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

Order 02-25

MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

David Loukidelis, Information and Privacy Commissioner
May 31, 2002

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Summary: The applicant requested employment records relating to herself for a specific period of time. The Ministry disclosed records, withholding some information under ss. 13(1) and 22. Applicant requested review of severing and Ministry's search. Ministry disclosed most s. 13(1) information and some records it had inadvertently originally missed in copying records. The Ministry has complied with its s. 6(1) duty in searching for records and properly withheld third-party personal information under s. 22. No order is necessary regarding s. 13(1).

Key Words: search for records – respond openly, accurately and completely – unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1) and 22.

Authorities Considered: B.C.: Order No. 73-1995, [1995] B.C.I.P.C.D. No. 46; Order No. 198-1997, [1997] B.C.I.P.C.D. No. 59; Order 00-44, [2000] B.C.I.P.C.D. No. 48; Order 01-23, [2002] B.C.I.P.C.D. No. 23; Order 02-03, [2002] B.C.I.P.C.D. No. 3.

1.0 INTRODUCTION

[1] The applicant in this case was an employee of the Ministry of Children and Family Development ("Ministry"). She requested, under the *Freedom of Information and Protection of Privacy Act* ("Act"), copies of correspondence – e-mails, deleted e-mails, notes, minutes of meetings and files – about herself by name, about her employment and about her case under the provincial government's Short Term Illness and Injury Program ("STIIP") for employees. She specified that she was interested in such records from July

7, 2000 to the date of her request, January 15, 2001, that were held by or sent to or from several named individuals or any staff working in their offices.

[2] The Ministry replied some five months later by providing approximately 200 pages of records, with some pages severed or withheld under ss. 13 and 22 of the Act. The applicant requested a review of the decision to withhold information and also said she believed there were more records. During mediation, the Ministry conducted another search for records, but said that it found no more records. Mediation was not successful in resolving the issues, so I held an inquiry under s. 56 of the Act. After my Office issued the Notice of Written Inquiry, the Ministry disclosed some of the records it had withheld under s. 13(1).

2.0 ISSUE

[3] The issues before me in this inquiry are:

1. Was the Ministry authorized to withhold information under s. 13(1)?

2. Was the Ministry required to withhold third-party personal information under s. 22?

3. Did the Ministry fulfil its duty under s. 6(1) to make every reasonable effort to respond to the applicant openly, accurately and completely in terms of its search for responsive records?

[4] Under s. 57(1) of the Act, the Ministry has the burden of proof respecting s. 13(1) while, under s. 57(2), the applicant has the burden regarding s. 22. Previous orders have established that the public body has the burden with respect to s. 6(1) issues.

3.0 DISCUSSION

[5] **3.1 Search for Records** – Section 6(1) of the Act imposes on a public body a variety of obligations. The section reads 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.

[6] A public body is required, as part of its duty under s. 6(1) of the Act, to undertake an adequate search for records that respond to an access request. Many previous orders have discussed the standards to which a public body must adhere in searching for records. See, for example, Order 02-03, [2002] B.C.I.P.C.D. No. 3, at para. 14. I will not repeat those standards, which I have applied in reaching my decision here.

[7] The applicant cites several examples of records that she believes exist, but which the Ministry did not provide to her. She refers to a "ghost" file she believes another

employee keeps on her, notes of a meeting which took place in August 2001 between the applicant's husband and another Ministry employee, during which her husband saw this employee taking notes, and records related to other meetings, telephone conversations, e-mail exchanges, e-mail attachments and other correspondence involving Ministry staff and others. She points out that the Ministry later disclosed more records and suggests that this shows that it either did not carry out an adequate search in the first place or it is withholding records improperly.

[8] The Ministry argues it has fulfilled its duty under s. 6(1) in searching for responsive records. It lists the areas within the Ministry where its staff searched for records and says it has no reason to believe records exist in other areas. Staff had included their e-mail "trash" folders in the search for deleted e-mails and had found no additional responsive records. The search was thorough and comprehensive and it has explored all possible search avenues (paras. 4.13-4-16, initial submission).

[9] The affidavit evidence from two Ministry employees supports the Ministry's submission on these points. One employee, Gerry Edwards, deposed that, after the Ministry had disclosed some previously withheld records, she reviewed the original records in the Ministry's Human Resources Branch. As a result, she said she found other records that the Ministry should have disclosed. It appears the Ministry then disclosed these additional records.

[10] The other employee, Frances Benedict, deposed as to how she had co-ordinated the search for records within the Ministry's personnel branch and other areas. She said she personally carried out some of the searches and had reviewed the collected records to ensure there were no gaps. She knows of no "ghost" files held by any Ministry employee and also points out that the applicant requested records for a specific period of time, not her entire personnel file.

[11] In response to the applicant's skepticism, based on the Ministry's having found and disclosed records after the initial searches, the Ministry says that, in the first case, it had disclosed records it had previously withheld. In other words, the Ministry does not see this as an indication that its initial search efforts were insufficient. In the case of later disclosures, it says, some records were simply overlooked in the photocopying process. Still another record that was later disclosed had been found initially, but there had been some doubt about whether or not it was responsive to the request. In the case of the meeting the applicant's husband had attended with a Ministry employee, the Ministry acknowledges this employee took notes of the meeting, but says he later destroyed them. He did this, the Ministry explains, when nothing came of the meeting. The Ministry responds in detail to the rest of the applicant's points on the search issue and has provided supporting affidavit evidence from its staff.

[12] I do not propose to recite here all of the Ministry's responses on the search issue. I am persuaded that the Ministry has provided reasonable explanations as to why it did or did not find records in all of the examples the applicant raised. In my view, the Ministry's searches for records were reasonable and would conform to the efforts that

a fair and rational person would expect. The Ministry has, in my view, met the standards for s. 6(1).

[13] I therefore find that the Ministry fulfilled its s. 6(1) duty in searching for records responsive to the applicant's request.

[14] The issue of whether or not the Ministry met its duty to respond completely and accurately is not before me, although the Ministry admits that it inadvertently missed some records while photocopying them and that there was a difference of opinion as to one record's responsiveness to the request, which the Ministry resolved in favour of disclosure to the applicant. Accordingly, I will not consider whether the Ministry met its s. 6(1) obligation to respond completely and accurately in the first place. I will note, however, that the Ministry has now apparently accounted for all records that it has found.

Deleted e-mails

[15] A separate issue under s. 6(1) is whether the Ministry was required to restore deleted e-mails in responding to the applicant's request. Relying on several of my predecessor's decisions on this point, the Ministry says s. 6(1) duty does not require it to find and restore to intelligible form e-mails that have been deleted and exist only in back-up tapes. See, for example, Order No. 73-1995, [1995] B.C.I.P.C.D. No. 46, and Order No. 198-1997, [1997] B.C.I.P.C.D. No. 59.

[16] The Ministry says back-up systems are designed to re-establish entire e-mail systems in the event of a catastrophe, not for retrieving individual deleted e-mails. Section 6(1) requires public bodies to make reasonable efforts to retrieve records and retrieving deleted e-mail messages from backup tapes exceeds a reasonable effort, the Ministry argues. Moreover, it says, there is no reason to believe there are any responsive deleted e-mails and it would be a complex, costly and time-consuming exercise to recover and search back-up tapes to determine if any such records exist (paras. 4.07-4.13, initial submission). The Ministry relies on an affidavit sworn by Ted Richter, who is the manager of security operations for the Information Services Technology Division, Ministry of Management Services.

[17] I agree with the Ministry that, in these circumstances, its s. 6(1) duty does not extend to retrieving deleted e-mail messages. The applicant's main reason for wanting a search for deleted e-mails is the supposed lack of information supplied to her in the first place. She argues, as well, that there is a conflict of interest on the part of the human resources advisor responsible for her case. She says this because that advisor also co-ordinated the search for records in response to her request and there was litigation between the applicant, on the one hand, and the Ministry and the advisor, on the other, at that time. As a result, it is doubtful in her view that this person could have done a thorough and unbiased search. The applicant did offer to reduce to three the number of individuals whose e-mails she wanted retrieved, although she did not give names. The number of individuals is, in my view, immaterial here. With the present state of technology, as described in the Richter affidavit, it is not reasonable, in my view, to

require the Ministry to do as the applicant asks. I find no fault with the Ministry's actions in refusing to search for and restore deleted e-mails.

[18] **3.2 Advice and Recommendations** – Section 13(1) allows a public body to withhold information the disclosure of which would reveal advice or recommendations developed by or for a public body or minister. The Ministry says that the only record to which it applied s. 13(1) is an e-mail message of March 7, 2001 regarding staffing issues (p. 74 of the records in dispute provided to me). This record is not actually responsive to the applicant's request, it argues, as it does not relate to the applicant or to her employment or STIIP situation. It says this record was included in error in the package of records. I do not therefore need to consider this record, according to the Ministry. If I decide to consider it, the Ministry says, the record contains a recommendation on how to deal with a personnel matter.

[19] I agree with the Ministry that this record does not fall within the scope of the applicant's request. It does not have anything to do with the applicant, her employment or her STIIP. It is therefore not necessary for me to deal with it.

[20] **3.3 Personal Privacy** – Section 22 requires a public body to withhold personal information the disclosure of which would be an unreasonable invasion of a third party's personal privacy. The Ministry argues that the information it withheld under s. 22 in this case falls under s. 22(3)(d) of the Act and that it is not aware of any factors that rebut the presumed invasion of privacy. I have discussed the application of s. 22, including s. 22(3)(d), in numerous previous orders and will not repeat the discussion here. See, for example, Order 00-44, [2000] B.C.I.P.C.D. No. 48, regarding how s. 22 is to be applied.

[21] The relevant sections of s. 22 read 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
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

> (e) he third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> (g) the personal information is likely to be inaccurate or unreliable, and
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (d) the personal information relates to employment, occupational or educational history, … .

[22] The withheld information in this case is minimal and all relates to other people, *i.e.*, it is all third-party personal information. The information mostly concerns leave management, personnel or employment issues of other employees and, in one case, is an employee's home telephone number. Technically, this information is all outside the scope of the applicant's request, as the Ministry argues. It is not, therefore, necessary for me to deal with this issue. By contrast to the s. 13(1) issue, however, I consider it desirable to address the s. 22 issue in light of the mandatory nature of the s. 22 exception.

[23] The Ministry argues the applicant has not met the burden of showing how disclosure of these people's personal information would not unreasonably invade their privacy. Indeed, apart from acknowledging that the Ministry applied s. 22 to some information, the applicant has not addressed s. 22 at all in her submissions. It is not clear if she is even interested in this non-responsive information.

[24] I agree with the Ministry that this information is third-party personal information and that most of it falls within s. 22(3)(d). The exception to this is the employee's home telephone number. It does not, in my view, fall within any of the presumed unreasonable invasions of personal privacy found in s. 22(3), although this does not mean it can be disclosed. As I stated at para. 11 of Order 01-23, [2002] B.C.I.P.C.D. No. 23, the issue of whether public body employees' home addresses must be withheld under s. 22 is to be decided in the circumstances of each case. The same view applies to an employee's home telephone number.

[25] In my view, none of the circumstances in s. 22(2) applies to any of the withheld personal information here and I am not aware of any other relevant circumstances. In the absence of any relevant circumstances that rebut the presumed unreasonable invasion of personal privacy of the third parties – and noting in passing the applicant's apparent lack of interest in this information – I am persuaded that the applicant has not met her burden of proof and that the Ministry is required by s. 22 to withhold all of this personal information.

4.0 CONCLUSION

[26] For the reasons given above, I make the following orders:

1. Under s. 58(3)(a) of the Act, I confirm that the Ministry has complied with its s. 6(1) duty to respond to the applicant openly, accurately and completely in its search for records.

2. Under s. 58(2)(a) of the Act, I require the Ministry to refuse the applicant access to the information that it withheld under s. 22.

For the reasons given above, no order is necessary regarding s. 13(1).

May 31, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia