OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 03-13

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

David Loukidelis, Information and Privacy Commissioner
March 31, 2003

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Summary: The applicant, a former Ministry employee, requested records related to an investigation into his conduct. The Ministry provided severed copies of the investigation report and severed copies of interview transcripts, but said it could not provide copies of the audiotapes of those interviews. Section 22 requires the Ministry to refuse access to third-party personal information. The Ministry has not complied with its duty under ss. 4(2) and 9(2) regarding copies of the audiotapes or their severing and must provide the applicant with copies of the audiotapes, severed as appropriate.

Key Words: severance – copies of records – workplace investigation – personal information – opinions or views – submitted in confidence – presumed unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 9(2) and 22(2)(c), (e) and (f), 22(3)(d).

Authorities Considered: B.C.: Order No. 204-1997, [1997] B.C.I.P.C.D. No. 66; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-19, [2002] B.C.I.P.C.D. No. 19; Order 02-21, [2002] B.C.I.P.C.D. No. 21.

1.0 INTRODUCTION

[1] This inquiry follows a decision by the Ministry of Public Safety and Solicitor General ("Ministry") in response to a September 2001 request, by a former employee of the British Columbia Corrections Service, for records related to an investigation of workplace incidents that led to his discipline. As both parties have reminded me in their submissions, this inquiry relates to issues I dealt with in Order 02-21, [2002]

B.C.I.P.C.D. No. 21. The two access requests dealt with in Order 02-21 were for records related to the applicant's complaint about alleged abuse of managerial authority by his supervisor. The access request addressed here was for records related to Ministry investigations that followed the applicant's complaint, with those investigations leading to the applicant being disciplined. Those investigations were not the subject of the previous access requests.

[2] The Ministry responded in December 2001 and January 2002 by disclosing severed copies of interview transcripts, from which it withheld some information under s. 22 of the *Freedom of Information and Protection of Privacy Act* ("Act"). It also told the applicant that it was "currently unable to provide copies of tapes" of those interviews (it did not explain why) and that it was unable to provide a transcript of one interview as "the tape quality was too poor to transcribe". The applicant requested a review of the Ministry's response in February 2002. He questioned the severing of the transcripts and the Ministry's inability both to provide copies of the interview tapes and to transcribe the tape it had said was of poor quality. He also pointed out that he had been interviewed as part of the investigation. He said that, while he had received a copy of the transcript of his own interview as a result of his earlier requests, he had still not received a copy of the tape of that interview, despite requesting it many times.

[3] The applicant also said that he had expected to receive records related to interviews with other named employees. It appears from the material before me that these issues fell away during mediation by this Office of the applicant's request for review. I note that the Portfolio Officer's fact report does not mention such records. Nor do the parties address them in their inquiry submissions. The applicant merely mentions this at one point. I have not dealt with this aspect of the applicant's request for review in this decision.

[4] Because mediation did not resolve all of the issues, an inquiry took place under Part 5 of the Act.

[5] The Ministry has provided me with copies of the records in dispute in this case: a four-page investigation report and six interview transcripts. The Ministry severed one name from the investigation report and also severed some lines and phrases from five of the six transcripts. The withheld information is a very small percentage of the information in the records.

2.0 ISSUES

[6] The first issue I will address is whether s. 22 of the Act requires the Ministry to withhold information from the interview transcripts and the investigation report. The Notice of Inquiry stated that the second issue was whether s. 6(1) of the Act requires the Ministry to provide copies of tapes of interviews where, in some cases, it has already disclosed transcripts of those interviews. Both parties provided submissions on whether, under s. 6(1) of the Act, the Ministry properly declined to sever copies of tapes of witness interviews or provide copies of tapes to the applicant. I consider that the Ministry's refusal to sever copies of the interview tapes is more properly characterized

as an issue under s. 4(2) of the Act and that its refusal to provide the applicant with copies of interview tapes more properly arises under s. 9(2) of the Act. Both parties have agreed to this characterization of the issues as arising under s. 4(2) and under s. 9(2) and I have dealt with them as such.

[7] Section 57(2) of the Act places the burden on the applicant with respect to the first issue, while previous orders have established that the burden regarding the s. 4(2) is on the public body. For similar reasons as given in cases allocating the burden under s. 6(1) to the public body, the Ministry is best placed to bear the burden under s. 9(2). I note, in this respect, that the Notice of Inquiry stated that the Ministry bore the burden on the s. 4(2) and s. 9(2) issues that were originally characterized as s. 6(1) issues.

3.0 DISCUSSION

[8] **3.1 Application of Section 22** – I have discussed the application of s. 22 in numerous orders. With respect to workplace issues, such as those underlying this case, see the discussions in Order 01-07, [2001] B.C.I.P.C.D. No. 7, Order 01-53, [2001] B.C.I.P.C.D. No. 56, and Order 02-21. I have applied here the principles found in those decisions.

[9] The relevant parts of s. 22 read as follows:

> **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
>
> …
> (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, …
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …

> (d) the personal information relates to employment, occupational or educational history, … .

[10] I will now discuss the s. 22 issues.

Is personal information involved?

[11] The vast majority of the withheld information is about people other than the applicant, principally his supervisor and his interactions with people other than the applicant. A small amount of the information relates to interactions between the applicant and his supervisor. I agree with the Ministry that the withheld information is information about the employment history of identifiable individuals, in that it relates to incidents in the workplace and to interactions in the workplace between the supervisor and others and, in a minority of areas, the supervisor and the applicant (paras. 5.36-5.42, Ministry's initial submission). It therefore raises a presumed unreasonable invasion of the third parties' personal privacy under s. 22(3)(d) of the Act.

[12] I will now consider whether any relevant circumstances favour withholding or disclosing the information in issue.

Fair determination of rights

[13] The applicant argues that the withheld information is relevant to a fair determination of his rights, in that it forms a partial foundation for his dismissal, which occurred in January 2002, and is needed for his grievance of that dismissal. He also believes the withheld information relates to his earlier discipline and that the basis for that discipline should not be secret. At p. 3 of his initial submission, the applicant argues as follows:

> The matter of the dismissal is currently the subject of a grievance. Given this circumstance, the matter is very much alive at this time and, given that the employer continues to use this information against me, it should be done openly so there can be a fair determination made as to the truth and my rights.

[14] The applicant repeats this argument in his reply submission. He also says he should be able to see how he "went wrong", since his employer found his complaint to be "vindictive and without any merit, hence my discipline" (p. 3, reply). He suggests, at pp. 4-6 of his reply submission, that the Ministry essentially investigated the question of his good faith in complaining about his supervisor, such that the withheld information concerns discipline against him.

[15] The applicant does not explain how the withheld information (which flows from an investigation in 1999 into the applicant's conduct) is relevant to a fair determination of his rights as regards the current grievance of his dismissal (which occurred three years later, for reasons which the Ministry says, as noted below, were distinct from those for which he was disciplined). I made a similar comment about the lack of linkage in the applicant's arguments in Order 02-21, when considering the applicant's contention that

the information there in dispute (which related to his complaint against his supervisor) was relevant to the later investigation that led to his discipline.

[16] The Ministry, for its part, argues that there is no live legal right or issue at stake in this case. The applicant's grievance of the discipline imposed on him in February 1999 (as a result of the second investigation) was settled before the inquiry that led to Order 02-21. The Ministry reminds me that I agreed, in Order 02-21, that the information withheld in that case (which related to the investigation into the applicant's complaint against his supervisor) was not relevant to the grievance of this discipline. It says that the withheld information in this case is not relevant to the events that led to the applicant's grievance of his dismissal, which took place three years later, in January 2002. The applicant's dismissal was, the Ministry says, the result of circumstances "separate and distinct" from those documented in these records (paras. 5.33-5.34, initial submission; paras. 2-3, reply submission). It has provided evidence to support this contention. It provided documentary evidence to show that the applicant's 1999 discipline flowed from the investigation that followed the applicant's complaint, whereas his dismissal resulted from other actions by the applicant that the Ministry found to be unacceptable. While the applicant's past behaviour was apparently considered to be a factor in the decision to dismiss the applicant, I accept the Ministry's evidence that his 1999 discipline was not directly linked to his dismissal.

[17] At paras. 31 and 32 of Order 01-07, [2001] B.C.I.P.C.D. No. 7, I discussed the test for determining whether s. 22(2)(c) applies. After applying this test here, I conclude that s. 22(2)(c) is not relevant in this case. While the applicant's grievance of his dismissal was active at the time of his request and this inquiry, he has failed to articulate how the withheld third-party personal information is relevant to a fair determination of his rights in that grievance process. Nor is it evident from the withheld information itself, which principally concerns his supervisor's actions in the workplace, how that information might be relevant in that grievance process. I do not consider the applicant's arguments on this point to be persuasive. I find that s. 22(2)(c) is not a relevant circumstance in this case.

Unfair exposure to harm

[18] The Ministry argues that disclosure of the information in dispute would unfairly expose third parties to harm. It supplied *in camera* affidavit material in support of this argument. The Ministry says, at para. 5.28 of its initial submission, that exposing the third parties to harm would be "unfair" given that the applicant's grievance of the discipline imposed on him in 1999 as a result of the investigation into the applicant's own conduct has since been settled. It did not explain how such unfair harm might occur nor did it explain how the settlement of the applicant's earlier grievance was relevant to the issue of such harm.

[19] The applicant says in his reply that the basis for the Ministry's argument on this point is not clear. He says there is no reason to believe that he would harm anyone who gave information in this matter and says he would appreciate the opportunity to respond to any allegations by the Ministry that he has "a propensity to harm".

[20] I note that the Ministry's *in camera* affidavit material is dated 2001 and actually comes from the Ministry's submissions to the inquiry that led to Order 02-21. It is not clear why the Ministry was not able to supply fresh affidavits on this point. When I considered this same material in Order 02-21, I said, at para. 39, that, while I could not discuss much of the material, some of which was hearsay, I considered it to be speculative for the most part and based on hypothetical scenarios.

[21] I noted that, in an open part of one affidavit, the deponent expressed the view that the applicant would likely malign and harass others if he received the withheld information and indicated that the applicant had a capacity for vindictiveness. I also noted that the Ministry had not provided any evidence or argument about the applicant's past behaviour or interactions with others that persuasively supported its argument that harm of some kind would ensue from disclosure of information related to third-party involvement in the investigation. I therefore concluded that the circumstance in s. 22(2)(e) was not relevant in that case.

[22] Again, the Ministry has not provided any new argument or evidence on this point in this inquiry. Based on my assessment of the material before me in this case, including the *in camera* material, I reach the same conclusion I reached in Order 02-21, *i.e.*, that the circumstance in s. 22(2)(e) is not relevant here.

Supply in confidence

[23] As for s. 22(2)(f), the Ministry says the various interviews proceeded on the understanding that the employees were speaking to the investigators in confidence. It says the employees were told not to talk about their interviews. The applicant argues in his reply that this does not mean information derived from the interviews was supplied in confidence. It is intended, he suggests, to ensure that employees come to their interviews without having their recollections altered by those of others. He argues it is not evident how the interviewees could presume that they were supplying information in confidence.

[24] In support of its argument, the Ministry supplied an affidavit from a director who participated in the investigation of the applicant's conduct. The director deposed that the interviewees were told that the information they provided would be treated confidentially, unless it had to be disclosed in a subsequent arbitration, and said that such information is kept confidential. The director further deposed that, while he or she could not remember exactly what was said to employees who were interviewed, she or he believed that, given "the sensitive nature of the discussions and the surrounding circumstances", the employees expected that the information they provided was being supplied in confidence, subject to any disclosure requirements as part of a labour relations arbitration (paras. 10-12).

[25] I have read the interview transcripts and can confirm that employees were told not to talk about their interviews. I dealt with the Ministry's argument on this issue in Order 02-21 as well. At para. 35 of that order, I said that the Ministry's argument went,

in my view, to the "chilling" argument that public bodies often bring up in such cases, that disclosure of the information under the Act will compromise future investigations or other activities. I said that such arguments are really harm arguments and that I have rejected them in the past. However, as with Order 02-21 – where the withheld information was supplied under similar circumstances – and based on the records and affidavit material before me, I have concluded that the withheld information was supplied in confidence within the meaning of s. 22(2)(f) and that this factor favours withholding the disputed information.

[26] For the reasons set out above, I find that the applicant has not rebutted the presumed invasion of privacy in s. 22(3)(d). The circumstance in s. 22(2)(f) favours withholding this information. The minimal amount of the applicant's personal information that is intertwined with his supervisor's personal information cannot, I agree with the Ministry, be disclosed without unreasonably invading the supervisor's privacy (para. 5.44, initial submission). For the same reason, I consider that s. 22(5) is not applicable in this case.

[27] **3.2 Did the Ministry Comply With Sections 4(2) and 9(2)?** – The Ministry takes the position that ss. 4(2) and 9(2) do not oblige it to provide the applicant with severed or complete copies of the audiotapes of the interviews. As I noted earlier, the parties originally argued these points on the basis of s. 6(1), but have both agreed with my characterization of the issues as falling under ss. 4(2) and 9(2). The following discussion analyzes the severance and copying issues under those sections. The Ministry did not provide me with copies of any of the audiotapes, but I did not find it necessary to review them for the purposes of this order.

[28] Section 4(2) reads as follows:

> 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.

[29] Section 9(2) reads as follows:

> (2) If the applicant has asked for a copy under section 5 (2) and the record can reasonably be reproduced,
>
> (a) a copy of the record or part of the record must be provided with the response, or
>
> (b) the applicant must be given reasons for the delay in providing the record.

[30] The Ministry argues, at paras. 5.49-5.56 of its initial submission, that it would not be reasonable to require it to disclose the tapes in this case as, essentially, it would be too hard to sever them. The Ministry provided a description, at para. 5.52 of its initial submission, of the process it has followed in the past to sever audiotapes. It says

it uses a tape-to-tape system and that the process requires it to stop, advance and re-play the tapes frequently to edit out severed material. It estimates that it would take staff four to five hours to sever the tapes in this case so that they are consistent with the severed transcripts. It supported this part of its submission with an affidavit by the analyst responsible for processing this request. He also deposed as to his personal experience in severing audiotapes with his own tape recorder, which, he says, he no longer has. The analyst says that, to date, he had already spent 12 hours processing the applicant's request. He also acknowledged that the applicant received a complete copy of his own interview transcript as part of his earlier requests (paras. 11-15 and 21, Stewart affidavit).

[31] With respect to the s. 9(2) issue, the Ministry does not explain why it did not provide the applicant with a copy of the audiotape of his own interview, which would not require severing. I also note that one of the six interview transcripts the Ministry provided was apparently also unsevered. Again, the Ministry did not explain why it could not provide the applicant with a copy of the audiotape of this interview.

[32] The Ministry points out that it paid $153.75 to a private company to transcribe some of the tapes for which it had no transcripts, which it was not obliged to do. It says it has already provided the applicant with transcripts of the tapes and argues that it would not be reasonable to require it to go to the expense and effort of severing the audiotapes. No useful purpose would be served by doing so, it suggests.

[33] The applicant says he wants copies of the audiotapes as transcriptions are not always accurate and because, he says, the "flavour of the conversation" is lost during the transcription process. The Ministry should provide the "best evidence", he argues. In his reply, he expresses little sympathy with the Ministry's arguments about the time and effort that would be required to sever the audiotapes, saying (at p. 7 of his reply submission):

> … given the seriousness of this information to me, it does not seem overly onerous for the [*sic*] to make copies of these tapes and discharge its duties under section 6.
>
> I submit that the fact that it may be somewhat time consuming to make copies of the tapes ought not to weigh into the equation. … I submit that the four to five hours of work is not an unreasonable burden for the Ministry to bear in its discharge under section 6.

