OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 00-31

INQUIRY REGARDING BRITISH COLUMBIA INSTITUTE OF TECHOLOGY

David Loukidelis, Information and Privacy Commissioner
August 2, 2000

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Summary: Applicant requested her personal information from BCIT, which failed to respond to her access request. BCIT responded, almost a year and a half later, after intervention by this Office. BCIT's response addressed only part of the applicant's request. BCIT found not to have complied with its s. 6(1) duty to respond without delay and to respond openly, accurately and completely. BCIT found not to have responded when required by s. 7(1). Reasons given for response were inadequate. BCIT ordered to conduct further searches and to respond to applicant's request completely and accurately. Conditions imposed respecting timing of further search and of response to applicant. Having failed to make submissions in inquiry, BCIT found not to be authorized by ss. 13, 15 or 17 to refuse to disclose information in the one disputed record. Minimal third party personal information in record appropriately severed under s. 22(1).

Key Words: duty to assist – respond without delay – respond openly, accurately and completely – every reasonable effort.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4, 5, 6(1), 8, 13, 15, 17, 22.

Authorities Considered: B.C.: Order No. 245-1998; Order 00-15; Order 00-26.

1.0 INTRODUCTION

This is the second time in two years that the British Columbia Institute of Technology ("BCIT") has been ordered to live up to its statutory responsibilities under the *Freedom of Information and Protection of Privacy Act* ("Act"). In Order No. 245-1998, my predecessor had to order BCIT to fulfill its duties under the Act. He observed, at p. 5, that BCIT had met "almost none of its obligations to the applicant" under ss. 6, 7 and 8 of

the Act. This is, regrettably, another case where BCIT has failed to obey the law. BCIT'S persistent disregard for its clear obligations under the Act is of grave concern.

This overly long saga began when the applicant, a former BCIT employee, submitted an access to information request to BCIT, on October 8, 1998, for:

> All files, notes, aides memoires that pertain to me and are kept by: Human Resources, VP Education, Dean and Associate Dean … [of a named BCIT department] and any other managers of BCIT.

The request went on to ask that the response "include the 'factual information on file' that the VP Education refers to in his letter dated September 8, 1998".

BCIT did not respond to this request, despite its clear obligation under the Act to respond to access requests within the prescribed time. On July 16, 1999, the applicant requested a review, under s. 52 of the Act, respecting BCIT's failure to respond to her request. Apparently as a result of intervention by this office, BCIT responded to the applicant's request on February 10, 2000. I quote the substantive portions of that response:

> This letter is in response to your request for "factual information on file" that the VP Education referred to in his letter dated September 8, 1998.
>
> With respect to the document on file, BCIT is refusing disclosure of this document under Section 15 (law enforcement) and 17 (disclosure harmful to the economic interest of a public body). The document constitutes material prepared for the VP Education in connection with the external investigation/negotiation process.
>
> In addition, Sections 13 and 22 support BCIT's decision to refuse to disclose the document referred to.

This prompted the applicant to request a review, under s. 52, of BCIT's failure "to produce all files as requested in my original application". According to the applicant, BCIT's reply was "incomplete" and BCIT had "clearly failed to conduct a proper search for files". The applicant characterized BCIT's February 10 response as "just one more example of BCIT's uncooperative response".

It is troubling that BCIT failed without explanation – despite two written warnings from this Office – to make any submissions or provide any evidence in this inquiry. The Notice of Written Inquiry issued by this Office on April 20, 2000 clearly established the schedule for the filing of initial and reply submissions. By a letter to BCIT dated May 11, 2000, this Office's Acting Registrar of Inquiries again drew BCIT's attention to the fact that initial submissions had been due on May 5, 2000 and that reply submissions were due on May 12, 2000. Again on May 11, 2000, the Executive Director of this Office wrote to BCIT, confirming that no submission had been received from BCIT and that no request for an extension of time had been received from BCIT. The last paragraph of the Executive Director's letter reads as follows:

> This inquiry is due to close on Monday, May 15, 2000, and if we have not received anything from you, the inquiry will go forward and the Commissioner will make his decision based on the Portfolio Officer's fact report and the initial submission of the applicant.

Despite these warnings – and the clear notice and instructions in the Notice of Written Inquiry – BCIT failed to deliver any submissions or evidence to support its February 10, 2000 decision. Accordingly, I have based my decision in this matter on the Portfolio Officer's fact report and the applicant's submission, as well as my review of the one record in dispute.

2.0 ISSUES

The issues to be considered in this inquiry are as follows:

1. Did BCIT fulfill its duty under s. 6(1) of the Act to make every reasonable effort to assist that applicant and to respond without delay to the applicant openly, accurately and completely?

2. Did BCIT fulfill its duty under s. 8(1) of the Act with respect to the contents of its response to the applicant?

3. Was BCIT authorized by s. 13, 15 or 17 of the Act to refuse to disclose information to the applicant?

4. Was BCIT required by s. 22 of the Act to refuse to disclose personal information to the applicant?

Consistent with previous orders on the point, BCIT has the burden of proof with respect to the first issue. On the second issue, the adequacy of its response for the purposes of s. 8(1) can be answered on the face of the response letter. Section 57(1) of the Act places the burden of proof on BCIT with respect to the application of s. 13, 15 or 17 of the Act and s. 57(2) of the Act places the burden of proof on the applicant with respect to the issue of disclosure of personal information under s. 22.

3.0 DISCUSSION

3.1 Did BCIT Fulfill Its Part 2 Duties? – BCIT's conduct in relation to the applicant's request raises one issue under s. 4(2), two issues under s. 6(1) and one issue under s. 8(1). Section 7 of the Act is also involved here.

Relevant Statutory Provisions

Sections of the Act relevant here read as follows:

> 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.
>
> 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.
>
> 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.

BCIT's Failure to Respond When Required

When it comes to a public body's obligation under s. 6(1) to respond to an applicant "without delay", it is clear that something more is contemplated than adherence to the mandatory response times contemplated by s. 7 of the Act. The s. 6(1) obligation to respond "without delay" cannot be interpreted as merely repeating, or as diminishing, the express obligation in s. 7 to respond within the prescribed times. The Legislature must be taken to have intended s. 6(1) to create a generalized obligation to respond as quickly as practicable within the envelope of the 30 day (or extended) response time contemplated by s. 7.

In this case, it is abundantly clear that BCIT simply did not live up to the clear requirements of s. 7, much less its s. 6(1) duty to respond "without delay". It has both failed to fulfill its s. 6(1) obligation to respond without delay and breached its s. 7

obligation to respond within 30 days (or the extended time under s. 10). Its belated response earlier this year can hardly be said to rectify that default in any meaningful way, although it does, technically, serve as a response to the applicant's access request. There is no point, in this light, for an order under s. 58 respecting BCIT's delay in responding, but I will say that its delay is utterly unacceptable.

BCIT's Failure to Respond Completely

In a number of recent decisions, I have confirmed the standards public bodies are to adhere to in searching for records. A public body must, in searching for records, make such efforts as a fair and rational personal would find acceptable or expect to be done. This does not impose a standard of perfection, but a public body's search efforts must be thorough and comprehensive. See, for example, Order 00-15 and Order 00-26.

On its face, BCIT's response relates only to what it describes as a "request for 'factual information on file' that the VP Education refers to in his letter dated September 8, 1998". The applicant's access request, the relevant portions of which are quoted above, plainly goes beyond this. The "factual information on file" just described is only one aspect of the broader request made by the applicant for "files, notes and aides memoires" that pertain to her and that identified departments or individuals at BCIT keep. Especially in the absence of any explanation from BCIT in this inquiry, I have no hesitation in concluding that its February 10, 2000 response failed to discharge BCIT's obligation under s. 6(1) to respond completely and accurately to the applicant's request. The appropriate order is made below.

Was BCIT's Response Letter Adequate?

In a number of orders, I have noted that public bodies must, as required by s. 8(1)(c)(i) of the Act, give "reasons for the refusal" by the public body to disclose information. This duty is in addition to the s. 8(1)(c)(i) obligation to tell an applicant "the provision of this Act on which the refusal" to disclose information is based. BCIT complied with the latter obligation, but failed to give "reasons for the refusal". I readily acknowledge that it will, in many cases, be difficult for a public body to give *detailed* reasons for refusal without disclosing information it has withheld. But s. 8(1) requires reasons to be given in as much detail as is reasonably practicable in the circumstances of each case and bearing in mind the practical limits just described.

BCIT's statement in its response to the applicant that the record "constitutes material prepared for the VP Education in connection with the external investigation/negotiation process" cannot be described as "reasons for its refusal" to disclose information. The words just quoted speak to the general purpose for which the disputed record was prepared. They do not give reasons for applying exceptions to information in that record.

On a lesser scale of severity, BCIT's response failed to comply with s. 8(1)(c)(ii), which requires every response to an applicant to include

> … 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.

I address this aspect of BCIT's failure to comply with statutory requirements in the conditions set out below.

BCIT's Duty To Sever

Section 4(2) requires a public body to review responsive records carefully and to sever and withhold from an applicant only those portions that are excepted from disclosure under one of the Act's exceptions. It reads as follows:

> 4. (2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

I have reviewed an unsevered version of the disputed record. It contains the applicant's own personal information, as well as general information and a small amount of third party personal information. The applicant's own personal information should, at the very least, have been disclosed to the applicant. BCIT should have severed any information it considered was excepted from disclosure and withheld only that information. By withholding the entire record, BCIT failed to perform this obligation under s. 4(2) of the Act.

3.2 Merits of BCIT's Response – As was noted above, BCIT's response dealt with only one aspect of the applicant's request, *i.e.*, her request for "'factual information on file' that the VP Education refers to in his letter dated September 8, 1998". BCIT withheld this record, which has a total of four pages, in its entirety, quoted above.

Information Withheld Under Discretionary Exceptions

With the exception of third party personal information protected under s. 22(1) – an issue that is dealt with below – BCIT's failure to submit evidence or argument in this inquiry respecting the application of s. 13, 15 or 17 of the Act means it has failed to discharge the burden of proof placed on it by s. 57(1) in relation to these exceptions. Again, BCIT failed to submit any evidence or argument in this inquiry. Records in dispute in an inquiry are themselves a kind of evidence; they may even be directly probative of facts in issue in the inquiry. In the vast majority of cases, however, it will not be possible to establish from the records alone the facts necessary to prove that one of the Act's exceptions applies to information in the records. Nor is it my duty to try to do that unaided by submissions from the party bearing the burden of proof under s. 57. At all events, this is certainly a case where it is not possible to establish, based on a review of the record alone, that any of the exceptions claimed by BCIT actually applies to any part of the record. I therefore find that BCIT is not authorized by any of those sections to refuse to disclose information in the disputed record to the applicant.

Personal Information Issues

In her initial submission, the applicant notes that she has only asked for files concerning her and not files about other people. The minimal amount of personal information in the record is almost entirely associated with a recitation of various complaints or allegations made by the applicant about others. The applicant, it is reasonable to conclude, knows the identity of the individuals about whose conduct she has complained. There is, however, a small amount of third party personal information in the record that goes beyond the names of individuals about whom the applicant complained or made allegations. I have decided this small amount of personal information should, especially in light of the applicant's statement that she does not wish to see other people's files, be severed and withheld under s. 22(1).

It should be emphasized that all public bodies, including BCIT, have an obligation when responding to an access request to review all responsive records with care and to determine whether exceptions to the right of access apply to information in them. Since s. 22(1) is a mandatory exception that protects third party personal privacy, it is especially important for public bodies to carefully consider, when responding to a request, whether personal information in the responsive records must be withheld under s. 22(1). If a public body proposes to release to an applicant third party personal information to which s. 22(1) might apply, s. 23 requires the public body to first give notice to, and receive representations from, any third party whose personal information is in issue. Where a public body proposes not to disclose third party personal information, it may consider using the s. 23 process, even though it is not mandatory where the public body has decided not to disclose the personal information. Again, it is of the utmost importance that public bodies always consider – at the time they respond to an access request – whether s. 22(1) applies to personal information. It is unacceptable for me to have to do this, except in extraordinary circumstances, in an inquiry.

4.0 CONCLUSION

For the reasons given above, the following orders are made:

1. Under ss. 58(3)(a) and 58(4) of the Act, I order BCIT to perform its duty under s. 6(1) of the Act to respond accurately and completely to the applicant's access request by completing all of the following within 30 days after the date of this order:

    (a) BCIT must undertake and complete a search for records responsive to the applicant's access request dated October 8, 1998;

    (b) BCIT must deliver to the applicant a response to her access request respecting any responsive records that are found as a result of the search described in paragraph 1(a) and in doing so must comply with s. 8(1) of the Act;

(c) BCIT must deliver to me a copy of its response to the applicant under paragraph 1(b), with that copy being sent to me concurrently with its delivery to the applicant; and

(d) BCIT must deliver to me (with a copy being sent to the applicant directly and concurrently), within 10 days after its response is sent under paragraph 1(b), an affidavit sworn by a knowledgeable person which describes BCIT's search for records and the results of the search, including by describing the various possible sources of records checked, how the search was conducted and by whom, and how much staff time was expended in the search.

2. Under s. 58(2)(a) of the Act, I require BCIT to give the applicant access to the information in the disputed record that BCIT refused to disclose under any one or more of ss. 13, 15 and 17 of the Act.

3. Under s. 58(2)(c) of the Act, I require BCIT to refuse to give the applicant access to those parts of the disputed record containing third party personal information protected by s. 22(1) of the Act, as shown on the severed version of the disputed record delivered to BCIT with its copy of this order.

August 2, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia