OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-17

INQUIRY REGARDING BC TRANSIT RECORDS

David Loukidelis, Information and Privacy Commissioner
June 21, 2000

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Summary: Applicant sought copies of his personnel file, including records of BC Transit's response to the harassment complaints he filed. BC Transit severed information under sections 13 and 22 of the Act. In addition, it withheld 165 pages under section 14 of the Act. Applicant entitled to 4 pages of information formerly severed under section 13 and 22. BC Transit appropriately applied sections 13, 22 and 14 to the other records.

Key Words: Personal Information – unreasonable invasion of privacy – advice or recommendations – solicitor client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 14 and 22.

Authorities Considered: B.C.: Order No. 177-1997; Order No. 191-1997; Order No. 193-1997; Order No. 218-1998; Order No. 324-1999; and 325-1999.

1.0 INTRODUCTION

This Order relates to an inquiry conducted by the Executive Director of the Office of the Information and Privacy Commissioner ("Executive Director") concerning a request for review of a decision of BC Transit to sever and withhold information from the "complete employment records from September 24, 1973 to September 17, 1998" of the applicant.

2.0 DISCUSSION

I disqualified myself from this inquiry. On August 16, 1999, I delegated the authority to conduct reviews to the Executive Director pursuant to s. 49 of the *Freedom of Information*

and Protection of Privacy Act ("Act"). Although s. 49 authorizes delegation of authority to conduct inquiries under s. 56 of the Act, it does not authorize delegation of my authority to make orders under s. 58.

The Executive Director conducted the inquiry. I took no part in the inquiry. The Executive Director then prepared a report respecting the inquiry, a copy of which is appended to this order. After receiving the Executive Director's report, I reviewed the filed material and the records in dispute. I have adopted the Executive Director's findings and recommendations in this order and this order executes those findings and recommendations.

3.0 CONCLUSION

For the reasons given in the Executive Director's report:

1. subject to the orders in paragraphs 2 and 3, below, under s. 58(2)(a) of the Act, I require BC Transit to give the applicant access to records H-1, H-2, H-3 and a portion of H-52, as indicated on the copy of the records delivered to BC Transit along with its copy of this order;

2. under s. 58(2)(b) of the Act, I confirm the decision of BC Transit to refuse to disclose information in the following records: of H-52, H-53, H-73, H-74, H-76, H-79, H-80, H-84, H-85, H-122, H-123, H-126, H-127, H-300, H-304, H-305, H-317, H-328, and L-1 to L-165 (except L-30 and L-93 to L-98, which were released by BC Transit), as indicated on the copy of the records delivered to BC Transit along with its copy of this order; and

3. under s. 58(2)(c) of the Act, I require BC Transit to refuse to give the applicant access to the parts of records O-36, O-57, O-90 to O-92, H-27 to H-28, H-79, H-209 and H-317, as indicated on the copy of the records delivered to BC Transit along with its copy of this order.

June 21, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia

APPENDIX TO ORDER 00-17

INQUIRY REGARDING BC TRANSIT RECORDS

REPORT OF THE EXECUTIVE DIRECTOR OF THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

1.0 INTRODUCTION

As Executive Director of the Office of the Information and Privacy Commissioner, I conducted a written inquiry under section 56 of the *Freedom of Information and Protection of Privacy Act* ("Act"). This inquiry arises out of a February 15, 1999 request to BC Transit for the complete employment records of the applicant, for the period from September 24, 1973 to September 17, 1998.

In response, BC Transit released some records to the applicant on March 30, 1999. The records included personnel records; operations records; uniform records; medical records; WCB records; and harassment records.

BC Transit noted in its response letter to the applicant that some of the records contained information that was severed from them. The severed information was of two types:

1) Information that would reveal advice or recommendations developed by or for a public body or minister; and

2) Certain personal information about other identifiable individuals.

Section 13(1) of the Act permits a public body to withhold information of the former type, while section 22 requires public bodies to withhold the latter type of information in order that the personal privacy of third parties may be protected.

In addition, 165 pages of records were withheld in their entirety under section 14 of the Act on the grounds that they were fully protected by solicitor client privilege.

2.0 ISSUES

2.1 Procedural issues – On April 29, 1999, the applicant wrote to this Office and requested a review of BC Transit's decision to sever and withhold information. In his request for review the applicant raised an argument with respect to section 13(2)(i). Neither the applicant nor the public body argued this section in their submissions. Therefore, it is not necessary for me to comment on this section.

During mediation with this Office, BC Transit released further information. However, some information remained severed. BC Transit added section 19 to its reasons for severing information on one record (numbered H-2). Section 19 is a discretionary section which allows the public body to sever information if the release of that information could reasonably be expected to threaten anyone else's safety. This was the first occasion BC Transit had referred to this section in relation to this request. While the Notice of Written Inquiry and the Portfolio Officer's Report did not mention section 19, the applicant addressed the section. BC Transit did not provide argument or adduce evidence in its initial submission on section 19. It did not mention section 19 on its "records index". In its reply submission, BC Transit objected, stating section 19 was outside the scope of the inquiry. It also requested an opportunity to make submissions on the applicability of section 19 to the record numbered H-2.

The public body had sufficient opportunity to adduce evidence and make submissions on this point during the inquiry. The public body seems to argue that it may wish to apply section 19 as an alternative if sections 13 and 22 do not apply. At this point in the inquiry it is too late for alternatives. Either the public body has made a decision to apply section 19 or it has not applied the section. The public body can not have it both ways. Therefore, I am not prepared to ask for further submissions or evidence. Based upon the information before me, I find that the public body has abandoned its reliance on section 19.

Last, the applicant raised concerns about the accuracy of the Portfolio Officer's Fact Report. I accept the version as set out by the Applicant in paragraphs 1-9 of the Applicant's affidavit.

2.2 Inquiry Issues – The issues I considered are as follows:

1. Was BC Transit authorized by sections 13(1) and 14 of the Act to withhold information from the applicant?

2. Was BC Transit required by section 22 of the Act to withhold personal information from the applicant?

Under section 57 of the Act, BC Transit bears the burden of proving it can rely on sections 13(1) and 14 of the Act, while the applicant bears the burden of proving that section 22 does not apply to personal information withheld by BC Transit.

3.0 DISCUSSION

3.1 Relevant Provisions – Relevant sections of the Act are set out below.

Section 13 reads as follows:

> 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.

(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

…

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

(l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body, or

…

(n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

…

(3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

Section 14 reads as follows:

14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

The relevant parts of section 22 are 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.

(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.

…

3.2 Records in Dispute – The public body provided a comprehensive records index, describing the records and listing the sections of the Act under which information was withheld. This, combined with the numbering of the pages, made the task of carefully reviewing a large number of records much easier. I reproduced a copy of the records index with my recommendations added beside each entry and provided a copy for the Commissioner, to make available to the applicant and public body. However, as this index

contains personal information about the applicant and others, I have not attached the index as an appendix to my report.

3.3 Section 22 – The applicant bears the burden of proof under section 57(2) of the Act to prove that the release of third parties' personal information would not be an unreasonable invasion of their personal privacy.

I have carefully reviewed each of the records where the public body has withheld information under section 22. The applicant argued that section 22(2)(c) permits the disclosure of personal information if that disclosure is relevant to a fair determination of the applicant's rights (section D, para. 2, of applicant's initial submission). Section 22(2)(c) is one of the relevant circumstances that the decision-maker must take into account when determining if the release of the personal information constitutes an unreasonable invasion of a third party's personal privacy. It is not a determinative factor on its own. The head of the public body is directed to consider all of the relevant circumstances before coming to a decision.

The applicant stated in his reply submission that he no longer seeks the disclosure of several pages containing third party personal information (applicant's reply submission, para. D.1). As a result, the only pages under review, as containing third party personal information, are pages O-36, O-57 and O-90 to O-92. In addition, portions of pages H-2, H-27 to H-28, H-79, H-209 and H-317 contain third party personal information.

The information that has been withheld under section 22 consists of either names or identifying numbers of other employees, or customers' names, addresses and telephone numbers. Some of the customers' personal information dates as far back as February 1996. I do not believe that any fair determination of the applicant's rights is linked to names and addresses of customers, when the body of a customer's complaint or commendation has been released to him. I also do not believe that the applicant has met the burden of proof with regard to information about fellow employees.

However, in the case of page H-2, the public body has applied section 22 to the names of employees who were acting in their employment capacity. The applicant submitted the personal information was needed as "the memo is likely to have had a severe impact on his relationship with the public body, and may have been the immediately precipitating factor in the public body's decision to terminate the applicant's employment" (applicant's initial submission). The public body addresses the section 22 argument in its reply submission, stating that the contents of the memo "were no factor in the public body's decision to terminate the applicant's employment" (public body's reply submission, page 9).

In most of the records reviewed above, the employees' names are linked to personal information, such as disability insurance information or their employment status. However, the names on an internal memo (page H-2) identify the author of an e-mail and one of the recipients of the e-mail. (The name of the other recipient was disclosed and that employee provided a supplemental affidavit about this record in the public body's reply submission). The e-mail was created by the employee acting in his/her professional

capacity with the public body. The other employee received this e-mail in his/her role with the public body. While a name is personal information under the definition of "personal information" in Schedule 1 to the Act, release of the name of an employee, acting in his/her employment capacity with the public body, does not amount to an unreasonable invasion of privacy under section 22 in this case.

Therefore, the applicant has met his burden with respect to the personal information on page H-2.

3.4 Section 13 – BC Transit has withheld, under section 13(1) of the Act, certain information from the file named the "Harassment File". It argued that the information that it has refused to disclose would reveal advice or recommendations developed by or for BC Transit in connection with the handling of the applicant's harassment complaint.

The public body relied on the "zone of confidentiality" concept of section 13 that was developed in Order No. 177-97 and Order No. 193-97 (page 5 of the public body's initial submission). While the Act does not include a "zone of confidentiality" as a reason to withhold information, section 13(1) does permit the giving of frank advice to executive and senior management by managers and staff on how to deal with difficult complaints.

The applicant argued that the public body failed to disclose the "report of the 'task force, committee, council or similar body that has been established to consider ….' the changes to the harassment policy and '….to make reports or recommendations to the public body'" and failed to disclose documents and information relating to the applicant in relation to the reasons for changing the policy as required by section 13(2)(k) of the Act (section B of the applicant's initial submission).

The records in issue here are a fax-cover sheet, memos, telephone messages, handwritten notes, letters, a director's briefing note, and one e-mail message. There is no report of a task force, committee, council or similar body in the records in dispute. Therefore, I find that section 13(2)(k) does not apply.

The applicant also argued that the harassment policy in issue must be considered a "plan or proposal to establish a new program or to change a program…" under section 13(2)(l) of the Act. Taken individually, as they must be under the Act, none of the records is a plan or proposal to establish a new program or to change a program. In Order No. 325-1999, the current Commissioner described "program" for the purposes of section 13(2) as "an operational or administrative program that involves the delivery of services under a specific statutory or other authority." The severed information in this case does not, in my view, amount to a program. Therefore, I find that section 13(2)(l) does not apply.

The applicant submitted that the information cannot be withheld because it falls under section 13(2)(n) of the Act, which reads: "the head of a public body must not refuse to disclose under subsection (1)… a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant". The employment matters that led to the termination of the applicant's

employment do not fall into the category of "a decision made in the exercise of a discretionary power or an adjudicative function". BC Transit argued that this provision has been the subject of previous orders of the Commissioner and noted that the word "decision" was interpreted in Order No. 191-1997 (pages 3 and 4 of the public body's reply submission).

In Order No. 191-1997, the previous Commissioner said the following:

> I find that in the present context, section 13(2)(n) applies to the final termination decision by the Deputy Minister and would include any records containing the Deputy Minister's own reasons for arriving at her decision. I conclude that section 13(2)(n) does not apply to information in records such as memoranda containing advice and recommendations for the Deputy Minister by her staff and officials of the Liquor Distribution Branch.

In Order No. 218-1998, he said the following:

> It [s. 13(2)(n)] does not require the disclosure of all records which relate in any way to the exercise of a discretionary power or an adjudicative function. Only records which contain a decision or reasons for it must be disclosed.

This interpretation applies here, because the documents I have reviewed are not the records of the final termination decision nor the reasons for that decision.

Turning to section 13(1), the Commissioner stated in Order No. 324-1999 that the test is whether the "information consists of 'advice or recommendations' to a public body as to a course of action …". The records in dispute here demonstrate the internal thinking of the public body on how to manage a series of specific issues around the applicant's employment. In some cases, the information in the severed records, if released, would reveal the advice which led to a "course of action" or strategy undertaken by the public body. In addition, if the "course of action" or strategy were to be revealed, this would allow a knowledgeable reader to accurately infer the advice leading up to the action. In other cases, the information, if released, would reveal drafts of a letter that ultimately was not sent by the public body. In this case, this draft is clearly advice developed by the public body but not acted upon. The critical issue is not whether the advice was "draft", but whether the severed information provided advice to the public body.

I have carefully reviewed the severed information, and believe that the public body has done a careful job of releasing any factual material (as it is required to do so under section 13(2)(a)) and has only withheld information that is advice or recommendations developed by or for the public body. I am satisfied that the information withheld under section 13(1) has been appropriately withheld and so find.

However, in the following cases I have found section 13(1) does not apply. Records H-1, H-2, H-3 and a portion of H-52 do not contain advice or recommendations developed by or for BC Transit. Record H-1 was included in the public body's package of records provided for this Office's review. However, in its reply submission (at page 6), the public

body stated that the record was outside the scope of the applicant's request, because record H-1 was dated October 20, 1998 and the applicant's request asked for records up to September 17, 1998. The public body stated that record H-1 was included by error. I am not willing at this late stage to exclude this record, which has been treated by the parties as being included in the request. Therefore, I am going to deal with it. The severed information in H-1 is a statement of fact that can be released under section 13(2)(a). The release of this factual information is not "intertwined" with advice or recommendations.

There is an additional issue with respect to record H-1. There appears to be some confusion over the apparent five-page attachment to it. In its reply submission, the public body explained that three of these pages were not retained as part of its "harassment" file, but rather appeared in the personnel file as pages P-291 to P-293 and were disclosed to the applicant. The other two pages were, according to the public body, "a draft of the October 21, 1998 letter of Ms. Adriana Wills (counsel to the public body) to counsel for the applicant." The final version of this letter was dated October 21, 1998. Again, according to the public body, these two pages were not retained in the harassment file, as they were considered to be drafts.

Record H-2 contains factual information, not advice or recommendations. As such, this is information under section 13(2)(a) and it must be disclosed. As noted above, this record contains the names of employees of the public body, the release of which would not be an unreasonable invasion of privacy under section 22. Also, record H-3 does not fall under section 13 of the Act, as it is a statement of fact.

Record H-52 is a handwritten note dated April 14, 1998. The top portion of this record states an observable fact, which is not covered by section 13(1). While the rest of the page sets out advice and recommendations, the factual information is not advice or a recommendation and it is not intertwined with advice or recommendations. The statement of fact must be disclosed.

3.5 Section 14 – By far the majority of the information that has been withheld, in its entirety or partially, has been withheld under section 14 or the Act.

In its initial submission (at page 7), the public body stated that it retained a law firm in connection with the harassment complaints of the applicant. The pages withheld from the operations, personnel and harassment files consist of the following:

(a) notes or memoranda made by BC Transit managers in connection with the taking of advice from BC Transit's solicitors (L-1 to 3, 6, 12, 40, 73, 115, 124, 144/145 and 162/163) and communications between BC Transit and its solicitors;

(b) letters from the solicitors for the BC Transit Health and Benefit Trust to a trustee (L-136 to 143); and

(c) correspondence between BC Transit and its solicitors.

In her affidavit, Susanne Fossey, Manager, BC Transit, stated that the withheld information consists of notes or memoranda prepared by BC Transit management in connection with taking advice from or instructing its solicitors, or correspondence (including enclosures) between BC Transit and its solicitors.

Having carefully reviewed each document which the public body has refused to disclose pursuant to section 14 of the Act (with the exception of pages L-136 to L-143, which are discussed below), I am satisfied that a solicitor client relationship existed between the public body and the author or recipient of the document at the material time and that the withheld information is privileged, as solicitor client communications, under section 14. Pages L-74 to L-78 do not appear on the records index provided by the public body. I have reviewed these pages and find that solicitor client privilege applies. These pages constitute advice provided by BC Transit's solicitors and privileged enclosures.

Pages L-136 to L-143 are letters from a law firm to a manager at BC Transit. The law firm was writing as the solicitors to the BC Transit Employees Health and Benefit Trust. The recipient manager was, at the time, a trustee of that trust. The applicant argued in his reply submission, at page 2, that any solicitor client privilege that may have been attached to the documents has been waived. The applicant went on to state that the public body claims the documents are in its possession, not in the possession of the manger in the manager's capacity as a trustee of the BC Transit Health and Benefit Trust. The applicant argues that, while the documents may have enjoyed solicitor client privilege as between the manager, as trustee of the trust, and his solicitors, that privilege was lost when the documents came into the possession of the public body.

The supplemental affidavit of Susanne Fossey, supplied by the public body in its reply submissions, answers the applicant's arguments by stating, on page 2, that

> … this is correspondence addressed to [the manager]. As a consequence of and incidental to his employment with BC Transit and the position he held at BC Transit, he was a Trustee of the BC Transit Employees' Health and Benefit Trust.

The affidavit went on to state that the Board of Trustees includes union and BC Transit appointees and that the manager was a BC Transit appointee. BC Transit's position was that correspondence between the solicitors for the trust and a management appointee, which relates to a BC Transit employee and is filed with the employee's records, is the proper subject of solicitor client privilege. I accept this position. I find that the information is appropriately withheld under section 14.

4.0 FINDINGS AND RECOMMENDATIONS

For the above reasons, I find that section 13(1) applies to portions of the following records: H-52, H-53, H-73, H-74, H-76, H-79, H-80, H-84, H-85, H-122, H-123, H-126, H-127,

H-300, H-304, H-305, H-317 and H-328, as indicated in the records index, recommendation column, and on the copies of the records I have delivered to the Commissioner with this report. However, I find section 13(1) does not apply to records H-1, H-2, H-3 and a portion of H-52, as indicated on the copies delivered to the Commissioner.

Therefore, I recommend that the Commissioner confirm the decision of BC Transit to withhold the information severed from the records I have indicated under section 13(1) of the Act, but require BC Transit to give the applicant access to records H-1, H-2, H-3 and a portion of H-52. I have provided the Commissioner with a severed copy of the records to indicate which parts I recommend be withheld under section 13.

For the above reasons, I find that section 14 applies to the records listed as L-1 to L-165, except L-30 and L-93 to L-98, which BC Transit released.

Therefore, I recommend that the Commissioner confirm the decision of BC Transit to withhold all of the information severed from the records under section 14 of the Act. I have provided the Commissioner with a severed copy of the records to indicate which parts I recommend be withheld under section 14.

For the above reasons, I find that section 22(1) applies to the portions of the records as indicated on the records index, recommendation column and on the copies of the records I have delivered to the Commissioner with this report. However, I find that section 22 does not apply to record H-2.

Therefore, I recommend that the Commissioner require BC Transit to refuse access to the personal information severed under section 22(1) of the Act, as indicated on the copies of records O-36, O-57, O-90 to O-92, H-27 to H-28, H-79, H-209 and H-317 that I have delivered to the Commissioner with this report. However, I recommend that the Commissioner require BC Transit to give the applicant access to record H-2. I have provided the Commissioner with a severed copy of the records to indicate which parts I recommend be withheld under section 22(1).

June 20, 2000

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Lorrainne A. Dixon
Executive Director
Office of the Information & Privacy Commissioner
for British Columbia