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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 222-1998
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INQUIRY RE: An applicant's request for access to a victim impact statement made at his parole hearing

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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 November 14, 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 of the response of the Ministry of Attorney General, Corrections Branch, (the Ministry) to the applicant's request for access to a copy of an audiotape that was recorded at his April 22, 1997 parole hearing. The applicant was provided with a copy of the tape, but the recorded statements made by the victim at the parole hearing were severed. The applicant wants access to the taped portion of the victim's oral impact statement. The victim is the third party in this inquiry.

2. Documentation of the inquiry process

The applicant submitted an undated request for access to the record to the British Columbia Board of Parole. On May 26, 1997 the Corrections Branch of the Ministry received a fax copy of this request from the Parole Board.

The Ministry responded to the applicant on July 15, 1997 by partially disclosing an audiotape of the applicant's parole hearing before the Parole Board. The Ministry withheld a portion of the audiotape containing the victim impact statement under sections 19(1)(a) and 22(1) of the Act. Both the applicant and the victim were present at the parole hearing when the victim made her victim impact statement to the Parole Board.

The Ministry's decision letter stated:

> Some of the tape contains information that is excepted from disclosure under sections 22(1), unreasonable invasion of a third person's privacy,

> and 19(1)(a), threaten an individual's safety, mental or physical health. This portion of the tape contains sensitive personal information from the victim in this case and Corrections Branch feels that the disclosure of the information would be an unreasonable invasion of the third party's personal privacy, and has the potential to further traumatize, and revictimize this individual. Disclosure of this information could put the safety of this individual at risk of harm, now or in the future.

On July 24, 1997 the applicant requested a review of the Ministry's decision to withhold the audiotape of the third party's victim impact statement. He subsequently requested an inquiry by the Information and Privacy Commissioner on October 7, 1997. On October 16, 1997 my Office gave notice to the applicant, the Corrections Branch, and the third party of the written inquiry to be held on November 6, 1997. I subsequently approved an adjournment by consent of the parties to November 14, 1997.

On October 29, 1997 pursuant to section 56(4)(b) of the Act, I invited the Elizabeth Fry Society of Prince George to participate as an intervenor in the inquiry.

3. Issue under review and the burden of proof

The issue to be reviewed is the Ministry's decision to withhold part of the audiotape under sections 19(1)(a) and 22(1) of the Act. The sections of the Act referred to by the parties are as follows:

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,
>
> ....

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.
>
> 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,
>
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
>
> (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,
>
> ....
>
> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> ....

Section 57 of the Act establishes the burden of proof on the parties in an inquiry. Under section 57(1) of the Act, where access to information in the record has been refused under section 19(1)(a), it is up to the public body to prove that the applicant has no right of access to the record or part of the record.

Under section 57(2) of the Act, if the record or part that the applicant is refused access to under section 22 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 in this inquiry is an audiotape of the applicant's parole hearing before the British Columbia Board of Parole. The Ministry withheld a portion of the audiotape containing the victim impact statement given by the applicant's victim. The applicant was present at the hearing when his victim gave her verbal statement. He submits that her statement runs about ten minutes, a fact confirmed by the Ministry. (Submission of the Applicant, p. 6; Submission of the Ministry, paragraphs 1.14, 4.013)

5. Procedural objections

Objection to the public body's involvement

The applicant objected to the involvement of the Ministry of Attorney General, Corrections Branch, as the public body for this inquiry. He argued that he first sent his request for the audiotape to the British Columbia Board of Parole and also argues, somewhat surprisingly, that his request for access was not made under the Act. The Corrections Branch subsequently responded to the request. The applicant wrote:

> Traditionally, audio cassette recordings of parole hearings were kept at the offices of the B.C. Board of Parole... the request that [the applicant] made in April of 1997 was properly addressed to the B.C. Board of Parole, and the Board should have responded within thirty days, pursuant to section 6 and 7 of the Act.
> ...
> If in fact the B.C. Board of Parole 'delegated' its authority to respond to [the applicant]'s request to the Corrections Branch, it had no authority to do so. (Submission of the Applicant, p. 2)

The applicant asks me to remit the matter to the Parole Board to determine as it is the appropriate public body.

I reject the applicant's objections to the Ministry's participation in this inquiry, because it has no relevance to his rights under the Act.

Objection to the use of in camera submissions

The applicant also objected to the use of *in camera* submissions in this inquiry:

> It is impossible for parties to ascertain the appropriateness of others' claims that their submission should be *in camera*, and the Commissioner does not even consider the matter before it is too late for any further submissions to be made.
>
> One of the fundamental reasons for the *audi alteram partem* rule is to allow parties to a dispute to correct misunderstandings and ensure that all information relied upon by the decision-maker is factual. In the absence of any information at all about the substance of *in camera* submissions, and in the absence of any timely determination of whether those submissions should have been made *in camera*, in my submission the procedure is unfair. (Reply Submission of the Applicant, p. 2)

It is my role, as I have done in this case, to determine whether an *in camera* submission is appropriate in a particular inquiry.

6. The applicant's case

The applicant seeks access to the record in dispute, whether in the form of a tape recording or a prepared transcript of what his victim said at the parole hearing. The applicant argues that he needs the record in order to assist him to appeal the denial of his parole and for use in legal proceedings to obtain the return of his personal possessions currently held by his victim. (Submission of the Applicant, p. 4) His view is that such disclosure would not be an unreasonable invasion of his victim's personal privacy under section 22 of the Act. (Submission of the Applicant, p. 7) He also argues that it is not reasonable to conclude that allowing the applicant to have a record of what the third party victim said at his parole hearing would compromise her safety or mental or physical health, such that non-disclosure is authorized under section 19 of the Act:

> Having freely chosen to speak at [the applicant's] parole hearing, we must assume that [the victim] has already weighed her personal security against her desire to be heard. It is irrational to conclude that allowing [the applicant] to have a tape of her statements would somehow suddenly put her in jeopardy. This is not a question for 'disclosure'. [The victim] has already 'disclosed' to the entire circulation for the Province Newspaper. Rather, this is a matter of allowing [the applicant] to have a record of that disclosure in order to pursue his legal remedies... (Submission of the Applicant, p. 4)

I note that the applicant acknowledges that the newspaper articles about him in The Province newspaper make no mention of the victim's name. (Submission of the Applicant, p. 6)

The applicant alleges that his victim "made statements at his parole hearing that he had not previously heard, that were not evidence at his trial and that were not true," and that it is unreasonable to expect him to be able to recall exactly what was said. Thus he needs this audiotape to have a record upon which to pursue his legal remedies. (Submission of the Applicant, p. 5) According to the applicant, providing the tape of the entire hearing is relevant to a fair determination of his rights under section 22(2)(c) of the Act. The applicant further argues that section 22(2)(a) applies, because disclosure of the record in dispute is desirable for purposes of subjecting the activities of the Parole Board to public scrutiny.

The affidavit of the applicant explains that he was convicted in 1996 of uttering threats, assault causing bodily harm, aggravated assault, and unlawful confinement for assaults on the third party in this inquiry. He was sentenced to eighteen months imprisonment and the maximum period of probation (three years). In sentencing the applicant, the judge described the offences committed by him on the victim as "sadistic acts resulting in serious injuries and I accept those serious injuries have had lasting physical and psychological effects." At the time of his affidavit, he was still on probation. He also admits to having a prior criminal record. The applicant claims that he

had a live-in relationship with the third party for a number of years prior to the events that led to his conviction. He believes that her statement at his parole hearing resulted in a denial of his parole. (Affidavit of the Applicant)

I have also reviewed an *in camera* submission from the applicant, which is ironic in light of his procedural objection.

7. The Ministry of Attorney General's case

The Ministry states that the third party's oral impact statement discussed "the impact of the Applicant's crimes on the Third Party both physically and mentally, and how she continues to fear for her safety and life. The statement also makes reference to her medical and psychological condition and treatment." (Submission of the Ministry, paragraph 1.14) The Ministry's position is that disclosure of the record in dispute would be an unreasonable invasion of the third party's personal privacy and has the potential to further traumatize and revictimize her. The Ministry also submits that disclosure could put the third party's safety at possible risk either now or in the future. (Submission of the Ministry, paragraph 1.23)

I have discussed below the Ministry's submissions on the application of specific sections of the Act.

8. The third party's submission

I received and reviewed the submissions and accompanying documentation of the victim/third party on an *in camera* basis.

9. The Elizabeth Fry Society of Prince George' submission

The Elizabeth Fry Society of Prince George provided me with general background about the safety and privacy needs of female victims of relationship crimes in particular. In its view, Parole Boards need to hear from victims in a decision regarding parole of an offender: "Given the current reality that the nature of crimes which result in institutional sentences are extremely serious, it is crucial to their safety that the victims of these crimes have input. It is also very important to stress the benefits to victims of having this voice in the process.... Having a voice and importance in the process is very important to recovery, healing and a sense of control over personal safety."

The Society also offered this comment about the privacy rights of persons like the victim in the present inquiry:

> The feeling of having personal privacy invaded is a constant one for most women living with and separated from abusive partners. Personal information disclosed in confidence to their partner is used against them on many later occasions, often in very public forums. The potential for

> women to be re-victimized by their assailant being given a tool to continue that abusive pattern needs to be considered in these types of cases in particular. For most victims, the offender's possession of a tape recording of their voice relaying personal information would pose a great threat to their mental well-being as well as their safety.

10. Discussion

I have made two decisions in recent months in which I ordered the disclosure of all, or significant parts, of tape recorded information about a harassment investigation and an employment issue to a participant in the original hearing. In each instance, however, I did so after carefully considering the exceptions to disclosure that exist under the Act and, in one case, severing a tape of sensitive personal information. See Order No. 204-1997, December 15, 1997; and Order No. 205-1997, December 18, 1997. I will now proceed to make another decision respecting access to information on an audiotape of a proceeding.

I agree with the Ministry that the fact that the applicant has heard the oral impact statement at his parole hearing does not grant him an automatic right of access to such a record under the Act. The Ministry points out that section 140(6) of the *Corrections and Conditional Release Act* acknowledges that the information and documents discussed at the Parole Board hearing are not public documents, and access to records or parts of them may be refused under access to information and privacy legislation. (Submission of the Ministry, paragraph 5.01; and Reply Submission of the Applicant, pp. 5, 12) (See Order No. 138-1996, December 18, 1996, p. 8; see also Reply Submission of the Ministry, pp. 1-2)

The applicant states that he would be quite content with a transcript and does not require the tape itself. (Reply Submission of the Applicant, p. 3) The simple response is that no transcript exists, and there is no obligation on a public body to produce one. (See also the Reply Submission of the Ministry, p. 2)

With respect to the applicant's claim that he requires access to the information in dispute for purposes of civil litigation respecting his personal possessions, I make my usual statement in this regard that the applicant should rely upon the disclosure process under the *Rules of Court*, not the Act. (Order No. 32-1995, January 26, 1995, p. 5; Reply Submission of the Ministry, pp. 4-5)

Section 19: Disclosure harmful to individual or public safety

The applicant is aware that I have acted with prudence in previous Orders in upholding decisions by public bodies not to disclose information on the basis of this section. His argument in the present inquiry is that the information requested has already been disclosed to him, since he was present when his victim addressed the Parole Board. As I have already indicated, the fact that he was present when the victim gave her oral impact statement does not mean he is entitled to this information under the Act.

The applicant's submission is that further disclosure of the information in dispute cannot threaten the safety of the third party. He further claims that the victim has also approached the press on more than one occasion to "publish those, or similar statements." (Submission of the Applicant, pp. 3-4, 6-7)

The Ministry points out that, under section 19(1)(a) of the Act, it need only demonstrate, on a balance of probabilities, that there is potential harm as opposed to actual harm. (See Order No. 28-1994, November 8, 1994) There need only be an increase in the risk that a third party will be a target for harm. (See Order No. 60-1995, October 31, 1995) There is no statutory requirement that the potential harms to individuals be specified in precise detail (See Order No. 80-1996, January 23, 1996)

A concise statement of the Ministry's reliance on section 19 follows:

> The Public Body submits that given the extremely violent and sadistic nature of the crimes committed by the Applicant upon the Third Party, the Applicant's lack of remorse and denial of these events, and the fact these crimes were not random incidents, but arose out of a common law spousal relationship, the access to that part of the record in dispute in this inquiry could reasonably be expected to threaten the Third Party's safety or mental or physical health. (Submission of the Ministry, paragraph 5.06)
> ...
> The voice of the victim and her highly personal account of the impact of the offender's horrific crimes on her physical and mental well being are not intended to be available at a later date for an offender to dissect, listen to over and over again, and use for whatever purpose he so desires. (Submission of the Ministry, paragraph 5.07)
> ...
> The Public Body submits that the Applicant's access request is simply another means of 'contact' between the offender and the Third Party and constitutes a means of the Applicant revictimizing the Third Party. It reflects another way by which the Applicant can attempt to control his victim. A copy of the victim's tape recorded statement will represent a 'trophy' of sorts for the Applicant. Providing the Applicant access to a copy of this information destroys any healing the Applicant may have achieved by participating in the parole process, and in and of itself, represents a form of re-victimization. It is important that the Third Party regain control over her life and information self-determination is an aspect of this control. (Submission of the Ministry, paragraph 5.11)

I agree with the Ministry's statement.

On the basis of such facts and arguments, and the various affidavits and *in camera* material submitted in support of its arguments, I agree with the Ministry's application of

section 19 to the records in dispute. It is clear on the affidavit evidence before me that disclosure could reasonably be expected to threaten the third party's safety or mental or physical health. (See Order No. 138-1996, pp. 7, 8) Contrary to the reply submission of the applicant, I do find that release of a tape of the victim impact statement could reasonably be expected to create the probability of risk of harm to the third party. (Reply Submission of the Applicant, p. 3)

Section 22: Disclosure harmful to personal privacy of third parties

The applicant argues for disclosure of the information in dispute on the basis of section 22(2)(a) of the Act. I do not find the applicant's arguments compelling or convincing.

The Ministry specifically argues against disclosure of the information in dispute on the basis of sections 22(2)(e) and 22(3)(a) of the Act and refers in this connection to the arguments it presented with respect to the application of section 19. (Submission of the Ministry, paragraphs 5.13 to 5.18) The Ministry further submits that the considerations in sections 22(2)(a), (b), and (c) militate against disclosure. (Submission of the Ministry, paragraph 5.19) I agree with the Ministry.

With respect to the application of section 22(3)(a), the Ministry submits that the record in dispute "contains a description of the Third Party's medical and psychological diagnosis, condition and treatment, and that providing access under the Act to this part of the record is a presumed unreasonable invasion of the Third Parties personal privacy." (Submission of the Ministry, paragraph 5.21) I agree with the Ministry's reliance on this subsection.

I find that the applicant has not met his burden of proof under section 22 of the Act. Disclosure of the information in dispute would be an unreasonable invasion of the third party's personal privacy.

The fundamental nature of victim impact statements

Although a decision in an inquiry like this one is quite clear-cut within the parameters of the Act itself, it is worth reflecting on the larger issue of the preservation of personal privacy that is at stake in this particular regard. The fundamental principle of data protection, or informational privacy, is informational self-determination. It is, regrettably, a principle that is more honoured and celebrated than observed in practice.

The concept of informational self-determination was most clearly developed in the decision of the then West German Federal Constitutional Court in its decision in 1983 on the constitutionality of the census of population. See David H. Flaherty, Protecting Privacy in Surveillance Societies, Chapel Hill, NC, 1989, pp. 46-47. The Court referred to the fact that individuals should have a fundamental right to control the disclosure of their own personal information. This is the link, in my mind, to appreciating the nature of

victim impact statements. In the present inquiry, for example, the law permitted a victim to assist the Parole Board by telling it about how the acts of her assailant had affected her. It is also, self-evidently, a part of the healing and recovery process that victims go through in such tragic and traumatic circumstances, which are fully set out in *in camera* submissions from the victim in this inquiry and those who have counselled her.

A victim impact statement is an extremely intimate document, comparable perhaps to use of the confessional in a religious ceremony, except that a victim may have a somewhat larger, but equally controlled, audience. The process of making an impact statement can be therapeutic for the individual in the best of cases. Thus, there is a principled reason why it should be unusual for any record of a victim impact statement to be disclosed to others, beyond its intended aural audience, unless the victim himself or herself chooses to make that disclosure. In this inquiry, the victim strongly resists the disclosure of the record in dispute.

11. Order

I find that the Ministry of Attorney General was authorized to sever and withhold part of the record under section 19(1) of the Act. Under section 58(2)(b) of the Act, I confirm the Ministry's decision to refuse access to the part of the record severed under section 19.

I also find that the Ministry of Attorney General was required to sever and withhold part of the record under section 22 of the Act. Under section 58(2)(c) of the Act, I require the Ministry to refuse access to the part of the record severed under section 22.

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David H. Flaherty
Commissioner

April 17, 1998