



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

Order F09-19

VANCOUVER POLICE DEPARTMENT

Celia Francis, Senior Adjudicator

November 6, 2009

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Summary: The applicant requested access to records related to the 1989 death of a named individual. The VPD initially withheld all records under s. 22(3)(b). It later added other exceptions and disclosed a few pages. The VPD are required to withhold the remaining third-party personal information under s. 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 15(1)(a), 16(1)(b), 22(1), 22(2)(a) & (d), 22(3)(a) & (b), 25(1)(b).

Authorities Considered: **B.C.:** Order F09-18, [2009] B.C.I.P.C.D. No. 24; 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 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order F05-24, [2005] B.C.I.P.C.D. No. 32; Order F08-16, [2008] B.C.I.P.C.D. No. 28; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order 02-19, [2002] B.C.I.P.C.D. No. 19.

1.0 INTRODUCTION

[1] The applicant requested access under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) to Vancouver Police Department (“VPD”) records related to the 1989 death of a named individual. The applicant said he was requesting the records, as a matter of public interest, for use in a documentary to be aired on the CBC. The VPD responded by denying access to the records in their entirety under s. 22(3)(b) of FIPPA.

[2] The applicant requested a review of this decision by this Office (“OIPC”), saying the subject of his investigation was the police, not the deceased individual, and that s. 25 was applicable. During mediation of the request for review, the VPD said it would also rely on ss. 13(1), 15(1)(a), 16(1)(b), 22(1), 22(3)(a) and 22(3)(d). The request for review did not settle and the matter proceeded to inquiry. The OIPC invited representations from the applicant, the VPD and, as intervenor, the United Native Nations. The applicant and the VPD made submissions but the intervenor did not.

[3] Although the VPD did not disclose any records during mediation, it did disclose a few pages of records around the date initial submissions were due. These records consisted of a number of newspaper clippings and the page containing the recommendations of the coroner’s jury from Verdict at Coroner’s Inquest on the third party’s death. The VPD later disclosed the first two pages of this three-page record, severing only the names of the jurors under s. 22.¹

[4] The applicant made similar requests to the VPD for records related to the deaths of two other named individuals, both of which also led to inquiries. I am issuing my decisions on these cases (Order F09-18² and Order F09-20³) concurrently.

2.0 ISSUES

[5] The notice for this inquiry stated that issues are:

1. Whether the public body is authorized by ss. 13(1), 15(1)(a), and 16(1)(b) to withhold the records.
2. Whether the public body is required by ss. 22(1), 22(3)(a), 22(3)(b) and 22(3)(d) to withhold the records.
3. Whether the public body is required by s. 25 to disclose information to the public.

[6] Section 57 of FIPPA establishes the burden of proof in inquiries. Under s. 57(1), the VPD has the burden regarding ss. 13(1), 15(1)(a) and 16(1)(b), 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

¹ Letter of November 5, 2009. This occurred as a result of my request that the VPD consult the Office of the Chief Coroner on the remainder of this record. The applicant did not object to the severing.

² [2009] B.C.I.P.C.D. No. 24.

³ [2009] B.C.I.P.C.D. No. 26.

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 Records in Dispute**—The VPD described the 584 pages of responsive records as follows: investigators' reports and reviews pertaining to the homicide of the third party; other investigations reviewed as part of that investigation; autopsy photographs and reports; witness and police statements; crime scene photographs; coroners' reports; computer printouts from police information databases; police interoffice correspondence; investigation, follow-up and analysts' reports; police forensic lab reports; third-party criminal history and images; jail booking sheets of the third party and other third parties; and the third party's medical records.⁴

[8] **3.2 Public Interest Override**—The relevant part of s. 25 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.

[9] A number of orders have dealt with s. 25 and I have applied the same principles here.⁵

[10] The applicant argued that there is an urgent and compelling public interest in disclosure of the records because of alleged flaws in the police investigation of the third party's death and in the police oversight mechanism. He referred to a number of orders dealing with public interest fee waivers in support of his position.⁶

[11] The VPD denied that there is an urgent and compelling public interest in disclosure, pointing out that the coroner's inquest scrutinized its activities and that the coroner's jury issued findings and recommendations. The VPD also reminded me that the Commissioner has said that s. 25 is not an investigative tool for those wanting to examine the affairs of a public body.⁷

⁴ Para. 10, VPD's initial submission.

⁵ See Order 02-38, [2002] B.C.I.P.C.D. No. 38, for example.

⁶ Page 8, applicant's initial submission; pp. 16-21, applicant's reply submission.

⁷ Paras. 3-13, VPD's reply submission.

[12] While the public may be interested in disclosure of the records, this is not the test, as many orders have confirmed. Similarly, any public interest in disclosure is not the issue. The applicant's argument that there is an urgent and compelling interest in disclosing these 20-year old records is not persuasive. The records show that there was an extensive police investigation at the time, as well as a public coroner's inquest. I see no urgent or compelling interests at stake here requiring disclosure "without delay". The applicant's reliance on public interest fee waiver orders on this topic is also misplaced. The test in such cases does not involve an assessment of the urgency or compelling nature of the situation. I find that s. 25(1)(b) does not apply.

