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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 258-1998
August 31, 1998**

INQUIRY RE: A request for employment-related records in the custody or under the control of the Vancouver Police Department

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on April 17, 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 Vancouver Police Department's (the Police Department) decision to sever and withhold records in response to the applicant's request for employment-related records.

2. Documentation of the inquiry process

On September 25, 1997 the applicant requested a copy of the records in a Vancouver Police Department Internal Investigation Section file. The applicant is a uniformed police officer with the Police Department. In response to this request, the Police Department severed some of the personal information about other members of the Police Department (the "third parties") in the records and withheld that personal information under section 22 of the Act. The Police Department's Information and Privacy Coordinator disclosed a package of records to the applicant on November 20, 1997.

The applicant was not satisfied with the extent of records disclosed by the Police Department. On December 7, 1997 the applicant requested a review by the Information and Privacy Commissioner of the Police Department's decision to sever and withhold third-party personal information under section 22 of the Act.

Although mediation resulted in a narrowing of the scope of records under review, the applicant requested an inquiry by the Information and Privacy Commissioner on February 23, 1998. By consent of the applicant and the Police Department, the parties

agreed to hold the written inquiry on April 3, 1998. I subsequently rescheduled the written inquiry to April 17, 1998, when the applicant objected to the late notice given by the Police Department of its decision to apply section 19(1) of the Act to the records.

Several third parties participated in the written inquiry, all of whom are employed by the Police Department. I invited the Vancouver Police Union to participate as an intervenor in the written inquiry, but it declined the invitation.

3. Issues under review and the burden of proof

The issue under review is the decision by the Police Department to sever information and withhold records under sections 19 and 22 of the Act.

The relevant parts of sections 19 and 22 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, or
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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
- ...
 - (c) the personal information is relevant to a fair determination of the applicant's rights,
 - ...
 - (f) the personal information has been supplied in confidence,
 -
- 22(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,

....

- 22(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

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 records has been refused under section 19(1), it is up to the public body, in this case the Vancouver Police Department, to prove that the applicant has no right of access to the records or parts of the records.

Under section 57(2) of the Act, if the records or parts of the records that the applicant is refused access to under section 22 contain personal information about third parties, it is up to the applicant to prove that disclosure of the personal information would not be an unreasonable invasion of the third parties' personal privacy.

4. The records in dispute

The records are part of a Police Department Internal Investigation Section file. They contain written and oral statements received by the Police Department from complainants and witnesses in an internal investigation of the applicant's conduct pursuant to the *Police Act*. (Submission of the Vancouver Police Department, paragraph 9) Of the original 304 pages of records, the 23 pages of records in dispute are pages 7, 92-95, 106-113, 139-140, 192-194, 229-231, 233-234.

5. Procedural objections

The applicant objected to the late application of section 19(1)(a) by the Police Department in support of its decision to sever information and withhold records. The applicant did not formally learn of the addition of this section, until he received the Police Department's initial written submission.

In response to the applicant's objection, I rescheduled the written inquiry from April 3, 1998 to April 17, 1998. This extension gave the applicant sufficient time to respond to the section 19(1)(a) argument and permitted him to collect affidavit evidence in support of his argument against the applicability of section 19(1)(a).

The applicant also objected to the Police Department's submission of *in camera* affidavits on behalf of three third parties who are employees of the Police Department. In his reply submission, the applicant wrote:

An additional objection is the lack of specific information to respond to. If the use of 'In Camera' affidavits, and General Submissions, is allowed, there is not an opportunity to reply fully... If the 'In Camera' submissions contain alleged facts to support the Vancouver Police Department's position that, 'the release of the document will be used to cause them harm,' I believe it is procedurally unfair to give them weight, unless I have an opportunity to respond to them. I would therefore request that the 'In Camera' request be denied, and I be allowed to answer any allegations contained therein. In keeping with the spirit of the *Freedom Of Information and Protection of Privacy Act*, I would be prepared to accept a synopsis of the facts, with sufficient detail to enable me to make a full answer.

I have read the *in camera* submissions and affidavits from the Police Department and the third parties. I accept that they were appropriately submitted on an *in camera* basis. Moreover, I have also accepted *in camera* affidavits from the applicant.

6. The applicant's case

I have carefully reviewed a detailed submission from the applicant in this inquiry concerning the background to his request for access to records about him. There is no benefit to the public that would follow from my summarizing this information here. Suffice it to say that the applicant was the subject of an internal investigation and that he is now seeking access to the remaining records that he has not yet seen.

7. The Vancouver Police Department's case

The Police Department has informed me that the records in dispute are written and oral statements received in confidence from complainants and witnesses in an internal investigation into the conduct of the applicant under the *Police Act*. They were specifically provided in confidence to the investigating officers. I have presented below submissions from the Police Department on the application of specific sections of the Act.

8. The third parties' cases

Certain third parties submitted brief *in camera* submissions which I have reviewed.

9. Discussion

Section 19(1)(a): Disclosure harmful to individual or public safety

The Police Department is concerned that disclosure of the records in dispute could result in the applicant using the records to harm the third parties involved. Much of the submission by the Police Department and third parties on this sensitive issue was submitted *in camera*. It is my judgment that, notwithstanding their position, there is a lack of sufficient evidence before me to establish that disclosure of the records could reasonably be expected to threaten the safety or mental or physical health of the third parties.

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 ... (c) the personal information is relevant to a fair determination of the applicant's rights

The applicant submits that he requires certain information in the records in dispute for ensuring a fair determination of his rights in the internal investigation which he claims exonerated him of certain allegations. I have considered this factor in determining whether the disclosure of the records in dispute would constitute an unreasonable invasion of the third parties' personal privacy. I have attributed only limited weight to this factor, because the applicant has been exonerated of any wrongdoing under the *Criminal Code* or the *Police Act*. While there may be some management issues that have yet to be resolved, that factor alone does not outweigh the considerations relied upon by the Police Department under section 22(2) addressed above, and section 22(3) which is addressed below.

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

The Police Department submits that the information contained in the duty reports was supplied in confidence to it by the third parties. The applicant contests whether "Duty Reports" filed by a police officer can be submitted in confidence within the meaning of the Act. He submits that for certain of the records in dispute, "there was no expectation of confidence, implied or given."

The "Working Guidelines for Reports and Statements by Members Pertaining to the Investigation of Police Conduct" are silent on the issue of confidentiality. It appears that a determination of whether reports are submitted in confidence must be assessed on a case-by-case basis. While there is nothing in the documentation submitted at the time which confirms that the information was supplied in confidence, I place considerable weight on the Affidavit of Acting Staff Sergeant Michael Barnard, who supervises the Internal Investigation Section. A/Sgt. Barnard, who was assigned to investigate this

matter in 1997, deposed that the duty reports and oral statements of witnesses were all provided to him in confidence.

I accept that even if the third parties filed their reports because of a duty to the Police Department, they did so with an expectation of confidentiality in the circumstances of this particular case.

Section 22(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,

I accept the submission of the Police Department that the information in the records in dispute was compiled as part of an investigation into a possible violation of law for the purposes of section 22(3)(b). As the applicant was exonerated from the allegations of criminal conduct, disclosure is not necessary to prosecute the violation or to continue the investigation. Disclosure would therefore be an unreasonable invasion of the personal privacy of the third parties who supplied the information in dispute to the Internal Investigation Section.

Having considered and weighed the relevant factors under section 22(2) and section 22(3), I conclude that disclosure of the information in dispute would constitute an unreasonable invasion of the personal privacy of the third parties.

I have carefully reviewed each of the records in dispute and confirm that they must be severed or withheld under section 22(1) of the Act.

Section 22(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

The applicant has requested that he be provided with a summary of the information supplied by the third parties, if I determine that the information was supplied in confidence. (Submission of the Applicant, page 5) I do not have the benefit of the Police Department's position with regard to the creation of a summary, because its reply is unfortunately silent on this point.

In this inquiry, I have found that personal information has been properly withheld under section 22 of the Act. Section 22(5) provides that on refusing to disclose personal information supplied in confidence about an applicant under section 22, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information. Based on my review of the records, I conclude that the Police

Department cannot create summaries of the withheld records in this inquiry because to do so would disclose the identities of the third parties who supplied the personal information in confidence. Therefore, I find that the Police Department is not required to create summaries of the records under section 22(5).

10. Order

I find that the Vancouver Police Department is required under section 22(1) of the Act to refuse access to the records requested by the applicant. Under section 58(2)(c) of the Act, I require the Vancouver Police Department to refuse access to the records.

David H. Flaherty
Commissioner

August 31, 1998