

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 202-1997
December 11, 1997**

INQUIRY RE: An applicant's request for records to the Saanich Police Department

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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 (the Office) on September 22, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review from the applicant of a decision by the Saanich Police Department to exclude records from the coverage of the Act.

2. Documentation of the inquiry process

On April 21, 1997 the applicant requested from the Saanich Police Department all records relating to an incident that took place on February 5, 1997. The Saanich Police Department responded to the applicant's request on May 13, 1997 by disclosing three pages of records related to the towing of the applicant's car. Some information relating to law enforcement was severed from one page under sections 15 and 16 of the Act (regarding unrelated incidents that occurred on February 5, 1997). This severing of information under sections 15 and 16 is not an issue in the written inquiry.

In the Saanich Police Department's response of May 13, 1997, the police excluded all records under section 3(1)(h) of the Act that related to the incident on February 5, 1997. At the time of the Saanich Police Department's response, criminal charges against the applicant arising from that incident had not yet been dealt with by the Provincial Court of British Columbia. The police therefore referred the applicant to the Office of Crown Counsel for disclosure under the criminal court process.

Other related records dealt with the applicant's complaints against members of the Saanich Police Department. These proceedings relate to a complaint under the

Police Act, and thus the police excluded them from coverage of the Act under section 3(1)(h) until completion of the proceedings. At the time of the Saanich Police Department's response on May 13, 1997 the hearing had not yet taken place.

On May 27, 1997 the applicant requested a review of the Saanich Police Department's disclosure decision. The applicant was not satisfied with the outcome of mediation and requested an inquiry by the Commissioner on July 28, 1997. On August 1, 1997 the Office of the Information and Privacy Commissioner gave notice to the applicant and the public body of the written inquiry to be held, by agreement of both parties, on August 26, 1997. By consent of the parties, the written inquiry date was rescheduled to September 22, 1997.

On November 4, 1997 I requested additional evidence and supplementary submissions from the parties on the status of the criminal proceedings at the time of the records request, the existence of any records pertaining to the police complaint, and the scope of the request for records. The Saanich Police Department filed an affidavit on November 18, 1997, and the applicant filed a response on November 24, 1997.

3. Issue under review and the burden of proof

The issue in this inquiry is the Saanich Police Department's decision to exclude records from coverage of the Act under section 3(1)(h) with respect to the proceedings before the Provincial Court of British Columbia and the proceedings under the *Police Act*. This section is reproduced below:

Scope of this Act

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

....

Section 57 of the Act establishes the burden of proof on parties in an inquiry. Under section 57(1), where access to information in the record has been refused under section 3(1)(h), it is up to the public body, in this case the Saanich Police Department, to prove that the applicant has no right of access to the records or parts of the records.

4. The records in dispute

The records in dispute relate to two separate proceedings. The first is the Provincial Court trial of the applicant on criminal charges arising from an incident on

February 5, 1997. The second is a hearing in relation to the applicant's complaint against members of the Saanich Police Department under the *Police Act*.

5. The applicant's case

The applicant's view is that the Saanich Police Department is withholding records, including personal information, about an incident involving him on February 5, 1997. He asserts that:

Certain elements of the **Public Body** have made false records in an attempt to evade due process and prosecution under the *Criminal Code*, and the withholding of information is accessory to multiple violations of the law, including the *Police Act*.

The applicant provided three *in camera* submissions, which I have also reviewed.

6. The Saanich Police Department's case

The Saanich Police Department submits that all of the records that it has withheld related to several *Criminal Code* charges brought against the applicant. It has done so on the basis of section 3(1)(h) of the Act, since the charges were still pending at the time of his application for access and as of September 10, 1997 (when this inquiry was underway).

7. Discussion

I agree with the Saanich Police Department that most of the applicant's two submissions did not concern themselves with the issue before me in this inquiry. I wish to add that this is true for the *in camera* portions of these submissions as well. (See Reply Submission of the Saanich Police Department)

I accept that the request for records was sufficiently broad to encompass documents relating to both the incident of February 5, 1997 and the complaint which was subsequently filed by the applicant under the *Police Act*. The Saanich Police Department claims that section 3(1)(h) applies to both sets of documents.

Section 3(1)(h): Scope of this Act

The Saanich Police Department has relied upon my interpretation of section 3(1)(h) in Order No. 20-1994, August 2, 1994, in which I described section 3(1)(h) [as it is now identified] as "a general exemption for records that pertain to the administration of justice through the courts." In that Order, I concluded as follows:

It is my view that this section only applies to records directly associated with a prosecution that is officially underway, which normally means that a charge has been laid. At that point the legislature intended to insulate

Crown Counsel from requests for access under this Act until a prosecution is completed.

The Saanich Police Department further states that once the prosecution proceedings against the applicant have been completed, he will have a right of access under the Act to the information in dispute.

I am satisfied on the basis of the evidence filed that the Saanich Police Department has discharged its burden of proving that the records concerning the incident of February 5, 1997 related to the prosecution of a criminal offence that was officially underway and not yet complete at the time of the applicant's request. The trial is currently scheduled for January 29, 1998. As a consequence, I conclude that the Saanich Police Department properly excluded these documents from the application of the Act under section 3(1)(h).

I do not agree, however, that section 3(1)(h) applies to documents relating to the *Police Act* complaint against members of the Saanich Police Department. Section 3(1)(h) provides that the Act does not apply to "a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed." "Prosecution" is defined in Schedule 1 as "the prosecution of an offence under an enactment of British Columbia or Canada." In my view, the proceedings under section 58 of the *Police Act* in this case did not relate to the prosecution of an "offence." When the Chief Constable refused to investigate the applicant's complaint against members of the Saanich Police Department, a panel of the Saanich Police Board was established under section 58(2)(b) of the *Police Act* to review that decision. The panel unanimously upheld the Chief Constable's decision. The proceedings were in the nature of an administrative review of a decision made concerning the need for an investigation and did not constitute a prosecution for a provincial or federal offence.

While section 3(1)(h) does not apply to the police complaint records in this case, the evidence indicates that the applicant has already been given access to all of Chief Constable J.R. Arnold's records in relation to that complaint (Affidavit of Kenneth Schmidt, paragraphs 10 and 13)

Section 2(2): Purposes of this Act

- (2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

The Saanich Police Department has also relied on this section of the Act to deny access to the applicant because he has a right to disclosure by means of Crown Counsel as provided for in *Regina v. Stinchcombe* (1991), 68 C.C.C. (3d) 1, a decision of the Supreme Court of Canada. To do otherwise, it contends, "raises the possibility of compromising the prosecution efforts."

In terms of the application of the Act itself, and the avenues for access to information that exist under it, I do not find the Saanich Police Department's submission on this subsection compelling. As I stated in a previous Order, "section 2(2) simply confirms that other procedures for access to information continue to exist; it does not limit my jurisdiction under the Act." (See Order No. 158-1997, April 10, 1997, pp. 3, 4; see also Order No. 51-1995, September 14, 1995, p. 4.)

8. Order

I find that the Saanich Police Department has properly applied section 3(1)(h) of the Act and is authorized to refuse access to the records pertaining to the incident of February 5, 1997 and the resulting criminal charges against the applicant. Under section 58(2)(b) of the Act, I confirm the decision of the Saanich Police Department to refuse access.

I also find that section 3(1)(h) does not apply to the records relating to the *Police Act* complaint. Under section 58(2)(a) of the Act, I require the Saanich Police Department to give the applicant access to any records that relate to the complaint under the *Police Act*. However, since I have found that the Saanich Police Department has disclosed all the responsive records to the applicant, I find that the Saanich Police Department has complied with this part of the Order and discharged its duty under section 6(1) of the Act.

David H. Flaherty
Commissioner

December 11, 1997