ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 36-1995
March 31, 1995

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A Request for Access to the Name of a Complainant in a Record Held by the Ministry of Environment, Lands and Parks concerning the Saturna Island Landfill

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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 February 9, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by Doris Ackerman (the applicant) to the Ministry of Environment, Lands and Parks (the Ministry), dated September 20, 1994, for access to a letter to the Ministry in which residents of Saturna Island "were accused of conspiring with the CRD (Capital Region District) to defraud the government by 'calculating more money than they were entitled to for closure of the Saturna Island Landfill.'" Ackerman made her request in her capacity as chair of the Recycling committee of the Saturna Community Club.

On October 12, 1994 the Ministry provided the applicant with a number of records, including a transcript of the original handwritten record with the name and other personal identifiers of its author severed.

The Ministry initially relied on section 22 of the Act as authority to refuse release of this information. It subsequently invoked section 15 at the oral inquiry.

2. Documentation of the inquiry process

On November 18, 1994 the Office of the Information and Privacy Commissioner gave notice, under section 54 of the Act, of receipt of a request for review to the Ministry

of Environment, Lands and Parks. This letter stated that if the matter was not settled, the Commissioner would conduct an oral inquiry by February 13, 1995.

On February 2, 1995 the Office issued a Notice of Oral Inquiry to take place on February 9, 1995. The Office further provided all parties involved in the inquiry with a one-page statement of facts (the Portfolio Officer's fact report), which all parties accepted for purposes of holding the inquiry.

J.M. (Jim) Campbell represented the applicant, Doris Ackerman. Catherine Hunt, Barrister and Solicitor with the Legal Services Branch, Ministry of Attorney General, presented the public body's case. Susan Butler, Information and Privacy Manager for the Ministry of Environment, Lands and Parks, also appeared for the public body.

On March 22, 1995, I conducted an *in-camera* telephone inquiry with the third party, because I wanted to ask him or her certain questions about his or her affidavit. Catherine Hunt, representing the Ministry, was present for this one-hour extension of the inquiry.

3. The record in dispute and the issues under review in the inquiry

The record in dispute is the signature, address, postal code, and telephone number of the writer of a letter sent on June 10, 1994 to the Ministry of Environment, Lands and Parks.

This inquiry examined the application of certain portions of sections 15 and 22 of the Act to the severance of a name from the letter held by the Ministry. The specific subsections relied on by the several parties are 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,

...

(d) reveal the identity of a confidential source of law enforcement information,

...

(2) The head of a public body may refuse to disclose information to an applicant if the information

...

(b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record, or

....

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.

(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

...

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

(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.

....

(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,

....

Under section 57(2) of the Act, the burden of proof is on the applicant to show that the release of the severed record would not be an unreasonable invasion of the third-party's personal privacy. With respect to the law enforcement exception, the burden of proof is on the Ministry.

4. The "Facts" in this case

Understanding what actually happened in this particular case may be difficult for a reader of this order, because I cannot reveal too much about the alleged facts without inadvertently identifying the name in dispute. The bare outline is that a person called the Minister's office in 1994 and stated that he or she suspected that public money had been spent inappropriately in the closing of a landfill on Saturna Island. The Recycling committee of the Saturna Community Club had carried out the work and then applied for reimbursement from the Ministry.

The complainant stated that he or she was acting "in the public interest," but intended that the documents he or she subsequently forwarded should only be for the personal and political use of the Minister. He or she had no intention of spurring a

witchhunt on Saturna, but that is exactly what the applicant in this case perceives as having happened, since she and her Recycling committee colleagues were subject to a ministerial audit, (which upheld the integrity of their government grant). They now want to know the name of the complainant.

The complainant claims that he or she was promised confidentiality for his or her identity and indeed expected it. He or she states that the Ministry used his or her information in a manner that he or she did not intend. While I am not dealing with the Ministry's authority, or indeed responsibility, to act in the way it did, I do have to decide whether it now has the legal right to withhold the name of the complainant under the Act.

The complainant still believes that he or she made an appropriate complaint. The applicant believes that the complaint was not only false but politically motivated. The complaint against the applicant and the Recycling committee indeed proved to be false, but I make my decision below without taking a final position on this difference of opinion about motivation, because further discussion of what may have been his or her other purposes may be a breach of confidentiality in itself. This may also make it difficult to predict the future results of parallel cases, because of the somewhat idiosyncratic nature of the dispute in the present inquiry.

5. The applicant's case

A group of residents of Saturna Island appeared in support of the applicant's petition for access to the name of the signatory of the letter to a Special Assistant in the office of the Minister of Environment, Lands and Parks. These persons are upset about the aspersions cast upon their reputations for their volunteer work with the Recycling committee of the Saturna Community Club and believe that only openness about the identity of the author of the letter will settle the situation in this community of three hundred persons. In their view, the "false" charges have hurt them, and the truth should be revealed. In their further view, it is a misuse of a governmental process to attack people involved in community work in this particular way. Those involved in volunteer activity on Saturna now fear more false allegations that can discredit them unjustly. They also point out that these allegations were brought only against specific persons involved in a dispute with a particular developer over a development on Saturna. The officers of the Recycling Committee state they have felt particular stress over the events of the last nine months.

After the informant in this present case contacted the Ministry, the Special Assistant sent the covering letter and accompanying materials to officials in the department "without any written or other comment about it." (Submission of the Applicant, p. 1) This led to a Ministry briefing note, dated June 21, 1994, entitled: "Allegations that the Saturna Community Club received a financial contribution from B.C. Environment under false pretenses."

The applicant believes "that the informant must have misunderstood any evidence he or she might have seen or had a grudge about something." (Submission of the Applicant, p. 1) She submits that there is no justification on privacy grounds under section 22 of the Act to withhold the information they now seek and cites the following reasons:

> Disclosure would not be an unreasonable invasion of the third party's personal privacy.
>
> The definitive measure of what is unreasonable depends on the values and traditions of those who are asked as well as on the motives of the parties in dispute. Proof of what is unreasonable can never be more than subjective. There is a traditional concept of justice which entitles the accused to face the accuser. Loosely defined [Ministry] policy now dictates that the identity of informers given in confidence regardless of substance will not be released and that material which makes reference to actions of others which may raise suspicions of wrong doing are not treated as accusations but as expressions of concern, delivered without malice by good citizens in the public interest.
>
> We all wish that this was always the way. The very existence of such a policy promotes abuse. It is strongly suggested by the Ministry officials that withholding the name of any informant is necessary in order to effectively ensure that there will be an unlimited supply of informants. This includes those who would willingly subject their neighbour to an inquisition over any imagined, suspected or alleged misdemeanor without fear of embarrassment to themselves. Indeed it is suggested that the Ministry could not function effectively if the privacy of all their informants could not be guaranteed. We might conclude from this that for Ministry purposes, anything that would make an informer uncomfortable enough not to inform is an unwarranted invasion of privacy. This would be a distortion of the legislation to suit the Ministry's administrative convenience rather than reasonable protection of an individual's personal privacy. (Submission of the Applicant, p. 2; paragraphing added)

The applicant rejects any reliance on section 22(2)(e) of the Act since, in her view, there is no risk that the third party will be exposed unfairly to financial or other harm. Similarly, she rejects the applicability of section 22(2)(f), since there is no record that the information was supplied in confidence, nor is there written Ministry policy about treating such complaints in confidence. (Submission of the Applicant, pp. 2-3)

With respect to an argument under section 22(2)(h) of the Act that disclosure might unfairly damage the reputation of the third party, the applicant's submission is that any potential damage inflicted by the release of the name would not be unfair,

"particularly if there were another open and less aggressive way available to the informer to have [had] the issue resolved." The applicant stated that:

> The truth sometimes hurts. False charges hurt and not everyone who hears them early hears later that they were false. The corollary is that the identity of the author of false accusations becomes a matter for serious speculation, particularly in a very small community. It is only the identity of the author that can really clear other suspects. The protection of confidentiality is not a right of the careless or frivolous.... [The] material provided [to the Ministry], by itself, demonstrates that the informer was at the least, careless or frivolous. (Submission of the Applicant, p. 3)

The applicant further addressed the basic principle of our system of justice that the accuser should have to face the accused, except in special circumstances:

> There are the special circumstances which involve public safety and the capture of real criminals or the protection of individuals who might sacrifice their employment or personal safety in the public interest. There are people who take substantial risks by informing in criminal matters and in other matters where urgency is of the essence as in dumping waste or reporting spills. Those that make false, careless or frivolous and vexatious allegations do not deserve that protection. We cannot allow those good reasons for protecting personal identity to be used as precedents for diluting the traditional protection of that basic principle of justice. Transparent matters such as this should be cleared up by a polite question or two put to the responsible people who prepared and submitted the application. No one could run from this matter. All the material was in place. Nothing was hidden. (Submission of the Applicant, pp. 3-4)

In terms of providing additional context for seeking the identifying information in dispute, the applicant stated that the Community Club has very broad membership on Saturna with open meetings and agendas. It operated the Saturna landfill as a licensed service. When it decided to close it, the province agreed to a sharing of the costs of closure under a formula which allowed the value of labour, equipment, and materials used to be calculated at true market value rather than actual cost. Staff of the CRD for the outer Gulf islands and the Ministry assisted in the preparatory work necessary for an agreement signed September 27, 1993. The Recycling committee did the work for the Club on this project and had the application for Ministry funding submitted by the Club on December 20, 1994. In the applicant's view, the current controversy arose because the actual cost that appeared in the financial papers sent to the Ministry by the complainant was less than one-half of the total cost figures submitted to the Ministry. (Submission of the Applicant, pp. 4-5)

When the Recycling committee and others in the community first heard of allegations of fraud against them in the closing of the landfill, they reacted with anger.

They perceived the complaint "as an act of malice and mischief. There was exactly at that time a fierce controversy about a requirement for park land as a condition of a subdivision came to a head." (Submission of the Applicant, p. 5)

The applicant's view is that this alleged dispute should have been settled by legitimate, polite discussion with one or more of the people known to be accountable for this project:

> There is no thoughtful basis at all for an allegation of any wrong doing. Furthermore any person who had as much access to the files as the informant obviously did, would have known that. It is hard to believe that this informer who had such good access to records acted in the public interest. It is hard to accept that naming this person is an unfair or unwarranted invasion of his/her personal privacy ....
>
> There are still several different people who are under suspicion of having unfairly maligned the recycling committee to the Ministry and until the name is released some or even all will remain unjustly under that cloud. If for no other reason than this[,] the name should be released. (Submission of the Applicant, p. 6)

5. The third party's case

The third party in this case submitted a lengthy affidavit, dated February 7, 1995, which I accepted on an *in camera* basis in accordance with my standard procedures for inquiries. This affidavit was also discussed *in camera* with the Ministry during the inquiry and, at a later date, with the third party. I did disclose to all parties the covering letter from the third party that accompanied the affidavit, minus specific identifiers, since the letter sought to make legal arguments under the Act for non-disclosure of his or her identity. (See Exhibit 8)

Although I cannot discuss the contents of the affidavit in any detail, because of considerations of confidentiality, the third party states that he or she intended his or her information only for the use of the Minister of the Environment in his personal and political capacity. He or she received assurances from the Special Assistant that "there was no way that my identity could be revealed...." He or she also emphasizes that the complaint was not made against the Recycling committee or the Community Club, but another body. (Affidavit, paragraphs 17-19, 23, 27-28) The third party also deliberately chose not to approach a law enforcement body or the Auditor General for his or her own private reasons.

