OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-01

INQUIRY REGARDING LANGLEY TOWNSHIP BYLAW ENFORCEMENT RECORDS

David Loukidelis, Information and Privacy Commissioner
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Summary: Applicant homeowner sought bylaw enforcement records about her property. Langley refused under ss. 15 and 19 and withheld some records entirely and severed others. Langley authorized to withhold law enforcement information and information that if disclosed could threaten the health or safety of others. Langley required to withhold third party personal information.

Key Words: Law enforcement matter – reasonable expectation of harm – confidential source – threaten – mental or physical health – safety

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 8(1), 15(1)(a), (d), (e), 19(1)(a), and 57(1)

Authorities Considered: B.C.: Order No. 39-1995; Order No. 323-1999

1.0 INTRODUCTION

This case revolves around a dispute between neighbours. The applicant and her husband live on what appears to be semi-rural property in the Township of Langley ("Langley"), in British Columbia's Lower Mainland. In June of 1998, the applicant and her husband complained to Langley about construction on, and use of, their next door neighbours' land. Langley later received a number of complaints about the applicant's use of her property.

Since then, allegations and accusations have flown. The neighbours have alleged intimidating and threatening behaviour on the part of the applicant and her husband. Langley has been involved for some time, and its officials have been in contact with the

applicant and with the neighbours. All of this is public knowledge, in part because the media have reported various aspects of this saga.

At some point, the Langley Detachment of the RCMP became involved in the fracas, as did a number of other public agencies. The applicant has alleged bias on the part of the RCMP and Langley's bylaw enforcement officer (who swore an affidavit in this inquiry).

On April 15, 1999, the applicant made an access to information request to Langley, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for "all by-law enforcement records, including SPCA calls" about the applicant's address since April 15, 1998. The applicant's request explicitly said the applicant did not wish access to another person's personal information. On May 3, 1999, Langley refused to give the applicant access to the requested records, citing ss. 15(1)(a), (d) and (e) of the Act, as well as s. 19(1). The response merely referred to those sections as the reason for the refusal. Langley failed to give reasons for its refusal, despite its duty to do so under s. 8(1) of the Act.

On May 19, 1999, the applicant asked for a review of this decision, under s. 52 of the Act. Langley released a large number of records to the applicant during the mediation phase of the review. Langley continued to refuse to disclose a number of other records, some of which were withheld entirely and some of which it severed and partly withheld.

Langley was represented by counsel in this inquiry, which was conducted in writing. The applicant made her own submissions.

2.0 ISSUES

The issue is whether Langley was authorized by s. 15(1)(a), (d) or (e) or s. 19(1) to refuse to disclose information to the applicant. Under s. 57(1), Langley bears the burden of establishing that it was authorized to refuse to disclose information to the applicant.

Two preliminary points must be made. First, in her initial submission the applicant mentioned that she had sought clarification of some kind about ss. 15(2)(b) and 15(3)(a) of the Act. Neither of these sections was cited by Langley in making its access decision here. Those sections are not before me in this inquiry. Second, it appears some discussions have taken place about mention of SPCA calls in the applicant's access request. Whether the SPCA or Langley is the appropriate respondent in respect of that aspect of the request is not before me. I note, however, that the SPCA is not mentioned in Schedules 2 or 3 of the Act as a public body covered by the Act.

3.0 DISCUSSION

3.1 Classification of the Records – For the purposes of this inquiry, it seems, the records have been numbered and separated by Langley into three categories. The first class – which contains 67 pages – consists of records disclosed in their entirety to the applicant as a result of mediation by this office. The second class – consisting of 45

pages – consists of records disclosed in part to the applicant. The third class – which contains 50 pages – contains records withheld in their entirety.

The majority of the information withheld from the second class of records consists of information that would identify confidential sources of law enforcement information. The resulting s. 15(1)(d) issue is dealt with below.

The third class of records was withheld under ss. 15(1) and 19(1) of the Act.

3.2 Applicant's Submissions – Because they are succinct and focussed, I will summarize the applicant's arguments here. In essence, the applicant argued Langley is hiding behind the Act, in an attempt to conceal what the applicant terms Langley's "culpability for the part they played in this ugly matter". The applicant says she and her husband have been subjected to a "vicious and systematic campaign of character assassination" through "bogus police complaints", arbitrary police detention, false charges of racism and "many other disreputable acts". As a result, information in Langley's bylaw enforcement files has "poisoned all our interactions with the municipal staff". Langley was participating in an "outrageous smear campaign" against the applicant and her husband. As a result, the contents of Langley's files "are inaccurate and enormously biased against us". Accordingly, the applicant argued, she requires access to the files "to clear our name".

3.3 Personal Information Issues – In its initial submission, Langley said it had not made submissions about the applicability of s. 22 of the Act. Langley said it had not followed the third party notice and consultation process under s. 23 of the Act, even though Langley believes that "nearly all of the records" contain personal information which, if disclosed, may unreasonably invade third party personal privacy. According to Langley, if I do not accept its ss. 15 and 19 arguments, this inquiry should be adjourned to allow the third party process to be followed.

Even though I have the authority, under ss. 42(1)(b) and 58(3)(a) of the Act, I am not going to do what Langley has asked. If Langley had reason to believe, at the time of its original access decision, that third party privacy would or might be unreasonably invaded by disclosure of personal information, it was *required* to do one of two things. It should either have withheld the information under s. 22(1) or have followed the s. 23 third party notice process, before it made its decision on the applicant's request, if it proposed to disclose any personal information. Langley did neither of those things. Perhaps Langley's head did not appreciate that s. 23(1) was triggered. It has, of course, taken the position in this inquiry that the s. 23 process should be followed now.

It is the responsibility of a public body to comply with the Act, including in respect of ss. 22 and 23. Public bodies cannot expect me, in the course of an inquiry, to permit or order them to do what they should have done in the first place. In each case, public bodies have the duty to carefully consider the records and the evidence available to them, in order to decide whether to withhold or disclose personal information under s. 22(1). They must also follow the third party process contemplated by s. 23 where appropriate.

Langley withheld small amounts of third party personal information from some of the records in this case. For example, the birthday of one individual was withheld, as were the telephone numbers and addresses of various third parties. That third party personal information is found on pages 68, 80 and 96-99. Langley did not cite s. 22(1) as the reason for severance of this information. By letter dated January 21, 2000, the applicant confirmed that she had "no interest in obtaining third party personal information". This responded to my January 20, 2000 request to the applicant to state her position on this issue. In light of the applicant's position that she does not seek access to others' personal information, I need not decide the s. 22(1) issue.

3.4 Disclosure Harmful to Law Enforcement – Section 15 of the Act is designed to protect certain important law enforcement interests. The scope of the section is well illustrated by s. 15(1)(a), which authorizes a public body to refuse to disclose information if the "disclosure could reasonably be expected to … harm a law enforcement matter". The term "law enforcement" is defined in Schedule 2 of the Act as follows:

> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
>
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

Langley relied on s. 15(1)(a) in refusing to disclose information to the applicant. There is no doubt that local government bylaw enforcement investigations, under the authority of the *Municipal Act* and the local government's bylaws, qualify as "law enforcement" investigations for the purposes of s. 15(1)(a). See Order No. 39-1995, with which I agree.

In its reply submission, Langley said it is not the intention of the Act to allow an applicant to "subvert an ongoing investigation by obtaining records" that would not otherwise be available to the applicant. Conversely, the Legislature did not make the exception in s. 15(1)(a) a class-based exception applicable to records within a defined class. That exception is clearly harms-based. A public body must establish – on evidence it submits – that there is a reasonable expectation of harm to a law enforcement matter before s. 15(1)(a) applies.

In this case, Langley's essential argument under s. 15(1)(a) is that disclosure of the disputed records would hinder its law enforcement efforts by making residents, generally, reluctant to provide personal information or records that could be disclosed through the Act. At p. 7 of its initial submission, Langley said that disclosure of identities, at least, would harm bylaw enforcement in this and "future cases". Langley's argument on this point comes close to saying that all records and information provided for bylaw enforcement purposes can be withheld because their disclosure will, by definition, hinder future bylaw enforcement efforts in other cases that may arise. Langley did not provide any evidence from a citizen that disclosure in this case would cause that person not to

come forward with bylaw enforcement information in the future. The only evidence on the point was in the affidavit of Langley's bylaw enforcement officer, who speculated this would be the result of disclosure in this case. I am not prepared to agree that disclosure can, in this case, reasonably be expected to harm bylaw enforcement generally in Langley.

Has Langley nonetheless established the necessary reasonable expectation of harm to a specific bylaw enforcement matter, *i.e.*, its ongoing investigation into allegations about the applicant? After careful consideration, I have concluded, for the following reasons, that Langley has made its case on this point.

At p. 8 of its initial submission, Langley said disclosure of the disputed records would "interfere with the on-going investigation of the Applicant's conduct". The ongoing nature of the bylaw enforcement investigation is attested to in Langley's affidavit evidence. No details were provided on this point. This is somewhat troubling as there is an indication in the records that, as of October of 1998, there was no active investigation. Nonetheless, other information in the material before me – including some of the disputed records – indicates investigative activity on the part of Langley after October of 1998. I accept the evidence provided by Langley that it has an "ongoing investigation" for bylaw enforcement purposes.

Obviously, disclosure of information in the records does not satisfy the harms-based test in s. 15(1)(a) simply because there is an ongoing Langley bylaw enforcement investigation. To summarize what I said about the reasonable expectation test in Order No. 323-1999, a public body must adduce sufficient evidence to show that a specific harm is likelier than not to flow from disclosure of the requested information. There must be evidence of a connection between disclosure of the information and the anticipated harm. The connection must be rational or logical. The harm feared from disclosure must not be fanciful, imaginary or contrived.

Here, Langley provided evidence that release of the requested information may harm the integrity of an ongoing investigation by causing various third parties to be reluctant to assist further with the investigation. As was noted above, Langley's written submission on this point was that disclosure of the information "will interfere with the on-going investigation". The troubling circumstances of this case support this view. Without in any way assigning blame to anyone in particular, it is an understatement to say relations between the applicant, her neighbours, Langley, the RCMP and others have been acrimonious, volatile and hostile. The records suggest the possibility of violence has existed and may still exist.

In this environment, Langley had reason to conclude that disclosure of information to which it applied s. 15(1)(a) might harm its ongoing investigation. One or more of the different complainants and potential witnesses – and there are a number of them – might well be reluctant to assist Langley further with its investigations. The nature of the various bylaw complaints indicates that testimony as to noise levels caused by the applicant's admitted air horn blowing, at various times, would be central to any noise

bylaw prosecution. Langley's ability to subpoena witnesses does not mean the need for co-operation of potential witnesses during the investigative, pre-prosecution, stage can be ignored.

Based on the evidence before me, Langley has made its case under s. 15(1)(a) in this inquiry.

3.5 Protection of Confidential Law Enforcement Sources – Langley also relied on s. 15(1)(d), which authorizes a public body to refuse to disclose information "if the disclosure could reasonably be expected to … reveal the identity of a confidential source of law enforcement information". It withheld the identities – and identifying information – of a number of individuals who had complained to Langley about the applicant's use of her property. The Property Use Complaint Forms used to initiate bylaw complaints contain the following notice to complainants:

> Anonymity will be maintained between the complainant and the alleged violator, except where necessary in a court of law. However, should this matter proceed to Court, you may be required to give evidence as a witness and your name and filed complaint will become public information.

The explicit assurance of confidentiality is qualified because there is a duty to disclose to an accused all information relevant to the proceedings. For the purposes of this inquiry, however, I accept that this notice means anyone who complains about a bylaw infraction using this form is a "confidential source of law enforcement information" for the purposes of s. 15(1)(d) of the Act. Disclosure of the name or other identifying information of informants would "reveal the identity" of those confidential sources of law enforcement information. Accordingly, Langley is authorized to refuse to disclose that information to the applicant.

3.6 Anticipated Harm to Others – Langley also relied on s. 19(1)(a) in refusing to disclose information to the applicant. That section says a public body may refuse to disclose information - including the applicant's own personal information – if the disclosure could reasonably be expected to "threaten anyone else's safety or mental or physical health".

Deliberation and care are necessary in assessing whether a reasonable expectation of harm exists for the purposes of s. 19(1)(a). A public body should assess the risk of harm in light of all of the evidence before it at the time of its decision. In this case, as in many others, a public body will have to act on evidence provided by others, often the individual who fears for his or her safety or health. Langley's evidence on the s. 19(1)(a) issue here is all hearsay. That means it consists of statements made by third parties to Langley about events or actions relevant to the s. 19(1)(a) analysis. Public bodies are entitled to base their s. 19(1) decisions on evidence of this kind.

The evidence offered by Langley in this inquiry on the s. 19(1) issue was submitted entirely *in camera*. That evidence is in part based on direct knowledge of the person who swore the affidavit, but much of the evidence is hearsay. It consists of statements of fact

that were provided by third parties – and I emphasize that more than one third party is involved – to the person who swore the affidavit.

Such hearsay evidence must, in an inquiry such as this, be treated with some caution. Having said that, hearsay evidence can be given weight and I do so here. The evidence cannot be described here in any detail, since that discussion could itself raise s. 19(1) risks. Suffice it to say I am satisfied, based on my review of the *in camera* evidence and the other circumstances of this case, that Langley has proven there is a reasonable expectation of harm, as contemplated by s. 19(1)(a), from disclosure of some of the disputed information

The following pages can be withheld under s. 19(1)(a): 105 and 106 (the parts already severed by Langley), 107 (part already severed by Langley), 113-139, 152-162. By contrast, Langley was not authorized by s. 19(1)(a) to refuse to disclose information from pages 70-79, 80, 82-99, 101 and 140-151. For example, copies of certain correspondence between third parties cannot, in my view, be withheld by Langley under s. 19(1)(a). Among other things, Langley has already disclosed copies of the same correspondence to the applicant. This finding does not alter the outcome, however, since I have found that Langley was authorized by s. 15(1)(a) and (d) to withhold the same information.

There is an exception to this. Langley severed and withheld what it called "contact information" from copies of correspondence that it disclosed to the applicant. The contact information consists of the name of a business and a telephone number apparently belonging to that business, from which the correspondence copies had been faxed to Langley. Since the correspondence in question was between the applicant's lawyer and the lawyer for the applicant's neighbour, there can be little doubt the applicant must know who sent the copies to Langley. It appears from the records that the "contact information" is that of the neighbour. Langley has disclosed the "contact number" in some records and not others. In these circumstances, I do not agree that s. 19(1)(a) authorizes Langley to refuse to disclose this contact information.

4.0 CONCLUSION

For the reasons given above, the following orders are made:

1. having found that Langley was authorized by s. 15(1)(a) to refuse to disclose parts or all of the disputed records identified above, under s. 58(2)(a) of the Act, I confirm Langley's decision to refuse to give the applicant access to the records, or parts of records, withheld by Langley under that section;

2. having found that Langley was authorized by s. 15(1)(d) to refuse to disclose parts of the disputed records, under s. 58(2)(b) of the Act, I confirm Langley's decision to refuse to give the applicant access to the parts of the records withheld by Langley under that section;

3. having found that Langley was authorized by s. 19(1)(a) to refuse to disclose pages 105 and 106 (the parts already severed by Langley), 107 (part already severed by Langley), 113-139 and 152-162, subject to the order in paragraph 4 below, under s. 58(2)(b) of the Act I confirm Langley's decision to refuse to give the applicant access to some of the disputed records withheld by Langley under that section; and

4. having found that Langley was not authorized by s. 19(1)(a) to refuse to disclose pages 70-79, 80, 82-99, 101 and 140-151 of the disputed records, subject to the orders under paragraphs 1 and 2, above, under s. 58(2)(a) of the Act I require Langley to give the applicant access to those pages.

January 26, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia