OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 03-27

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

Celia Francis, Adjudicator
July 8, 2003

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Summary: Applicant requested records related to himself. Ministry severed some information. Applicant requested review of response, saying certain records missing. Ministry found to have complied with s. 6(1) duty in searching for records and to have applied ss. 13(1) and 22 properly to some information.

Key Words: duty to assist – adequacy of search – respond openly, accurately and completely – every reasonable effort – advice or recommendations – developed by or for a public body or a minister – personal privacy – unreasonable invasion – workplace investigation – supplied in confidence – employment history – fair determination of rights – unfair exposure to harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 13(1), 22(1), 22(2)(c), (e) and (f), 22(3)(d), 22(4)(e) and 22(5).

Authorities Considered: B.C.: Order 00-26, [2000] B.C.I.P.C.D. No. 29; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-30, [2001] B.C.I.P.C.D. No. 31; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-12, [2002] B.C.I.P.C.D. No. 12, Order 02-20, [2002] B.C.I.P.C.D. No. 20.

1.0 INTRODUCTION

[1] In May 2001, the applicant, who was at that time a Corrections Branch employee but who has since, it is said, voluntarily left the provincial service, requested access from the Ministry of Attorney General under the *Freedom of Information and Protection of Privacy Act* ("Act") to copies of all records that related to him personally for the period 1990-2002. He included with his request a list of correctional centres and people he expected would hold records about him.

[2] The Ministry of Public Safety and Solicitor General ("Ministry"), by then the appropriate public body, responded in January 2002 by providing copies of some records and severing some information under ss. 13, 15, 17, 19 and 22 of the Act. The applicant requested a review of the Ministry's response later the same month, stating that the Ministry had not provided all of the records that should exist. For example, he said, there were no records related to a complaint he had filed in 1994 nor were there any records related to his "latest involvement with the Ministry", which he said had been going on for 18 months at that time.

[3] During mediation, the Ministry abandoned its decision to apply s. 19 to portions of the records. Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act.

[4] I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[5] The issues before me in this case are:

1. Whether the Ministry complied with its duty under s. 6(1) of the Act in carrying out an adequate search for the requested records,

2. Whether the Ministry was authorized by s. 13(1) of the Act to withhold some information and

3. Whether the Ministry was required by s. 22 to withhold personal information.

[6] Section 57(1) of the Act places the burden of proof on the Ministry with respect to the information it withheld under s. 13(1). Previous orders have established that the burden with respect to s. 6(1) issues is also on the Ministry. Under s. 57(2), the applicant has the burden regarding s. 22.

3.0 DISCUSSION

[7] **3.1 Scope of this Inquiry** – I will begin with some remarks on the exceptions and records I have considered in this inquiry.

Issues under review

[8] The Notice of Inquiry that this Office issued for this inquiry in May 2002 states that ss. 6(1), 13, 15, 17 and 22 were in issue. Numerous adjournments took place in the months that followed to allow the Ministry to reconsider its decisions. In July 2002, the Ministry released some information it had earlier withheld, also stating that it was withholding information under ss. 13 and 22 of the Act.

[9] At paras. 1.04 and 3.01 of its initial submission, the Ministry states that it is no longer relying on ss. 15, 17 and 19 and that only ss. 6(1), 13 and 22 are in issue. This is repeated in paras. 21 and 40 of the affidavit of Lori Bird, filed by the Ministry. The applicant did not object to framing the issues this way.

[10] The applicant complains, both in his request for review and initial submission, about the delay in the Ministry's response to his request. This aspect of s. 6(1) was not, however, listed in the Notice of Inquiry or the Portfolio Officer's Fact Report for this inquiry. The only s. 6(1) issue listed is the adequacy of the Ministry's search for records. Accordingly, I have not considered the Ministry's response time in this decision.

Records not in dispute

[11] The Ministry issued a decision, on May 23, 2003, denying the applicant access under ss. 15, 19 and 22 of the Act to transcripts of two taped interviews it said it had found at a corrections location during mediation on this review. The applicant did not request a review of this decision. I do not therefore address the Ministry's decision to deny the applicant access to these two transcripts in this decision.

[12] It is not clear from the Ministry's submissions whether or not it made a decision on 1994 complaint records it says it found during mediation at another corrections location. The applicant has not raised this as an issue either. I have therefore not considered here any decision the Ministry may have made respecting these 1994 complaint records.

[13] **3.2 Adequacy of Ministry's Search** – The Ministry argues that it complied with its duty under s. 6(1) of the Act in searching for records responsive to the applicant's request. This section reads as follows:

> **Duty to assist applicants**
>
> **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.

[14] The Information and Privacy Commissioner has considered in a number of orders the standards applicable to a public body's search for records and for describing its search efforts in inquiries like this. See, for example, Order 00-26, [2000] B.C.I.P.C.D. No. 29. I will not repeat that discussion here but have applied the same principles in this decision.

[15] In his request for review, as noted above, the applicant gave examples of records he had not received from the Ministry. The Ministry says that, during mediation, it located additional responsive records that the applicant did not already have at two corrections locations, including records apparently related to a complaint the applicant made in 1994 and tapes of interviews, apparently from the applicant's "latest involvement with the Ministry".

[16] The Ministry provides a comprehensive account of where it searched for records, initially and subsequently, and how it came to discover the additional records, at paras. 5.08-5.16 of its initial submission, with affidavit support from two employees of the Ministry who were knowledgeable about the initial and subsequent searches (see the Bird affidavit and the affidavit of Stephanie MacPherson). The Ministry argues that its earlier searches were based on reasonable assumptions and that the fact that it later turned up additional records does not mean it failed to search properly in the first place.

[17] I do not propose to reproduce the Ministry's account of its searches here, but have reviewed it in detail. I accept that the Ministry made reasonable assumptions initially about where to look for responsive records and that other records turned up later in places the Ministry was not at first aware of. The fact remains of course that it did find other responsive records after the applicant complained to this Office that he had not received certain records. The Ministry cannot therefore be said to have performed an adequate search at first, although I believe it made reasonable efforts to do so.

[18] The applicant did not make a reply submission. I invited the applicant to comment on an exchange of post-inquiry correspondence between the Ministry and me which involved a number of issues, including this one. The applicant made an *in camera* supplementary submission in June 2003 but withdrew it when I questioned the need to receive it entirely *in camera.* I have therefore not considered it in this decision. Based on his request for review and initial submission (which latter did not specify records the applicant thought might still be missing), however, I conclude that the Ministry has now accounted for the records that the applicant said he had not received in the Ministry's first response.

[19] In my view, while the Ministry did not initially comply with its duty under s. 6(1) in searching for responsive records, through its later efforts it rectified this failing and has now fulfilled its s. 6(1) duty. I find that the Ministry has made, and has demonstrated that it made, reasonable efforts to search for records responsive to the applicant's request. In view of this finding, there is no need to order the Ministry to do anything further in this area.

[20] **3.3 Advice or Recommendations** – The Ministry applied s. 13(1) of the Act to four lines of information in record 3, the second page of an e-mail message. Section 13(1) reads as follows:

Policy advice, recommendations or draft regulations

> **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.

[21] The Ministry argues at para. 5.27 of its initial submission that the information it withheld under s. 13(1) is

> a recommendation concerning a specific course of action, namely, a recommendation as to what should be communicated to an employee (and his union representative) concerning a labour relations dispute.

[22] The Ministry says that the information in question is a recommendation that a labour relations advisor with the Public Service Employee Relations Commission made to a Ministry personnel officer. It says that this recommendation was not followed and supplied a copy of the final letter which shows that the Ministry did not incorporate some of the recommended wording. It argues that it is authorized to withhold the information and says it exercised discretion in deciding not to disclose it. Sections 13(2) and (3) do not apply, it concludes (paras. 5.27-5.32, initial submission; affidavits of Ron Williams and Catherine Tully).

[23] I agree with the Ministry that the withheld information in record 3 constitutes a recommendation developed for a public body and I find that it falls under s. 13(1). I am also satisfied that the Ministry exercised its discretion in deciding to withhold this information.

[24] **3.4 Invasion of Third-Party Privacy** – Section 22 of the Act requires public bodies to withhold personal information where its disclosure would be an unreasonable invasion of third-party privacy. The Information and Privacy Commissioner has discussed the principles for applying s. 22 in a number of orders (see, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56). I will not repeat that discussion but will apply the same principles in this decision.