[34] I agree with the applicant that s. 4(2) requires the Ministry to sever and disclose the audiotapes of those interviews for which it has disclosed severed transcripts. The information to be withheld is not voluminous and, while I acknowledge that it would take some time and effort to sever this information from the audiotapes, the analyst's estimated four to five hours to do so does not strike me as unreasonable. As I said at para. 66 of Order 02-19, [2002] B.C.I.P.C.D. No. 19, public bodies must comply with their duty to sever where reasonably possible. While it is not possible to say what the limits of this duty might be in all such cases, the effort needed to sever these few tapes is not so great as to relieve the Ministry of its duty to sever under s. 4(2). Nor can it plausibly be argued that the severing of audio-tapes is, by virtue of the technology,

inherently outside the s. 4(2) duty regardless of the actual effort involved in severing. I note that, in Order No. 204-1997, [1997] B.C.I.P.C.D. No. 66, Commissioner Flaherty ordered the public body to disclose a severed copy of an audiotape, although he provided the public body with that copy, having severed it himself.

[35] Further, in the absence of any explanation as to why the Ministry could not provide copies of the tapes of the two interviews where it disclosed complete transcripts, I fail to see why the Ministry should be relieved from having to provide copies of these tapes, in accordance with s. 9(2) of the Act. The applicant has requested copies of records, *i.e.*, the tapes themselves. The Ministry is to be commended for having obtained transcripts of the interviews, but the Act permits the applicant to have copies of the tapes themselves unless, as provided in s. 9(2), those records "cannot reasonably be reproduced". The Ministry has not provided any evidence to support the conclusion that the tapes cannot in this case "reasonably be reproduced". The Ministry must copy the tapes and provide them to the applicant.

[36] As for the tape that the Ministry says is inaudible, the Ministry says (at para. 5.55 of its initial submission) that it is of such poor quality that the words recorded on it are indiscernible. The transcription company was thus unable to transcribe this tape, the Ministry says. It is concerned, however, that with improvements in technology, someone might be able to discern the voices. The Ministry considers it likely that the tape contains information that it would have to withhold under s. 22, given the nature of the other interviews, and that it has an obligation to protect such information. It supported this point with an affidavit by the analyst who processed the applicant's request. The analyst deposed that he had listened to the tape in question and that it was of such poor quality that he could only tell that there were voices at the beginning of the tape. He also says he was unable to tell what was said (para. 9, Stewart affidavit).

[37] The applicant says that, in his experience, the Ministry uses new, good-quality audiotapes and he therefore questions the statement that this tape's quality is so poor that it cannot be understood. If it is, however, he argues, the Ministry should not be able to argue that the contents of the tape fall under s. 22.

[38] I am not convinced by the Ministry's arguments on this aspect of the case. If the voices on the tape are indeed inaudible for the most part, I do not see how the Ministry can reasonably argue that s. 22 likely applies to some of the information. The Ministry cannot have it both ways. In my view, accepting the Ministry's contention that the tape is inaudible – a contention buttressed by, among other things, the related invoice from the transcription company – s. 9(2) requires the Ministry to provide the applicant with a copy of this tape as well.

[39] For the reasons given above, I find that the Ministry has not complied with its duty under ss. 4(2) and 9(2) with regard to the audiotapes and must provide the applicant with copies of the requested audiotapes of the interviews, both with the applicant and others, in full or severed form as the case may be.

4.0 CONCLUSION

[40] For the reasons above, under s. 58, I require the Ministry to withhold the information it withheld under s. 22 of the Act. I also require the Ministry under s. 58(3)(a) to perform its duty under ss. 4(2) and 9(2) of the Act to provide the applicant with copies of the requested audiotapes as follows:

1. A full copy of the tape of the applicant's own interview;

2. A full copy of the interview tape which the Ministry says is indiscernible;

3. A full copy of the tape of the interview with the employee, the transcript of which it disclosed in full (pp. 24-32 in the records provided to me in this inquiry); and

4. Severed copies of the other five interview tapes, severed consistently with the interview transcripts which the Ministry disclosed to the applicant in severed form (pp. 5-23 and 33-60 of the records provided to me in this inquiry).

March 31, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia