

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 256-1998
August 13, 1998**

INQUIRY RE: A request by the British Columbia College of Teachers for a statement in the custody or under the control of the Vancouver Police Department

**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 March 11, 1998 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 Vancouver Police Department (the Police Department) to a request by the British Columbia College of Teachers (the College) for a copy of a statement given by a victim to the Vancouver Police Department in relation to its investigation of a teacher.

2. Documentation of the inquiry process

On October 20, 1997 the College requested from the Police Department a copy of a June 21, 1995 statement by a former student. On October 23, 1997 the Police Department denied access to the statement on the basis of section 3(1)(h) of the Act, since it relates to a prosecution that is still before the courts.

The College was not satisfied with the Police Department's response and requested a review of the decision by the Information and Privacy Commissioner on November 27, 1997. On February 17, 1998, my Office gave notice to the College and the Police Department of the written inquiry to be held on March 11, 1998. By consent of the parties, the written inquiry was held outside the ninety-day review period, which ended on February 25, 1998.

3. Issues under review and the burden of proof

There are two issues to be reviewed in this inquiry. The first issue relates to the Police Department's application of section 3(1)(h) to exclude the record from the

coverage of the Act. The second issue relates to the Police Department's entitlement not to disclose the requested statement under section 33(n) of the Act.

The relevant parts of sections 3 and 33 are as follows:

Scope of this Act

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

...

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

....

Disclosure of personal information

33. A public body may disclose personal information only

...

(n) to a public body or a law enforcement agency in Canada to assist in an investigation

(i) undertaken with a view to a law enforcement proceeding, or

(ii) from which a law enforcement proceeding is likely to result,

....

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 a record has been refused under section 3(1)(h), I decided in Order No. 202-1997, December 11, 1997, that 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.

Section 57 is silent with respect to a decision by a public body not to disclose personal information under section 33(n) of the Act. The public body is in the best position to establish whether disclosure is appropriate under section 33 of the Act.

4. The record in dispute

The record in dispute is a June 21, 1995 written statement given to the Police Department by a former student concerning allegations of abuse of him by a teacher. It is a ten legal-size, page transcript of an interview with questions and answers.

5. The College of Teachers' case

The College states that it is seeking access to the record in dispute because it concerns the Police Department's investigation of an alleged offence involving one of the College's members. The College received a report from a School Board concerning the suspension of a female teacher, who is a member of the College. The teacher has since resigned her position. The Ministry of Attorney General has informed the College that this teacher has been charged with criminal offences with respect to a former student. The College further obtained the consent of the student's solicitor for the requested disclosure. (Submission of the College, pp. 2-3)

The College's basic argument is that it is a law enforcement agency within the meaning of the Act and is thus entitled to access to the record in dispute on the basis of section 33 of the Act. The College's submission reviews its role in the administration and enforcement of the *Teaching Profession Act* with respect to teachers, which I am familiar with from previous Orders. (See Submission of the College, pp. 3-6; *Re: Stolen and British Columbia College of Teachers* (1995), 128 D.L.R. (4th) 453; and Order No. 62-1995, November 2, 1995) The College further argues that the record in dispute is not covered by section 3(1)(h) of the Act.

I have presented below the College's detailed submissions on the application of various sections of the Act.

6. The Vancouver Police Department's case

The Police Department has refused to disclose the record in dispute, because it relates to a criminal prosecution before the courts, where it will be used as evidence. (Submission of Police Department, paragraph 5) It also argues that it was under no obligation to disclose the information on the basis of section 33 of the Act.

I have discussed further below its submissions on the application of specific sections of the Act.

7. Discussion

In a number of my earliest Orders I had occasion to promote a common sense, practical approach to the implementation of the Act. Of course, the application of any statute has to be in accordance with its specific terms. More recently, I have become very concerned about the problems that some public bodies have encountered in obtaining personal information for purposes of performing their statutory duties, particularly in the area of child protection.

Thus I believe that child protection workers, for example, should face as few impediments as possible in obtaining prompt access to relevant records from police departments, schools, and hospitals. I hold the view that the Act should not become a

barrier to the disclosure of relevant information in the public interest. I am thus promoting compliance with the following aphorism for records covered by the Act:

The right information
to the right people
at the right time
for the right purposes

This background discussion sets the context for the specific recommendation to the Police Department in this inquiry.

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

In Order No. 202-1997, I decided that a police department could invoke this section to refuse to disclose records relating to prosecutions still before the courts. The applicant seeking disclosure in that case was the individual concerned in the prosecution itself. I concluded as follows:

It is my view that this section only applies to records directly associated with a prosecution that is officially underway, which normally means that a charge has been laid. At that point, the legislature intended to insulate Crown Counsel from requests for access under this Act until a prosecution is completed. (See Order No. 20-1994, p. 7; Order No. 202-1997, p. 3)

The Police Department submits that the Act “does not apply to records relating to a prosecution still before the courts regardless of which public body (Crown Counsel or otherwise) has custody and control of the records.” (Reply Submission of the Police Department, paragraph 5)

I agree that the record in dispute falls within the scope of section 3(1)(h) of the Act, regardless of which public body has custody of the record. Clearly the Legislature was concerned with insulating Crown Counsel from requests for access, and thus created a broad exclusion for any record relating to a prosecution, if the proceedings in relation to that prosecution are not yet complete. The plain meaning of section 3(1)(h) extends to all records relating to a prosecution, whether or not they are in the custody of Crown Counsel. It is worth noting also that section 3(1)(h) is not limited, either expressly or by implication, to records in the custody of Crown Counsel.

Section 33: Disclosure of Personal Information

The Police Department correctly submits that section 33 is discretionary and not mandatory. (Submission of the Police Department, paragraph 11) Section 33 is meant to be a limiting factor for a public body, part of the privacy protective part of the Act. It provides the boundaries within which personal information can be disclosed. If information meets one of these criteria, then a public body must determine whether it

believes the disclosure is warranted. As in all other matters, I strongly urge a practical, common sense approach to application of this discretion. The “exceptions” to disclosure, which are in Part 2, Division 2 of the Act, provide the basis for public bodies to disclose general or personal information. In this instance, the record in dispute is the personal information of a third party who has consented to its disclosure to the College through his solicitor.

I do not possess the detailed knowledge of the Police Department as to customary practices with respect to disclosures of records among public bodies involved in “law enforcement,” as defined in the Act. Non-disclosure may be necessary in cases where the police and prosecutors legitimately fear that disclosure of a requested record would jeopardize a prosecution or result in unauthorized re-disclosure. However, since the record in dispute in this inquiry is clearly exempt from the Act, it follows that I cannot order the Police Department to reconsider its decision under section 33(n).

I reach this conclusion regrettably, because it does not make sense in these circumstances, for one law enforcement agency to refuse to cooperate with another public agency engaging in a law enforcement activity. The record is comprised of personal information of a third party, who has consented to its disclosure to the College through his solicitor. As I have accepted in previous Orders, self-governing professions engaged in disciplinary proceedings against their members are engaging in law enforcement as defined by the Act. (See Order No. 116-1996, August 26, 1996) In short, this would be an appropriate case for disclosure of personal information under section 33(n) of the Act.

I can only urge the Police Department to reconsider its decision not to disclose the personal information to the College, which has its own statutory mandate to fulfill.

8. Order

I find that the Vancouver Police Department has properly applied section 3(1)(h) of the Act and is authorized to refuse access to the record requested by the College. Under section 58(2)(b) of the Act, I confirm the decision of the Vancouver Police Department to refuse access.

Since I have found that section 3(1)(h) of the Act excludes the requested record from coverage of the Act, I make no order in respect of section 33(n) of the Act.

David H. Flaherty
Commissioner

August 13, 1998