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

Order F05-27

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

David Loukidelis, Information and Privacy Commissioner

August 25, 2005

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Summary: The applicants sought Ministry records relating to a complaint they had made about a business. Sections 13(1) and 14 authorize the Ministry to refuse disclosure and, with one exception relating to personal information of the applicants, s. 22 requires the Ministry to refuse disclosure.

Key Words: policy advice—advice or recommendations—developed by or for a public body or a minister—solicitor-client privilege—personal privacy—unreasonable invasion—submitted in confidence—employment history—public scrutiny—fair determination of rights.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 14 & 22.

Authorities Considered: B.C.: Order 02-38; [2002] B.C.I.P.C.D. No. 38; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 01-10, [2001] B.C.I.P.C.D. No. 11; Order 01-53 [2001] B.C.I.P.C.D. No. 56.

Cases Considered: *Snow v. Toth*, [1992] B.C.J. No. 1143 (S.C.); *Shaughnessy Golf & Country Club v. Uniguard Services et al.* (1986), 1 B.C.L.R. (2d) 309 (C.A.); *Hamalainen v. Sippola*, [1991] B.C.J. No. 2641 (C.A.); *M.N.R. v. Canadian Bio-Mass Research*, [1989] F.C.J. No. 30 (Fed. Ct. T.D.); *Goldman, Sachs & Co. v. Sessions*, [1999] B.C.J. No. 2185 (S.C.); *R. v. Cresswell*, [1998] B.C.J. No. 1770 (S.C.).

1.0 INTRODUCTION

[1] The applicants in this case requested records held by the Security Program Division of the Ministry of Public Safety and Solicitor General ("Ministry") under the *Freedom of Information and Protection of Privacy Act* ("Act"). The records related to a complaint they had made to the Ministry against a private investigation business. The records included correspondence and any contracts between the private investigation business and its client. The Ministry responded by disclosing a number of records and withholding information and records under ss. 13(1), 14, 15, 16, 21 and 22 of the Act. The applicants requested a review of the decision to deny access and also argued that s. 25 applied to the records.

[2] The material before me indicates that, during mediation by this office, the Ministry disclosed some more information, revised its application of ss. 14 and 22 to some records and dropped ss. 15, 16 and 21. The applicants abandoned their argument on s. 25. They also said they would not pursue s. 14 as it applied to the government's own legal advice, but that they wished all other information to which the Ministry had applied s. 14. As the matter was not completely resolved through mediation, I held an inquiry under s. 56 of the Act. This office invited submissions from the applicants, the Ministry and third parties and, with the exception of a single third party, they all provided submissions.

2.0 ISSUE

[3] The issues before me in this inquiry are:

1. Whether the Ministry is authorized by ss. 13(1) and 14 to withhold information.

2. Whether the Ministry is required by s. 22 to withhold information.

[4] Under s. 57(1) of the Act, the Ministry has the burden of proof regarding s. 13(1) and s. 14 while, under s. 57(2), the applicants have the burden regarding third-party personal information.

3.0 DISCUSSION

[5] **3.1 Background**—The two applicants are involved in a personal injury suit against a company arising out of an incident in 1999. They say they became aware at some point that a private investigation business gained access to their credit histories without their knowledge or consent. As a result, they made separate complaints in 2001 and 2002 to the Ministry's credit reporting and security program offices about the private investigation business's activities, alleging that the business had improperly gained access to their credit information. The applicants say that both regulatory agencies found that the business "acted illegally" in obtaining their credit information (paras. 3-15, applicants' initial submission).

[6] The records in dispute in this case appear to derive from the Ministry's Security Program Division's investigation of the applicant's complaint and include correspondence between that division and the private investigation business.

[7] **3.2 Procedural Objection**—The applicants objected to the submission by third parties of *in camera* material to this inquiry, saying they have been unable to respond to those submissions.

[8] As this office's inquiry policies state, a party may make an *in camera* submission where its contents could disclose information in dispute or information subject to one of the Act's exceptions. While I understand the applicants' concerns, I am satisfied in this case that the material submitted *in camera* by third parties is properly received *in camera*.

[9] **3.3 Advice or Recommendations**—The Ministry withheld a small amount of information under s. 13(1) of the Act, which reads as follows:

> **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.

[10] I have considered the interpretation of s. 13(1) in numerous orders. See, for example, Order 02-38[1]. I will apply here, without repeating them, the principles for interpreting s. 13(1) set out in those orders.

[11] The Ministry withheld two lines of information under s. 13(1) on p. 35 of the records in dispute. The information falls at the end of the recommendation section of a report, by an investigator in the Ministry's Security Program Division, on his investigation into the applicants' complaint against the investigation business.

[12] The Ministry refers me to a number of previous orders dealing with s. 13(1). It says the information it withheld constitutes a recommendation concerning a suggested course of action by a Ministry investigator to the registrar under the *Private Investigators and Security Agencies Act* ("PISA Act"). In the Ministry's view, this information clearly falls under s. 13(1). It also says that ss. 13(2) and (3) do not apply to this information (paras. 4.06-4.14, initial submission). Section 13(2) states that certain types of information may not be withheld under s. 13(1), while s. 13(3) says that s. 13(1) does not apply to information in a record that has existed for more than 10 years.

[13] The applicants suggest that the information in question falls under s. 13(2). They also reject the notion that disclosing the information would hinder the Ministry's ability to engage in full and frank discussions or to protect advice or recommendations (paras. 16-18, initial submission).

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[1] [2002] B.C.I.P.C.D. No. 38.

[14] The disputed information is, as the Ministry says, a recommendation on a suggested course of action and it may be withheld under s. 13(1). I do not see how s. 13(2)—including s. 13(2)(n)—nor s. 13(3) applies.

[15] **3.4 Solicitor-Client Privilege**—The Ministry severed and withheld a number of records under s. 14, which reads as follows:

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

[16] I have considered s. 14 in numerous orders (see, for example Order 02-01[2]) and the principles for its application are well-established. I will apply here, without repeating them, the principles set out in those orders.

[17] I will note here that the Ministry also applied s. 14 to the two lines of information to which, as I found earlier, s. 13(1) applies. In view of my s. 13(1) finding, I do not need to address whether s. 14 also applies to this information.

[18] The Ministry describes the two branches of solicitor-client privilege—legal professional privilege and litigation privilege—at paras. 4.15-4.28 of its initial submission and refers also to a number of orders on s. 14. It says the information it withheld under s. 14 involves a third party as the client of a lawyer (para. 3.04, initial submission). The Ministry says it compelled the production of this information from a third party under s. 22 of the PISA Act and that, at the time, the third party said the information was confidential and privileged and should not be disclosed to anyone else. The Ministry suggests that the compelled production under the PISA Act and the third party's claim of confidentiality and privilege are relevant in considering whether any third-party privilege has been waived. The Ministry provided additional argument on s. 14 on an *in camera* basis (paras. 4.29-4.30 and 4.34 of its initial submission).

[19] The applicants acknowledge that one of them was pursuing an insurance claim with a named insurance company at the time their credit information was accessed. They say the claim was still in the adjustment phase at that time, as shown by correspondence from the insurance company—they have provided copies to me—indicating that it was gathering information about the claim. The claim was not yet in the litigation phase, they say, and the insurance company's legal counsel was not yet involved. Therefore, they argue, there can be no argument that litigation privilege applies to the records in question. The applicants refer me to court decisions in support of their position, such as *Snow v. Toth,*[3] *Shaughnessy Golf & Country Club v. Uniguard Services et al.*[4] and *Hamalainen v. Sippola*[5] (paras. 3, 21-26, initial submission).

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[2] [2002] B.C.I.P.C.D. No. 1.
[3] [1992] B.C.J. No. 1143 (S.C.).
[4] (1986), 1 B.C.L.R. (2d) 309 (C.A.).

[20] The applicants say they assume that the law firm for the insurance company has asked that certain information be withheld on the basis of solicitor-client privilege. They say, if I understand their argument correctly, the private investigation business was never a client of that law firm and it has not been shown that the law firm acted for the defendants in the applicants' lawsuit.

[21] Further, while the applicants do not dispute that information gathered by a private investigator for a lawyer in defending a court action can be covered by "lawyer's work product privilege" or "litigation privilege", they say this is not so where there has been unlawful conduct. Even if litigation privilege did apply, the applicants say, the private investigation business's "illegal" actions invalidated any claim of litigation privilege over the disputed records. The basis for this submission is, the applicants say, the private investigation business's allegedly illegal access to their credit information, for which the business was, they argue, formally reprimanded by the Director of Credit Reporting. In the applicants' view, a breach of a regulatory statute suffices to invalidate a claim of privilege. They say that the courts in such a case will treat the privilege as having been waived and point to a number of court cases for support of their argument, including *M.N.R. v Canadian Bio-Mass Research,*[6] *Goldman, Sachs & Co. v. Sessions*[7] and *R. v Cresswell*[8] (paras. 27-39, initial submission).

[22] The Ministry says the privilege in the disputed information benefits a third party, not the Ministry. Unless the third party waives the privilege, the Ministry cannot disclose the information. The third party has not waived privilege, it says. The third party has taken the position that the information is privileged and should not be disclosed. It therefore says it has no discretion to disclose the information. It refers to Order 01-10,[9] where I discussed records subject to a third party's privilege (paras. 4.35-4.37, initial submission).

[23] I have already said that materials submitted by the Ministry and third parties—including a principal of the private investigation business (which has since split into two different businesses)—on an *in camera* basis are properly received on that basis. As has been the case in other inquiries, my ability to explain my reasoning in this case is constrained.

[24] Bearing this in mind, I will limit myself to saying that, having carefully reviewed the disputed information and the submissions and evidence before me, I am satisfied that the information to which the Ministry has applied s. 14 is privileged and therefore may be withheld under that provision.

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[5] [1991] B.C.J. No. 2641 (C.A.).
[6] [1989] F.C.J. No. 30 (Fed Ct. T.D.).
[7] [1999] B.C.J. No. 2185 (SC).
[8] [1998] B.C.J. No. 1770 (S.C.)
[9] [2001] B.C.I.P.C.D. No. 11.

[25] I also find that, in the case of information privileged to the benefit of a third party, the privilege has not been waived or lost by virtue of production of materials to the Ministry or otherwise (including on the basis of illegality, as the applicants contend).

[26] I found above that s. 13(1) applies to one withheld item on p. 35 and that there was therefore no need to make a finding on s. 14 as it relates to this item. The applicants have stated that they do not wish access to the government's own legal advice (that is, information on pp. 31 and 35 of the records in dispute). I find in any case that the information withheld on p. 31 and other information on p. 35 characterized as the government's legal advice are privileged and may be withheld under s. 14. I find that s. 14 authorizes the Ministry to refuse to disclose the information to which it has applied that exception.

[27] **3.5 Personal Privacy**—The Ministry withheld information under s. 22 of the Act. I have considered the application of s. 22 in numerous orders, for example, Order 01-53.[10] I will apply here, without repeating it, the approach taken in those orders. The relevant parts of s. 22 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 …
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny, …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights, …
>
> (f) the personal information has been supplied in confidence, …
>
> (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, …

[10] [2001] B.C.I.P.C.D. No. 56.

> (d) the personal information relates to employment, occupational or educational history, …

[28] The applicants argue that the Ministry erred in withholding information under s. 22, saying the Ministry's application of this exception is too broad. In any case, they say, and despite the fact that s. 57(2) of the Act places on them the burden of proof regarding third-party personal privacy, they are claiming "access to documents that contain material that relates to the Applicants which was unlawfully obtained by the third parties". They contend that the Ministry has the burden of proving that the applicants have no right of access to their own personal information. They then question whether the information in question relates to individuals or to corporations, suggesting that individuals working for such corporations or businesses at the time have a reduced expectation of privacy. Nor do corporations have any privacy rights, they argue, and s. 22 does not apply to the names of any firms or organizations (paras. 46-53, initial submission).

[29] The applicants believe a relevant circumstance favouring disclosure is that the information withheld under s. 22 is factual information about themselves that should not be withheld or is correspondence, e-mails, contracts and reports that do not contain personal information. Such records may contain the applicants' personal information but not that of third parties, they argue. They also say they already know the identities of some of the third parties and disclosure of their names in this case would therefore not be an unreasonable invasion of their privacy. The allegedly "unlawful conduct" of the third parties also means the third parties have effectively waived their privacy rights, the applicants suggest. Therefore, the applicants argue, the factors in s. 22(2), including s. 22(2)(c), apply to any information that falls under s. 22(3)(b) or (d) (paras. 54-63, initial submission).

[30] The Ministry says that the information that it withheld under s. 22 is information about an identifiable individual and is thus personal information. It says the information in question falls under s. 22(3)(d) of the Act because it "deals with how individuals conducted themselves during their employment, including subjective evaluations as to whether their conduct was appropriate. It refers me to previous orders where it says this type of information was found to be protected by s. 22(3)(d) (paras. 3.03, 4.38-4.44, initial submission).

[31] The Ministry then says that it collected the information in confidence during its investigation of the applicants' complaint of alleged misconduct. Accordingly, the Ministry says, the factor in s. 22(2)(f) is relevant and favours withholding the information. It also argues that other factors favour withholding the information in dispute. The first is that the information was collected for the purpose of inquiring into whether there had been any misconduct by a third party and its employees and that any finding of misconduct could potentially have resulted in a decision to cancel or suspend a licence under s. 16 of the PISA Act. Another is that the applicants have already received a copy of the decision of the Registrar under the PISA Act on their complaint, as well as information on the results of the investigation into that complaint. In the Ministry's view,

it has shown that it is accountable for its actions and the factor in s. 22(2)(a) therefore does not apply in this case (paras. 4.45-4.47, initial submission; para. 21, Kyle affidavit; para. 7, Rannaoja affidavit).

[32] The Ministry also suggests that the amount of information already disclosed is a relevant circumstance. The applicants have already received considerable information on the Ministry's investigations, it says, and s. 22(2)(a) does not weigh in favour of disclosing the information in issue here. The Ministry knows of "no compelling reasons why third-party privacy interests should be sacrificed for the purpose of providing further information to the Applicants" (para. 4, reply).

[33] A third party provided a submission, most of it *in camera* (and appropriately so), saying (without explaining how or why) that s. 22(3)(b) applies to the information in issue. The open part of the third party's initial submission says there are policy reasons why people should co-operate with investigations into possible violations of law and should be encouraged to do so without worrying the info will be disclosed under the Act. The third party also makes other comments about, he says, his not having been given a proper opportunity to respond during the Ministry's investigation. The third party also makes other comments about the investigation.

[34] He says in his reply, which was not submitted *in camera*, that the alleged misconduct happened in Alberta, such that Alberta's legislation should apply. (It is not clear if this refers to Alberta's credit-reporting legislation or its *Freedom of Information and Protection of Privacy Act*, although it appears to be the former. I do not find this relevant to this inquiry under the Act.)

[35] The Ministry applied s. 14 to much of the same information it withheld under s. 22. Because I found above that s. 14 applies, I need not consider whether s. 22 also applies to the same information. I will therefore consider only whether s. 22 applies to records to which the Ministry did not also apply s. 14, *i.e.*, parts of pp. 32-35, 77, 78 and 80-83 and all of pp. 85-94.

Unreasonable invasion of privacy

[36] Most of the withheld information in question concerns interactions between employees of the private investigation business and the Ministry's PISA investigator, their interactions with each other in relation to another complaint the applicants made, correspondence to and from the private investigation business and the Ministry investigator's comments on what the employees said and did.

[37] Despite the applicants' suggestion about the nature of the withheld information, it all relates, with one exception at the top of p. 92, to the employment history of the private investigation business's employees, as previous orders have interpreted "employment history". This information concerns their views and actions in the context of a complaint investigation, as well as the investigator's comments on and opinions of their activities. It falls under s. 22(3)(d), which raises the presumption that disclosure of this third-party

personal information would be an unreasonable invasion of third-party privacy. In view of this finding, it is not necessary to decide whether s. 22(3)(b) also applies to this information.

Relevant circumstances

[38] I accept that the employees provided the information in confidence during the complaint investigation. The factor in s. 22(2)(f) is therefore a relevant circumstance and it favours the withholding of this information.

[39] As for other factors, the Ministry's argument that the amount of information already disclosed is relevant has been rejected as irrelevant in a number of previous orders and I take the same view here. The Ministry's argument about the purpose and consequences of the investigation also has no bearing on this issue. I also do not agree with the applicants that the allegedly "unlawful conduct" of the employees of the private investigation business means that they have waived their privacy rights.

[40] The applicants provided no support for their assertion that s. 22(2)(c) is a relevant circumstance and there is nothing on the face of the records or otherwise in the material before me indicating that the withheld information would be relevant to a fair determination of the applicants' legal rights. I therefore find that s. 22(2)(c) does not apply here.

[41] I agree with the Ministry that s. 22(2)(a) also does not apply in this case. The applicants have received most of the report of the investigation into their complaint and nothing in the withheld information would shed any light on the Ministry's activities or assist in subjecting these activities to public scrutiny.

[42] To summarize, the third-party personal information falls under s. 22(3)(d). The relevant circumstance in s. 22(2)(f) favours withholding the third-party personal information and there are no relevant circumstances favouring its disclosure. The Ministry must withhold it under s. 22.

[43] As for the exception on p. 92 that I mentioned above, the information concerns the applicants and s. 22 does not apply to it. I have prepared a severed copy of this page for the Ministry to disclose to the applicants.

4.0 CONCLUSION

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

1. I confirm that the Ministry is authorized to refuse access to the information it withheld under s. 14;

2. Subject to para. 3 below, I require the Ministry to refuse access to the information it withheld under s. 22; and

3. I require the Ministry to disclose to the applicants their personal information on p. 92, a severed copy of which is provided to the Ministry with this order.

August 25, 2005

ORIGINAL SIGNED BY

David Loukidelis
Acting Information and Privacy Commissioner
for British Columbia

OIPC File No. 17522