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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 271-1998
November 13, 1998

INQUIRY RE: A third party's request for a review of a decision by the Simon Fraser Health Region to disclose the contents of the third party's interview given during a Community Care Facilities Licensing investigation

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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 July 21, 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 by a third party under section 52(2) of the Act. It provides that a third party notified under section 24 of a decision by a public body to give access may ask the Commissioner to review any decision made about the request by the head of a public body.

The public body, the Simon Fraser Health Region (the Health Region), notified the third party of its intention to disclose the contents of an interview of the third party to an applicant seeking access to that information under the Act. The interview was conducted by the Health Region in the course of a Community Care Facilities Licensing investigation into the applicant's conduct. The third party does not want this information disclosed to the applicant and has therefore asked me to review the Health Region's decision. The third party believes that the release of this information would give rise to an unreasonable invasion of her personal privacy.

2. Documentation of the inquiry process

In October 1995, the applicant was dismissed from her position as Manager of a Day Care, a position she had held for some eighteen years. In January 1997, her Early Childhood Education licence was suspended. The applicant believes that she was wrongfully dismissed, that her licence should not have been suspended, and that the Health Region has information that would help her "adequately present her case."

On July 28, 1997 the applicant submitted a request to the Simon Fraser Health Unit (now part of the Simon Fraser Health Region) for access to the following information:

1. All written material, including complaints, reports, letters, etc. from the staff, the board(s) and parents (past and present) of the ... Day Care that you have on file that relate to me

2. Transcripts of the interviews with the staff, parents, children and the board. I require copies of these interviews in writing and where taped I wish copies of the tapes of the taped interviews as well as any written transcripts. I have been told that there were taped interviews with the staff and some of the children of the Day Care. I have been informed that these interviews were conducted with a number of individuals including the following:….

On September 29, 1997 the Health Region responded to the applicant's request by disclosing some information in the requested records. Some information in the records was excepted from disclosure under sections 15(1)(d) and 22(2)(f) of the Act.

On November 2, 1997 the applicant asked me to review the Health Region's decision to refuse access, among other things, to the interview transcription, the third party's written statement, and the tape of the interview with the third party.

On January 21, 1998 the deadline for completion of the review was extended, with the agreement of the Health Region and the applicant, to March 30, 1998.

On March 19, 1998 the Health Region wrote to the applicant and advised her that it had reviewed its decision to withhold the transcript of the third party's interview and the interview tapes:

> After considering all relevant factors, the Simon Fraser Health Region has decided to give you access to [the third party's] interview and all tapes with the exception of the tapes of the children. These tapes are excluded under Section (22) of the *Freedom of Information an Protection of Privacy Act* (the *Act*), which states that 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.
>
> Under the *Act*, a third party has the right to appeal the decision to release information to the Office of the Information and Privacy Commissioner. We will therefore be in a position to release these records to you after 8 April 1998, providing an appeal has not been requested.

The Health Region also notified the third party in writing of its decision to disclose the transcript of its interview with her and the interview tape and of her right to seek a review of its decision under section 52 of the Act.

On March 25, 1998 the deadline for completion of the review was further extended, with the agreement of the Health Region and the applicant, to June 11, 1998.

On May 14, 1998 the Health Region disclosed transcriptions for all of the previously withheld tapes, except those related to the third party.

On April 15, 1998 the third party requested that my Office review the decision of the Health Region to disclose the transcript and tape of her interview to the applicant.

On June 25, 1998 the third party indicated that she would like the matter to proceed to an inquiry, which was scheduled for July 21, 1998 with the consent of the Health Region and the third party.

3. Issue under review and the burden of proof

The issue under review at this inquiry is whether the Health Region appropriately applied section 22 of the Act in reaching its decision to disclose the third party's interview transcription, statement, and tape to the applicant.

Under section 22(1) of the Act, the head of a public body is required to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. In determining whether such disclosure of third-party personal information constitutes an unreasonable invasion of that third party's personal privacy, the public body must consider all of the relevant circumstances, including those expressly enumerated in section 22(2). In this case, the circumstances which the various parties say are "relevant circumstances" are those set out in section 22(2)(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), and, (f) (personal information has been supplied in confidence). Thus 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.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(3)(a) of the Act, where the inquiry is into a decision to give an applicant access to all or part of a record containing personal information that relates to a third party (as in this case), it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

4. The records in dispute

The records in dispute consist of the audio tape of an interview between the third party and Community Care Licensing staff, eighteen typed pages that were transcribed from the audio tape, and a two-page handwritten statement signed by the third party.

5. The applicant's case

The applicant argues that she has a right of access to the records in dispute because, in her view, their disclosure would not be an invasion of the privacy of the third party and would not be harmful to individual or public safety. She says that she already knows the name, address, and telephone number of the third party. She also says that she employed the third party as a student assistant and felt that they had an adequate rapport with one another.

6. The Simon Fraser Health Region's case

The Health Region says that it took into account the following factors in deciding to release the records in dispute to the applicant: there is personal information about the applicant in the records; the applicant knows the third party; information provided by other persons in the investigative process was released to the applicant and there was "no evidence that the applicant has threatened harm to any of these individuals;" and the investigation has been completed and "the information made public during the hearing that was held in regard to the facility licence process."

7. The third party's case

I reviewed an *in camera* submission from the third party as to why the record in dispute should not be disclosed to the applicant. She did not make a reply submission.

8. Discussion

I have indicated above the factors which the Health Region took into account in deciding that it was not required by section 22 of the Act to withhold access to the records in dispute. In their submissions, neither the third party nor the applicant relied on any particular provision of the Act. Nevertheless, the sections that have been implicitly invoked by them are 22(2)(c), (e), and (f). Section 22(2)(c) is implicitly invoked by the applicant because she seeks the third party's statement for use as evidence with respect to her human rights complaint. She believes that, in the context of this complaint, "it is vital that the contents of the taped interview of the third party should be revealed, so that [she] may have a full picture of her version of the events that took place in that period of time" and that "such disclosure would enable [her] to challenge the third party's understanding of events" and allow her to weigh the third party's recollections against her own.

The third party implicitly invokes both sections 22(2)(f) and (e) of the Act. The third party makes the point that the personal information she provided to the Health Region was provided in confidence. The third party has also provided me with *in camera*

submissions which raise personal safety concerns and which implicitly engage section 22(2)(e) of the Act. I find them persuasive.

Section 22: Disclosure harmful to personal privacy

The applicant asserts that the information she seeks is relevant to a fair determination of her rights in the context of a complaint she has filed with the British Columbia Human Rights Commission. This is a relevant circumstance for the head of the public body to consider under section 22(2)(c) of the Act, but it is not solely determinative of the issue. I must also have regard to the fact the information was supplied in confidence and that personal safety concerns have been raised.

I have carefully considered all of the competing interests at stake in this inquiry and the submissions and relevant circumstances relied on by the applicant, the public body, and the third party. I find that the scale tips toward non-disclosure of the records in dispute and that disclosure of them in all of the circumstances would give rise to an unreasonable invasion of the third party's personal privacy. I have therefore concluded that the applicant has fallen short of meeting her burden of proof under section 57(3)(a) of the Act.

I am moved by the fact that the third party, who supplied the information in dispute on a confidential basis, does not wish the record to be disclosed. In circumstances such as this, the lack of consent is a central consideration for me. I find this desire for non-disclosure to be persuasive in the context of the investigative environment in which the information was first collected by the public body. In my view, even if the third party had been warned at the time the information was collected that it may be difficult or impossible for the public body to keep the information confidential, this does not extinguish the right of the third party to object to disclosure under the Act.

I note that none of the parties referred to section 22(3)(b) of the Act which creates a presumption that disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy where that 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." In this inquiry, the records in dispute were compiled and are identifiable as part of the public body's investigation under the *Community Care Facility Act*, R.S.B.C. 1996, c. 60, into the applicant's conduct at the Day Care. Ultimately, the applicant's Early Childhood Education certificate was suspended by the director of licensing following a hearing conducted pursuant to the *Community Care Facility Act*. While it is not necessary for me to decide conclusively if this presumption applies in this case, I am inclined to the view that it does.

9. Order

I find that the Simon Fraser Health Region is required to refuse to provide the applicant with access to the records in dispute under section 22 of the Act. Under section 58(2)(c), I therefore require the Simon Fraser Health Region to refuse to provide access to the records.

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David H. Flaherty
Commissioner

November 13, 1998