OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-02

INQUIRY REGARDING PERSONAL INFORMATION IN MINISTRY OF ATTORNEY GENERAL RECORDS

David Loukidelis, Information and Privacy Commissioner
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Summary: Applicant sought access to records that contained personal information of a woman whom the applicant had pleaded guilty to having harassed criminally, under the *Criminal Code*, in 1995. Ministry's refusal to disclose parts of the records authorized by ss.15(1)(g) and 19(1)(a). Ministry required to refuse to disclose personal information under s. 22(1). Not necessary to deal with Ministry's reliance on s. 16.

Key Words: Law enforcement – exercise of prosecutorial discretion – threat to health or safety – personal information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(2), 15(1)(g), 16(1)(a)(ii), 16(1)(b), 16(2)(a), 19(1)(a), 22(1), 22(2)(a), (c), (e) and (f), and 22(3)(b); *Criminal Code of Canada*, s. 264(2)(b)

Authorities Considered: B.C.: Order No. 125-1996, Order No. 138-1996, Order No. 193-1997, Order No. 244-1998, Order No. 323-1999 and Order No. 330-1999

Cases Considered: *R.*. v. *Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.)

1.0 INTRODUCTION

On March 3, 1999, the applicant made a request for records under the *Freedom of Information and Protection of Privacy Act* ("Act") to the Ministry of Attorney General ("Ministry"). The applicant was charged in 1995 with offenses under the

Criminal Code. The charges arose out of the applicant's work as a security guard. Through his work, the applicant came into contact with a woman in whom he took an interest. Because of his behaviour towards this woman, the applicant ultimately was charged with criminal harassment, colloquially referred to by many as "stalking." The applicant pleaded guilty to one of the charges against him. The woman he had pursued is the main third party concerning the records in this inquiry.

The applicant was put on probation for a two-year period. His access request asked the Ministry for all files relating to his probation, including police records relating to his arrest, interviews with the victim and the victim's family members, probation assessment records and a forensic assessment report. On April 9, 1999, the Ministry responded to the applicant by disclosing certain records, but by withholding all or part of approximately 145 pages of records under ss. 15, 16, 19 and 22 of the Act.

On April 21, 1999, under s. 52 of the Act, the applicant submitted a request to this office for a review of the Ministry's decision. On July 22, 1999, the Ministry disclosed four additional pages of records to the applicant following mediation.

The parties consented to extend the original inquiry deadline of July 26, 1999, to September 9, 1999. During the formal submission process, the Ministry requested an adjournment and, with the consent of the applicant, the inquiry was adjourned to September 30, 1999.

On September 22, 1999 the Ministry sent an initial submission to this Office. On the same date, in a letter to this office, the Ministry stated that it intended to disclose additional records to the applicant. The Ministry also suggested that as a result of the proposed disclosure, the applicant might wish to adjourn the inquiry to allow him to better prepare for the inquiry and to reconsider going forward with it. The Ministry's additional disclosure, of 14 more pages of records, took place on October 1, 1999. This office received submissions from both parties concerning an adjournment, and the inquiry was adjourned to October 21, 1999.

A good deal of the Ministry's evidence in this inquiry was submitted *in camera*. This was because disclosure of that evidence to the applicant would necessarily have disclosed to him much of the information that had been withheld by the Ministry.

2.0 ISSUES

The issues that must be resolved in this inquiry are as follows:

1. Was the Ministry authorized to apply ss. 15(1)(g), 16(1)(a)(ii), 16(1)(b), 16(2)(a) and 19(1)(a) of the Act to records or parts of records withheld from the applicant?
2. Was the Ministry required under s. 22(1) of the Act to withhold information from the applicant?

The records in dispute are records numbered: 10; 12-69; 88-92; 70-87 and 93-125.

The Ministry bears the burden of establishing that it is authorized to withhold information under ss. 15, 16 and 19. In its submissions, the Ministry said the applicant bears the burden of proving that information withheld under s. 22(1) was improperly withheld. This is only partly correct. Section 57(2) of the Act places that onus on the applicant where "personal information about a third party" is in issue. Where personal information of the applicant is involved, however, the Ministry has the burden of proof under s. 57(1). See Order No. 330-1999.

3.0 DISCUSSION

3.1 Summary of the Applicant's Arguments – Because the applicant's submissions in this inquiry are succinct, it is convenient to summarize them here, in one place.

The applicant argued that his victim has made inconsistent and unproven statements to various agencies. He argued that his victim violated his privacy and the Act by disclosing personal information about him to others, which he says effectively nullifies the Act as it applies to privacy interests of his victim and others.

He argued against the applicability of s. 22(2)(e) to protect his victim's privacy interests, because, he said, he wishes to sue the Ministry, not the victim. He said that, because his victim had disclosed his personal information to others, s. 22(2)(f) does not apply in relation to the victim's personal information. He argued that he has not caused the victim financial or other harm, and that "privacy and security concerns are not an issue – because they never were an issue". The applicant said he wished to bring the matter to a close and clear his name by having full disclosure. He said he intends to use the court, and will *subpoena* any records he cannot get under the Act.

The applicant's statement that he wishes to have access to personal information of his victim and others is at odds with the statement in his request for review that personal information of the victim – including information about her medical history and "personal status" – "could be censored". In his request for review, the applicant did say he could not predict whether any lawyer he might hire would seek more personal information through the court process. In any case, it seems the applicant has, at this point, reconsidered the matter and now presses his case for full disclosure of others' personal information.

The applicant also said that because his victim had, he alleged, broadcast his personal information far and wide, the victim gave up her own privacy rights. Disclosure of someone else's personal information by an individual, in their private capacity and not as the agent of a public body, is outside the scope of the Act. It has nothing to do with whether a public body should disclose personal information of the allegedly indiscreet individual.

3.2 Information Used In the Exercise of Prosecutorial Discretion – The Ministry withheld a number of records comprising a police report that had been delivered to Crown counsel for the purpose of determining whether the applicant should be charged

criminally. The police report comprises records numbered 10 through 125. The Ministry also refused to disclose certain notes made by Crown counsel related to the Crown's conduct of the criminal charges against the applicant. This was record 9 of the disputed records.

The Ministry argued that it was authorized by s. 15(1)(g) of the Act to refuse to disclose information in these records. That section states a public body may refuse to disclose information if the disclosure "could reasonably be expected to … reveal any information relating to or used in the exercise of prosecutorial discretion". Schedule 1 to the Act defines the term "exercise of prosecutorial discretion" as follows:

> **"exercise of prosecutorial discretion"** means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power
>
> (a) to approve or not to approve a prosecution,
> (b) to stay a proceeding,
> (c) to prepare for a hearing or trial,
> (d) to conduct a hearing or trial,
> (e) to take a position on sentence, and
> (f) to initiate an appeal

The Ministry said the Crown used the information in the police report to Crown counsel in deciding whether to approve the criminal charges against the applicant. The Ministry provided an affidavit sworn by the Crown counsel who had approved the charges against the applicant. She swore that she had a "general recollection" of having reviewed the report to Crown counsel with respect to the matter involving the applicant. She also swore that her practice was and is to review such reports in deciding whether to approve charges.

As the Ministry noted in its initial submission in this inquiry, the charge approval process in British Columbia involves the supply of information regarding possible charges to Crown counsel by the relevant police agency. The Crown then decides, based on policy and legal criteria, whether to lay charges. The information provided to Crown counsel comes in the form of a report to Crown counsel, although other information may be provided separately.

In this case, the report to Crown counsel was also used to prepare the applicant's pre-sentence report after he pleaded guilty to one of the charges against him.

The Ministry was clearly authorized to apply s. 15(1)(g) to records 9 through 125 of the disputed records. This section covers record 9 because it contains information related to the activities of Crown counsel in preparing for or conducting a trial or in taking a position on sentencing. See, for example, Order No. 244-1998. The rest of the records are covered because they comprise the police report to Crown counsel – and associated material given to Crown counsel – and the evidence clearly supports the conclusion that Crown counsel reviewed that material and considered it in exercising the discretion to lay criminal charges.

There is no indication in the material before me whether the Crown disclosed this material to the applicant or his lawyer in connection with the applicant's guilty plea in 1995. The Crown is legally bound to disclose relevant material to the defence: *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.). Section 15(1)(g) is a discretionary exception. A public body may disclose material that is technically covered by the section if it wishes to do so. In an appropriate case, a public body should consider exercising its discretion in favour of disclosure, if material sought by an applicant is technically covered by s. 15(1)(g) but has previously been disclosed to the applicant, under *Stinchcombe*, in a prosecution. Based on the evidence in this case, however, there are clearly factors warranting non-disclosure even if the applicant has received some or all of this material before under *Stinchcombe*. I am thinking here of the s. 19(1)(a) and s. 22(1) findings made below. In this case, discretionary disclosure is not warranted because of concerns about the health or safety, and recognized privacy interests, of others (including the applicant's victim).

Information Received from a Municipal Agency – The Ministry also relied on two aspects of s. 16 of the Act to withhold information from the applicant. In light of my decision in respect of ss. 15, 19(1)(a) and 22(1) of the Act, I need not deal with these issues.

3.3 Threat to Safety or Mental or Physical Health – The Act protects individuals against threats to their mental or physical health or their safety through s. 19(1)(a). That section says a public body may refuse to disclose information – including an applicant's own personal information – if the disclosure could reasonably be expected to "threaten anyone else's safety or mental or physical health".

Although s. 19(1) involves the same standard of proof as other sections of the Act, the importance of protecting third parties from threats to their health or safety means public bodies in the Ministry's position should act with care and deliberation in assessing the application of this section. A public body must provide sufficient evidence to support the conclusion that disclosure of the information can reasonably be expected to cause a threat to one of the interests identified in the section. There must be a rational connection between the disclosure and the threat. See Order No. 323-1999.

I agree with my predecessor, David Flaherty, that s. 19(1)(a) may have special application in cases involving victims. Disclosure of information surrounding workplace harassment, or events such as those involved here, can cause a victim to re-live her or his experiences - or fear again for her or his safety - in a way that causes anguish or torment. Of course, s. 19(1)(a) speaks of a threat to mental "health", but I do not interpret this as requiring proof that disclosure will cause or exacerbate a mental illness or condition before the section can apply. Accordingly, where disclosure can reasonably be expected to cause serious mental distress or anguish, s. 19(1)(a) may be applied. See, for example, Order No. 125-1996 and Order No. 138-1996.

Has the Ministry established a reasonable expectation of a threat to the mental or physical health, or to the safety, of others from disclosure of information in the records to which it applied s. 19(1)(a)? First, it is clear from the applicant's submissions that he believes he has been wronged and has not done anything wrong. He said, in his initial submission, that none of the "allegations" against him was ever proven and that they are hearsay. This ignores the fact that the applicant, by pleading guilty to a charge under s. 264(2)(b) of the *Criminal Code of Canada*, at law admitted the truth of the facts underlying that charge. The relevant portions of s. 264(2)(b) provide that a person must not harass anyone else or engage in conduct that causes another "person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them".

On its face, the applicant's access request seeks personal information of the victim and information about the events involving the applicant and the victim. Again, the applicant says he wants this information to sue "the state" and not to contact the victim or to reconcile with her. Despite these assurances, the Ministry has submitted sufficient evidence to support the conclusion that disclosure to the applicant of information in the police report to Crown counsel, in the pre-sentencing report materials, and in the probation materials, can reasonably be expected to threaten the mental or physical health, or safety, of others. The fact that some of this information may previously have been disclosed to the applicant does not mean he has a right to see it now without regard to the health and safety interests of third parties.

3.4 Would Disclosure Cause an Unreasonable Invasion of Personal Privacy? – The Ministry withheld some of the information under s. 22(1) of the Act, which reads as follows:

> 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.

The Ministry applied s. 22(1) to protect the identity of individuals who provided information to the police during the criminal investigation into the applicant. The Ministry also applied s. 22(1) to personal information of the applicant, even though it is *his* information, because it concluded disclosure would unreasonably invade the privacy of third parties who provided the information in confidence.

The Ministry based its reasoning on s. 22(3)(b) of the Act, which raises a presumed unreasonable invasion of third party personal privacy, through disclosure of the information, where the personal information in issue

> … 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.

There is no doubt that the personal information collected in connection with the investigation of the applicant falls under s. 22(3)(b). Once such a presumption of an unreasonable invasion of personal privacy is raised, the Ministry is required by s. 22(2) to

consider "all the relevant circumstances" in deciding whether disclosure of the personal information would unreasonably invade the personal privacy of third parties.

In support of its conclusion that s. 22(1) requires it to withhold the information, the Ministry relied on s. 22(2)(e), and gave essentially the same reasons for the application of s. 22(2)(a) as it advanced for the application of s. 19(1)(a). Section 22(2)(e) says the Ministry must consider whether a third party will be exposed unfairly to financial or other harm by disclosure of the personal information. The Ministry argued that the threshold is not the likelihood of harm but the likelihood of exposure to harm. It is clear that s. 22(2)(e) deals with more than mere financial harm – it explicitly refers to "other harm". In my view, exposure to physical or mental harm can fall within this section. The question remains, however, whether the exposure to harm is 'unfair'. In this case, the Ministry argued that disclosure would unfairly expose others to "stress or other mental harm". For the reasons given above in the s. 19(1)(a) discussion, I find the Ministry correctly considered s. 22(2)(e) to be a circumstance favouring non-disclosure of personal information.

The Ministry also relied on s. 22(2)(f) of the Act. According to that section, a public body must consider whether the personal information in issue "has been supplied in confidence". Again, the Ministry's evidence supports its contention that personal information – and other information – supplied to the police (and others) in this case was "supplied in confidence". There are no explicit markers of confidentiality in the records themselves, but the affidavit evidence submitted by the Ministry clearly permits one to conclude the information was implicitly supplied in confidence for investigative purposes. This conclusion, it should be emphasized, very much depends on the facts of this case.

In the Ministry's view, the circumstances in ss. 22(2)(a) and 22(2)(c) do not favour disclosure of the information. The Ministry says that during the criminal law process, the applicant's rights were properly determined and the Ministry was accountable for its actions. Those sections require a public body to consider whether:

> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> ...
>
> (c) the personal information is relevant to a fair determination of the applicant's rights.

As regards s. 22(2)(a), it is in any case clear that – despite the applicant's statements about his wish to sue the government – the focus of his grievances is on what he sees as the false allegations and hearsay directed at him by the victim and others. He does not, after all is said and done, seem as concerned about what the government may have done as what others have, in his view, done to him. Moreover, a great deal of the information sought by the applicant is personal information of the victim and others. Disclosure of such information would not, in this case, assist in subjecting government or public body activities to scrutiny. In light of these considerations, and in light of my review of the

records and evidence here, I conclude that s. 22(2)(a) does not favour disclosure of the disputed records.

For reasons similar to those just given, I have also concluded the Ministry was correct to decide that s. 22(2)(c) of the Act does not favour disclosure. In any case, there is nothing to stop the applicant from suing the government and seeking disclosure of the records through the discovery process provided for in the *Rules of Court*. Section 2(2) of the Act says the Act "does not replace other procedures for access to information". This is not to say the availability of document discovery in civil litigation displaces the Act and does not allow it to be used by applicants. I am only saying that s. 22(2)(c) does not, in this particular case, favour disclosure. Whether the applicant will fare any better in a lawsuit he might see fit to commence is another matter.

In light of the above, I conclude the applicant has not met the burden of establishing that disclosure of the personal information of others would not unreasonably invade their personal privacy.

The last issue is whether s. 22(1) required the Ministry to refuse to disclose information that is not third party personal information and to refuse to disclose personal information of the applicant. As was noted above, the burden of proof on this issue lies with the Ministry. The applicant's personal information consists of statements made to police, in confidence, by potential witnesses about the applicant's actions (including towards the victim and others) and statements. This personal information of the applicant can be withheld from him if its disclosure would unreasonably invade the personal privacy of anyone else.

I agree with the following passage from p. 13 of Order No. 193-1997:

> While one of the Act's premises is that individuals have a *prima facie* right to access their own personal information, the Act does put limits on that *prima facie* right by providing exceptions to disclosure where appropriate. One such limit is where a disclosure of an applicant's own personal information would unreasonably invade the personal privacy of a third party. When an applicant's and a third party's personal information are intertwined, and the third party has supplied the applicant's personal information in confidence, the Act strikes the balance in competing individual privacy rights by requiring that public bodies go the extra step of preparing summaries of the applicant's personal information rather than simply refuse access. But the Act draws the line on the side of protecting the privacy of the third party; if even a summary would reveal the identity of the third party who supplied the applicant's personal information in confidence, the applicant does not have a right to his or her own personal information.

Section 22(5) of the Act reads as follows:

> 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.

Here, disclosure to the applicant of what others said about him would unreasonably invade their personal privacy, because summaries of what others have said cannot be prepared without identifying those individuals. As the discussion earlier in this order indicates, disclosure could also reasonably be expected to threaten their health or safety. I have no doubt this is one of those relatively rare cases where an applicant's *prima facie* right to have access to his or her own personal information is overcome. I also conclude this is a case where it is not possible for the Ministry to prepare summaries of personal information of the applicant, provided by third parties about the applicant, without disclosing the third parties' identities.

4.0 CONCLUSION

For the reasons given above, I make the following orders:

1. Having found the Ministry is authorized by ss. 15(1)(g) and 19(1)(a) of the Act to refuse to disclose the disputed records to the applicant, under s. 58(2)(b) of the Act, I confirm the decision of the Ministry to refuse to disclose the records to the applicant; and

2. Having found the Ministry is required by s. 22(1) of the Act to refuse to disclose personal information in the disputed records to the applicant, under s. 58(2)(c) of the Act, I require the Ministry to refuse to disclose information in the disputed records to the applicant.

January 28, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia