OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
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Order 01-08

MINISTRY OF ATTORNEY GENERAL

David Loukidelis, Information and Privacy Commissioner
February 27, 2001

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Summary: Third parties wrote complaint letter to RCMP about views publicly expressed by RCMP officer about gay and lesbian issues. Ministry disclosed most of the letter to applicant. Ministry not authorized by s. 15(2)(b) or s. 19(1)(a), or required by s. 22(1), to withhold most of the remaining information in the letter. Small portions of remaining information, however, had to be withheld under s. 22(1).

Key Words: confidential source – expose to civil liability – threaten – mental or physical health – safety – personal information – unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(d), 15(2)(b), 19(1)(a) and 22(1).

Authorities Considered: B.C.: Order No. 153-1997, [1997] B.C.I.P.C.D. No. 11; Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43; Order 01-01, [2001] B.C.I.P.C.D. No. 1.

Cases Considered: *Fletcher-Gordon* v. *Southam Inc.* [1997] B.C.J. No. 269 (S.C.); *Hodgson* v. *Canadian Newspapers Company Ltd. et al.*, [1998] O.C.J. No. 2682 (O.C.J., G.D.); *Ontario (Information and Privacy Commissioner, Inquiry Officer)* v. *Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

1.0 INTRODUCTION

[1] This case concerns a complaint letter written to the RCMP, on June 10, 1998, by residents of a small community in British Columbia. The letter expressed concern about the conduct of a local RCMP officer; it complained about letters he wrote to a local

newspaper, expressing his views on sex education in schools and on homosexuality. The complaint letter was copied to the Ministry of Attorney General ("Ministry"), which as a result had custody of that record. The letter was also copied to RCMP Headquarters, the federal Minister of Justice and a Member of Parliament.

[2] The applicant in this case is the police officer mentioned in the letter. On November 22, 1999, he requested, under the *Freedom of Information and Protection of Privacy Act* ("Act"), copies of correspondence regarding letters to the editor of the newspaper, dated June 1998 or later, including a letter of complaint to the Ministry and all material received or generated afterward.

[3] The Ministry responded to the request on December 16, 1999. It provided the applicant with a severed copy of the complaint letter and a computer print-out of its mail log, which recorded receipt of the complaint letter. The complainants' names and addresses were severed from the log under ss. 19(1)(a) and 22(1) of the Act. The same information was severed from the complaint letter, as was additional information, under ss. 15(2)(b), 19(1)(a) and 22(1) of the Act. According to the Ministry's response letter

> … personal opinions of third parties have been severed under section 19(1)(a) and section 22(1) to prevent harm to their mental health and to protect their personal privacy. Section 15(2)(b) has also been applied on the basis that disclosure of these personal opinions from a law enforcement record may expose the third parties to civil action.

[4] The Ministry also provided the applicant with a summary of "all personal information pertaining to yourself, in accordance with the requirements of section 22(5)". The Ministry says in this inquiry that it believes the applicant already knows the identity of the third party or parties who signed the letter. It argues that he is only seeking a copy of the letter to confirm that fact (and perhaps for other purposes, not specified by the Ministry).

[5] On December 29, 1999, the applicant asked for a review, under s. 52 of the Act, of the Ministry's decision. The applicant requested a review of the severing of information from the complaint letter only, as well as a review of the completeness of the Ministry's response. On the latter point, the applicant expressed concern about the completeness of the Ministry's response. He noted that, although the complaint letter said that samples of his letters to newspapers were attached, copies of those records had not been provided to him along with the copy of the complaint letter. He also said that he did not receive a copy of the Ministry's response to the complaint letter and that a file number printed on the top of the log print-out suggested a reference to another file.

[6] On March 20, 2000, the Ministry responded to these concerns about its response. It provided the applicant with copies of his letters to the newspaper which had been attached to the original complaint letter, explained that the file number at the top of the mail log simply referred to the file in which the complaint letter was located (and not to another file) and advised him that there was no response from the Ministry to the letter. The Ministry also provided more detailed reasons for its decision to sever information under ss. 15(2)(b), 19(1)(a) and 22(1).

[7] The applicant remained unsatisfied with the severing of the complaint letter and I held a written inquiry under s. 56 of the Act.

2.0 ISSUES

[8] The Portfolio Officer's Fact Report and the Notice of Written Inquiry issued to the parties set out the issues under review, *i.e.*, the Ministry's application of ss. 15(2)(b), 19(1)(a) and 22 (1) to the record in dispute. Less than two weeks after that notice was issued, the Ministry sent the applicant another letter, informing him that it would also be relying on s. 15(1)(d) of the Act to withhold information.

[9] The applicant objects to the Ministry's late claim of the benefit of s. 15(1)(d). He argues that the Ministry had plenty of time, including during the mediation process, to further consider and modify its position. He says that he framed his initial submission in accordance with the Portfolio Officer's fact report and that the Ministry should have objected at the outset if the fact report failed to accurately describe the Ministry's position. He objects to the Ministry's attempt to change the parameters of the inquiry.

[10] In its initial submission, the Ministry argues that it is authorized under s. 15(1)(d) to withhold the names of the authors of the letter. Section 15(1)(d) reads 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
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> …
>
> (d) reveal the identity of a confidential source of law enforcement information.

[11] In his initial submission, the applicant says he does not wish to receive the authors' names. The applicant says he "has no interest in obtaining personal information that identifies third parties". The applicant is interested in the "allegations and supporting arguments advanced in the letter, not its authorship."

[12] In its reply submission, the Ministry clarifies that it only wishes to apply s. 15(1)(d) to the names of the third parties and that, if the applicant is not pursuing access to the names of the third parties, the names are no longer at issue. The Ministry, therefore, has withdrawn its application of s. 15(1)(d). In this light, it is not necessary to consider the applicant's objection any further. I will say, however, that the applicant's objection to the late addition of s. 15(1)(d) was compelling and I would have been inclined to not allow the Ministry to raise that discretionary exception at such a late stage. Among other things, I note that, at the very end of the mediation process, the Ministry wrote again to the applicant, clarifying its position and providing further information on how and why it applied the exceptions it did. No mention of s. 15(1)(d) was made.

[13] The issues under review in this inquiry, therefore, are as follows:

1. Was the Ministry authorized by s. 15(2)(b) or s. 19(1)(a) of the Act to refuse to disclose information to the applicant?

2. Was the Ministry required under s. 22(1) of the Act to withhold personal information from the applicant?

[14] Under s. 57(1), the Ministry bears the burden of establishing that it is authorized to withhold information under s. 15(2)(b) or 19(1)(a). Under s. 57(2), the onus is on the applicant with respect to s. 22(1) and third party personal information. 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, [1999] B.C.I.P.C.D. No. 43.

3.0 DISCUSSION

[15] **3.1 Record In Dispute** – In his initial submission, the applicant says he only seeks access to portions of the severed letter. He does not seek access to personal information that identifies the third parties and, after dividing the severed portions of the letter into what he refers to as "Record A" and "Record B", he says he only seeks disclosure of Record B.

[16] The terms Record A and Record B refer to summaries of severed information that the Ministry attached to the severed record as part of its response to the applicant. The Ministry summarized the first portion of severed information in the letter as consisting of

> … a specific allegation against the applicant, and the complainants' rationale in support of that allegation, including concerns about the effect of the applicant's letters on public opinion… .

[17] The second portion of severed information was summarized as "the complainants' concerns about the RCMP system at large in light of the applicant's letters." The third and fourth portions were summarized as "the complainants' concerns about the effect of the applicant's views as expressed in his letters on the performance of his professional duties".

[18] The applicant defines the information severed from the first, third and fourth severed portions collectively as Record A and the information severed in the second portion as Record B. The applicant apparently concluded that he would not be able to meet the burden of proof with respect to disclosure of Record A, so he said that he was not continuing to seek access to the corresponding portions of the record. The portions of the record described as Record A are, therefore, no longer in issue in this inquiry.

[19] **3.2 Exposure to Civil Liability** – The Ministry argues that s. 15(2)(b) applies to all of the severed information (including, by inference, information other than the third parties' identities). Section 15(2)(b) reads as follows:

> 15(2) The head of a public body may refuse to disclose information to an applicant if the information
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> …
>
> (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

[20] Relying, in part, on *in camera* affidavit evidence, the Ministry argues (at para. 4.2.1 of its initial submission), that this section applies because the applicant is "someone who has demonstrated a willingness to, in a determined and public fashion, pursue issues that he sees as important." It relies on Order No. 153-1997, in which my predecessor considered s. 15(2)(b). It contends that s. 15(2)(b) applies where there is evidence that an applicant "may threaten civil proceedings against a third party, rather than there needing to be evidence that such civil proceedings would have a reasonable prospect of success" (para. 4.20, initial submission). The Ministry says the evidence here establishes that the third parties have "reasonable grounds" to fear that the applicant "may threaten civil proceedings" against them. It does not elaborate on what those reasonable grounds are. The applicant agrees with the s. 15(2)(b) test proposed by the Ministry, but says there is no evidence to support its contention that he will or may threaten civil proceedings against any third party.

[21] The circumstances before my predecessor in Order No. 153-1997 are materially different from those before me. In that case, the public body provided evidence that the applicant had a history of instigating or threatening to instigate civil proceedings against individuals with whom he had disputes. The applicant in this case has, in the past, exercised his freedom of expression by speaking publicly about issues that he believes to be of public interest. In this sense, he has, as the Ministry observes, 'pursued' issues he sees as important. It does not follow, however, that this establishes a reasonable expectation that disclosure of the severed information will expose the letter's author to civil liability in the sense contemplated by the section or Order No. 153-1997. The test under s. 15(2)(b) is whether there is a reasonable expectation that disclosure would expose the authors of the record, or a person who has been quoted or paraphrased in the record, to civil liability. In all the circumstances – including having regard to evidence (or lack thereof) as to the applicant's intentions and to the contents of the record – I find that the Ministry has failed to establish a reasonable expectation of harm within the meaning of s. 15(2)(b).

[22] I note in passing that, in *Fletcher-Gordon* v. *Southam Inc.* [1997] B.C.J. No. 269 (S.C.), Dillon J. ruled that, where the media had reported the contents of records obtained under the Act, a qualified privilege existed for the purposes of the law of defamation. (A contrary conclusion was reached by Lane J. in the Ontario case of *Hodgson* v. *Canadian Newspapers Company Limited et al.*, [1998] O.C.J. No. 2682 (Ont.Ct.J.).)

[23] **3.3 Threat to Third Party Safety or Health** – According to the Ministry, disclosure of the severed information could reasonably be expected to threaten the safety, or mental or physical health, of others within the meaning of s. 19(1)(a) of the Act. That section reads as follows:

> 19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
>
> (a) threaten anyone else's safety or mental or physical health, or … .

[24] The Ministry observes that the s. 19(1)(a) test requires only that there be a reasonable expectation of a threat to third-party safety or health – not a reasonable expectation of actual harm to safety or health. Citing previous orders, it says that it is required to act prudently and cautiously in applying s. 19(1)(a), and that it has done so in this case. It also says I should act prudently in such matters.

[25] In this case, the Ministry argues, s. 19(1)(a) is triggered because disclosure of the severed information "would increase the risk that third parties will be a target for harm" (para. 4.28, initial submission). Although the Ministry does not allege that the applicant is a threat to anyone – including the third parties – it argues "there is reason to believe that disclosure of the Information could reasonably be expected to result in the Applicant attempting to stir up anti-homosexual sentiment in the community" and that the applicant "may decide to target the third party's [*sic*] in any such public debate" (para. 4.29, initial submission). The Ministry says the applicant "has been quite willing to vocalize his concerns about issues surrounding homosexuality in a public manner", and that any attempt by the applicant to "stir up anti-homosexual sentiment in the community" could ultimately result "in other individuals harassing, threatening or assaulting homosexual members of the community" (para. 4.29, initial submission).

[26] This line of argument is elaborated on at paras. 4.30 and 4.31 of the Ministry's initial submission, where it says that, if the applicant "were to stir up more homophobic sentiment" in the community by publicly speaking out on such issues, unidentified individuals who are

> … capable of assaulting or harassing gays and lesbians as a result of their sexual orientation are likely to take notice of the fact that it is an RCMP officer who is adopting an anti-gay and lesbian attitude.
>
> There is a risk that such individuals will see the views of a police officer as validating their own anti-gay and lesbian attitudes, which will in turn heighten the already prevalent risk that such people will assault or harass gays or lesbians in the community. Given the legitimate fears of the third parties, the Public Body submits that the Commissioner should act prudently in such a matter.
>
> 4.31 The Public Body submits that the release of the Information could result in the Applicant making the Third Parties a target of public criticism or the unwanted focus of public controversy. The Public Body submits that such a result will create a risk of harm to the third parties, and those around them, that [*sic*] they could be the subject of harassment, threats or assaults by individuals who are predisposed to engage in conduct that is homophobic in nature. Further, there is a potential for harm to third party businesses and financial interests, which in turn could result in mental harm.

[27] The Ministry maintains its s. 19(1)(a) position despite the fact that the applicant does not wish to have access to identifying information. In light of the fact that the applicant does not wish identifying information, I am not convinced by the Ministry's s. 19(1)(a) arguments.

[28] The Ministry's argument fails to recognize that the applicant does not need the severed (non-identifying) information in order to speak out publicly and create the risk identified by the Ministry. It is open to a person in the applicant's present position – albeit on pain of criminal prosecution and perhaps other sanction – to speak publicly in a way that will create a climate of fear or even facilitate violence against gays and lesbians. (I emphasize there is no evidence whatsoever that the applicant would do this and he vehemently denies that he would.) I am not persuaded of the link between disclosure of the severed, non-identifying information and a reasonable expectation of harm, within the meaning of s. 19(1)(a), on the basis advanced by the Ministry. My reasoning here proceeds on the test for s. 19(1)(a) that I most recently expressed in Order 01-01, [2001] B.C.I.P.C.D. No. 1.

[29] In addressing this issue, I have considered the Ontario Court of Appeal decision in *Ontario (Information and Privacy Commissioner, Inquiry Officer)* v. *Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395, on which the Ministry relies. I referred to that decision in Order 01-01. It does not assist the Ministry here.

[30] **3.4 Unreasonable Invasion of Third Party Privacy** – While acknowledging that some of the severed information relates to the applicant, and could therefore be characterized as his personal information, the Ministry says that s. 22(1) of the Act requires it to refuse to disclose that information. Section 22(1) says that 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. In this case, the Ministry argues that disclosure of the severed information "would be an unreasonable invasion of third party privacy, as it would identify confidential third party communications and unfairly expose third parties to harm" (para. 4.0, initial submission). Among other things, the Ministry says that the presumed unreasonable invasions of personal privacy set out in ss. 22(3)(b) and (h) apply. Those sections read as follows:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
>
> (b) 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,
>
> …
>
> (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,
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> … .

[31] Again, the applicant is not interested in obtaining information that would identify the third parties. I conclude that neither s. 22(3)(b) nor s. 22(3)(h) applies in this case. I need not consider whether any relevant circumstances – including those set out in s. 22(2) – apply with respect to those provisions.

[32] In the perhaps unique circumstances of this case, it is not possible for me to discuss my reasons for concluding, as I do, that very minor portions of the severed information qualify for protection under s. 22(3). I have severed that information from the record, as shown on the copy delivered to the Ministry with its copy of this order. The Ministry may also sever the address, names and signatures of the complainants, since the applicant has conceded that he is not interested in this information. The rest of the information severed and withheld by the Ministry is not required to be withheld under s. 22(1).

[33] However, the Ministry may, as a result of the applicant conceding that he is not seeking disclosure of Record A, withhold the information so described by him. I note in passing that, had the applicant not removed this portion of the record from the inquiry, I would have been strongly inclined to order its release. This portion of the letter pertains to the applicant just as much as the rest of the letter does. It may reflect the complainants' concerns about the RCMP, but only in relation to the applicant's behaviour.

4.0 CONCLUSION

[34] The applicant has confirmed that he does not wish access to information that would identify anyone. For the reasons given above, I make the following orders:

1. Under s. 58(2)(a) of the Act, subject to paragraph 2, below, I require the Ministry to give the applicant access to the information in the disputed record withheld by the Ministry under ss. 15(2)(b), 19(1)(a) and 22(1); and

2. Under s. 58(2)(c) of the Act, I require the Ministry to refuse, under s. 22(1) of the Act, access to the personal information shown on the copy of the disputed record that I have delivered to the Ministry along with its copy of this order and, in light of the applicant's concessions described above, to refuse access to personal information in the record that would identify those who signed the letter.

February 27, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia