OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order F09-18

VANCOUVER POLICE DEPARTMENT

Celia Francis, Senior Adjudicator

November 6, 2009

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Summary: The applicant requested access to records related to the VPD's homicide investigation of the 1992 death of a named individual. The VPD initially refused access to all of the records under s. 22(3)(b) of FIPPA. It later added other exceptions and disclosed some records. The VPD is required to withhold the remaining third-party personal information under s. 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a) & (d), 22(3)(a), (b) & (d), 15(1)(g), 25(1)(b).

Authorities Considered: B.C.: Order F09-19, [2009] B.C.I.P.C.D. No. 25; Order F09-20, [2009] B.C.I.P.C.D. No. 26; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 00-16, [2000] B.C.I.P.C.D. No. 19; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order F08-16, [2008] B.C.I.P.C.D. No. 28; Order No. 250-1998, [1998] B.C.I.P.C.D. No. 45; Order 01-37, [2001] B.C.I.P.C.D. No. 38.

1.0 INTRODUCTION

[1] This decision flows from the applicant's request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Vancouver Police Department ("VPD") for copies of records related to the VPD's homicide investigation of the 1992 death of an individual ("third party"). The VPD denied access to all of the requested records under s. 22(3)(b) of FIPPA. The applicant requested a review of this decision by this Office ("OIPC"), arguing that s. 25 applies in this case. During mediation of the applicant's request for review, the VPD said it would also rely on ss. 13(1), 15(1)(g), 16(1)(b), 22(1), 22(3)(a) and 22(3)(d). The matter did not settle in mediation and so an inquiry took place. The OIPC invited and received submissions from the VPD, the applicant and, as intervenor, the United Native Nations ("UNN").

[2] Although the VPD did not disclose any records during mediation, around the date initial submissions were due, it did disclose 40 pages of records: a 1987 VPD report entitled "Use of Deadly Force by Peace Officers within the Canadian Perspective", together with a covering letter; extracts from legal texts and enactments; VPD firearms regulations from 1982; newspaper clippings; the jury's recommendation from the inquest into the third party's death (page 3 of a three-page document of the Office of the Chief Coroner) which says "Due to the increase of firearms in the community, we recommend police officers receive additional training in dealing with individuals in confrontational situations";[1] and a one-page "Miscellaneous and Supplementary Report" of March 3, 1998, which says:

> This case was investigated and forwarded to Crown Counsel for a review. It was returned with a "no charge" recommendation.
>
> Because of this incident being a police shooting, a complete inquest was held by the Coroner's service.
>
> This case is concluded.

[3] The applicant made similar requests to the VPD for records related to the deaths of two other individuals, both of which also led to inquiries. I am issuing my decisions on these cases (Order F09-19[2] and Order F09-20[3]) concurrently.

2.0 ISSUES

[4] The notice for this inquiry listed the issues as follows:

1. Whether the VPD was authorized by ss. 13(1), 15(1)(g) and 16(1)(b) to withhold information.

2. Whether the VPD was required by 22(1), 22(3)(a), (b) and (d) to withhold information.

3. Whether the VPD is required by s. 25 to disclose the records.

[5] The VPD abandoned ss. 13(1) and 16(1)(b) at the inquiry[4] and so these exceptions are no longer issues.

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[1] At my request, the VPD later asked the Office of the Chief Coroner for its views on disclosure of the other two pages of this record. As a result of this consultation, the VPD disclosed the two pages with minor severing (jurors' names) under s. 22; VPD's letter of November 5, 2009. The applicant did not object.
[2] [2009] B.C.I.P.C.D. No. 25.
[3] [2009] B.C.I.P.C.D. No. 26.
[4] See para 11 of its initial submission.

[6] Section 57 of FIPPA establishes the burden of proof in inquiries. Under s. 57(1), the VPD has the burden regarding s. 15(1)(g), while under s. 57(2) the applicant has the burden of proving that disclosure of personal information of a third party would not be an unreasonable invasion of third-party personal privacy. Previous decisions of the Commissioner have held that, while s. 57 of FIPPA is silent on the burden of proof in determining whether s. 25 applies, as a practical matter, it is in the interests of each party to present evidence as to whether s. 25 applies and requires disclosure.

3.0 DISCUSSION

[7] **3.1 Procedural Matter**—The OIPC re-scheduled the due dates for submissions, first at the request of the public body and later due to a delay in the receipt of the applicant's initial submission. After correspondence between the applicant and the OIPC regarding his delays in making submissions in this and the related inquiries, the OIPC set a revised due date for reply submissions. The public body provided a reply by the revised due date but the applicant did not. The day after the revised due date, the applicant said he would provide a submission within a few days but did not. When the OIPC had not heard from the applicant for several days, it closed the inquiry. The applicant later requested and received permission to deliver a late reply submission. When he sent it, however, it was not in the form and number the OIPC requires and the OIPC declined to accept it. The applicant accepted this decision and asked that the inquiry proceed.

[8] **3.2 Records in Dispute—**The VPD described the 324 pages of responsive records as follows:

- the Report to Crown Counsel file—forwarded by the VPD to Regional Crown Counsel "with respect to a decision regarding the laying of possible charges" (pp. 2-296 of the responsive records); the VPD said these records include personal information related to the employment, occupational and educational history of third parties (pp. 146, 147, 185-196, 197, 201, 202) and personal information that relates to a medical history, diagnosis, condition, treatment or evaluation of the third party (pp. 115-140)

- the Crown Counsel Report—Regional Crown Counsel response to the Report to Crown Counsel File (pp. 297-310)

- miscellaneous records—these include a VPD miscellaneous, supplementary and continuation report (pp. 311-320); the VPD said these "miscellaneous records" were all "compiled as part of an investigation in a possible violation of law"[5]

[5] Paras. 4-9, VPD's initial submission.

[9] **3.3 Public Interest Override—**Section 25 requires public bodies to disclose information in certain circumstances. The relevant part reads as follows:

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

[10] A number of orders have dealt with s. 25 and I have applied the same principles here.[6]

[11] The general thrust of the applicant's arguments on s. 25 is that there is an urgent and compelling need to subject the police and police oversight systems to public scrutiny regarding the deaths of aboriginal people in custody. The applicant said that he has been collecting information "on over 50 Aboriginal deaths in police custody since 1967", for use in a documentary to be aired on CBC television. In his view, these deaths are "symptomatic of systemic or structural flaws" in police investigations and police oversight mechanisms. He alleged that there have been "past cover-ups of criminal acts" by the VPD. He expressed concern that the public will see continued resistance by police to having their actions subject to investigation as an indication that they have something to hide.[7]

[12] The VPD rejected the applicant's contentions that there is an urgent and compelling interest requiring immediate disclosure in this case. It said that it provided Regional Crown Counsel with full disclosure of the evidence related to the third party's death in its Report to Crown Counsel. This gave Crown counsel the opportunity to assess the evidence and determine whether charges were appropriate in this case. In addition, the coroner's inquest provided a forum for informing the public of the VPD's activities and resulted in the jury's findings and recommendations, based on the evidence. In the VPD's view, its activities received full scrutiny in those processes. The VPD also argued that the Commissioner has said that s. 25 is not a vehicle for investigating a public body's activities.[8]

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[6] See Order 02-38, [2002] B.C.I.P.C.D. No. 38, for example.

[7] Pages 3-8, applicant's initial submission; see also applicant's request for records. The applicant also referred to the Josiah Wood *Report on the Review of the Police Complaints Process in British Columbia* which, he said, found that one out of five internal investigations did not meet minimal professional standards.

[8] Paras. 17-28, VPD's reply submission. The VPD referred to relevant orders in support of this argument, including Order 00-16, [2000] B.C.I.P.C.D. No. 19.

[13] I accept that there is a public interest in scrutinizing the police's activities and police oversight mechanisms. I also accept that the records may be of interest to the applicant for the purposes of preparing a television documentary. These are not the tests for s. 25(1)(b), however. The third party died in 1992. The material before me shows that, at the time, there was an extensive police investigation, a review by Crown Counsel and a public coroner's inquest, as well as media coverage of the matter. I see no urgent and compelling interest here that requires immediate release of the 17-year old records in dispute. I find that s. 25(1)(b) does not apply.

[14] **3.4 Harm to Third-Party Privacy—**Many previous orders have considered the application of s. 22[9] and I take the same approach here. The relevant provisions are these:

> **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, …
>
> (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people, …
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> (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,
>
> …
>
> (d) the personal information relates to employment, occupational or educational history, …

[9] See Order 01-53, [2001] B.C.I.P.C.D. No. 56 and Order 02-56, [2002] B.C.I.P.C.D. No. 58, for example.

Unreasonable invasion of third-party privacy

[15] The VPD made the following arguments on this issue:

- the records consist entirely of third-party personal information related to the homicide investigation of the third party

- "personal information" applies to both living and deceased individuals and the third-party personal information in this case includes names, addresses, dates of birth of adult individuals whom the VPD interviewed or who were mentioned in interviews as part of that investigation; and witness statements and documents the police generated, such as various reports and notes

- the information in the records was compiled and is identifiable as part of an investigation into a possible violation of law, the *Criminal Code*, and thus all of it falls under s. 22(3)(b)[10]

- the s. 22(3)(b) information includes information related to third-party employment and educational history, compiled through interviews and other means as part of the investigation into the shooting death of the third party, which falls under s. 22(3)(d)[11]

- the s. 22(3)(b) information also includes records related to the autopsy and post-mortem examination of the third party, as well as related photographs, and laboratory analyses, which falls under s. 22(3)(a)

[16] The VPD also argued, in the alternative, that it is not reasonable to sever the records under s. 4(2).[12] This last argument has no bearing on whether or not s. 22 applies to withheld information but rather to whether or not it is reasonable to sever excepted information (personal or non-personal) from a record and disclose the remainder.[13]

[17] The notice for this inquiry stated that the applicant had the burden of proof regarding third-party personal information. In such cases, an applicant's initial submission is expected to provide argument and evidence to support his or her case that s. 22 does not apply. However, the applicant said in his initial submission that he would wait to respond on the s. 22 issues until his reply submission. For reasons noted above, the OIPC declined to accept the applicant's late reply submission. It is however clear from the applicant's other material[14] and his purpose for making the request that he is aware of the general character of the records as relating to a police homicide investigation.

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[10] Paras. 13-28, VPD's initial submission.
[11] Paras. 34-42, VPD's initial submission.
[12] Paras. 29-30, VPD's initial submission.
[13] See Order F08-16, [2008] B.C.I.P.C.D. No. 28, at paras. 36-37.
[14] His request, request for review and s. 25 arguments.

[18] The records in dispute arose out of a criminal investigation into the third party's death and include medical records about the third party and the employment and educational history information of third parties. The VPD accurately described the records above as "compiled and identifiable as part of an investigation into a possible violation of law" and I agree they contain third-party personal information, all of which falls under s. 22(3)(b). I also agree that some of the information in the same pages falls under s. 22(3)(a) and (d), as the VPD argued. Disclosure of this personal information is therefore presumed to be an unreasonable invasion of third-party privacy.

Relevant circumstances

[19] The UNN, the intervenor, said it is "an Aboriginal organization that represents the socio-economic and cultural interests of off-reserve Aboriginal people in British Columbia, both rural and urban". The UNN argued that the circumstances of the third party's death are "worthy of consideration and investigation". With reference to s. 22(2)(d), the UNN argued that the records in dispute are "a critical part of researching or validating a grievance of aboriginal people" and said it is troubling that the VPD is citing the third party's privacy rights to refuse access to the records. The UNN also referred to Order No. 250-1998[15] in which the applicant, the Te'mexw Treaty Association, relied on s. 22(2)(d).[16]

[20] The VPD rejected the UNN's arguments on s. 22(2)(d), saying the applicant has characterized himself as an "independent production company" and has explicitly stated he requested the records for use in a CBC television documentary. While First Nations appear to be aware of and support the applicant's "journalistic exercise", the VPD said, "the Applicant has provided no evidence that he is working on behalf of First Nations organizations, nor engaged in an official study or research endeavour on behalf of 'Aboriginal' persons". The VPD argued that s. 22(2)(d) does not outweigh the "relative high sensitivity" of the information. The VPD reiterated that the Regional Crown Counsel and the Coroner's inquest provided for scrutiny of the VPD's actions and it is neither necessary nor appropriate to disclose the personal information in question for "unfettered use in a film documentary".[17]

[21] I accept that the applicant and the intervenor have concerns respecting the deaths of aboriginal people in police custody. I do not however consider that any issues arising out of these deaths are "claims, disputes or grievances of aboriginal people" for the purposes of s. 22(2)(d).[18] I find that s. 22(2)(d) is not a relevant circumstance here.

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[15] [1998] B.C.I.P.C.D. No. 45.
[16] UNN's submission.
[17] Paras. 4-16, VPD's reply submission. The latter argument does not relate to s. 22(2).
[18] See Order 01-37, [2001] B.C.I.P.C.D. No. 38, where at para. 38 the Commissioner said this about s. 22(2)(d): "In my view, the Legislature intended s. 22(2)(d) to refer to "people" in a collective sense, *i.e.*, to any people in the sense of a First Nation, Indian band under the *Indian*

[22] The applicant's and VPD's arguments on s. 25 (see above) also have some relevance to the factor in s. 22(2)(a) and I have therefore considered them here as well. The UNN also made general public interest arguments on the need for scrutiny of the deaths of the third party and other aboriginal people in custody.[19] I have considered all of these arguments carefully but, for reasons I gave above in my finding on s. 25, I find that s. 22(2)(a) does not apply here.

Conclusion on section 22

[23] I found above that ss. 22(3)(a), (b) and (d) apply to the records in dispute and that there are no relevant circumstances favouring disclosure. I therefore find that s. 22(1) requires the VPD to withhold the information in its entirety.

[24] **3.5 Exercise of Prosecutorial Discretion—**This section 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
>
> …
>
> (g) reveal any information relating to or used in the exercise of prosecutorial discretion, …

[25] The VPD argued that s. 15(1)(g) authorized it to withhold the Report to Crown Counsel file and the Crown Counsel Report. It said that in May 1992 the VPD forwarded the Report to Crown Counsel file to Regional Crown Counsel for a decision regarding the laying of possible charges. Regional Crown Counsel returned the file to the VPD in September 1992, having completed his review of the March 1992 fatal shooting. The VPD argued that it is clear from numerous references Regional Crown Counsel made in his report to information in the Report to Crown Counsel that he used the information, both in the Report to Crown Counsel and in his own report, in the exercise of his prosecutorial discretion.[20]

Act or other distinct aboriginal people. The section is aimed at the claims, disputes or grievances of peoples, not individuals. … "

[19] UNN's submission. The VPD argued that no relevant circumstances favour disclosure; para. 32, VPD's initial submission.

[20] Paras. 48-67, VPD's initial submission. The applicant made no submissions on this exception in his initial submission. The VPD provided new affidavit evidence in support of s. 15(1)(g) with its reply, although it did not explain why it had not provided this evidence with its initial submission. The applicant did not have an opportunity to comment on this new evidence but, as I have decided I need not deal with s. 15(1)(g), this is not an issue.

[26] The VPD's arguments have merit. I have however decided I do not need to consider s. 15(1)(g), as I found above that s. 22(1) applies to the withheld personal information in its entirety.

4.0 CONCLUSION

[27] For reasons given above, I require the VPD to refuse the applicant access to the remaining withheld records in their entirety under s. 22(1).

[28] Given my findings above, no order is necessary respecting s. 15(1)(g) or s. 25(1)(b).

November 6, 2009

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File No. F07-32148