



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 00-44

INQUIRY REGARDING MINISTRY OF SOCIAL DEVELOPMENT AND ECONOMIC SECURITY RECORDS

David Loukidelis, Information and Privacy Commissioner
October 5, 2000

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Summary: Applicant sought access to Ministry records about him. Applicant not entitled to see some of the third party personal information withheld from the record in issue. Third party personal information consisted of employment history of third party. Disclosure would be unreasonable invasion of third party's personal privacy.

Key Words: personal privacy – unreasonable invasion – employment history.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(c), (e) – (h), 22(3)(d), (g).

1.0 INTRODUCTION

The applicant says he is entitled to have access to personal information of an employee of the Ministry of Social Development and Economic Security (“Ministry”). That information was generated during the Ministry’s investigation of certain allegations made by the applicant about the employee. The information is found in a two-page Ministry memorandum dated June 17, 1999, which the Ministry considered was responsive to the applicant’s October 31, 1999 access to information request under the *Freedom of Information and Protection of Privacy Act* (“Act”). That request was for “information/records concerning myself being maintained by MSDES, in both the Vancouver and Victoria offices”. In his request, the applicant said he was aware that the Ministry was “maintaining information/records concerning myself, consequent to my formal complaints on June 4, 1999” about the Ministry employee (who is referred to here as the third party).

In its response dated March 2, 2000, the Ministry disclosed records to the applicant, but withheld portions of the June 17, 1999 memorandum under ss. 19(1) and 22(1) of the Act. The applicant sought a review, on April 7, 2000, under s. 52 of the Act. I held a

written inquiry under s. 56 of the Act on June 28, 2000 after the matter was not resolved in mediation.

The applicant, the Ministry and the third party each provided me with written submissions. The Ministry's submissions were supplemented by affidavit evidence.

2.0 ISSUE

The issue here is whether the Ministry is required by s. 22(1) of the Act to refuse to disclose personal information to the applicant.

In his submissions, the applicant says that, "given the circumstances of this case", the Ministry should bear the burden of proof. Section 57(2) of the Act stipulates that the applicant has the burden of establishing that disclosure of the third party's personal information would not be an unreasonable invasion of the third party's personal privacy. It is not open to me to shift this burden. Section 57(2) must be adhered to.

3.0 DISCUSSION

3.1 Nature of the Personal Information – The material before me indicates that the applicant and the third party have had personal dealings, outside the third party's employment duties, that apparently have created ill-will. The applicant at one point complained to the Ministry about what he alleged was improper conduct by the third party. The Ministry investigated the allegation and the applicant later sought access to his own personal information in the Ministry's files. Again, the Ministry's search for responsive records turned up the two-page memorandum of June 17, 1999, which records a meeting on the same day, that is in issue here. It relates to the Ministry's investigation of the applicant's allegations against the third party.

The Ministry disclosed part of the memorandum to the applicant, but withheld some information under ss. 19(1) and 22(1). (The Ministry no longer relies on s. 19(1).) The Ministry has withheld the third party's name from the applicant, even though it is clear to the applicant that the June 17 meeting was called to discuss his allegations about the third party. The disclosed portions of the memorandum have confirmed this. The Ministry has also withheld portions of the record which reveal who said what at the meeting respecting the allegations. The withheld portions include the third party's response to the allegations.

3.2 Relevant Statutory Provisions – In support of its case that s. 22(1) prohibits disclosure of the third party's personal information, the Ministry says ss. 22(3)(d) and (g) each create presumed unreasonable invasions of personal privacy which the applicant must rebut. The Ministry relies on ss. 22(2)(c) and (e)-(h) as relevant circumstances that favour its position.

Section 22(1) of the Act requires a public body to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy. Section 22(3) creates presumed unreasonable invasions of personal privacy in certain cases. The portions of s. 22(3) relevant in this case read as follows:

- (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) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party.

A public body's task does not end there. In deciding whether a disclosure of personal information would unreasonably invade a third party's personal privacy, a public body must consider all relevant circumstances, including those found in s. 22(2). The relevant portions of s. 22(2) read as follows:

- (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
- ...
- (c) the personal information is relevant to a fair determination of the applicant's rights,
- ...
- (e) the third party will be exposed unfairly to financial or other harm,
- (f) the personal information has been supplied in confidence,
- (g) the personal information is likely to be inaccurate or unreliable, and
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

3.3 Presumed Unreasonable Invasions of Third Party Privacy – The Ministry argues that the disputed information is personal information of the third party for the purposes of s. 22(1). I agree as regards most of the information the Ministry withheld.

Employment History

The Ministry also contends that the personal information is covered by the presumed unreasonable invasion of privacy created by s. 22(3)(d), which deals with employment history. I agree that some of the information withheld from the applicant “relates to employment ... history” of the third party.

There are some exceptions to this, however. I find that the third party's name, which is known to the applicant, is not covered by the presumption just described. In any case, because of the way the record was (necessarily) severed by the Ministry, there can be little doubt the applicant has deduced that the third party's name was part of the information severed.

I have also concluded that the recitation in the record of the allegations made by the applicant does not fall under s. 22(3)(d). The applicant already knows those allegations, since he made them in the first place. In such a case, I do not agree that the allegations themselves, already known to the applicant, are part of the third party's employment history as it relates to the applicant's request.

Further, the date of the meeting out of which the memorandum arose, and the number of the Ministry district within which the third party worked at the time, are not covered by s. 22(3)(d). There is no doubt the applicant could infer, from the severed record he received, that a district number or designation was part of the information deleted by the Ministry (presumably to be consistent with its deletion of the third party's name).

Nor is there much doubt, judged on the material before me, that the applicant knows the date on which the meeting occurred. It is not clear to me how that information could, in any case, be characterized as "personal information" within the meaning of the Act.

Personnel Recommendations or Evaluations

The Ministry also characterizes the severed information as personal information which, within the meaning of s. 22(3)(g), consists of "personnel recommendations or evaluations" of the third party. The Ministry says some of the information in issue – it does not claim all of it is covered by s. 22(3)(g) – "clearly relates to an evaluation by management as to the" ability of the third party to perform his duties and to comply with the standards of conduct for employees. I disagree. It is information pertaining to the Ministry's investigation of the applicant's allegations, *i.e.*, information as to what was said at a meeting about the allegations. It does not qualify as an "evaluation" by the Ministry of its employee.

In light of my finding that s. 22(3)(d) creates a presumed unreasonable invasion of personal privacy here – except as regards the third party's name, the allegations, the meeting date and the Ministry district number – the next question is whether the applicant has rebutted that presumption. This determination can only be made in light of the relevant circumstances, including those the Ministry relied on.

3.4 Relevant Circumstances – As I noted earlier, in deciding whether s. 22(1) requires personal information to be withheld, a public body must consider all relevant circumstances, including those set out in s. 22(2).

Personal Information Supplied In Confidence

The first circumstance invoked by the Ministry is found in s. 22(2)(f). The Ministry has provided me with affidavit evidence which establishes that the third party participated in

the June 17, 1999 meeting in the expectation that what he said at the meeting, and the outcome of the investigation, would be kept confidential. The evidence also establishes that this expectation was shared by the Ministry staff attending the meeting. In his submission in the inquiry, the third party again contended that he had expected confidentiality at the meeting. Accordingly, I find that the relevant circumstance in s. 22(2)(f) applies – the third party supplied personal information in confidence.

Unfair Exposure to Harm

I have greater difficulty with the Ministry's reliance on ss. 22(2)(e), (g) and (h). As to the first, the Ministry asserts that disclosure "would unfairly expose the Third Party to stress and other harm, such as the risk that the applicant may make attempts to harass the Third Party". An *in camera* affidavit speaks to this issue. While I have no doubt the applicant's own words speak to his ill-will toward the third party, I cannot conclude there is a rational connection between disclosure of the disputed information and exposure to harm, including harassment. The information includes the third party's name, which the applicant already knows. It also includes details as to the allegations made by the applicant, but those are also known to the applicant. Some of the severed information consists of the third party's responses to the applicant's allegations, but I am not persuaded its disclosure can rationally be connected to exposure to harm within the meaning of s. 22(2)(e). That section speaks of whether the third party "will be" exposed unfairly to harm because of the disclosure.

Inaccurate or Unreliable Information

I am also not persuaded, as regards s. 22(2)(g), that information in the memorandum concerning the applicant's allegation is "likely to be inaccurate or unreliable". The Ministry's point here depends on my accepting that the disputed information, which details the applicant's allegations, is inaccurate or unreliable. By their nature, allegations are unproven and thus may be characterized as "inaccurate or unreliable" information. They may also be true. I do not, however, agree that the allegations fall within s. 22(2)(g) simply because they are allegations. Even in light of all the evidence before me on this point, I am not persuaded that the allegations themselves are "likely to be" inaccurate or unreliable simply because they are unproven allegations.

Unfair Damage to Reputation

The last part of s. 22(2) the Ministry relied on is s. 22(2)(h), which requires a consideration of whether disclosure of the personal information "may unfairly damage the reputation of any person referred to in the record". The Ministry asks me to accept that

... any reference to such an allegation in a government record could legitimize or give unwarranted credibility to that allegation, which could further damage the Third Party's reputation.

Again, the applicant knows what the allegations are, since he made them. Although he might risk defaming the third party by doing so, there is nothing to stop the applicant

repeating his allegations to the third party's Ministry colleagues or to anyone else. I fail to see how the fact the Ministry at some point recorded the unproven allegations gives them any legitimacy or credibility. They remain allegations until proven. (In fact, it should be emphasized that nothing in this order can be interpreted to mean that the applicant's allegations have been proven or not.) I am not persuaded that s. 22(2)(h) applies.

3.5 Must the Information Be Withheld? – This does not mean the applicant is entitled to all of the information. I have already found that the presumed unreasonable invasion of personal privacy in s. 22(3)(d) applies to the personal information in the record that the Ministry withheld (other than the information I have already noted is not covered by s. 22(3)(d)).

The applicant has not rebutted the presumption raised by s. 22(3)(d). He has not shown that any relevant circumstances, including any of those found in s. 22(2), favour his position. The applicant complained to the Ministry about the third party, the Ministry looked into the matter and told the applicant it had done so. His concern here, really, seems to be to find out what went on with the Ministry's investigation and what its resolution was. I am not persuaded that the third party's personal information is necessary for a fair determination of the applicant's rights, within the meaning of s. 22(2)(c). I have decided, quite readily, that – with the exception of the personal information described above – the applicant is not entitled to the third party's personal information.

4.0 CONCLUSION

Because I have found that the Ministry is authorized by s. 22(1) of the Act to refuse to disclose only some of the information it withheld under that section:

- (a) under s. 58(2)(a) of the Act, I require the Ministry to disclose to the applicant the information in the record other than the personal information described in paragraph (b), below; and
- (b) under s. 58(2)(c) of the Act, I require the Ministry to refuse to give the applicant access to the personal information that I have severed from the copy of the record delivered to the Ministry with its copy of this order.

October 5, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia