

**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 306-1999  
April 23, 1999**

**INQUIRY RE: Decisions by the Public Service Employee Relations Commission of the Office of the Minister Responsible for the Public Service to refuse access to records related to a former Ministry of Health employee**

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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 January 22, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of two requests for review by the applicant of decisions by the Public Service Employee Relations Commission (PSERC), now of the Office of the Minister Responsible for the Public Service, to refuse access to a variety of records related to the applicant's wife's former employment with the Ministry of Health and to subsequent events. (At the time of the requests, PSERC was part of the Ministry of Finance and Corporate Relations.)

**2. Documentation of the inquiry process**

***First Request***

The applicant made a request to PSERC in late November 1997 for certain records he had not received as part of an earlier disclosure of records by PSERC:

- (1) a memorandum of July 25, 1996;
- (2) electronic mail messages to and from a named labour relations officer; and
- (3) a complete copy of a submission from PSERC to the Office of the Information and Privacy Commissioner in an inquiry before me held on June 30, 1997.

PSERC informed the applicant in early January 1998 that it did not have the first two items, and that the third was in fact not a PSERC record, but a Ministry of Health

record, also not in its possession. The applicant requested a review by the Office of this decision, including the adequacy of PSERC's search with regard to item (2). The ninety-day review period began on February 2, 1998, with an initial expiry date of May 4, 1998.

In late March 1998, as the result of mediation, PSERC disclosed a copy of item (1), with one line severed under section 13(1) of the Act. PSERC said that it had no records responding to item (2) for the time period in question. Finally, after clarifying that the applicant wanted the *in camera* portions of item (3), PSERC said that it was refusing access to those portions and a related *in camera* affidavit under sections 3(1)(c), 13, and 17 of the Act. In early April 1998, the applicant told the Office that he wished these decisions to proceed to an inquiry by me. PSERC and the applicant consented to an extension of the ninety-day timeline for this review, to accommodate PSERC's response to the applicant's January 1998 request (see below) and the outcome of another inquiry before me on an earlier request (which resulted in Order No. 224-1998, April 20, 1998).

### ***Second Request***

The applicant made a request for records to PSERC in a letter of January 30, 1998. He again requested the memorandum of July 25, 1996 and also requested all electronic mail messages, telephone notes, and correspondence of any personnel handling his wife's case, including the Attorney General's office and legal counsel. He also asked for any other such records that he had not yet received or requested.

PSERC responded in three stages by disclosing:

- (4) 65 pages of handwritten notes (unsevered);
- (5) the total cost of two legal bills (records themselves withheld under section 22(3));
- (6) the cost of an arbitrator's services (billing record itself withheld under section 22(3));
- (7) a set of 15 records comprising 42 individual items (unsevered); and
- (8) a set of other records (some unsevered and some severed under sections 13 and 14); still others were fully withheld under sections 13 and/or 14 and/or 15.

The applicant requested a review of this three-phased decision and the ninety-day review began on June 4, 1998 with an initial expiry date of September 2, 1998.

Mediation on the second review resulted in a series of decisions and disclosures by PSERC:

- disclosure of item (6), the arbitrator's bill, in severed form, with section 22(3) revised to section 17;
- a change in the decision on item (5), the two legal bills, to section 14 from section 22(3);

- regarding item (8), disclosure of one previously withheld record and the addition of section 17 to other records;
- full disclosure of three other records;
- the application of section 14 to other legal bills (different from those in item (5));
- the full withholding of still other items under section 14; and
- various additions to, and deletions of, the applications of sections 13, 14, 15, and 17 of the Act, resulting in the disclosure of some more records (severed and in full) and the complete dropping of section 15.

During mediation, the applicant made it clear that he would want the second review to proceed to an inquiry before me. During mediation, the parties also consented to a series of extensions to both reviews to accommodate mediation and the inquiry scheduling. The Office issued the Notice of Inquiry, covering both reviews, on November 10, 1998. With the consent of the parties, the Office rescheduled the inquiry from December 2, 1998 to January 22, 1999.

### **3. Issues under review and the burden of proof**

The issues under review in this inquiry are PSERC's application of sections 3(1)(c), 13(1), 14 and 17(1) of the Act to records related to the handling of the applicant's wife's case. Section 15 is no longer an issue.

In addition, I considered PSERC's application of section 6(1), that is, whether or not PSERC met its duty to assist the applicant with respect to the adequacy of its search for relevant records. During the inquiry, the applicant also raised sections 7 and 8(1) as issues.

The relevant sections of the Act read 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:
- ...
  - (c) a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;
  - ....

#### ***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.

***Time limit for responding***

7. The head of a public body must respond not later than 30 days after a request is received unless
- (a) the time limit is extended under section 10, or
  - (b) the request has been transferred under section 11 to another public body.

***Contents of response***

- 8(1) In a response under section 7, the head of the public body must tell the applicant
- (a) whether or not the applicant is entitled to access to the record or to part of the record,
  - (b) if the applicant is entitled to access, where, when and how access will be given, and
  - (c) if access to the record or to part of the record is refused,
    - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,
    - (ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and
    - (iii) that the applicant may ask for a review under section 53 or 63.

***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.

***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:

...

- (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
- (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;
- (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
- (e) information about negotiations carried on by or for a public body or the government of British Columbia.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under sections 3(1)(c), 13, 14, and 17, 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 of the Act is silent with respect to a request for review about the issue of adequate search. I decided in Order No. 103-1996, May 23, 1996, that the burden of proof is on the public body.

**4. Procedural objections**

PSERC lodged two objections to the applicant's actions:

- to his *in camera* submission, and
- to the introduction of argument on sections 7 and 8 of the Act in his initial inquiry submission.

PSERC requested that I order disclosure of some or portions of the applicant's *in camera* submissions that were germane to the issues in this inquiry, so that it could have a right of reply. I have carefully read the *in camera* submissions. My decision in this case was not influenced by the *in camera* evidence supplied by the applicant. Therefore, I do not find it necessary to grant this request.

The applicant has raised issues related to section 7 and 8 of the Act. PSERC objected to this on the grounds that the Notice of Inquiry did not identify these sections as issues under consideration. PSERC has asked me to disregard the applicant's submissions relating to section 7 and 8. I agree with PSERC's position. I find that the only issues under review in this inquiry are the application of sections 3(1)(c), 13(1), 14, and 17(1), and whether PSERC met its duty to assist the applicant under section 6 of the Act.

## **5. The records in dispute**

The records in dispute consist of briefing notes, an arbitrator's bill, legal bills, other legal items, *in camera* material in a submission in an earlier inquiry before me involving the same applicant, and other inquiry material, including fax cover sheets, a memorandum of July 25, 1996, and an electronic mail message.

PSERC has kindly supplied the applicant and me with a two-page listing of the records in dispute, which indicates eleven specific records and then three categories of records that have been withheld in whole or in part. I have relied on this listing for purposes of my review of the records in dispute below.

## **6. The applicant's case**

The applicant's primary submissions are very detailed comments on specific documents, which I will consider in connection with my review, below, of the records in dispute. Further, the applicant complains that PSERC's slow release of records to him is in breach of section 6 of the Act. Furthermore:

It is important that the Commissioner takes into consideration the number of times PSERC has denied the existence of records, then refused their release, then released in severed form, then changed reasons for severance. This mode of dealing with FOIPP requests clearly demonstrates a disdain for the law and an attempt to circumvent it.

## **7. The Public Service Employee Relations Commission's (PSERC's) case**

Since PSERC's submissions are largely tied to the application of sections of the Act to specific records in dispute, I have treated them below.

PSERC's general case is set out in the following broad statements:

7.07 The Public Body has withheld under section 13(1) sentences and portions of sentences in a letter, briefing notes, and the Previous Submission, options, recommendations, and supporting reasons in a briefing note, a portion entitled “Conclusion” in a briefing note, and some handwritten notes on an email message printout.

....

7.17 The Public Body has withheld under section 17(1) information that reveals the amount of effort expended on the Employer’s case, some of the costs incurred in preparing and presenting the Employer’s case, options considered and recommendations made regarding the handling of the matter, and some information unrelated to the preparation of the Employer’s case that would, if disclosed, be financially harmful to government for other reasons.

7.23 The Public Body submits that most of the information it has withheld under section 17(1) falls within the wording of, or is similar in type to, the information listed in section 17(1)(e)....

7.24 Section 17(1)(e) is intended to protect the public body’s ability to negotiate effectively with other parties, and applies to ongoing or future negotiations....

7.28 The Public Body and its counsel, as representative of the Employer, cannot carry on fruitful negotiations with a party who is aware of the Public Body’s negotiating position, strategy for dealing with the matter at arbitration, strengths and weaknesses of the Employer’s case as identified by the Public Body, or extent of effort made on behalf of the Employer. Premature disclosure of such information is harmful to the negotiation process inasmuch as it detracts from the equality necessary for effective negotiation and resolution of disputes.... (See Order No. 1-1994, January 11, 1994; Order No. 6-1994, March 31, 1994; Order No. 75-1996, January 4, 1996; Order No. 191-1997, September 24, 1997)

## **8. Discussion**

This applicant has previously been the subject of Order No. 183-1997, August 14, 1997; Order No. 184-1997, August 15, 1997; and Order No. 224-1998, April 21, 1998. The government describes the applicant’s wife as “a government employee in the Ministry of Health who has filed grievances that are now the subject of an arbitration.” (Submission of PSERC, paragraph 2.01) PSERC is advising the Ministry of Health in this matter, which was adjourned generally after four days of arbitration hearing. (Submission of PSERC, paragraphs 2.03 and 2.04)

## ***Section 6: Duty to assist applicants***

The applicant's initial submission on the application of this section was made on an *in camera* basis, so I am unable to discuss its contents.

I have carefully reviewed the detailed submission of PSERC and the affidavit of its Information and Privacy Advisor with respect to the search for records responsive to the applicant's requests. On the basis of Order No. 30-1995, January 12, 1995, I am satisfied that PSERC has made every reasonable effort to identify and locate the requested records and has therefore met its duty to assist the applicant openly, accurately and completely.

### **9. Review of the Records in dispute**

Because most of the issues in dispute concern specific documents, I am reviewing each of them below to determine the applicability of relevant sections of the Act. I am following the list set out by PSERC. Although I have carefully reviewed the detailed submissions of the parties on each of these items in dispute, I have found almost no reason to reproduce these arguments below in detail, especially since, in my view, the decisions of PSERC are largely supportable on the basis of the language of the relevant sections of the Act.

1. Unnumbered record: PSERC has withheld part of a sentence. I find that it has been properly withheld on the basis of section 13(1) as revealing advice developed by or for the Simon Fraser Health Region. See Order No. 184-1997, August 15, 1997.
2. Unnumbered record: PSERC has entirely withheld the Ministry of Health's submission of argument and evidence to me for purposes of an inquiry on June 30, 1997. I find that it has done so appropriately on the basis of section 3(1)(c) of the Act, as it was then, since it is "a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions" under the Act.
3. Item 1D: A Briefing Note to Janet McGregor, Ministry of Health, from its Human Resources Division. PSERC has withheld about half of this four-page briefing note. I find that it has done so appropriately on the basis of sections 13(1) and 17(1) of the Act, because the severed text contains advice and recommendations developed for the Ministry of Health in six instances and, in five instances, disclosure of the severed text "could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia," including "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." I agree with PSERC that these materials were developed within a zone of confidentiality to which public bodies are entitled.

4. Item 1E: One sentence has been withheld from a briefing note. I find that PSERC has properly withheld advice or recommendations developed by or for the Ministry of Health on the basis of section 13(1) of the Act.
5. Item 2: PSERC has withheld nine lines from a fax cover sheet on the basis of section 14 of the Act. I find that this is indeed information that is subject to solicitor client privilege.
6. Item 3: PSERC has withheld marginal notes by counsel for the Ministry of Health on the basis of section 14 of the Act. These appear on a submission from the applicant in a June 20, 1997 inquiry. I find that this information has been withheld appropriately.
7. Item A: PSERC has withheld in its entirety the June 27, 1997 *draft* reply submission of the Ministry of Health as part of the June 30, 1997 inquiry between the applicant and the Ministry. I find that this material has been properly withheld on the basis of section 14 of the Act, because it was prepared by the Legal Services Branch, Ministry of Attorney General.
8. Item B: PSERC has withheld in its entirety the June 27, 1997 *draft* reply submission of the Ministry of health as part of the June 30, 1997 inquiry between the applicant and the Ministry. I find that this material has been properly withheld on the basis of section 14 of the Act, because it was prepared by the Legal Services Branch, Ministry of Attorney General.
9. Item C: PSERC has withheld a two-page June 23, 1997 from a law firm to one of its officials on the basis of section 14 of the Act. I find that this material has been properly withheld on the basis of section 14 of the Act.
10. Item D: PSERC has withheld notes on the bottom of a printout of an e-mail message between a Human Resource officer for the Ministry of Health and a PSERC official. I find that it has done so appropriately on the basis of section 13(1) of the Act, because the severed text contains advice and recommendations developed for the Ministry of Health.
11. Item E: PSERC has withheld in its entirety the draft affidavit of one of its officers and a fax cover sheet sending it to counsel for the Ministry. I find that it has done so appropriately on the basis of section 14 of the Act.
12. Unnumbered record: PSERC has withheld eleven pages of legal bills from its outside counsel in their entirety on the basis of section 14 of the Act. I find that it has done so appropriately.
13. Item ASB: PSERC has withheld the financial details in a half page of an arbitrator's bill on the basis of section 17(1) of the Act. I agree with its position on this matter made on an *in camera* basis.

14. Additional records: PSERC has withheld in their entirety additional records of its outside law firm on the basis of section 14 of the Act. It did not provide me with copies of these records, because its own law firm did not send them to PSERC, which submits that they are the working and file notes of legal counsel. I find that these records have been properly withheld on the basis of section 14 of the Act.

## **10. Order**

I find that the Public Service Employee Relations Commission of the Office of the Minister Responsible for the Public Service is authorized to refuse access to the parts of the records in dispute under sections 3(1)(c), 13(1), 14, and 17(1) of the Act. Under section 58(2)(b), I confirm the decision of the head of the Public Service Employee Relations Commission to refuse access to the parts of the records in dispute.

I find that the Public Service Employee Relations Commission made every reasonable effort to identify and locate the requested records and has therefore met its duty to assist the applicant openly, accurately, and completely within the meaning of section 6(1) of the Act.

Under section 58(3)(a), I require the Public Service Employee Relations Commission to perform its duty under section 6 of the Act. However, since I have found that it has met its duty to assist the applicant, I find that the Public Service Employee Relations Commission has complied with this section and discharged its duty under section 6(1) of the Act.

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David H. Flaherty  
Commissioner

April 23, 1999