

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 191-1997
September 24, 1997**

INQUIRY RE: Decisions by the Ministry of Attorney General and the Liquor Distribution Branch to sever records relating to the termination of employment of a former employee

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on July 15, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of two requests for review of decisions by the Ministry of Attorney General and the Liquor Distribution Branch to sever records relating to the termination of the applicant's employment.

2. Documentation of the inquiry process

The Deputy Minister of Attorney General (the Deputy Minister) terminated the applicant's employment on December 23, 1996. On January 14, 1997 the applicant made two separate requests for records to the Ministry of Attorney General (the Ministry). The first request was to the Information and Privacy Program of the Ministry of Attorney General and the second was to the Liquor Distribution Branch. Both requests sought "all correspondence between the Liquor Distribution Branch and the Office of the Deputy Minister of the Ministry of Attorney General regarding the discharge of my employment...."

The Information and Privacy Program of the Ministry of Attorney General responded to the applicant's first request on February 19, 1997. One record, a two-page memorandum to the Deputy Minister, was located that fell within the scope of the request. Portions of this record were severed under sections 17(1) and 22(1).

The Liquor Distribution Branch responded to the applicant's second request on February 25, 1997. It disclosed two records to the applicant with portions severed under sections 17(1) and 22(1). On June 24, 1997 the Liquor Distribution Branch informed the applicant that it was also relying on section 13 of the Act.

The applicant requested reviews of the decisions by the Information and Privacy Program and the Liquor Distribution Branch on March 24, 1997 and April 8, 1997 respectively. The applicant also requested that both reviews be heard together.

3. Issue under review and the burden of proof

The issue under review is the application by the Ministry of sections 13(1), 17(1), 22(1) and 22(3)(h) to the records. The relevant portions of these sections of the Act are as follows:

Policy advice, recommendations or draft regulations

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
- 13(2) The head of a public body must not refuse to disclose under subsection (1)
 - ...
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

Disclosure harmful to the financial or economic interests of a public body

- 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
 - ...
 - (e) information about negotiations carried on by or for a public body or the government of British Columbia.

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.

22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
- ...
- (c) the personal information is relevant to a fair determination of the applicant's rights,
- ...
- (e) the third party will be exposed unfairly to financial or other harm,
- (f) the personal information has been supplied in confidence,
- ...
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

- (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,

....

22(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

Section 57 of the Act establishes the burden of proof on parties in an inquiry. Under section 57(1), where access to information in the record has been refused under section 13 or 17, it is up to the public body, in this case the Ministry of Attorney General, to prove that the applicant has no right of access to the record or part of the record.

Under section 57(2), where access to information in a record has been refused under section 22, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third parties' personal privacy.

4. The records in dispute

The only record in the custody of the Information and Privacy Program of the Ministry is a two-page memorandum to the Deputy Minister from her Executive Advisor. The two records in the custody of the Liquor Distribution Branch are a one-page memorandum from its General Manager to the Deputy Minister and a seven-page memorandum setting out the “Case for Dismissal” from the Liquor Distribution Branch’s A/Executive Director of Human Resources & Social Policy to its General Manager.

5. The applicant’s case

The applicant submits that the Ministry has failed to discharge its burden of proof under sections 13 and 17 of the Act. With respect to the application of section 22, the applicant submits that the information in dispute should be characterized as “accusations” which were not provided in confidence. He also interprets section 22(2)(h) as providing protection against the dissemination of his personal information to a third party by the Liquor Distribution Branch.

6. The Ministry’s case

The Ministry made extensive submissions regarding the application of sections 13, 17 and 22, some of which were received *in camera*. The Ministry submits that portions of the severed information fall within the type of labour relations information protected from disclosure under section 13 of the Act. Reliance is also placed on section 17 on the basis that disclosure could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia. The Ministry submits that section 17(1)(e) is specifically designed to protect a public body’s ability to negotiate effectively with others and that it is only required to show a reasonable expectation of harm as opposed to real harm.

With respect to section 22, the Ministry takes the position that the applicant has been provided with all information in the record about himself with the exception of information which would identify the third parties to the applicant. The Ministry submits that the information provided by the third parties was supplied and held in confidence under section 22(2)(f). The third parties object to disclosure of the information and argue that they would be exposed unfairly to harm under section 22(2)(e) in the event of such disclosure.

7. Discussion

Section 13: Policy advice, recommendations or draft regulations

The applicant submits that the Ministry has failed to establish that the information severed from the records in dispute would reveal advice or recommendations developed by or for a public body or a minister, or that its disclosure would cause real harm.

The applicant further submits that the information severed on the basis of this section falls under section 13(2)(n) (“a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant”) and therefore must be disclosed. The Ministry contends that the applicant has been informed of the reasons for the decision of the Deputy Ministry to discharge him from his employment, and that “the information severed under section 13 cannot be considered a ‘decision’ or ‘reasons for a decision’ because the persons providing this advice do not have discretionary power to make such a ‘decision.’”

The Government of British Columbia’s *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual* provides assistance in interpreting section 13(2)(n) at section C.4.4, p. 30, although it is not binding. The Manual defines “decision” as “... a formal judgement, including the reasons which were used in reaching that judgement.” I find that in the present context, section 13(2)(n) applies to the final termination decision by the Deputy Minister and would include any records containing the Deputy Minister’s own reasons for arriving at her decision. I conclude that section 13(2)(n) does not apply to information in records such as memoranda containing advice and recommendations prepared for the Deputy Minister by her staff and officials of the Liquor Distribution Branch.

The Ministry has made both open and *in camera* submissions pertaining to the application of this section. With respect to the disclosure of labour relations information, the Ministry relies on the need for a zone of confidentiality for a public body to conduct such matters, such as complaint investigations and subsequent disciplinary proceedings, as discussed in Order No. 158-1997, April 10, 1997, p. 8. (Submission of the Ministry, paragraphs 5.01-5.07) I am of the view that this discussion is also relevant to the circumstances of this inquiry.

Having reviewed all of the submissions and evidence in relation to the application of section 13, I am satisfied that the Ministry has discharged its burden of proof that disclosure would reveal advice or recommendations developed by or for a public body.

Section 17: Disclosure harmful to the financial or economic interests of a public body

The applicant submits that the public body has “failed to provide convincing evidence supporting their claim that disclosing the information severed under this section would be harmful to the financial or economic interests of the public body.” (See also the Reply Submission of the Applicant)

The Ministry relies on section 17(1)(e) (“information about negotiations carried on by or for a public body or the government of British Columbia”). It cited in particular my Order No. 1-1994, January 11, 1994, p. 11. (See Submission of the Ministry, paragraphs 5.09-5.18, the last of which was *in camera*)

I find that the Ministry has presented sufficient evidence to discharge its burden of proof for the application of section 17 under section 57(1). (Reply Submission of the Ministry, p. 1)

Section 22: Disclosure harmful to personal privacy

The applicant submits that the information in records from or about third parties withheld from him “is more appropriately categorized as ‘accusations’” and suggests that it is unlikely that these statements were provided in confidence.

The Ministry takes the position that it has refused to disclose “information which would reveal the identities of third parties who supplied in confidence an evaluation of the Applicant’s performance. The Applicant has been provided with all information in this record about himself, with the exception of information which would identify the third parties to the Applicant.” (Submission of the Ministry, paragraph 5.20)

Section 22(2)(a): the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny

The applicant relies on section 22(2)(a) in support of his argument that the severed information should be disclosed.

Although I must consider section 22(2)(a), I find there is nothing in the records in dispute which raises particular concerns about subjecting the activities of the government of British Columbia or a public body to public scrutiny.

Section 22(2)(c): the personal information is relevant to a fair determination of the applicant’s rights

The applicant submits that the information he is seeking resulted in the termination of his employment and “therefore directly related” to his rights. He relies in particular on statements in the Freedom of Information and Protection of Privacy Act Policy and Procedures Manual, section C.4.13, pp. 18, 19, in support of this argument.

The Ministry submits that the information submitted by the third parties “may have contributed to the dismissal of the Applicant” but that its weight as a relevant circumstance in this particular case is outweighed by the privacy interests of the third parties protected under sections 22(2)(e), (f), and (h). The Ministry also points out that:

... if the Applicant feels that he has been unfairly dismissed, he has the ability to sue for wrongful dismissal and is then entitled to all records relating to the issues in that action (i.e. there is another avenue available to the Applicant for disclosure of the requested personal information).
(Reply Submission of the Ministry, p. 2)

Section 22(2)(e): the third parties will be exposed unfairly to harm

The Ministry relies on section 22(2)(e) as a basis for withholding the severed information. (Submission of the Ministry, paragraph 5.22) Based on my review of the evidence, I conclude that there is a basis for finding that disclosure would expose third parties unfairly to harm.

Section 22(2)(f): the personal information has been supplied in confidence

The Ministry submits that the information in the records in dispute about complaints against the applicant were supplied and held in confidence by it. (Submission of the Ministry, paragraph 5.22) I am satisfied on the basis of my review of an *in camera* affidavit submitted by the Ministry that this was indeed the case.

Section 22(3)(h): the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,

The Ministry submits that the information about the applicant provided by the third parties can be characterized as personal or personnel evaluations under section 22(3)(h). Disclosure of such information is presumed to be an unreasonable invasion of their privacy under the Act. (Submission of the Ministry, paragraphs 5.23, 5.24) Based on my review of the records in dispute, I find that this section is not applicable to the information severed under it. (See Order No. 34-1995, February 3, 1995, p. 5; Order No. 71-1995, December 15, 1995, p. 11)

Burden of Proof

In all the circumstances, I conclude that the applicant has not discharged his burden of proof under section 57(2) of the Act to prove that disclosure of the information would not be an unreasonable invasion of third parties' personal privacy under section 22.

Review of the records in dispute

The Ministry has provided a two-page grid that describes each of the records in dispute, the specific amount of severance which has occurred, the sections of the Act invoked to refuse disclosure and the reasons. Approximately 27 lines have been severed from nine pages of records. I agree with the severances.

8. Order

I find that the Ministry of Attorney General was authorized under sections 13 and 17 of the Act to refuse to give the applicant information in the records in dispute. Under section 58(2)(b), I confirm the decision of the Ministry to refuse access to the applicant.

I also find that the Ministry of Attorney General was required under section 22 of the Act to refuse to give the applicant information in the records that would unreasonably invade the personal privacy of third parties. Under section 58(2)(c), I require the Ministry to refuse access to those portions of the records to the applicant.

David H. Flaherty
Commissioner

September 24, 1997