

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 46-1995
July 5, 1995**

INQUIRY RE: A decision by School District 68 (Nanaimo) to release records about severance settlements provided to two former employees

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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 in Victoria on May 2, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review into a decision by School District 68 (the public body) to release the severance settlements of Mr. X and Mr. Y (the third parties). On November 18, 1994, Ms. Heather Mousseau of CKEG AM Radio in Nanaimo requested "documents which give details of severance settlements for [Mr. X] and [Mr. Y]." The public body determined there was no reason to withhold these documents under the Freedom of Information and Protection of Privacy Act and notified the third parties of its intention to release them in a severed form under sections 22(4)(e) and (j) of the Act. The third parties then requested a review of that decision by this Office.

2. Documentation of the inquiry process

On April 12, 1995, this Office issued a Notice of Written Inquiry to be held on May 2, 1995. The notice informed the parties that initial submissions were due by April 21, 1995 and final submissions by May 1, 1995. Included with this notice was a statement of facts (the Portfolio Officer's fact report), which all parties accepted as accurate for the purpose of conducting this inquiry.

3. The records in dispute

In the case of Mr. X, the records in dispute are:

An agreement dated June 21, 1989 between the Board of School Trustees and Mr. X

A memo from a payroll assistant to the secretary-treasurer of the Board of School Trustees, dated June 29, 1989

A letter from the secretary-treasurer to Mr. X dated October 23, 1989

A letter from the secretary-treasurer to Mr. X dated January 25, 1990

In the case of Mr. Y, the records in dispute are:

A letter from the Board of School Trustees' lawyer to Mr. Y's lawyer with an attached document entitled "Detail of Severance Settlement" dated December 6, 1993

A letter from the Board of School Trustees' lawyer to the Director of Human Resources dated February 15, 1994

4. Issue under review at the inquiry

The basic issue in this inquiry is whether section 22(4) of the Act requires the disclosure of the records in dispute.

The relevant parts of section 22 provide:

Disclosure harmful to personal privacy [of third parties]

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.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

....

(j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in subsection (3)(c).

5. The applicant's case

The applicant stated her case quite briefly. She submitted that section 22(4)(e) and (j) of the Act apply to severance agreements.

Both [Mr. Y] and [Mr. X] were officers of School District 68 and under contract to supply a service. Their [sic] salaries were paid by taxpayers and the amount they earned was public record. I believe any severance package they received should also be public record.

6. The School District's case

The School District pointed out that both third parties are former employees, who had agreements with the School District related to the terms of their departure. Mr. X's agreement was reached at the same time that he left the district; none of it was made public by the individual or the district. Mr. Y's agreement was reached almost a year later to settle a wrongful dismissal suit that he launched against the School District. Some of the "facts" of this agreement became public in documents filed in court and in subsequent media reports. However, neither party made public the terms of the settlement.

In seeking to respond to the applicant's request for relevant "documents," the district "attempted to locate documents which would give a complete account of the severance settlements as concisely and simply as possible." This explains the list of records in dispute that appears above.

The School District interprets sections 22(4)(e) and (j) of the Act as requiring disclosure of the records in dispute. It intended to sever portions of these documents which were personal information not related to remuneration, position, and function.

The School District also quoted from my Order No. 24-1994, July 27, 1994 ordering disclosure of severance payments related to the closing of a Vancouver hospital and noted that section 22(2) of the Act allows it to take into account whether "the disclosure is desirable for the purpose of subjecting the activities of a public body to public scrutiny."

With respect to the third parties' arguments that the details of their agreement with the District should remain confidential, the School District had had similar expectations and sympathized with their argument, "but was unable to find a basis in the Act to withhold the information." Mr. X's agreement states that a mutually agreed-on statement "shall constitute the only public comment which will be made by either party." Mr. Y's settlement states that "[t]he details of this settlement shall be confidential and not disclosed to anyone by either party, except as required by statute." The School District believes that the *Freedom of Information and Protection of Privacy Act* is such a statute.

The School District considered and rejected other exceptions in the Act which would allow it to withhold the information, including the fact that the documents were from the district's lawyer to the Board of School Trustees: "The district did not believe it was appropriate to claim solicitor client privilege in this situation, since the letter did not contain legal advice but, rather, the terms of the agreement that had been reached."

7. Mr. X's case

Mr. X maintains that a condition of his "good faith" settlement agreement with the Nanaimo School District was that the confidentiality of the severance package should be maintained.

These termination events have already adversely affected his career, and he is concerned about his relationship with his present employer and any future job prospects.

Mr. X argues that he is prohibited from revealing to the general public "how shabbily" he was treated by his employer and why he accepted a "modest compensation package to keep me quiet about the injustice of the situation."

Mr. X is opposed to overturning the "confidentiality clause" in his severance package, because it would be unfair, a betrayal of the intention of the agreement, and an unreasonable invasion of his privacy.

8. Mr. Y's case

This third party views the disclosure of the details of the negotiated settlement between the School Trustees and himself as an unjustified invasion of his privacy.

Mr. Y argues that at the time of signing of his negotiated settlement, he "was no longer an officer or an employee of the District, nor did I receive remuneration as defined by the Act." He notes that the *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual* defines "remuneration" as "salary amounts and benefits received as a result of employment."

Mr. Y further argues that his December 7, 1993 settlement "was not a severance agreement, but rather an agreement to end the wrongful dismissal litigation between myself and the Board." This financial settlement was neither a discretionary benefit under section 22(4)(j) of the Act, nor was it remuneration that he received as an employee of a public body.

Disclosure of the information about himself that is in dispute could "result in further harm to my reputation and continue to negatively affect my efforts to obtain equivalent employment." Mr. Y further believes that the disclosure "could result in unnecessary further personal mental trauma."

9. Discussion

I find that both sets of records in dispute pertaining to the third parties are records subject to the Act, and that they fall within section 22(4)(e). Severance payments or agreements, whenever made, can and should be construed as "remuneration." These are payments customarily made "in lieu of notice" for services that would have been performed during the notice period had the employer required the employee to continue work during that period. In my view, such payments constitute "remuneration" under the Act whether an agreement is reached while the employee is still employed or after he or she has left, and whether an agreement is reached before or after litigation has been commenced. This is consistent with the interpretation given in the Manual at C.4.13, where the complete effort at definition of remuneration reads: "Information about 'remuneration' includes salary amount and benefits received as a result of employment. Severance pay is included in the meaning of 'remuneration.'"

The records in dispute: Mr. X

Mr. X and the Board of School Trustees made a contractual agreement on June 21, 1989 to terminate his employment contract with the Nanaimo School Board in return for cash payments and benefits. Schedule A to the contract contains a brief public statement, which "shall constitute the only public comment which will be made by either party about the early termination of the Contract." This is not the kind of "confidentiality clause" that I would expect in an agreement of this sort, if it were intended to be a classic confidentiality clause. There is no clause on confidentiality in this contract that fits the description advanced above by Mr. X. It is only a ban on publication. Thus I find nothing specific in this contract to prevent the disclosure of severance information under the *Freedom of Information and Protection of Privacy Act*.

In addition, because the third parties are concerned about the unfairness of their situation, I should note that there is no retroactivity principle in the Act. Had the Legislature wanted a retroactivity clause for non-disclosure of information in existing contracts, for example, it could have included one. The Act applies retroactively to all records held by public bodies. It does not make an exception for contracts entered into before the Act came into force.

I acknowledge the serious concerns about expectations of confidentiality expressed by this third party. However, the legislation does not permit me to balance this factor in making a determination under section 22 that disclosure of the information is not an unreasonable invasion of privacy. The factors listed in section 22(2) apply only to a determination under section 22(1) or (3). Section 22(4) deems that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information falls within (a) to (j).

Because of my conclusion that the information in dispute falls under section 22(4)(e), disclosure of the personal information in this case is not an unreasonable invasion of the third party's personal privacy. The Act requires disclosure.

The records in dispute: Mr. Y

There are two letters from the lawyer for the School District to the Board of Trustees and to the lawyer for Mr. Y. He achieved a "negotiated settlement" after which a Consent Dismissal Order was entered in court. The settlement agreed on a joint public statement about what had happened. The third party received various payments and benefits. There was an additional provision that "[t]he details of this settlement shall be confidential and not disclosed to anyone by either party, except as required by statute." [emphasis added] Thus there is nothing in this settlement to prevent the disclosure of this record under the *Freedom of Information and Protection of Privacy Act*. I agree with the School District on this point.

I have carefully considered this third party's argument that he was no longer an employee when he entered into an agreement with the public body. He also characterized it as a settlement agreement rather than a severance agreement. As discussed above, I disagree. To make such a distinction would in my view create unfairness. An agreement reached between an employer and a present or past employee as a result of a termination of employment provides essentially the

same remedy regardless of when that agreement is made. The remedy is payment of equivalent remuneration in lieu of notice of termination.

Section 22(4)(e)

I find that the records in dispute in this inquiry fall within the language of [section 22\(4\)\(e\)](#) of the Act, that is, "the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body...." This means that the records are disclosable. Were it not for my finding on this section, I would have found that section 22(4)(j) authorized disclosure in either of these two cases of severance payments.

My general findings are in accord with my prior Order No. 24-1994, September 27, 1994, and what I interpret as the legislative intent underlying section 22(4)(e). The public generally has the right to know how public money is being spent. Thus I agree with the School District's intended application of this section in this case.

10. Order

Under section 58(2)(a) of the Act, I require the Board of School Trustees for School District 68 to give the applicant access to the records in dispute that it had intended to disclose in severed form.

David H. Flaherty
Commissioner

July 5, 1995