

COPY

Date: 20091112
Place: Vancouver

In the Matter of:

**The *Freedom of Information and Protection of Privacy Act*,
R.S.B.C. 1996, c. 165 (the "Act")**

And in the Matter of:

An Adjudication Under Section 62 of the *Act*,

Requested by C.S. on April 23, 2009

Reasons for Decision

of the

Honourable Madam Justice Griffin

Counsel for the Commissioner: S.E. Ross

On his own behalf: C.S.

Written Submissions of C.S. dated: July 11, 2009
August 18, 2009
September 2 and 19, 2009
and October 19, 2009

Written Submissions of the Office of the Information
and Privacy Commissioner dated: September 10, 2009

INTRODUCTION

[1] This matter has been framed as an application by C.S. pursuant to s. 62 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*] for a review of the decision made by the Office of the Information and Privacy Commissioner of BC (the "OIPC") on April 20, 2009 (the "Decision"). The Decision refused the request by C.S. for disclosure of certain information in the files of the OIPC, specifically, the records of the OIPC's handling of the privacy complaint made by C.S. against the Vancouver Police Department in 2005. C.S. sought a review of this Decision by letter dated April 23, 2009 to the Minister of Labour and Citizens' Services.

[2] I have been designated as an adjudicator under section 60 of the *FIPPA*, to rule on the application for review of the Decision and have asked for and received written submissions from C.S. and from the OIPC. This is my ruling with respect to this application.

BACKGROUND

[3] By letter dated January 12, 2005, C.S. through his lawyer, Mr. Phil Rankin, complained to the OIPC regarding an issuance of a public warning by the Vancouver Police Department (the "VPD") about C.S. C.S. alleged that the VPD had issued a public warning from the Sexual Offence Squad's High Risk Offender Unit about C.S. Mr. Rankin complained that this warning was a serious breach of the *FIPPA* because it falsely labelled C.S. as a dangerous sexual offender. C.S. had been convicted of certain violent offences but not sexual offences. Mr. Rankin asked the OIPC to take immediate steps to investigate the matter and if necessary, to call a public hearing.

[4] In a letter dated March 8, 2005 from the OIPC to Mr. Rankin, a Portfolio Officer of the OIPC indicated that she had been authorized, under s. 42(2) of the *FIPPA*, to investigate the complaint and to negotiate a settlement of the issues where appropriate. However, the Portfolio Officer indicated that on the request of

the VPD in February 2005, she agreed to refrain from intervening in order to give the VPD an opportunity to settle the matter with C.S. directly.

[5] The March 8, 2005 letter from the OIPC to Mr. Rankin referred to a letter dated February 23, 2005 from the VPD to Mr. Rankin. In this letter the VPD apparently defended its actions by stating that in the text of the warning no mention had been made of C.S. in relation to sexually related offences; rather, the text highlighted that his history consisted of violence and property related offences. The VPD's letter also apparently further indicated that, in response to this complaint, the VPD would change the way future public warnings are issued by citing only a specific Unit or Section as their source or simply putting 'Vancouver Police Department' on the warning.

[6] As a result of the purported communication by the VPD to Mr. Rankin and the VPD's decision to change future public warnings, the Portfolio Officer stated in the March 8, 2005 letter from the OIPC that she considered that the matter had been resolved, and she had closed the file. The wording in the letter implied that the OIPC did no investigation of its own but rather, simply accepted the VPD position, with respect to future public warnings, as ending the matter.

[7] C.S. claims that he never received the OIPC March 8, 2005 letter written to Mr. Rankin. He also claims that neither he nor Mr. Rankin ever received the VPD letter of February 23, 2005 to Mr. Rankin, referred to in the OIPC letter.

[8] Further, C.S. claims that as of March 2005, Mr. Rankin was no longer his lawyer. As a result, C.S. asserts that he never received any word from the OIPC personally about the investigation -- whether any investigation was carried out and whether any conclusion or settlement was made.

[9] C.S. wrote a letter to the OIPC by fax dated April 14, 2009 to try to follow up with the outcome of his complaint. In his April 14, 2009 letter to the OIPC, C.S. asked if there had been any investigation of his complaint against the VPD. Also, in the closing paragraph of his letter to the OIPC, C.S. stated:

Can you make inquiries at this time and tell the VPD that they should be taking me off their high risk offender media release radar? Can you please share what information you do have so that I can get a better idea of who made this happen and why?

[10] The OIPC treated the above sentence as a request for access to records under *FIPPA* (ss. 4 and 5). The OIPC considered this a request to access the records of the OIPC's investigation and disposition of C.S.'s privacy complaint against the VPD.

[11] In the Decision letter dated April 20, 2009, Catherine Tully, A/Executive Director of the OIPC, responded to the April 14, 2009 letter from C.S. and stated that she did review the documents in his file but "there is no record in that file that is, in my opinion, responsive to your request". Ms. Tully stated that the OIPC letter of March 8, 2005 from the Portfolio Officer to Mr. Rankin identified that the OIPC did not conduct an investigation because the VPD asked to settle the matter directly with C.S., and that settlement had occurred.

[12] Ms. Tully added in the OIPC Decision letter of April 20, 2009 to C.S.: "[y]ou should also be aware that even if any responsive records existed, we would not disclose them to you for the following reason". The letter then stated that the records were operational records of the OIPC, and cited s. 3(1)(c) of the *FIPPA* for the authority that such records were excluded from disclosure. Ms. Tully then suggested to C.S. that if he was unhappy with this response he could ask an adjudicator under s. 62 of the *FIPPA* to review it. The April 20, 2009 letter from the OIPC to C.S. also stated that an Intake Officer would contact C.S. with respect to the issues in the remainder of C.S.'s letter.

[13] C.S. then wrote to the Minister of Labour and Citizens' Services by letter dated April 23, 2009, asking that an adjudicator review the April 20, 2009 OIPC response to his request for information. C.S. complained that the VPD letter was never given to him. He also stated "[a]t any rate the VPD response was not adequate in absence of an apology and compensation for the position this slander has placed me in."

[14] This matter was then referred to me, as adjudicator, to review the Decision i.e. to adjudicate the issue of whether or not C.S. should be granted access to the records of the OIPC in relation to his complaint against the VPD.

DISCUSSION AND FINDINGS

Preliminary Issue: What Is This Adjudication About?

[15] There may be confusion in this matter about what solution or remedy C.S. is seeking. Before I deal with the access to information request, I first wish to address how the issue is framed in this case. Or, to put it another way, I wish to make clear what this adjudication is about, and what it is not about.

[16] The OIPC, in its Decision of April 20, 2009, framed C.S.'s concerns in his letter of April 14, 2009 as an access to information request under ss. 4 and 5 of the *FIPPA*: that C.S. sought access to information held by the OIPC regarding his 2005 complaint and the subsequent OIPC investigation or decision not to investigate.

[17] I accept that access to the OIPC's files is an aspect of C.S.'s April 14, 2009 letter. But in the larger context, C.S.'s correspondence indicates that access to information is not C.S.'s only concern. Rather, C.S. is concerned with the fact that the OIPC decided not to investigate his claim and considered the matter resolved as a result of the VPD's letter to his lawyer Mr. Rankin, dated February 23, 2005, a letter which C.S. says neither he nor his lawyer have seen. C.S. expresses concern that the VPD misled the OIPC. It may be that the OIPC Intake Officer, referred to in the Decision letter, has followed up with C.S. in respect of these matters, but whether or not that is so is not relevant to my role.

[18] C.S. is self-represented and the process under the *FIPPA* is not easy to understand. It is therefore important that I make clear to C.S. that my role as adjudicator is not to review the adequacy of the OIPC investigation and response to C.S.'s complaint against the VPD. Nor is it my role to investigate the allegation that C.S. was improperly named in the VPD sexual offender media release website.

[19] If C.S. is seeking to investigate the OIPC's handling of his privacy complaint against the VPD, then it appears that the remedy C.S. should have been seeking is judicial review of the OIPC's decision set out in the OIPC letter of March 8, 2005 to Mr. Rankin, or any subsequent decision on the substance of his complaint against the VPD, if there is one. The March 8, 2005 OIPC decision was to treat C.S.'s complaint as resolved without investigation, based primarily on advice the OIPC had received that the VPD had sent a letter to Mr. Rankin dated February 23, 2005.

[20] A review of the OIPC decision not to investigate C.S.'s complaint, and to treat it as resolved, would require a different process than the process before me. The process to follow would appear to be that set out in the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[21] Under s. 62(1) of the *FIPPA*, my role as adjudicator is confined to reviewing the Decision of the OIPC, made by letter dated April 20, 2009, not to allow C.S. access to the information he requested. My role is to determine whether or not that Decision was made in accordance with the *FIPPA* (*Mr. and Mrs. Y. v. Information and Privacy Commissioner* (October 08, 2003) at para. 11; *J. and D.S. v. Information and Privacy Commissioner* (December 05, 2008) at para. 12).

[22] To be clear, as an adjudicator in this matter, I have no jurisdiction to inquire into C.S.'s privacy complaint against the VPD, or to review the OIPC's decision not to investigate C.S.'s complaint, or to review any of the procedures taken by the OIPC with regard to C.S.'s complaint, aside from the access to information request. These inquiries and reviews might be appropriate in a judicial review of the matter but this is not a judicial review hearing.

[23] I will turn now to the issue that is before me, adjudication of C.S.'s request for access to information from the OIPC, as refused in the OIPC Decision of April 20, 2009. This is the sole issue I have jurisdiction to adjudicate in this matter.

Access to Information Request

[24] The issue in this adjudication is whether the OIPC, by way of its Decision letter dated April 20, 2009 to C.S., was correct to refuse access to the information requested by C.S regarding the OIPC's investigation into his complaint about the VPD in 2005.

[25] The precise issue is whether the requested records are exempt from the disclosure requirements of the *FIPPA* by virtue of s. 3(1)(c) of the *FIPPA*.

[26] Section 5 of the *FIPPA* provides that an applicant may make a written request for a record of a public body. Section 4(1) of the *FIPPA* provides:

4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[27] Under Schedule 1 of the *FIPPA*, a "public body" is defined as follows:

'public body' means

...

(b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2...

[28] Schedule 2 of the *FIPPA* lists the OIPC as a "public body". Therefore, a person may make a request for records from the OIPC under s. 4(1).

[29] However, s. 3(1) of the *FIPPA* specifies various types of records to which the *FIPPA* does not apply. In particular, s. 3(1)(c) excludes records of an officer of the Legislature relating to the exercise of that officer's functions, as follows:

3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(c) subject to subsection (3), a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act.

[30] The Information and Privacy Commissioner is an officer of the Legislature as defined in Schedule 1 to the *FIPPA*.

[31] Adjudication case law has described two classes of records in the custody or control of the OIPC: operational records and administrative records. Adjudication case law indicates that administrative records are those which do not relate to the OIPC's functions under the *FIPPA*, and therefore an individual has a right of access to these records from the OIPC under s. 4 of the *FIPPA*.

[32] By contrast, operational records are those which relate to the OIPC's powers, duties, and functions under the *FIPPA*. A person has no right of access to these records by virtue of s. 3(1)(c) (*R.G. v. Information and Privacy Commissioner* (November 10, 1997); *C.M. v. Information and Privacy Commissioner* (January 5, 1998); and *J and D.S. v. Information and Privacy Commissioner* (December 05, 2008)).

[33] In *Mr. R. v. Information and Privacy Commissioner* (April 22, 1996) at paras. 16-18, Madam Justice Levine (as she then was) discussed the nature of operational records for the purpose of s. 3(1)(c). She stated that they include records specific to a case file, case management and tracking records, and any other case specific documents created by the OIPC in the course of opening, processing, investigating, inquiring into, considering, or taking action on a case.

[34] It is clear from the context of the request made by C.S. to the OIPC that he wishes to see the "operational" content of the OIPC file relating to the handling of his complaint against the VPD in 2005. He asked, in his April 14, 2009 letter to the OIPC:

...was an investigation made into those matters? What was done and what was found?

...

and

[C]an you please share what information you do have so that I can get a better idea of who made this happen and why?"

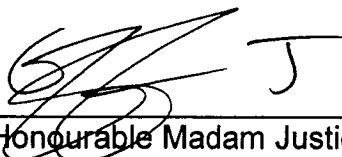
[35] In his written submissions to me, C.S. has also made it clear that the information he is seeking are records showing the substance of the way OIPC handled his complaint against the VPD, and records that would allow him to pursue his suspicion that the VPD misled the OIPC. In his September 19, 2009 submission to me, C.S. wrote:

[t]here is no reason, other than saving face, that the Commissioner for the [OIPC], cannot share what information they have concerning this investigation that was shut down by a VPD deception.

[36] I also note that the OIPC, in its response to C.S.'s request for information, wrote in its Decision letter of April 20, 2009 that it has no record of an investigation because none was undertaken. However, the OIPC may have records of its communications with the VPD and this is what C.S. seems to really want. Nevertheless, these records would be part of the OIPC's operational records as they directly relate to the OIPC's handling of C.S.'s complaint, and as such, they are excluded from production pursuant to s. 3(1)(c).

CONCLUSION

[37] I therefore confirm the Decision of the OIPC to deny C.S. access to the records he has requested.



The Honourable Madam Justice Griffin