[13] **3.3 Advice or Recommendations**—Section 13(1) says this:

Policy advice or recommendations

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.

[14] The VPD did not provide any argument on s. 13(1), although its decision letter relied on this exception and the notice for this inquiry listed it as an issue.⁸ This would normally mean that the VPD had not met its burden regarding this exception and I would thus find that s. 13(1) does not apply. Given my finding on s. 22(1), however, I need not consider s. 13(1).

[15] **3.4 Third-Party Privacy**—Many previous orders have considered the application of s. 22⁹ 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, ...

⁸ The VPD did not explain why it failed to address s. 13(1) although this may be, as the applicant pointed out, because under s. 13(3), s. 13(1) does not apply to information in records that are more than 10 years old. The records in this case date back to the late 1980s and early 1990s.

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.

- (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,

Unreasonable invasion of third-party privacy

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

- most if not all of the information in dispute consists of third-party personal information related to the homicide investigation of the third party
- this information therefore falls under s. 22(3)(b), as it was compiled and is identifiable as part of an investigation into possible violation of law, the *Criminal Code*
- s. 22(3)(b) applies to living and deceased individuals, whether or not the investigation is over and regardless of whether the information relates to someone who did not violate the law
- previous orders have found that the deceased have privacy rights
- in Order F05-24,¹⁰ the Commissioner found that s. 22 required the Abbotsford Police Department to withhold information related to a criminal investigation into a death that had occurred some years before but was still ongoing at the time of the inquiry¹¹

[17] The VPD also argued that the records include autopsy and post-mortem examination reports of the third party, his medical charts, related photographs and laboratory analyses, and are therefore the third party's medical information as set out in s. 22(3)(a).¹²

¹⁰ [2005] B.C.I.P.C.D. No. 32.

¹¹ Paras. 9-24, VPD's initial submission; paras. 9-12, Porteous affidavit. The VPD referred to s. 22(3)(d) in its second decision letter but provided no argument on this provision. I could find no third-party employment history in the disputed records. I do not in any event need to consider this section, given my findings on ss. 22(3)(a) and (b).

¹² Paras. 31-36, VPD's initial submission. The VPD said that s. 22(3)(a) applies to pp. 227-257 and 262-292 of Binder #1 and pp. 5-8 and 142-149 of Binder #2.

[18] The VPD argued, as part of its submission on s. 22, that it is not reasonable to sever the records under s. 4(2).¹³ This last argument has no bearing on whether or not s. 22 applies to withheld information but rather on whether it is reasonable to sever excepted information (personal or non-personal) from a record and disclose the remainder.¹⁴

[19] As the applicant himself acknowledged, the records in dispute arise out of a criminal investigation into the third party's death and include medical records about the third-party.¹⁵ The VPD accurately described the records (see para. 7 above) and I agree they contain third-party personal information that falls under ss. 22(3)(a) and (b). Disclosure of this personal information is therefore presumed to be an unreasonable invasion of third-party privacy.

Relevant Circumstances

[20] The VPD does not believe any relevant circumstances favour disclosure in this case¹⁶ while the applicant raised ss. 22(2)(a) and (d) as factors weighing in favour of disclosure.¹⁷

[21] The applicant's submission indicates that he is researching the deaths of aboriginal people in custody.¹⁸ He raised the possibility that the police beat up the third party while the third party was in the VPD's custody. He also argued there was conflicting testimony at the inquest as to what happened while the third party was in the Vancouver city lock-up. He suggested that the incident "was covered up and conveniently ignored".¹⁹ In his view, "police oversight systems are fundamentally flawed" and the third party's death—and the VPD itself—must therefore be investigated and subject to public scrutiny.²⁰ He also argued "the impact of these flaws is disproportionately borne by British Columbia's Aboriginal population".²¹

¹³ Paras. 25-27, VPD's initial submission.

¹⁴ See Order F08-16, [2008] B.C.I.P.C.D. No. 28, at paras. 36-37.

¹⁵ Pages 4 and 9, applicant's reply submission. He said this was why he was asking for them.

¹⁶ Para. 2, VPD's reply submission.

¹⁷ Page 6, applicant's initial submission; pp. 2-3, applicant's reply submission. The applicant's submissions also cite ss. 22(2)(b) and (d) as relevant factors but he provided no argument on them. I see nothing in the material before me to indicate that these sections apply here.

¹⁸ See p. 3, applicant's reply submission. The newspaper clippings the VPD disclosed indicate that the third party, who was aboriginal, died after being released from police custody and that his death was apparently as a result of a blow to his abdomen. It also appears that there was an issue about when and where the third party received his injuries. Exhibit "C", VPD analyst's affidavit.

¹⁹ Page 1, applicant's reply submission.

²⁰ Pages 3, 6 & 9, applicant's initial submission; pp. 10-11, applicant's reply submission. The applicant also said he intended to put the records before experts for scrutiny of the autopsy findings and the police investigation.

