



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

Order F05-08

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Celia Francis, Adjudicator
March 23, 2005

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Summary: Applicant requested complaint record provided by third party to BC Hydro. Third party objected to its disclosure, although he later agreed to disclosure of most of record. Section 22 applies to some but not all of remaining withheld information.

Key Words: unreasonable invasion – submitted in confidence – personal privacy – public scrutiny – fair determination of rights – unfair exposure to harm – inaccurate or unreliable personal information – unfair damage to reputation – position, functions or remuneration of public body employees – compiled as part of investigation into possible violation of law.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15, 22(1), 22(2)(a), (c), (e), (f), (g) & (h), 22(3)(b) and 22(4)(e).

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-07, [2001] B.C.I.P.C.D. No. 7.

1.0 INTRODUCTION

[1] The applicant is a BC Hydro employee who requested access to a record of a complaint made against him to his employer by a third party. BC Hydro notified the third party under s. 23 of the *Freedom of Information and Protection of Privacy Act* (“Act”) regarding the possible application of s. 22 of the Act to the complaint record. The third party replied that he did not consent to BC Hydro disclosing any of the record, as he had prepared the “Officers’ [sic] notes” as part of an ongoing criminal harassment investigation regarding the applicant, such that the record falls under s. 22(3)(b) of the Act.

[2] BC Hydro then told the third party that it had determined that it was obligated to release most of the record as, in its view, s. 22 applied only to a part of the record that related to still another person. It also said that the RCMP had not provided information that would allow BC Hydro to conclude that s. 15 applies at all.

[3] The third party requested a review of BC Hydro's decision. Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. 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

[4] The issue before me in this case is whether BC Hydro is required by s. 22 to refuse the applicant access to the complaint record.

[5] Section 57(3)(a) sets out the burden of proof in this inquiry as follows:

Burden of proof

57 (3) At an inquiry into a decision to give an applicant access to all or part of a record containing information that relates to a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy

3.0 DISCUSSION

[6] **3.1 Application of Section 22** – The Information and Privacy Commissioner has considered the application of s. 22 in numerous orders, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56. I have applied here, without repeating it, the approach taken in those orders.

[7] I reproduce below the relevant parts of s. 22:

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

(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, ...

(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,

(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 ...

(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, ...

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if ...

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

[8] **3.2 Does Section 22 Apply?** – BC Hydro asked that virtually all of its submissions be received on an *in camera* basis. While BC Hydro's submissions are properly received *in camera*, this makes it difficult for me to discuss its arguments. I have however read and considered them carefully in arriving at my decision. The third party and applicant also made submissions to which I will refer as appropriate.

[9] The first step in applying s. 22 to a record is to determine if it contains personal information. The record in this case is a one-page statement prepared by the third party, outlining a series of incidents involving the applicant and third parties. The applicant did not initially receive a severed copy of this record. During the inquiry process, however, the third party attached to his reply submission a severed version, which he said the applicant could have. The applicant received the severed copy as part of the normal exchange of submissions through this Office.

[10] The applicant has thus received most of the information in the record that relates to himself, in addition to a small amount about the third party. The information which remains withheld (the first three entries) is about identifiable individuals, including the applicant, and is therefore personal information.

Section 22(4)(e)

[11] The applicant argues that s. 22(4)(e) applies to the information in dispute, arguing, mistakenly, that the RCMP is a public body under the Act. The RCMP is not a public body under the Act. It is an institution covered by federal access to information and privacy legislation.

[12] The withheld personal information that relates to individuals other than the applicant does not relate to the position, functions or remuneration of public body employees. Section 22(4)(e) does not apply to it.

Presumed unreasonable invasion of privacy

[13] The third party, an RCMP officer, argues that the information in dispute falls under s. 22(3)(b). He says that he prepared the record as part of an ongoing RCMP criminal investigation regarding the applicant and that it forms part of the RCMP investigation file. He says he also complained to BC Hydro about the applicant's actions and that BC Hydro requested a copy of his notes to initiate its own investigation. He also states that the RCMP told BC Hydro not to disclose the record to the applicant.

[14] BC Hydro is sceptical that s. 22(3)(b) applies to the withheld information and provides detailed reasons for its views (paras. 43-50, *in camera* initial submission; para. 23 & Exhibit #4, *in camera* McGraw affidavit; paras. 7-12, *in camera* Pollock affidavit).

[15] The applicant disputes the third party's claims regarding an RCMP investigation. He also makes a number of allegations regarding the third party's actions and motives for preparing the record in dispute.

[16] Although the third party claims to have been acting as an RCMP officer in preparing the record, there is no investigation number and the record is not on RCMP letterhead. There is also no indication on the face of the record that the third party prepared it in his capacity as an RCMP officer for the purposes of an RCMP criminal investigation into the applicant and later gave it to BC Hydro.

[17] Based on the parties' evidence on the reasons for and timing of the creation of the record, which conflicts to some extent, I am unable to determine conclusively that the information was compiled and is identifiable as part of an investigation of a possible violation of law. I therefore find that s. 22(3)(b) does not apply to the information in dispute.

[18] The remaining withheld personal information concerns domestic activities of third parties in their private capacity, caught up in the account of the incident leading to the complaint. It does not fall squarely within any of the categories of information listed in s. 22(3) but I am satisfied that s. 22(1) applies to it.

Relevant circumstances

[19] The applicant says that s. 22(2)(a) applies, apparently with relation to the third party's actions and motives. I do not agree. The minimal amount of third-party personal information that remains withheld would not assist in subjecting the activities of BC Hydro to public scrutiny.

[20] BC Hydro says it considered ss. 22(2)(c), (e), (g) and (h) to be relevant circumstances. At paras. 30-36 and 41-42 of its *in camera* initial submission, it provides its reasons for concluding that s. 22(2)(c) may apply but that ss. 22(e), (g) and (h) do not. Nothing in the material before me supports the relevance of s. 22(2)(c), (e), (g) or (h) to the withheld information.

[21] The third party argues that s. 22(2)(f) applies, saying he supplied the information in confidence to BC Hydro for use only in its investigation of his complaint. BC Hydro denies that the record was supplied in confidence for the purposes of s. 22(2)(f) and explains why it takes this position (paras. 37-40, *in camera* initial submission; paras. 7-12, *in camera* Pollock affidavit). I find that s. 22(2)(f) does not apply.

[22] BC Hydro and the applicant both point out that the applicant is aware of much of the information in the record in dispute. BC Hydro provides reasons for taking this view (see, for example, the *in camera* Pollock affidavit). It is not surprising that the applicant would be aware of the incidents, given it largely concerns his actions and interactions with third parties. In my view, these factors favour disclosure to the applicant of the first two of the three remaining withheld entries. In addition, the first entry is in part the applicant's own personal information while the second entry is virtually identical to third-party personal information elsewhere in the record that the third party agreed to the applicant receiving. For these reasons, I agree with BC Hydro's decision to disclose these two entries.

[23] The third entry contains a small amount of the applicant's personal information, intertwined with third-party personal information which I found above falls under s. 22(1). The applicant's personal information cannot, in my view, reasonably be severed and disclosed to him without unreasonably invading third-party privacy. This is one of those rare occasions when the application of s. 22 means that the applicant is not entitled to his own personal information (see para. 51, Order 01-07, [2001] B.C.I.P.C.D. No. 7, for a similar finding).

[24] **3.3 Section 15** – BC Hydro acknowledges that s. 15 was not listed as an issue in the notice for this inquiry but explains how it concluded during its processing of the request that s. 15 does not apply to the withheld information (paras. 26-29, *in camera* initial submission). Section 15 is not properly before me in this inquiry and I do not consider it here. I will say, however that, for much the same reasons as I gave above in the discussion of s. 22(3)(b), it is not clear to me how s. 15(1) would apply to the small amount of information in dispute.

4.0 CONCLUSION

[25] For the reasons given above, under s. 58 of the Act, I require BC Hydro to withhold under s. 22 the information highlighted in pink on the copy of the record provided to BC Hydro with its copy of this order.

March 23, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator