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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 58-1995
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INQUIRY RE: A decision by the Victoria Police Department to sever information and withhold law enforcement records from an applicant

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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 (the Office) in Victoria on August 30, 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 an applicant of a decision of the Victoria Police Department (the police) to sever information and withhold records in response to the applicant's request for records.

2. Documentation of the inquiry process

On March 13, 1995 the applicant requested copies of all police file information, including personal notes, concerning the investigation of a murder of a woman that took place in Victoria, British Columbia, in 1978-79. The applicant was convicted of first degree murder in the Supreme Court of British Columbia and was sentenced to life imprisonment with no possibility of parole for 25 years. The British Columbia Court of Appeal upheld the conviction in 1980.

The police responded to the applicant on March 22, 1995 and extended the time for response by thirty days. The police acted under section 10(1)(b) of the Act, because of the large number of records that had to be searched.

On May 18, 1995 the police disclosed some of the records in the investigation file to the applicant. The police severed some information and withheld some records under sections 15, 16, 19, and 22 of the Act. On May 30, 1995 the applicant requested a review of the police decision to sever information and withhold records. In particular, the applicant wants information concerning the investigative methods and techniques used by the police in the investigation.

Mediation by the Office involved a complete review of all records in the investigation file. There are approximately 1,500 individual records divided into thirteen categories. The ninety-day mediation period commenced on June 12, 1995 and expired on September 11, 1995.

As a result of mediation, the applicant received seven additional newspaper clippings that relate to media coverage of the murder and his conviction. However, he was not satisfied with the result of mediation and, on August 9, 1995, he requested an inquiry by the Information and Privacy Commissioner. Further mediation resulted in a narrowing of the categories of records to be reviewed by the Commissioner.

On August 16, 1995 the Office gave notice to the applicant and the public body of the oral inquiry to be held on August 30, 1995. Since the applicant is a resident at a correctional facility elsewhere in Canada, he participated in the oral inquiry by telephone. His Case Management Officer also listened to the inquiry but did not participate directly.

3. Issues under review at the inquiry

This inquiry concerned the application of sections 15, 16, 19 and 22 of the Act to records in the custody or under the control of the police. They read in appropriate part as follows:

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

> (a) harm a law enforcement matter,
> ...
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
> (d.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,
> ...
> (j) facilitate the commission of an offence under an enactment of British Columbia or Canada, or
> ....

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;
...
(iv) the government of a foreign state;....

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

(2) Moreover, the head of a public body must not disclose information referred to in subsection (1) without the consent of
(a) the Attorney General, for law enforcement information, or
(b) the Executive Council, for any other type of information.

(3) Subsection (1) does not apply to information that is in a record that has been in existence for 15 or more years unless the information is law enforcement information.

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 [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.
...
(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,

At an inquiry into a decision to refuse an applicant access to part of a record under sections 15, 16, and 19, it is up to the head of the public body to prove that the applicant has no right of access to the part (section 57(1)).

At an inquiry into a decision to give an applicant access to part of a record containing "personal information" that relates to a third party under section 22, 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 (section 57(3)(a)).

4. The applicant's case

The applicant wants access to the records in dispute in order to find out what actually happened to him in 1978-79, since he claims to be not guilty of the murder. He seeks access to the original statements to the police of those who testified against him in court, the police photos used in court, and the notes of the police investigations of him.

In response to police allegations that he remains a risk for harm to persons involved in his prosecution, the applicant emphasized repeatedly that he is "not a monster" and thus not a threat to third parties. In his view, it would not be an unreasonable invasion of the privacy of third parties to disclose identifiable data about them from police records.

5. The Victoria Police Department's case

As noted in greater detail below, the police have relied on sections 15(1)(a), (c), (d.1), (e) and (j), 16, 19, and 22(3)(b). With respect to the last two sections, the police severed "every instance where the personal information of a third party (i.e., that of a witness) appears in the report material," because to release that information "would be an unreasonable invasion of the third parties' personal privacy and also has the potential to endanger the safety or mental or physical health of those witnesses." It makes similar claims for the personal information of other suspects in the case. Although the applicant is in prison, the police argue that he can threaten others by correspondence, telephone calls, or the assistance of recently-released criminal associates. (Submission of the Police, pp. 4, 5)

The police conclude that it is in the public interest that information about third parties and other suspects not be disclosed to the applicant in order to protect their privacy and to protect them from possible harm. (Submission of the Police, p. 11)

6. Discussion

What the applicant wants

The police essentially responded to a very broadly-worded request from the applicant for all records in its possession concerning his trial and conviction. The applicant refined his request somewhat during the inquiry. One of his requests is for all of the statements that witnesses who appeared in court at his trial gave to the police in the first instance. (He accepts that he has no right to access witness statements that were not used in court by the prosecution.) His interest is in learning whether there were contradictions in these statements between what was said to the police and what was said in the court. While I sympathize with his concern, I note that this is not relevant to a request for access to records under the Act, which has to be evaluated on the basis of the exceptions in it. Nor is relevant that the applicant was unable to read or write what was written about him at the time of his trial. These are matters for the federal government to consider in an application for a new trial under section 690 of the *Criminal Code*. (See Submission of the Police, p. 3) If such a petition were to be granted, a federal prosecutor would deal with counsel for the applicant for access to such records as those in dispute in this case. The police testified at the inquiry that they do not have the court transcripts and have no idea whether there are discrepancies between witness statements to them and to the court.

The applicant is under the mistaken notion that he can use the Act to secure access to court records from his trial. Such records are not under the jurisdiction of the Act (section 3(1)(a)), unless they are for some reason in the custody, or under the control of, a public body. Even if the applicant once had such records in his possession and he and/or his counsel have lost them, the Act is not a vehicle for access to court records that are not administrative records of a court (section 3(1)). Thus even though the applicant claims to remember the names of those who testified against him in open court, this is not relevant to his request for access to the same information, from police records, under the Act.

In camera session

The applicant, who is incarcerated in another province and who participated in the inquiry by telephone conference call, was concerned that he could not be present at the *in camera* session that I held during the inquiry to discuss an *in camera* submission from the police department. I informed him then that the written material to be discussed *in camera* consisted of about three more pages beyond the written submission already shared with him. In fact, the *in camera* session lasted less than fifteen minutes and consisted of the police identifying for me the thirteen paragraphs added for *in camera* purposes to the document shared with the applicant. The police gave me brief explanations of why they chose not to reveal this information or argument with the applicant. In every instance, I find that the police acted properly and in accordance with the Act in the choices they made concerning submissions made *in camera*.

The applicant was also concerned that his interests would not be protected during an *in camera* session, because he could not be present and because his trust in authorities is non-existent. I reminded him that it is my responsibility to be objective and disinterested in the conduct of inquiries and in the evaluation of submissions to me, from all parties, in the course of conducting an inquiry and making my decisions. This is an obligation that I take very seriously.

The police agreed *in camera* that a copy of an affidavit to a court could be released to the applicant from the file of witness statements.

Section 15: Disclosure harmful to law enforcement

Under this section of the Act, a municipal police chief has considerable discretion not to disclose information affecting a very broad range of law enforcement interests.

Section 16: Disclosure harmful to intergovernmental relations

The police argue that law enforcement information obtained from other police departments in the U.S. fall under both the section 15 and 16 exemptions. At my urging the police informed the applicant, at the hearing, which U.S. police departments were involved.

Section 19: Disclosures harmful to individual or public safety

The police argued that the applicant was dangerous in 1978-79 and remains a threat to various people even today. The primary investigator in the original murder investigation is now the Chief

Constable, and thus head of the public body, so he was able to bring his personal knowledge of the applicant to bear on the judgment of ongoing risk of harm. (Submission of the Police, p. 2; *In Camera* Submission of the Police, p. 6)

The applicant contested, vigorously, the police contention that there were criminal charges outstanding against him at the time of his arrest and trial and evidence connecting him to other murders in the United States. (Submission of the Police, p. 2) The police responded by claiming that they based their opinion on information in police files from the time of the trial. Whatever the accuracy of this particular allegation, I find that the police were authorized to base their judgments of current risk to individual and public safety on all of the information available to them, at present, in the conduct of their risk assessment. (See Submission of the Police, pp. 4-6)

Based on my own review of the records in dispute, I find that a number of individuals might still be at substantial risk if their role in the original prosecution became known to the applicant. As I stated in Order No. 18-1994, July 21, 1994, p.4 , I prefer to act prudently when it comes to disclosure of personal information about individuals who can reasonably be expected to be at risk of harm, now or in the future, from the disclosure.

Section 22(3)(b): The privacy rights of third parties

I agree with the police that their severance of personal information about identifiable third parties, including witnesses and other suspects, was appropriately kept from release to the applicant. Such persons continue to have rights to privacy under the Act, even for statements made as long ago as 1978-79 as part of a police investigation of a murder in Victoria. I note as well that this particular part of section 22 presumes that disclosure of personal information "compiled and ... identifiable as part of an investigation into a possible violation of law" is "an unreasonable invasion of a third party's personal privacy."

In my opinion, the passage of time has restored the witnesses' personal privacy in respect of their statements. While some of the statements may have been considered in open court in 1978 and 1979, the door of privacy has closed on these records because they contain sensitive personal and law enforcement information. The witnesses' "right to be forgotten" shifts these formerly-available records under the protection of sections 22(1) and 22(3)(b) of the Act. If they were to be disclosed today, there is a presumption that an unreasonable invasion of the witnesses' personal privacy would occur.

The records in dispute

In order to reach my decisions in this inquiry, I have carefully reviewed each of the records in dispute, as follows.

1. Victoria City Police investigation report [135pp.] (partially disclosed and severed under sections 15, 19, and 22)

These are the records kept by police investigators from the start of a murder investigation on May 14, 1978 through the applicant's hearing before the B.C. Court of Appeals in May 1980.

The police have withheld about forty pages in total. The excluded narrative material includes names, addresses, and other identifiers of witnesses and informants and some of what they told the police. Other withheld information concerns the broad category of criminal intelligence and confidential sources of law enforcement information. I find that this record has been appropriately severed under section 15, 19, and 22 of the Act.

2. Identification Section documents (3 records disclosed in full; 3 records severed and/or withheld under paragraph 15(1)(c))

This file contains approximately twenty pages. Seven pages, plus a few paragraphs, have been withheld from the applicant. I find that they have been appropriately withheld under section 15(1)(c), since they concern "investigative techniques and procedures currently used, or likely to be used, in law enforcement."

The following categories of records have been completely withheld from the applicant.

3. Detective daily reports (withheld under sections 15 and 22)

In 1978 this source of several hundred pages served as a daily log or notebook of all of a particular police officer's activities. A clerical assistant then transcribed the relevant portions for a particular case into an investigation report, as in item 1 above. The police argue that this makes the daily reports "an `illustrative guide' to investigative techniques. An individual who was given the opportunity to study such a log would clearly have an advantage should that individual decide to commit a crime similar to the one detailed." (Submission of the Police, p. 7) It might help a released convict reoffend. I find this argument unpersuasive with respect to section 15(1)(c): "investigative techniques." I am also unpersuaded that release of this information would facilitate the commission of a crime by this applicant, or any other, meaning that it should be kept from disclosure under section 15(1)(j). (Submission of the Police, p. 8) However, I am satisfied that severing of this category of records under other parts of section 15 and sections 19 and 22 would give the applicant nothing more than what he has been entitled to receive under item 1 above. I therefore find that this category of records was properly withheld from the applicant.

4. Witness statements (withheld under sections 19 and 22)

This file contains lists of police and lay witnesses and copies of the written statements that the latter made to the police during their investigation. There are about sixty pages. Much of the same information appears in item 1 above. I find that this set of records has been appropriately withheld from the applicant under sections 19(1) and 22(3)(b).

5. Amador County, California: District Attorney's Office documents and reports (withheld under sections 15 and 16)

This twenty-page record concerns a criminal prosecution and conviction of the applicant in 1975 for assault with a deadly weapon. Most of the pages are statements by witnesses to the event.

There is also the record of a five-page interrogation of the accused. I find that this record has been appropriately withheld under sections 15(1), 16(1), and 16 (3) of the Act.

6. Port Angeles, Washington, Police Department reports and documents (withheld under sections 15 and 16)

This record concerns the police investigation of a homicide in April 1978 in Port Angeles, Washington. It includes witness statements and photographs. I find that this record has been appropriately withheld under sections 15(1), 16(1), and 16(3) of the Act.

7. Sacramento Police Department reports and documents (withheld under sections 15 and 16)

This record contains copies of various offences reported to the Sacramento Police Department between 1969 and 1973 involving the applicant. I find that this record has been appropriately withheld under sections 15(1), 16(1), and 16(3) of the Act.

8. San Diego Police Department documents (withheld under sections 15 and 16)

This record consists of only two pages. I find that this record has been appropriately withheld under sections 15(1), 16(1), and 16(3) of the Act.

9. Other police agency reports and documents (withheld under sections 15 and 16)

Only one of the three records in this file concerned the applicant, and then only in small part. I find that these records were appropriately withheld under sections 15 and 16 of the Act.

10. Follow-up correspondence file (withheld under section 15(1)(c))

This record is a miscellaneous collection of investigative material surrounding the 1978 murder in Victoria and police efforts to solve it. I find that the relatively small amount of information that concerns the applicant has been appropriately withheld under section 15 of the Act.

11. Canadian Police Information Centre (CPIC) correspondence (withheld under sections 15 and 16)

These records are file copies of communications over CPIC during Canada-wide police investigations of the Victoria murder. They are mainly messages among and between police departments, only a small amount of which concerns the applicant. I find that these records have been appropriately withheld under sections 15 and 16 of the Act.

12. Investigating detective's working notes (withheld under sections 15(1)(a) and 15(1)(c))

Victoria police investigators met with various United States law enforcement officials to discuss a series of homicides that seemed to show similar patterns. This record contains information

about the various crimes. I find that these records have been appropriately withheld under sections 15 and 16 of the Act.

13. Photograph file on the 1978 homicide investigation and other crimes believed to be related (withheld under sections 15 and 22)

This file contains crime scene photos and photographs compiled during the murder investigation in Victoria. Only two or three pages of photos out of approximately fifty pages of photos concern the applicant directly. There are many more photos of victims. I find that the records have been appropriately withheld under sections 15 and 22 of the Act.

7. Order

I find that the Victoria Police Department was authorized or required to refuse access to the records in dispute.

Under section 58(2)(b) of the Act, I confirm the decision of the Victoria Police Department to refuse access to the records in dispute to the applicant under sections 15, 16, and 19. Under section 58(2)(c), I require the Victoria Police Department to refuse access to those parts of the records in dispute under section 22.

October 12, 1995

David H. Flaherty
Commissioner