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

Order 00-48

INQUIRY REGARDING CITY OF VANCOUVER RECORDS

David Loukidelis, Information and Privacy Commissioner
October 25, 2000

Quicklaw Cite: [2000] B.C.I.P.C.D. No. 52
Order URL: http://www.oipcbc.org/orders/Order00-48.html
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: Applicant not entitled to access to third party personal information relating to employment history or educational history as it relates to qualification of third parties for specific employment positions. Applicant also not entitled to personal information of third parties relating to their resignation from employment. Public body found to have fulfilled its duties under s. 6(1).

Key Words: duty to respond – respond openly, accurately and completely – every reasonable effort – personal privacy – unreasonable invasion – employment history.

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

Authorities Considered: B.C.: Order No. 78-1996; Order 00-15; Order 00-26; Order 00-32.

1.0 INTRODUCTION

Although the background to this inquiry is both lengthy and detailed, the issues to be disposed of are relatively straightforward. They boil down to whether the City of Vancouver ("City") has conducted an adequate search for records responsive to certain aspects of the applicant's access to information request under the *Freedom of Information and Protection of Privacy Act* ("Act") and whether the City is required to refuse to disclose third party personal information to the applicant.

These issues stem from an access to information request the applicant made, dated November 10, 1994. In 1997, my predecessor authorized the City, under s. 43 of the Act, to disregard requests from the applicant related to the City's hiring or employment practices, including records related to certain specified employment competitions. The

applicant initiated court proceedings under the *Judicial Review Procedure Act* to have this s. 43 authorization set aside. That petition has not been heard.

The City and the applicant later entered into discussions in an attempt to resolve differences connected with the s. 43 authorization. As part of this, the City agreed to process four access requests from the applicant, three of which were covered by the s. 43 authorization. These four requests are set out in the applicant's June 4, 1999 letter to the City's Legal Department. The amended Portfolio Officer's Fact Report in this inquiry summarizes the requests as follows:

A. records that pertain to the recruiting and selection in 1990 of the City's Director of Human Resources;
B. records from personnel files for disciplinary actions, terminations and resignation letters of all past and present Human Resources Advisors and Personnel Officers;
C. written interview notes in personnel files in the Planning Department and Human Resources Department that pertain to the selection in 1991, 1992 and 1993 of three Landscape Architectural Technicians; and
D. correspondence mentioned in the City's s. 43 application respecting the applicant.

The City responded to these requests on November 9 and December 16, 1999. In response to item A, it disclosed some records from which it had severed personal information under s. 22 of the Act. In the words of the City's November 9, 1999 response, the severed personal information related "to the candidates' employment, educational and personal history, and personnel evaluations."

As regards item B, the City told the applicant, in its December 16, 1999 letter, that all personnel files for human resources staff who left the City before 1989 had been destroyed in accordance with its Records Retention Schedule. It told the applicant it had identified personnel files of the six individuals who had held the position of Human Resources Advisor or Personnel Officer between 1989 and 1994 (the latter being the date of the applicant's request). The City said that none of the records in the six personnel files related to disciplinary actions or to termination of employment by the City. Letters of resignation were found in the files, but the City concluded that it was "obliged to withhold these letters in their entirety, as they consist of personal information relating to the writers' employment history" and were thus covered by s. 22 of the Act.

As regards item C, the City told the applicant that it no longer had records pertaining to the 1991, 1992 or 1993 selection of Landscape Architectural Technicians. It said those records had been destroyed according to the City's Records Retention Schedule. Last, in its November 9, 1999 response, the City told the applicant it had been able to locate most of the correspondence relevant to item D and disclosed it to the applicant. It said, however, that it had not been able to find some of the correspondence.

In a letter to this Office dated December 9, 1999, the applicant requested a review under the Act. The request related to the merits of the City's decision and the applicant's allegation that the City had failed to comply with s. 6(1) in searching for records. Because the matter was not settled in mediation, I held a written inquiry under s. 56 of the Act.

It should be noted here that the applicant requested an oral inquiry because he believed the evidentiary issues involved made it necessary. In a letter dated March 3, 2000, I confirmed that the inquiry would be written. At that time, I said that if my review of the material revealed that "credibility issues as to relevant factual matters" were raised, I would then decide whether an oral inquiry should be convened. As no issues of credibility are involved, I remain of the view that there is no need for an oral inquiry.

The applicant's February 3, 2000 letter to this office noted that his "request for review and the subject matter of" this inquiry "pertains exclusively to the June 4 [1999] correspondence and the City's related correspondence". This is inconsistent with the applicant's assertion, in the same letter, that the operative date of the access request that is in issue in this inquiry is November 10, 1994. It appears the City – in the context of its discussions with the applicant regarding the s. 43 authorization – agreed to revive aspects of the applicant's 1994 access request (which had been frozen by my predecessor's s. 43 authorization). Based on my review of the material before me, I conclude that November 10, 1994 is the date of the applicant's request for the purposes of its processing (including as regards the s. 6(1) issue).

A number of the 51 appendices to the applicant's submissions in this inquiry consist of copies of correspondence originating with this Office, the City or the applicant in relation to attempts to mediate matters between the parties back in 1995. The Notice of Written Inquiry this Office issued to the parties – and this Office's rules for inquiries – clearly preclude a party from submitting this kind of material without the consent of all other parties to the inquiry. Since the applicant did not obtain the City's consent, I have disregarded any mediation-related material he submitted.

2.0 ISSUES

The Notice of Written Inquiry issued to the parties on February 17, 2000 states that the issues to be considered are the application by the City of s. 22 of the Act to "personnel records" and whether the City "conducted an adequate search for other records" as required by s. 6(1) of the Act. The s. 6(1) issue relates only to items B, C and D of the applicant's request. Paragraph 2 of the applicant's initial submission concurs with this characterization of the issues.

Under s. 57(2) of the Act, the applicant bears the burden of establishing that third party information can be disclosed to him. Previous orders have established that the City bears the burden of proof on the s. 6(1) issue.

At paragraph 4 of his initial submission, the applicant says that the City's alleged "delay in responding" to him regarding items C and D is also in issue. His material includes submissions on that point, to which the City responded briefly in its reply submission. Again, the only issues before me are the s. 6 reasonable search and s. 22 personal privacy matters outlined above. (The City's material in any case adequately explains any delay that may have occurred and I would be inclined to find in the City's favour if the matter were before me.)

3.0 DISCUSSION

3.1 City's Searches for Records – Section 6(1) of the Act requires the City to "make every reasonable effort to assist applicants and to respond to each applicant without delay openly, accurately and completely." The standards contemplated by s. 6(1) with respect to a public body's search for records have been canvassed fully in Order 00-15, Order 00-26 and Order 00-32. There is no need to repeat the discussion here.

The applicant's concern is that the City's searches for records responsive to items B, C and D of the applicant's request were inadequate. I will deal with each of these items separately.

Item B Search Efforts

The thrust of the applicant's complaint respecting item B appears to be that the City wrote to the applicant early in 1995 – before the s. 43 authorization brought the process to a halt – and told him it had not identified records that responded to this item. The applicant says that, in its November 9, 1999 letter to him, the City "claimed that there were approximately 10 individuals' files from 1989 to 1994 that would contain the records that are being sought under this item." He says that, when the City responded to him on December 16, 1999, "the City informed the applicant that there were six individuals' files and not 10". The applicant appears to believe that this discrepancy means the City has (intentionally or otherwise) not produced all responsive records.

If a public body finds all responsive records but does not disclose them, that is not a question of search adequacy. It is a question of whether the public body has responded accurately and completely. The issue here is whether the City has searched adequately in an effort to find all responsive records, not whether it has withheld records that it found.

According to the City, the difference in the numbers of files noted in its two responses is, in any case, readily explained. It says that its November 9, 1999 letter to the applicant – in which it told him that it would respond later on the item B request – said that "approximately 10 individuals" who held the relevant posts had been identified. The City apparently *thought* that "approximately" ten people had held the posts, but it later turned out that only six individuals were involved, so the City reviewed only six files.

The City's Manager of Corporate Information and Privacy, Paul Hancock, deposed that he "reviewed all freedom of information files related to the Applicant and did not locate any personnel records answering" to item B. His affidavit includes various e-mails that he sent to other City employees in an attempt to locate responsive records. Hancock deposed that he communicated with the City's General Manager of Human Resources, its Employee Relations Advisor and its Manager of Bylaw Administration and Records with respect to item B. At paragraph 11 of his affidavit, he deposed that he

> … was advised that relevant records would have been placed in the Human Resources Department Employee Files, which are destroyed 10 years after the employee's date of separation pursuant to the City's records retention schedule. Consequently, I was advised, the City no longer had personnel files for Human

> Resources staff who left the City before 1989. I was also advised that Human Resources had approximately 10 files responsive to the request, covering the period 1989 to 1994.

He also deposed that he subsequently asked the City's human resource staff "to locate and retrieve the remaining personnel files responsive to" item B (paragraph 14). As a result, the City located and retrieved only six personnel files, all of which pertained to employees who no longer worked for the City. Paul Hancock deposed that his review of the files disclosed that none of them contained records relating to disciplinary actions or to the termination of employment by the City, although some of them did contain resignation letters.

Much of the applicant's remaining argument about item B centres on his allegation that the City did not search for records between his original 1994 request and the City's response at the end of last year. I have already found that the City properly treated November of 1994 as the operative date of the applicant's request, which was merely revived in 1999.

I am satisfied that the City's search efforts with respect to item B were adequate and discharged the City's obligation under s. 6(1) of the Act. Those efforts conform to what a fair and rational person would expect to be done or would consider acceptable.

Item C Search Efforts

The applicant disputes the City's claim that interview notes requested by the applicant were destroyed after three years, in accordance with the City's records retention schedule. He does so on the basis that, in 1994, he obtained copies of interview notes from the Vancouver Police Department ("VPD") even though those notes had been created in 1990. He concludes that if the VPD was able, six years ago, to produce four year old interview notes, the City's assertion that such records are destroyed after three years cannot be correct.

Paul Hancock deposed that he reviewed all freedom of information files related to the applicant and did not locate any interview notes that responded to item C. He also made other efforts to find interview notes through other City departments. He deposed, at paragraph 12 of his affidavit, that he was told by the City's human resources staff that any responsive records would have been placed in the closed competition files maintained by the City and that, "pursuant to the retention schedule, these were destroyed three years after the close of the employment competition." As he did in relation to item B, Hancock deposed that he had requested records from every source known to him at the City "that could reasonably be expected to have custody or control of" responsive records (paragraph 18).

Two comments are in order about the applicant's observation that the VPD some time ago produced four year-old records to him. First, the VPD – as a separate public body under the Act, with a different statutory environment than the City – does not necessarily have the same records retention schedule as the City. Second, the VPD interview notes

produced to him in 1994 might have been kept too long, even if the VPD had the same records retention schedule as the City.

I find that the City's item C search efforts satisfied its s. 6(1) obligations. It is clear that its efforts to find responsive records conform, in the circumstances, to what a fair and rational person would expect to be done or would consider acceptable.

Item D Search Efforts

The applicant's item D allegations relate to four pieces of correspondence he says exist and should have been disclosed to him. He provides a number of reasons to suppose that this correspondence exists. Only two require specific mention here. First, at paragraph 43 of his initial submission, the applicant says the missing correspondence "was the more current of the eight pieces requested." He apparently concludes from this that these records could not have been "disposed of according to any record disposition policy or procedure." (paragraph 43, initial submission). Second, he says the City cited these pieces of correspondence in its September 5, 1997 submissions to my predecessor in support of the City's application for an authorization under s. 43 of the Act. The applicant asks how the City could formulate these submissions if the correspondence "did not exist in their files".

It appears from the City's evidence that the missing correspondence has been lost. The City says it "reviewed all freedom of information files relating to the Applicant, and located copies of most of the correspondence requested." In his affidavit, Paul Hancock deposed (at paragraph 9) that he reviewed "all of the City's voluminous freedom of information files – both paper and electronic – relating to" the applicant. He also deposed (again at paragraph 9) that he had "reviewed the files of the City Clerk's Department relating to general freedom of information matters for the period 1989 to the present". Last, he deposed that he had discussed the applicant's requests with the City's previous Manager of Corporate Information and Privacy, with a view to locating the requested records" (paragraph 9).

This aspect of the applicant's request covers records one would expect to find in the locations searched by the City. The City found eight pieces of correspondence in those locations. It is clear that it made further efforts, including by searching in its general freedom of information files, to find the missing four letters. It is not reasonable to expect that this material would be found elsewhere in the City's records. In the circumstances, I am satisfied that the City has searched in all of the files in which records responsive to item D could reasonably be expected to be located and that it has discharged its s. 6(1) search obligations with respect to item D.

3.2 Third Party Personal Privacy – Section 22(1) of the Act requires the City to refuse to disclose personal information if its disclosure would unreasonably invade the personal privacy of a third party. In this case, the City says that disclosure of personal information contained in records covered by items A and B is presumed to be an unreasonable invasion of third party privacy under ss. 22(3)(d), (g) and (h).

Those sections read as follows:

> 22(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,
> …
> (h) 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.

At paragraphs 47 and 48 of his initial submission, the applicant acknowledges that records responsive to item A "contain information that is covered under" s. 22(3)(d), (g) and (h) and that records covered by item B contain information subject to s. 22(3)(d). The applicant, who bears the burden of proof under s. 57(2), has not attempted to rebut the presumption of unreasonable invasion of privacy created by 22(3)(d), (g) or (h). He says, instead, that s. 4(2) of the Act requires the City to sever personal information subject to those presumed unreasonable invasions of personal privacy and to disclose the remainder of the records. He argues, at paragraph 49, that he should be given information revealing "the dates the records were created and received" and says this "is one example that illustrates" the principle of severance.

The records withheld by the City are as follows:

- candidate reports for four candidates for the position of Director of Human Resources in 1990, which contain personal information of each candidate, a career summary, a career history, a section describing the candidates' career and aspirations and a section containing interview impressions,
- candidate reference checks, for each of the four candidates just described, which contains the names of referees and their opinions about the candidates, and
- resignation letters from several personnel files of Human Resource Advisors or Personnel Officers.

The City relies on Order No. 78-1996, in which my predecessor found that performance appraisals are subject to s. 22(3)(d). The City contends that "interview impressions" in each of the candidates' reports qualify as performance appraisals for the purposes of s. 22(3)(d). I disagree. I find, however, that the interview impressions qualify as personal information relating to employment history within the meaning of s. 22(3)(d). I also agree that the reference check information is covered by s. 22(3)(g), while personal information in the resignation letters falls under s. 22(3)(d). I also find that s. 22(4)(e) does not apply to any information in the disputed records. (That section provides that it "is not" an unreasonable invasion of a third party's personal privacy if "information is

about the third party's position, functions or remuneration" as (among other things) an employee of the public body.)

The City argues that s. 22(3)(h) requires it to withhold the identities of those who provided references for the various candidates. Here is the City's argument on the point, from page 6 of its initial submission:

> … in Order No. 327-1999, the privacy commissioner stated that in the absence of an explicit confidentiality policy, he can rely on evidence after the fact that the evaluation or recommendation was supplied in confidence.

I am satisfied, in this case, that s. 23(3)(h) applies to the identities of reference providers. Support for this is found in, among other places, the affidavit of Paul Hancock, who deposed as to his understanding that reference providers are given assurances of confidentiality by the City. Further, disclosure of the places of work of those individuals would reveal information as to the candidates' employment history. The presumed unreasonable invasion of personal privacy created by s. 22(3)(h) applies to the identities of the reference providers.

Section 22(2) provides that a public body must, when determining under ss. 22(1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, consider "all relevant circumstances", including those set out in s. 22(2). The City refers here to the circumstances in ss. 22(2)(a) and (f). The first requires the head of a public body to consider whether disclosure of the requested information "is desirable for the purpose of subjecting the activities of … a public body to public scrutiny". The City acknowledges the applicant's claim that disclosure of the disputed information "is in the public interest because it would reveal alleged deficiencies in the City's employment process", but says the following in reply, at page 7 of its initial submission:

> The City submits that even if such deficiencies [as the applicant alleges] existed, there is no evidence that disclosing the details of the personal and employment history of job applicants or City staff would help to reveal them. Furthermore, even if any conclusions could be reached from this information, they would only relate to the employment process as it was 10 years ago. If there is any public interest in the matter, it is in the preservation of confidentiality of sensitive personal information about job candidates and staff, to avoid discouraging qualified individuals from applying for employment with the City.

I am not persuaded that disclosure of the third party personal information in the records is desirable for the purpose of subjecting the City's activities to "public scrutiny".

Section 22(2)(f) of the Act requires the head of a public body to consider whether the personal information in question "has been submitted in confidence". On this point, the City says, at page 7 of its initial submission, that it is

> … a matter of established practice in the City that personal information related to the employment, occupational or educational history of job applicants and

> incumbents, as well as the contents of personal evaluations of these applicants, is considered confidential.

As I have already indicated on the confidentiality issue, in the absence of any evidence supporting this contention, I cannot conclude that s. 22(2)(f) is relevant here. This does not, of course, mean the personal information must be disclosed.

To the contrary, the applicant has not persuaded me that personal information in the records can be disclosed to him. I find that the City is required under s. 22(1) to refuse to disclose third party personal information in the records to the applicant.

Severance of Personal Information

The City argues that severing the personal information covered by s. 22 from non-personal information "would have been extremely time-consuming" and that it was considered unlikely the "information remaining would have been intelligible or useful" to the applicant. The City therefore determined, for the purposes of s. 4(2), that "this information could not be reasonably severed".

To some extent, I agree with the City that this is a case where the protected information could not reasonably be severed. The substance of the candidate reference checks, and the identities of reference providers, comprise almost all of the disputed records. The checks include employment history information of the third parties and, to a large degree, confidential evaluations provided to the City by reference providers. There is really no information that could be severed and released from these records. Each reference check states, on its first page, the position for which the candidate was competing (the applicant knows this), the year of the competition (the applicant also knows this) and the name of the employer (again, the applicant knows this). In the circumstances, and subject to what is said below, I find that the City has no duty to sever these disputed records under s. 4(2).

As an exception to this, the City must disclose the date of each candidate reference check. Nothing in the material before me indicates even remotely that disclosure of the date of each check would somehow disclose third party personal information. The applicant is for some reason in interested in knowing the dates of these checks and I see no reason why those dates cannot be disclosed to him.

As regards the resignation letters sought by the applicant, they each contain personal information – beyond the names and addresses of the third parties – that is excepted from disclosure under s. 22(1). This includes information as to the third parties' employment histories and their reasons for resigning their positions. The applicant already knows – by virtue of how he framed his request and how the City responded – that the positions resigned were human resources staff positions. I find that the City has no duty to sever these records under s. 4(2), again with the exception of the date of each resignation letter (or, in one case, the date it was received by the City). Nothing before me indicates that these dates would, if disclosed, reveal personal information.

4.0 CONCLUSION

For the reasons given above, under s. 58(2)(c) of the Act, I require the City to refuse access to the disputed records, with the exception that, under s. 58(2)(a) of the Act, I require the City to disclose to the applicant the dates of each candidate reference check and the date of each resignation letter or the date on which it was received by the City.

Since I have found that the City has discharged its s. 6(1) obligation in search for records, no order is necessary under s. 58(3) of the Act.

October 25, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia