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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 138-996
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INQUIRY RE: A request for review of a decision by the Ministry of Attorney General to refuse a former employee of its Corrections Branch access to records pertaining to an investigation of workplace harassment

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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 August 28, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of the applicant's two requests for review of decisions by the Ministry of Attorney General (the public body) to withhold a variety of records produced during an investigation of the applicant's alleged misconduct.

2. Documentation of the review and inquiry process

On October 10, 1995 the Ministry received the applicant's request for copies of minutes, notes, telephone and computer records, tape recordings, correspondence, memoranda, and facsimile records created or acquired by the Ministry during its investigation of his alleged misconduct while employed as a correctional officer.

On March 21, 1996 the Ministry issued its first response by providing the applicant with access to a number of letters, internal memoranda, a transcript of the applicant's audio taped interview with the investigators, and other items. Some information in these records was severed under section 22 of the Act. In the same response, the Ministry denied access under sections 19 and 22 of the Act to several other records in their entirety, principally the transcripts of audio taped interviews with the applicant's former fellow employees and notes made by some of them of their dealings with him. He requested a review of this decision in late March 1996.

On May 3, 1996 the Ministry provided its second response by denying access under sections 17(1)(e) and 22 to several more records, including a number of internal memoranda on the investigation. In mid-May 1996, the applicant requested a review of

this decision as well. During a separate arbitration process involving the Public Service Employee Relations Commission (PSERC), which took place during the summer of 1996, the applicant received a copy of an internal memorandum to a Deputy Minister on the investigation and copies of transcripts of interviews with some of his former colleagues. As a result, the applicant agreed to withdraw these records from the scope of the review.

The applicant has also raised the issue of an e-mail message that he believes was circulated to his colleagues instructing them not to speak to him. He also said he believed that management had later sent out a second e-mail message retracting the instructions in the first message. The Ministry could not locate any such e-mail messages and so informed the applicant.

On August 2, 1996 the Office of the Information and Privacy Commissioner issued a Notice of Inquiry to the applicant, the Ministry, and the Public Service Employee Relations Commission as an interested party.

In mid-August 1996 the Ministry approved the release, in full or in part, of a number of additional records, including a number of internal memoranda on the investigation. It also provided partial access to some records which it had not previously located. These consisted of the audio tape of the employee's own interview with the investigators and portions of an investigator's handwritten notes of interviews with the applicant and with other employees. However, the Ministry refused access under sections 19 and 22 of the Act to the audio tapes of interviews with the applicant's former colleagues and to the majority of the investigator's notes of those interviews.

In the same response, the Ministry withdrew its application of section 17 to the records, as well as its application of section 22 to one employee's interview transcript. The Ministry continued to deny access to all other records under sections 19 and 22 of the Act.

3. Issues under review at the inquiry and the burden of proof

There are two issues under review in this inquiry. First, has the Ministry fulfilled its duty under section 6(1) of the Act in its search for the e-mail messages that the applicant believes existed? Section 6(1) reads:

> ***Duty to assist applicants***
>
> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

The Act is silent on the burden of proof in this case, but since the Ministry is in a better position to address the issue of an adequate search for the e-mail messages requested by the applicant, I have determined that the burden in this case rests with it.

The second issue is whether sections 19(1) and 22(1) apply to the remaining records withheld by the Ministry. These sections read as follows:

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, or

(b) interfere with public safety.

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

...

(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,
>
> (g.1) 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.

Section 57 of the Act establishes the burden of proof. Under section 57(1), at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the public body to prove that the applicant has no right of access to the record or part of the record. In this case, the Ministry has to prove that, under section 19(1), the applicant has no right of access to the records in dispute.

Under section 57(2) of the Act, if the records in dispute contain personal information about a third party, it is up to the applicant to prove that disclosure of the personal information would not be an unreasonable invasion of the third party's personal privacy under section 22. In this case, therefore, the applicant has to prove that disclosure of the information in dispute will not unreasonably invade the personal privacy of third parties.

4. The records in dispute

The records in dispute consist of a variety of records generated during the investigation of the applicant's alleged misconduct. They chiefly comprise transcripts of interviews with approximately 15 former colleagues of the applicant, audio tapes of interviews with 22 former colleagues, an investigator's handwritten notes taken during the same interviews, and some employees' handwritten notes of their dealings with the applicant while he was employed by the Ministry. The revised Portfolio Officer's fact report, dated August 16, 1996, item 14, lists the specific records in dispute.

5. The Ministry of Attorney General and PSERC's case (the public bodies)

The public bodies state that the applicant was employed in a bargaining unit position in the Ministry's Corrections Branch. A management investigation of his conduct in the workplace "revealed that he had a pattern of seriously inappropriate, harassing, and threatening conduct that had significant detrimental impact on other Corrections Branch employees." He was then terminated for cause. During subsequent arbitration, the union withdrew its argument that the applicant "had not conducted himself in a seriously improper way, and has indicated that it will instead put forward a defence based on medical incapacity of the Applicant (who is currently under medical care, in that regard)." (Initial Submission of the Public Bodies, paragraph 2)

The management investigation collected information from 22 fellow employees of the applicant. On the basis of past behaviour, the public bodies argue that the applicant "continues to pose a threat to the safety and/or mental or physical health" of these individuals. Since the allegations against him were serious, the public body states, there is a higher expectation that he will harbour ill will against the individuals who complained. Thus the public bodies argue that the records in dispute should be withheld under section 19 of the Act in order to protect the safety and mental and/or physical health of these persons. (Initial Submission of the Public Bodies, paragraphs 3-7)

The public bodies also made submissions on sections 6 and 22 of the Act, which I will discuss separately below. With respect to the latter section, the public bodies submit that disclosure of the requested information would be an unreasonable invasion of the third parties' personal privacy. (Reply Submission of the Public Bodies, paragraph 17.0)

6. The applicant's case

The applicant made an initial submission on section 22 of the Act. Based on certain transcript information released to him during the arbitration process, he argues that the personal information in dispute is in fact his information since it is about him. The personal information of third parties would be primarily their names and genders, which are already known to him. (Submission of the Applicant, p. 4) In his view, the sensitive information already released to him under the Act makes his current request "a reasonable one." (Submission of the Applicant, p. 5)

I will discuss below the applicant's detailed submissions on aspects of section 22. (Submission of the Applicant, pp. 7-13)

7. Discussion

Review of the records in dispute: a workplace harassment investigation

The context for this case only becomes clear upon review of the records in dispute; this was essentially a workplace harassment investigation. I make this point at the beginning of my analysis in order to allow readers to make sense of what follows.

In my view, the present inquiry can be settled as an extension of my previous Order No. 70-1995, December 14, 1995, and Order No. 71-1995, December 15, 1995. In both of these cases the media made access requests for various records concerning harassment investigations. The present inquiry is different in the sense that it is the subject of the investigation who is asking for the records, but I conclude that the same principles and findings relied on in the earlier Orders, or at least an extension of them, should prevail.

In Order No. 70-1995, pp. 7-9, I made the following general statements, which I intend to follow in the present matter:

> It seems to be that in cases of harassment the balancing of competing interests between openness and accountability and the protection of personal privacy should be struck on the privacy side of the equation .... It seems to me that there are certain bright lines that can be drawn with respect to the disclosure of sexual or personal harassment information to the general public by public bodies covered by the Act. I think that the fundamental concern is to protect the integrity of the process that a complainant sets in motion. A complainant is entitled under section 22 of the Act to confidentiality for both his or her name and the substance of the complaint.
>
> The substance of the subsequent investigative report should also 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 that is either substantiated or unsubstantiated. Generally, sections 13, 14, and 22 are relevant in this connection. I think that the written policies of any public body should state that this kind of information is collected in confidence for purposes of section 22(2)(f) and will not be disclosed to third parties in particular.
>
> With respect to the application of section 22(2)(h) of the Act, I am also of the view that public bodies should not disclose personal information that may unfairly damage the reputation of any person(s) referred to in the record requested by an applicant. The goal of the investigative process is to secure justice for the complainant, the alleged harasser, and those asked to provide evidence, and then to facilitate the reintegration of the "offender" into the work force as a productive member of society.
> ....

In Order No. 70-1995, p. 6, I refused to release a complaint and the accompanying investigation report to the media.

Order No. 71-1995, in terms of the present inquiry, largely involved the application of section 22. I have used segments of this Order below as I deemed it appropriate to do so.

The meaning of "personal information"

The public bodies helpfully pointed out that the definition of personal information in Schedule 1 of the Act covers "recorded information about an identifiable individual, including ... (h) anyone else's opinions about the individual, and (i) the individual's personal views or opinions, except if they are about someone else." (Reply Submission of the Public Bodies, paragraph 2.0)

I need to address what these definitions mean in the context of the current case. According to Schedule 1 of the Act, the applicant's personal information includes anyone else's opinions about him, meaning in this case his co-workers. The latter's personal information includes their personal views or opinions, except to the extent to which they are about the applicant. Thus there is a strong presumption under the Act, despite the burden of section 22 about protecting the privacy rights of third parties, of disclosing to the applicant his personal information as defined in the Schedule. But that is also qualified by the section 19 exception for disclosures that may be harmful to individual or public safety.

Section 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, or ....***

The public bodies have reviewed my various Orders involving the application of this section and concluded "that not only would the application of section 19 in this case be supported on any one of the above lines of reasoning alone, but that all of them are present in this case, making the application of section 19 very clear." (Initial Submission of the Public Bodies, paragraph 10) (See Orders No. 28-1994, November 8, 1994 (evidence of potential as opposed to actual violence); Order No. 28-1994 (medical condition only with no history of violent behaviour); Order No. 7-1994, April 11, 1994, and Order No. 80-1995, January 23, 1996 (history of threatening behaviour); and Order No. 39-1995, April 24, 1995 (detailed and convincing affidavit evidence of past experiences))

In terms of the affidavit evidence presented by the public bodies, I emphasize the refusal of most of the applicant's fellow employees to allow the release of their evidence for the management investigation, and the belief of a Labour Relations Officer involved in the arbitration itself that this request for access is "forcing the correctional officers to relive their fears and concerns for their personal safety, and I believe that this fact alone is re-victimizing." (Affidavit of Lori Bird; Affidavit of Tony Raymond) I regard this

concern of preventing any re-victimization of the applicant's former colleagues as a critical consideration in this present inquiry. (See Order No. 25-1996, September 17, 1996, p. 4)

Although the applicant replied to the public bodies' submission on section 19, a number of his points are not relevant to his request for access under the Act, since they primarily deal with alleged management and arbitration faults. (Reply Submission of the Applicant, paragraphs A, 1-4) However, the relevant point is made that the applicant suffered from an illness that has now been diagnosed and treated, leading to a "dramatic change in the applicant's disposition today ...."

> The applicant harbours no ill will towards these individuals who complained which led to his dismissal .... It has been a whole year now since the applicant was dismissed and nothing has happened to these
>
> people, their fears are unjustified. (Reply Submission of the Applicant, p. 4)

The applicant has also received a number of interview transcripts, and nothing has happened to these persons. (Reply Submission of the Applicant, p. 5)

The applicant concludes that the public bodies have not proven that a reasonable expectation of harm exists for the persons interviewed in his management investigation, whose records have not been released to him. (Reply Submission of the Applicant, p. 9)

I have reviewed *in camera* medical evidence to the effect that the applicant has been undergoing treatment. I also am aware that he states that he is not currently a threat to his former fellow employees and that no harm has come to the five persons whose records were disclosed to him during the arbitration process.

Because of the sensitive nature of the records in dispute, especially the fact that they are the records of a workplace harassment investigation, I find that they should be withheld under section 19(1). I am not at liberty to disclose the details of past incidents involving the applicant. I wish to be guided by the record of past performance in acting prudently in a sensitive matter, such as the present inquiry, rather than relying on promises of reformation that may not withstand the test of time. My primary concern is for the mental health and safety of the third parties whose records have not been released to date.

Section 22: Disclosure harmful to personal privacy of third parties

In light of some general arguments advanced by the applicant, I emphasize that the fact that an applicant has already obtained certain information and records, that are also contained in the records in dispute, does not create an obligation on a public body to disclose the same material to him under the Act. Thus disclosures under an arbitration

process, such as in the present inquiry, are separate and discrete and not a precedent for similar treatment under the Act. (See Reply Submission of the Public Bodies, paragraphs 4.1-4.5, 12.0(b), and Order No. 83-1996, February 16, 1996, p. 4) I agree with the public bodies that in "this case, while most of the interviewees may have consented or acquiesced to their privacy being invaded for the purpose of attempting to ensure that the Applicant's dismissal from employment was upheld at arbitration, they [with one exception] have not consented to disclosure of their statements under the Act." (Reply Submission of the Public Bodies, paragraph 4.4) However, it must also be made clear that five interview transcripts of the public body were released to the applicant during the arbitration process and thus are not at issue in this inquiry.

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

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

The applicant argues that he has a right to the records in dispute because the information is about him and thus relevant to a defense of his rights:

> It is only fair to the applicant to have the records that have caused detrimental effects to his life. The employer must be accountable for the actions they took against the applicant which has ruined his career, damaged his reputation, affected his livelihood, and has aggravated his mental state. (Submission of the Applicant, p. 10)

The public bodies reject this contention. In their view, the applicant's rights have already been considered in the arbitration process, where he was provided with relevant records at the direction of the arbitrator, and where there is no longer a case being argued on the merits of his dismissal from employment. (Reply Submission of the Public Bodies paragraphs 11.0-11.4)

On the basis of Order No. 52-1995, September 15, 1995, the public bodies further argue that section 22(2)(c) does not support disclosure to the applicant for the purpose of assessing the fairness of a past determination of a right: they argue that "once it has been determined that the information requested is not relevant to a fair determination of an applicant's rights, other factors tip the balance of the protection of third party personal privacy." (Reply Submission of the Public Bodies, paragraphs 11.6, 11.7) I agree with the public bodies in this regard. (See also Alberta Information and Privacy Commissioner (Robert C. Clark), Order 96-008, July 31, 1996, pp. 6, 7)

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

The applicant denies that this section has any relevance for third parties: "The applicant is no longer an employee at this workplace and he will not be returning to it. He is not in a position to unfairly harm any third party in the records, financially or otherwise." (Submission of the Applicant, p. 11)

The public bodies "strongly" refute the applicant's submission in this regard:

> The fact that the Applicant will not be returning to the workplace does not mean that he is not in a position to harm the third parties. On the contrary, there is every reason to believe that the disclosure of the requested information would unreasonably invade the personal privacy of the employees who were interviewed by management, by exposing them to harassment or other harm. (Reply Submission of the Public Bodies, paragraph 9.0)

I agree with the public bodies that the risk of unfair exposure to physical or mental harm is a relevant circumstance militating against disclosure in this case. (See Order No. 71-1995, p. 8)

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

The applicant questions whether the records in dispute were actually supplied in confidence and notes my expectation of as much explicitness as possible with respect to claims of confidentiality. (See Order No. 28-1994, November 8, 1994, p. 9)

> In this case there is no explicit evidence that the witness/interview statements were provided and received in confidence. The individuals interviewed should have been told from the outset about confidentiality guarantees with respect to the collection of any personal information during the investigation. A matter of this importance should not be presumed. (Submission of the Applicant, pp. 7, 8)

Since the applicant has received some of the transcripts, he is able to point out that a number of them contain no recorded promises of confidentiality to the respondents: "The employees knew the investigation was about the applicant and that no disciplinary action would be taken against them and they willingly disclosed information without confidentiality being explicitly stated as a condition, nor promised by the employer." (Submission of the Applicant, pp. 8, 9)

The public bodies advanced evidence to the effect that "employees who were interviewed by management supplied their comments to management in confidence." The two management interviewers informed most of the interviewees, at least at some point in the interview, that their comments were being received in confidence. Sometimes this did not occur at the beginning of the interview, but most individuals were apparently given a promise of confidentiality "before the audio tape recorder was

activated to record the interview." (Affidavit of Mardy Makowsky, paragraph 3; and Reply Submission of the Public Bodies, paragraphs 8.0, 8.1)

I regard this as an unsatisfactory state of affairs. If an interview is being audio taped on the basis of a promise of confidentiality, the latter should be tape recorded as well, so that the interviewee can be shown to have been given appropriate notice. I am similarly concerned about the fact that the Corrections Branch of the Ministry does not have a written policy on confidentiality for such investigations, since I have given plenty of notice to public bodies in this regard.

In the end, I do accept, on balance, the argument of the public bodies "that the evidence shows that information provided by the interviewees was in fact supplied in confidence." (Reply Submission of the Public Bodies, paragraph 8.6) I especially recognize that a management investigation of the workplace behaviour of an employee was occurring in the context of the work of a correctional institution, which is part of the law enforcement apparatus of the province, meaning that staff are especially sensitized to issues of confidentiality. The interviews also took place at a site away from the institution itself. Such an expectation of confidentiality is thus a relevant circumstance militating against disclosure. (See Order No. 70-1995, pp. 6, 7)

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

The applicant denies that this section has any relevance, not least because it is his own reputation that has been damaged: "Any third party referred to in these records is already known to the applicant and a great deal of sensitive information has been released to him through his own transcript and the five other full transcripts received." (Submission of the Applicant, p. 12)

The public bodies seek to argue that such disclosure of some opinions given by some employees about other employees (not the applicant) could unfairly damage the reputations of the employees about whom other employees spoke. (Reply Submission of the Public Bodies, paragraph 10.1) My simple view in this regard is that the applicant should not be receiving any of the opinions of third parties about employees other than the applicant.

In Order No. 71-1995, p. 10, I found with respect to the application of this section that:

> The records in dispute contain unsubstantiated allegations against the former Cabinet Minister, descriptions of events, and names of other persons. Although the name of the former Cabinet Minister is generally known, and even the names of some of those who have brought complaints of sexual harassment against him (on the basis of media reporting to date), disclosure of the records in dispute in this case and in

> this forum (under the scope of the Act) would, in my judgment, unfairly damage the reputation of any person referred to in the record.
>
> ... the contents of the records are of a very sensitive nature and character for all of those involved. While comparable information may have to be provided in a court room or during a human rights hearing, I do not think it would serve the public interest, however defined, by my ordering disclosure under the Act.

I have already cited above, at the beginning of this analysis, my finding from Order No. 70-1995 with respect to the application of section 22(2)(h). I am following this precedent in the present inquiry. (See also Order No. 70-1995, pp. 6, 7)

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 applicant argues that this section is not relevant since the employment history is his and not the third parties. (Submission of the Applicant, p. 10) The public bodies implicitly agree with this point, except to the extent that the information relates to the employment history of any other employee. (Reply Submission of the Public Bodies, paragraph 14.0) I agree with this analysis. (See Order No. 70-1995, pp. 6-7; Order No. 71-1995, p. 11) Each transcript of interviews conducted during the management investigation in fact contains personal information directly related to the employment history of a third party.

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

The applicant again argues that this section is not relevant, since the personal and personnel evaluations, recommendations, and character references are about him and not a third party: "This is the applicant's own personal information and employment history." (Submission of the Applicant, p. 11) The public bodies implicitly agree with this point, except to the extent that the information relates to the employment history of any other employee. (Reply Submission of the Public Bodies, paragraph 15.0) I agree with this analysis.

I have previously found that this section does not customarily apply to the contents of sexual harassment complaints. See Order No. 71-1995, p. 11: "The contents of the complaints are not what are customarily recognized as personal recommendations or evaluations, character references, or personnel evaluations." However, I did accept the application of this section to certain of the records in Order No. 70-1995, p. 7.

Section 22(3)(g.1): 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 applicant again argues that this category largely covers his own personal information. (Submission of the Applicant, p. 11) The public bodies correctly submit that the disclosure of information that would reveal the identity of the person who supplied the personal or personnel evaluations or character references is a presumed unreasonable invasion of the personal privacy of that person. (Reply Submission of the Public Bodies, paragraph 16.0) (See Order No. 131-1996, November 19, 1996, p.7)

The provision of a summary under section 22(5)

Section 22(5) reads as follows:

> 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.

The public bodies have advanced a rather ingenious argument on the basis of section 22(5) of the Act. Its basic position with respect to section 22 generally is that any personal information, whether of the applicant or the third parties, must be withheld "if disclosing it would unreasonably invade someone else's personal privacy." In its view, a *prima facie* limit to disclosure under this section is "where a disclosure of an applicant's own personal information would unreasonably invade the 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 an extra step, and prepare 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. (Reply Submission of the Public Bodies, paragraphs 6.0, 6.1)

In this particular inquiry, the public bodies did not prepare summaries of the withheld information, because it was also applying section 19 to the records in dispute. I agree, at least in principle, with the public bodies that they are not required to provide summaries under this section where another exception applies to the information that would otherwise go into the summaries. (Reply Submission of the Public Bodies, paragraph 6.2) In addition, the applicant has already received summaries as part of the

arbitration process, which "were written with a view to protecting the personal privacy and safety of the interviewees ...." (Reply Submission of the Public Bodies, paragraph 6.3) He has also received copies of notes that a union representative made while reviewing some of the interviews. (Reply Submission of the Applicant, p. 7)

The audio tapes

The public bodies state that although the applicant received five of the transcripts of investigative interviews during the arbitration process, section 19 of the Act "may still be applied to the audio tapes from which those transcripts were produced, in their entirety." (Initial Submission of the Public Bodies, paragraph 8)

The public bodies also wish to protect from disclosure an audio tape for one individual who has actually consented to its disclosure, because there is a risk of future mental and/or physical harm. (Initial Submission of the Public Bodies, paragraph 9) I am of the view that the public bodies cannot override an individual's informed consent to such a disclosure, whatever the merits of its position, especially when an adult professional has freely made the decision. Thus I recommend that the Ministry release this audio tape to the applicant.

The applicant is suspicious that the unreleased audio tapes contain information not included in the transcripts that he has received. Moreover, the applicant has placed his representative (his wife) in charge of handling his personal affairs, so she will be the one hearing the audio tapes. (Reply Submission of the Public Bodies, p. 6) I am not persuaded of the merits of this point.

Based on my review of the audio tapes, I am of the view that the transcripts of the audio tapes are essentially accurate. Moreover, I intend to treat them in this inquiry like any of other records in dispute and withhold them from disclosure under sections 19 and 22 of the Act.

Generally, I find that the applicant has not met his burden of proof under section 22 of the Act.

Section 6(1): The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

The public bodies state that the only issue under this section is whether its effort to locate a requested e-mail memorandum was adequate to satisfy the search aspect of its duty under this section. On the basis of Order No. 30-1995, it argues that the question becomes: "Did the Public Body make every reasonable effort in its search for the e-mail memorandum that would be responsive to the Applicant's request?"

On the basis of the description of its search efforts submitted to me and an accompanying affidavit, I find that the public bodies have adequately searched for the

record sought by the applicant and has therefore met that aspect of its duty under section 6(1). I further agree with the public bodies that:

> the Public Body met its search duty even though it did not believe that the requested record existed. The management of the [correctional centre] state that there is only one person who would have sent such a message, and that person confirms that he did not ever send such a message to staff. (Initial Submission on Section 6(1); and Affidavit of Lori Bird)

8. Order

I find that the Ministry of Attorney General has adequately searched for an e-mail record sought by the applicant and has therefore met that aspect of its duty under section 6(1).

I find that the Ministry of Attorney General is authorized to refuse access to the records in dispute under section 19(1)(a) 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 all of 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

December 18, 1996