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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 65-1995
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INQUIRY RE: A decision by the City of Nelson to refuse access by the media to records of long distance telephone calls made from its offices

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1. Introduction

As Information and Privacy Commissioner, I conducted an inquiry on August 4, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by Graham Currie (the applicant) of KBS Radio in Nelson for review of a decision by the City of Nelson (the City) to refuse access, under section 22 of the Act, to long distance telephone records.

The request was for records of all long distance telephone calls made from the Mayor's office, or for records of all 1-900 telephone calls, or for records of all long distance telephone calls made from City Hall. The requests were for a specified time period. The applicant subsequently agreed to limit the scope of this inquiry to records of all long distance telephone calls to 1-900 telephone numbers made from Nelson City Hall and from the Mayor's office from February 1994 to February 1995. (Reply Submission of the Applicant, pp. 1, 2).

2. Issue

The issue in this inquiry is whether records of certain long distance telephone calls made from the offices of a public body should be disclosed, or whether those which can likely be attributed to a specified individual are properly severable under section 22 of the Act. The relevant portions of this section are as follows:

Disclosure harmful to personal privacy

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

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,

...

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

...

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

3. Burden of proof

At an inquiry into a decision to refuse an applicant access to all or part of a record, the head of the public body must prove that the applicant has no right of access (section 57(1)). However, under section 57(2), if the record or part to which the applicant is refused access contains 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. In this case, the applicant has the burden of proving that the exception in section 22 does not apply.

4. The records in dispute

The requested records are, in effect, B.C. Tel bills for the City (typically 40 to 60 pages per month), as well as internal computer-generated "Department Summary Reports" and/or "Extension Detail Reports." The Department Summary Reports, generated for each Division and/or Department (i.e. Administration, Finance, Police, Public Works, etc.), purport to list the total number and total duration of all long distance calls made from each extension during any one-month time period. The Extension Detail Reports purport to list each long distance call made from each extension during each specified time period.

5. KBS Radio's case

The applicant submits that the public has a right to access the phone records in dispute, especially with respect to 1-900 calls:

> ... the public has a right to know whether or not such calls are or have been made by users of Nelson City Hall phone systems and to what level. Again, these are expenses paid by the taxpayers of the City of Nelson and such usage of the Nelson City Hall telephone system, if it in fact it has occurred, is a matter of public interest. The information should be accessible by the public. (Submission of the Applicant, p. 1)

The same arguments apply to calls made from the Mayor's office. In the applicant's view there can be no impact on third parties from any disclosure that may occur, if indeed one can even be identified. Even if the information is "personal information" under the Act (which the applicant denies), "the desirability of public scrutiny of these records justifies release of the records" under section 22(2)(a) of the Act.

6. The City's case

The City first contested the applicant's request for access to all telephone billings from Nelson City Hall, which would include its internal tracking system. The scope of the original request would include its switchboard and at least thirty-five private lines. Since Nelson owns its own electrical utility, some electrical customers in the surrounding area can only be reached by long distance. The City also has an Employee Assistance Program to assist employees with various problems:

> Several of the professionals used under this program reside in the outlying areas, [thus] release of our telephone records would indicate which employees telephone was used to make calls under the Employee Assistance Program, under which, we guarantee the employees confidentiality. (Submission of the City, p. 2)

The City pointed out that the Mayor is also chair of the Nelson Police Board and calls made from his office could pertain to policing matters. (Submission of the City, p. 3)
The City did not cite any specific provisions of the Act to support non-disclosure of any such information, including any 1-900 calls, except for a general reference to section 22(3).

7. The third party's case

The third party essentially argues that since the City did not prohibit personal telephone calls by staff, councillors, or the mayor, and since the third party paid for all personal long distance calls made from City Hall, "these phone calls should not be open to the public anymore than phone calls from my home should be." The third party also submitted that calls made from any city hall phone could have been made by anyone.

Simply put, the third party regards this access request as an invasion of his or her personal privacy.

8. Discussion

City policy on personal telephone use

The City's attempt to argue that the records created by these calls by any staff or elected official do not fall under the Act fails, because it in fact has control and custody of the records. However, the City made the following statement on this matter:

> Our records indicate that the only 1-900 calls made from City Hall in this period were personal calls made by a third-party; these calls were not in any way related to City business and were paid for entirely by the third-party. During this time period, the City of Nelson did not have any policy which prohibited the use of City telephones for personal calls, as long as the cost of the calls were the responsibility of the caller. (Submission of the City, p. 2)

There is nothing in the Act to prevent the City from having such a policy on personal telephone use. It is the obligation of the City to monitor that its telephones are properly used. The evidence in this case indicates that the City knows how its telephones are being used, at least for personal purposes.

Disclosure harmful to personal privacy

One of the several problems that I have in coming to a finding in this inquiry is that those making submissions did not tie them, for the most part, to the specific sections of the Act that are supposed to support their position. This is not helpful. Applicants, public bodies, and third parties are well advised to connect the arguments they seek to make to the provisions of the Act.

Section 22(3): Presumed unreasonable invasions of personal privacy

The City generally believes that this section should allow it to withhold the records in dispute but suggests that "only the third party can shed light on whether the release of this information falls under the prohibitions outlined in Section 22(3) of the Act."

The applicant views the use of City telephones for 1-900 calls as not resulting "in an unreasonable invasion of a third party's personal privacy." He argues that other public bodies have chosen to release records of 1-900 calls. (Reply submission of the Applicant, p. 1)

The applicant did not meet the burden set out under section 57(2) of the Act to prove that disclosure of the personal information at issue would not be an unreasonable invasion of the third party's personal privacy under section 22. In particular, I consider that the factors in section 22(2)(e) and 22(2)(h) apply in this case and outweigh the factor in section 22(2)(a). If the records are disclosed, the third party will be exposed unfairly to harm, and the disclosure may also unfairly damage the reputation of the third party. Because the telephone calls in this case were private, and were paid by the third party, the public scrutiny factor in section 22(2)(a) should be given less weight.

I find, under section 22(1) of the Act, that it would be an unreasonable invasion of the third party's personal privacy for the City of Nelson to disclose the specific telephone numbers in dispute. Thus the City is required to refuse access in this case.

As I have noted in my two immediately preceding Orders on the same subject matter, I regard these decisions as wake-up calls to all public bodies covered by the Act to develop appropriate written policies about the collection, use, retention, and disclosure of telephone log records in various formats.

9. Order

Under section 58(2)(c) of the Act, I require the City of Nelson to refuse access to the records in dispute to the applicant.

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David H. Flaherty
Commissioner

November 21, 1995