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

Order F05-24

ABBOTSFORD POLICE DEPARTMENT

David Loukidelis, Information and Privacy Commissioner

August 9, 2005

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Summary: The applicant sought access to records of a police investigation into a probable homicide. Although the death occurred a number of years ago, the investigation is ongoing and s. 15 authorizes the APD to withhold the information it withheld. Section 16 also authorizes, and s. 22 requires, the APD to withhold information. The APD's decision is upheld.

Key Words: disclosure harmful to law enforcement—disclosure harmful to intergovernmental relations or negotiations—personal privacy—unreasonable invasion—investigation of a possible violation of law—public scrutiny.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 15(1)(a), 16(1)(b), 22(1), 22(2)(e), (f), (g) and (h) and 22(3)(b).

Authorities Considered: B.C.: Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34; Order 00-01, [2000] B.C.I.P.C.D. No. 1; Order 02-19, [2002] B.C.I.P.C.D. No. 19; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

1.0 INTRODUCTION

[1] This inquiry arises out of the police investigation into the apparent homicide of a young person a number of years ago. The applicant, who says he is a representative of the person's mother, made a request under the *Freedom of Information and Protection of Privacy Act* ("Act") to the Abbotsford Police Department ("APD") for records related to the investigation. The APD responded by refusing access under s. 15(1)(a) of the Act, saying the investigation was ongoing and disclosure could prejudice the outcome of the investigation.

[2] The applicant requested a review of the APD's decision. During mediation by this office, the APD confirmed its decision to apply s. 15(1)(a) to the records, citing continued

concern that disclosure of information would interfere with the investigation. The APD said that the investigation was active and it had not abandoned the possibility of recommending charges. Maintaining the confidentiality of the police file is crucial in the APD's view, "if justice is ever to be served in this case". The APD also said it is now relying also on adding ss. 16(1)(b) and 22(3)(b), but it disclosed other records that it considered were "not crucial to the integrity of the investigation" and did not fall under ss. 15(1)(a), 16(1)(b) and 22(3)(b). The records it disclosed included newspaper clippings, media releases and correspondence with the victim's mother.

[3] Mediation was otherwise unsuccessful, so I held an inquiry under Part 5 of the Act.

2.0 ISSUES

[4] The issues before me are:

1. Is the APD authorized by ss. 15(1)(a) and 16(1)(b) to refuse access to information?

2. Is the APD required by s. 22 to refuse access to information?

[5] Under s. 57(1) of the Act, the APD has the burden of proof respecting ss. 15(1)(a) and 16(1)(b) while, under s. 57(2), the applicant has the burden respecting third-party personal privacy.

3.0 DISCUSSION

[6] **3.1 Procedural Objections**—The APD objected to the applicant seeking a 21-day extension for submitting his reply to this inquiry, which he sought on the grounds that the APD had received an extension in the past, the APD's initial submission was not delivered to him in a timely way and he needed time to consult with legal counsel.

[7] The APD said the applicant was trying to split his case and that an extension would "result in a serious breach of procedural fairness and prejudice to [the APD]". It suggested that the applicant would now make a "re-formulated submission", having seen what the APD had to say. The APD also said it appeared that the applicant had taken the benefit of legal counsel over the inquiry period. In its view, the applicant should take responsibility for making timely submissions that address the inquiry issues. The applicant's initial submission dealt with the conduct of the investigation, in the APD's view, and not the inquiry issues.

[8] The Registrar of Inquiries for this office pointed out that the parties had had the same amount of time to prepare initial submissions. She also noted that the applicant had copied his correspondence to his legal counsel. She therefore decided that a 21-day extension was not reasonable but granted an extension of 14 days, in view of the fact that the applicant had not received the APD's initial submission on time.

[9] The APD repeated its objection to this extension in an October 29, 2004 letter and also raised related issues respecting submission deadlines. It said it had contacted the lawyer to whom the applicant had copied his correspondence and had been told that the lawyer was not advising the applicant in this inquiry. It also said that, despite having the burden of proof

regarding third-party personal information, the applicant had failed to address any of the s. 22 issues in this inquiry.

[10] In view of my findings in this case, I need not address the APD's allegations about a supposed "serious breach of procedural fairness and prejudice" to the APD arising from the 14-day extension granted to the applicant during the inquiry process.

[11] In a letter of November 4, 2004 the APD objected to some of the contents of the applicant's reply, saying he had dealt with matters outside the scope of this inquiry, *i.e.*, his perceptions of the conduct of the police investigation. In addition, the APD said the applicant's reply had made allegations and provided copies of newspaper articles which he could have included with his initial submission. These amounted, in the APD's view, to the introduction of new assertions and evidence to which the APD has been denied the opportunity to respond.

[12] Again, in view of my findings here, I need not address the APD's allegations about supposedly new assertions and evidence. I will say, however, that the applicant's reply submission and accompanying material addressed to some extent issues outside the scope of this inquiry into issues under the Act and to that extent I have not considered this aspect of the reply in reaching my decision here.

[13] **3.2 Harm to Law Enforcement**—The following description of the records in dispute is found in the affidavit of Robert Daniel Wight, submitted by the APD:

> 5. … investigators' reports, Crown Counsel reports, autopsy reports, witness statements, crime scene photographs, coroners' reports, computer printouts from police information data bases, police interoffice correspondence, newspaper articles, letters from family members of the victim, written correspondence from potential suspects, analysts' reports and police forensic lab reports.

[14] The APD says that the records the applicant requested were gathered for the purpose of a criminal investigation into the homicide of a young person. The APD believes the person was murdered and says it conducted the investigation with a view to gathering information to support appropriate charges under the *Criminal Code*. Although there have been periods of investigative inactivity for a number of reasons over the years, as well as the unfortunate loss of some information, the APD says it has not abandoned the possibility that the person it considers responsible for the death will be prosecuted. It therefore considers this investigation to be ongoing and active. It also says that the RCMP have co-operated with the APD from time to time in the investigation. The APD says that the Unsolved Homicide Unit of the RCMP formally assumed responsibility for conducting the investigation in late 2003 (paras. 3-9, initial submission).

[15] The APD points out that the person's mother has shown, through various communications, that she understands the investigation is still active. The APD draws my attention to Order No. 321-1999,[1] in which my predecessor found that s. 15(1)(a) applies to police records concerning an ongoing investigation into possible breaches of the *Criminal*

[1] [1999] B.C.I.P.C.D. No. 34.

Code. In the APD's view, the same finding applies to this situation (paras. 10-14, initial submission).

[16] The APD expresses concern regarding the prejudicial effect disclosure might have on procedural fairness in any resulting prosecution, as well as on the integrity of the investigation and quality of the evidence. This is because the investigation would be vulnerable to interference with police methods of gathering evidence, the APD says. The APD says the deceased's mother has informed the public of her understanding as to the progress of the investigation and descriptions of a potential suspect. While the APD is sympathetic to the mother, it is concerned that communications of this kind will interfere with the integrity of the investigation, and harm the case for the prosecution, if the records are disclosed. The APD also provides *in camera* argument, as well as open and *in camera* affidavit evidence from ADP and RCMP officers, in support of its position on s. 15(1)(a) (paras. 15-24, initial submission; Wight, Emery, Bloxham & Meachin affidavits; *in camera* affidavits).

[17] The applicant's submissions (including a statement by the deceased's mother) deal more with concerns over the conduct of the homicide investigation than with the issues before me. The applicant does try, however, to cast doubt on the APD's argument that disclosure could harm the police investigation (section 7, reply).

[18] Section 15(1)(a) of the Act reads as follows:

> **Disclosure harmful to law enforcement**
>
> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm a law enforcement matter,…

[19] I have considered this exception in past orders (see, for example, Order 00-01[2]) and will apply here the principles in those orders without repeating them. I have noted in past orders that the fact that an investigation is ongoing is not enough on its own for s. 15(1)(a) to apply. It is necessary to show that disclosure could reasonably be expected to harm a law enforcement matter, in this case, an ongoing investigation.

[20] Because some of the APD's submissions and affidavits was submitted on an *in camera* basis—which I am satisfied was appropriate here—and this is one of those cases where I am constrained in what I can say about the APD's arguments and evidence. It is however clear from them, and the disputed records themselves, that the records were gathered or created in the course of a criminal investigation for the purposes of law enforcement. I also accept on the evidence that, despite the length of time since the person's death, the investigation is still ongoing.

[21] While I am sympathetic to the mother's feelings and situation, and understand her wish to have the investigation concluded, I have concluded that disclosure of the disputed records could reasonably be expected to harm the ongoing investigation.

[2] [2000] B.C.I.P.C.D. No. 1.

This finding is amply supported by the material before me, including the *in camera* material and the records themselves. I therefore find that s. 15(1)(a) applies to the information and records in dispute, as noted in the APD's submission and copies of the records provided to me for this inquiry.

[22] I note in passing that the APD did not apply s. 15(1)(a) to records that would appear to warrant it, as their contents are similar to others to which the APD applied s. 15(1)(a). Although it is not necessary to decide this matter, as I find below that s. 16(1)(b) applies to these other records, I would be inclined to find that s. 15(1)(a) applies to most if not all of these other records as well, had the APD applied s. 15(1)(a) to them.

[23] **3.3 Information Received in Confidence from the RCMP**—The APD says s. 16(1)(b) applies to various records that the RCMP provided to the APD. The APD says that it and the RCMP have "established a working relationship of confidentiality in this Investigation, as well as generally". The APD says that it received various records implicitly or expressly in confidence from the RCMP and that these records meet the test for confidentiality that I established in Order 02-19[3]. It then provides some comments on the benefits of confidential inter-agency co-operation and argues, among other things, that the RCMP are not subject to the Act and that I cannot order them to disclose records. It provides further comment and evidence in support of its position on the confidentiality issue on an *in camera* basis (paras. 25-37, initial submission; Wight, Emery & Bloxham affidavits; *in camera* affidavit). The applicant does not specifically address s. 16(1)(b).

[24] The relevant parts of s. 16 read as follows:

> **Disclosure harmful to intergovernmental relations or negotiations**
>
> 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to …
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
>
> (i) the government of Canada or a province of Canada;
>
> (ii) the council of a municipality or the board of a regional district;
>
> (iii) an aboriginal government;
>
> (iv) the government of a foreign state;
>
> (v) an international organization of states,
>
> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, …

[25] I considered the interpretation of s. 16(1)(b) in Order No. 331-1999[4] and Order 02-19 and will apply here, without repeating them, the principles set out in those orders.

[26] As with the discussion of s. 15(1)(a) above, I am not able to say much about the APD's submissions regarding s. 16(1)(b), as to do so would reveal *in camera* argument and

[3] [2002] B.C.I.P.C.D. No. 19.
[4] [1999] B.C.I.P.C.D. No. 44.

evidence, as well as potentially revealing the contents of the records in dispute. I am, however, satisfied from a careful review of the material before me, as well the records themselves, that disclosure would reveal information received in confidence, as contemplated by s. 16(1)(b).

[27] **3.4 Personal Privacy**—The APD says that s. 22(3)(b) applies to a "substantial number" of the records, *i.e.*, "[v]irtually all of the personal information that is related to the Investigation". It does not elaborate on this argument. It also says it considered the factors set out in s. 22(2)(e) to (h) to be particularly relevant in this case (although, again, it does not explain how). Also relevant in the APD's view were the fact that the investigation is into "a possible violation of the most serious offences under the *Criminal Code*" and that the investigation is not closed. It also refers me to a number of orders which it considers to support its position on s. 22 (paras. 38-45, initial submission).

[28] Despite the fact that the applicant has the burden of proof respecting third-party privacy—a fact brought to the applicant's attention in the notice of inquiry that this office issued to the parties—his submissions do not directly address the third-party personal information issues, beyond saying that he and the deceased's mother want all the records, apparently due to what they perceive as mishandling of the investigation by the police (section 1, reply submission).

[29] I have considered the application of s. 22 in numerous orders—for example, Order 01-53[5]—and have applied here, without repeating it, the approach taken in those orders. The parts of s. 22 on which the APD relies read as follows:

> **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 …
>
> (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) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

[5] [2001] B.C.I.P.C.D. No. 56.

[30] I commented above that the records in dispute were clearly gathered as part of a criminal investigation. Again, I cannot say much about their contents but it is clear from the records themselves that the information was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code*. The great majority of the information in the records is third-party information that all clearly falls into this category and its disclosure is therefore presumed, by s. 22(3)(b), to be an unreasonable invasion of privacy.

[31] I am also satisfied that, due to the nature of the investigation and the records themselves, the circumstances in ss. 22(2)(e) to (h) are all relevant in this case and that they favour the withholding of the disputed information. The applicant's perceptions about the conduct of the police investigation are not relevant for the purposes of s. 22(2) and he has failed to discharge his burden respecting s. 22. I find that s. 22 requires the APD to withhold the third-party personal information in question.

4.0 CONCLUSION

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

1. I confirm that the APD is authorized to withhold the information it withheld under ss. 15(1)(a) and 16(1)(b); and

2. I require the APD to withhold the information it withheld under s. 22.

August 9, 2005

ORIGINAL SIGNED BY

David Loukidelis
Information & Privacy Commissioner
for British Columbia