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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 52-1995
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INQUIRY RE: A request for competition records held by the Ministry of Government Services

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 604-387-5629
Facsimile: 604-387-1696
Web Site: http://www.cafe.net/gvc/foi

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 June 23, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Ac*t (the Act). This inquiry arose out of a request for review made by the applicant of a decision of the Ministry of Government Services (the Ministry) not to release the test papers of two unsuccessful job candidates for a Ministry job competition.

On January 6, 1995 the Ministry began processing the applicant's request for access to "the résumés and test responses of all candidates who were called for an interview" in a competition for a management position with the Ministry, in which the applicant was a candidate. The applicant stated in his request that he was not asking for the other candidates' names.

The Ministry wrote to the applicant on January 24, 1995 to inform him that it was notifying the third parties involved to give them an opportunity to make representations concerning the disclosure of the records.

On February 16, 1995 the Ministry provided the applicant with a final response by disclosing the test paper and résumé of the successful candidate in identifying form and the test paper of one of the unsuccessful candidates in non-identifying form. It withheld the résumés and test papers of the remaining two unsuccessful candidates in their entirety. It informed the applicant that it was applying section 22 of the Act to the withheld information on the grounds that its disclosure would be an unreasonable invasion of the third parties' privacy.

On March 14, 1995 the applicant requested a review of the Ministry's decision from the Office of the Information and Privacy Commissioner. The ninety-day period for this review began on that date and was extended at the request of the applicant.

On May 25, 1995 the Ministry disclosed the résumé of one of the remaining unsuccessful candidates in non-identifying form to the applicant.

2. Documentation of the inquiry process

All parties received a Notice of Inquiry outlining the issues in this case, and a two-page statement of facts (the Portfolio Officer's fact report), which was accepted by the parties as accurate for the purposes of conducting the inquiry.

The Office invited written submissions from the applicant, the Ministry, the third parties, and seven intervenors. The intervenors were: the Public Service Employee Relations Commission; the Professional Employees Association; the B.C. Government Managers' Association; the Public Interest Advocacy Centre; the Freedom ofInformation and Privacy Association; the B.C. Civil Liberties Association; and the B.C. Government Employees Union. The applicant represented himself. The public body was represented by Catherine Hunt, Barrister and Solicitor, of the Ministry of Attorney General, Legal Services Branch, who made submissions and an *in camera* submission. Two intervenors, the Professional Employees Association, in the person of Executive Director Alan MacLeod, and the B.C. Government Managers' Association, in the person of M. Patricia Haakonson, Executive Director, made submissions. The third parties and the remaining five intervenors did not make representations.

3. Issue under review at the inquiry

This inquiry concerns the application of section 22 of the Act to the test papers of the third parties. The relevant sections read in appropriate part as follows:

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.

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

> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> ...
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> ...
>
> (f) the personal information has been supplied in confidence,

...

(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.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

...

(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,

....

For the purposes of section 22, section 57(2) of the Act places on the applicant the burden of proving that the release of the record in question would not be an unreasonable invasion of the privacy of the third party.

4. The records in dispute

The records in dispute are the test papers only of two of the four unsuccessful candidates in the job competition. They consist of lengthy narrative responses to a series of instructions: a briefing note on contentious issues relevant to the position; and a second briefing note on the responsibilities and strategies of three areas relevant to the job.

5. The applicant's case

The applicant notes that out-of-service job applicants no longer have the right to appeal hiring decisions of the government under the *Public Service Act*. They must therefore rely on the Act "to ascertain whether their application has received fair consideration or whether some hidden form of discrimination has been practiced." In his view, the Ministry's invocation of section 22 is "an attempt to escape a closer private or public examination of its hiring practices." (Initial Submission by the Applicant, p. 1)

The applicant emphasizes that the request for responses to exam queries was not stated to be in confidence and that the candidates were not expected to offer personal information beyond their names. (Initial Submission of the Applicant, pp. 1-2)

6. The Ministry of Government Services' case

In order to exempt the identifiable personal information in the records in dispute from disclosure to the applicant, the Ministry has relied on sections 22(3)(d) and (g.1). It argues further that section 22(4)(e) of the Act does not apply in the present case. In the interests of brevity, I have discussed these specific arguments below, as relevant.

7. The Professional Employees Association's case as an intervenor

This organization made the following statement:

The contents of the test papers presumably reflect the candidates' knowledge of the job functions canvassed by the test questions. If that is the case, and unless the test papers reveal personal information which clearly falls into one or more of the categories stipulated in s. 22(3), we do not see that the ministry has a legitimate basis for refusing to disclose the test papers.

It argued that section 22(2)(a) and (c) were quite compelling in this connection, in the absence of legitimate evidence that "disclosure would reveal personal information in one or more of the s. 22(3) categories ...."

The Professional Employees Association concluded that:

Our experience with the new Public Service Appeal Board makes it clear that public service panels make mistakes. We therefore believe it is in the public interest that, subject only to the limitations set out in s. 22, the deliberations of public service panels should be open to scrutiny, and that where questions arise as to the propriety of given decisions, affected parties should have access to all documents related to a panel's determinations.

8. The B.C. Government Managers' Association's case as an intervenor

The Association takes "the position that where the disclosure of personal information is concerned, the protection of privacy is of paramount interest," as dealt with under section 22 of the Act, and urges me to deny the applicant's request.

The BCGMA is of the opinion that public scrutiny of the job competition process is met through the disclosure of summary information of the successful candidates, and the disclosure of the desired test responses and the standard for evaluating test responses. It is our opinion that no public good would be served by the disclosure of the test responses of unsuccessful candidates.

9. Discussion

Appeals under the Public Service Act

The applicant has pointed out that out-of-service competitors can no longer exercise rights of appeal under the *Public Service Act* and must therefore rely on the *Freedom of Information and Protection of Privacy Act* for a possible remedy. I conclude that while this may be indeed the case, the exceptions to disclosure under the Act still apply to records of a public body. The Act is also not a vehicle for contesting a public policy decision on such appeals that the government presumably took for considered reasons, a position that the Professional Employees Association supported in its intervention. If, as the applicant argues, "[s]creened out candidates have virtually no institutional mechanism for checking screening decisions for fairness," I suggest that his remedy does not lie with the Act.

Section 22(2)(a): Public Scrutiny

I accept the argument of the Ministry that this exception has no application to the circumstances of this case. "The Ministry submits that public scrutiny is met in the job competition forum by its disclosure of a summary of the educational and professional qualifications of the successful candidate for the position. In this case, the applicant received not only the resume, but the unsevered test answers of the successful candidate for the management position." (Submission of the Ministry, p. 9)

The applicant argues that the inclusion of personal information "gratuitously" or "incidentally" in the test papers cannot be used to defeat the intent of this section, which is indeed "the pith and substance" of his case. (Reply Submission for the Applicant, paragraphs 26-28, 33-34) My finding is that the personal information does not fit these categories but is in fact perfectly legitimate and relevant for inclusion, given the questions that were asked of the candidates.

Section 22(2)(c): Fair Determination of Applicant's Rights

I accept the Ministry's position that this section is not applicable in the current inquiry: "... in this job competition, the applicant was ultimately measured against the successful job candidate." (Submission of the Ministry, p. 10) This person's records have been disclosed.

Section 22(2)(f): Information Supplied in Confidence

The Ministry's argument, supported by *in camera* affidavits from the third parties, is that the test answers were supplied in confidence in the context of the job competition. (Submission of the Ministry, p. 10) Moreover, neither party has consented to the disclosure. Both third parties believed that they were submitting their responses in confidence, at least implicitly. I accept that that was indeed the case, given customary practice in the past. I have noted elsewhere my preference that public bodies make such expectations explicit in advance. (See Order No. 39-1995, April 24, 1995, p. 8) The recommendations made below by Public Service Employee Relations Commission (PSERC), if widely adopted, should help to settle this particular issue.

Section 22(3)(d): Employment or Occupational History

The Ministry argues that the records in dispute relate to employment or occupational history. (Submission of the Ministry, p. 8) In general, I find, in the context of this case, that this section is

intended to apply to what happens after a person has become an employee of the public body. More specifically, I accept that this section can apply to a situation, as in the present case, where the records in dispute are about current government employees who are applying for another job. Once a person has been hired, I am inclined to view what is put in his or her personnel file about his or her hiring as then being covered by section 22(3)(d). Thus I accept the application of this section in the present case.

Section 22(3)(g.1): Personal Evaluations

The Ministry seeks to argue that the records in dispute should not be disclosed because they contain "personal ... evaluations" of freedom of information and privacy issues. (Submission of the Ministry, p. 8) I have no difficulty in concluding that such evaluations have to be about human beings in order to be covered by this privacy exception. (See Reply Submission for the Applicant, paragraphs 29-30) The only way in which the Ministry might apply this exception would be in reference to "confidential" evaluations in the records in dispute of particular persons involved in the subject area.

Section 22(4)(e): Information about a Public Servant's Position or Functions

The Ministry argues that this section does not apply in the present inquiry. (Submission of the Ministry, p. 9) I agree that it does not apply to exam records produced when individuals are applying in job competitions, as in the present case. It may be relevant after a person has become an employee of a public body.

The records in dispute

The records in dispute are essentially responses to various forms of exam questions. As might be expected, they are sophisticated documents, reflecting the kind of expert knowledge, including direct personal experience with the subject matter of the competition, that one would expect of final candidates for a senior-level government position. In both instances, the third parties reflect on their own experiences in the process of answering the questions, which, in my judgment, makes them relatively identifiable. Their answers are also candidly critical of various people, policies, and practices developed in the course of the initial implementation of a significant piece of government legislation.

I disagree with the applicant's position that disclosure of general public policy test papers does not in itself constitute an invasion of candidates' privacy: "Where candidates choose to insert personal information in public policy test papers, it is the applicant's contention that any consequential invasion of privacy is incidental and should be accepted as reasonable." (Initial Submission of the Applicant, p. 2) I find it understandable that a serious candidate for the job competition in question would use personal information to attempt to justify his or her suitability for a post. In fact, I can only assume that this unsuccessful job applicant did the same thing. He or she would then have had the right to disclose his or her own responses, just as some of his or her competitors have in fact chosen not to do so. I find it perfectly understandable that an unsuccessful applicant is less likely to want to do this than the winner.

The Ministry's position in the present inquiry is that "neither of the third parties' test answers may be severed in such a manner as to eliminate the ability of the applicant to identify the individuals involved." It cites in support of this proposition two orders of the Ontario Information and Privacy Commissioner: Order P-722, July 22, 1994 p. 1; Ontario Order P-733, July 28, 1994, p. 2. (Submission of the Ministry, pp. 4, 7) The applicant has attempted to distinguish these cases from the present inquiry. (Reply Submission by the Applicant, paragraphs 19-23)

I agree with the Ministry that even if the names of the two applicants are removed, there is a significant risk that outsiders, including the applicant, with some knowledge of the subject matter of the job competition could identify them and thereby breach their fundamental right to personal privacy. This is the issue that statisticians in particular call the problem of re-identification, that is that supposedly anonymized information can be associated again with a real person. (See George T. Duncan, Thomas B. Jabine, and Virginia A. de Wolf, eds., Private Lives and Public Policies: Confidentiality and Accessibility of Government Statistics [National Academy Press, Washington, D.C., 1993], chapter 6, especially pages 162, 168.)

I received an *in camera* submission from the Ministry in support of its argument against severing these particular records in dispute. Having reviewed this material, I find it persuasive for particular reasons that I cannot reveal without the risk of identifying one or more of the third parties.

Expectations of confidentiality of job applicants

The applicant has made a point that job applicants do not have expectations of confidentiality in written submissions. (Initial Submission of the Applicant, p. 2) I respectfully disagree. It is a matter of my personal observation in this province that a number of applicants in competitions have legitimate reasons to keep confidential their interest in another position within the government. (See Submission of the Ministry, pp. 11-12, including American case law under the U.S. *Freedom of Information Act*.) This is, in my view, an issue of informational self-determination that should be controlled by the particular individuals, as has happened in the present inquiry.

The Ministry has advanced a policy argument to the effect that there is a public interest in maintaining confidentiality in job competitions, especially for unsuccessful job applicants. To do otherwise, would be to "jeopardize the ability of the government to attract high quality candidates in future." (Submission of the Ministry, p. 10)

The government's recommended practices on disclosure

The Ministry submitted to me a number of recommended practices set out by PSERC with respect to responding to requests for access to test answers and indicated that it had adopted this recommended approach. Both events occurred after the filing of the request for review in this matter.

The Ministry's newly-adopted policy stipulates that test answers should be released, if the name of the applicant, the ratings of specific answers (other than pass/fail), and identifiable details of the individual are severed. Handwriting must also be masked by typing handwritten responses. Individuals should be notified that the material is being released. (Submission of the Ministry, p. 4) The applicant has made some interesting observations about how these policies might be improved, which I recommend to PSERC. (Reply Submission by the Applicant, p. 2)

Burden of proof

The applicant is concerned about his ability to meet the burden of proof under section 57(2) and (3) of the Act, with respect to section 22, since he cannot examine the records in dispute or the in camera submissions: "Under the circumstances it would violate fundamental principles of justice to impose the burden of proof on the applicant." (Reply Submission by the Applicant, paragraphs 5-5, 9-15, 17-18) I have previously determined that it is ultimately my responsibility to examine the records in dispute and to draw the balance between competing interests. (See Order No. 17-1994, July 11, 1994, p. 6; Order No. 24-1994, September 27, 1994, pp. 7-8; and Order No. 27-1994, October 24, 1994, pp. 11-13)

10 Order

Under section 58(2)(b) of the Act, I find that the Ministry of Government Services was authorized to refuse to disclose the information in dispute. Therefore, I confirm the decision of the public body not to disclose the record in dispute to the applicant.

September 15, 1995

David H. Flaherty
Commissioner