

Date: 20130412
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 the Vancouver Police Department on March 27, 2012

Reasons for Decision

of the

Honourable Madam Justice S. Griffin

Counsel for the Commissioner:

Catherine J. Boies Parker

Counsel for the Vancouver Police Department (VPD):

Darrin Hurwitz

Written Submissions of the VPD dated:

July 17, 2012

Written Submissions of the Office of the Information
and Privacy Commissioner dated:

August 16, 2012

Introduction

[1] By letter dated October 11, 2006, the Office of the Information and Privacy Commissioner ("OIPC") instigated an investigation into the use of the Police Records and Information Management Environment ("PRIME") by the Vancouver Police Department ("VPD"). The stated purpose of the investigation was to determine whether PRIME was designed and being operated in a manner that complies with ss. 6(1) and (2) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] On January 4, 2010 the OIPC, by letter from Portfolio Officer Tim Mots, reported on the investigation. Arguably his letter suggested a narrower purpose to the investigation than what was originally stated in the October 11, 2006 letter from the OIPC. He stated that the investigation was "into whether the [VPD] was protecting personal information in its custody or under its control in PRIME as required by [FIPPA]".

[3] In any event, Mr. Mots reported the results of the investigation in the following paragraph of his January 4, 2010 letter:

I have reviewed the information presented to me during the course of this investigation. I have not found any major cause for concern. The VPD provided us with evidence that it is capable of conducting audits revealing users who have browsed, added, modified, or deleted records in the VPD's custody or under its control in PRIME.

[4] Mr. Mots indicated that the investigation was now concluded.

[5] Despite the fact that no fault was found with the VPD, the VPD was not satisfied. It wanted to know more about what the OIPC had learned in the investigation.

[6] The VPD says that it understands that Ms. Bev Hooper was contracted by the OIPC to conduct the investigation and provide a report to the OIPC. As part of that investigation, the VPD met with Ms. Hooper and provided her with documents. The

VPD believes that Ms. Hooper prepared a report and provided it to the OIPC on July 10, 2009.

[7] On January 25, 2011, the VPD requested that the OIPC provide it with a copy of Ms. Hooper's report. In that letter, the VPD candidly acknowledged that the report may reside outside the scope of *FIPPA* but asked the OIPC to exercise its discretion to release the report to the VPD. The letter also acknowledged that there might be information in the report that could harm the security of the PRIME system if made public, but suggested that releasing the report directly to the VPD could mitigate these security concerns.

[8] In a letter dated January 31, 2012, Assistant Commissioner Catherine Tully of the OIPC acknowledged the request and indicated that Ms. Hooper's report existed (the "Hooper Report") and was held by the OIPC in investigation file F06-29896, but refused to disclose the record because it was an operational record under s. 3(1)(c) of *FIPPA* (the "Tully Decision").

[9] The VPD then applied to have an adjudicator review the Tully Decision pursuant to s. 62(1) of *FIPPA*. I am the adjudicator appointed to carry out this review.

Tully Decision

[10] The Tully Decision set out her reasons for denying the VPD's request for disclosure of the Hooper Report. After acknowledging the request and the existence and location of the report, the Assistant Commissioner noted the OIPC, like other public bodies, is obligated to respond to requests for records if they exist and are under their custody or control. She then commented that s. 47(1) of *FIPPA* "states that the commissioner and anyone acting for her are not permitted to disclose any information obtained in the performance of our duties, powers and functions under *FIPPA*, with limited exceptions."

[11] Ms. Tully then stated that operational records of the OIPC are excluded from the general disclosure obligation by s. 3(1)(c) because the OIPC is an officer of the

Legislature. She concluded that “the records [the VPD] have requested will not be disclosed because they are operational records.”

The Statute

[12] Section 3(1)(c) of *FIPPA* states:

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;

[13] Section 47 of *FIPPA* states:

47(1) The commissioner and anyone acting for or under the direction of the commissioner must not disclose any information obtained in performing their duties, powers and functions under this Act, except as provided in subsections (2) to (5).

(2) The commissioner may disclose, or may authorize anyone acting on behalf of or under the direction of the commissioner to disclose, information that is necessary to

(a) conduct an investigation, audit or inquiry under this Act, or

(b) establish the grounds for findings and recommendations contained in a report under this Act.

(2.1) The commissioner and anyone acting for or under the direction of the commissioner must not give or be compelled to give evidence in court or in any other proceedings in respect of any records or information obtained in performing their duties or exercising their powers and functions under this Act.

(2.2) Despite subsection (2.1), the commissioner and anyone acting for or under the direction of the commissioner may give or be compelled to give evidence

(a) in a prosecution for perjury in respect of sworn testimony,

(b) in a prosecution for an offence under this Act,

(c) in an investigation, a determination or a review referred to in section 60 (1), or

(d) in an application for judicial review of a decision made under this Act.

(2.3) Subsections (2.1) and (2.2) apply also in respect of evidence of the existence of proceedings conducted before the commissioner.

(3) In conducting an investigation, audit or inquiry under this Act and in a report under this Act, the commissioner and anyone acting for or under the direction of the commissioner must take every reasonable precaution to avoid disclosing and must not disclose

(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 5, or

(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.

(4) The commissioner may disclose to the Attorney General information relating to the commission of an offence against an enactment of British Columbia or Canada if the commissioner considers there is evidence of an offence.

(5) The commissioner may disclose, or may authorize anyone acting for or under the direction of the commissioner to disclose, information in the course of a prosecution, application or appeal referred to in section 45.

Position of the VPD

[14] The VPD argues that the OIPC has erred in its interpretation of ss. 3(1)(c) and 47(1) of *FIPPA*.

[15] First, with respect to s. 3(1)(c), the VPD argues that the OIPC has erroneously interpreted this section as an absolute bar to production of the Hooper Report. The VPD argues that despite s. 3(1)(c) the OIPC retains a discretion to release a record that falls within that section in accordance with any policies that the OIPC may develop.

[16] Second, with respect to s. 47(1), the VPD argues that the OIPC has erred in interpreting s. 47(1) as requiring the OIPC to deny the VPD access to the Hooper Report; or, alternatively, erred in the application of s. 47(2).

Analysis

[17] The entitlement to information held by a public body under *FIPPA* is not an at-large entitlement but one carefully defined and confined by *FIPPA* itself.

[18] No doubt others have said it more clearly and concisely, but for convenience I will refer to an earlier decision in which I described the ambit of *FIPPA* in respect of

a similar record in *C.S. v. Information and Privacy Commissioner, Adjudication Order No. 22 (November 12, 2009)* at paras. 25-33 as follows:

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.

[19] There is no doubt that the record in question is an operational record. Indeed, the VPD appears to have understood this in its requests and submissions.

[20] The OIPC agrees with the submissions of the VPD that in some circumstances, documents which are excluded from the scope of *FIPPA* may be disclosed by the head of a public body. It argues that it has not taken the position that s. 3(1)(c) bars production of a document. Rather, it has argued a different position: that s. 3(1)(c) does not give rise to a right to access and therefore there is no right to review a decision not to produce the document. In short, the discretion to produce a document does not give rise to an entitlement to production of the document.

[21] I agree with the submissions of the OIPC. The point which appears to be missed by the VPD is that given that the record is excluded under s. 3(1)(c) of *FIPPA*, the VPD has no right to the record, regardless of whether or not the OIPC has discretion to produce it.

[22] Since there is no right of access to the document in question, the decision by the Commissioner not to produce the document does not give rise to any error subject to an adjudicator's review under *FIPPA*.

[23] This analysis is sufficient to end the matter.

[24] However, since the parties also made submissions regarding s. 47, I will also comment briefly on that section of *FIPPA* as well.

[25] It is important to note that the VPD's offer to protect the security of the information, as though between two related government actors just helping each other out, and the VPD's acknowledgment that public disclosure might not be in the public interest, makes it clear that there is no argument advanced by the VPD that disclosure of the requested information is clearly in the public interest. Such an argument might bring into play s. 25(1) of *FIPPA*.

[26] However, the VPD's position in this matter fails to appreciate the policy basis for s.47 of *FIPPA* and its interplay with s. 3(1)(c), and the special role of the OIPC.

[27] The role of the OIPC was canvassed by Levine J. as she then was in *G.R. v. Information and Privacy Commissioner*, Adjudication Order No. 3 (June 30, 1997) at paras. 16-18. In that decision Levine J. noted that the OIPC has several operational functions, including investigations, mediations, and processing and deciding complaints. To ensure the effectiveness of these roles, the Legislature has seen fit to protect the confidentiality of these operational functions.

[28] The nature of the role of the OIPC explains why there is no public right to the records generated in conducting its operational functions, under s. 3(1)(c). That is also why there is a Legislative mandate that prohibits disclosure of any of these records, under s. 47(1), subject to only limited exceptions.

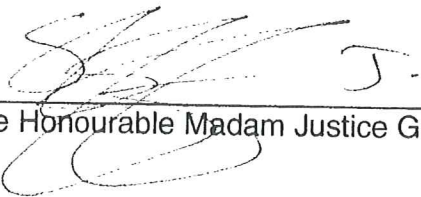
[29] When in the judgment of the OIPC it is necessary to disclose information to conduct an investigation, audit or inquiry, or to establish the grounds for findings and recommendations contained in a report, then it may disclose such information pursuant to s. 47(2). However, such a decision to disclose or not to disclose the otherwise excluded information is not subject to adjudicative review by an adjudicator, as it is not a decision about a record that anyone has a right to request under the *Act*.

Conclusion

[30] The OIPC, through Mr. Mot, saw fit to give very brief reasons for its decision regarding the VPD and the PRIME system. While the VPD may have wished to

understand more about the investigation, it has no right to more information in the files of the OIPC. The Legislation does not give a right to such information based on broader policy reasons having to do with the proper performance of the functions of the OIPC.

[31] I therefore confirm the Tully Decision to deny the VPD access to the information it has requested.



The Honourable Madam Justice Griffin