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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 50-1995
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INQUIRY RE: A decision by the Ministry of Finance and Corporate Relations to refuse access to records from an internal audit concerning a conflict of interest investigation

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1. Description of the review

As Information and Privacy Commissioner, I conducted an oral inquiry at the Office of the Information and Privacy Commissioner in Victoria on July 4, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of Alan Grove's request for a review of a decision by the Ministry of Finance and Corporate Relations (the Ministry) to refuse access, under section 15(1)(c) of the Act, to a series of answers to audit interview questions. These were the result of a conflict of interest investigation involving Gordon Hanson, a former NDP member of the ***provincial*** Legislature and also aboriginal affairs critic for the party.

On November 19, 1993 Alan Grove (the applicant) requested access to all investigative material compiled in the Gordon Hanson Conflict of Interest Investigation. On February 11, 1994 the public body released a variety of records but withheld the working papers, since it was seeking advice regarding their status under the Act.

During the spring of 1994, the public body showed a sample of severed audit records to the applicant. At that time it appeared that the applicant felt that severed material would not meet his needs. The public body closed the case in November 1994. believing that the applicant had abandoned his request. In January 1995 the applicant contacted the public body to ask for the remaining documents which he believed were to be released. The public body retrieved the records and began processing them in stages, beginning with samples of the audit interview questions and answers. On April 6, 1995 the public body decided to withhold the sample interview questions and answers under section 15(1)(c) of the Act.

On April 10, 1995 the applicant wrote to the Office of the Information and Privacy Commissioner (the Office) requesting a review of the public body's decision to withhold the records. On June 15, 1995 the Office issued a Notice of Oral Inquiry to take place on July 4, 1995. On June 22, 1995 the Ministry released to the applicant a complete and unsevered copy of

the questions used in conducting the interviews, including the names of those interviewed. On June 30, 1995 the Ministry notified the applicant that it was also applying section 22(1) of the Act to certain portions of the records. The application of section 22 did not come before this inquiry, because the applicant did not have time to prepare.

2. Documentation of the inquiry process

On June 15, 1995, along with the Notice of Inquiry, the Office issued a one-page statement of facts (the Portfolio Officer's fact report) which the parties reviewed for the purposes of this inquiry. The applicant disagreed with the factual basis of the fact report and supplied his own more detailed time line of events and developments (Exhibit 1).

The Office invited representations from the applicant and the public body. The Office also invited three intervenors at the suggestion of the applicant: Professors John P.S. McLaren and Colin Bennett of the University of Victoria and Ross Lambertson of Camosun College, representing Victoria Civil Liberties Association. The first two prepared written submissions; the last appeared in person at the inquiry.

3. Issue under review at the inquiry

The only issue in this inquiry is the applicability of section 15(1)(c) of the Act to the records in dispute.

Section 15(1)(c) reads as follows:

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

> ...
>
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
>
> ....

4. The records in dispute

The records in dispute consist of approximately twenty-eight handwritten pages of answers to questions asked by Ministry auditors during interviews of government and non-government officials who had knowledge of Gordon Hanson's contract work.

5. The applicant's case

The applicant states that his "search for research material" began before news of the Andrew Petter/Gordon Hanson affair, as he terms it, broke in the media in late

April 1992. Then Minister of Aboriginal Affairs, Andrew Petter, was asked in the Legislature about his Ministry's use of the consulting services of Gordon Hanson. Petter announced an internal inquiry into various allegations, which led to the "Mathieson Report," prepared by S. D. (Sunny) Mathieson, Acting Executive Director of the Internal Audit Branch for the Office of the Comptroller General in the Ministry of Finance and Corporate Relations. The Minister released this report and accompanying material on September 10, 1992 (Exhibit 2).

The applicant had decided to monitor this case, "[h]oping to learn the proper process of investigating allegations of patronage, conflict of interest, double-dipping, criminal misconduct and political payoffs ...." Upon reading the Mathieson report, he states that he was inclined to question the credentials of the author. Some of her qualifying statements made him (and Ross Lambertson) think that "there was more here than met the eye." (Applicant's case, pp. 5-6)

Concerned that the media gave the event short shrift, Lambertson and the applicant decided to prepare a case study:

We took a broad approach examining not only the narrow question of contractual conflict of interest, but also broader issues like what constitutes political conflict of interest, the process for investigating questions of political misconduct raised in the House, how other jurisdictions handle similar matters, and why the press simply accepted Petter's version of the events. (Applicant's case, pp. 6-7)

The co-authors presented a preliminary draft of their paper at the B.C. Universities History Conference at Parksville in 1993.

Although confident that we had clearly demonstrated how easy it is for a skillful government to circumvent the watchdogs of the legislative assembly, a lack of hard evidence prevented us from doing more than expressing our concern that Petter, a law school professor, would engage in the unsavory practice of contracting with a company controlled by a recently retired NDP MLA without putting the contract up for public tender[,] and our apprehension that there appeared to be some conflict of interest, with breaches of the statute and guidelines by both Petter and Hanson. (Applicant's case, p. 7)

Their research to this point in time included an abortive effort to interview Minister Petter, after submitting written questions that he had apparently requested: "... he [Petter] felt it would be inappropriate to answer our questions." (Applicant's case, pp. 7-8)

Lambertson subsequently withdrew from the project because of other commitments. The applicant then took advantage of the spirit of the forthcoming *Freedom of Information and Protection of Privacy Act* to make formal requests for access to the records he wished to see. (See Exhibit 1) His review of the first material released to him caused him "great concern,

because it proved conclusively that people who had the most to lose if the potentially politically damaging questions were revealed had played the most prominent role in determining who should conduct the investigation, even though their conduct was being investigated." (Applicant's case, p. 8)

The applicant offered examples of questions originally posed during the Mathieson investigation. It is his view that the public has the right to know the answers to such questions. Moreover, this quest for research material "by investigative researchers" should, in the applicant's view, be granted promptly.

6. Intervenor Colin Bennett's case

Professor Colin Bennett, a political scientist at the University of Victoria, intervened in support of the applicant's request for access, because it is the first "scholarly request for information" under the Act that has come to an oral inquiry:

The scholar's interests here are threefold: to tell a more reflective, objective and complete story of contemporary political history; to examine the effectiveness of political and administrative processes and institutions; and to draw lessons from the past on the successes and failures. Those are the general motivations of the academic who researches the policy process.

I believe they are also the interests of Mr. Grove and his colleagues.

Bennett further pointed out that "the researchers have a more general desire to subject to public scrutiny the process by which the allegations of conflict-of-interest and double-dipping were investigated .... The applicant wishes to raise questions about whether the investigation was sufficiently thorough and 'arm's-length.' This scholarly endeavour should involve a careful analysis of how the investigation was conducted."

Bennett focused as well on the accountability principle set forth in section 2(1) of the Act.

... it seems to me that the very purpose of FOIPP [the Act] is to ensure that applicants such as Mr. Grove are provided with the fullest possible information with which they can scrutinize not only the activities and expenditures of Ministries, but also the conduct of bodies (such as the Internal Audit Branch) whose purpose is to keep government accountable.

Bennett concluded by reiterating "the scholarly interest in having access to as much background information as possible. The interest of journalists in this story has long since waned. It is now the job of scholars to tell the complete story. ..."

7. Intervenor John P.S. McLaren's case

John McLaren is the Lansdowne Professor of Law at the University of Victoria. He wrote in support of the applicant "as a member of the academic community, and in particular as a legal historian with a profound concern that public documents be as freely available as possible to members of the public in general, and researchers in particular .... [H]istorians need to be

concerned with preservation of and access to the records from the past, while also ensuring that investigative work on current issues of public concern is facilitated."

Academic researchers and investigative journalists, in McLaren's view, are surrogates for the public in examining matters of public concern and interest. He quoted approvingly the statement by Auditor General George L. Morfitt in his May 1995 report on his Review of Contracts between NOW Communications Group Inc. and the Government of British Columbia:

Openness in government means more than that citizens can -- with enough skill and enough effort--tease out a few facts about government activities. Openness means that appropriate information is either directly accessible through the public record or that the existence of the information is part of the public record and the information itself is available on request.

8. Intervenor Ross Lambertson's case

Ross Lambertson teaches political science at Camosun College and is also a member of the Victoria Civil Liberties Association. As noted above, he was originally a co-researcher with the applicant on the issue that is the focus of this inquiry: "From the very beginning both of us were interested in the superficiality of most political commentary in this province; journalists rarely have the time, inclination, or training to pursue real investigatory reporting, and academics too seldom utilize their privileged positions to investigate contemporary issues which are politically volatile."

In Lambertson's view, the applicant's interest in "rooting around" in "the dark and mysterious tunnels of politics is exactly the kind of attitude that is necessary to a healthy political system. If such investigations initially cause some discomfort to those in power, in the long run they can help prevent abuses of power and even restore the public's faith in the democratic process."

9. The Ministry's case

The Ministry's "overriding concerns in this case are that sensitive information that individuals provide to auditors be protected from disclosure. Internal Audit Branch (IAB) auditors depend on confidential interviews as a forensic audit investigative technique." (Argument for the Ministry of Finance and Corporate Relations, p. 6) This can involve a determination of whether a possible crime has been committed and the forwarding of audit materials to appropriate law enforcement agencies, if auditors find sufficient evidence of wrongdoing. Auditors need to continue to receive candid information from those they interview in order to do their jobs effectively. (Argument for the Ministry, pp. 6, 8)

In the Ministry's view, disclosure of the information in the interview notes in dispute could "harm the effectiveness of the investigative technique of confidential interviews which is currently used for audit purposes." (Argument for the Ministry, p. 6)

I have presented the Ministry's more detailed arguments below in the appropriate places.

10. Discussion

The mediation process

The applicant has chosen to reveal to me various events that occurred during his efforts to obtain access to the records in dispute from the Ministry of Finance and Corporate Relations. (Applicant's case, pp. 10-14) Although I have read all of the material submitted to me, I refrain from commenting on these matters, since they are extraneous to the specific issue at stake in this inquiry, that is, the interpretation and application of a particular section of the Act. The applicant's concerns can be summarized in his own sentence: "The record shows that in the past week the Ministry of Finance has resorted to deception, threats, and intimidation in their attempt to keep this material [in dispute] secret." I would investigate allegations of such behaviour under section 42(1) of the Act, were I persuaded that such charges reflected commonplace behaviour by public servants administering the Act.

Section 15(1)(c)

a) Law enforcement

I accept the Ministry's submission that the forensic audit process followed in the Hanson affair was a law enforcement matter in that the investigation of potential "double dipping" and conflict of interest could have led to a penalty or sanction being imposed, which is covered by the definition of law enforcement in Schedule 1 of the Act. (Argument for the Ministry, pp. 7, 9-11) My conclusion is in accord with my discussion of this matter in Order No. 36-1995, pp. 13-14. In fact, the Hanson audit did not lead to a criminal prosecution because a special prosecutor appointed by the Attorney General concluded that there was insufficient evidence for such purposes. (Testimony of Sunny Mathieson, Transcript, pp. 63-64; Argument for the Ministry, Affidavit of Sunny Mathieson, paragraph 4)

b) Investigative techniques and procedures

Colin Bennett and John McLaren made a number of very helpful points in connection with the application of section 15. They urged me to construe section 15(1)(c) narrowly so as to prevent use of this section to avoid public scrutiny of law enforcement matters. Bennett emphasized that the exemption is discretionary and not mandatory. In his view, the "confidentiality fosters frankness" argument made by the auditors should be viewed with more skepticism in this case, not least because "the public interest in disclosure needs to be balanced against the fears of the public body that the audit process may be compromised." I accept that I need to balance competing interests in this way.

I read section 15(1)(c) to cover the protection of technologies and techniques used in law enforcement, not the actual contents of the product of such "investigative techniques and procedures currently used, or likely to be used, in law enforcement," unless disclosure of that information could reveal those investigative techniques and procedures. Thus it may be inappropriate to reveal that policing authorities have a capacity to use high resolution

surveillance cameras and that they can manage to read documents or observe persons at considerable distances or under adverse conditions.

The Ministry, however, argues that disclosure of the interview notes will harm the effectiveness [emphasis added] of relying on confidential interviews in the audit process. (Transcript, pp. 117-18) My finding is that a process of relying on confidential interviews is not an investigative technique or procedure as defined in section 15(1)(c) of the Act. Thus I am in agreement with the Information and Privacy Branch's Policy Manual that section 15(1)(c) does not preclude the disclosure of information about commonly known investigative techniques such as wiretapping or fingerprinting. (See the contrary view expressed in Argument for the Ministry, pp. 8, 10, which suggests that the wording of the B.C. Act deliberately protects the effectiveness of techniques.) I do not accept that "confidential interviews" are "techniques and procedures" used in law enforcement under section 15(1)(c). In my view, other sections of the Act may be used to sever portions of such interview notes, but they cannot be protected under section 15(1)(c) in such a blanket fashion.

My view is in accord with the interpretation of section 14(1)(c) of the Ontario *Freedom of Information and Protection of Privacy Act*. That section provides in part:

A head may refuse to disclose a record where disclosure could reasonably be expected to ...

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement ...

I note that section 15(1)(c) of the B.C. Act includes a harms test in the definition.

Ontario Order 170, May 25-1990 (John McCamus, Inquiry Officer) defined "investigative technique and procedure" as essentially including a harms test. The Order says:

In order to constitute an "investigative technique or procedure" in the requisite sense, it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. The fact that the particular technique or procedure is generally known to the public would normally lead to the conclusion that such compromise would not be effected [sic] by disclosure and according [sic] that the technique or procedure in question is not within the scope of the protection afforded by section 14(1)(c). (pp. 30-31)

In Ontario Order 170 one of the records at issue was a 315-page document consisting of an audit report which summarized the substance of investigations made about an individual. Extracts from various investigative reports of the Ontario Provincial Police were appended.

The Ministry of the Attorney General (which argued that the entire report should not be disclosed) described the "techniques and procedures" involved as interviewing techniques, establishing a paper trail of documents, preparing draft statements, and taking interview notes. They suggested that "integration of these techniques illustrates how evidence is collected and organized." (p. 32)

The inquiry officer concluded that disclosure of the entire record would not reveal "investigative techniques and procedures" in the sense intended by section 14(1)(c). The actual methods employed by the investigators did not "appear to be anything other than what a lay person would expect." While some portions of the report in dispute might be exempt under other provisions of the Ontario Act, it was held that "disclosure of the report would not provide the requester with information that would hinder or compromise effective utilization of the investigative methods employed in this investigation." (pp. 32-33)

Section 22

The Ministry invoked this section of the Act at a late stage in the pre-inquiry process, which meant that the applicant was not prepared to discuss the matter at the oral inquiry. Thus my order deals only with the section 15 issues. The application of section 22 will need to be settled under standard procedures established by the Act.

Access to information for scholarly purposes

Although it is not the central issue in this case, I find it appropriate to comment on matters relating to the issue of access to information under the Act for scholarly purposes. The applicant is a legal historian with scholarly publications to his credit in the University of British Columbia Law Review and in a book about to be published by The Osgoode Society, an organization devoted to promoting the legal history of Canada. See Hamar Foster and Alan Grove, "Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyer and their Employers," University of British Columbia Law Review, 27 (1993), 213-55; and Alan Grove, "'Where is the Justice, Mr. Mills?': A Case Study of R. v. Nantuck," in Hamar Foster and John McLaren, eds. Essays in the History of Canadian Law, VI: B.C. and Yukon, forthcoming, 1995. It is relatively easy to conclude in the present case that the applicant is a legitimate researcher. The applicant and Ross Lambertson referred to themselves as "investigative researchers."

The use of research agreements

The Ministry states that the applicant declined the Ministry's offer of signing a research agreement under section 35 of the Act as a vehicle for the applicant to gain access to the records in dispute. (Argument for the Ministry, p. 12) The applicant testified that he had never seen a research agreement in writing and objected in principle to the idea of one, since he would not "be able to have complete access and control of the record. I wanted public disclosure." (Transcript, pp. 111-115) I note that the offer of a research agreement was only made on or about June 26, 1995, that is, about a week before the inquiry. (Argument for the Ministry, Affidavit of Sunny Mathieson, paragraph 13)

At the inquiry, I discussed the problems of using a research agreement with respect to the records in dispute, because, for example, the applicant would take away impressions from looking at the interview notes that it would be very difficult to control the further dissemination or use of. (Transcript pp. 114-15) Having read the records, I am of the opinion that a research agreement might have been an appropriate initial solution, once the researcher understood its purpose and how it might apply. In this case, he could have been told that he could use nothing from the

records until he indicated what he wanted to use. My own impression of the records is that their perusal would disabuse the applicant of some of the suspicions that he appears to harbour.

For future purposes, I note that the research community will have to become accustomed to the detailed provisions of research agreements made possible under section 35 of the Act, especially if individuals wish to have access to sensitive personal data or to have expeditious access to large volumes of information that cannot be quickly severed because of limited staff resources in such public bodies as the B.C. Archives and Records Service.

In general, I am persuaded that the use of research agreements is of considerable assistance to a public body, and an applicant who is a researcher, when large volumes of material are the subject of a request and the applicant is not sure just what is relevant to his or her work. It is a wise use of scarce resources to allow controlled access to a legitimate researcher who understands that his or her future access to records in the custody or control of public bodies will be jeopardized, if he or she does not comply with the conditions set forth in a section 35 research agreement with respect to the use of personal information.

Although I recognize that section 35 of the Act specifically covers the use of "personal information" for research and statistical purposes, because of the sensitivity of the practice, I read the Act as implicitly permitting the use of such an agreement to facilitate initial access to any records held by a public body, whatever discretionary exceptions may potentially apply to them. (See Order No. 3-1994, p. 5) A public body may exercise its discretion in favour of disclosure under a research agreement, which preserves its right to review any applicable exceptions once the researcher has determined what information he or she wants to include in a report.

The applicant stated that he is a graduate student in history at the University of Victoria. (Transcript, p. 111) That poses a small problem for a public body entering into a research agreement with him, since it may be difficult to enforce its terms, whereas sanctions in the form of denying future access to public records might be easier to maintain against the academic intervenors in this case, for example, if they breached the terms of such a research agreement. One possible solution, in these circumstances, is to ask the student's professor, or the chair of his or her department, to co-sign a research agreement as a means of both facilitating access to records and ensuring compliance with the terms of the agreement.

I have made the point in other orders that I cannot control what applicants do with information they have a legitimate right to access under the Act. Research agreements, when used appropriately, provide a greater degree of potential control over a member of the research community. (I am not aware of a documented case in Ontario, a jurisdiction that allows such agreements, where a researcher has breached a research agreement.)

The need for public scrutiny

The Ministry responded to Colin Bennett's argument about the need to scrutinize the investigative process and reach some conclusions about its thoroughness by emphasizing the number of groups that can already subject the Internal Audit Branch of the Ministry to such

scrutiny. (Argument for the Ministry, p. 12) I simply note that the general public, including the scholarly community, have comparable rights to subject this Branch to scrutiny under the broad access provisions of the *Freedom of Information and Protection of Privacy Act.*

The issue of candour

I want to discuss the evidence provided by the Ministry of concerns about the risk of not obtaining candid responses to questions in future investigations, if the records in dispute in this case are released in an unsevered form. I note in particular the affidavit sworn by George Morfitt, the Auditor General. I sympathize with these concerns yet I must follow the requirements of the Act. It is a fact of life that information collection techniques in government are all gradually changing in response to the Act. An ethical interviewer should now inform a respondent that his or her answers to candid questions may be accessible in future to both the subject of the inquiry and to others with general interest in the subject matter. This has been the case at the federal level in Canada and in Quebec and Ontario for a number of years. One result has been more objective, fact-oriented recording of answers and a more general discouragement of the disclosure of biases and casual pejorative character judgments. People volunteer statements that may not be relevant to the concerns of an interview. This should be discouraged or not recorded. In my view, caution and candour can coexist.

In her affidavit for this inquiry, Sunny Mathieson noted her concern that a particular audit director and his staff "are no longer recording certain kinds of interview comments that they feel may be misleading or inflammatory." Her concern is that this practice "has serious implications for the completeness of our audit record." She had noted earlier in her affidavit that "[o]ften, it is a hunch expressed by an interviewee, or an offhand remark that sets the auditor down a particular path which may lead to the discovery of inappropriate or illegal action." (Argument for the Ministry, Affidavit of Sunny Mathieson, paragraphs 9, 12) In my view, it is important to distinguish these two conditions in interview situations. It seems inappropriate to record comments that are "misleading" or "inflammatory," but it seems fully appropriate to record a hunch or an offhand remark that appears useful. It is the former type of comment that may pose problems later for those interviewed, not the latter.

I do not agree with the view that disclosure of the records in dispute in this case will end candour in internal audits of the type conducted in the Hanson matter. Those interviewed are under a legal obligation to respond. They may even have counsel present with them if that seems appropriate. The notion of accountability embodied in the Act has wide application for those paid from the public purse. That this requires incremental changes in ways of doing business should be celebrated as an important form of progress in creating a more open society in British Columbia rather than denigrated as some kind of egregious error made by the Legislature in enacting the *Freedom of Information and Protection of Privacy Act*.

The Ministry also advanced the argument that in 1992 at the time of the Hanson audit, "there was an expectation both on the part of the auditor and the interviewee that information obtained in interviews would be kept confidential." (Argument for the Ministry, p. 8) I note that the Act, as approved unanimously by the Legislature in 1993, applies retroactively to all records held by public bodies, subject to the applicable exceptions set forth in the statute.

11. Order

I find that the records in dispute do not fall under section 15(1)(c) of the Act.

Under section 58(2)(a) of the Act, I find the Ministry of Finance and Corporate Relations was not authorized or required to refuse access to the records in dispute under section 15(1)(c) of the Act. Subject to the application of section 22 of the Act by the Ministry, I order the disclosure of the records in dispute to the applicant.

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David H. Flaherty
Commissioner

September 13, 1995