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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 64-1995
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INQUIRY RE: A decision by the City of Vancouver to refuse access by the Kitsilano News to records of long distance telephone calls made to four specified numbers

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1. Introduction

As Information and Privacy Commissioner, I conducted an inquiry on August 4, 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 by Russ Francis of the Kitsilano News (the applicant) of the decision of the City of Vancouver (the public body) to refuse access, under sections 15, 16, 17, 19, and 22 of the Act, to records of all telephone calls made to four specified numbers during a specific time period.

2. Issue

The issue in this inquiry is the applicability of sections 15, 16, 17, 19, and 22 of the Act to the records in dispute.

The relevant portions of these sections are set out below:

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,

(d.1) reveal criminal intelligence that has a reasonable connection with the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities,

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

....

Section 16: Disclosure harmful to intergovernmental relations or negotiations

16(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 the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:

(i) the government of Canada or a province of Canada;
(ii) the council of a municipality or the board of a regional district;
(iii) an aboriginal government;
(iv) the government of a foreign state;
(v) an international organization of states,

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

...

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:

(a) trade secrets of a public body or the government of British Columbia;

(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;

....

(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 individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

...

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,

...

(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

...

(h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or

....

(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 remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

....

3. Burden of proof

At an inquiry into a decision to refuse an applicant access to all or part of a record, the head of the public body must prove that the applicant has no right of access (section 57(1)). However, under section 57(2), if the record or part to which the applicant is refused access contains personal information about a third party, it is up to the applicant to prove that disclosure of the personal information would not be an unreasonable invasion of the third party's personal privacy. In this case, the City has the burden of proving that the exceptions in sections 15, 16, 17, and 19 apply. The applicant has the burden of proving that the exception in section 22 does not apply.

4. The record in dispute

The applicant's request was for records of all telephone and fax calls made from the Mayor's office--including from his staff--from December 1, 1993 to March 15, 1995 to four specific telephone numbers (which the applicant supplied). The City used its internal, computer-based, telephone records system, to generate a one-page listing of telephone calls made between June 1, 1994 and April 30, 1995 to the four specified numbers. The one-page record lists the City Hall extension number which originated the call, as well as the date, time, duration (in seconds), and the number called with its geographic location by city. The assumption is that these are the only telephone calls recorded during the time period of the request.

5. The applicant's case

The applicant generally argues that he should obtain access to the records he is seeking. The applicant regards it as a matter of "overriding public interest that records of phone calls made by public employees and/or elected officials on official telephone lines paid for by the taxpayers be made available." I have used his arguments on specific sections below.

6. The City of Vancouver's case

The Standing Committee of Council on City Services and Budgets, acting as head of the public body, rejected various applications for the records in dispute on two occasions under sections 15, 16, 17, 19, and 22 of the Act. I discuss the specific arguments under each section below, as appropriate. Corporation Counsel for the City and the City Clerk both recommended to the Standing Committee on City Services that the record of telephone calls not be released.

7. Discussion

Despite the differences between this inquiry and the preceding one, Order No. 63-1995, November 21, 1995, the City made the same submission.

Section 15: Disclosure harmful to law enforcement

The City's argument is as follows:

> The Mayor, Council and City staff are sometimes involved in issues where they make telephone calls to individuals involved in by-law and criminal investigations. Were these telephone numbers to be released, it is possible a confidential source of intelligence may be jeopardised. While the issue discussed is not disclosed in the log, independent information relating to a law enforcement matter and giving the date thereof, could provide the basis to link the telephone number to the incident. (Submission of the City, p. 2)

The applicant submits that the City can hardly be serious in suggesting that disclosure of the records in dispute would harm law enforcement. The City has provided no evidence for this in the particular circumstances of this case. Thus I find that the City has not met the burden of proving that disclosure of the specific records in dispute in this case could reasonably be expected to harm law enforcement.

Section 16: Disclosure harmful to intergovernmental relations

The City's argument is as follows:

> The Mayor, Council and senior City Staff are regularly engaged in negotiations with the Provincial Government. The release of these calls could jeopardize these negotiations and cast unreasonable doubts upon city staff as to their future ability to undertake such negotiations. It is reasonable to expect that staff at one level of government should be able to speak with staff at another level of government, in confidence, to explore public policy issues and that these issues should be able to be explored competently. (Submission of the City, p. 2)

The applicant argues that since the destination telephone numbers in the records in dispute are of various B.C. Liberal Party offices, and not of any government offices, section 16 is not applicable. The Liberal Party is not part of any government.

The City's submission does not provide any objective grounds to believe that disclosure could reasonably be expected to result in the harm contemplated by this section. I therefore find that the City has not met the burden of proving that disclosure of the specific records in dispute could reasonably be expected to harm intergovernmental relations.

Section 17: Disclosure harmful to the financial or economic interests of a public body

The City's argument is that:

> When Council or staff are party to intergovernmental negotiations on a variety of subjects, the publicity of calls made to one or more of the parties could jeopardize the negotiations and harm the public body. (Submission of the City, p. 2)

The applicant queries how release of contact information between the City and the Liberal Party could harm the financial interests of the City. Again, the City has provided no objective grounds or rationale to show how the proposed disclosure could reasonably be expected to result in the harm contemplated by this section. Therefore I find that it has not met the burden of proving that disclosure could reasonably be expected to harm its financial or economic interests.

Section 19: Disclosure harmful to individual or public safety

According to the City, "[i]ssues of concern here are telephone calls made between Council, staff and members of the public regarding property and by-law complaints or the reporting of criminal activity." (Submission of the City, p. 3)

The applicant wonders how release of the record in dispute could harm individual or public safety: "Is the city suggesting that there will be a riot in the street if this information becomes publicly known?" In his view, section 19 does not apply.

On the basis of the limited evidence submitted to me by the City, I find that disclosure of these specific records cannot reasonably be expected to harm individual or public safety.

Section 22: Disclosure harmful to personal privacy

The City notes that this is the only mandatory exception that it relies on, the rest being discretionary. In its view, section 22 in its entirety compels it to refuse the applicant's request on the grounds that disclosure would be an unreasonable invasion of the personal privacy of third parties. It emphasizes that telephone conversations are "widely considered to be among the most sensitive and private of interpersonal contacts." (Submission of the City, p. 3; Reply Submission of the City, p. 1) In fact, the applicant is seeking the records of numbers called, not the substance or contents of conversations.

The City also submits that a phone call from a business line "could be personal in nature, whether to a private or to a business number." (Submission of the City, p. 3) I agree with the City's description on this point.

I will consider each part of section 22 separately. In doing so, I am required to consider the factors set out in section 22(2) and any other factors that I consider to be relevant in the circumstances.

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 City recognizes that this section is an obvious argument for disclosure of the records in dispute. In general, I accept the principle that disclosure of telephone toll records regarding the specific numbers in this case might indeed be desirable for the purposes of public scrutiny covered by this section. But I do not think that knowing whether a Mayor's office ever placed calls to a particular telephone number (absent a law enforcement investigation) is responsive to the issue of subjecting the activities of a public body to public scrutiny, since the existence of a telephone link does little to establish the substance of what actually transpired and which specific persons were directly involved at either end of a possible conversation.

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

The City argues that the personal information in the record in dispute was supplied in confidence and, indeed, "the record was collected without the knowledge of the third parties. This compels the City to believe that the Act requires that the record should not be collected in future and must not be released." (Reply Submission of the City, p. 2) This argument cuts both ways, since the City is in fact in possession of personal information about both its own elected leadership and staff and persons (or at least telephone numbers) called. Since the City admits that the data on its telephone logs are used for monthly verification purposes, it is hard to agree that its personnel supplied the information in confidence in the usual sense of that word. In fact, the kind of automatic recording at work in this kind of situation may not even fit the definition of being "supplied." The Information and Privacy Branch's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, C.4.13, p. 20, says that "supplied in confidence" applies to information that one person "entrusts to another," which is not how the information about telephone calls was collected in the present inquiry.

I find that the specific records in dispute were not supplied in confidence under the meaning of this section. If public bodies wish to regard telephone toll records as being supplied in confidence by individual employees, they should have formal, written policies to this effect.

Section 22(2)(g): The accuracy and reliability of the records in dispute

One of the factors under the Act that a public body must keep in mind is whether to disclose inaccurate or unreliable records and thereby unreasonably invade the privacy of a third party. I agree with the City that this is a risk in the present inquiry. Multiple telephone lines, call forwarding, other telephone management options, and the availability of lines to other staff and members of the public make it difficult to establish the origins of the record. This is especially true, the City argues, since the applicant seeks to "establish relationships between telephone calls and individuals. The record is not capable of providing such information." (Submission of the City, p. 3)

I am of the view that any specific information that might be disclosed in this inquiry would likely be "accurate" within the meaning of this section, in the sense that someone from the Mayor's office most likely did call a particular telephone number. But it would not be reliable enough to subject the City to public scrutiny.

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

The City suggests that disclosure will allow the applicant to unfairly harm reputations of individuals who may have been called by the Mayor's office: "As the record will be used to impute actions that the record cannot provide the data to support, its release will unfairly cause damage to individuals' reputations." (Reply Submission of the City, p. 2)

Because offices or persons identified as having been called by the Mayor's office may not have wanted or indeed invited such an approach, and may in fact have rejected it, I find that disclosure of the records in dispute may indeed unfairly damage the reputation of persons identifiable from the record as being the subscriber at a number called, or, in this case, an identifiable person from the Mayor's office who had legitimate reasons to call the Liberal Party, or the Liberal Party Caucus, or individual members, if that is indeed where the calls went.

Section 22(3)(h): The personal information indicates the third party's political beliefs or associations

The Act presumes that it is an unreasonable invasion of a third party's personal privacy to disclose his or her political beliefs or associations. This section seems to me to have some relevance to the determination of the present inquiry. It is at least arguable that disclosure of the fact that someone has called the phone number of a particular employee of the Liberal Party or its legislative caucus members or staff would thereby reveal their political beliefs or associations. My difficulty in applying this section is that I have no real knowledge whether the telephone numbers called are those of particular individuals or of party offices. Thus I am not relying on this section in making a determination in this case.

Section 22(4)(e): Information about a third party's position, functions or remuneration as an officer, employee or member of a public body

I find that disclosure of telephone toll records is not required by this section of the Act, because they do not concern the position, functions, or remuneration of an employee of a public body. The fact that people who work in the Mayor's office make telephone calls is not a distinguishing characteristic of any position in this day and age. I also find that there is no obligation under the Act to disclose telephone numbers called by a particular staff member or office, at least in the circumstances advanced by the applicant in this particular case.

Section 57: The burden of proof

The City argues that it is unreasonable for it to bear the burden of proof with respect to the application of particular exceptions to individual calls. It states that its reliance on all of the exceptions has led it to predict a reasonable expectation of harm. It argues that it is unfair to expect it to bear the burden of proof "as to personal nature, or validity of other Sections of the Act cited." (Submission of the City, pp. 3, 4)

The Act clearly gives the City the burden of proof for the discretionary exceptions in sections 15, 16, 17, and 19 (which it has not met), but I discuss the practical aspects of this in the next section.

Expectations of confidentiality

The City argues that it would be "impossible" to distinguish personal calls on a corporate line. (Submission of the City, p. 4) Doing this would infringe on privacy rights and "would compromise the ability of the public body to function normally." (Reply Submission of the City, p. 1) Moreover:

> It is clearly unfair to force anyone to reconsider their routine work habits and frustrate their ability to function normally as an employee of a public body because basic privacy rights and fundamental confidences could be compromised by the release of telephone logs. The record was created without the knowledge of staff and the calls made by staff were made in the expectation of complete confidentiality. It is unfair to revoke this expectation of confidentiality. (Submission of the City, p. 4)

In fact, many public bodies have had to change routine practices in response to the advent of the Act. Records containing personal information should not be created without the knowledge of staff except in unusual circumstances, such as surveillance for disciplinary or law enforcement purposes. Staff in practice also have very limited legal expectations of confidentiality, when they are using means of communication controlled and paid for by a public body and are also creating records under the Act.

Public bodies need to develop written policies concerning the collection, disclosure, linkage, and destruction of personal information created in the form of electronic prints created in the workplace. If a legitimate claim can be made that a certain type of data is indeed transitory, then it should be erased automatically at fixed intervals, subject to rational schedules for record retention. In my view, for example, detailed telephone toll records should be destroyed when they are no longer needed for verification, audit, or payment purposes.

I am of the view that employees of public bodies have reasonable expectations of confidentiality in their long distance telephone toll records, when this information is recorded by automated or manual systems of either the telephone company or a public body. It appears to be customary for employers to tolerate a reasonable amount of personal telephone use, during the work day, as personnel seek to manage their personal lives during normal business hours. Just as staff would expect confidentiality for local numbers dialed, so I think that they are entitled to non-disclosure of long distance toll records outside of a public body, at least in the circumstances of the present case. The public body has the responsibility of policing telephone use and, indeed, having a policy of charging staff for any personal calls.

I find, under section 22(1) of the Act, that it would be an unreasonable invasion of personal privacy of third parties for the City of Vancouver to disclose the records of calls made to the specific telephone numbers in dispute to the applicant. Thus the City is required to refuse access.

8. Order

Under section 58(2)(c) of the Act, I require the City of Vancouver to refuse access to the records in dispute to the applicant.

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David H. Flaherty
Commissioner

November 21, 1995