Order 00-52

# INQUIRY REGARDING BRITISH COLUMBIA SECURITIES COMMISSION INVESTIGATION RECORDS

David Loukidelis, Information and Privacy Commissioner
December 19, 2000

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**Summary:** Applicant, who was formerly investigated by BCSC, sought access to BCSC files about its (now closed) investigation. BCSC was entitled to withhold information that would identify confidential informants and was required to withhold third party personal information compiled as part of its investigation into a possible violation of law.

**Key Words:** law enforcement – harm to a law enforcement matter – harm to investigative techniques – confidential source – personal information – violation of law – unreasonable invasion of personal privacy.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 15(1)(a), (c) and (d), 15(2)(b), 22(2)(c), (e) and (f), 22(3)(b).

**Authorities Considered: B.C.:** Order No. 39-1995; Order 00-08.

**Cases Considered:** *Doe* v. *British Columbia (Information and Privacy Commissioner)* (1996), 45 Admin. L. R. (2d) 293 (B.C.S.C.).

## 1.0 INTRODUCTION

This inquiry stems from an October 21, 1999 access to information request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the British Columbia Securities Commission ("BCSC") which refreshed a 1996 access request by the same individual. In the current request, the applicant's lawyer requested "a copy of all records in the custody and control of the British Columbia Securities Commission relating to our client". The BCSC responded, on November 3, 1999, by noting the applicant had "made

a similar request" for records on July 17, 1996, at which time "[c]ertain documents were withheld". The BCSC said those same records would continue "to be withheld." In responding to the applicant, the BCSC severed and then disclosed portions of some records and withheld some records in their entirety. Although the BCSC's 1999 response did not cite any of the Act's exceptions in refusing to disclose information, it has relied here (as it did in 1996) on ss. 15 and 22 of the Act.

Because mediation did not resolve the matter, I held a written inquiry under s. 56 of the Act.

## 2.0 ISSUES

The issues to be addressed here are as follows:

1. Is the BCSC authorized by s. 15(1) of the Act to refuse to disclose information?
2. Is the BCSC required by s. 22(1) of the Act to refuse to disclose personal information to the applicant?

Section 57(1) places the burden of proof on the BCSC with respect to the first issue, while s. 57(2) requires the applicant to establish that personal information can be disclosed to him without unreasonably invading the personal privacy of third parties.

I note here that, in its reply submission, the BCSC refers to s. 15(1)(a) of the Act. Under that section, a public body can refuse to disclose information if the disclosure "could reasonably be expected to … harm a law enforcement matter". The BCSC acknowledges that s. 15(1)(a) was referred to in its 1996 decision respecting the applicant's first request, but also concedes that the s. 15(1)(a) "ground became less pertinent in the meantime, because the investigation was closed in October 1998." Because the BCSC does not, in its submissions, pursue the s. 15(1)(a) argument any further than the mention in its reply – it focuses instead on s. 15(1)(c) and (d) – I would find, if it were necessary to do so, that the BCSC has not made its case regarding s. 15(1)(a).

## 3.0 DISCUSSION

**3.1 Background** – The applicant here seeks information he believes will help him pursue legal remedies against those who have allegedly defamed him. He says a series of allegedly defamatory newspaper articles have been published about him, some of which have said he has been implicated in the past by the Vancouver Stock Exchange "in a series of suspicious transactions". One of the newspaper articles – none of which is relevant here – apparently quotes an unnamed BCSC representative as saying that the BCSC was "well aware" of the applicant. To the applicant, this implies that he is "suspected of some wrongdoing."

He says it is "deeply troubling" to have his "reputation tarnished by these defamatory statements", since he has

> … never been convicted of any offence, has never been the subject of administrative action by the Vancouver Stock Exchange, has never been found liable in any civil case for any breach of contract, civil fraud or breach of fiduciary duty and has never been found guilty of any breach of securities law by the Commission or the securities commission of any other jurisdiction.

The applicant says he "believes the source of the defamatory statements that continue to be made" about him may be "false and misleading information contained in the files of the" BCSC. Unless he can obtain access to this information, the applicant argues, he "may never be in a position to stop the attacks which continue to be made" on his reputation.

The BCSC is, under the *Securities Act*, responsible for regulating the trading of company shares and other securities in British Columbia. The BCSC has the authority to initiate proceedings that can lead to administrative penalties being imposed on anyone who has violated the *Securities Act*. It also has the authority to issue investigation orders under s. 142 of the *Securities Act*, which empower investigators to summon individuals to testify and to compel testimony and the correction of records.

In this vein, almost ten years ago, the BCSC issued a temporary order and Notice of Hearing to the applicant under what was then s. 144 of the *Securities Act*. The order placed certain restrictions on the applicant's activities respecting the trading of securities in British Columbia. It also put the applicant on notice that a hearing would be held to determine whether it was in the public interest to make further orders against him under the *Securities Act*.

**3.2 BCSC's Arguments About Its Law Enforcement Role** – In both its initial and reply submissions, the BCSC advanced an argument that should be dealt with before I address the ss. 15 and 22 issues. In paras. 24 through 26 of its initial submission, and paras. 10 through 12 of its reply submission, the BCSC contends that the applicant's access request has been made for personal reasons and therefore has nothing to do with making the BCSC more accountable to the public, as contemplated by s. 2(1) of the Act.

The BCSC contends, at para. 11 of its reply submission, that because the applicant's request "does not fall under the clear purposes of the freedom of information request established by section 2(1)", the request is "not authorized by it". It relies on the decision of Esson C.J.S.C. (as he then was) in *Doe* v. *British Columbia (Information and Privacy Commissioner)* (1996), 45 Admin. L. R. (2d) 293. The following passage is found at para. 12 of the BCSC's reply submission:

> Applied in this context, it is submitted it is not for the Commission [*i.e.*, the BCSC], when it receives a request for access, to address the purpose thereof. However, the Commissioner derives his jurisdiction from the *FOIPP Act* and has to consider the purpose of a request. He cannot, it is submitted, order documents to be released for purposes that are clearly not contemplated by this Act. That would, with respect, be beyond the power of the Commissioner. Therefore, the exceptions under the *FOIPP Act* may not be addressed.

There is no support for this argument in the Act or the case law. The Legislature's statement of purposes in s. 2(1) is relevant to the Act's interpretation, but it does not substantively define my jurisdiction – or the duties of public bodies – as the BCSC suggests it does. The entire thrust of the Act's provisions respecting public bodies' obligations, and regarding my jurisdiction and role under Part 5 of the Act, is completely to the contrary effect. The decision in *Doe*, above, does not advance the BCSC's position.

I disagree, as well, with the BCSC's argument that the accountability goal in s. 2(1) cannot be met when an applicant requests access to personal information for 'personal reasons'. At the very least, such a request can function to hold the public body accountable, in some measure, for its collection, use and disclosure of the individual's personal information.

**3.3 Law Enforcement Information** – Section 15 of the Act contains a variety of provisions that protect law enforcement activities. Some of the protection that s. 15 offers uses a harm-based test, while other aspects protect certain classes of information. The BCSC relies on ss. 15(1)(c) and (d). The relevant portions of s. 15(1) read as follows:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> …
>
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
>
> (d) reveal the identity of a confidential source of law enforcement information, … .

The BCSC also raised, in its reply submission, s. 15(2)(b) of the Act, which reads as follows:

> (2) The head of a public body may refuse to disclose information to an applicant if the information
>
> …
>
> (b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record, or … .

This exception was raised because the BCSC learned, through the applicant's initial submission, that the applicant wished to use the requested information to pursue his legal rights against those who, he says, have defamed him.

As I noted above, the BCSC says that, for the purposes of s. 15 of the Act, its activities respecting the applicant qualify as "law enforcement" activities within the meaning of the Act. Schedule 1 to the Act defines "law enforcement" as including "investigations that lead or could lead to a penalty or sanction being imposed" and "proceedings that lead or

could lead to a penalty or sanction being imposed". I accept that, in light of the *Securities Act* now (and as it existed when the disputed records were created), the BCSC was engaged in "law enforcement" activities within the meaning of the Act. The next question is whether the BCSC has established that either s. 15(1)(c) or s. 15(1)(d) applies to information or records that it has withheld from the applicant.

***The Parties' Arguments***

It is convenient, in this case, to summarize the parties' s. 15 arguments in one place, since the arguments (especially the BCSC's) meld together.

The BCSC's evidence – in the form of an affidavit sworn by Gerry Halischuck – establishes the following facts: (1) the records in dispute were obtained or created by BCSC staff in the course of investigating a possible violation of law (Halischuck affidavit, para. 2); and (2) all the information was received in confidence (Halischuck affidavit, paras. 7 and 9). The BCSC concedes that no "enforcement action was ultimately taken in respect to the allegations and information concerning the Applicant received from third parties due to lack of evidence and staff resources". These facts are attested to in the affidavit of Gerry Halischuck, who is the BCSC's Deputy Director of Compliance. He was a manager of investigations in the BCSC's enforcement division at the time of the BCSC's 1991 actions involving the applicant.

The following s. 15 argument is taken from the BCSC's initial submission:

> 16. It is submitted that there is no doubt that the Commission is a law enforcement agency as contemplated in the *FOIPP Act*.
>
> 17. There is also no question that the information that the Applicant requested was obtained by the Commission staff in the course of an investigation under the *Act* and in confidence.
>
> 18. The Commission provided the Applicant with a list of all the available records with a clear indication of the provisions of the *FOIPP Act* on which reliance is placed for refusal to disclose.
>
> 19. Although the Commission relies primarily on section 22 of the *FOIPP Act* because the records all contain personal information of third parties, it is also of the opinion that disclosure of some of the documents would harm the effectiveness of investigative procedures currently used as well as reveal the identity of confidential sources of law enforcement information, as provided for in sections 15(1)(c) and (d) of the *FOIPP Act*.
>
> …
>
> 21. The Commission is very reliant on the fact that information it gathers should be confidential. If not, a large number of sources of information could become inaccessible and a substantial part of the Commission's investigative procedures could become ineffective. Registrants, other participants in the securities industry and other law enforcement agencies could become increasingly reluctant to voluntarily come forward and provide the Commission with information.

*Halischuck Affidavit*, paras. 7 & 8

22. Therefore, it is submitted that the Chair of the Commission exercised his discretion properly in refusing to disclose the documents as authorized by section 15 of the *FOIPP Act*.

23. It is submitted, because of the specialized nature of the Commission, its expertise and the provisions of section 11 of the *Act*, the Commission should be allowed some latitude in exercising its discretion in not disclosing information under section 15.

The last of these paragraphs invites me to give the BCSC "some latitude in exercising its discretion" under s. 15. I interpret this as a submission that I should not too readily interfere with the BCSC's decision because of its specialized nature, its expertise and the confidentiality provision of s. 11 of the *Securities Act*. This submission, of course, uses language familiar in the administrative law context, in relation to the appropriate standard of review by the courts on judicial review applications respecting administrative tribunal decisions. The review and inquiry process under the Act differs from the judicial review process undertaken by the courts. As I noted at p. 40 of Order 00-08, it is clear from s. 2(1)(e) and Part 5 – notably ss. 56 and 58 and the duties they impose on the Commissioner – that the Legislature "intended access to information decisions of public bodies" to be "subject to independent review" by the Commissioner under the Act.

As regards the s. 15(1)(c) argument, the BCSC says there "is clear evidence that releasing the information would harm the effectiveness of investigative procedures used by" the BCSC. The BCSC does not provide any particulars of "the information" the disclosure of which would allegedly harm the effectiveness of its "investigative procedures". It relies on para. 7 from Gerry Halischuck's affidavit:

7. In my opinion, releasing this information [*i.e.*, the withheld information generally] would severely undermine the effectiveness of the investigative procedures of staff of the Commission and reveal the identities of confidential sources of law enforcement information. We are relying heavily on information from the public and other law enforcement agencies for the efficacy of our regulatory function. Under section 11 of the *Act*, staff of the Commission, except in limited circumstances, must keep confidential all facts, information and records obtained or provided under the *Act*. My experience is that sources of law enforcement information expect that their provision of information will be kept confidential. If people thought that information they provided to the Commission in the course of investigations could potentially be released to the public they may be reluctant, or even refuse, to voluntarily come forward with relevant information. The same applies to other law enforcement agencies.

The BCSC notes that my predecessor said, in Order No. 39-1995, that he would interpret s. 15(1)(c) "narrowly". As with all sections of the Act, s. 15(1)(c) must be applied using a plain reading of its language. There is no authority for a 'narrow' interpretation of this or any other section in the Act.

At paras. 18 and 19 of its reply submission, the BCSC

> … asserts that the effectiveness of its investigative procedures, which are reliant on confidentiality, may be harmed by a ruling that the documents in issue should be disclosed. [emphasis in original]

The BCSC distinguishes Order No. 39-1995 on the basis that the public body in that case "attempted to protect a single 'technique' that was commonly-known and essentially conducted in public". The BCSC says this case is different, because its "investigative procedures are conducted behind closed doors and in the strictest of confidence." It says that it would have "difficulty collecting information relevant to law enforcement if it could not promise anonymity to complainants and other sources." On the latter point, it relies on paras. 7 (quoted above) and 8 of the Halischuck affidavit:

> 8. Many of the third parties from whom this information was received are players in the securities industry and staff of the Commission is heavily reliant on registrants and other persons involved in the securities industry to supply information about trades and other activities in the industry. This source of information is very important for staff of the Commission to act in the public interest and regulate the securities industry. The securities industry is highly competitive and information about clients and trading activities is considered very sensitive. Should the fact that these particular third parties provided information to the Commission be disclosed it could result in general reluctance, or even refusal, in the industry to voluntarily cooperate with staff of the Commission for investigation purposes.

The applicant's argument on s. 15(1)(c), found at page 1 of his reply submission, is as follows:

> Section 15 of the Act is intended to protect the effectiveness of an investigative technique. It is no secret that the Commission obtains much of its information from informants. The effectiveness of this investigative technique will not be harmed by the disclosure of the information it received through informants. If the Commission seeks to protect the identity of those individuals or organizations who provide truthful and substantiated information, as opposed to the information itself, they should do so through section 22. Section 15, we submit, provides no basis for withholding the information itself.

In my view, Order No. 39-1995 cannot be distinguished from this case as contended by the BCSC. Moreover, the BCSC has not persuaded me that disclosure of information provided by informants – or of any of the other information withheld by the BCSC – could reasonably be expected to harm the effectiveness of the BCSC's investigative techniques and procedures.

For one thing, it is reasonable to conclude that the BCSC, like many law enforcement agencies, relies on informants to give it leads or evidence. It is not clear to me how disclosure of the information provided by informants – as opposed to the identities of the informants themselves – could reasonably be expected to harm the effectiveness of the technique or procedure of using confidential informants. If the information provided by

an informant is disclosed without identifying the informant, how will that disclosure impair the use of confidential informants? I find that the BCSC is not authorized to refuse, under s. 15(1)(c) of the Act, to disclose information to the applicant.

***Identity of Confidential Informants***

At para. 19 of its initial submission, the BCSC says that it is "of the opinion" that disclosure would reveal the identity of confidential sources of law enforcement information. At para. 20 of its reply submission, the BCSC says it

> … has clearly established that the sources on which its staff relied in this investigation are confidential and that their identities ought to be protected pursuant to section 51(d) of the *FOIPP Act*.

It relies on paras. 7 and 8 of the Halischuck affidavit, which are quoted above. In para. 7 of his affidavit, Gerry Halischuck deposed that, in his "experience", sources of law enforcement information "expect that their provision of information will be kept confidential." There is no evidence before me to suggest that the BCSC has, or in 1991 had, a formal policy of confidentiality respecting the identity of informants. (It certainly would assist the BCSC if it had a written policy to this effect.) Gerry Halischuk's evidence suggests informants, generally, might have expected confidentiality. It does not, of course, unequivocally establish that any of the specific informants involved in this case was explicitly given assurances of confidentiality by anyone at the BCSC. Nor does it establish that there was implicit confidentiality respecting information any informants provided.

Section 11 of the *Securities Act* – which was in force in all relevant times – is relevant here:

> 11(1) Every person acting under the authority of this Act must keep confidential all facts, information and records obtained or provided under this Act or the regulations, or under a former enactment, except so far as the person's public duty requires or this Act permits the person to disclose them or to report or take official action on them.

Although it would have been preferable to have more explicit markers of confidentiality, I am satisfied that s. 11 of the *Securities Act* – taken together with the affidavit evidence of Gerry Halischuck – is sufficient to establish the necessary element of confidentiality for the purposes of s. 15(1)(d) (and, as appears below, s. 22). I have reviewed the disputed records and find that identifying information withheld by the BCSC under s. 15(1)(d) was properly withheld under that section.

***Exposure of Third Parties To Civil Liability***

As I noted above, the BCSC, in its reply submission, raised s. 15(2)(b) as a ground for withholding information. According to the BCSC, disclosure of information it has withheld would expose third parties to civil liability at the applicant's hands. The

applicant's counsel, in a further reply submission, said the following about the applicant's intentions:

> … he has no intention to sue either the informants referred to in the documentation in question or the law enforcement officers themselves for statements recorded in the said documents.
>
> … [The applicant] only seeks the right to see the allegations which have been made against them [*sic*] and, if he so chooses, to reply to the Securities Commission and request that his reply be placed in the enforcement file of the Securities Commission.
>
> We trust that this clarifies … [the applicant's] intentions. … [The applicant] has been aware that allegations have been made against him for a long time and has never taken action against the Securities Commission, its enforcement staff or unidentified informants.

This is, of course, a non-binding statement of present intention that is of some weight, but not much.

In any case, the issue here is whether the BCSC has, as contemplated by s. 15(2)(b), established that disclosure of specific information in "a law enforcement record could reasonably be expected to expose to civil liability" either the author of the record or someone "who has been quoted or paraphrased in the record". In light of my findings under ss. 15(1) and 22(1) of the Act, I need not deal with this issue. Were it necessary to do so, I would be inclined to the view that the BCSC must do more than it has done to establish the reasonable expectation required under this section. The BCSC has not pointed me to any information in a "law enforcement record" the disclosure of which could reasonably be expected to expose someone to civil liability. Some evidence and argument as to the veracity or falsity of the disputed information would be in order. Faced with the applicant's own initial submission – in which he refers to lawsuits that he has brought for defamation – I would think evidence confirming the existence of those suits, and establishing their relationship (if any) to the information sought here from a "law enforcement record", would be relevant.

**3.4 Third Party Personal Privacy** – The BCSC also relies on s. 22(1) of the Act in refusing to disclose third party personal information to the applicant. Section 22(1) requires a public body to refuse to disclose information "if the disclosure would be an unreasonable invasion of a third party's personal privacy." The BCSC relies on s. 22(3)(b), which provides that a disclosure of personal information "is presumed to be an unreasonable invasion of a third party's personal privacy" if

> … 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,

Having noted that the applicant bears the burden of proof respecting the s. 22(1) issue, the BCSC argues that he should bear a "particularly heavy burden" of proof, especially in light of the "presumption of unreasonableness" created by s. 22(3)(b) and the fact that

"the Applicant was investigated." The BCSC also says (at para. 20 of its initial submission) that it "can be presumed that some of the third parties involved informed against the Applicant" and that it can be presumed that "it may be particularly detrimental to them should this become known to him."

First, there is no basis for imposing a "particularly heavy burden" of proof under s. 57(2) of the Act. Second, a public body in the position of the BCSC must, on receiving an access request under the Act, satisfy itself that there is a factual basis on which it can conclude that one or more of the presumed unreasonable invasions of personal privacy under s. 22(3) actually exists in the circumstances. A public body cannot assume or 'presume' anything. In this case, the BCSC cannot presume or assume that any third party informed against the applicant and that his or her personal information therefore was, to use the words of s. 22(3)(b), "compiled and is identifiable as part of an investigation into a possible violation of law".

Despite these observations, however, I am satisfied on the basis of the Halischuck affidavit, and the disputed records themselves, that s. 22(3)(b) applies to information in the records that would identify third parties. It is abundantly clear from the records, moreover, that some of the withheld third party personal information falls under s. 22(3)(b) because it relates to the investigation of third parties, not just the applicant. I return to this issue below.

The BCSC argues that the applicant has not tried to rebut the presumed unreasonable invasion of personal privacy created by s. 22(3)(b), with the result that s. 22(3)(b) prevents disclosure of personal information. The following paragraph is found at p. 2 of the applicant's reply submission:

> We remind the Commission that [the applicant] has never been convicted of any offence, has never been the subject of administrative action by the Vancouver Stock Exchange, has never been found liable in any civil case for any breach of contract, civil fraud or breach of fiduciary duty and has never been found guilty of any breach of securities law by the Commission or the securities commissions of any other jurisdiction. Given these facts, we can presume that information provided to the Commission suggesting wrongdoing on the part of [the applicant] was false and defamatory. The identity of such informants should not be protected. On the contrary, those who dispense falsehoods should receive no protection under the Act. At the very least, [the applicant] should be provided with the specifics of the allegations that were made so that he can refute them.

The paragraph just quoted amounts to an argument that the third party personal information "is relevant to a fair determination of the applicant's rights", within the meaning of s. 22(2)(c) of the Act.

Section 22(2) requires a public body, when considering an access request that involves third party personal information, to "consider all the relevant circumstances" including those set out in s. 22(2). In my view, the applicant's expressed desire to seek legal redress from those who, he says, have defamed him is a relevant circumstance for the

purposes of s. 22(2)(c). This does not mean, however, that the scales have tipped in favour of disclosure and against third party personal privacy.

Another relevant circumstance is that established by s. 22(2)(f), which requires the head of a public body to consider whether the "personal information has been supplied in confidence". I have already found that the identities of informants are protected, in this case, under s. 15(1)(d) of the Act. I also find that the same information, which qualifies as personal information within the meaning of the Act, was supplied in confidence for the purposes of s. 22(2)(f). This circumstance, in my view, weighs against disclosure of that personal information.

As is noted above, the personal information withheld by the BCSC is third party personal information that is covered by the presumed unreasonable invasion of personal privacy created by s. 22(3)(b). I am not persuaded by the applicant's arguments in favour of disclosure and find, in light of the relevant circumstances referred to above, that the BCSC is required by s. 22(1) to refuse to disclose the personal information it withheld.

## 4.0 CONCLUSION

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

1. Under s. 58(2)(b) of the Act, I confirm the decision of the BCSC that it is authorized to refuse access to the information it has withheld from the applicant under s. 15(1)(d) of the Act; and

2. Under s. 58(2)(c) of the Act, I require the BCSC to refuse access to the information it has withheld from the applicant under s. 22(1) of the Act.

I make no order respecting s. 15(2)(b) of the Act.

December 19, 2000

**ORIGINAL SIGNED BY**

________________________________

David Loukidelis
Information and Privacy Commissioner
for British Columbia