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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 78-1996
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INQUIRY RE: A decision by the Capital Regional District to refuse access to an investigation report regarding a complaint of harassment in the workplace

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1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner on November 1, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of the applicant's request for review of a decision of the Capital Regional District (the CRD) to refuse access, under sections 19 and 22 of the Act, to an investigation report.

2. Documentation of the inquiry process

The applicant submitted a request on July 11, 1995 for access to a report of an investigation of a workplace/personal harassment complaint made about him. The relevant investigation report was completed on April 27, 1995. The CRD initially replied to the applicant on June 28, 1995, by way of a confidential memo, to deny access to the entire report but providing him with a copy of Part I of the report, which is a two-page summary of Part II of the report. The CRD sent a second memo to the applicant on July 12, 1995 to confirm the denial of access to the rest of the report. The applicant wrote on July 31, 1995 to the Commissioner to ask for a review of the CRD's decision.

Subsequently, during the mediation process, the CRD provided a severed version of Part II of the report to the applicant.

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

The issues under review in this inquiry are the application of sections 19 and 22 of the Act to information, including personal information of the applicant and third parties, contained in the investigation report.

For the purposes of section 19, section 57(1) of the Act places the burden of proof on the CRD to establish that the release of the information in dispute, including personal information about the applicant, could reasonably be expected to interfere with public safety or threaten anyone else's safety or mental or physical health.

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

The relevant sections of the Act are:

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

...

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

...

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

...

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

...

4. The records in dispute

The body of the report about harassment in the workplace is 37 pages. It also has a cover page, a table of contents, the Part I summary, and a two-page appendix. The applicant has received a copy of the Part I summary and the appendix. During the mediation process, the applicant was given access to 12 complete pages and portions of 13 pages of Part II of the report. Another 10 pages were withheld entirely. Thus the records in dispute are the pages not already provided to the applicant.

5. The applicant's case

The applicant is an elected official of the CRD (Salt Spring Island Electoral Area), who was the subject of a complaint of personal harassment in the workplace. As appropriate, I have discussed the specifics of his submission below. The applicant is of the view that he has no way of knowing the nature of the accusations against him without having access to the unsevered report. He denies that he has harassed the complainant.

6. The Capital Regional District's case

In addition to submissions that were shared with the applicant, the CRD also made submissions on relevant matters that I accepted on an *in camera* basis. As appropriate, I have used aspects of its detailed submissions below.

7. Discussion

The applicant's main submission largely challenged the process under which the investigation against him was undertaken, "a process which should be condemned as a disgrace." He described it as "an uncontrolled fishing expedition driven by politically motivated

chicanery." The applicant also concluded in his rebuttal that "there is no direct evidence to support the complaint levelled against me." These are not matters that I have the authority to deal with under the Act.

The applicant also seems to argue that he needs access to the full report to address problems that appear to have arisen in various aspects of his work as an elected official on Salt Spring Island. While this may indeed be true, he will have to seek other avenues for addressing such "systemic problems," since his status under the Act, in this inquiry, is that of an applicant for records.

Section 19: Disclosure harmful to individual or public safety

The applicant finds the application of this section "particularly offensive. The innuendo that goes with the citing of this section is tantamount to being accused without being able to defend oneself. This is damaging to my reputation which I consider worth defending."

The CRD presented detailed information from the record in dispute, on both an *in camera* and public basis, that supports the view that the complainant and others could reasonably perceive that they have been the object of threats and intimidation from the applicant. I have said in other decisions that I prefer to act prudently in situations where a public body believes that the safety of someone may be at stake. See Order No. 18-1994, July 21, 1994, p. 4; Order No. 58-1995, October 12, 1995, p. 6. My order below reflects this on-going concern, which can be largely satisfied in this case by severing the names and unique identifiers of those cited in the investigative report.

Section 22: Disclosure harmful to personal privacy

The applicant sees no reason why sections 22(2) and 22(3) should apply in his case, since he is "a reasonable person who has every interest in avoiding conflict with my constituents."

Section 22(2)(c): the personal information is relevant to a fair determination of the applicant's rights

In the course of arguing that this section has no relevance, the CRD made a rather extraordinary admission that seems to me to vitiate its point:

> The Executive Director [of the CRD] concurs that the terms of reference for the report were exceeded and the report was prepared in a manner that does not reflect the method of investigation the Capital Regional District promotes. Therefore the report will not be acted upon. Given that the report will not be acted upon, and thus no action taken for or against the respondent [applicant], release of personal information is not required for a 'fair determination of the applicant's rights.'

I am of the view that these admissions in fact are a "relevant circumstance" promoting disclosure of more information from the report to the applicant, a goal that is reflected in my order below.

In my view, an applicant who perceives himself to be a victim of a botched investigation, and receives confirmation on that point from a public body, has a considerable claim of access to relevant records concerning himself or herself.

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

The CRD rightly interpreted this section as applying to the third parties mentioned in the report. It argues that some of those individuals interviewed for the report currently hold paid positions with the CRD, "should their statements be released it may expose them to reprisals and position risk and therefore, place them in a financially precarious position." This creates a risk of an expanding circle of harassment, since "the respondent is not reluctant to threaten firing and removal of individuals not in concurrence with similar political philosophies. This is accomplished in the form of emotional harassment, verbal abuse and bodily threats." I agree with the CRD that this "relevant circumstance" militates against disclosure, but the solution again is largely the severance of unique identifiers.

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

The CRD concludes that some of those mentioned in the report "have an acceptable working relationship with the respondent [applicant] but have witnessed situations whereby the respondent has exhibited threatening behavior. Should the document be released individuals' reputations will be at risk as well as exposure to harassment." I agree with the CRD that this "relevant circumstance" militates against disclosure, but the solution again is largely the severance of unique identifiers.

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

The actual submissions of the CRD on this section had little to do with the purpose of the section in creating a presumption of an unreasonable invasion of a third party's personal privacy. The applicant did not address this point either. This is unfortunate because it is arguable that the information recorded from witnesses or interviewees was compiled as part of an investigation into a possible harassment violation under a harassment policy. However, it is unclear if a harassment policy is "law" within the meaning of this section. Without the benefit of reasoned argument on this point, I decline to make a determination that the presumption under this section applies.

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

The CRD states that disclosing aspects of the performance appraisal of the complainant would be an unreasonable invasion of his privacy, a point with which I concur for that specific information.

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 CRD submits that this section can be used to protect from disclosure what it refers to as "evaluations" of the applicant. While I appreciate the CRD's point that those interviewed require "a safe harbour to express their concerns," it is my view that this is not the intent of this section. See Order No. 71-1995, December 15, 1995, p. 11.

Review of the severed record in dispute

I have engaged in a detailed review of the severances made by the CRD in the version of the report disclosed to the applicant. In general, I have some difficulty in this inquiry in making a logical connection between the CRD's arguments under the Act against further disclosure of the contents of the report in dispute and the actual severances that it has made. It is also important to realize that a great deal of sensitive information has already been disclosed to the applicant. I find that disclosure of non-identifying information would not be an unreasonable invasion of the privacy of the third parties, because it seems unlikely that they can be identified with precision.

Pages 4 to 10 present the substance of the complaints made against the applicant and the findings of the investigator who prepared the report. Almost all of the contents are fairly general allegations and supporting documentation. Since submissions culled from the press and presented to this inquiry indicate that it is known on Salt Spring Island that the complainant charged the applicant with harassment in the workplace, I conclude that disclosure of the actual details of the charges will not cause harm to the complainant beyond the risks he has already run by the fact that knowledge of the original complaint became public.

The CRD has also made minor severances of portions of text on pages 11, 12, 13, 16, 17, 18, 19, 20, 21, 23, 24, 27, 30, 32, and 33. My general conclusion is that the CRD has been much too cautious in making these severances in order to prevent harm to the individuals quoted. I am of the view that primarily identities and related identifiers need to be severed in order to provide appropriate protection, under section 19 of the Act, to those interviewed or quoted by the investigator. I did sever a paragraph of information about employment history.

I have prepared a re-severed copy of the report for disclosure to the applicant.

8. Order

I find that the Capital Regional District is not authorized to refuse access, under section 19 of the Act, to parts of the record described in this order. I also find that the Capital Regional District is not required to refuse access, under section 22, to these same parts of the record.

Under section 58(2)(a) of the Act, I require the Capital Regional District to give the applicant access to those parts of the record which were inappropriately severed, as described in these reasons and specified in the re-severed copy of the record that I have prepared for disclosure.

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David H. Flaherty
Commissioner

January 18, 1996