²¹ Page 2, applicant's reply submission.

[22] I do not agree with the applicant that disclosure would add to the public's understanding of the VPD's investigation into the third party's death. As noted elsewhere, the records show that there was an extensive police investigation into the homicide and that the coroner's inquest aired a number of issues surrounding the third party's death. Both activities received extensive media coverage. I do not consider that disclosure of the records themselves would add meaningfully to the public's understanding of the investigation and I find that s. 22(2)(a) does not apply here.

[23] Given the sensitivity of the personal information in dispute in this case, I also do not accept the applicant's apparent suggestions that the passage of time since the third party's death in 1989 has diminished any impact on the third party's privacy.²²

Conclusion on section 22

[24] I found above that ss. 22(3)(a) and (b) apply to the records in question and that no relevant circumstances favour disclosure. The applicant has failed to discharge his burden respecting s. 22. I therefore find that s. 22(1) requires the VPD to withhold the remaining disputed records in their entirety.

[25] **3.5 Harm to Law Enforcement**—The VPD said that the records pertain to an unsolved homicide from 1989 and they consider the status of this particular criminal investigation to be “open” and ongoing. The VPD said it is not unusual for them to receive tips years after the fact which lead to cases, including homicides, being solved. From time to time, as resources permit, it reviews historical homicide files and this case will be the subject of a review by the VPD's Major Crime Section. The VPD also said that, if appropriate, this file will also be the subject of review by the Provincial Unsolved Homicide Unit, which solves the majority of the homicide investigations it undertakes. The VPD argued that, despite the length of time since the third party's death, disclosure of the records in dispute could, for a number of reasons, reasonably be expected to harm the investigation.²³

²² Pages 5 & 9 of applicant's reply submission indicate that he believes this factor is relevant. He also appeared to argue that it would be relevant to consider any view the third party's relatives may have on possible disclosure of the records. He provided no such information however and there is thus in my view no basis for considering this factor.

²³ Paras. 46-54, VPD's initial submission; VPD's initial submission; paras. 8-13, Porteous affidavit; Exhibit “D”, VPD civilian analyst's affidavit. Exhibit “D” is a document prepared by a VPD detective seconded to the Provincial Unsolved Homicide Unit. Exhibit “D” states, among other things, that disclosure could inform a suspect that he was or was not a suspect, could make it difficult to corroborate or verify information and could taint witnesses' accounts of events. The VPD also referred to Order F05-24, [2005] B.C.I.P.C.D. No. 32, in support of its position.

[26] The applicant acknowledged that the records relate to an investigation into the third party's death. He suggested however that because the investigation is over and the fact of the investigation is public, he should have access to the records.²⁴

[27] Section 15(1)(a) says this:

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, ...

[28] The VPD arguments have merit. While I cannot say much about the contents of the records, I can say that they support the VPD's argument that disclosure might reveal information that could harm the investigation, in ways the VPD contended, even given the length of time since the third party's death. I have however decided I need not deal with s. 15(1)(a), as I found above that s. 22(1) applies to all of the remaining personal information in dispute.

[29] **3.6 Information Received in Confidence**—The VPD argued that s. 16(1)(b) applies to CPIC²⁵ correspondence received in confidence from the RCMP and other agencies, pertaining to third-party victims and suspects. It also noted that previous orders have found that information in the CPIC system is not to be disclosed by any other police organization or agency unless that body was the one that entered the information in the CPIC system.²⁶ The VPD said that the CPIC records in this case contain information that agencies other than the VPD inputted into the system. In support of its position, the VPD provided, on an *in camera* basis, a brief extract from the CPIC Reference Manual.²⁷

[30] The applicant generally questioned the VPD's arguments and pointed out that this exception is discretionary.

[31] Section 16(1)(b) reads 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

...

²⁴ Page 5, applicant's initial submission.

²⁵ Canadian Police Information Centre.

²⁶ In this regard, the VPD referred to relevant British Columbia and Ontario orders.

²⁷ Paras. 37-45; Exhibit "A", VPD civilian analyst's affidavit.

- (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

[32] The VPD's argument and evidence on this issue are not compelling and not up to the standard that previous orders have required for establishing that this exception applies.²⁸ The brief manual extract referred to above provides some support for its position. More detailed documentary evidence would, however, have been helpful, for example, documents describing the operation of the CPIC system and the confidential receipt of information in the system, including any relevant memoranda of understanding. Relevant affidavit evidence from VPD officers or others with direct knowledge and experience in the confidential receipt of information through the CPIC system would also have been desirable. I have however decided I do not need to consider whether s. 16(1)(b) applies in this case, as I have already found that s. 22(1) applies.

4.0 CONCLUSION

[33] For reasons given above, under s. 58, I require the VPD to withhold the disputed information in its entirety under s. 22(1).

[34] Given my findings on s. 22(1), no order respecting s.15(1)(a) or s. 16(1)(b) is necessary.

November 6, 2009

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File No. F07-32149

²⁸ See, for example, Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44 and Order 02-19, [2002] B.C.I.P.C.D. No. 19.