ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 218-1998
March 13, 1998

INQUIRY RE: A decision by the Ministry of Attorney General to refuse an individual access to some of his Human Resources records

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: http://www.oipcbc.org

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 August 14, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by the applicant, an employee of the Ministry of Attorney General (the Ministry), for a review of the decision by the Ministry to withhold and sever information from records related to his employment. The applicant received an unfavorable performance appraisal in 1995. He subsequently complained about the content of the evaluation and the process by which it was done. The records he has requested pertain to the original evaluation and the internal investigation by the Ministry into the appraisal process.

Early in 1997 the applicant initiated legal proceedings against the government, alleging that the appraisal constituted harassment. The Ministry has withdrawn the original appraisal. (Submission of the Applicant, p. 10)

2. Documentation of the inquiry process

The applicant made two requests dated, December 21, 1995 and March 11, 1996, for records in the custody and control of the Ministry related to his personnel file and personnel evaluation. The Ministry responded to these requests on March 8 and March 19, 1996 and provided him with some records. It also withheld records and severed information from other records under sections 13, 14, and 22 of the Act.

On March 21, 1996 the applicant requested a review of these decisions. During mediation, sixteen pages of notes were disclosed to the applicant, and the file was closed.

The applicant made another request on July 9, 1996 requesting "all documents on or pertaining to my personnel file with the Ministry of Attorney General." He sought access only to those previously denied.

The Ministry responded to the applicant's third request on September 9, 1996 by disclosing further records. However, the applicant was denied access to other records and information under sections 13, 14, 17, and 22 of the Act. On September 24, 1996 the applicant requested a review of this decision.

In an effort to resolve this matter and due to scheduling difficulties, this inquiry was subject to a series of adjournments by mutual consent, with the written inquiry finally taking place on August 14, 1997.

3. Issue under review and the burden of proof

The issues under review at this inquiry are whether the Ministry correctly applied sections 13, 14, 17, and 22 to the personnel-related records requested by the applicant and whether the Ministry fulfilled its duty to conduct an adequate search for all of the records responsive to the applicant's request.

The relevant sections of the Act are as follows:

Duty to assist applicants

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Policy advice, recommendations or draft regulations

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

(2) The head of a public body must not refuse to disclose under subsection (1)

...

(n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

Legal advice

14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

Disclosure harmful to the financial or economic interests of a public body

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

...

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

...

(e) information about negotiations carried on by or for a public body or the government of British Columbia.

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.

(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,

...

(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,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable, and

....

(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,

...

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

(h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,

....

4. The burden of proof

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to records has been refused under sections 13, 14, and 17, it is up to the public body, in this case the Ministry of Attorney General, to prove that the applicant has no right of access to the records or parts of the records.

Under section 57(2), 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.

5. The records in dispute

The records in dispute are internal memoranda, handwritten notes, and reports pertaining to the personnel evaluation of the applicant, the subsequent internal investigation into the handling of the evaluation, and memos concerning the processing of the applicant's access requests. The Portfolio Officer's Fact Report for this inquiry listed nineteen records in dispute; that number was reduced to seven by the time the Ministry had completed its reply submission. In each instance, the applicant has received a basic description of the record withheld, including its length, the author, and the recipient. The seven records are identified as records 4, tab 3; 2, tab 4; 12; 15; 33; B; and the Barrow Report.

6. The applicant's case

The applicant seeks disclosure of all of the remaining records in dispute. He also questions the adequacy of the search that the Ministry has made for remaining records.

He submits that he has a right of access to all the "personal information" about himself that remains outstanding.

The applicant has made detailed submissions about specific records that the Ministry decided to disclose during the mediation process. These records are obviously no longer in dispute.

I have discussed the adequacy of search issue below and the applicant's submissions on the application of various sections of the Act to the remaining records in dispute.

7. The Ministry of Attorney General's case

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

8. Discussion

In writing this Order I am attempting to reduce a complicated case to its basic components, avoiding immersion in the merits of either side. I have also written elliptically to protect the identity of the applicant.

As a preliminary point, I note that the applicant has acknowledged that the Ministry has disclosed "most of the records in dispute." (Reply Submission of the Applicant, p. 6)

Section 6: the adequacy of the Ministry's search for records

The applicant has specific recall of records that he saw during the time of his employment with the Ministry, which should either be in his personnel file or in appropriate court files. He also saw seven letters, memoranda, or phone messages in his personnel file, complimentary of his performance, which the Ministry has not disclosed; in some instances, he obtained copies of these records elsewhere. (Submission of the Applicant, p. 2) Copies of such records are appended to the affidavit of the applicant. He has also noted a number of other records about himself that the Ministry has not produced. (Submission of the Applicant, pp. 3 and 4)

The applicant admits that the missing records "could conceivably all have been misplaced, lost or otherwise removed from the searched files" but submits that it is more likely that the Ministry's search was inadequate. There is also a possibility, of course, that the missing records were deliberately removed from his personnel file. (Submission of the Applicant, p. 11)

The Ministry submits that it has made a reasonable effort to locate records responsive to the applicant's requests in its Human Resources Branch, the Criminal

Justice Branch, and the Legal Services Branch. (Submission of the Ministry, paragraphs 1.01 to 1.04)

In reply, the applicant appropriately points out that the Ministry has not addressed the significant issue of what has happened to the records which he was able to locate from other sources that have not been found in the records of the Ministry. He questions whether these records have been destroyed or removed from areas that the Ministry has searched. (Reply Submission of the Applicant, p. 1)

The Ministry has indicated that it will continue to search for one record referred to in the applicant's submissions but takes the position that, if the applicant seeks access to information about himself in case files rather than personnel files, he should file a new request under the Act. (Reply Submission of the Ministry, paragraphs 5.01 to 5.02)

In its reply submission the Ministry states that additional searches of a regional office have located two additional files:

> One of these files is an old personnel file which was created by previous management, and the existence of this file was not known by subsequent management. The other file is an administrative file that was supposed to contain only such things as leave transactions forms, and not personal performance-related things such as appraisals or commendatory letters. (Reply Submission of the Ministry, paragraph 5.03)

The applicant listed 9 missing records of which 4 remain unlocated. The Ministry stated that the records located will be disclosed in the very near future. Additional records located as the result of an office move from a regional office to Vancouver will also be disclosed to the applicant.

After reviewing the evidence, I am prepared to accept the Ministry's submission that "it has exhaustively searched the [regional] office and any relevant files that were moved to Vancouver." I also accept that it has "conducted a thorough search" of other parts of the Criminal Justice Branch, the Human Resources Division, and the Legal Services Branch. (Reply Submission of the Ministry, paragraph 5.07) The detailed affidavit of the Information and Privacy Analyst with the Ministry, provides persuasive evidence regarding the adequacy of the Ministry's searches.

However, I would be remiss if I did not comment on the fact that the process of finding records for this applicant is not a credit to the records management practices of the Ministry. Were it not for the fact that the applicant was able to list specific missing records, he would not have been in a position to argue persuasively for additional searches. It should not be necessary for public servants to copy their personnel files regularly and safeguard them for fear that the contents of such files will not be found in the event of subsequent need. The success of the Ministry's searches in this inquiry owes much to the tenacity and knowledge of an informed applicant.

Application of the exceptions to disclosure

Before turning to each of the relevant sections in this case, I note that the Ministry relied on Order No. 177-1997, July 22, 1997, to emphasize two points relevant to this case, which I would paraphrase as follows. First, the Act is not a suitable mechanism for settling human resource issues, particularly when there are exceptions under it that must be applied to the records in dispute (p. 4). Second, it is not always necessary to disentangle the application of multiple exceptions to records in dispute (p. 6). (Submission of the Ministry, paragraphs 5.01 and 5.02)

Section 13: Policy advice, recommendations or draft regulations

The applicant is essentially seeking the disclosure of all "factually based comments" under this section as well as any advice not specifically directed towards a "policy issue." (Submission of the Applicant, pp. 5 and 6)

The Ministry has withheld a "small amount of information" from records 12, 15, and the Barrow Report on the basis of this section, most of which is also being withheld under section 17. It has held back "information that would reveal, either explicitly or implicitly, advice and recommendations about how to proceed at different stages of the review of the appraisal." (Submission of the Ministry, paragraph 3.01) It relies in particular on Order No. 93-1996, March 19, 1996; and Order No. 177-1997, p. 4. In this inquiry, the records also contain allegations of harassment and a request for a review of the disputed performance appraisal. In principle, I agree with the Ministry that "it should be able to operate in a zone of confidentiality as it develops information, choices, recommendations, and advice on such matters." (Submission of the Ministry, paragraph 3.03)

Based on my review of the records, I accept that section 13 applies to the small amount of information severed from all three records. It constitutes advice and/or recommendations developed for a public body within the scope of section 13(1).

The applicant relies on section 13(2)(n) to compel disclosure of this information. I agree with the Ministry that the applicant's reliance on section 13(2)(n) to compel disclosure is misguided. (Reply Submission of the Ministry, paragraph 3.04) It does not require the disclosure of all records which relate in any way to the exercise of a discretionary power or an adjudicative function. Only the records which contain a decision or reasons for it must be disclosed.

Section 14: Legal advice

The Ministry has withheld under section 14 half a page of record 2, tab 4, which comprises handwritten notes of a Ministry lawyer.

I will not reproduce the Ministry's entire submission with respect to the meaning of solicitor-client privilege, because I basically agree with it. The Ministry argues that the single record in dispute falls under the "reasonably contemplated litigation" component of such privilege. It submits that this record "was created by the client [the Criminal Justice Branch of the Ministry] for the dominant purpose of litigation which was reasonably contemplated at the time the record was created." (Submission of the Ministry, paragraph 1.07)

The applicant submits that the Ministry "has supplied insufficient evidence on which to conclude that the severed portion of record 2, tab 4 was created in contemplation of litigation." (Reply Submission of the Applicant, p. 2) I cannot accept this submission.

The Ministry has provided an affidavit indicating that the author of the record prepared the notes in question for the "dominant purpose" of litigation which he expected the applicant to commence against the government. (See Affidavit of Geoffrey Barrow) Barrow deposes that it was apparent that this matter would proceed to litigation by May 1995. After reading a letter from the applicant's lawyer in October 1995, Mr. Barrow believed that litigation was a certainty and created the record for this purpose.

Based on this evidence, I accept that the Ministry has established that record 2, tab 4, was created for the dominant purpose of litigation and was thus properly withheld under section 14 of the Act.

Section 17: Disclosure harmful to the financial or economic interests of a public body

The Ministry has withheld record 15 and the Barrow Report in their entirety and severed information from three other records (3; 12; and 2, tab 4) on the basis of section 17 of the Act. (Submission of the Ministry, paragraph 2.08) The Ministry submits that it has withheld information that would reveal the elements and reasons for the government's position, strategy, and assessment of its case. It relies in particular on section 17(1)(c), as interpreted in Order No. 177-1997, to argue that "disclosure of this information would have a direct consequence on the financial interests of the public body and the government because the applicant would have advance knowledge of the elements of the government's case." (Submission of the Ministry, paragraphs 2.04 and 2.06; Order No. 6-1994, March 31, 1994, p. 3)

The applicant contends that it is the "height of irony" for the Ministry to suggest that disclosure of records containing "incriminating information" relating to his action against the Ministry will potentially harm the government's economic interests, since it is the Ministry's "actionable conduct which has led to the possibility of economic harm." (Submission of the Applicant, p. 9) The applicant also contests the Ministry's reliance on Order No. 177-1997, arguing that my decision in that case depended upon the fact that disclosure of records would reopen what was essentially a settled matter. The applicant submits that "there is no such consideration in this case .... Regardless of the disclosure or non-disclosure of any of these records, the Ministry is embroiled in ongoing litigation and

will have to spend further funds in support of that litigation." (Reply Submission of the Applicant, p. 3) In particular, the applicant submits that record 15 cannot be characterized as falling under section 17(1)(c).

The applicant also challenges the assertion that any amount of reasonably expected harm is sufficient to engage section 17. (Reply Submission of the Applicant, p. 3) For its part, the Ministry contends that it has the discretion to invoke section 17 on the basis of potential harm that and "it is not for the Commissioner to ... assess the degree of harm that may ensue, and balance that against a general policy of disclosure or of a right to know." (Reply Submission of the Ministry, paragraph 2.02)

Having reviewed the two records withheld in their entirety under section 17, and the three records from which information has been severed, I accept the Ministry's submission that disclosure of the information withheld could reasonably be expected to harm the financial interests of the government. Not all of the information contained in record 15 can be characterized as falling specifically under section 17(1)(c), but it has been properly characterized as information the disclosure of which could reasonably be expected to harm the financial interests of a public body under section 17(1).

The application of section 17 raises the fundamental issue, once again, of the appropriate venue for disclosure of information to an applicant involved in litigation with the government. I have consistently tried to keep the various venues in which applicants can seek disclosure of information as separate as possible in my decisions, because the rules are different. (See Order No. 32-1995, January 26, 1995) Thus, an applicant who has commenced an action against the government may not be authorized to receive information under the Act that would harm the financial or economic interests of the government, but may be entitled to that information under the rules for discovery which apply to the litigation process. That seems to me to be an appropriate balancing of competing interests.

Section 22: Disclosure harmful to personal privacy

Information from records 4, tab 3; 12; 15; B; and the Barrow Report has been severed under section 22 of the Act. The applicant suspects that these records "focus largely on himself, his abilities as a [professional], on his [date of] appraisal and on the methods used to create it." (Submission of the Applicant, p. 9)

The applicant seeks access to record 15 on the ground that it may be inaccurate and record 12, which is a letter written by a Ministry official sent to look into the circumstances of the controversial performance appraisal. The applicant contends that, to the extent that this letter deals with the process of appraisal and the issues currently being litigated, he has "a right to be aware of and respond to any allegations made regarding his performance or any recommendations made by [the Ministry official] in investigating how his specific appraisal was flawed. Furthermore, any comments in this document criticizing or supporting the evaluation process reflect directly on the appraisal's validity

and the Ministry's assessment of [his] ability as a practitioner." (Submission of the Applicant, pp. 10 and 11)

Before addressing each of the submissions made in relation to section 22(2)(a), (c), (e), (f), and 22(3)(h), I note that many of the severances under section 22 simply identify the names of third parties and, in one case, an opinion about a third party.

Section 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,

The applicant particularly wants access to any allegations contained in a lengthy response (to a Ministry critique) prepared by the supervisor who conducted the performance appraisal. In this regard, the applicant refers to Order No. 36-1995, March 31, 1995; and Order No. 43-1995, June 9, 1995, which address the merits of allowing full disclosure of negative allegations among competing parties. The applicant submits that his inability to access record 15 and the allegations against him is highly relevant to subjecting the activities of government to public scrutiny under section 22(2)(a). (Submission of the Applicant, p. 10) He seeks disclosure of the records so that he may subject the Ministry to public scrutiny and points out that he "began and continued in this FOIPPA disclosure process long before he contemplated litigation." (Reply Submission of the Applicant, p. 5)

I agree that section 22(2)(a) is relevant in this inquiry. Disclosure of some of the information withheld under section 22 may be desirable in terms of subjecting the activities of the public body to public scrutiny with respect to appraisals. However, this consideration must be weighed against a number of other relevant factors which militate against disclosure of the personal information. Those factors are addressed below.

22(2)c): the personal information is relevant to a fair determination of the applicant's rights,

The Ministry has withheld information that it states would reveal: (a) the names of individuals who complained about the applicant, and the telephone number of one such individual; (b) names of individuals who were contacted for the purposes of the performance appraisal of the applicant; (c) the stated opinions, feelings, and wishes of identified individuals; and (d) some opinion information about the applicant where its disclosure would unreasonably invade the personal privacy of third parties. (Submission of the Ministry, paragraph 4.02)

The applicant submits that this personal information is relevant to a fair determination of his rights under section 22(2)(c) of the Act. The Ministry submits that this section does not support disclosure in this inquiry, because the applicant's rights will

be determined in the litigation which he is pursuing against the government. (Submission of the Ministry, paragraph 4.06) The applicant submits that "an individual who has commenced a Supreme Court action is [not] barred from using the FOIPPA to seek supplementary disclosure to that provided under the Rules of Court." While I agree that the existence of litigation does not "bar" access to records under section 22(2)(c), I am also cognizant of the fact that the applicant's rights will be determined in a litigation process which provides for disclosure of relevant records.

Section 22(2)(e): the third party will be exposed unfairly to financial or other harm,

Based on my Order No. 177-1997, pp. 6-7, the Ministry submits that disclosure of the identities of the third parties in the records in dispute will expose them unfairly to financial or other harm under section 22(2)(e). (Submission of the Ministry, paragraph 4.05) As noted above, the applicant contests this reliance on Order No. 177-1997. He points out that he will not be returning to work at the Ministry and will not be coming into regular (or any likely) contact with individuals outside the Ministry who supplied information about him and that "the type of harm hinted at in the Ministry's submission will not come to pass." (Reply Submission of the Applicant, p. 5)

I agree with the applicant that the evidence does not establish that disclosure of the personal information would expose the third parties unfairly to financial or other harm.

Section 22(2)(f): the personal information has been supplied in confidence,

The Ministry's fundamental position is that individuals who "provide comments for the purposes of the performance appraisal desire confidentiality" and that "it is only reasonable to expect confidentiality when supplying information in a performance appraisal context." The applicant submits that the Ministry has failed to supply evidence that the records were expressly supplied in confidence. (Reply Submission of the Applicant, p. 4)

Based on my review of the records in question, and the circumstances in which the information was obtained, I am satisfied that the personal information provided for the purpose of the personnel assessment was supplied in confidence under section 22(2)(f) of the Act. Disclosure of the records would reveal the identities of third parties.

Section 22(3): a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if ... (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,

The Ministry submits that "much of the withheld information is properly characterized as personal or personnel evaluations or character references." (Submission

of the Ministry, paragraph 4.10) The applicant responds that such information must be "expressly" supplied in confidence. (Reply Submission of the Applicant, p. 5)

While section 22(2) sets out factors which I must consider in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, section 22(3)(h) presumes disclosure to be an unreasonable invasion, if disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference, or personnel evaluation.

I am satisfied that much of the information severed under section 22 falls squarely within the scope of section 22(3)(h). Having reviewed the records, I accept that disclosure of this information could reasonably be expected to reveal that third parties supplied, in confidence, a personal recommendation or personnel evaluation, and/or a character reference.

In summary, disclosure of the personal information in dispute is relevant to subjecting the activities of government to public scrutiny and may be relevant to a fair determination of the applicant's rights but, in my view, those considerations are outweighed in this case by the fact that the personal information has been supplied in confidence under section 22(2)(f), and disclosure could reasonably be expected to reveal that the third parties supplied a personal recommendation or personnel evaluation and/or a character reference in confidence under section 22(3)(h). I conclude that the applicant has failed to discharge the burden of establishing that disclosure of the information in dispute would not constitute an unreasonable invasion of the third parties' personal privacy.

Review of the Records in Dispute

In reviewing the records in dispute, I have carefully reviewed the detailed submissions about the specific records submitted by the applicant and the Ministry. (See Submission of the Applicant, pp. 5-10)

The Ministry has applied section 13 to record 12, 15, and the Barrow Report, which are being withheld in their entirety due to the combined application of sections 13, 17, and 22. (Reply Submission of the Ministry, paragraph 3.01) I accept that the information severed from these three records falls within the scope of section 13 of the Act.

The Ministry has applied section 14 to information in record 2, Tab 4. I accept that this information was properly withheld under section 14 of the Act.

The Ministry has applied section 17 to information severed from records 2, 12, and 33 and has withheld two records in their entirety on the basis of section 17, in

combination with sections 13 and 22. I accept that section 17 was properly applied to these records in dispute.

The Ministry has applied section 22 to information in a total of five records (Records 4, 12, 15, B, and the Barrow Report). I agree with the Ministry's submission that the applicant has not discharged his burden of proving that disclosure of this information would not constitute an unreasonable invasion of the personal privacy of third parties.

9. Order

I am required under section 58(1) to make an order in relation to the inquiry under section 6(1) of the Act. Subject to the Ministry's continued search for one letter, I find that the Ministry has otherwise discharged its duty to the applicant under section 6(1) of the Act by means of an adequate search. Under section 58(3)(a) of the Act, I require the Ministry to perform its duty under section 6(1) to make every reasonable effort to search for the remaining letter and to report the results to my Office and to the applicant within 30 days of this order.

I find that the Ministry was authorized to withhold or sever the records in dispute under sections 13, 14, and 17 of the Act. Under section 58(2)(b) of the Act, I confirm the decision of the Ministry to refuse access to the records in dispute that have been withheld or severed under sections 13, 14, and 17.

I also find that the Ministry was required to withhold or sever the records in dispute under section 22 of the Act. Under section 58(2)(c) of the Act, I require the Ministry to refuse access to the records in dispute that have been withheld or severed under section 22.

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David H. Flaherty
Commissioner

March 13, 1998