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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 193-1997
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INQUIRY RE: A decision by the Ministry of Attorney General to refuse access to records relating to an investigation of a complaint of sexual harassment against an 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 4, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the Ministry of Attorney General (the Ministry) to withhold records requested by the applicant, who was the subject of an harassment investigation.

2. Documentation of the inquiry process

On July 26, 1996 the applicant submitted a request under the Act to the Ministry for records in the custody or under the control of the Ministry. On November 29, 1996 the Ministry responded by releasing records responsive to the applicant's request and by withholding or severing records under sections 13, 15, 17, and 22 of the Act.

On January 22, 1997 the applicant requested an extension of the deadline for submitting a request for review of the Ministry's decision to my Office. On January 28, 1997 the Office granted the extension and accepted the applicant's request for review. The original inquiry deadline was set for April 28, 1997. The applicant and the Ministry subsequently consented to extend the deadline to May 28, 1997 and a second time to June 26, 1997.

On June 12, 1997 the Ministry released a second package of records containing information that had been previously withheld or severed. It also revised certain

exceptions that apply to the records remaining at issue in this inquiry, including the additional application of section 19 of the Act.

On June 16, 1997 the applicant requested an extension of the deadline to make submissions, and the applicant and the Ministry consented to extend and adjourn the inquiry from June 26, 1997 to July 4, 1997.

During the course of the inquiry, the Ministry presented a corrigendum to its submissions. I provided the applicant with a copy and offered him an opportunity to respond. He has responded. The content of this exchange is reviewed in the discussion below.

3. Issue under review and the burden of proof

The issue in this inquiry is whether the Ministry properly applied sections 13, 15, 17, 19, and 22 of the Act to the records that were withheld from the applicant.

The relevant sections of the Act are as follows:

Policy advice or recommendations

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.

(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

...

(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 law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(d) reveal the identity of a confidential source of law enforcement information,

....

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 individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health,

....

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

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

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

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

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

> ...
> (d) the personal information relates to employment, occupational or educational history,
> ...
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
> ...
> (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,
> ....
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> (a) the third party has, in writing, consented to or requested the disclosure,
>
> (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.
>
> (6) The head of the public body may allow the third party to prepare the summary of personal information under subsection (5).

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under sections 13, 15, 17, and 19, it is up to the Ministry to prove that the applicant has no right of access to the record.

Under section 57(2), if the record that the applicant is refused access to under section 22 contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

4. The records in dispute

The records in dispute relate to all matters concerning the investigation of a complaint of sexual harassment against the applicant, his subsequent demotion, related negotiations, and a forthcoming dispute resolution proceeding. (Submission of the Ministry, p. 4) These records include handwritten interview notes with the complainant,

the respondent, and witnesses; a report of the investigation; and notes and office e-mails setting out the options available to the employer.

5. Procedural objections

There are two procedural objections in this case. The first was in response to a decision I made with respect to a request for further submissions. The other was related to the Ministry's *in camera* submission.

Both parties made three submissions (Initial Submissions on June 25, 1997; Reply Submissions on July 3, 1997; Second Reply Submissions received from the Applicant on July 8, 1997 and from the Public Body on July 17, 1997). On July 22, 1997 the applicant requested an opportunity to respond to the Ministry's second reply. In order to bring about some finality to this process, I decided on July 25, 1997 that the inquiry would proceed on the basis of the submissions received at that point and not to accept further submissions. The applicant requested that I reconsider this decision. On July 31, 1997 I wrote to both parties indicating that I would not accept further replies. I stated that I may ask for further submissions in response to specific points at a later date. I do not require any further submissions.

In addition, on July 7, 1997 the applicant objected to an *in camera* affidavit submitted by the Ministry with its reply submission. My office provided the applicant's objections to the Ministry. The Ministry suggested that certain portions of the affidavit be released. On July 25, 1997 I decided to release only those portions of the *in camera* affidavit suggested by the Ministry. I reviewed the portions of the affidavit which the Ministry requested remain *in camera* and found that the release of these portions may reveal, either explicitly or by implication, information in the records in dispute.

6. The applicant's case

The complainant in the harassment case and the applicant were fellow employees in a location outside the Lower Mainland. The applicant states that one specific episode led to a complaint some time later. The resulting investigation report recommended the demotion of the applicant. Following the investigation, the Ministry decided to offer the applicant two options; either demotion, or suspension without pay pending a recommendation for dismissal. The applicant has been demoted, transferred, and has disputed this to the Public Service Employee Relations Commission (PSERC) through the government's Dispute Resolution Policy. Although he has been contesting this result, he states that he has not received relevant records that he has requested through his counsel. (Submission of the Applicant, pp. 1-6) There is no need for me to rehearse the complex procedural history laid out by counsel for the applicant.

The applicant submits that the Ministry has refused to respond adequately to his requests for access to information under the Act: "The records at issue show that very little disclosure was made." (Submission of the Applicant, p. 7) The Ministry has

disclosed eleven pages of severed documents which consist essentially of the original complaint and a small portion of the Ministry's investigation report.

I have presented below the submissions of the applicant on the Ministry's recourse to various sections of the Act to refuse disclosure.

7. The Ministry of Attorney General's case

In addition to submissions on the application of specific sections of the Act, which I have discussed below, the Ministry has referred to my discussion in previous Orders of a zone of confidentiality with respect to matters related to both the investigation of harassment complaints and the conduct of subsequent or related disciplinary proceedings. (Order No. 158-1997, April 10, 1997, p. 8) It has also relied on statements that I have made in previous Orders that qualify an applicant's right to access his own information in regard to complaints of harassment, since the privacy of the individuals involved in the complaint and investigation is of paramount importance. I concluded in Order No. 70-1995, December 14, 1995, pp. 7-9, that the substance of a complaint and the resulting investigative report should be protected from disclosure as well as the substance of meetings held by those in authority to make a decision on what to do about a complaint. (Submission of the Ministry, pp. 6, 7) (See also Order No. 138-1996, December 18, 1996, p. 5)

The Ministry concludes that it is authorized to withhold from the applicant information about its conduct of the investigation and that its obligation to provide the applicant his own personal information "is limited in this case as required to protect the privacy of other individuals under section 22 [of the Act,] ... and is also limited by the application of sections 17, 13, 15 and 19 to that information." (Submission of the Ministry, p. 7)

8. Discussion

The Ministry stated in its initial submission in late June that a dispute resolution proceeding involving the applicant is scheduled for October 1997. (Submission of the Ministry, p. 4)

The applicant appears to think that PSERC has made decisions about refusing him access to disputed records. Although PSERC may have been consulted in the process, and was certainly involved in the harassment investigation and resulting negotiations, the Ministry is, for purposes of this particular access request, the "public body" as that term is defined in Schedule 1 to the Act. Accordingly, it was the Ministry that made the decisions on access under various sections of the Act. (Reply Submission of the Applicant, p. 7) In his reply submission the applicant further questions the appropriateness of PSERC's involvement in this entire matter. (Reply Submission of the Applicant, pp. 12, 13; see also the Reply Submission of the Ministry, paragraph 9.01)

PSERC's involvement is neither surprising nor inappropriate, given that it is the central government agency with overall responsibility for government employee relations, including the duty to advise and assist all government ministries in matters relating to employee discipline and dismissal. To the extent the applicant has raised concerns about PSERC's involvement in the pending dispute resolution proceedings, these are matters outside my jurisdiction and are more appropriately raised in those proceedings.

Section 4(2): The obligation to sever

Based on his review of the records released to him, the applicant submits that the Ministry cannot have met its duty to sever documents where possible. (Submission of the Applicant, p. 11) The Ministry's response is that "it has severed records where unexcepted information could reasonably be severed from information to which an exception applies." (Reply Submission of the Ministry, paragraph 8.01) On the basis of both my review of the withheld information and the submissions of the parties, I am satisfied that the Ministry has complied with its duty to sever in this case.

Section 13: Policy advice, recommendations or draft regulations

In his initial submission, the applicant noted that section 13(2)(a) excludes factual material from the scope of the exception and questioned whether the Ministry has properly severed factual information from records severed on this basis. He also relies on section 13(2)(n) for the disclosure of "all conclusions, analysis, findings and recommendations sections of the investigative reports, as well as any other information about the decision or the reasons for the decision." (Submission of the Applicant, p. 10) Finally, the applicant argues that this section can only apply to actual advice and not to the basis for that advice. (Reply Submission of the Applicant, p. 13)

In response, the Ministry distinguishes between factual material and isolated statements of fact, relying on the Government of British Columbia's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, Section C.4.4, p. 10; it has only withheld "statements of fact that are intertwined with advice or recommendations." (Reply Submission of the Ministry, paragraph 7.01)

The Ministry further submits that it has withheld under this section "information that would reveal, either explicitly or implicitly, advice and recommendations (of various degrees of specificity) about how to proceed or what to consider at different stages of the investigation or negotiations, and about other possible courses of action." (Submission of the Ministry, paragraph 3.01) I agree with the analysis of the Ministry to the effect that this section "is intended to allow full and frank discussion within the public service, preventing the harm that would occur if the deliberative process were subject to excessive scrutiny." (Submission of the Ministry, paragraph 3.01) I further agree with the Ministry that this section would prevent the disclosure of information that would allow an applicant "to draw accurate inferences about advice or recommendations...." (Submission

of the Ministry, paragraph 3.02; Order No. 93-1996, March 19, 1996; Order No. 123-1996, September 5, 1996; Order No. 158-1997, April 10, 1997)

Section 13(2) of the Act lists the types of information a public body may not refuse to disclose under section 13(1). That list includes, in 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." The Ministry submits that "none of the information it has withheld under section 13 falls in the subsection 13(2) list," including section 13(2)(n), because the applicant has been given the reasons for the disciplinary action that has been taken against him:

> The information withheld under section 13 relates to subsidiary recommendations or to other suggested courses of conduct. Paragraph 13(2)(n) therefore does not apply... (Submission of the Ministry, paragraph 3.04)

The applicant argues that, at minimum, section 13(2)(n) requires the release of all conclusions, analysis, findings, and recommendations sections of the investigative reports, as well as any other information about the decision or the reasons for the decision. (Submission of the Applicant, page 10) In my opinion, section 13(2)(n) is not reasonably construed as including all or any "analysis, findings and recommendations sections of the investigative reports, as well as any other information about the decision or the reasons for the decision." The section clearly and specifically requires disclosure of a decision "made in the exercise of a discretionary power or an adjudicative function" that affects the rights of an applicant, as well as the reasons for the exercise of that power or function. While the subsection refers to "including reasons," viewed in its context, it appears that this phrase was included to make it clear that the decision also includes the reasons for the decision.

The applicant submits that this section cannot be used to protect the names of public servants who may have participated in a meeting, or their names generally, from government records. (Reply Submission of the Applicant, pp. 11, 12)

The Ministry replies that disclosing the names and positions may reveal "a recommendation that a matter be dealt with at a particular level." (Second Reply of the Ministry, paragraph 4.01) The Ministry has not provided any evidence as to how the disclosure would reveal recommendations in this case. I note that names of public servants were disclosed to the applicant. The fact that a particular person provided advice or recommendations does not, in this case, in and of itself reveal the advice or recommendations. There may be sensitive issues where the very fact that a particular person has given advice on a particular date reveals the advice or recommendations. I am unable to conclude that in this case the names and positions withheld would reveal advice or recommendations.

Section 15: Disclosure harmful to law enforcement

The Ministry states that it has withheld information "that would identify, either by name or by implication, the individuals interviewed during the investigation." (Submission of the Ministry, paragraph 5.01) Relying on the definition of "law enforcement" in Schedule 1 of the Act as including "investigations that lead or could lead to a penalty or sanction being imposed," the Ministry submits that the demotion and transfer of the applicant in this case was a penalty or sanction and therefore a "law enforcement" matter. (Submission of the Ministry, paragraph 5.02) (See Order No. 71-1995, December 15, 1995, p. 6)

The applicant has relied upon a decision of the Ontario Information and Privacy Commissioner, which was upheld on judicial review, for the proposition that this section was not intended to apply to witness statements regarding internal disciplinary matters. He claims that the Ontario Commissioner decided that a report prepared by the Ontario Ministry of Correctional Services, concerning wrongdoing by staff at a provincial training school, was not a law enforcement report. The applicant submits that:

> Classifying internal discipline as law enforcement broadens the scope of this exemption beyond its intended ambit and effectively provides complete anonymity to witnesses in such matters. (Reply Submission of the Applicant, pp. 8, 9)

The Ontario decision relies upon the fact that the public body which carried out the investigation did not have the function "to enforce or regulate compliance," but had to forward the report to the local Crown Attorney's Office. (See Ontario (Solicitor-General) v. Ontario (Assistant Information and Privacy Commissioner) (1993), 102 D.L.R. (4th) 602 (Ont. Div. Ct.) In this case it is clear that the British Columbia Ministry of Attorney General had the authority to impose a penalty or sanction. In his chronology of events the applicant clearly documents the role of different officials of the Ministry of Attorney General in the decisionmaking process that culminated in the penalty imposed on the applicant. (Submission of the Applicant, pp. 1-6) In this case the applicant was demoted and transferred. The Ministry had the authority to and did impose a penalty or sanction on the applicant. I find that the Ministry's investigation in this matter falls within the definition of "law enforcement."

Section 15(1): The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to ... (d) reveal the identity of a confidential source of law enforcement information,

The applicant submits that this section has no possible application in this case. (Submission of the Applicant, p. 9) The Ministry's submission is that those interviewed for purposes of the harassment investigation were "confidential sources" providing information in confidence and that therefore this subsection applies to such information. (Submission of the Ministry, paragraphs 5.05, 5.06)

The applicant argues that the Ministry has not provided sufficient evidence that the information was collected in confidence. The Ministry has supplied an affidavit by the manager who carried out the interviews for the Ministry. The affidavit states: "At the outset of each interview I told each of the individuals that the information they were about to provide would be kept confidential." The affidavit continues that the only exception to this would be disclosure required during the appeal of the disciplinary decision. The particular context in which these interviews were conducted (allegations of sexual harassment) indicates that "confidentiality is a fundamental and necessary element of these types of investigations." (See Order No. 71-1995, December 15, 1995, p. 6)

I find that the Ministry has established that this investigation was conducted in such a manner that the parties had a mutual expectation of confidentiality at the time the information was collected.

Finally, the applicant holds the view that this exception does not apply when a proceeding is completed. (Reply Submission of the Applicant, p. 9, relying on Order No. 13-1994, June 23, 1994, p. 12) The Ministry argues that section 15(1)(d) does apply after an investigation or proceeding has been completed. The Ministry points out that the immediate purpose of section 15(1)(d) is to protect the privacy and safety of confidential sources of law enforcement information. (See Second Reply Submission of the Ministry, paragraph 3.01) I discussed this issue in Order No. 71-1995, December 15, 1995, p. 7. In that case the investigation was complete. The applicant has raised Order No. 13-1994, June 22, 1994, p. 12, as an example of the names of complainants being released. However, in that case I found that the public body had not shown explicit expectations of confidentiality. I have found that such expectations were present in this case. Section 15(1)(d), unlike other parts of section 15, such as 15(1)(a), is not a "harms-based" test. In some cases, the timing of the disclosure may lessen the harm to law enforcement matters. However, section 15(1)(d) does not require proof of harm. The Ministry can apply this section to the records in dispute.

Section 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.

The applicant submits that this section has no application to most of the records at issue:

> The process undertaken was an investigation of a very serious allegation which resulted in a clear decision to demote the respondent. It was a specific investigation of a serious allegation, not a negotiation process. (Submission of the Applicant, pp. 9, 10; and Reply Submission, p. 9, 10)

The Ministry states that it has relied on section 17 to withhold information that would reveal:

> actions considered, taken, or not taken in the disciplinary investigation or in negotiations with the Applicant, and the reasons why and related considerations; assessments of the Applicant's case and of the Public Body's case; the contents of interview statements and related discussion; and discussion of the impact of the investigation on the workplace and staff. (Submission of the Ministry, paragraph 2.01)

The Ministry submits that the subsections of section 17 are not an exhaustive list, even though in this inquiry "[m]uch, if not all, of the information withheld under section 17 falls within the wording of paragraph 17(1)(e)." (Submission of the Ministry, paragraph 2.02)

In a recent Order I reviewed the application of section 17 to labour relations records. In that Order I found that the public body could apply section 17 to labour relations records. (See Order No. 184-1997, August 15, 1997, pp. 5, 6)

I agree with the Ministry that it need only prove that there is a reasonable expectation of harm to its or the government's financial interests under this section. (Submission of the Ministry, paragraphs 2.03, 2.04; and Order No. 159-1997, April 17, 1997, p. 8) I disagree with the applicant's view that "the Ministry must explain specifically how such harm will arise from disclosure of each and every record." I do agree that Order No. 158-1997, p. 5, requires line-by-line review to establish the basis for severing, as the applicant also argues, but the Ministry has in fact done so in this case, as evidenced by my review of the unsevered records.

I find that the Ministry properly claimed section 17 with respect to information that would be used in the government's case in the dispute resolution proceeding being pursued by the applicant. (See Order No. 6-1994, March 31, 1994, p. 3) It makes no sense that the applicant should have advance access "to the government's negotiating position, strategy, or the Public Body's or PSERC's assessments of its case and the Applicant's case." I agree with the Ministry, in general, that disclosure of this information "would detract from the equality necessary for effective negotiation and dispute resolution." (Submission of the Ministry, paragraphs 2.05, 2.06) I am also influenced by the fact that various types of dispute resolution procedures feature their own specialized rules for access to records relevant to the matters at issue. Although I have stated that the existence of alternative access regimes does not preclude an application under the Act, it is also true that these do provide an alternative outlet for an applicant in an inquiry like this one, where limited additional disclosure may be possible. (Reply Submission of the Applicant, p. 7; and Order No. 119-1996, August 28, 1996; and Order No. 158-1997)

I have carefully reviewed the applicant's extended effort to argue that he was not involved in "negotiations" within the meaning of this subsection. He seeks to distinguish between information that could serve as the basis for negotiations (not protected) with actual negotiations (protected). Further, this exception cannot apply "to any factual information which forms the basis for negotiations." I do not find these attempted distinctions persuasive in the context of this particular inquiry. A public body may clearly be "negotiating" and preparing a negotiating strategy in its internal communications about an investigation, even if there has not yet been any direct contact with the applicant or his lawyer. (Reply Submission of the Applicant, pp. 9, 10) I believe that my discussion in Order No. 142-1997, January 29, 1997, p. 10, between information used in actual negotiations and "records that provide the framework or basis for subsequent negotiations," can be readily distinguished from the present inquiry.

Section 19: Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to (a) threaten anyone else's safety or mental or physical health,

The applicant argues that I have established a very high standard of proof with respect to this section in Order No. 138-1996. In his submission, this section cannot apply. (Submission of the Applicant, p. 10)

The Ministry, for its part, relied on this subsection to withhold "information that would identify interviewees either by name or by implication from the contents of the interviews, and that would reveal what they said to the interviewer." (Reply of the Ministry, paragraph 6.01) The Ministry argues that section 19(1) applies because those interviewed during the investigation of the harassment complaint "would at least suffer severe mental stress at the thought of the information being disclosed to the Applicant." (Reply of the Ministry, paragraph 6.02) There is no evidence before me which would support the Ministry's contention that disclosure of the withheld information could reasonably be expected to threaten the mental health of those persons who were interviewed as part of the Ministry investigation. I have concluded that section 19(1)(a) cannot be relied on by the Ministry to withhold information that would identify interviewees either by name or by implication or that would reveal what they said to the interviewer.

In reaching my finding that the Ministry has not relied appropriately on section 19 in this inquiry, I have also relied on a statutory declaration by the applicant that "at no time during this entire process have I threatened anyone's mental or physical health or conducted myself in any manner which could be construed as a threat." (Statutory Declaration of the Applicant, paragraph 6; and Reply Submission of the Applicant, p. 11) In this connection, I have also read an *in camera* affidavit that accompanied the reply submission of the Ministry.

Schedule 1: The definition of personal information

Section 22 applies to personal information. Relying on the definition of "personal information" set out in the Schedule to the Act and my Orders No. 138-1996 and No. 166-1997, May 29, 1997, the applicant submits that personal information includes an individual's personal views or opinions, except if they are about someone else:

> To the extent that any of the records claimed under section 22 contain other individuals' views about the respondent, they are the respondent's personal information and section 22 cannot apply. Further, in my submission any third party's views or opinions about an incident involving the respondent qualify as the respondent's personal information. (Submission of the Applicant, p. 8)

The Ministry recognizes that much of the information in the records is the personal information of the applicant, in that it consists of opinions about him which have been provided by third parties. However, the Ministry submits that section 22 clearly contemplates that personal information about the applicant may be withheld if disclosing it would unreasonably invade someone else's personal privacy. The Ministry points out that, unlike section 21, section 22 does not specify that the information must be "of a third party" to be protected by the section; rather, it states only that personal information must be withheld if disclosure would unreasonably invade a third party's personal privacy. Moreover, the Ministry submits, section 22(5) buttresses this interpretation. Section 22(5) provides:

> **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. (Emphasis added by the Ministry)

I agree with the Ministry that section 22 places limits on an individual's right to access their own personal information:

> While one of the Act's premises is that individuals have a *prima facie* right to access their own personal information, the Act does put limits on that *prima facie* right by providing exceptions to disclosure where appropriate. One such limit is where a disclosure of an applicant's own personal information would unreasonably invade the personal privacy of a third party. When an applicant's and a third party's personal information are intertwined, and the third party has supplied the applicant's personal information in confidence, the Act strikes the balance in competing individual privacy rights by requiring that public bodies go the extra step of preparing summaries of the applicant's personal information rather than simply refuse access. But the Act draws the line on the side of protecting

> the privacy of the third party; if even a summary would reveal the identity of the third party who supplied the applicant's personal information in confidence, the applicant does not have a right to his or her own personal information. (Submission of the Ministry, paragraph 4.05)

The Ministry holds the view that any "personal information" about the applicant may be withheld, "if disclosing it would unreasonably invade someone else's personal privacy." I agree with its reliance on section 22(5) to buttress this position. (Submission of the Ministry, paragraph 4.04)

The Ministry states that it has withheld personal information from the applicant, but that it did not prepare the section 22(5) summaries, because it was also withholding the information on the basis of sections 13, 15, 17, and 19. (Submission of the Ministry, paragraph 4.06; Order No. 138-1996, p. 13) I agree with the Ministry's position.

Section 22: Disclosure harmful to personal privacy

The Ministry states that it has refused to disclose under this section information that:

> would reveal the identities of individuals interviewed during the investigation, statements made during their interviews, and discussion about those statements; specific information about how various people were affected or felt about various aspects of the case; information about the personal lives of individuals; and the name of an individual unrelated to this case where the records dealt with more than just this case. (Submission of the Applicant, paragraph 4.02)

Section 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,

The applicant first raised this section in his further reply submission. (Further Reply Submission of the Applicant, paragraph 5) He referred in particular to the highly-publicized harassment case at Simon Fraser University in the summer of 1997 as highlighting "the public interest in the sexual harassment investigation process." I do not think that the Simon Fraser University case has any relevance to the current inquiry, nor do I think that section 22(2)(a) applies in this case.

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

In essence, the Ministry submits that the applicant wishes to use the information he is requesting for purposes of his dispute resolution proceeding, and that the Act is not the most appropriate mechanism for that purpose: "The upcoming dispute resolution proceeding is the venue in which the Applicant's rights will be determined." (Submission of the Ministry, paragraph 4.16) In its Corrigendum to its submissions, the Ministry states that it "has just been informed that, in fact, determination about disclosure of records will not be made in that venue [the dispute resolution proceeding]. (Corrigendum to submissions of the Ministry, October 2, 1997) The Ministry argues that in spite of the fact that the dispute resolution proceeding does not make disclosure decisions, section 22(2)(c) applies because the applicant is free to pursue any other legal process (such as a civil action). These other venues can make decide about the disclosure of records. I am not persuaded by the Ministry's interpretation of this subsection.

For his part, the applicant generally asserts that "fairness to the applicant in this case is of paramount importance especially in light of the Ministry's--and PSERC's--refusal to release virtually any information about the allegations." (Reply Submission of the Applicant, p. 5) He has described a number of signs that the Ministry may have investigated matters beyond the specific allegation of harassment; "fairness requires that those records must be released." (Submission of the Applicant, p. 6) The applicant made further submissions when notified of the Ministry's Corrigendum to its submissions. The applicant argues that the existence of other processes, such as the court system, is irrelevant as there is no evidence of the applicant using these processes. "[S]urely a citizen ought not to have to mount an expensive and time consuming civil action simply to get information which forms the basis for serious decisions about their livelihood." (Applicant's additional submission, October 6, 1997)

In my opinion, the mere existence of another avenue of disclosure is not sufficient to defeat the applicant's claim to a fair determination of his rights. While I agree with the applicant's interpretation of section 22(2)(c), I need to emphasize that this is simply one "relevant circumstance" that the Ministry should take account of under section 22 of the Act.

Section 22(2)(e): the third party will be exposed unfairly to financial or other harm,

With respect to this "relevant circumstance" militating against disclosure, the Ministry relied on the same submissions as with respect to the application of section 19, which are discussed above. (Submission of the Ministry, paragraph 4.14) In neither instance, do I find the Ministry's arguments about prospective harm adequately compelling. (See Reply Submission of the Applicant, p. 7)

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

Those interviewed during the complaint investigation were informed that their comments would be kept confidential and would only be disclosed within government as necessary to deal with the complaint, or might be disclosed to the applicant in the context

of an appeal by the applicant against any disciplinary measure imposed on him. (Submission of the Ministry, paragraphs 4.10, 4.11; and Affidavit of Michael Caisley, paragraph 4)

The applicant's reply to the above submission is that the Ministry has provided "insufficient evidence" on this factor. (Reply Submission of the Applicant, p. 5) I disagree. In my view, section 22(2)(f) is a relevant factor in this case.

Section 22(2)(h): the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant,

Relying on my clear guidance on this subsection in Order No. 70-1995, p. 8, the Ministry submits that:

> ...disclosure to the Applicant of some opinions given by some individuals about other individuals (not the Applicant) could unfairly damage the reputations of the individuals about whom other individuals spoke. The damage to reputation would be 'unfair' because those individuals, if they disagree with what was said about them, would have no opportunity to present their views to the Applicant.

The applicant has attempted to distinguish Order No. 70-1995 by arguing that the applicant in this case is the respondent to an harassment investigation, whose reputation has been unfairly damaged. (Reply Submission of the Applicant, p. 7) Whatever the merits of this point, however, I find it is not relevant to the application of this subsection. (See Order No. 138-1996, pp. 5, 6, 11, 12)

Section 22(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,

> The Ministry submits that:
>
> ...to the extent that the information relates to the employment history of any other employee (not the Applicant), its disclosure is a presumed unreasonable invasion of that employee's personal privacy. (Submission of the Ministry, paragraph 4.19)

The applicant submits that this section only applies to information directly related to a third party's employment history. I find that the disclosure of the information about a third party employee's employment history would be an unreasonable invasion of that employees' personal privacy.

Section 22(3)(g): the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

The Ministry submits that:

> ...to the extent that the information can be characterized as personal or personnel evaluations or character references, any such evaluations or references by one individual about another (not the Applicant) is the personal information of the other individual, and its disclosure is a presumed unreasonable invasion of that individual's personal privacy. (Submission of the Ministry, paragraph 4.20)

The applicant submits that this section does not apply to the contents of sexual harassment complaints. I find the Ministry's use of this section appropriate.

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:

> ...to the extent that the information can be characterized as personal or personnel evaluations or character references, the disclosure of information that would reveal the identity of the person who supplied the information is a presumed unreasonable invasion of the personal privacy of that person. The Public Body submits that it would be very difficult, and often impossible, to disclose the information provided, without revealing who provided it. (Submission of the Ministry, paragraph 4.21)

The applicant did not make submissions on this section. I find the Ministry's use of this section appropriate.

Section 22(4): A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if (a) the third party has, in writing, consented to or requested the disclosure,

According to the applicant, a Ministry investigator interviewed the applicant's wife and notes were taken. He has a signed consent for disclosure of that information to him. In addition, he argues that all third parties who were interviewed at his suggestion should be contacted and asked for their consent to disclosure of their personal information. (Submission of the Applicant, p. 9) In his reply submission, the applicant reiterated this point and enclosed a consent form from another person interviewed during the complaint investigation. (Reply Submission of the Applicant, p. 8)

The Ministry's interpretation of section 22(4)(a) is that consent by itself does not finally determine the disclosure of third-party information: "it does not preclude the application of other exceptions to the third party's personal information." It relies in

particular on section 17 for this purpose in the present inquiry. (Reply Submission of the Ministry, paragraph 3.02) The applicant disagrees. (Further Reply Submission of the Applicant, paragraph 3) I agree with the Ministry that, if the information to which consent to disclose has been obtained is properly withheld under other provisions of the Act, then the information may be withheld notwithstanding the consent. (See Order No. 138-1996, p. 9)

Review of the records in dispute

The Ministry has supplied me and the applicant with a useful grid that describes the specific records that have been withheld and/or severed and the specific sections of the Act, almost always at least two, that it has relied upon to refuse disclosure. A substantial number of pages deal with the actual notes of interviews conducted during the investigation of the harassment investigation. I agree that they can or must be withheld under sections 15(1)(d), 17(1)(e), and 22 of the Act. The same conclusion applies to the report of the harassment investigation and the accompanying witness statements, which constitute a significant portion of records. In my judgment, the handwritten material, in particular, reflects the kind of investigative information that the Ministry has a legitimate reason to protect within a "zone of confidentiality" that is essential for the successful conduct of such activities. I note that while I have not accepted the Ministry's arguments on section 19, the information can be withheld under sections 15(1)(d), 17(1)(e), and 22. In addition to the investigation notes and report, the records in dispute include other notes and office e-mails. I agree that the Ministry can withhold information under sections 13 and 17(1)(e) of the Act and some information must be withheld under section 22 of the Act.

9. Order

I find that the Ministry of Attorney General is authorized to refuse access to the records in dispute under sections 13, 15, and 17 of the Act. Under section 58(2)(b), I confirm the decision of the Ministry of Attorney General to refuse access to the records in dispute to the applicant.

I find that the Ministry of Attorney General is required to refuse access to the records in dispute under section 22 of the Act. Under section 58(2)(c), I require the head of the Ministry of Attorney General to refuse access to the records requested by the applicant.

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David H. Flaherty
Commissioner

October 7, 1997