Order F05-25

MINISTRY OF HEALTH

Errol Nadeau, Adjudicator

August 10, 2005

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Summary: Applicant requested records relating to the decision to make her position redundant during a major downsizing of the Ministry's operations. Applicant made a second request concerning consultations between the Ministry and the union representing employees affected by the downsizing. The Ministry did not meet its duty to assist with respect to the first request but did so after the close of inquiry. The Ministry did meet its duty to assist with respect to the second request.

Key Words: adequacy of search—duty to assist—respond without delay.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6, 7, 10.

Authorities Considered: **B.C.:** Order 00-32, [2000] B.C.I.P.C.D. No. 35.

1.0 INTRODUCTION

[1] The applicant in this case is a former employee of the Ministry of Health Services. The applicant's position was one of many declared redundant as part of the restructuring of the Ministry due to fiscal pressures and changes in the Ministry's core business functions. The applicant received formal notice of that decision on January 17, 2002.

[2] The applicant submitted two formal written requests under the *Freedom of Information and Protection of Privacy Act* ("Act") jointly to both the Ministry of Health Services and what was then the Ministry of Health Planning. The two Ministries have since been combined into the Ministry of Health ("Ministry").

[3] The applicant's first request, dated February 27, 2002, was in two parts as follows:

> Part 1) I would like to request any and all records from May 1, 2001 to January 17, 200[2] in any format, created by and/or shared between the Ministries of Health through the Ministry Joint Committee and the B.C. Government and Service Employees' Union (BCGEU) regarding the decision to make my position redundant as [position title, position number, program and branch], Ministry of Health (Services) in accordance with 13.1c of the Thirteenth Master Agreement. "Ministry will consult with the Union through the Ministry Joint Committee established pursuant to Article 29 respecting workforce adjustment which results in redundancy as required pursuant to (a) above." 13.1(c)
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> Part 2) I would like to request any and all records from May 1, 2001 to January 17, 2002, in any format, created by and/or shared between the Ministries of Health and the Ministry Joint Committee identifying my position (as identified in Part 1 of the request), Position number […], as redundant as per 13.1(b) of the Thirteenth Master Agreement. "The timeframe for Clause 13.1 placement activities is 90 days, or a lesser time frame for smaller adjustments, from the date the employee receives written notice of redundancy as mutually agreed by the Ministry Joint committee. Such notice will only be issued after consultation with or advice to the Ministry Joint Committee." 13.1(b)

[4] On May 15, 2002, the Ministry responded to the applicant's request for records by releasing, in their entirety, records that it considered were responsive to the applicant's request. The Ministry's file number for this release was HSE-02-037. The records provided were copies of a string of emails between the applicant and an Assistant Deputy Minister who was the Chair of the Ministry's Transition Steering Committee. The subject of the emails was the applicant's request for clarification of the Ministry's interpretation and application of the collective agreement provisions regarding the timeframe for placing employees whose positions were declared redundant into other positions.

[5] The applicant did not consider the records provided by the Ministry to be responsive to her request and, by letter dated June 1, 2002, she requested that this office review the Ministry's response.

[6] On May 22, 2002, the applicant submitted her second formal written request for records. The second request was also in two parts and read as follows:

> Part 1) I would like to request copies of any and all records from May 1, 2001 to January 17, 2002 in any format, indicating that the Ministries of Health through

> the Ministry Joint Committee consulted with the British Columbia Government and Service Employees' Union (BCGEU) prior to issuing redundancy letters to Ministry staff on January 17, 2002 in accordance with 13.1c of the Thirteenth Master Agreement. "Ministry will consult with the Union through the Ministry Joint Committee established pursuant to Article 29 respecting workforce adjustment which results in redundancy as required pursuant to (a) above." 13.1(c).
>
> Part 2) I would like to request copies of any and all records from May 1, 2001 to January 17, 2002, in any format, indicating that the Ministries of Health prior to issuing letters of redundancy to ministry staff on January 17, 2002 "consulted with or advice to the Ministry Joint Committee" regarding the implementation of Article 13 of the Thirteenth Master Agreement as per 13.1(b).

[7] On July 16, 2002, the Ministry responded by releasing records it believed were responsive to the applicant's second request for records. The Ministry also identified two of the records as being responsive to the applicant's first request.

[8] The applicant did not accept that the records were responsive to her request. On August 12, 2002 she requested that this Office review the Ministry's response to her second request for records.

[9] The applicant's two requests for review were assigned to the same mediator in this office. Mediation did not resolve either request for review to the satisfaction of the applicant. However, by letter dated October 25, 2002, the Ministry released additional records to the applicant in response to her two requests.

[10] On January 6, 2003, apparently after confirming that the applicant was not satisfied with the records released by the Ministry and determining that further mediation would be of no benefit, the mediator referred both requests for review for formal inquiry.

[11] As the matters at issue were not resolved in mediation, a written inquiry was held under Part 5 of the Act. The matter was originally assigned to another adjudicator in this office and was subsequently reassigned to me when the previous adjudicator took an extended leave of absence from this office. 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 ISSUES

[12] The issues in this inquiry are:

1. Has the Ministry met its duty under s. 6(1) of the Act to make every reasonable effort to assist the applicant and by responding openly, accurately and completely, and without delay, to the applicant's first request?

2. Has the Ministry met its duty under s. 6(1) of the Act to make every reasonable effort to assist the applicant and by responding openly, accurately and completely, and without delay, to the applicant's second request?

[13] Section 57 of the Act, which establishes the burden of proof on the parties in an inquiry, is silent with respect to a review about the duty to assist under s. 6 of the Act.

3.0 DISCUSSION

[14] **3.1 Duty to Assist Applicants** – This inquiry brings into consideration s. 6(1) of the Act, which 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.

[15] In Order 00-32[1], at pp. 5 and 9, the Commissioner had the following comments regarding the standards imposed by s. 6(1):

> Given my findings in this case, it is worth repeating what I have said before – for example, in Order 00-15, Order 00-26 and Order 00-30 – about the standards imposed by s. 6(1) on a public body's search for records. Although the Act does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. In an inquiry such as this, the public body's evidence should candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also indicate how the searches were done and how much time its staff spent searching for the records. The question here is whether the Ministry has discharged its s. 6(1) search obligations in light of this.
>
> …
>
> An applicant should not have to initiate the review process under the Act in order to ensure that a public body has discharged its s. 6(1) duty. The Act requires a public body to meet the above-described search standards – and its other duties under s. 6(1) – at the time it responds to an applicant. It can still meet its s. 6(1) duties after an applicant makes a request for review under s. 52 of the Act: any steps taken by a public body after its initial search and response – including during the review and inquiry processes – will be relevant to any order I might make. But the first question to be considered in an inquiry such as this is whether, at the time it responded to an applicant's access request, the public body met its duty to make every reasonable effort to assist" the applicant and to "respond without delay … openly, accurately and completely" to the applicant.

[16] I have considered these comments both in considering the merits of the matters at issue in this inquiry and in dealing with the procedural matters which follow.

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[1] [2000] B.C.I.P.C.D. No. 35.

[17] **3.2 Procedural Matters** – Beginning immediately following the exchange of initial submissions to this inquiry and continuing for several months thereafter, the parties exchanged a series of objections both to the submissions and objections of the other party and to the procedures of this office. I do not intend to enter into a detailed chronology of these exchanges but will deal with them primarily on an issue-by-issue basis.

[18] I also do not intend to deal with the applicant's general objections and assertions regarding this office's hearing procedures except to address those concerns that relate to procedural fairness in the conduct of this inquiry. In that context, I will comment on the decisions made to ensure that the parties had a fair and equal opportunity to present their own submissions to this inquiry and to consider and respond to each other's submissions.

Unsigned affidavits and extensions of procedural time limits

[19] The Ministry included unsigned affidavits of Ministry employees as evidence in support of its initial submissions. In forwarding a copy of the Ministry's reply submission to the applicant, the Registrar of Inquiries enclosed sworn copies of the affidavits the Ministry had included with its reply submission.

[20] On the same day the reply submissions were exchanged, the applicant contacted the Registrar to object to the sworn copies of the affidavits being entered after the close of the date for initial submissions. In response, the Registrar granted the applicant a one-week extension of the time limit for the applicant to make a reply submission.

[21] In a written objection to the Commissioner, the applicant complained that this office had been unfair in accepting unsworn affidavits from the public body and that by doing so, this office had effectively granted the Ministry an extension of procedural time limits for making its initial submission.

[22] There is no requirement that evidence presented at inquiry be properly attested. Any evidence that is submitted by a party that is relevant to the matters at issue may properly be considered at inquiry. That the evidence is unsworn goes only to the weight that may be given to the evidence.

[23] Further, the Registrar has discretion to extend procedural timeframes in the interests of fairness and does not require the consent of either party to do so. As a matter of fair process in exercising her discretion, the Registrar may give notice to the other party and allow the other party to comment before making a decision.

[24] I find that this extension was appropriate to avoid prejudice to the applicant. Perhaps unaware that the unsigned affidavits could properly be considered as evidence in this inquiry, the applicant had chosen to offer no reply to the points made in, or in reference to, the unsigned affidavits. The extension gave the applicant the opportunity to more fully make her case.

[25] I do not accept the applicant's objection that the extensions granted by the Registrar in this case were unfair to the applicant.

Direct communication from Ministry counsel

[26] The applicant objected, in strong terms, to counsel for the Ministry attempting to contact her, both by email and by telephone, after initial submissions but before the date for inquiry. The applicant included copies of counsel's email to her and her email in response to his telephone discussion with her.

[27] It is neither unusual nor improper for the parties to a hearing to communicate for the purpose of clarification or even to discuss resolution of the matters at issue in the hearing. The copy of the email from counsel to the applicant confirms that counsel was both tactful and discreet in his request to speak with the applicant. It is also apparent that counsel's efforts to communicate directly with the applicant ceased when the applicant made it clear to him that she preferred to have the matter dealt with formally through the inquiry process.

Exclusion of mediation material

[28] In accordance with this office's usual practice, as communicated to the parties in the Notice of Written Inquiry, the Registrar of Inquiries removes information generated as part of the mediation process from the submissions of the parties unless all parties consent to its inclusion.

[29] The applicant requested that the Registrar ensure that information was removed from the submission of the Ministry and from the sworn affidavits included with the Ministry's submission. The Registrar agreed but, in her letter of objection to the Commissioner, the applicant expressed concern that unsevered copies of the submission and affidavits might go forward to the Commissioner or his delegate.

[30] I can confirm that material identified as being related to mediation, including that specified by the applicant, was deleted from the submissions and affidavits before I considered them in this inquiry.

Combining requests for review at inquiry

[31] The applicant objected to the reviews of the Ministry's response to her two requests for records being combined at inquiry. She expressed concern that the Ministry and this office considered her two requests for records to be one request.

[32] The two reviews were combined at inquiry for administrative convenience because the issues raised were related and overlapped. This enabled both parties to deal with the issues comprehensively without unnecessary duplication. However, for the purpose of this inquiry, I have framed the issues separately and have made separate decisions with respect to the two requests for records made by the applicant.

Challenging the credibility of deponent

[33] Counsel for the Ministry objected to submissions by the applicant which challenged the credibility of assertions made by an employee of the Ministry in a sworn affidavit regarding the Ministry's search efforts in response to the applicant's requests for records. Counsel objected that the applicant's submissions unfairly impugned the integrity of the employee and that they should be given no weight in this inquiry.

[34] In reply, the applicant cited para. 14 of Order 02-30 (also cited above) which outlines the evidence a public body should adduce in an inquiry into the adequacy of search efforts, including how much time public body staff spent on the search. The applicant asserted that her intention was to "question the accuracy of the Ministry's search time estimate."

[35] It is proper for a party to challenge the credibility of relevant evidence put forward by the opposing party. I accept that this was the purpose of the applicant's submissions in this regard and accept them as argument for that purpose in this inquiry.

[36] In their exchanges of correspondence on this issue, the parties also disputed whether the objection of counsel for the Ministry constituted a reply submission and whether it was properly made. I consider the objection to have been properly made and that the applicant was given ample opportunity to respond to the objection.

Records released after the close of inquiry

[37] Well after the close of this inquiry but before this matter was assigned to me for adjudication as delegate of the Commissioner, the applicant wrote to object that the Ministry had released records to her outside of the inquiry process. Enclosed with the applicant's letter were copies of records released to her by the Ministry as well as copies of correspondence relating to the release of records.

[38] By letter dated April 11, 2003, the Ministry informed the applicant:

> In your February 12, 2003 submission to the OIPC in relation to file HSE-02-037, you clarified that you wanted records created by the Ministry regarding the decision to make your position redundant (p.14). In your February 27, 2003 reply submission to OIPC, you requested the Commissioner 'to order the Ministry to search for records that relate to "the decision to make my position redundant".
>
> Given that you have indicated that you are seeking any internal Ministry records dealing with the decision to make your position redundant, the Ministry is opening a new request under the Freedom of Information and Protection of Privacy Act (the Act) and will assign the file to the program area responsible for your past position. The scope of this request is for records in the custody and control of the Ministry up to January 17, 2002. …

[39] By letter to the Registrar of Inquiries dated April 23, 2003, the applicant protested the Ministry's decision to open a new request file and accused the Ministry of "stepping outside" the inquiry process. The applicant also asserted: "The fact is I requested records regarding 'the decision to make my position redundant' in my initial request dated February 27, 2002."

[40] With a letter to the applicant dated May 29, 2002, the Ministry released what it termed "the records in response to your request" under the new file number 292-30/HPL-03-016. The applicant responded with the above referenced letter to this office, dated June 26, 2003, objecting to the Ministry's release of records, which she termed an "untimely response", although she acknowledged the Ministry's attempt, in her words, to "right their wrong".

[41] The Registrar decided to forward the applicant's June 26, 2003 letter and attachments to the adjudicator for consideration as a procedural objection and so notified counsel for the Ministry. Counsel objected, on behalf of the Ministry that the letter and attachments should not be considered by the adjudicator on the grounds that this inquiry had closed, that the letter was not a procedural objection concerning the inquiry and that the letter related to a decision of the Ministry that is not at issue in this inquiry. The applicant responded that the adjudicator should consider the Ministry's "continued lack of regard for duty."

[42] In order to determine if I should consider the applicant's June 26, 2003 letter and attachments, I wrote to counsel for the Ministry to request clarification of how and where the additional records were located. I also asked whether the Ministry was aware of any further records that might be both relevant to the records released to the applicant and responsive to her request for records.

[43] Shelley Burnham and Evon Soong, Directors of Information, Privacy, Records and Library Services, responded on behalf of the Ministry:

> During the inquiry process, in her February 12, 2003 submission to the OIPC in relation to file HSE-02-037, [the applicant] clarified that she wanted the Commissioner to order the Ministry to search for records relating to the decision to make her position redundant (p.14). Upon getting this information, in an effort to assist the applicant, we opened a new request, under a new tracking number HSE-03-16, to give her these records. Therefore, these records do not in fact relate in any way to the inquiry at hand.
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> Evon Soong met with Tom Gregory of Population Health and Wellness, to locate the records. …
>
> For the additional records you are talking about (i.e. the records related to HSE 03-16 and not HSE-02-037) we simply searched through all the records Tom Gregory had that were related to the downsizing exercise, and pulled any that related in any way to the decision to make [the applicant's] position redundant.

[44] The Ministry also confirmed that it was not aware of any additional relevant and responsive records. This office forwarded a copy of the Ministry's response to the applicant.

[45] For reasons set out below, I consider the applicant's June 26, 2003 letter and attachments to be relevant to the matters at issue in this inquiry and accept them as argument and evidence in this regard.

[46] **3.3 Ministry's Response to First Request** – Much of the submissions of both parties was taken up with issues concerning the Ministry's responses to the applicant's first request for records.

[47] In response to the applicant's first request for records, the Ministry released a string of emails between the applicant and an Assistant Deputy Minister concerning the applicant's request for clarification of the Ministry's interpretation and application of the collective agreement provisions regarding the timeframe for placing employees whose positions are declared redundant into other positions. These were dated between February 18 and 28, 2002.

Timeliness of the Ministry's response

[48] The applicant's first request for records was dated February 27, 2002 and the Ministry's response to that request was dated May 15, 2002. In her initial submission the applicant pointed out that the response was well outside the time limit for responding to a request stipulated by the Act and that the Ministry did not extend the time limit for responding as provided in the Act. The Ministry did not directly respond to these assertions.

[49] On the face of the documentation provided for this inquiry and, in the absence of any contrary argument by the Ministry, it is apparent that the Ministry failed to meet the 30-day statutory time frame for providing a timely response to the applicant's first request. It follows, and I find, that the Ministry did not respond "without delay" to the request, as required under s. 6 of the Act.

Relevance of the Ministry's response

[50] In her request for review of the Ministry's response and in her submissions, the applicant complained that the records provided by the Ministry were not responsive to her request. She argued that they "were clearly not about the decision to make my position redundant or records to identify my position as redundant …" and that they fell outside the time frame of her request. She also indicated that the Ministry's response made her mistrustful of the Ministry's willingness to respond openly and accurately to her request. The Ministry did not directly respond to these assertions.

[51] On their face, it is not clear how these records are responsive to the applicant's first request. Often, in an effort to provide a comprehensive response to a request for

records, a public body will include records that, while not technically within the scope of the request, may be of interest to the applicant. However, in this case the records provided were copies of the applicant's own email correspondence and, in the absence of any other records, the Ministry's response could have given the impression that its search efforts were cursory.

Scope of the request

[52] The parties' submissions had considerable variance in their interpretations of the scope of the applicant's first request. This was despite discussions between the applicant and Ministry staff, including a meeting specifically for the purpose of clarifying her requests, and also despite mediation by this office prior to this inquiry. This is unfortunate because, if a public body is unclear about what an applicant is requesting, it is difficult for the public body to provide a satisfactory response to the request.

[53] In her initial submission, the applicant pointed out that each part of her first request for records had two components. The first component was for records created by the Ministry regarding the decision to make her position redundant or identifying her position as redundant. The second component was for records the Ministry shared with the union via the Ministry Joint Committee regarding the decision to make her position redundant or identifying her position as redundant.

[54] In reply submissions the Ministry argued:

> At page 5 of her initial submissions, the Applicant separates her request into two parts, the first part dealing with records created by the Ministry regarding the decision to make her position redundant. The Ministry interpreted Request One to be for records dealing with the decision to make her position redundant that were shared with either the BCGEU or the Article 29 Committee prior to January 17, 2002. The Ministry submits that its interpretation of Request One was reasonable under the circumstances. The Ministry interpreted that request in such a manner because the Applicant had referenced Articles 13.1 (b) and (c) of the Thirteenth Master Agreement in Request One. As a result, the Ministry presumed that the Applicant was looking for records that would indicate that the Ministry consulted with the Union and or the Ministry Joint Committee about her position. The Ministry wishes that the Applicant would have made it clear from the outset, or at least on the occasions that the Ministry communicated her during the processing of her requests, that she was also seeking Ministry records dealing with the decision to make her position redundant that were not shared with either the BCGEU or the Article 29 Committee.
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> Given how detailed and specific Request One was, and given that the Applicant was and is a Ministry employee, the Ministry presumed the Applicant was aware of exactly what she wanted access to and that she only wanted access to the records specified in her request. The Ministry submits that it is up to an applicant to be clear as to what records he or she requires. If the Applicant had worded Request One in the same manner that she worded it on page 5 of her initial submissions, the Ministry would have interpreted her request in a different manner.

> The Ministry notes that [a Ministry employee] met with the Applicant on June 6, 2002 in order to determine what records she was interested in obtaining. Unfortunately, the Applicant did not communicate to [the Ministry employee] her desire to obtain records dealing with the decision to make her position redundant that were not shared with either the BCGEU or the Article 29 Committee.
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> As mentioned, the Ministry interpreted Request One to be for records dealing with the decision to make her position redundant that were shared with either the BCGEU or the Article 29 Committee prior to January 17, 2002. As such, the Ministry did not search for records dealing with the decision to make her position redundant that were not shared with either the BCGEU or the Article 29 Committee.

[55] In my view, the applicant's interpretation is preferred as the reasonable interpretation of her first request for records. The Ministry's interpretation is inconsistent with the wording of the request which included records "created by and/or shared between" the Ministry and the union. The request was for records created by the Ministry or shared between the Ministry and the union. It is not logical for the Ministry to interpret the applicant's request as excluding records created by the Ministry relating to the decision to make her position redundant but not shared with the union. Records created by the union and not shared with the Ministry would have been outside the scope of the Act.

[56] The Ministry's interpretation of the applicant's first request for records is also inconsistent with the nature of the records the Ministry initially released to the applicant as being responsive to the applicant's first request. Those clearly were not records that the Ministry would have shared with the union or the Ministry Joint [Article 29] Committee, although it is conceivable that they could be considered to be related to the decision to make the applicant's position as redundant or related to identifying her position as redundant.

[57] This is not to suggest that the Ministry deliberately misinterpreted and narrowed the scope of the applicant's request. It appears much more likely that, in discussions with the applicant, the focus was shifted toward the records created in the course of consultations with the union about redundancies in the Ministry. However, there is nothing in the submissions to suggest that the applicant gave any indication to the Ministry that she was not interested in records created by the Ministry but not shared with the union.

[58] The applicant's comments when she requested that this office review the Ministry's response to her first request for records may have influenced the Ministry's focus on records relating to consultation with the union. As required by s. 54 of the Act, this office gave notice to the Ministry by providing a copy of the applicant's request for review.

[59] In her request for review, the applicant explained her request for records and why she considered that the records provided to her by Ministry were not responsive to her request. She explained the purpose of her request for records as follows:

> The Ministry of Health Services implemented Article 13.1 of the Thirteenth Master Agreement [between the provincial government and the BCGEU] when on January 17, 2002, I was informed by letter that my position had been made redundant. The Ministry of Health Services implemented Articles 13.2 and 13.3 when on April 17, 2002 they issued me a layoff notice. My request specifically asks for access to records that show that clauses 13.1(b) and 13.1(c) which precede 13.2 and 13.3 were followed. I would like access to the records to ensure that my position was not identified as redundant in error. Access to the record would also indicate whether or not the layoff process which was agreed to by both parties was followed.

[60] While these comments emphasize the labour relations elements of the Ministry's decision to downsize its operations, they do not obscure the fact that the decision was the Ministry's, as was its obligation to ensure that it complied with the provisions of the applicable collective agreement in implementing that decision. Apart from any obligation to consult with the union, the Ministry was likely to have records documenting its decision-making processes.

[61] The Ministry has acknowledged in it submissions that it did not search for records dealing with the decision to make the applicant's position redundant that were not shared with either the union or the Ministry Joint Committee. I find that, in its interpretation of the applicant's first request for records, the Ministry unduly narrowed the scope of the request and thereby unreasonably restricted the scope of its search for records responsive to the request.

Second release of records

[62] On July 16, 2002, the Ministry responded to the applicant's second request for records. The Ministry's release letter stated that, in conducting its search for records responsive to the applicant's second request, the Ministry had also located records related to her first request. These were a list of the employees of the Ministry of Health Services who had received "Redundant Letters" on January 17, 2002 and Page 31 of a Ministry Service Seniority Report identified as being run on January 25, 2002.

[63] The applicant submitted that these records should have been located in the Ministry's initial search. The Ministry responded:

> [T]he Applicant refers to the fact that the Ministry advised her, in its July 16, 2002, response letter, that additional records were found responsive to her first request. In fact, those records were created after January 17, 2002, the end date specified in Request One. Those records were therefore outside the scope of that request. As such, the Ministry replies that providing the Applicant with additional records on July 16, 2002, that identified her specifically is not evidence that the Ministry previously failed to locate records responsive to Request One in a timely manner.

> To the contrary, the inclusion of such records (being records outside the scope of the request) is indicative of efforts made by the Ministry to assist the Applicant and be as forthcoming as possible.

[64] The Ministry further clarified:

> In the Ministry's letter to the Applicant dated July 16, 2002, the Ministry referred to additional information being located regarding Request One. That statement was incorrect, given that the records referred to were outside the scope of the request by virtue of being created after January 17, 2002, the end date referred to in the request. The Ministry provided those records in order to assist the Applicant.

[65] I accept the Ministry's characterization of these records and why they were provided to the applicant. However, it is understandable that the applicant would have a different perspective.

Records released after the close of inquiry

[66] By letter to the applicant dated May 29, 2003, after the close of this inquiry, the Ministry released additional records to the applicant that it described as being "in response to your request". The Ministry's cover letter used a different Ministry file tracking number from those used for the applicant's requests for records that are the subject of this inquiry.

[67] The applicant wrote to this office on June 26, 2003 to object to what she termed the "untimely response" by the Ministry. She had made no additional requests for records and clearly regarded the records released by the Ministry to be responsive to her first request for records. In response to my request for clarification described above, the Ministry characterized the records as not being related to the requests for records that are the subject of this inquiry.

[68] I have reviewed the records in detail. They can be described as follows:

1. A summary sheet headed "Reduction Exercise" dated October 13, 2001, which lists the areas of the Ministry in which the applicant was employed that were to be downsized. For each program area, the summary gives an estimate of the FTE [full time equivalent employee] reduction, the dollar saving and the reason for the program being reduced or eliminated.

2. A document headed "Ministry of Health Services - Reduction Strategy Issue Paper" also dated October 13, 2001, which discusses a proposed reduction of administrative support staff in the Ministry.

3. A document headed "Ministry of Health Services 02/03 – 04/05 Budget Reductions Summary" which outlines a strategy to reduce the Ministry's Regional Programs Policy and Strategic Initiatives Program Management to meet a 45%

budget reduction. The document lists dollar and FTE savings and the implication of reducing the program areas.

4. Four pages of records each identifying specific employees, including the applicant, who will be affected by proposed staff reductions. These records had the personal information of other employees deleted.

5. A "Transition Implications" summary document of functions formerly provided by Regional Programs Policy and Strategic Initiatives that would no longer be provided or would be provided by a new program titled "Population Health and Wellness".

[69] The Ministry's response to my enquiries described these records as "records relating to the decision to make [the applicant's] position redundant". In my view these records clearly fall within the scope of the applicant's first request for records as I have defined it above.

[70] With respect to the search for these records, the Ministry met with a program area manager and, in its words "simply searched through all the records [the manager] had that were related to the downsizing exercise, and pulled any that related in any way to the decision to make [the applicant's] position redundant.

[71] I found above that the Ministry had unduly restricted the scope of the applicant's first request for records. It is evident that, had the Ministry properly construed the request, it could have located these records much earlier. I find that because of its error, the Ministry was not able to, and did not, meet its obligation under s. 6 of the Act to respond openly, accurately and completely to the applicant's first request.

[72] **3.4 Ministry's Response to Second Request** – In addition to the two records the Ministry identified as being responsive to the applicant's first request for records, the Ministry's July 16, 2002 release of records included records responsive to the applicant's second request. These were a list of relevant "Article 29 (Ministry Joint Committee)" minutes and copies of the minutes, which apparently were also available on the Ministry's web site.

[73] In her request that this office review the Ministry's response the applicant complained:

> I requested copies of records that indicate that 13.1(c) of the collective agreement was followed. There have been no records provided that clearly indicate that there was any formal consultation between the Ministry Joint Committee and the B.C. Government and Service Employees' Union as per 13.1 (c) of the collective agreement.

[74] The context for the applicant's requests for records and her complaints regarding the Ministry's search efforts is found in the language of the collective agreement that applied at the time the applicant's position was declared redundant. The relevant

language is in the Extension to the Thirteenth Master Agreement between the Government of the Province of British Columbia and the B.C. Government and Service Employees' Union (BCGEU). Although the Extension to the Thirteenth Master Agreement was signed after the letters of redundancy were issued, the language cited here was carried forward from the previous collective agreement:

> **13.1 Ministry Workforce Adjustment (Phase 1)**
>
> (a) The Parties recognize that workforce adjustment will be necessary due to the elimination of positions resulting from a reduction in the amount of work required to be done by the Employer, reorganization, program termination or closure which impacts a number of employees. …
>
> (c) Ministry will consult with the Union through the Ministry Joint Committee established pursuant to Article 29 respecting workforce adjustment which results in redundancy as required pursuant to (a) above. Ministry workforce adjustment activities will be guided by the following principles and procedures: …
>
> **ARTICLE 29 - MINISTRY JOINT COMMITTEE**
>
> **29.4 Responsibilities of Committee**
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> (a) …
>
> (b) In the event of any substantial re-organization in a Ministry which results in redundancy, relocation or reclassification, the Committee shall meet in order for the Employer to consult with the Union. …

[75] The Ministry Joint Committee is the forum for the consultation required under Article 13.1. Therefore, I find that the minutes of the Ministry Joint Committee that the Ministry provided to the applicant are records of the formal consultation to which the applicant referred and that they are records responsive to her second request for records.

[76] The applicant may be disappointed with the lack of detailed information in the records. The following section provides some indication why the Ministry was unable to provide more detailed records.

Records released during mediation

[77] During mediation by this office of the applicant's request for review, the Ministry released additional records to the applicant in response to her two requests. These included two pages of hand written notes, dated January 17, 2002, that the Ministry's Employee Relations Manager had made in an "Article 29" meeting with the union. Also included were copies of:

- Minutes of the January 17, 2002 "Special Meeting" of the Article 29 Committee.

- An organization chart of the Ministry dated January 16, 2002.
- A form letter to be delivered to BCGEU members whose positions were declared redundant.
- A form letter dated January 17, 2002, to employees of the Vital Statistics Agency confirming that their positions had been transferred to the Ministry effective the same day.
- An undated three page document entitled "Resources for Employees" outlining the resources available to employees affected by workforce adjustment.
- A three page document dated January 15, 2002 and entitled "Resources for Managers" outlining the resources available to managers who supervised employees affected by workforce adjustment.

[78] I note that the minutes of the "Special Meeting" of the Article 29 Committee had been provided to the applicant in its second release of records. The Ministry made the following submissions in regard to this release of records:

> On October 25, 2002, the Ministry provided the Applicant with additional records responsive to the Requests. Those records included notes that [Ministry employee], Employee Relations Manager, took at an Article 29 meeting on January 17, 2002. Though that record was not within the scope of the Requests, as it was not sent to the union or the Article 29 Committee, it was provided to the Applicant anyway. Prior to the disclosure of October 25, 2002, the Applicant had expressed concern that she had not received all of the records she wanted. In the interests of completeness and in the interests of assisting the Applicant, the Ministry decided that it would disclose all of the records even remotely related to the subject matter of the Requests. For instance, the records released to the Applicant in response to Request One were not, strictly speaking, within the scope of that request. That is because the Ministry did not discuss specific positions, including the Applicant's position, with the Article 29 Committee or the BCGEU prior to January 17, 2002. Nevertheless, the Ministry decided to disclose records that listed the Applicant's position, despite the fact that those records were sent to the Article 29 Committee after January 17, 2002, and thus were outside the scope of the Requests. With respect to the records released on October 25, 2002, the Ministry decided to disclose all of the records shared by the Ministry with the Union, through the Article 29 Committee, even if some of the records were not, strictly speaking, with the scope of the Requests.

[79] I consider this a reasonable answer to the applicant's concerns, expressed in her submissions, that the Ministry provided records that were not, strictly speaking, within the scope of her requests. With respect to her concerns that the Ministry did not provide records that the applicant considered should exist, the Ministry canvassed the senior union representative on the Ministry Joint Committee with the following result:

> Peg Orcherton, the Article 29 Co-Chair, advised [the Ministry employee] by e-mail on December 19, 2002, that the union had received the following records from the Ministry on January 17, 2002, at the Article 29 meeting held on that date;
>
> - An overview of numbers to be cut over 3 years (no details of program areas),
> - A high level organization chart,
> - A document on resources for employees,
> - A document on resources for managers,
> - Generic letters of what employees would receive when they received a notice that his or her position was being declared redundant, and
> - A copy of a letter to all staff relating to an announcement from Penny Ballam, Deputy Minister.
>
> All of the above-mentioned records have been provided to the Applicant in response to the Requests. As such, the Ministry has no reason to believe that additional responsive records exist.

[80] It is apparent that the consultations at the Ministry Joint Committee were a high level overview of the Ministry's downsizing plans. The most significant of these briefings took place on January 17, 2002, the day Ministry employees received their layoff notices. Given the scope of the downsizing activity, not only in the Ministry but also across government, it would not be surprising if there would be no records of more detailed consultations.

[81] The applicant is mistaken if she believes that Article 13.1 imposes a requirement on the employer to consult with the union on every layoff or redundancy resulting from a workforce adjustment. The collective agreement has detailed language governing how the employer will implement layoffs and it is the employer's responsibility to ensure that it complies with the contract requirements. Any dispute regarding whether an individual employee, or group of employees, has been laid off or displaced in accordance with the collective agreement is dealt with through the grievance process, not through the consultations contemplated by Article 13.1.

[82] The Ministry submitted, and provided case law to support its submission, that it is not required to prove that certain records do not exist. It also argued that there is no requirement under the Act for a public body to explain why records do not exist. I agree with both propositions. The Ministry is required to provide evidence that it has discharged its s. 6(1) search obligations. In my view, the Ministry has established that it made reasonable efforts to respond to the applicant's second request for records.

[83] **3.5 Adequacy of the Ministry's Search Efforts** – I have examined the submissions of the Ministry, and the sworn affidavits of two employees of the Ministry with respect to the Ministry's search efforts. I accept that they demonstrate that the Ministry made reasonable efforts to locate records that the Ministry considered were responsive to the applicant's requests for records.

[84] The applicant urges that the Ministry was motivated to delay its response and withhold records for fear that the records would disclose that the Ministry had contravened the collective agreement. I do not accept this submission, which is not supported by any evidence. Indeed, the evidence suggests that the applicant may have overestimated the extent of the obligation under the collective agreement for the Ministry to consult with the union.

[85] The Ministry argued that it undertook the necessary search efforts according to the applicant's requests as worded. With respect to the applicant's first request, I disagree. It would be more accurate to say that the Ministry undertook the necessary search efforts according to the Ministry's interpretation of the applicant's request. The deficiency was not in the search efforts. It was in not properly appreciating what records the applicant was seeking.

[86] The Ministry missed the point of s. 6 when, after the applicant's submission clarified for the Ministry what records she was seeking, it continued to focus its energy on defending the adequacy of its initial search and response. In its reply submission, the Ministry invited the applicant to make a new request for the records relating to the decision to make her position redundant that were not shared with the union. When the applicant declined to do so, preferring to rely on the inquiry process, the Ministry opened a new request file to provide her with the records.

[87] The purpose of mediation by this office in applications such as this is to clarify and focus the expectations of the applicant and to assist the public body to respond fully to the applicant's request. If evidence of additional records, or a clarification of the request, comes through in mediation, or even in submissions at inquiry, the appropriate response is for the public body to seek the additional records and to provide then to the applicant. As the Commissioner pointed out in Order 00-32, any steps taken by a public body after its initial search and response, including during the review and inquiry process, will be relevant to any order that may be made following an inquiry.

[88] In this respect, the review and inquiry process can be viewed as a continuing dialogue between the parties to ensure that the requirements of s. 6 are met. Of course that dialogue is not enhanced when, as in this case, the applicant views every attempt of the public body to respond to a request as an attempt to evade its responsibilities under the Act or when the public body, when confronted with evidence that it may have misinterpreted the request, continues to defend its interpretation instead of simply continuing its search. In my view, with better communication by both parties in this case, this inquiry could have been avoided.

[89] **3.6 Remedy Sought –** The applicant sought an order for the Ministry to conduct a further search for records regarding the decision to make her position redundant or to identify her position as redundant. Had the Ministry not searched for and provided the records it did after this inquiry closed, such an order would have been appropriate. However, by providing those records, the Ministry demonstrated that it had

properly understood that aspect of the applicant's request and that it had made a reasonable effort to provide records responsive to the request.

[90] In the alternative, the applicant sought an order for the Ministry to provide a written summary of the events that transpired to make her position redundant. The Ministry correctly submitted that there is no authority under the Act for the Commissioner (or his delegate) to make such an order.

3.0 CONCLUSION

[91] For the reasons given above, under s. 58 of the Act:

1. I find that the Ministry did not meet its duty under s. 6(1) of the Act to make every reasonable effort to assist the applicant and by responding openly, accurately and completely, and without delay, when it responded to the applicant's first request for records. However, the Ministry subsequently demonstrated, by providing further records, that it had made a reasonable effort to provide records responsive to the request. No order is required in this regard.

2. I confirm that the Ministry met its duty under s. 6(1) of the Act to make every reasonable effort to assist the applicant and by responding openly, accurately and completely, and without delay, to the applicant's second request for records.

August 10, 2005

ORIGINAL SIGNED BY

Errol Nadeau
Adjudicator

OIPC Files: F02-15634/ F02-16085