[25] The Ministry applied s. 22 to information in records 1 and 4-27. (It disclosed record 2 in full and applied only s. 13(1) to record 3.) It argues that ss. 22(1), 22(2)(c), (e) and (f) and 22(5) are relevant in this case. The Ministry alludes briefly to s. 22(3)(d) regarding records 21-27 on p. 11 of its initial submission.

[26] The applicant's principal concerns as stated in his request for review were about records he believed the Ministry had not found and, to some extent, the delay in the Ministry's response to his request. The applicant did not, in his request for review, expressly object to the Ministry's severing of information. The applicant's initial submission, further, simply chronicles the events of the request and inquiry processes and again expresses his frustration with the delays in the Ministry's response to his request. He also states that he does not want third-party personal information but just information related to himself. Nowhere does he address the information withheld under s. 22,

although s. 57(2) of the Act places the burden of proof for s. 22 on him and the Notice of Inquiry explicitly set out this burden. The applicant did not make a reply submission.

[27] The relevant parts of s. 22 read as follows:

> **Disclosure harmful to personal privacy**
>
> **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,
> …
> (e) the third party will be exposed unfairly to financial or other harm,
> (f) the personal information has been supplied in confidence,
> …
>
> (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, …
>
> (5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

Employment history and other personal information

[28] The records in dispute in this case are e-mail messages, internal notes and memoranda, an incident report, a visitor list, grievance summaries, what appear to be an investigation report and related interview notes and a number of records dealing with employee start-dates and similar routine personnel matters. Except for the personnel records (which are records 21-27), the records relate to investigations of workplace incidents involving the applicant, work-related complaints against him and subsequent grievances.

[29] The information in all of these records is of the type that the Information and Privacy Commissioner has said, in several orders, falls under s. 22(3)(d) of the Act (see Order 01-53, for example). The withheld information in records 1 and 4-20 consists mainly of the names and other identifying information of inmates, complainants, visitors

and witnesses and, in the case of records 4, 5 and 13, several lines of withheld information which the Ministry says was provided by inmates. The withheld information in records 21-27 consists of the names of other employees listed with that of the applicant in various memoranda dealing with routine personnel matters. In my view, the withheld information in records 1 and 4-27 falls into s. 22(1) or s. 22(3)(d). Its disclosure is therefore presumed to be an unreasonable invasion of third-party privacy.

Fair determination of applicant's rights

[30] The Ministry says that s. 22(2)(c) of the Act is not relevant here. The applicant is no longer a Ministry employee and has no outstanding grievances, it says, and it has no reason to believe that s. 22(2)(c) supports disclosure (paras. 5.52-5.53, initial submission). The applicant does not address this argument. The Information and Privacy Commissioner has interpreted this section as relating to an applicant's "legal rights" (see Order 01-07, [2001] B.C.I.P.C.D. No. 7, for example) and I am not aware of any such rights at stake for the applicant in this case. I agree with the Ministry on this point and find that s. 22(2)(c) has no relevance here.

Unfair exposure to harm

[31] The Ministry says that disclosure of information from p. 1 of the records would unfairly expose a third party to harm. It goes on to say:

> The Ministry is concerned that if the Applicant were to learn of the identity of the person who supplied that document, the Applicant might seek retribution against that person. The Ministry has reason to consider the Applicant to be a legitimate safety risk.

[32] The Ministry refers to an *in camera* affidavit in support of this argument. After I had reviewed this affidavit, I concluded that it was not appropriate to receive it entirely *in camera* and obtained the Ministry's agreement to its disclosure in severed form to the applicant. The now-open portions of this affidavit, at paras. 9-12, say staff at the applicant's workplace are concerned about the applicant because he is perceived to be unstable, that the deponent believes the applicant has the potential to be a threat to third-party personal safety and that he sent a threatening poem by e-mail to staff and has consistently left an impression over the years of instability and unpredictability. The portions of this affidavit which remain *in camera* are in the same vein (paras. 5.50-5.51, initial submission; *in camera* affidavit).

[33] According to the copy of the record the Ministry provided with its initial submission, the Ministry disclosed almost all of the information in that record. It withheld only the name of an individual who provided information about the applicant to a Corrections Branch employee. The rest of the information sets out this individual's comments about the applicant, such as that the applicant is dangerous and that the applicant's (unspecified) threats must be taken seriously.

[34] As noted earlier, the applicant did not reply to the Ministry's initial submission. After being invited to address the now-open portions of the affidavit and supplementary letters between the Ministry and me on this and other issues, the applicant made an *in camera* supplementary submission in June 2003 (the same one as I mention above). However, he withdrew it when I questioned the need to receive it entirely *in camera.* I have therefore not considered it in this decision.

[35] In its argument, and its open and *in camera* affidavit evidence, the Ministry has not said what kind of unfair harm or retribution it considers might result from disclosure of this third-party personal information. The Ministry also has not provided any details of the applicant's allegedly threatening behaviour. It also does not explain how it considered him to be "a legitimate safety risk", nor does it provide any evidence that the applicant has ever carried out any of his supposed threats or that disclosure of similar information to the applicant has led to some kind of harm in the past. Based on the material before me, I am unable to find support for the application of s. 22(2)(e) to the withheld name in record 1 and I find that s. 22(2)(e) does not apply to it.

Supplied in confidence

[36] In the case of records 4, 5, 7 and 13, which contain information provided by inmates, the Ministry argues that s. 22(2)(f) favours withholding the information (paras. 5.39-5.45, initial submission). It suggests that s. 8 of the *Correctional Centre Rules and Regulations*. B.C. Reg. 284/78 ("CCRR") supports its position. This section prohibits employees at correctional centres from disclosing information learned in the course of their employment, unless authorized by the director or as required by due process of law. The Ministry suggests that this rule would lead inmates to believe that any information they provided would not be disclosed. It also says the Information and Privacy Commissioner found in Order 02-20, [2002] B.C.I.P.C.D. No. 20, that disclosure restrictions in the *Legal Profession Act* and the Law Society's Rules, and the Law Society's own commitment to the public on confidentiality, established that s. 22(2)(f) applied.

[37] Nothing before me shows whether inmates are aware of s. 8 of the CCRR nor whether they believe that correctional employees are prohibited from disclosing information those employees learn in the course of their duties. In any case, s. 8 of the CCRR does not say that information provided by inmates is deemed to have been provided in confidence. I do not consider that s. 8 of the CCRR assists the Ministry's confidentiality arguments here.

[38] The Ministry also provides a few lines of speculative *in camera* argument on this point. They do not, in my view, support the Ministry's position either, as they do not directly address whether the inmates provided the information in confidence. Nor did the Ministry provide any policies or other documentation dealing with conditions of confidentiality for information supplied by inmates in the situations described in the withheld information in the records. The Ministry also did not provide any testimony from the inmates in question, nor from a knowledgeable corrections employee, on this

point. Nothing in the Ministry's evidence directly supports its argument that the inmates supplied this information in confidence.

[39] Nevertheless, the withheld information in records 4, 5, 7 and 13 is itself a sufficient basis for me to conclude that the inmates in question considered they were supplying information in confidence. I therefore find that s. 22(2)(f) applies to records 4, 5, 7 and 13 and favours withholding the information in those records.

Applicant's knowledge of information

[40] The Ministry acknowledges that an applicant's awareness of information is a relevant circumstance for the purposes of s. 22(2). For this reason, it does not take the position that he is not entitled to know the substance of the complaints against him (see paras. 5.56 and 5.62 of the Ministry's initial submission, for example). It is certainly clear from the records themselves that the applicant is at least aware of the incidents in which he was involved.

[41] The Ministry says the applicant's knowledge of some information came from his employment with the Ministry. He may well remember the names of the inmates in question, it acknowledges. However, the applicant is no longer an employee, it goes on, and he should now be treated like any other member of the public with regard to third-party personal information. The Ministry cites Order 02-12, [2002] B.C.I.P.C.D. No. 12, in support of this argument. It argues that the applicant is not entitled to now receive the names and related information of inmates and others (paras. 5.46-5.49, initial submission). There is no evidence before me to show whether or not the applicant already knows the withheld information as it relates to names and other personal information the Ministry withheld in records 1 and 4-27.

[42] The Information and Privacy Commissioner has found on occasion that an applicant's knowledge of withheld information favours disclosure (see, for example, Order 01-53, at para. 80). He has also found, however, that such knowledge, while a relevant circumstance, does not mean an applicant is entitled to withheld information. In Order 01-30, [2001] B.C.I.P.C.D. No. 31, for example, he considered this issue in relation to s. 22(2)(f) and said, at para. 19, that the fact that the applicant was aware of certain information did not vitiate the s. 22(2)(f) relevant circumstance.

[43] The applicant did not deal with this issue in his submission. He did not, for example, provide me with copies of records he might have received, either under the Act or through some other process, which might support an argument that he knows the withheld names or other withheld information. As I have noted elsewhere, it is far from clear that the applicant is even interested in any of the personal information that the Ministry withheld in the records in dispute here. His failure to address the withheld information in his submission means that he has not met his burden respecting s. 22 and he is not, in my view, entitled to the information withheld under s. 22 in records 1 and 4-27.

[44] I include here the name and related information of an employee which the Ministry says it withheld in records 9, 19 and 20. I note that the copies of the records that the Ministry provided to me with its initial submission do not indicate that the Ministry withheld this information, but it says it did in its initial submission. The Ministry said, in its initial submission and in supplementary correspondence, that it had decided to disclose this person's name and related information after giving this person notice under s. 23 of the Act and after receiving objections from this person to the disclosure of the information. The Ministry said that, despite its decision to disclose the name and other information, it had not done so. Rather, it asked me to confirm its decision (paras. 5.58-5.65, initial submission; letters of May 8 and 23, 2003).

[45] The Ministry did not explain how it had arrived at the decision to disclose this employee's name and related information and did not provide any representations on this issue from the employee in response to the Ministry's s. 23 notice to the employee. It also did not explain why it had not disclosed the information, even after learning that the employee had not requested a review of its decision by this Office.

[46] There is no basis in the material before me on which to determine that s. 22 does or does not apply. This corrections employee appears to have acted as a witness in a workplace complaint investigation. I conclude that s. 22(3)(d) applies to the person's name and related information that the Ministry apparently withheld in records 9, 19 and 20 and, in the absence of submissions from the applicant as to relevant circumstances that might counter the presumed invasion of privacy, find that it must be withheld along with the rest of the information severed under s. 22.

Is the Ministry required to provide a summary?

[47] The Ministry argues that s. 22(5) of the Act does not require it to provide the applicant with a summary of the withheld information. It says it does not take the position that the applicant is not entitled to information on the substance of the complaints against him – it acknowledges that he knows this. It does, however, argue that it is appropriate to withhold the names of third-party complainants and the names of inmates and the information those inmates provided (paras. 5.54-5.56, initial submission). Again, the applicant does not address this aspect of the matter.

[48] The only records in which the applicability of s. 22(5) might arise are, in my view, records 4, an incident report, 5, an e-mail and 13, a related paragraph. It would not be possible, in my opinion, to prepare a summary of the withheld information in these pages without revealing the identities of those who provided it in confidence. I do not therefore consider that s. 22(5) applies here.

Is the applicant entitled to more information?

[49] Possibly because it is of no concern to him, the applicant has advanced no arguments for the release of the names of his fellow employees or other withheld information in records 1 and 4-27, based on his previous knowledge or on any other

grounds. There is also no other basis on which I might conclude that he is aware of, or otherwise entitled to, the withheld information. The applicant's failure to address the withheld information means, in my view, that he has not met his burden respecting s. 22 and I find that he is not entitled to any of the information withheld under that section.

4.0 CONCLUSION

[50] For the reasons given above, I make the following orders under s. 58 of the Act:

1. I confirm that the Ministry is authorized to withhold under s. 13(1) of the Act the information it withheld in record 3.

2. I require the Ministry to withhold the information in records 1 and 4-27 that it withheld under s. 22.

[51] Given my findings on the Ministry's search for responsive records, it is not necessary for me to make an order regarding s. 6(1).

July 8, 2003

ORIGINAL SIGNED BY

Celia Francis
Adjudicator