the Ministry of Government Services, in separate interviews both in person and by telephone, held with a number of persons who related their personal experiences respecting alleged sexual harassment by the former Cabinet Minister.

The records that I actually reviewed comprised twenty-three handwritten pages organized by the pseudonym of the complainant and written in different hands.

4. The applicant's case

The applicant's position is that it is "an extremely rare event for a Cabinet minister to be accused of seriously inappropriate personal behavior - apparently on a number of different occasions - of sufficient gravity as to eventually lead to his dismissal as minister." His argument is that the public "remains largely in the dark as to just what inappropriate activities" the former Cabinet Minister took part in.

As I will note further below, the applicant relied upon sections 22(2)(a), 22(4)(e), and 25(1)(b) of the Act in support of his argument for disclosure of anonymized records.

5. The Office of the Premier's case

I have presented below the detailed arguments of the Office of the Premier with respect to its reliance on sections 15 and 22 of the Act to prevent disclosure of the records in dispute in this case.

The Office of the Premier's position with respect to section 22 in this case is that "disclosure of any identifying material would be an unreasonable invasion of the third parties' personal privacy." (Submission of the Office of the Premier, paragraph 5)

6. The complainants' case

I received *in camera* submissions from all except one of the complainants in this case, either directly or through an agent. Each of those successfully contacted by the Office of the Premier opposed disclosure of their records to the applicant. Speaking generally, their reasons included their reasonable expectations of confidentiality, the fear of the chilling effect of

disclosure on future complainants, the risk of harm to their reputations, their finances, and their rights, and invasion of their privacy by the media.

7. The former Cabinet Minister's case

I have discussed below, as appropriate, the specific arguments advanced by the former Cabinet Minister against disclosure of the records in dispute to the applicant. More generally, the argument under section 22 is that release of the records in dispute would be an unreasonable and unjustifiable invasion of his personal privacy, "given that the purpose of the release is for the applicant's commercial gain." (Submission of the former Cabinet Minister, p. 2)

8. Discussion

Confidentiality requirements of this inquiry

Because the applicant does not wish to know the names of the complainants in the case, the Office of the Premier supplied me with copies of the original records in dispute with the names of these persons severed. I accepted this practice as appropriate in the context of this particular high profile case. I decided that I did not need to know the names of the persons involved.

Although the name of the former Cabinet Minister involved in this inquiry is hardly a state secret, I have followed my usual practice in writing orders of keeping the names of individuals out of the Order when there is no need or reason to identify them personally.

The applicant in particular has made various "deductions" about who the complainants are in this case, and who they may not be, based on what is publicly known about this episode. I have read his submissions and considered them, but I cannot support or refute his several assumptions without revealing confidential personal information about just what has and is happening in regard to this matter. (See Reply Submission of the Applicant, pp. 1, 2)

The chilling effect of the disclosure of the records in dispute

I fully agree with the Office of the Premier that "disclosure of this type of personal information would have a chilling effect on encouraging government employees and others who have suffered or are suffering sexual harassment to come forward with their complaints." I am referring in particular to records of original complaints, which is what is at issue in this inquiry. (Submission of the Office of the Premier, paragraphs 80-84) I have addressed this matter more fully in my decision on Nanaimo Regional General Hospital, Order No. 70-1995, December 14, 1995, pp. 7, 8.

The position of the third parties

The complainant third parties in this inquiry (who were successfully contacted) are unanimously opposed to the disclosure of their personal information. The Office of the Premier views this as a "relevant factor" under section 22 of the Act and notes that "the complainants

have clearly exercised their rights of informational self-determination.” (Submission of the Office of the Premier, paragraphs 42, 43) This consideration is certainly persuasive with me, when it comes to the application of section 22 of the Act by any public body.

Section 15: Disclosure harmful to law enforcement

I agree with the Office of the Premier that the records in dispute in this case fall within the definition of law enforcement information in Schedule 1 of the Act, because they involve an investigation that leads, or could lead, to a penalty or sanction being imposed. (Submission of the Office of the Premier, paragraphs 47, 48) In this case, the investigation led to the rescission of the appointment of the Cabinet Minister by the Premier. I think this action can be construed as a penalty or sanction, based on standard dictionary definitions of these terms.

The Office of the Premier also pointed out that matters pertaining to sexual harassment are regulated by various government policies and procedures, the *Human Rights Act*, civil suits, and criminal charges. It cited a number of my Orders in support of its position on the law enforcement issue. (Submission of the Office of the Premier, paragraphs 50-59)

Section 15(1)(a): Harm a law enforcement matter

The head of a public body may refuse to disclose information to an applicant, if the disclosure could reasonably be expected to harm a law enforcement matter:

The public body submits that section 15(1) provides an exception from disclosure for a wide variety of investigations and proceedings by public bodies, including disciplinary proceedings by a public body The public body submits that confidentiality is a fundamental and necessary element of these types of investigations, particularly at the initial stages. (Submission of the Office of the Premier, paragraph 17)

I agree with the Office of the Premier on this issue. Further, I am pleased with the wording of the requirement of confidentiality in the government’s draft “Policy and Procedures on Discrimination and Harassment in the Workplace,” because it couples an expectation of “strictest confidence” with an acknowledgment of subsequent distribution of pertinent information on a “need-to-know” basis. (Submission of the Office of the Premier, paragraphs 62, 63; see also paragraphs 64-66; and the *In-camera* Submission of the Office of the Premier, paragraphs 8-11)

I am also aware of the fact that disclosure of the records in dispute in this inquiry might also jeopardize law enforcement matters (as defined in Schedule 1) that may be ongoing, a point also made by the former Cabinet Minister. (Submission of the former Cabinet Minister, pp. 1, 2)

I find that disclosure of the records in dispute in this inquiry could harm a law enforcement matter within the meaning of this section and that the Office of the Premier has met its burden of proof in this regard.

Section 15(1)(c): Harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement

Although the Office of the Premier has attempted to use this section of the Act to prevent disclosure, I cannot characterize confidential interviews as being covered by it. (Submission of the Office of the Premier, paragraph 70) See my Order No. 50-1995, September 13, 1995, pp. 6, 7.

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

The Office of the Premier has sought to apply this exception to the records in dispute and thus protect the identity of the complainants. (Submission of the Office of the Premier, paragraph 73) Since the applicant is not asking for the names of the complainants, at one level this is not an issue in this inquiry. However, I accept the Office of the Premier's application of this section in this case, because the details presented in the notes of complaints might themselves allow the identity of the complainants to be revealed.

Section 15(1)(g): Deprive a person of the right to a fair trial or impartial adjudication

I accept the argument of the Office of the Premier that disclosure of the records in dispute might deprive any of the complainants and the former Cabinet Minister of an impartial adjudication of the issues. I also accept the argument of the former Cabinet Minister that disclosure might jeopardize his right to a fair and impartial hearing "by the inevitable publicity that will result from the disclosure of the subject records."

Thus I find that disclosure of the records in dispute might deprive the complainants and the former Cabinet Minister of the right to an impartial adjudication of the allegations.

Section 22

Section 22(2)(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

The applicant relies on this section to argue for information about the activities of a former Minister of the Crown and a sitting Member of the Legislative Assembly. He asks whether sexual harassment is in fact tolerated in the day to day operations of government ministries:

Were the alleged transgressions - apart from those already publicly revealed - simply the occasional use of inappropriate language, which [the former Cabinet Minister] immediately withdrew? Were the transgressions entirely acceptable, within the government's bureaucratic culture? Or did they amount to highly exceptional behaviors, so atypical that they stood out from the quotidian goings-on of an important government office? These are some of the questions that disclosure of the records might help answer. In other words, release of the

records could cast light on the authenticity of the government's public stance on sexual harassment. (Submission of the Applicant, p. 2)

The Office of the Premier's reply is that "the Premier acted responsibly in the circumstances of this case in rescinding the appointment of the former Cabinet Minister." (Reply Submission of the Office of the Premier, p. 2)

In my view, the applicant's argument on this section is without merit in the context of the present inquiry. (See also Reply Submission of the Applicant, pp. 2, 3)

Section 22(2)(e): The third party will be exposed unfairly to financial or other harm

Counsel for the former Cabinet Minister made an extensive statement on this section and section 22(2)(h):

Whether or not, but perhaps especially where, the allegations are untrue the material may be of such a nature that its disclosure and publication will unfairly expose [the former Cabinet Minister] and his family to serious harm, personal, social, psychological and financial. His reputation, which has already been unfairly savaged by the media would be further irreparably damaged. [The former Cabinet Minister] would be forced to choose between responding to these published allegations - engaging in a 'trial by newspaper' - or remaining silent and appearing to admit them. [The former Cabinet Minister] should not be put in such an invidious position. Nor should he be forced to commence very expensive libel litigation to remedy the damage caused by the disclosure and publication of this material. (Submission of the former Cabinet Minister, p. 2)

Since I am not in a position to establish the veracity of the allegations made by the complainants in this inquiry, I prefer to err on the side of prudence with respect to accepting the decision of the Office of the Premier to consider the reputation of the former Cabinet Minister and his family under section 22(2)(h) in particular.

Section 22(2)(f): The personal information has been supplied in confidence

In seeking to rely on this section to prevent disclosure of the records in dispute, the Office of the Premier set out a number of factors outlined in the Information and Privacy Branch's *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual*, Section C.4.13 at pp. 20, 21, as factors that should be considered when making a determination on this matter. (Submission of the Office of the Premier, paragraph 33)

In the context of the present case, it is my view that the records in dispute were supplied in confidence, based in particular on the submissions of the complainant third parties.

Section 22(2)(g): The personal information is likely to be inaccurate or unreliable

Counsel for the former Cabinet Minister made an extensive statement on this section:

... [the former Cabinet Minister] has never seen or been given an opportunity to review the documents in question, and he has very serious doubts as to their accuracy, reliability and completeness. In any event, there is no way for the Commissioner to determine their accuracy or reliability short of conducting a full adversarial hearing into the merits of the allegations. This ... would greatly exceed his jurisdiction. The truth or falsity of these kinds of allegations must be left for the Human Rights Council should they become the subject of any hearing or should it decide to proceed with any further investigation.

Furthermore, since it appears that the records may contain what is essentially the evidence from one party in an unresolved dispute, the Commissioner should not assume their accuracy and reliability. Indeed if they do contain comments that adversely affect [the former Cabinet Minister], the presumption of innocence should negate any such assumption, and the Commissioner should therefore refuse to order their disclosure. (Submission of the former Cabinet Minister, p. 2)

These points are persuasive with respect to the decision of the Office of the Premier not to disclose the records in dispute.

Section 22(2)(h): The disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant

The records in dispute contain unsubstantiated allegations against the former Cabinet Minister, descriptions of events, and names of other persons. Although the name of the former Cabinet Minister is generally known, and even the names of some of those who have brought complaints of sexual harassment against him (on the basis of media reporting to date), disclosure of the records in dispute in this case and in this forum (under the scope of the Act) would, in my judgment, unfairly damage the reputation of any person referred to in the record. (See also Submission of the Office of the Premier, paragraph 39)

The Office of the Premier has further argued that “it is impossible to sever the records in such a manner as to eliminate the ability of certain individuals to identify the individuals involved.” (Submission of the Office of the Premier, paragraph 9) I agree with the Office of the Premier on this point. In addition, the contents of the records are of a very sensitive nature and character for all of those involved. While comparable information may have to be provided in a court room or during a human rights hearing, I do not think it would serve the public interest, however defined, by my ordering disclosure under the Act.

I noted in my previous Order No. 70-1995, December 14, 1995 that consideration of the disclosure of the basic records in any sexual harassment case especially raises fundamental issues under section 22(2)(h) of the Act.

The representations of the former Cabinet Minister with respect to this section are discussed above with respect to section 22(2)(e).

I note, without sympathy, the statement of the applicant that “[i]f any of the third parties finds their reputation has been unfairly damaged by the publication of details obtained from the records in question, they have full recourse to the courts.” (Reply Submission of the Applicant, p. 2) In addition to not being realistic in a moral or legal sense, this statement fails to address the obligations imposed on me by the requirement of this section of the Act. I have even less sympathy for the applicant’s assertion that “a strong case exists ... to the effect that the former Cabinet Minister’s reputation could not be further damaged by disclosure. It might exonerate him, or at least place the allegations in a context heretofore hidden from the public.” (Reply Submission of the Applicant, p. 3)

Section 22(3)(b): The personal information was compiled and is identifiable as part of an investigation into a possible violation of law

The Office of the Premier argues that the records in dispute were “compiled” using information from confidential sources “as part of an investigation into a possible violation of law.” (Submission of the Office of the Premier, paragraph 24) The former Cabinet Minister argues that these records must have been compiled for the purposes of investigations that are in fact still under way. (Submission of the former Cabinet Minister, p. 2)

Based on my review of the records in dispute, I agree with the position of the Office of the Premier and the former Cabinet Minister on this section. I find that disclosure of this information would be an unreasonable invasion of the privacy of third parties, including the complainants and the former Cabinet Minister.

Section 22(3)(d): The personal information relates to employment, occupational or educational history

The Office of the Premier made an *in camera* submission with respect to the applicability of this section to certain of the records in dispute. I accept this argument on the basis of my review of these records. I find that the personal information relates to employment and occupational history. I cannot say more on this point without running the risk of revealing sensitive personal information. (*In camera* Submission of the Office of the Premier, paragraphs 3-7)

Section 22(3)(g): The personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party

The Office of the Premier states that the records in dispute “consist of personal evaluations by the complainants about the former Cabinet Minister.” (Submission of the Office of the Premier, paragraph 26) Based on my review of the records in dispute and my understanding of the purpose of this section, I do not find it applicable to the records in dispute in this inquiry. The contents of the complaints are not what are commonly recognized as personal recommendations or evaluations, character references, or personnel evaluations.

Section 22(3)(g.1): 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

The Office of the Premier submits that “disclosure of the requested records would reveal personal evaluations about the former Cabinet Minister supplied in confidence by the complainants.” (Submission of the Office of the Premier, paragraph 29)

Based on my review of the records in dispute and my consideration of the language of the section, I am not persuaded that the records in dispute contain personal information covered by this section. I find that these records do not have the character of what are commonly recognized as evaluations, recommendations, or references in the human resources context.

Section 22(4)(e): The information is about the third party’s position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister’s staff

The applicant argues that the records in dispute should be released because they fall into this category of information about the former Cabinet Minister, and their release would not be an invasion of his personal privacy.

I find that this section does not apply to the records in dispute in this inquiry. (See also the Reply Submission of the Office of the Premier, pp. 2, 3) See Order No. 54-1995, September 19, 1995, p. 9.

Section 25(1)(b): Information must be disclosed if it is clearly in the public interest

The applicant seeks to invoke this section of the Act, because casting light on the workings and policies of the government would be in the public interest. Based on my review of the records in dispute, I find no basis to conclude that the Office of the Premier ought to have considered the application of section 25 in the context of this request. (See also the Reply Submission of the Office of the Premier, p. 3)

9. Order

Under section 15 of the Act, I find that the Office of the Premier is authorized to refuse access to the records in dispute. Under section 58(2)(b), I confirm the decision of the Office of the Premier to refuse access to the records in dispute to the applicant.

Under section 22 of the Act, I also find that the Office of the Premier is required to refuse access to the records in dispute. Under section 58(2)(c), I require the Office of the Premier to refuse access to the records in dispute to the applicant.

David H. Flaherty
Commissioner

December 15, 1995