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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 220-1998
March 31, 1998**

**INQUIRY RE: A decision of the Ministry of Transportation and Highways to
refuse access to records relating to an audit of a Traffic Safety Initiative**

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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 November 24, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the Ministry of Transportation and Highways (the Ministry) to refuse access to some information in records relating to an Audit Report on the management of the government's Traffic Safety Initiative. The applicant was formerly retained on contract by the Ministry as a consultant with respect to that initiative.

2. Documentation of the inquiry process

The applicant wrote to the Ministry of Finance and Corporate Relations on January 2, 1997 to outline his concerns about the contents of a report entitled "Audit of the Management of the Traffic Safety Initiative (TSI)." It would appear that the applicant had been invited by the Ministry to comment on the Audit Report, since he had performed a contract for services relating to matters which culminated in that Report. After outlining his concerns, the applicant asked "that the requested response date be delayed and that [the applicant] be provided with all background material used in the preparation of the report." The applicant listed seven specific categories of records. On April 17, 1997 the Ministry of Finance and Corporate Relations transferred three of them (earlier reviews initiated by the Ministry and other government bodies, copies of the applicant's electronic calendar, and copies of the applicant's e-mail) to the Ministry of Transportation and Highways (the Ministry) pursuant to section 11 of the Act.

By a letter dated June 26, 1997 the Ministry advised the applicant that electronic copies of his e-mail and electronic calendar no longer existed and that while some of this information might exist on back-up tapes, the retrieval costs would be prohibitive. The Ministry was able to locate printed copies of most of his e-mails and copies of early reviews of the Traffic Safety Initiative. The Ministry withheld some of these records pending completion of its review to determine whether those records were subject to the Cabinet confidentiality provisions of the Act (section 12). The Ministry disclosed other records, which were severed on the basis that information in them was excepted from disclosure under sections 13, 14, 15, 17, 21, and 22 of the Act.

The applicant wrote to the Office on July 3, 1997 to ask for a review of the Ministry's June 26, 1997 response. The inquiry was initially scheduled for October 17, 1997 but was extended twice by consent, in part because the applicant has not yet had a complete response to the part of his request which remained with the Ministry of Finance and Corporate Relations, and in part because the Ministry indicated it would be disclosing more records to the applicant once it had completed its section 12(1) review. The Ministry provided more records on September 9, 1997 and indicated that information was withheld from some of those records under sections 12(1), 13, 14, 15, 17, 21, and 22 of the Act.

On November 21, 1997 the Ministry provided the applicant with additional records, along with a revised severance grid indicating all records which were withheld in whole or in part and the exceptions used to refuse access to each. In total, the Ministry disclosed to the applicant records consisting of 257 unsevered pages and 57 severed pages. The Ministry subsequently withdrew its application of section 15 of the Act to the records in dispute. It also made other adjustments to its decision, including the withdrawal of section 21 from most of the records to which it was initially applied.

3. Issue under review and the burden of proof

The issue under review is the Ministry's application of sections 12(1), 13, 14, 17, 21, and 22 of the Act to refuse access to information and records requested by the applicant. The relevant portions of these sections are as follows:

Cabinet and local public body confidences

- 12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
- (2) Subsection (1) does not apply to

- ...
- (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
 - (i) the decision has been made public,
 - (ii) the decision has been implemented, or
 -

Policy advice, recommendations or draft regulations

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
- (2) The head of a public body must not refuse to disclose under subsection (1)
 - ...
 - (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
 - (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

Legal advice

- 14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

Disclosure harmful to the financial or economic interests of a public body

- 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

- (a) trade secrets of a public body or the government of British Columbia;
- (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
- (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
- (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
- (e) information about negotiations carried on by or for a public body or the government of British Columbia.

Disclosure harmful to business interests of a third party

- 21(1) The head of a public body must refuse to disclose to an applicant information
- (a) that would reveal
 - ...
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party,
 - (b) that is supplied, implicitly or explicitly, in confidence, and
 - (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
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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
- ...
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
-
- (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,
- (i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or
-

Under section 57(1) of the Act, at an inquiry into a decision to refuse an applicant access to all or part of the record, it is up to the head of the public body, to prove that the applicant has no right of access to the record or part thereof. In this case the Ministry has the burden of proving that sections 13, 14, and 17 may be applied, and that sections 12(1) and 21 must be applied, to the information that it has withheld under those sections.

Under section 57(2), if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. Accordingly, the applicant has the burden of proving that disclosure of the information the Ministry has withheld under section 22 would not unreasonably invade the personal privacy of a third party.

4. The records in dispute

The records in dispute are printed copies of electronic mail messages sent or received by the applicant while he was a contractor to government working on traffic safety initiatives, a program review report, a draft memo, and a memo with appendices.

The records consist of 57 pages from which information has been severed on the basis of sections 12(1), 13, 14, 17, 21, and 22 of the Act. Most of the information withheld was in messages sent by or to the applicant, or copied to him, when he was working on the Traffic Safety Initiative Project for the Ministry.

5. The applicant's case

I have discussed below, as I deemed it appropriate to do so, the applicant's initial submissions on the application of sections of the Act to the records in dispute. The applicant did not make a reply submission.

6. The Ministry of Transportation and Highway's case

I have discussed the Ministry's initial and reply submissions below.

7. Discussion

The access rights of former employees or contractors

The Ministry makes the case that this applicant, a former contractor to the Ministry who no longer works for it, "is in the same position as any other member of the public who chooses to make a request under the Act.... The fact that when he worked for government he was privy to certain information does not have any bearing on the question of whether he has a right under the Act to access to records containing that information." (Submission of the Ministry, paragraph 1.02) That is a persuasive statement. In this instance, it is appropriate for the Ministry to apply exceptions under the Act to the e-mail records in dispute. Similarly, I agree that the Ministry can now sever information, under the Act, that the applicant was once privy to. (Submission of the Ministry, paragraph 1.03) In previous Orders, I have found that this same principle applies to records that an applicant may have had full access to in court, but he or she may be entitled only to parts of those records under the Act. See Order No. 58-1995, October 12, 1995; and Order No. 125-1996, September 17, 1996.

Section 12(1): Cabinet and local public body confidences

The applicant submits that as an independent contractor he did not prepare any material directly for submission to Cabinet or any of its committees. He gave advice to the Project Sponsors and the Project Steering Committee. He admits that he has "no direct way of knowing ... whether that advice was accepted in whole or in part or indeed ever communicated to the Ministerial level." He submits that virtually all of the material requested should fall under the categories of "background explanations or analysis" or "the decision has been implemented." (sections 12(1) and 12(2)(c)(ii))

The Ministry, relying on Order No. 48-1995, July 7, 1995; Order No. 165-1997, May 20, 1997; and Order No. 187-1997, August 21, 1997, says that the information

withheld by it is information which would permit an individual to draw accurate inferences about the substance of Cabinet deliberations or of its committees. (Submission of the Ministry, paragraphs 2.01 to 2.04) It has withheld information that would reveal decisions of, requests for decisions by, or issues before Treasury Board, Cabinet Committees, and the Cabinet. It has also withheld the contents of draft legislation. (Submission of the Ministry, paragraph 2.05) The Ministry submits that section 12(2) does not apply to exclude the application of subsection 12(1).

I agree with the Ministry's application of section 12(1) to the records in dispute.

Section 13: Policy advice, recommendations or draft regulations

The applicant maintains that sections 13(2)(l), (m), and (n) are relevant to this inquiry. The applicant submits:

...the Minister of Transportation and Highways in a public news release cited the audit report as the reason for the termination of my contract. That release was widely reported on the front pages of major newspapers in the province and has caused me significant personal grief and professional harm. The Minister has been given ample opportunity to withdraw her remarks but has chosen to completely ignore my letter. If the material was indeed the reason for making a decision, the government cannot refuse to disclose that information. If it is not the reason for the decision, the Minister has an obligation to publicly apologize and withdraw her statement.

The Ministry has withheld information pursuant to section 13(1) of the Act from two records that "would reveal advice provided by Treasury Board Staff regarding the preparation of a submission to Treasury Board." (Submission of the Ministry, paragraphs 3.04 and 3.05) The Ministry relies on the principles set out in Order No. 165-1997. The Ministry also says that the information severed under section 13 would reveal advice which is unrelated to either the Audit Report or the applicant's working or not working for government. (Reply Submission of the Ministry, p. 2) Therefore, sections 13(2)(l), (m), and (n), relied on by the applicant, have no relevance to the severing carried out by the Ministry.

I agree with the Ministry's application of section 13(1) to the records.

Section 14: Legal advice

The Ministry has withheld information from ten e-mail records under section 14. The withheld information concerns legal opinions received, or to be obtained, from a lawyer, including legal advice respecting the wording of draft legislation. I agree with the Ministry that records that fit these categories are privileged and may be protected from

disclosure under section 14 of the Act (Submission of the Ministry, paragraphs 4.08 to 4.11)

Section 17: Disclosure harmful to the financial or economic interests of a public body

The applicant finds it “difficult to imagine how revealing information about negotiations or other matters now concluded could damage the interests of the Province.”

The Ministry submits that all of the information it has withheld under section 17 falls within the scope of section 17(1). Relying on Order No. 159-1997, April 17, 1997, the Ministry points out that section 17 does not require it to prove that disclosure would harm financial interests, only that it could reasonably be expected to do so. It need only show that there is a reasonable expectation of some harm to its or the government’s financial interests. The Ministry submits:

ICBC, which is a separate public body under the Act, now has responsibility for government’s traffic safety initiatives program. The Public Body submits that disclosure of the information withheld under section 17 could reasonably be expected to harm the financial or economic interests of ICBC or the government. The remainder of the Public Body’s submission on the application of section 17 will be made *in camera*, as the submission itself will disclose the information that has been withheld. (Submission of the Ministry, paragraph 5.05)

I have reviewed a lengthy *in camera* submission and accompanying affidavits from the Ministry, which explain why it has severed information from certain records on the basis of section 17(1).

I agree with the Ministry’s application of section 17(1) to the records.

Section 21: Disclosure harmful to business interests of a third party

The applicant believes section 21 has been invoked by the Ministry to sever comments made by public servants to an auditor. The Ministry has in fact withheld information from one page of a record under this section, which “consists of ranges of hourly and daily rates of individual members of a company working on contract to government” and has nothing to do with comments that may have been made to an auditor. The Ministry did so to protect third-party business interests, so that they are not disadvantaged by the fact that they do business with government. (Submission of the Ministry, paragraphs 6.02 and 6.03)

The Ministry submits that this severed information meets the three-part test set out in this section. The affidavit evidence confirms each element. The severed information reflects commercial or financial information of third parties (section 21(1)(a)), that is supplied in confidence when contractors offer their services (section 21(1)(b)); and that

[if disclosed] could reasonably be expected to harm the competitive position of third parties (section 21(1)(c)(i) and/or result in similar information no longer being supplied to the public body. (section 21(1)(c)(ii))

I agree with the Ministry's application of section 21(1) to the records.

Section 22: Disclosure harmful to personal privacy

The applicant argues that section 22(4)(f) is relevant to this inquiry. It provides that the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the disclosure reveals financial and other details of a contract to supply goods or services to a public body. The applicant submits:

As the audit is an attempt to evaluate the value for money of the service provided by me and other parties under a 'contract to provide... services,' disclosure cannot be considered an unreasonable invasion of a third party's privacy. (Submission of the Applicant, p. 2)

The Ministry replies that the information withheld under section 22 does not reveal information or other details of a contract to supply goods or services to a public body, so that section 22(4)(f) does not preclude the application of section 22.

The Ministry has withheld personal information concerning third parties in a number of records. In some cases the information consists of the applicant's opinions about third parties. It relies in particular on section 22(2)(h) and sections 22(3)(d), (g), and (i) for that purpose, thus covering unflattering opinions about third parties, their employment history, personal or personnel evaluations or character references, and ethnic origin. (Submission of the Ministry, paragraphs 7.02 to 7.11) As noted below, I have confirmed the appropriateness of these minor severance's on the basis of my detailed review of the records in dispute.

I agree with the Ministry that the applicant has not met his burden of proof under this section. (Reply Submission of the Ministry, p. 3)

Review of the Records in Dispute

I have carefully reviewed each severance made by the Ministry in the records in dispute as well as the *in camera* affidavits by the Ministry in support of the severing. Minor amounts of personal information concerning specific third parties comprise most of the section 22 severances. The Ministry has also severed information on the basis of sections 12 and 13 of the Act. Information pertaining to the government's Traffic Safety Initiatives has been severed on the basis of section 17. Finally, information subject to solicitor-client privilege has been appropriately severed on the basis of section 14.

I find that each severance based on either section 12(1), 13, 14, 17, 21, or 22 of the Act is proper. In particular, I find that the Ministry is required to withhold the information it has withheld under sections 12, 21, and 22, and that the Ministry is authorized to withhold the information it has withheld under section 13, 14, and 17 of the Act.

8. Order

I find that the Ministry of Transportation and Highways was required to withhold information in the records in dispute under sections 12(1), 21, and 22 of the Act. Under section 58(2)(c) of the Act, I require the Ministry to withhold the information severed under sections 12(1), 21, and 22.

I also find that the Ministry of Transportation and Highways was authorized to withhold information in the records in dispute under sections 13, 14, and 17 of the Act. Under section 58(2)(b) of the Act, I confirm the decision of the Ministry to withhold information under sections 13, 14, and 17 of the Act.

David H. Flaherty
Commissioner

March 31, 1998