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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 153-1997
March 11, 1997**

INQUIRY RE: A refusal by the Association of Professional Engineers and Geoscientists to disclose registration and investigation records

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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 December 19, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of an applicant's request for review of a refusal by the Association of Professional Engineers and Geoscientists (APEG) to provide him with access to certain registration and investigation records concerning him. It is a professional association that regulates the practice of engineering and geoscience. That authority comes from the *Engineers and Geoscientists Act*.

2. Documentation of the review process

On January 30, 1996 the applicant requested from the APEG all records related to himself. On March 1, 1996 it disclosed some records from a registration file which contained records related to the applicant's unsuccessful application for registration. The APEG also disclosed other records in an investigation file containing records that it compiled during an investigation of the applicant's complaint about a third party. The APEG withheld some records and information in these two files under sections 15(2)(b), 22(2)(f), 22(3)(g), and 22(3)(g.1) of the Act. The APEG also provided the applicant with summaries of some of the information in accordance with section 22(5).

The applicant requested a review of this decision on March 21, 1996. After various extensions of the time limit for the review, the APEG disclosed some additional records. An inquiry date was set to resolve the remaining issues in dispute.

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

The issues to be reviewed in this inquiry are the APEG's application of sections 15(2)(b), 22(2)(f), 22(3)(g), and 22(3)(g.1) of the Act to certain records and information to the records in dispute. These sections read as follows:

Disclosure harmful to law enforcement

- 15(2) The head of a public body may refuse to disclose information to an applicant if the information
- ...
- (b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record, or
-

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.
- (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
- ...
- (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
- (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,
-
- (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 in this inquiry. In this case, the APEG must prove that the applicant has no right of access to the material withheld under section 15(2)(b) of the Act. However, the applicant must show that release of the remaining information withheld under section 22 would not be an unreasonable invasion of the privacy of third parties.

4. The records in dispute

In the registration file, the records in dispute consist of the identifying information of several third parties (withheld under section 22 of the Act) who provided the APEG with references as part of the applicant's application for registration. The APEG also applied section 22 to the reference forms completed by the third parties during the admission process, one third party's letter to the APEG, and one phrase in an excerpt from the APEG's registration minutes of August 1994. Certain annotations in other records reflecting the referees' comments were also withheld under section 22. The applicant is not concerned in this inquiry with the withholding of one of these third parties' reference and identifying information.

In the initial disclosure, under section 22(5), the applicant received summaries of the referees' comments, in non-identifying form, in a separate document created by the APEG. At that time, the applicant also received typed versions of handwritten notes of the Geoscience Committee, which considered the applicant's application for registration with the APEG and the referees' comments. The names of the Committee members were also withheld under section 22 from various records in this file, but they are not of interest to the applicant in this inquiry.

With respect to the investigation file, the records in dispute consist of the severed portions of a letter from one third party to the APEG and of a record of a telephone call between the APEG and the same third party, withheld under section 15(2)(b).

5. The applicant's case

As appropriate, I have discussed below the applicant's submissions on specific sections of the Act.

6. The Association of Professional Engineers and Geoscientists' case

The applicant applied for membership in the APEG in 1994; this relates to the records withheld from him under section 22 of the Act. The second issue concerns an action commenced by the applicant against a third party, a member of the APEG, who had given a reference in support of his membership application; this involves the application of section 15(2)(b). This complaint led to the creation of an Investigation

Committee for the APEG. The records of this activity have been released to the applicant, except for three paragraphs of the response of the third party to the complaint and a portion of a record of a telephone call with the same third party.

The position of the APEG is that the investigation of the third party was a matter of professional concern on the part of the Association in response to a complaint about one of its members. Thus, it argues, the applicant's legitimate interest in the investigation is peripheral and does not warrant the requested disclosure.

I have discussed below the APEG's submission on the application of sections 15(2)(b) and 22 of the Act.

7. The third parties' case

I received submissions from several third parties in this inquiry indicating that they did not wish to disclose their identifying details to the applicant on the grounds, among others, that to do so would be an unreasonable invasion of their privacy. They placed particular emphasis on section 22(2)(f) of the Act. Despite the objections of the applicant, I accepted one of these submissions beyond the filing deadline, because the third party had been out of the country until after this deadline.

8. Discussion

In his several submissions, the applicant has made a number of general points about his relationship with the APEG or the work of its Investigation Committee that have no relevance to the decision that I am authorized to make about his requests for access to records under the Act.

The Investigation file

Section 15(2): The head of a public body may refuse to disclose information to an applicant if the information ...

- (b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record, or***

The APEG relies on my previous interpretation of the meaning of law enforcement in Order No. 36-1995, March 31, 1995, p. 15, which sets out two requirements for reliance on this section. In this connection, I agree with the APEG that it has a statutory mandate to investigate and impose sanctions or penalties on members of the association, and the resulting records should therefore be considered law enforcement records as contemplated in the Act.

I also agree that disclosure of this material to the applicant could reasonably be expected to expose the persons involved in its creation to civil liability within the ambit of section 15(2)(b) of the Act. The APEG submits that the applicant has a “penchant for litigation,” to use a quaint but evocative term, and that there is a real risk that he will instigate proceedings against the Association and/or those who responded to its inquiries about the applicant.

The applicant asserted that the public body provided no evidence in support of its statement that he was litigious. However, the APEG furnished information in its submission that the applicant, in his personal capacity, as well as that of a Director of a resource company, has a history of instigating or threatening to instigate civil proceedings against individuals with whom he has disputes. For example:

[The applicant’s] message left on the telephone voice mail of ... [the] Director, Professional Practice and Ethics, on July 24, 1995, refers to Supreme Court proceedings commenced against [a member] by [the company], as well as intimating that the Association could be joined in those proceedings

While I would prefer to have this information by way of affidavit evidence, I am prepared to consider it, since the allegation is supported by evidence provided by one of the third parties (on an *in camera* basis). I have also reviewed the records in dispute, as well as the records released to the applicant, which indicate that the applicant has made threats of issuing complaints and making claims against various people.

While I note that section 15(2)(b) of the Act is limited to protecting individuals, not public bodies, from civil liability, I conclude on the whole of the evidence that the APEG has met its burden of proof under this section.

The APEG also took the position that disclosure of personal information included in the records of the Investigation Committee would constitute an unwarranted invasion of the privacy of the third parties involved in the matter. This is an argument against disclosure under section 22 of the Act, which was not fully argued in this inquiry. Due to my conclusion on the application of section 15(2)(b), it is not necessary to decide this issue.

The Registration file

Section 22: Disclosures harmful to the personal privacy of third parties

The applicant argues, incorrectly, that information provided by referees is not personal information under the Act and therefore the authors have no privacy rights. He believes that he has a right of access in order to determine whether the information provided is “free of malice, error, falsehood, or a personal agenda of the referees and is contrary to the public interest.” Further, he believes there is a public interest in scrutiny

of the APEG's procedures in dealing with an application for membership. Finally, the applicant believes that the APEG's undertakings to the referees to keep their statements confidential is contrary to the objectives of the Act.

The APEG first made a general statement about the importance of confidential evaluations in the context of applications for professional membership in order to maintain the integrity, trustworthiness, and reliability of a profession. Such information needs to be supplied and created on the invariable assumption of confidentiality.

Since the APEG has disclosed summaries of the records in dispute to the applicant, or the actual records in certain cases, it is concerned now about 1) the names of the individuals who supplied recommendations to the Geoscience Committee regarding the application, linked to what they actually said, 2) the names of those members of the Committee who reviewed the application, and 3) the names of those individuals who sat on the Committee to finally decide on the application. The applicant is not interested in items 2) and 3), so I need not address these matters.

With respect to category 1), I am in full agreement with the position of the APEG concerning the application in this instances of section 22(3)(g.1) of the Act. (See Order No. 34-1995, February 3, 1995; Order No. 71-1995, December 15, 1995; and Order No. 52-1995, September 15, 1995, p. 6) I also agree with the APEG that the referees (item 1)) received appropriate notices of expectations of confidentiality for their submitted material about the applicant.

I note as well that the APEG attempted and failed to obtain the consent of the referees to release the actual contents of their references about the applicant.

In response to some of the applicant's stated concerns, I am impressed by the APEG's argument that he has received summaries of the contents in question. Thus the applicant has no evident need to receive the names of the authors, connected to their actual statements in order to reassure himself that the selection process affecting him was free from malice, falsehood, or private agendas. In addition, the applicant is not entitled to view the names in dispute because he has not discharged his burden of proof under section 22.

Review of the records in dispute

I have reviewed all of the severances and severed records in dispute in this inquiry. I find that the APEG has appropriately applied sections 15 and 22 of the Act to these records for the reasons already indicated above.

I find that the APEG has met its burden of proof in this inquiry under the appropriate sections of the Act. I find that the applicant has not met his burden of proof.

9. Order

I find that the Association of Professional Engineers and Geoscientists is authorized to refuse access under section 15 of the Act to the records in the investigation file that are in dispute. Under section 58(2)(b), I confirm the decision of the head of the APEG to refuse access to these records.

I also find that the Association of Professional Engineers and Geoscientists is required to refuse access under section 22 of the Act to the records in the registration file that are in dispute. Under section 58(2)(c), I require the head of the APEG to refuse access to these records.

David H. Flaherty
Commissioner

March 11, 1997