In an affidavit dated February 15, 1995, which I requested at the hearing, the Special Assistant to the Minister confirmed that the informant believed that he or she could not approach another body in this matter, but she disputes his or her view that the information was provided for the private use of the Minister: "I accepted the complaint

on behalf of Moe Sihota in his role as Minister of Environment, Lands and Parks, the Minister responsible for the grant program that awarded moneys to the Saturna Island Recycling Committee." (Affidavit of the Special Assistant, paragraph 7) The Special Assistant did concur with the informant's statement that the Special Assistant had "indicated that there would be no way that my identity could be revealed and that she thanked me for not going to the press." (Informant's Affidavit, paragraph 19; Affidavit of the Special Assistant, paragraph 8)

Finally, the third party had made the following statement in his or her affidavit:

> Had [the Special Assistant] indicated to me that notwithstanding that I had provided this information for the personal use of Moe Sihota and the political wing of the party, there was a chance that my name may be disclosed, I would have requested that any material provided by me be returned and that my inquiry not be logged. This is a privilege I believe I wouldn't have had should I have chosen to deal with the RCMP commercial crime, Auditor General or the Conflict of Interest Commissioner. (Affidavit, paragraph 35)

The Special Assistant subsequently swore that she could not comment on this statement by the third party, because it reflects his or her "state of mind." (Affidavit of the Special Assistant, paragraph 9)

6. The Ministry's case

The Ministry is of the general opinion that disclosure of the identity of the informant would be an unreasonable invasion of a third party's personal privacy under section 22 of the Act.

With respect to the application of section 22(3)(b) of the Act, the Ministry states that the records in this case "pertain to a concern by the third party of possible irregularities with respect to a grant application by the Saturna Island Recycling Committee." (Outline of Argument, paragraph 13, as amended at the oral inquiry) Further disclosure of personal information would be contrary to section 22(1), which is a mandatory exemption. In reaching this decision, the head of the public body relied on section 22(3)(b).

The Ministry further submitted that section 22(2)(f) of the Act is relevant to the current inquiry, since, it argued, the personal information in dispute was supplied in confidence. It relied for this purpose on definitions set out in the Policy and Procedures Manual prepared by the Information and Privacy Branch of the Ministry of Government Services. (Outline of Argument, paragraphs 22-24) It also advanced other arguments that motivated the Ministry at the time of its decision to conceal the identity of the complainant. These include the fact that the third party was feeling harassed by subsequent events and that he or she would not have made the complaint had he or she

been aware that his or her name would be disclosed. Moreover, the Ministry's past practice has been to refuse to disclose identities of such complainants. It is concerned about threats of physical or professional retaliation against the complainant. Disclosure might also inhibit the Ministry's receipt of comparable information in future. (Outline of Argument, p. 30)

The Ministry further submitted that the information provided by the third party in this case was "law enforcement information" under section 15 of the Act. Schedule 1 of the Act defines law enforcement to include:

> (b) investigations that lead or could lead to a penalty or sanction being imposed,
>
> ....

The Ministry submits that the definition includes "activities by public bodies to enforce compliance or remedy non-compliance with standards, duties and responsibilities under statutes and regulations." In the present case, "the letter and accompanying materials from the complainant initiated a ministry investigation into the funding of the Saturna Island Recycling Committee." (Outline of Argument, paragraphs 42-45)

Overall, the Ministry argues that the information brought forward by the complainant in the present case could have resulted in a criminal prosecution, "[i]f the Ministry or the independent auditors had found any irregularity." (Outline of Argument, paragraph 48) Thus disclosure of the identity of the source of the information could reasonably be expected to harm a law enforcement matter under section 15(1)(a) of the Act. (Outline of Argument, paragraph 50)

Under section 15(1)(d), the Ministry submitted that disclosure could clearly reveal the identity of a confidential source of law enforcement information, a person who had been given assurances of confidentiality. (Outline, paragraphs 53 to 59) The Ministry further stated that it relies upon such individuals to volunteer information about "irregularities .... Confidentiality has been the norm in the past specifically to protect the individuals who do inform the Ministry and to ensure that others who might report in future are satisfied that their identities will be protected." (Outline, paragraph 61)

Under section 15(2)(b), the Ministry argues that disclosure of the identity of the third party could subject him or her to civil liability:

> The Ministry submits that it is evident from the animosity existent within the small community of Saturna Island that there is a real risk that should the third party's name be disclosed, that he or she may be the object of legal action and/or retaliatory action. (Outline, paragraph 68)

Some additional points in favour of non-disclosure made by the Ministry are discussed below at appropriate places.

7. Discussion

Both the written and oral representations of the applicant and her associates make a case, on equitable grounds, for the disclosure of the identity of the informant. They seek openness and accountability, which is in accord with the fundamental goals of the *Freedom of Information and Protection of Privacy Act*. The premise that those accused should have the right to face their accuser is also a basic principle of the Anglo-Canadian criminal justice system. The fact that an allegation proves to be false, and an applicant's belief that a complaint was malicious, are worthy of careful consideration. But a request for disclosure of the identity of a complainant must be further supported by detailed consideration of several provisions of the Act.

I am struck by the fact that the third party and the applicant in this case tell such contrasting stories about the circumstances of the original complaint. In fact, the way in which the Ministry chose to treat a phone call to a member of the Minister's staff has a lot to do, in retrospect, with the kind of problem that subsequently arose on Saturna Island. Its investigator subsequently treated it as an "allegation" against the Saturna Island Community Club. (Exhibit 2, briefing note, June 21, 1994)

The third party believes that he or she was acting in the public interest and specifically emphasizes that he or she was not making allegations against the Recycling committee. I cannot disclose more of the third party's views without disclosing his or her identity. I simply want to emphasize that I have given them careful consideration.

The Ministry emphasized the substantial burden of proof on the applicant to demonstrate that disclosure of the information in dispute would not be an unreasonable invasion of privacy. The Ministry sought to distinguish the current case from my Order No. 34-1995, which directed a public body to disclose the contents of a letter of complaint in a situation where the name of the complainant was already known to the applicant. Its point is that the applicant in the current case does know the contents of the record in dispute and thus should be in a better position than the ordinary applicant in such cases to overcome the presumption of privacy for third parties. (Outline of Argument, paragraphs 7-12) I accept the Ministry's distinction, but I conclude that the applicant has indeed made a reasoned effort to overcome this presumption.

Section 22

In my view, disclosure of the identity of the complainant will not be an unreasonable invasion of the subject's privacy under section 22(1). In my judgment, one possible consequence of making what proves to be a false accusation in connection with an administrative and non-criminal proceeding may be public scrutiny by those who perceive themselves as falsely accused. The agent for the applicant claimed at the inquiry that an unreasonable, careless, and vexatious act occurred when the original complaint was made. Regardless of motivation, those accused should have the right to know the names of their accusers (with the exception, for example, of situations where vulnerable

persons and others protected under section 19 of the Act may make complaints), not least in this case because of the perceived harm to their reputations in the Saturna community that occurred when the fact of the Ministry's investigation of "fraud" became publicly known. The applicant further testified through her agent that she and her colleagues were not interested in a witch hunt but in bringing peace to their community. This sentiment is admirable, and it is possible that the full disclosure of the identity of the complainant may facilitate this process. However, all the access and privacy protection principles of the Act must be considered first and a reasonable balance struck.

Section 22(2)

With respect to its argument for non-disclosure under this section, the Ministry relied on my decision "in a similar case," Order No. 25-1994, in which I concluded that a third party was "concerned about vengeful actions and safety matters concerning him or her and his or her family. The third party advanced a reasoned case not to disclose certain personal information about himself or herself." (Outline of Argument, paragraph 33) This earlier case involved the identification of a third party involved in an investigative report concerning an automobile accident. After considering the matter, I conclude that the circumstances of the two cases are not similar for purposes of my decision-making in the present case, because the fact situations and, especially, allegations of potential harm are quite different.

Section 22(2)(e): Unfair Financial Harm

Under section 22(2)(e), and the possibility that the third party will be exposed unfairly to financial harm, I conclude that disclosure is not unfair in the present case. It seems appropriate in an increasingly accountable society for informants who wish to make complaints to public bodies to consider in advance the various risks of exposure that they are running, including civil liability.

Section 22(2)(f): Information Supplied in Confidence

The Ministry attempted to interpret my Order No. 13-1994 in support of its resistance to disclosure of the name of the complainant in this case. (Outline of Argument, paragraphs 27-29) In that case, I directed the B.C. Police Commission to disclose the full text of complaints against the police minus the identifying particulars of the persons complained against as well as the complainants. Order No. 13-1994 clearly deals with a law enforcement matter, which is not so evidently the situation in the present inquiry.

Under section 22(2) of the Act, I accept that the identity itself was personal information supplied in confidence. The body of the information that the complainant supplied was meant for the Minister to use for personal or political reasons. In fact, the Minister's staff decided to use the information to launch an "investigation," which is

something that the complainant did not intend. It appears clear that the complainant wished to keep his or her identity confidential.

However, section 22(2)(f) is simply one factor to be used in determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy. Within section 22(2), all relevant circumstances must be considered. I have considered two other circumstances. The Ministerial Special Assistant gave assurances of confidentiality that could not be supported at law. The instructions that she conveyed to the Ministry manager in the Rural Waste Management Program were simple and oral and apparently said nothing about any promises of confidentiality. Second, the Ministry did not have written policies on when it was appropriate to offer a promise of confidentiality.

The Ministry's Manager for Information and Privacy testified at the inquiry that the Ministry has no written policy on confidentiality practices with respect to such complaints. She said that the Ministry was more likely to withhold the name of a complainant to a conservation officer, for example, in small versus large communities. She also indicated that the advent of this Act may have changed the rules governing such disclosures. It is obvious that line staff need to be made more aware of the broad implication of this Act for such matters.

The Ministry does have an "Observe Record Report" program encouraging persons to report violations of fish and game laws on a toll-free hotline. (Exhibit 9) The reporting card and accompanying form include a complete request for particulars of the alleged offense and the offender. "Complete secrecy and anonymity is guaranteed," although the Ministry and the federal Department of Fisheries and Oceans invite persons who are willing to testify to include their names. These reports are intended for B.C. Environment Conservation Officers. The Ministry does not have comparable practices in place for the type of complaint being considered in this Order.

Section 22(2)(h): Unfair Damage to Reputation

Under section 22(2)(h), I do not believe that the third party will suffer unfair damage to his or her reputation. Since the unfairness to date has been to those Recycling committee members whose reputations have been sullied, there is an element of "leveling the playing field" in my decision to order disclosure. Third parties who voluntarily report their suspicions to non-law enforcement agencies should carefully consider the potential consequences of exposure, when acting as the third party chose to do in the present case.

The applicant should not have to bear the burden of the difference of opinion between the third party and the Minister's Special Assistant as to the level of confidentiality he or she expected and/or was promised. The Ministry chose to treat the third party's information in a way that he or she never intended. The third party was given a promise of confidentiality that the Ministry could not uphold, because of the statutory framework on disclosure created by the Act.

Section 22(3)(b): Investigation Information

This section stipulates that the personal information in question be "compiled" and be "identifiable" as part of an investigation into a possible violation of law. I accept the fact that the Ministry treated the body of records supplied by the third party in that manner, even though he or she did not intend that it be used for law enforcement. I prefer to distinguish the circumstances of the present case by noting that the Ministry itself did not "compile" the information; it was supplied by the third party for another purpose and then used by the Ministry for an investigation. Given the fact that all of the records have now been disclosed to the applicant, except for the identity of the informant, I am not persuaded that this section alone can be used to withhold the identity.

Section 22(3)(b) may cover the circumstances in which the Ministry used the information, but it does not cover why the third party supplied it in the first place, which in my view of these specific circumstances definitely did not constitute a "law enforcement matter" for the third party.

Section 15: Law Enforcement

The Ministry decided at some point in the mediation process that an additional reason for non-disclosure of identifying detail is that this activity was a law enforcement matter under the Act. Its detailed argument was presented above.

This argument is a typical after the fact practice that public bodies resort to once they have given more thought to the reasons for a decision that they have already made. To this point in time I have been quite lenient in allowing new exceptions to be claimed at any point in the process of requests for review, providing that there is no prejudice to the other parties. For the present, I decline the Ministry's invitation to give guidance on this matter, as the Ontario Information and Privacy Commissioner has done, until I have a more appropriate case in front of me, such as where an applicant contests a late choice of an additional exception. (See Outline of Argument, paragraph 40)

I will discuss law enforcement generally and then turn to specific arguments under sections 15(1)(a), 15(1)(d), and 15(2)(b) of the Act. The Ministry argues that the public body's enforcement of standards, duties, or responsibilities under statutes and regulations is law enforcement. Law enforcement is defined in part in schedule 1 of the Act as "investigations that lead or could lead to a penalty or sanction being imposed." In order to characterize information as resulting from a law enforcement action, a public body must establish it had a law enforcement mandate. I find support for this proposition in Ministry of the Attorney General, Ontario Information and Privacy Commissioner, Order P-416, February 23, 1993, p. 5 (Tom Mitchinson, Assistant Commissioner). The definition of law enforcement in British Columbia requires, in my view, that a public body have a specific statutory authority to conduct the investigation and to impose sanctions or penalties.

The word "investigation" requires further discussion. Black's Law Dictionary defines investigation as follows:

> To follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry.

The Ministry has not identified any statutory authority that it was relying upon to initiate and conduct its initial review and the subsequent Saturna audit. I note that there were no written policies in place dealing with the conduct of this review. The Ministry official testified that he does not treat complaints resulting in such reviews as law enforcement matters. He was acting under the provisions of the contract (made pursuant to the Rural Waste Management Guidelines) when he requested the audit of the Community Club's books. The contract contains a clause permitting an audit within twenty-four months of the completion of the contract. The Ministry stood in the capacity of a party to a contract only. Had the outside auditors discovered any wrongdoing on the part of the Recycling committee, the matter may have been referred to the Ministry of Attorney General. At that point it would have become a law enforcement investigation.

The Ministry submitted that the information from the audit could have resulted in criminal charges being laid. I do not read the law enforcement exceptions in the Act as applying to information compiled in anticipation of an investigation which could lead to a sanction or penalty being imposed. (See City of North York, Ontario Information and Privacy Commissioner, Order M-10, April 21, 1992, p. 8.) In this case I have found that an investigation (as contemplated under section 15) was never begun. Until such time as the information becomes part of such an investigation, the law enforcement exceptions do not apply to it. A public body cannot rely on the statutory mandate of another body to impose sanctions in order to locate its actions within the Act's definition of law enforcement.

Section 15(1)(a) specifies "harm" as the necessary result of the disclosure of the information in question. The Legislature has made it clear that this is a high standard to be distinguished from mere "interference," which is the standard used in the Ontario Act:

> What we've basically done is to narrow the law enforcement exceptions. We've made it more specific. I think the most important thing is that we've made it more harm-based, so that the information will not be able to be made public if it would harm an investigation by law enforcement initiative.
>
> Originally, in the legislation, we had used the word 'interfere' with law enforcement activity. The general feeling was that the word "interfere" was not the appropriate one, and that harm to the actual investigation was the most important issue. (The Honourable Colin Gabelmann, Attorney General, B.C. Debates, June 22, 1992 at p. 2875)

The Ministry has not indicated how the requested disclosure could harm a law enforcement matter. Section 15(1)(a) is, then, irrelevant to any determination in this case.

With respect to section 15(1)(d), no one is contesting what the Ministry did with the information it compiled, but rather the disclosure of what it received from the third party (almost all of which has been disclosed). One can indeed distinguish the treatment of information that the Ministry itself generates or collects directly from information it receives from a third party.

I think it is also relevant that the Ministry's use of the third party's information did not result in a law enforcement action in the circumstances of the present case, so that these materials can be treated differently, and full disclosure granted to the applicant.

In this case, the third party also deliberately chose not to approach a law enforcement body or the Auditor General, which reduces the option of treating the non-disclosed information as law enforcement data after the fact. Moreover, according to the third party, the Ministry should have returned the complaint information to him or her rather than use it for purposes that he or she did not intend.

The present decision to refuse access was not considered as a law enforcement matter until late in the day and, even then, in my view, should not have been so treated. The third party never perceived his or her report to the Minister as a law enforcement matter. Neither did the briefing note writer, who referred to the "allegations." The third party had no intention of being a confidential source of law enforcement information under section 15(1)(d) of the Act. This act of informing did not become a law enforcement matter in this particular case.

The Ministry argued that section 15(2)(b) of the Act applied. This section has two requirements:

(a) there is a law enforcement record; and
(b) the disclosure could reasonably be expected to expose to civil liability....

The record in dispute in this case was not a law enforcement record. It was a letter of complaint but, as I have indicated above, this was not a law enforcement matter.

I have considered the question of what matters qualify as "law enforcement" in a number of previous Orders. In Order No. 28-1994, November 8, 1994 and Order No. 32-1994, December 12, 1994, I found that the actions of the Superintendent of Motor Vehicles and the Director of the Employment Standards Branch, respectively, were indeed law enforcement because they acted pursuant to a statutory mandate to conduct their investigations and to impose any sanctions or penalties.

I accept the argument of the applicant that the material submitted to the Minister by the third party was an inadequate base for a section 15 claim. I further conclude that the Ministry has not met its burden of proof with respect to section 15 of the Act.

Other Considerations

I find the following considerations, arising out of the Act, to be additionally persuasive on the side of disclosure of the identity of the third party.

The applicant is acting on behalf of a duly elected community body, not on her own. She represents a group of people who feel deeply offended and, indeed, harmed by what has proved to be a false accusation in the present matter. More than the reputation of one individual in an intimate community is at stake here. The applicant appeared with a group of supporters from Saturna Island numbering almost a dozen people, which is a significant proportion of the adult population there. The potential harm to the reputations of the members of the Recycling committee was substantial in such a small geographic locale with a tiny permanent population.

The Recycling committee's minutes are not public documents; only several persons had access to them. Thus the Committee has a fair idea of who informed on them to the Ministry. Those falsely accused deserve confirmation on this point. Those falsely suspected should have the burden lifted from their shoulders. This distinction seems important in the present matter, where the applicant suspects that the third party did not act solely in the public interest. The motives of a third party can be taken account of in a specific situation like the present one. After disclosure of the third party's identity in the present case, it may be easier for him or her to reassure those who perceive themselves as falsely accused that this result was unintentional and that they were not, as he or she claims, his or her primary target.

The applicant suspects that the third party acted maliciously and for political purposes. He or she knew from the package of materials he or she forwarded to the Ministry that the Community Club had explicitly acknowledged that it was subject to a discretionary Ministry audit within twenty-four months and would have to repay any amounts requested, if the audit results were unsatisfactory. (Exhibit 2) Including J.M. Campbell's letter to the Times Colonist in May 1994 in the package forwarded to the Ministry is evidence, in the applicant's view, of at least political meddling. (Exhibit 2) The letter criticized the Premier in connection with alternative methods of land transportation.

Future Cases

The facts of the present case are decidedly not an appropriate platform from which to set out broad or narrow guidelines for confidentiality in the treatment of future complaints to public bodies from the general public. My practice has been to make decisions that address the empirical realities of each case, so that the jurisprudence of the

legislation will evolve in as coherent and realistic a way as possible. There clearly will be circumstances in the future where it will be fully appropriate, under this Act, for anonymous complaints to be made, and so treated, by public bodies, but it is up to them to establish and publicize the appropriate policies on confidentiality and disclosure to govern such practices by applying the Act.

Despite the unusual aspects of this Saturna island case, I think there are several clear implications to my decision requiring disclosure of the identity of the complainant. First, public bodies should have written policies in place about the degree of confidentiality that they can legitimately give to complainants of various types and for varying levels of problems. These should cover both the identities of complainants and the substance of their complaints I assume that the identity of a complainant in non law enforcement matters will be more likely to be disclosed if a complaint proves to be false. Secondly, this decision accepts a standard of natural justice and due process which assumes that those accused will for the most part ultimately know the names of those accusing them, as would normally be the case if a complaint led to criminal charges.

8. Order

It is my determination that disclosure of the severed record would not be an unreasonable invasion of the third party's personal privacy. Therefore I, find that the head of the public body is not authorized or required to refuse access to the record in dispute. Accordingly, under section 58(2)(a) of the Act, I order the Ministry to disclose the record in dispute to the applicant.

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David H. Flaherty March 31, 1995
Commissioner