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

Order 04-17

MINISTRY OF MANAGEMENT SERVICES

David Loukidelis, Information and Privacy Commissioner
July 22, 2004

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Summary: The applicant requested access to records disclosing telephone numbers called by the Premier from his private lines during a specified period. Section 17(1) does not authorize the Ministry to refuse disclosure. Section 22(1) requires the Ministry to refuse disclosure and severance under s. 4(2) is not required.

Key Words: financial harm—reasonable expectation of harm—personal privacy—unreasonable invasion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 17(1) and 22(1).

Authorities Considered: B.C.: Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 00-16, [2000] B.C.I.P.C.D. No. 16; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order No. 63-1995, [1995] B.C.I.P.C.D. No. 36; Order No. 64-1995, [1995] B.C.I.P.C.D. No. 37; Order No. 65-1995, [1995] B.C.I.P.C.D. No. 38; Order 03-16, [2003] B.C.I.P.C.D. No. 16.

1.0 INTRODUCTION

[1] The applicant in this case made a request, under the *Freedom of Information & Protection of Privacy Act* ("Act"), for access to "records for all of the Premier's personal and official phone lines" for a specified period. They included "all fax, telephone, and cellular telephone logs, both long distance and local, and the long distance telephone bills for that time."

[2] In response, the Ministry of Management Services ("Ministry") severed information under ss. 15 and 17 of the Act. The Ministry's response said s. 15 authorized it "to withhold information if its disclosure could reasonably be expected to harm security

of a system." For s. 17, the Ministry's response simply said it "permits the public body to refuse to disclose information which could harm the financial or economic interests of a public body or the Government of British Columbia."

[3] The applicant asked this office to review the Ministry's decision and the matter was referred to mediation. During mediation, the portion of the request dealing with fax and cellular telephone logs was resolved. The applicant also agreed that he would not pursue access to the Premier's private telephone numbers in Victoria or Vancouver. (The Ministry later confirmed, in supplementary affidavit evidence that I requested, that other private telephone numbers remain in the requested records.) Last, the Ministry notified the applicant that it was no longer relying on s. 15 of the Act, but said it was applying s. 22 of the Act. It said that s. 22 required it to refuse to disclose "all out-going telephone numbers". Because the matter did not fully settle in mediation, a written inquiry was held under Part 5 of the Act.

[4] In his request for review, the applicant raised the question of whether s. 25 of the Act requires the Ministry to disclose the disputed information in the public interest.

2.0 ISSUES

[5] The issues in this case are as follows:

1. Does s. 25 require the Ministry to disclose information in the public interest?

2. Does s. 17 of the Act authorize the Ministry to refuse to disclose information?

3. Does s. 22 of the Act require the Ministry to refuse to disclose information?

[6] The Ministry also says that, if the disputed information has to be disclosed, it cannot reasonably be severed, within the meaning of s. 4(2) of the Act, from information that may or must be withheld, such that the entire record can be withheld.

[7] Section 57 of the Act places the burden of proof on the Ministry respecting s. 17. It places the burden of proof on the applicant respecting personal information to which the Ministry has applied s. 22.

3.0 DISCUSSION

[8] **3.1 Public Interest Disclosure** – Section 25(1) of the Act requires a public body to, in certain circumstances, disclose information in the public interest:

> **Information must be disclosed if in the public interest**
>
> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

[9] The approach to determining whether s. 25 requires disclosure has been outlined in a number of decisions. In this case, I will follow the approach taken in Order 02-38, [2002] B.C.I.P.C.D. No. 38, without repetition.

[10] The applicant's s. 25 submissions, found in his initial submission, are concise:

> Please order the government to release the records I have requested, regarding the Premier's telephone records. I believe these are clearly in the public interest to disclose (i.e., FOIPP sec. 22 [*sic*]).
>
> There is an obvious precedent to disclose, in that former Premier Mike Harcourt released his phone records in full in response to FOI requests from the B.C. Reform Party and its leader Jack Weisgerber in 1994-95. This formed the basis for many media stories on the premier's calls to Ron Johnson and NOW Communications, Karl Struble of Washington DC, et al. [See attached story from Globe and Mail, Apr. 14/95.]
>
> The premier's office has also – via FOI – released the premier's agenda book to me, showing whom he met with and why. The phone records share the similar principle.
>
> If a very few calls were truly personal (e.g., medical), perhaps those might be severed, but government-to-government and business phone contacts are the public's affair, and should be released – exactly as such written correspondence contact is. The premier should use only his personal phone lines for personal calls.

[11] In response, the Ministry cites previous decisions in which I said s. 25 is not triggered simply because there may be a general public interest in scrutinizing government activities and that s. 25 is not an investigative tool for those who seek to look into the affairs of a public body. See Order 00-16, [2000] B.C.I.P.C.D. No. 16. The Ministry contends that none of the information in the disputed records is of a nature that requires immediate public-interest disclosure under s. 25.

[12] There is nothing to suggest that the information the applicant seeks is anything other than operational information generated in the ordinary-course of the Premier's discharge of his duties. Nor is the fact that a former Premier may have, almost a decade ago, disclosed similar information in response to an access request relevant or persuasive on the question of whether immediate, mandatory public interest disclosure is required here despite any other exception to the right of access.

[13] The criteria for s. 25 disclosure have not been met here. No factors are evident to support a finding that disclosure is required in the public interest under s. 25(1). I find that s. 25(1) does not require the Ministry to disclose this information in the public interest.

[14] **3.2 Harm to the Province** – Section 17 of the Act authorizes a public body to refuse to release information the disclosure of which could reasonably be expected to harm the public body's financial or economic interests. The relevant portions of this section read as follows:

> **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.

[15] In dealing with s. 17, I will apply the principles and approach found in Order 02-50, [2002] B.C.I.P.C.D. No. 51, without repetition.

[16] The Ministry says s. 17 does not require the expected harm to be significant or material—a public body is only "required to show a reasonable expectation of some harm to its financial interests" (para. 5.09, initial submission). It says the disclosure of "some of the information" in the disputed records could reasonably be expected to harm the Province's interests, such that s. 17 applies. Here is the Ministry's entire argument respecting s. 17 (para. 5.11, initial submission):

> The Ministry says that if some of the information in the Logs is disclosed, the harm contemplated in section 17 could reasonably be expected to occur: disclosure of this information could reasonably be expected to harm the financial interests of the Province. While a thorough analysis of section 17's application has not yet been undertaken, the Ministry says that it is reasonably sure that at least some of the information in the Logs may be withheld under section 17. For detail on this point the Ministry refers the Commissioner to the affidavit of Tom Syer.

[17] The Ministry's s. 17 case rests on an affidavit sworn by Tom Syer, who is the Senior Coordinator, Issues Management, in the Office of the Premier. He deposed that the Premier's office does not keep detailed records of incoming or outgoing telephone calls for any phone lines in the Premier's office. His understanding, he deposed, is that

the disputed phone logs are maintained on a computerized database within the Ministry, not the Premier's office.

[18] Syer deposed that he had reviewed telephone logs "with the assistance of the Deputy Chief of Staff, Executive Assistant to the Premier and the Premier" himself (para. 5). According to him, this review disclosed that a portion of the numbers related to "private and personal calls", while others were made from "private (not publicly available) numbers" not listed in the government's directory or a telephone book (para. 5). He also acknowledged that a fair portion of the numbers were not immediately recognized by the Premier, and that in some case it would likely not be possible to determine the nature of the call (para. 5).

[19] He deposed as to the "daunting" administrative burden that would be imposed to try—perhaps without success—to determine long after calls were made the nature of each call, which calls (if any) related to which official matters and what was discussed (paras. 10 and 11). He estimated that this would take, "conservatively, 60 hours", with the Premier personally having to spend approximately 15 hours to assist in the process (para. 10). Syer expressed the opinion that, if the government were required to undertake this work in this case—or more generally—this would have the "very real potential to significantly disrupt the operations of government" (para. 11). He also referred to the costs to the provincial government of having to respond to similar requests for telephone logs (para. 7).

[20] On the evidence before me, the Ministry has not shown the necessary reasonable expectation of harm under s. 17 to either its interests, the interests of the provincial government or the interests of any other Ministry on the basis of the administrative burden of this request or other requests that might or might not be made in future (the alleged burden of possible future requests being speculative at this point).

[21] As regards s. 17, Tom Syer further deposed as follows:

> 6. The disclosure of information from the Logs – numbers, the dates on which calls took place – and by extension the disclosure of the fact that calls took place on certain dates or at all, could assist a third party in determining the Province's position on a potentially significant matter at a given point in time. This has the potential to be harmful to government. It would require considerable additional time to investigate whether disclosure of such information would in fact be harmful. I am reasonably sure that a least some of the information in the Logs, if disclosed, would be harmful to the Province's financial interests.
>
> 7. The disclosure of private (not available on directories) government numbers has a high probability of causing disruption of government affairs and would result in new costs to redress the disclosure of such information. For example, interest groups could use a private phone number to disrupt senior civil servants and/or elected officials by organizing 'phone jamming' sessions. Governments of all political backgrounds are subject to pressure tactics and campaigns to shift opinion and ensure perspectives are heard at the highest level. It is reasonable to protect key decision-makers from dealing with organized

> campaigns by maintaining both a private and a public contact number. It is also entirely possible this could occur for non-governmental numbers as well.

[22] It strikes me as speculative for the Ministry to claim that disclosure of unspecified telephone numbers, and the dates on which telephone conversations took place, could assist a third party in determining the "Province's position" on an unidentified, but (as Syer nonetheless put it) "potentially significant matter" at an unspecified point in the past.

[23] Syer deposed, at para. 6, that he is "reasonably sure" that disclosure of "at least some of the information"—he does not say which information—would "be harmful to the Province's financial interests" in some manner that he does not specify. He did not disclose any particulars on which he has based this opinion.

[24] Even if I accept that someone could, using this information, somehow infer the province's position respecting a specific matter on a given date, I am not prepared, without more, to find that such knowledge could reasonably be expected to lead to harm within the meaning of s. 17. In the absence of more particularized evidence, I fail to see how a reasonable expectation of harm from disclosure has been shown on this basis.

[25] Nor am I persuaded by the spectre of disruption of government affairs, and the costs that would allegedly be required to respond, that would allegedly have a high probability resulting from disclosure of these telephone numbers meet the test for s. 17.

[26] Syer deposed, at para. 7, that "interest groups" could use private government telephone numbers to "disrupt senior civil servants and/or elected officials by organizing 'phone jamming' sessions", and expressed the opinion that it would be reasonable to protect "some decision-makers" against "organized campaigns" by maintaining the confidentiality of private telephone numbers. Syer referred to "new costs" that would be incurred by the provincial government to "redress the disclosure of such information", but gave no particulars of the kind or amount of such costs.

[27] There is no evidence before me that "phone-jamming" sessions or "campaigns" have been mounted in the past against *publicly-available* contact telephone numbers for the Premier or other officials. This would have given some weight to Syer's speculation that "phone-jamming" sessions or "campaigns" might be organized for *private* telephone numbers if they were disclosed. But I am not, without more, prepared to find that Syer's assertion about the likelihood of these things happening, or the costs he says would follow, meet the necessary standard of proof under s. 17(1).

[28] Applying the approach indicated in para. 137 of Order 02-50, I am not persuaded that the necessary reasonable expectation of harm has been established and find that the Ministry has not met its s. 17(1) burden of proof.

[29] **3.3 Personal Privacy** – The Ministry says that, if some of the disputed information is disclosed, this would result in an unreasonable invasion of the personal

privacy of third parties and refers to the affidavit of Tom Syer (paras. 5.12 and 5.13, initial submission).

[30] The Ministry relies heavily on Order No. 63-1995, [1995] B.C.I.P.C.D. No. 36, Order No. 64-1995, [1995] B.C.I.P.C.D. No. 37, and Order No. 65-1995, [1995] B.C.I.P.C.D. No. 38. It says the following (with citations omitted) about Order No. 63-1995, which Commissioner Flaherty applied in Order No. 64-1995 and Order No. 65-1995:

> 5.14 In Order 63-1995 (and again in immediately subsequent Orders), the previous Commissioner dealt with the application of section 22 to all information contained in certain telephone logs. He held in those cases that staff may well have been making personal calls, and that section 22 required the log information about such calls to be withheld under section 22. The Ministry says that the same conclusion holds here.
>
> 5.15 Because in Order 63-1995 he accepted that it would not be reasonable to require the public body to undertake what would have been necessary in order to determine exactly which information section 22 properly applied to, he upheld the public body's decision to withhold those logs in their entirety under section 22. The Ministry says that this case is directly analogous to that case, and that the same result should therefore hold here.

[31] Tom Syer's evidence, on which the Ministry relies, establishes that some third-party personal information is involved here. The Ministry says, at para. 5.15 of its initial submission, that Order No. 63-1995, is "directly analogous" to this case. It says, therefore, that the "same result should therefore hold here", *i.e.*, I should uphold its s. 22(1) decision and order it to refuse to disclose any information. For his part, the applicant says I am not bound to follow previous decisions.

[32] In Order No. 63-1995, the City of Vancouver had refused to disclose logs of telephone calls. The City contended that ss. 15, 17, 19 and 22 authorized or required it to refuse access. Commissioner Flaherty dismissed the City's arguments under ss. 15, 17 and 19, but upheld its s. 22 decision. In Order No. 64-1995 and Order No. 65-1995, he came to the same conclusion respecting telephone log information and s. 22.

[33] In Order No. 63-1995, the City argued that the considerable amount of resources that would have to be expended in going through the requested records and determining which numbers related to personal calls, and which did not, meant that the City did not have to sever the records under s. 4(2). The Ministry makes the same argument here (and I accepted similar arguments respecting severing under s. 4(2) in Order 03-16, [2003] B.C.I.P.C.D. No. 16).

[34] It is true that I am not, technically, bound to follow earlier orders under the Act. By the same token, consistency with past decisions is desirable wherever feasible as part of a principled approach to interpretation and enforcement of the Act.

[35] I decline in this case to differ from Commissioner Flaherty's approach in Order No. 63-1995, Order No. 64-1995 and Order No. 65-1995. As in Order No. 63-1995, I find that s. 22(1) requires the Ministry to refuse to disclose the disputed information and that s. 4(2) does not require the Ministry to sever the records.

[36] It follows from this that the Ministry is required by s. 22(1) to refuse to disclose the entirety of the disputed record.

4.0 CONCLUSION

[37] Because I have found that s. 25 does not require disclosure in the public interest, no order under s. 58 is necessary in that respect.

[38] For the reasons given above, I make the following orders under s. 58:

1. Subject to para. 2, below, I require the Ministry to disclose the information it withheld under s. 17(1); and

2. I require the Ministry to refuse to disclose the information it withheld under s. 22(1).

July 22, 2004

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia