OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 04-09

MINISTRY OF HEALTH SERVICES

James Burrows, Adjudicator
April 6, 2004

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Summary: The applicant made a request for records related to the Core Services Review of the BC Ambulance Service. The Ministry denied access under ss. 12(1), 13, and 17. Prior to the inquiry, the Ministry released some records, fulfilling its duties under s. 4(2). The Ministry carried out its duties under s. 6. Section 25 does not apply. The Ministry applied s. 12(1) appropriately.

Key Words: public interest – public health or safety – public interest – Cabinet confidences – substance of deliberations – duty to assist – reasonably be severed

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* ss. 4(2), 6(1), 12(1), 13, 17 and 25.

Authorities Considered: B.C.: Order 00-16, [2000] B.C.I.P.C.D. No. 6; Order 02-38, [2002] B.C.I.P.C.D. No. 38.

1.0 INTRODUCTION

[1] On June 18, 2002, the applicant made an access request to the Ministries of Health Services and Health Planning, now joined as the Ministry of Health Services ("Ministry") under the *Freedom of Information and Protection of Privacy Act* ("Act"). The request was for the KPMG Core Services Review of the BC Ambulance Service ("BCAS"), including draft and final copies of the review and correspondence to or from 10 named individuals and three corporate entities. Between that date and September 12, 2002, the applicant made two more similar requests each extending the date that the request covered.

[2] On November 21, 2002, the Ministry denied access to all the requested records, stating that the records were excepted from disclosure under ss. 12, 13, and 17 of the Act. On December 21, 2002, the applicant requested a review of the decision of the Ministry to withhold the records. As the matter did not settle in mediation, a written inquiry was scheduled under Part 5 of the Act for June 5, 2003. With the mutual agreement of both parties, the inquiry date was re-scheduled until July 24, 2003. Prior to the inquiry date, the Ministry re-considered its decisions about the records and released more than half the records at issue.

[3] 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.

ISSUE

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

1. Did the Ministry fulfill its duty under s. 6(1) of the Act in its responses to the applicant's requests?

2. Did the Ministry fulfill its duty under s. 4(2) of the Act in its responses to the applicant's requests?

3. Does s. 25(1) require the Ministry to disclose information to the public?

4. Was the Ministry required by s. 12(1) of the Act to deny access to the records?

5. Was the Ministry authorized by ss. 13 and 17(1) of the Act to refuse to disclose the information requested by the applicant?

[5] Under s. 57(1), the Ministry has the burden of proof regarding ss. 12(1), 13 and 17. Previous decisions of the Commissioner have held that, while s. 57 of the Act is silent on the burden of proof in determining whether s. 25 applies, as a practical matter, it is in the interests of each party to present evidence as to whether s. 25 applies and requires disclosure. I have carefully reviewed the submissions of both parties with respect to the issues raised by ss. 4(2) and 6(1) of the Act.

3.0 DISCUSSION

[6] **3.1 Records at Issue** – The Ministry has identified 894 pages of records which are responsive to the applicant's request. Although the Ministry withheld all the records prior to the inquiry, in September of 2003, it re-considered its decision and released 507 pages. The applicant also agreed not to take issue with another 38 pages to which the Ministry had applied ss. 21 and 22. Therefore these records are not under consideration.

[7] The remaining 349 pages are the core review final report and drafts as well as copies of overhead transparencies from presentations by the consultant, KPMG.

[8] **3.2 Duty to Assist Applicant** – The applicant has argued that the Ministry failed in its duty to assist under s. 6(1) of the Act because the Ministry only released records after the matter had been sent to inquiry.

[9] 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] There is no evidence before me that the Ministry withheld records for any reason other than its view that it had properly applied the exceptions, a view it reconsidered just before the inquiry. I am not prepared to say, in this case, that disclosure of further records after a final review before the inquiry is untoward. I find the Ministry has fulfilled its duties under s. 6 of the Act.

[11] **3.3 Requirement to Sever Records** – The applicant also raised the issue that the Ministry did not appear to have considered severing the responsive records.

[12] The Act requires that a public body review any requested records to ensure that information excepted from disclosure cannot be severed from the records and the rest of the record produced.

> **Information rights**
>
> **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.

[13] The applicant has argued that the Ministry did not properly apply this section to the records which he requested. However, when the Ministry provided the applicant with records prior to the inquiry, it had clearly fulfilled its requirement to review the records and apply the exceptions as it saw fit. Whether the remaining records should be released or withheld in full or in severed form, I will discuss below. Therefore I find that the Ministry did fulfill its duty under s. 4(2) of the Act.

[14] **3.4 Public Interest Disclosure** – The applicant has argued that the requested records are a matter of public interest and, under s. 25 of the Act, must be released.

[15] Section 25 reads as follows:

> **Information must be disclosed if in the public interest**
>
> **25**(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[16] The Commissioner has examined the issue in several orders and has determined that the Act specifies an urgent need for release, as discussed by the Commissioner in Order 02-38, [2002] B.C.I.P.C.D. No. 38:

> [53] As the applicant notes, in Order 01-20 and other decisions, I have indicated that the disclosure duty under s. 25(1)(b) is triggered where there is an urgent and compelling need for public disclosure. The s. 25(1) requirement for disclosure "without delay", whether or not there has been an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.

[17] The applicant has presented the position that because the BCAS is an organization that provides emergency services to the public, any review of its services would be a sufficient reason to require release under s. 25. However, I do not believe that a core review of this organization, even if one assumes for argument's sake that it might possibly result in changes to staffing or the provision of emergency services, creates a situation of urgent need.

[18] Further, the Commissioner has ruled that this section does not relate to the scrutiny of public bodies. In Order 00-16, [2000] B.C.I.P.C.D. No. 6, at pp. 13-14, he provides clear details about the use of s. 25 for investigating the activities of public bodies:

> The concept of the public interest has a number of facets. The reason given by the applicant for public interest disclosure in this case is essentially to secure the proper, and transparent, functioning of the Board under the Code. The Board is an important institution; whether it operates fairly and lawfully no doubt affects labour relations in British Columbia. I accept that the "health" of the Board is a proper object of public scrutiny and concern. I do not believe, however, that the public interest in this general sense – and as it may be invoked by the applicant's reasons for seeking access to Board records in this case – triggers s. 25(1)(b) of the Act. This provision is not an investigative tool for those who seek to look into the affairs of a public body. It is an imperative requirement for disclosure which is triggered by specific information the disclosure of which is clearly in the public interest. The applicant may be suspicious about the manner in which the Board conducts itself. From my review of the requested records, which I have undertaken on a record by

> record basis, I conclude that while these records may be of interest to the applicant (and others) for purposes of scrutinizing the operations of the Board, that interest, in the circumstances of this case, is not a reason which triggers mandatory public interest disclosure under s. 25(1)(b) of the Act.

[19] I believe that this matter involves similar circumstances. While the records that the applicant has requested deal in a general sense with the provision of emergency services in the Province, the records themselves do not trigger circumstances which require the urgent release contemplated by s. 25. Therefore, I do not find there was a need for the Ministry to disclose the records under s. 25.

[20] **3.5 Cabinet Confidences –** At the time of the inquiry, the Ministry submitted that the records at issue would be presented to Cabinet or its committees and, as such, would reveal the "substance of deliberations." The relevant portion of s. 12 reads as follows:

> **Cabinet and local public body confidences**
>
> **12**(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[21] The Ministry' argument was supported by the affidavit of the Ministry's Assistant Deputy Minister, Planning and Innovation. In his affidavit, he deposed, at p. 4, that:

> (t)he issue of the BCAS core review will be proceeding to Cabinet shortly. When that issue goes to Cabinet, the Ministry intends to include the final KPMG report…in the package of material that will be forwarded to Cabinet for its consideration.

[22] I accept that, at the time of the inquiry, the Ministry was planning to forward the KPMG report to Cabinet and therefore the records were prepared for submission to Cabinet. As such, I find that the records at issue are properly withheld under s. 12(1) of the Act.

[23] An issue which remains outside the scope of this inquiry is whether or not the withheld records did ultimately reflect the substance of deliberations of Cabinet or its committees. Clearly what happened after the inquiry date is not relevant to the inquiry and I can only determine the applicability of the exceptions as they were on that date. Therefore, I rely on the argument of the Ministry and the affidavit of the Assistant Deputy Minister, Planning and Innovation. Obviously, for any future access request, the Ministry would have to confirm that the records would reveal the substance of Cabinet deliberations if disclosed.

[24] As I have already found that s. 12 applies to all of the withheld records, I have not considered whether s. 13 or s. 17 applies to the same information in this matter.

4.0 CONCLUSION

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

1. I confirm that the Ministry has performed its duty under ss. 4(2) and 6(1);

2. I confirm that the Ministry is not required under s. 25 of the Act to disclose the information that it has withheld; and

3. I require the Ministry to refuse to disclose the information that it has withheld under s. 12(1) of the Act.

[26] For the reasons given above, it is not necessary for me to make an order respecting s. 13 or s. 17 of the Act.

April 6, 2004

ORIGINAL SIGNED BY

James Burrows
Adjudicator