



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

Order 03-44

PUBLIC GUARDIAN & TRUSTEE OF BRITISH COLUMBIA

James Burrows, Adjudicator
December 18, 2003

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Summary: The applicant made a request for records for all information about the applicant and her mother held by the public body. The PGT provided records to the applicant but severed some information and withheld other records. Section 22 requires the PGT to refuse access to third-party personal information. Section 3(1)(c) requires the PGT to withhold operational records created by or for the Office of the Information & Privacy Commissioner. The PGT found to have applied s. 22 and s. 3(1)(c) properly to the severed and withheld records and to have complied with s. 6(1) duty in searching for records.

Key Words: duty to assist – adequacy of search – personal privacy – unreasonable invasion – supplied in confidence – outside scope of Act.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(c), 6(1) and 22, *Adult Guardianship Act*, ss. 46(2) and 62(4).

Authorities Considered: B.C.: Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order 00-26, [2000] B.C.I.P.C.D. No. 29; Order 01-43, [2001] B.C.I.P.C.D. No. 45; Order 03-43, [2003] B.C.I.P.C.D. No. 44; Adjudication No. 17 (October 8, 2003, Smith J.).

1.0 INTRODUCTION

[1] On August 28, 2002, the applicant made an access request to the Public Guardian and Trustee of British Columbia (“PGT”) under the *Freedom of Information and Protection of Privacy Act* (“Act”). The request was for records contained in any file related to a complaint made by a third party. On November 1, 2002, the PGT responded to the applicant by denying access to the records under s. 22(2)(f) of the Act and s. 46(2) and 62(4) of the *Adult Guardianship Act* (“AGA”).

[2] On November 20, 2002, the applicant extended the request to all information about the applicant and her mother. On April 9 and May 16, 2003, the PGT responded to the applicant providing copies of some records while severing some of the information. On May 19, 2003, the applicant made a third request asking for access to the entire file regarding the applicant and her mother “from May 23, 2002 to May 2003.” The PGT responded on May 16, 2003, providing the applicant with more records.

[3] On July 2, 2003, the applicant requested a review of the decision of the PGT to withhold some records and sever others. During mediation, the applicant stated that she believes other records existed and raised the issue of adequate search under s. 6(1). On August 19, 2003, the third party was notified of the inquiry. As the matter did not settle in mediation, a written inquiry was scheduled under Part 5 of the Act and was held on September 11, 2003.

[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 inquiry are:

1. Was the PGT required by s. 22 of the Act to deny access to third-party personal information?
2. Does s. 3(1)(c) exclude certain records from the scope of the Act?
3. Was the PGT required by ss. 46(2) and 62(4) of the AGA to deny access to personal information?
4. Did the PGT fulfill its duty under s. 6(1) of the Act in its responses to the applicant’s requests?

[6] Under s. 57(2), the applicant has the burden regarding s. 22. Previous orders have established that the PGT has the burden with respect to ss. 3(1)(c) and 6(1).

3.0 DISCUSSION

[7] **3.1 Procedural Issues** – The applicant has objected to the fact that the submission of the third party was made *in camera*. On p. 4 of Order 00-07, [2000] B.C.I.P.C.D. No. 7, the Commissioner said the following about *in camera* submissions:

As far as reliance on *in camera* submissions generally is concerned, there is no doubt the Act gives me the authority to receive materials *in camera*. This should be done only where it is necessary to do so to protect information that is subject to one of the Act’s exceptions to the right of access. This is what has happened here. If, however, a party submits material that should not properly be *in camera*, because it is not necessary to protect information, it risks having me reject that

material. This office's published policies and procedures – and the notice of inquiry in each case – set out the procedure that will be followed on this point.

[8] I have reviewed the submission of the third party and I find that the release of this submission would provide the applicant with the information that she seeks from this inquiry and that I have also found, as discussed below, is protected under s. 22 of the Act. I find that the submission is properly received *in camera*.

[9] **3.2 Adequacy of Search by the PGT** – Section 6(1) of the Act 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.

[10] The Commissioner has examined the issue of adequate search on numerous occasions and has clearly stated the principles upon which reasonable effort should be judged. See, for example, Order 00-26, [2000] B.C.I.P.D. No. 29. I will not repeat that discussion here but have applied the same principles in this decision.

[11] The first affidavit of the Director of Services to Adults (“Director”) for the PGT, details the search efforts of the PGT to fulfill its duties under s. 6(1) of the Act. In the affidavit, she describes the various information systems of the PGT and her efforts to review each of the systems where responsive information may be stored. She also deposes that she searched these systems more than once for responsive records. She states that there are no records other than what has been identified to the applicant.

[12] Based on the search efforts described in the affidavit of the Director, I find that the PGT conducted an adequate search for records.

[13] **3.3 Presumed Unreasonable Invasion of Third Party Privacy** – Section 22(1) requires a public body to withhold personal information where its disclosure would be an unreasonable invasion of a third party's privacy. The relevant parts of s. 22 are:

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

...

(f) the personal information has been supplied in confidence,

[14] Under s. 22, the applicant holds the burden of proof and must present arguments as to why she should be entitled to third-party personal information. In her submission, the applicant focuses on the events which preceded her request for records. She has not offered specific arguments as to why disclosure of the third-party personal information would not be an unreasonable invasion of third-party privacy.

[15] The public body has argued that information about “alleged incapable adults” that is received by the PGT has been provided in confidence. This confidentiality is established both in procedures of the PGT and by statute under the AGA. I will examine both of these arguments below.

Applicability of s. 46(2) of the Adult Guardianship Act

[16] The PGT has argued that it is required to withhold certain information under ss. 46(2) and 62(4) of the AGA:

46(2) A person must not disclose or be compelled to disclose the identity of a person who makes a report under this section.

and

62(4) The Public Guardian and Trustee must not disclose information obtained under this Act except for the purposes of performing the duties, powers or functions of the Public Guardian and Trustee.

[17] With regard to the application of ss. 46(2) and 64(2) of the AGA, I have already found in Order 03-43, [2003] B.C.I.P.C.D. No. 44 that the Act takes precedence over the AGA and apply that reasoning here. However, as in Order 03-43, I have considered those sections of the AGA as supporting the argument of the PGT that the information at issue was provided to the PGT in confidence.

Was the personal information provided in confidence as required by s. 22(2)(f)?

[18] The second affidavit of the Director details the procedures of the PGT regarding the gathering of information of “allegedly incapable adults.” She deposes that the training of the Assessment and Investigation Services staff of the PGT includes instruction that all personal information must be treated “in a confidential manner.” She also states that the normal practice is to tell individuals that information provided to the PGT staff is held in confidence.

[19] The PGT acknowledges that there is no express provision which allows the AGA to override the Act but it argues that it is required to conduct its business as described in the AGA. Under the AGA, the PGT must ensure that it protects the confidentiality of its informants.

[20] I have also reviewed the submission of the third party who further deposes that the information was supplied to the PGT in confidence.

[21] Based on the evidence in the various affidavits, the nature of the information in the records, and s. 46(2) of the AGA, I am persuaded that the withheld information was provided in confidence to the PGT. There being no other circumstances in the material before me that favour disclosure to the applicant, I find that the release of the third-party personal information would constitute an unreasonable invasion of third-party privacy under s. 22 of the Act.

[22] **3.4 Records Out of Scope of the Act** – The applicant has argued that she is entitled to disclosure of operational records of the Office of the Information and Privacy Commissioner (“OIPC”) held by the PGT and which relate to the mediation of this matter. Section 3(1)(c) of the Act states that the Act does not apply to certain records of an officer of the Legislature, which includes the Information and Privacy Commissioner. Section 3(1)(c) reads as follows:

Scope of this Act

- 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
- ...
- (c) a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer’s functions under an Act.

[23] A number of decisions have established that s. 3(1)(c) excludes from the Act’s scope operational, as opposed to administrative, records of an officer of the Legislature. See, for example, Order 01-43, [2001] B.C.I.P.C.D. No. 45. This same approach has been taken in adjudications involving access requests made directly to this Office. See, most recently, D. Smith J.’s ruling Adjudication No. 17 (October 8, 2003). I have applied the principles set out in these two decisions without repeating them here.

[24] My careful review of the records in issue leads me to find that they are records created by the OIPC or by the PGT as part of the mediation process for this access request by the applicant under the Act. These records are operational records of the Commissioner and are thus out of scope of the Act. I find that the PGT was correct to refuse to disclose these records on this basis.

4.0 CONCLUSION

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

1. I require the PGT to refuse to disclose the information that it has withheld under s. 22 of the Act;
2. I require the PGT to refuse to disclose the information that it has withheld under s. 3(1) of the Act; and

3. I confirm that the PGT has performed its duty under s. 6(1) to assist the applicant by conducting an adequate search for records.

[26] For the reasons given above, it is not necessary for me to make an order respecting s. 46(2) or s. 62(4) of the *Adult Guardianship Act*.

December 18, 2003

ORIGINAL SIGNED BY

James Burrows
Adjudicator