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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 24-1994
September 27, 1994

INQUIRY RE: A Request for Access to Records of the Ministry of Health and the Ministry Responsible for Seniors

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1. Description of the review

As Information and Privacy Commissioner, I conducted an oral inquiry at the Office of the Information and Privacy Commissioner in Victoria, British Columbia on Thursday, September 15, 1994 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 the applicant in this case, Alison Appelbe, a reporter for the Vancouver Courier.

On December 30, 1993 the applicant made a request to the Ministry of Health and the Ministry Responsible for Seniors (the Ministry) for a list of the severance packages awarded to non-union employees of University Hospital, Shaughnessy Site, Vancouver (Shaughnessy Hospital), following the announcement in February 1993 of the closure of the hospital. She specifically requested the following items:

a. The names of the employees
b. The dates of the agreements
c. The amounts of the packages

The Ministry received the request on January 6, 1994 and on February 1, 1994 extended the response deadline for the request by 30 days, stating that it was taking the Ministry longer than anticipated to locate the requested records, because the records associated with the closure of Shaughnessy Hospital were then in transition.

During the month of March 1994 the Ministry determined that the records in question were under the control of Shaughnessy Hospital and transferred the request to that body. It told the applicant that she could expect to receive a reply directly from the coordinator of the Shaughnessy Hospital Transition Team. The Ministry invited the

applicant to resubmit her request to the Ministry, if she was dissatisfied with the response from the hospital.

On March 25, 1994 the applicant received from the Shaughnessy Hospital Transition Coordinator a four-page document entitled "Displacement of University Hospital Non-Union Staff." It consisted of a covering letter that provided the total amount of severance money paid to all former non-union employees of Shaughnessy Hospital and a three-page document entitled "Arrangements for Non-Contract Staff," which included the methods of calculating the severance packages.

On March 31, 1994 the applicant wrote to the Ministry once again requesting the detailed information she had originally requested. On May 26, 1994 the Ministry extended the response deadline by up to 30 days on the grounds that it was necessary to consult with the Ministry of Attorney General. On June 10, 1994 the Ministry of Health responded to the applicant's second request by refusing access to the record in question in its entirety. The Ministry stated that disclosure of the information would result in an unreasonable invasion of the privacy of the former employees on the basis of section 22(3)(f) of the Act.

On June 23, 1994 the applicant wrote to the Information and Privacy Commissioner requesting a review of the Ministry's refusal to provide her with the requested information. The ninety-day period for this review began on June 30, 1994 and expires on September 28, 1994. On August 15, 1994 the Office issued a notice of oral inquiry to be held on September 15, 1994.

2. Documentation of the inquiry process

Under sections 56(3) and (4) of the Act, the Office invited representations from the applicant, the Ministry, and the following intervenors: British Columbia Health Association; Health Administrators Association of B.C.; Nurse Administrators of B.C.; Council of University Teaching Hospitals; Health Employers Association of B.C.; B.C. Association of Private Care; and the Freedom of Information and Privacy Association (FIPA).

The applicant represented herself at the inquiry. She also presented a submission prepared for her by Barry Gibson, barrister and solicitor with Farris Vaughan Wills & Murphy. The Ministry was represented by Shauna Van Dongen, a barrister and solicitor with the Legal Services Branch, Ministry of Attorney General. FIPA did not appear at the inquiry but submitted written representations which were circulated among the other parties a week before the inquiry. The other intervenors made a joint submission in the person of Darren Kopetsky, Coordinator, Advisory Services, B.C. Health Association. This submission also represented the position of the Public Administrator of University Hospital (the Transition Coordinator). The Transition Coordinator was appointed as Public Administrator of the University Hospital Society, by Order-in-Council # 0162,

February 15, 1993, made pursuant to sections 36 and 44 of the *Hospital Act*, R.S.B.C. 1979, c. 176.

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a two-page statement of facts (the Portfolio Officer's fact report), which was accepted by all parties as accurate for purposes of conducting the inquiry.

3. Issue under review at the inquiry

The issue under review was the applicability of section 22 of the Act to the records in dispute, that is, will the release of the record, in whole or in part, constitute an unreasonable invasion of the privacy of the former employees of Shaughnessy Hospital?

Under section 57(2) of the Act, the burden of proof in this inquiry was on the applicant to demonstrate that disclosure of the personal information of the third parties would not be an unreasonable invasion of their privacy.

4. The record in dispute

The record in dispute consist of a four-page document containing three columns of information: the dates on which the severance agreements were reached with the various employees, the names of the former employees, and the severance amounts paid to each of them.

5. The applicant's case

The applicant first noted that the provincial government took over Shaughnessy Hospital in 1974 to operate it as a public hospital. In her view, it was simply a public hospital and thus subject to the Act.

She believes that the record should be disclosed to her under section 22(4) of the Act, which reads in part as follows:

> (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,
> ....

> (i) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit, or
>
> (j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in subsection (3)(c).
> ....

The applicant argued that section 22(4) creates an absolute requirement to disclose information, which, in her view, should prevail in the present case. The public has a right, for example, to know the salaries of public servants (section 22(4)(e)). A severance payment is a discretionary payment covered by section 22(4)(j). As the applicant stated in a written submission, "[t]his provision recognizes that discretionary benefits are subject to abuse and that any discretionary benefit granted by a public body should be disclosed so that the public can assess whether the benefit was justified."

The applicant is concerned that "[a]t the time of closure, it became common knowledge that a number of administrative staff took severance packages and shortly afterwards joined other hospitals--a practice known as double-dipping because these employees ended up being paid twice from public funds."

The applicant noted that the public was very interested in this particular hospital closure because it affected almost 2,000 jobs and disrupted the lives of patients. She is suspicious that Mr. Bert Boyd, the Transition Coordinator appointed by the Cabinet to close the hospital, offered generous packages to hospital administrators, the amounts of which might now embarrass the Ministry of Health. The applicant is skeptical of Mr. Boyd's written statement to her that "[t]he severance package was structured so that staff who had accepted comparable employment at another facility did not receive any severance." She suspects that a loophole may have existed by which "some administrators may have withheld pursuing or accepting a post for a matter of days or weeks, thereby receiving a severance package. It is only fair to the public that this possibility be investigated, as well as the matter of how strictly the [severance] grid was applied, if any packages exceeded the formula and, if so, why."

In her additional written submission, the applicant advanced various arguments to the effect that section 22(3)(d) and (f) of the Act do not cover the record that she is seeking. These sections read:

> (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,
> ...
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
> ....

In the applicant's view, the language of these clauses cannot be construed to include severance payments: "Disclosure of a single, recent payment from public funds would not disclose an individual's overall finances or income, and it certainly would not indicate their assets, liabilities, net worth, bank balance or financial history or creditworthiness."

6. The Ministry of Health's case

As discussed below, the Ministry seeks to hold the applicant to a very high standard of proof in order to rebut the mandatory presumption of protecting privacy under section 22(3)(f) of the Act. It rejects severing the names and releasing the rest of the record, because certain individuals who received larger severance packages could be identifiable. Based on newspaper articles already published by the applicant, the Ministry fears that she would be able to link other records with the severed record to identify specific persons, since she has already focused on one person: "The Ministry's position is that even if a single individual is correctly identified by the applicant or by others (such as co-workers who already know the missing pieces of information) an invasion of personal privacy will have occurred." (Argument, p. 10)

The Ministry is mindful of its obligation under section 22(2) of the Act to consider "all the relevant circumstances" with respect to the possible disclosure of personal information about a third party. This includes whether

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

The Ministry expressed its specific concern in this case as follows:

> The Ministry is concerned that information appearing in the newspaper in the future may unfairly convey the impression that some of the individuals involved were not entitled to a severance package as they subsequently found other employment. The Ministry submits that as [sic] the nature of any severance payment is that a certain amount of guess work about future circumstances is involved, no one can predict with absolute accuracy whether or not a severance payment will represent the actual loss suffered by an individual. The Ministry believes that speculation on this issue could unfairly damage the reputations of the employees involved. (Argument, p. 11)

The Ministry also stated that, "[t]he public is aware of how much money was involved in the Shaughnessy severance. Additionally, the key factor in determining whether or not the severance payments were reasonable is whether the formula used to calculate them was reasonable, not the actual amounts themselves."

The Ministry has not sought to rely upon section 17 of the Act, and I have not considered it.

7. The health care intervenors' case

The various health care intervenors supported the position of the Ministry "that it would be an unreasonable invasion of personal privacy to accede to the Applicant's request for the names of the individuals." They argued, among other things, that severance payments are not "remuneration" within the meaning of section 22(4)(e) of the Act and are not "discretionary benefits" within the meaning of section 22(4)(j).

Under section 22(3)(f) of the Act, the intervenors argued that severance payments are the equivalent of information that describes the "finances" and "income" of a third party. Alternatively, they should be characterized as part of "employment history" under section 22(3)(d).

8. The Freedom of Information and Privacy Association's (FIPA) case

FIPA essentially argued that the presumption of an unreasonable invasion of personal privacy created by section 22(3) of the Act can be rebutted by an applicant: "In this case, the controversy surrounding closure of the Hospital, and the prospect that some employees may have been compensated for losses they in fact did not suffer, make this matter one of great public interest."

FIPA thinks that the language of section 22(4) makes it clear that the disclosure of the remuneration of an employee of a public body "is not" an unreasonable invasion of that employee's personal privacy.

FIPA's view of section 22(2)(a) of the Act led it to conclude that disclosure of the record "is desirable for the purpose of subjecting the activities of the government of British Columbia ... to public scrutiny," because "the controversial closure of the Hospital, a publicly funded institution, imposed extra-ordinary costs on taxpayers."

9. Discussion

Shaughnessy Hospital is not and has never been a public body under this Act, but it was publicly funded. It is therefore not necessary to decide the submission made by the health care intervenors as to any significance of present closure of an institution, in this case the hospital, to its past status as a public body. Of greater significance is the fact

that, though the hospital is not and has never been a public body, I was informed by counsel for the Ministry at the inquiry that the hospital received block funding channeled through the Ministry of Health and administered by the University Hospital Society, with the result that the hospital was eighty-five percent publicly-funded and the rest of its funding came from private donations.

Both this fact and the fact of public funding of the hospital are confirmed by section 10 of the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180, and by the 1992/93 Public Accounts for the Province of British Columbia which have a heading under the Grants and Contributions section for the fiscal year ended March 31, 1993, for University Hospital (Shaughnessy Site) with entries showing total government grants and contributions to have been $321,263.00, broken down by Ministry as follows:

Attorney General	3,548
Health	226,435
Social Services	61,280
Women's Equality	30,000

Burden of proof

British Columbia, in common with Alberta, reverses the burden of proof in a case like this one and places it on the applicant. The Ministry argues that section 57(2) of the Act "recognizes that it will be very rare for one person to obtain access to another person's personal information without the consent of the person to whom the information relates." (Argument, p. 8) The Ministry cited Re: Ministry of the Attorney General (Information and Privacy Commissioner of Ontario, October 7, 1988, Order 20) to the effect that the legislative intent of the Ontario equivalent of section 22(3) in the British Columbia Act is that certain types of personal information not "be disclosed to someone other than the person to whom they relate without an extremely strong and compelling reason." The Ontario standard may be given persuasive value by me in construing the British Columbia standard.

In Order No. 4 - 1994, dated March 1, 1994, which was factually far removed from this case in that it related to a request for access to psychological records held by the B.C. Board of Parole, I stated at p. 9:

> Section 22(3) of the Act creates a strong presumption that disclosure of specified kinds of personal information is an unreasonable invasion of a third party's personal privacy. In order for that presumption to be rebutted, the party with the burden of proof must submit clear and compelling evidence that one or more of the circumstances listed in s. 22(4) exist. Further, all relevant circumstances, including those listed in s. 22(2) should be considered.

> In my view, the facts of this case do not present compelling circumstances affecting the health or safety of the applicant that would allow the head of a public body to determine that disclosure of the records at issue would not be an unreasonable invasion of the third party's personal privacy under s.22(4) of the Act....
>
> In the present case, the balance between s.22(3)(a) and s.22(4)(b) of the Act lies with the former, as I would normally expect it to do, since the detailed circumstances set out in s.22(4) are not specifically met. I have also considered the circumstances under which the psychological assessment was made, with particular reference to s.22(2)(f) (that the personal information was received in confidence).

I do not propose to depart from the basic approach I described in Order No. 4 - 1994, though I have reached a different conclusion in this case. This result is necessitated by the specific factual circumstances of this case as well as the provisions of sections 22(2), (3) and (4) sought to be relied upon by the parties. In the present case, the applicant made a measured argument for the public interest requiring the disclosure of the full details of the publicly-funded severance packages (even without relying on section 25 of the Act). In my view, the next step is for me, as the decision-maker, to review the document in full and make a judgment of where to draw the balance between accountability to the public and the personal privacy of third parties. Most applicants will not be able to make a completely compelling argument on their own, beyond what the applicant accomplished here, since they cannot see the record(s) in dispute. Hence my role as the Commissioner is to hear the argument, evaluate its merits, review the disputed document, and make a decision.

I find myself in considerable sympathy with the problem facing any applicant in this kind of case. He or she has not seen the record and cannot make an "internal" argument with respect to its contents in order to overcome the presumption of the privacy interests of third parties' trumping openness.

The interrelationship of sections 22(2) and 22(3)

The health care intervenors argued that the presumption of an unreasonable invasion of privacy that exists for one of the listed types of information in section 22(3) cannot be rebutted by any combination of the factors in section 22(2) (factors to be considered in determining whether or not an invasion of privacy would be unreasonable). This argument was based on a number of Ontario orders and the Ontario Court, General Division decision in John Doe v. Ontario (Information & Privacy Commissioner) (1993), 106 D.L.R. (4th) 140. However, the wording of the Ontario provision is different, and the Ontario approach cannot be reconciled with the wording of section 22(2) of the Act. Under the British Columbia legislation, the head of a public body is required to consider the factors listed in section 22(2) in making a determination under section 22(3).

The Financial Information Act

Section 22(4)(c) of the *Freedom of Information and Protection of Privacy Act* states that it is not an unreasonable invasion of privacy to disclose personal information where an enactment of British Columbia or Canada authorizes the disclosure. Section 22(4)(g) also separately brings into that concept the public access to information that is provided for under the *Financial Information Act.* Thus I note the statutory obligation to disclose certain financial information (which includes hospitals). Section 2(1)(e)(i) of the *Financial Information Act* requires corporations covered by the Act to make available a schedule showing "in respect of each employee earning more than a prescribed amount [$35,000], the total remuneration paid to the employee and total amount paid for his expenses." A "corporation" under that Act includes by definition a society, such as the University Hospital Society, that receives funds under the *Hospital Insurance Act*. Section 6 of the schedule to the *Financial Information Transitional Regulation* under the *Financial Information Act* defines remuneration as "any form of salary, wages, bonuses, gratuities, taxable benefits, payment into trust or any form of income deferral paid by the corporation during the fiscal year being reported on, whether or not such remuneration is reported under the *Income Tax Act (Canada)*" (B.C. Regulation 131/87) I am satisfied for the purposes of this discussion, that severance payments are a taxable benefit.

Section 6 further states that the schedule of remuneration and expenses shall include a statement of "the number of severance agreements made during the preceding fiscal year by corporations in respect of its chief executive and senior administrative officers excluded from coverage as employees under the collective agreements of the corporation and the range of equivalent months' gross salaries represented by these agreements." It appears from the context of this provision that "senior administrative officers" includes all employees excluded from union membership. This would encompass all of the employees whose severance agreements are being sought here.

The significance of the definition of "remuneration" is that it is the total remuneration paid to "each employee" that must be set forth in the Schedule required under the *Financial Information Act*, and this disclosure requirement applies regardless of the generality of the disclosure requirement for severance agreements. For this reason, I think that the Schedule of Remuneration and Expenses under the *Financial Information Transitional Regulation* must include payments that were part of a severance package, though they are not separated out from the total "remuneration" listed. These provisions of the *Financial Information Act* and regulations were in force at the time of the severances in question in this inquiry.

I was not provided with copies of the information on salaries and severances that the hospital was required to make available to the public under the *Financial Information Act*. However, I am aware from statements at the inquiry that, by way of example, the schedules of remuneration and expenses submitted under the Act for specific years by various hospital societies identify each employee by name along with their individual

salary. The list of such severance agreements is not specific to individuals, which is not surprising given the wording of the regulation.

Section 22(4)

In my judgment, the applicant's arguments for disclosure under sections 22(4)(e) and (j) would be persuasive and powerful if the hospital had been a "public body" under the Act. For example, the severance payments can be construed as "remuneration." I agree with FIPA's point that a severance payment (payment in lieu of notice) is "remuneration for services that would have been rendered during the notice period had the employer required the employee to work through the period." Under section 22(4)(j) of the Act, the severance payments could also be considered "a discretionary benefit of a financial nature granted to the third party by a public body ...." However, as stated, the fact that the hospital was and is not a public body makes it problematic to rely on what otherwise could be applicable paragraphs in section 22(4).

Section 22(2)

In my view**,** Section 22(2) of the Act is the key to this inquiry. It provides a non-exhaustive list of the circumstances to be taken into account in determining whether to disclose personal information. This section reads in part as follows:

> 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
>
> (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,
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
> ....

I reject the effort by the health care intervenors to interpret section 22(2)(a) to the effect that disclosure of the record in dispute is not desirable for the purposes of subjecting the activities of the government of British Columbia or a public body to public scrutiny. The Ministry controlled the public funding of the hospital under the *Hospital Insurance Act* and has custody and control of the record in dispute. The Order in Council appointing the Public Administrator of the hospital under the *Hospital Act*, who took over the powers of the Board of Trustees of the University Hospital Society and in that capacity negotiated the severance packages, provides expressly for consultation by Public Administrator with the Ministry. The Ministry is both a ministry of the Province of

British Columbia and a public body under this Act. Ensuring such public scrutiny is exactly why the record should be disclosed.

I equally do not accept the view that the third parties supplied the information in the record "in confidence." (section 22(2)(f)) I received no such evidence from the Ministry or the health care intervenors. Nor was it demonstrated that "the third parties concerned had an expectation that the information would be kept confidential." Given the fact that their hospital salaries were already public under the *Financial Information Act*, it is hard to imagine that they had expectations of confidentiality for severance payments made in accordance with a stipulated grid. Moreover, the record of the severance payments is information created by the Transition Coordinator, not information supplied by the individuals.

I am not persuaded by the Ministry's concern for the reputations of those who received severance payments, if there is indeed future media speculation on the matter. Anyone who receives a significant public benefit runs the risk of media scrutiny, because it is ultimately the taxpayers' money that is being spent. That is why I am deciding the present case on the broad principles of openness and accountability in the Act, as reflected in section 22(2)(a). The Ministry fears what the applicant will do with the record in dispute if it is disclosed to her. It is concerned that this journalist will again focus on persons who received the highest settlements. In my view, that is exactly the purpose of requesting disclosure of the record.

It is for editors and journalists, not the government, to decide what is newsworthy and publishable under the laws of Canada. The media are unlikely to be interested in why someone received a very low severance payment, unless a recipient suddenly reports unjust treatment.

I am moved, in this particular case, by the need for the public, through the media, to learn more about how public funds are spent on such matters as severance payments, since there appears to be considerable public suspicion and political concern about such matters as double-dipping. One of the fundamental purposes of the Act is to promote scrutiny of expenditures from the public purse and, thereby, seek to ensure accountability to the taxpayers.

In times when taxpayer revolts are discussed and threatened, those among the public who care to know deserve to learn how their money has been spent, absent powerful considerations to the contrary. This will sometimes result in detailed scrutiny of a particular person; that is a risk run by all of us who are paid from the public purse. There may even be a future occasion when persons will turn down a severance payment to which they are otherwise entitled, because they do not wish to have to defend the amount in public. There will also continue to be occasions when competing interests prevail over the public need-to-know. (See Order No. 14-1994, June 24, 1994.)

I am well aware from other facets of my work as Information and Privacy Commissioner that some politicians, editorialists, and members of the general public are quite enthusiastic about data matching of public records to identify double-dipping among those on income assistance and other alleged forms of criminal fraud. Those targeted are largely among the less fortunate in our society. In both the United States and Canada such tracking measures are rarely used against the "haves" as opposed to the "have nots." Recipients of severance payments from public funds deserve at least as much scrutiny as recipients of income assistance payments from the Ministry of Social Services.

Thus I also conclude, under section 22(2)(h) of the Act, that release of severance payment information will not "unfairly" damage the reputation of any person referred to in the record. The operative principle in this section is fairness versus unfairness.

Section 22(3)(f)

I also find somewhat tenuous the argument of the health care intervenors that severance payments are the equivalent of "finances" or "income" of a third party with respect to a presumed unreasonable invasion of privacy. Even if there is a possibility that that argument could succeed, I am satisfied that the force of the factors in section 22(2) takes precedence in the narrow circumstances of this case.

Other matters

My order will result in some invasion of the privacy of those who received severance payments. But, I have concluded, under section 22(2)(a), that the public interest in knowing how public money has been spent should prevail for those non-unionized staff affected by the closing of Shaughnessy Hospital. I recognize that informed users may be able to use the severance grid to figure out exactly how long the recipients of severance payments had worked for the hospital and what their salary was. The latter result is not very significant from a privacy perspective, since salaries of such persons were already public under the *Financial Information Act,* S.B.C. 1985, c. 8.

Additional support for a "public-interest" review of individual severance packages comes from the stipulated arrangements for the non-contract staff in question, dated March 16, 1993. This document was supplied to the requester by the Transition Coordinator. It implies that severance packages were only offered to staff who were not retained by Vancouver General Hospital or offered comparable employment at other health care facilities in the Lower Mainland. Thus severance payments were intended for those terminated from Shaughnessy Hospital. The document specifically states that "staff who had accepted comparable employment at another facility did not receive any severance. Those who had accepted employment at a lesser position and/or rate of pay were offered a reduced severance, based upon the extent of their projected loss in income." There are other terms of the document that may also deserve public scrutiny, because included in the total payout amount of $6,228,364 "was additional compensation for those long term employees who qualified for special severance benefits based upon

the 1974 Federal-Provincial Agreement established when the Province assumed responsibility for Shaughnessy Hospital from the federal government."

The key variables in this inquiry, in my view, remain the fact that public money was being spent in supplying certain employees with a benefit, the government of British Columbia and the Ministry were instrumental in the appointment of the Public Administrator to close the hospital, and influential, at least, in the Public Administrator's exercise of the powers of the hospital board to effect the closure by negotiating the severance packages with its employees.

10. Order

Under section 58(2)(a) of the Act, I order the Ministry of Health and the Ministry Responsible for Seniors to disclose the record in dispute.

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David H. Flaherty
Commissioner

September 27, 1994