

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 41-1995
May 29, 1995**

INQUIRY RE: A request for review of a decision by the Ministry of Social Services not to disclose to the Canada Ports Corporation the date that a third party commenced employment with the Ministry

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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 in Victoria on February 28, 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 Canada Ports Corporation ("the applicant") of a decision of the Ministry of Social Services ("the public body") not to release the date upon which a certain employee ("the third party") became employed by the Ministry.

On November 17, 1994 Mr. Rick Shields, Counsel, Common Law, for the applicant, requested from the public body a record of the "date upon which [the third party's] employment commenced with your Ministry as [position title]." On November 29, 1994 the Ministry refused to release this record on the grounds that the information it contained related to the third party's employment history. The public body argued that under section 22(3)(d) of the Act such a disclosure was presumed to be "an unreasonable invasion of a third party's personal privacy." It rejected the applicant's argument that the information was about the third party's "position, functions or remuneration" as its employee, release of which would not be an unreasonable invasion of the third party's privacy under section 22(4)(e).

The applicant requested this Office to conduct a review of the public body's decision on December 6, 1994. The notice of inquiry was distributed on February 6, 1995.

2. Documentation of the inquiry process

This Office invited written submissions from Canada Ports Corporation, the Ministry of Social Services, and the third party. It also invited the Professional Employees' Association, the B.C. Government Managers' Association, and the B.C. Government Employees' Union (BCGEU) to make submissions as intervenors. All parties and intervenors, except the BCGEU, made submissions.

All parties received a Notice of Inquiry outlining the issues in this case and a one-page fact report, which was accepted by the parties as accurate for the purposes of conducting the inquiry.

3. Issue under review at the inquiry

This review concerned the application of the following sections of the Act, which read in appropriate part as follows:

Disclosure harmful to personal privacy [of third parties]

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,

....

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

....

(d) the personal information relates to employment, occupational or educational history,

....

(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,

f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

....

Division 4 - Public Interest Paramount

Information must be disclosed if in the public interest

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

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

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

(2) Subsection (1) applies despite any other provision of this Act.

Under section 57(2) of the Act, if the record or part of a 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 of the information would not be an unreasonable invasion of the third party's personal privacy.

4. The record in dispute

The record in dispute consists of a standard "personnel/pay data authorization" record, on a single sheet, containing the third party's date of hire (i.e., the date on which the third party commenced employment with the Ministry of Social Services).

5. Canada Ports Corporation's (CPC) case

The applicant believes that it should be entitled to disclosure of the date of the third party's employment start because it does not appear that section 22(3)(d) of the Act was intended to protect such information from disclosure. It argues that "employment history" is intended to protect information of the sort that "could reasonably be expected to have a prejudicial aspect, such as performance evaluations or discipline records.... [T]he parameters of the term should not be viewed so expansively as to legitimize the non-disclosure of innocuous information such as employment commencement dates."

The applicant argues that the "need for a sensible limitation on the notion of 'employment history' becomes especially apparent when paragraph 22(3)(d) is viewed in conjunction with paragraph 22(4)(e)." It argues that the start or termination date of an individual's employment has to fall within the category of information described by the phrase "the third party's position, functions or remuneration as an ... employee For without a temporal frame of reference, information about an individual's position, function or remuneration is of little value."

The applicant further argues that the Ministry has a public interest obligation to disclose the information requested under section 25(1)(b) of the Act, because Canada Ports Corporation is trying to determine whether the third party legitimately received monies paid to him under a severance agreement:

The agreement in question provides that certain payments to be made on behalf of the third party would terminate on the date of his reemployment while other payments made to the third party would be reduced. It appears to be possible that the third party neglected to advise CPC upon becoming reemployed.

Canada Ports also has a responsibility to inform Public Service Superannuation, Canada Pension Plan, and Unemployment Insurance when an individual ceases to be its employee which, in the present case, would be the date of reemployment of the third party.

In the applicant's view, the Ministry has an obligation to disclose the requested information "in order to advance the public good," by ensuring that public funds expended by Canada Ports Corporation have not been unfairly diverted from the public purse. The proper functioning of complex federal programs relies on timely flow of correct and complete information.

Finally, the applicant argues that section 22(4)(f) of the Act contemplates the disclosure of "financial and other details of a contract to supply goods and services to a public body." Its argument is that under the law of master and servant, new employees "enter into a `contract of service,' express or implied, whereby they undertake to supply their services as employee to the specified employer." Canada Ports believes that the third party's employment relationship with the Ministry can be so characterized, which would justify the requested disclosure of a basic detail of the contract, the commencement date of the term.

6. The Ministry of Social Service's case

The Ministry determined that the start date of employment could not be released under section 22(3)(d) of the Act, which deals with employment history. The third party refused to allow disclosure of the information requested.

The Ministry interprets section 22(4)(e) on the basis of the *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual*, which states that the intent of the section is to allow the release of information that relates to a job description, classification, duties and salaries, or other benefits, the Ministry argues, "rather than to focus on the more personal details relating to the individual's personal employment history." (Submission of the Ministry, p. 2) Further, "the Ministry submits that s. 22(4)(e) does not include the more personal employment information such as the date on which an employee began working for a public body or any other details about an employee's term of employment." (Reply Submission of the Ministry, p. 2)

Section C.4.13, p. 28 of the same Manual states, with respect to section 22(3)(d), that the definition of employment history includes an individual's "term of employment" and "any information regarding an individual's work record." Further, the Ministry argues "[i]nformation pertaining to an employee's start date is a key component in any employee's `term of employment.'" Thus the Ministry is of the opinion that the Manual "clearly supports the Ministry's interpretation of this section." The Ministry also referred me to two decisions of the Ontario Information and Privacy Commissioner, which I will discuss below.

The Ministry did take into consideration section 22(2)(c) of the Act, which requires consideration of whether release of the requested information would be relevant to a fair determination of the applicant's rights:

Canada Ports Corporation now wishes to have the start date of employment, in case the third party has been in violation of the terms of contract. The applicant is not indicating that the third party is in violation of the contract. Therefore, it appears that Canada Ports Corporation is 'fishing' for information of a personal nature about the third party. Thus a fair determination of the applicant's rights is not at issue.

The Ministry also considered section 22(2)(e) of the Act, which concerns whether a third party will be exposed unfairly to financial or other harm and concluded:

Ports Canada Corporation [sic] is attempting to gain access to the personal information in order to determine whether a contractual relationship has been violated. The result of releasing the information in question could have harmful financial, or other consequences to the third party.

7. The third party's case

The third party agrees with the Ministry's efforts to protect his privacy against unreasonable intrusion. He especially relies on section 22(3)(d) of the Act to protect his personal information from disclosure. Further, he explains that his current work requires him to investigate and prosecute individuals responsible for criminal activity against the Ministry of Social Services. In this connection, he seems to claim that an individual he has investigated has made threats of violence against him and that he and his family require protection.

The third party indicates that he worked for Canada Ports Corporation for over twenty years. He was declared redundant in 1993. This event caused considerable distress for himself and his family. The third party perceives that Canada Ports Corporation is attempting to establish better terms, retroactively, for their Notice of Separation to him. He states that the applicant is well aware that the third party's benefits attached to his Notice of Separation were due to expire in November 1994, since the person acting for the applicant in this case signed the original letter to the third party.

8. The Intervenors' Comments

The B.C. Government Managers' Association supports the position of the Ministry that the record in dispute should not be disclosed, since it forms part of the confidential personnel file and employment record of the third party and is thus protected under section 22(3)(d) of the Act. It should not be released without a written consent from the third party.

The Professional Employees' Association further supports the Ministry's position, again based on section 22(3)(d) of the Act.

9. Discussion

Section 22 of the Act requires the head of a public body to refuse to disclose information if the disclosure would be an unreasonable invasion of a third party's personal privacy. On the facts of this case, I am of the opinion that disclosure of the start date of employment would not be an unreasonable invasion of the third party's personal privacy. My reasons follow.

Section 22(4)(e)

A person's start date of employment is information which, in my view, falls under section 22(4)(e) of the Act as information about the third party's position as an employee of a public body. The Manual clarifies that a third party's position, functions, and remuneration (which may be released) include a job description and classification, a description of duties to be performed in the course of employment, and salary amount and benefits received as a result of employment, including severance pay. (section C.4.13, p. 39) The examples offered in the Manual of information that can be released include the job classification and exact salary of a public body employee and details of a severance package provided to a former employee. (section C.4.13, p. 40)

I find that the information in dispute in this case relates to the third party's position and functions as an employee of a public body under section 22(4)(e).

I am supported in this view by a 1986 decision of the Quebec Commission on Access to Information in the case of Jean-Claude Boucher against La Ville de Laval ([1986] C.A.I. 548 to 552). An applicant sought information about a police officer who operated a radar system for the city, in particular his qualifications, his experience, and his years of service. The Commission interpreted article 57 of the Quebec law, which states that the name, title, function, address, and office telephone number of a staff member of a public body are public information. It had previously decided that the word "function" included the dates of the beginning and ending of an employee's work relationship with a public body. It now decided as follows:

Conformément à sa décision précédente, la Commission considère aussi que les dates du début et de la cessation d'un emploi dans un organisme public sont des renseignements publics.

In conformity with its previous decision, the Commission also considers that the dates of the beginning and end of employment in a public body are public information. ([1986] C.A.I. 552; translated from the French)

The Commission ordered the City of Laval to release a description of the past and current work activities of the official in question as well as the dates when he assumed them.

Sections 22(3)(d)

In addition to my reasons under section 22(4)(e), I also find that the presumption raised in section 22(3)(d) of the Act does not apply in this case. The relevant issue here is whether a start

date of employment is "employment history" within the meaning of this section. The Manual advances the following definition of this term:

`Employment history' refers to any information regarding an individual's work record. This includes the name of her or his employer, the term of employment, the duties associated with the position, the salary and the reasons for leaving. (section C.4.13, p. 28)

The further examples offered by the Manual include employment performance appraisal reports, but notes that "this presumption does not apply to some employment information about officers, employees or members of public bodies See comments at paragraph 22(4)(e) below." (C.4.13, p. 29)

I am specifically choosing not to follow two recent decisions of the Information and Privacy Commissioner for Ontario, which concluded that the dates of hiring of former employees fell under the concept of "employment history" in section 14(3)(d) of the Ontario *Municipal Freedom of Information and Protection of Privacy Act*. Both of these cases dealt with information in severance arrangements with former employees, and I do not find them persuasive with respect to the matter currently before me. See Order M-173, August 11, 1993, Assistant Commissioner Irwin Glasberg, p. 7; Order M-278, March 2, 1994, John Higgins, Inquiry Officer, p. 3.

I agree with the Manual's basic interpretation that employment history includes information about an individual's work record. I emphasize the word "record" because in my view this incorporates significant information about an employee's performance and duties. I do not think that the singular fact of an employee's start date is a part of his or her record, as used in this context. In any event, I also find that even if the information is part of "employment history," I have concluded that the presumption that disclosure of this information would be an unreasonable invasion of personal privacy has been rebutted in this case. In reaching this conclusion, I have considered all of the circumstances of this case, as well as the factors set out in sections 22(2)(c) and (e) as argued before me.

Section 22(2)(c)

I do not think that disclosure of the information in issue here is relevant to a fair determination of the applicant's rights. The Ministry and the third party argued that the applicant is engaged in a fishing expedition. I disagree, because a request for one specific record cannot reasonably be characterized as a fishing expedition. While it is arguable that the applicant may have a right of access to the employment start date in order to learn whether it has spent public money on a severance agreement in accordance with the relevant rules, I do not think that the applicant's rights are really at issue here.

Section 22(2)(e)

This section considers whether a third party will be exposed to financial or other harm after the release of personal information. I cannot conclude, in terms of public policy, that this factor would allow an individual to withhold information which may be relevant to the receipt of public

funds. If the Ministry of Social Services was alleging some type of abuse of income assistance against an employee of the federal government, I find it hard to imagine that it would readily accept an argument that the federal *Privacy Act* prohibited disclosure of the start-up date for employment, because release of the information would harm the financial interests of the third party it was pursuing.

With respect to the third party's views that he and his family require protection from someone by non-disclosure of the record in dispute, which presumably derives from section 22(2)(e), I find this line of argument unpersuasive when it comes to an applicant that is a federal government body and also subject to the federal *Privacy Act*. The third party has recently had strained relations with Canada Ports Corporation, but there is no evidence that it, or anyone working for it, poses a threat of some sort to him.

Section 22(4)(f)

The applicant wishes me to apply this section of the Act. The Ministry submits that this section does not apply to the facts in this inquiry, since it interprets the section to apply to independent contractors who are not employed by the Ministry as regular employees. It cites Ontario Order M-173, April 11, 1993, Irwin Glasberg, Assistant Commissioner, in support of this distinction. In the alternative, it argues, the information in dispute in this case does not fall within the ambit of section 22(4)(f), because an employee's start date is not information that reveals "financial and other details" of a contract. I accept the Ministry's first position on this section. The third party's contract of employment puts him under section 22(4)(e) of the Act, which applies to employees of public bodies (not contractors).

Third party consent

The Ministry construes this case as follows: "It appears that one level of government is attempting to force another level of government to release personal information about a third party without the third party's consent." Thus the Ministry views the issue of consent as crucial in this case. I respectfully disagree. Under normal circumstances, consent may well be critical, because an individual might agree to a reasonable request for disclosure of information in these circumstances. But consent is only one way to obtain disclosure under the *Freedom of Information and Protection of Privacy Act*.

Section 25

The Ministry argues that section 25(1)(b) does not apply in the circumstances of this review. It is of the view "that the interests of the applicant on behalf of Canada Ports Corporation are similarly [Order No. 22 - 1994, p. 15] not broad enough to justify overriding the privacy protection in s. 22 of the FOI Act in this case." Moreover, this applicant "has not shown how release of one individual's personal information would be clearly in the public interest." Despite the arguments of the parties, I do not believe it is necessary to involve section 25 in this case, given my conclusions about section 22.

10. Order

It is my determination that disclosure of the record in dispute would not be an unreasonable invasion of the third party's personal privacy under section 22 of the Act. Therefore, I find that the head of the public body is not authorized or required to refuse access to the record in dispute. Accordingly, under section 58(2)(a) of the Act, I order the Ministry to disclose the record in dispute to the applicant.

David H. Flaherty
Commissioner

May 29, 1995