

Date: 20180830
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 B.F. on May 4, 2018

Reasons for Decision

of

The Honourable Christopher Grauer

Sitting as an adjudicator appointed under Section 60 of the Act

The Requesting Party on his own behalf:	B.F.
Counsel for the Public Body:	Catherine Boies Parker, Q.C. Kate R. Phipps
Written Submissions of B.F. dated:	May 4 and 29, 2018
Written Submissions of the Office of the Information and Privacy Commissioner dated:	June 22, 2018

1.0 INTRODUCTION

[1] B.F. (the "Applicant") has applied pursuant to s. 62 of the *Freedom of Information and Privacy Act*, R.S.B.C. 1996, c. 165 [Act] for review of a decision of the Information and Privacy Commissioner (the "Commissioner") dated April 23, 2018 (the "Disclosure Decision"). The Disclosure Decision denied the Applicant the access he sought to records used by the Office of the Commissioner ("OIPC") in its investigation of the Applicant's complaint that the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry") inappropriately used his personal information.

[2] I have been designated as an adjudicator under s. 60 of the Act to rule on this application for review. I received written submissions from the Applicant, who is self-represented, and from counsel for the OIPC.

2.0 BACKGROUND

2.1 Job Offer and Rescission from the Ministry: 2015

[3] In January 2015, the Applicant was placed on an eligibility list for a position as a Senior Legislative Analyst with the Ministry. In February 2015, the Applicant was offered the position, which he accepted; however, in March 2015, the Ministry informed him that it was rescinding the offer. The Ministry stated in part that the Applicant had failed to disclose relevant and pertinent information during the hiring process.

2.2 Initial Privacy Complaint to the OIPC: 2015–2016

[4] On March 26, 2015, the Applicant filed a complaint with the Commissioner (the "Privacy Complaint"), alleging that the Minister had inappropriately collected and used his personal information during the hiring process, contrary to the Act. On April 9, 2015, the Commissioner requested more information concerning the Privacy Complaint, to which the Applicant responded in May and June 2015.

[5] On June 26, 2015, the Commissioner issued a Notice of Complaint. On November 4, 2015, the Commissioner issued a Notice of Assignment of Investigator. The Applicant made further written submissions to the Investigator.

[6] On February 18, 2016, the Investigator wrote to the Applicant and reported that she was unable to substantiate the Privacy Complaint. The Investigator concluded that the Ministry's collecting of his personal information was authorized by s. 26(c) of the *Act*, as it was necessary for the Ministry to effectively enforce government standards for forestry operations. She also found that the use of the Applicant's personal information was necessary for the performance of the duties of the Deputy Minister, per s. 33.2(c) of the *Act*.

2.3 Discrimination Complaint to Human Rights Tribunal: 2016–2018

[7] On March 29, 2016, the Applicant filed a complaint to the BC Human Rights Tribunal ("BCHRT") against the Ministry, alleging employment discrimination on the basis of political beliefs, contrary to s. 13 of the *Human Rights Code* (the "Discrimination Complaint"). Although there had been a delay in initiating the Discrimination Complaint, the BCHRT accepted the Applicant's late filing: *Fraser v. B.C. (Ministry of Forests, Lands and Natural Resource Operations)*, 2016 BCHRT 124 [*Timeliness Decision*].

[8] On January 3, 2017, the Applicant applied to the BCHRT to compel the Ministry to disclose certain documents that were previously not disclosed. The BCHRT ordered the disclosure of the documents, except for records subject to solicitor-client privilege: *Fraser v. B.C. (Ministry of Forests, Lands and Natural Resource Operations)*, 2017 BCHRT 104.

[9] The Ministry subsequently applied to the BCHRT to have the Discrimination Complaint struck. On January 12, 2018, the BCHRT dismissed the application to strike, and set the complaint for a hearing: *Fraser v. B.C. (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCHRT 5.

2.4 OIPC Disclosure Request and Decision: 2018

[10] On March 30, 2018, the Applicant wrote to the Commissioner and requested access to all documents and the final report of the OIPC's investigation into his 2015 Privacy Complaint (the "Records"), for his use at the BCHRT hearing of the Discrimination Complaint (the "Disclosure Request"). On April 14, 2018, the

Applicant wrote to the Commissioner again, stating that he would also be applying to the BCHRT pursuant to s. 34(3)(b) of the *Administrative Tribunals Act* for production of the Records.

[11] By letter dated April 23, 2018, the Deputy Commissioner of the OIPC issued the Disclosure Decision, through which he denied the Disclosure Request, except as it pertained to Records that were initially provided by the Applicant himself.

[12] In making his determination, the Deputy Commissioner explained that the Records were operational records created by or for the Commissioner and were related to his function under the *Act*, and therefore were excluded from disclosure by virtue of s. 3(1)(c) of the *Act*.

[13] The Deputy Commissioner further advised that pursuant to s. 47 of the *Act*, the Commissioner does not have discretion to disclose the Records outside of a formal freedom of information request. With respect to the application to compel disclosure under the *Administrative Tribunals Act*, the Deputy Commissioner advised that s. 47(2) of the *Act* prevents the Commissioner from being compelled in a court or other proceedings to give evidence of records or information obtained while performing his duties under the *Act*.

[14] On or about May 10, 2018, the Applicant requested this review.

3.0 POSITIONS OF THE PARTIES

3.1 Applicant's Position

[15] The Applicant raises two grounds for review of the Disclosure Decision. First, he submits that the OIPC erred in stating that under s. 47 of the *Act*, the Commissioner does not have discretion to disclose the Records. Second, he submits that in accordance with s. 25(1)(b) of the *Act*, disclosure is required as being clearly in the public interest. The Applicant also alerted me to the possibility that the OIPC would rely on solicitor-client privilege.

3.2 Respondent's Position

[16] The OIPC submits that there are four issues to be determined in this review:

1. Are the Records exempt under s. 3(1)(c) of the *Act*?
2. Should the Commissioner have exercised a discretion to disclose, and is such decision reviewable?
3. Is disclosure required under s. 25 of the *Act*?
4. What is the relevance of solicitor-client privilege?

[17] In conducting this review, I will address the four issues outlined by the respondent, as they assist in the consideration of the submissions of the Applicant.

4.0 DISCUSSION

4.1 Are the Records exempt under s. 3(1)(c) of the *Act*?

[18] Section 4 of the *Act* provides a public right of access to records in the custody of "public bodies":

- 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.

[19] Schedule 1 of the *Act* defines public body as:

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

[20] Schedule 2 of the *Act* lists the OIPC as a "public body" and the Commissioner as its head. It follows that persons may therefore request records from the OIPC pursuant to s. 4 of the *Act*.

[21] However, the *Act* puts certain limits on records that may be requested. Section 3 sets out the scope of the *Act* and, in subsection 3(1), describes types of records to which the *Act* does not apply. Paragraph 3(1)(c) specifically excludes records in the custody or control of an officer of the Legislature that relate to the officer's exercise of his or her functions under an *Act*:

- 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; ...

[22] Subsection 37(2) of the *Act* provides that the Commissioner is an officer of the Legislature.

[23] Pursuant to s. 57(1) of the *Act*, the burden is on the Commissioner to prove that there is no right of access pursuant to s. 3(1)(c). This Disclosure Request specifically seeks records in the custody or control of the Commissioner, therefore the burden in this review is on the Commissioner.

[24] A necessary condition for the s. 3(1)(c) exclusion is that the record must relate to the exercise of the officer's functions under an Act. Past adjudication decisions under the *Act* have drawn a distinction between two classes of records that may be in the custody or control of the OIPC: operational records and administrative records. Administrative records are those not relating to the OIPC's functions under the *Act*, and so are not excluded. The Applicant would be entitled to access to such records. See, for instance, *Adjudication (Doe)*, (06 January 2015) Vancouver, Adjudication Order No. 26, at paras. 39–40 [*Doe*], and cases cited therein.

[25] Operational records, however, relate to the Commissioner's powers, duties and functions under the *Act*, and, by s. 3(1)(c), these *are* excluded from the right of access under s. 4: *Doe* at para. 41.

[26] Into which category do the Records sought by the Applicant fall?

[27] Operational records have been held to include any record specific to a case file, such as case management or tracking sheets and lists, notes and working papers (including draft documents) of the Commissioner or his/her staff, or any other case-specific records received or created by the Commissioner's office in the course of opening, processing, investigating, mediating, settling, inquiring into, considering,

taking action on, or deciding a case: see, for example, *Doe*, citing *Mr. and Mrs. Y v. Information and Privacy Commissioner*, (05 December 2008) Adjudication Order No. 17 at paras. 20–23; *Adjudication (G.R.)*, (30 June 1997) Adjudication Order No. 3 at paras. 16–19 [G.R.]; *Adjudication (C.M.)*, (5 January 1998) Adjudication Order No. 7 at paras. 14–15; *Adjudication (F.G.B.)*, (17 May 2000) Adjudication Order No. 13 at para. 13.

[28] The Records currently at issue are the OIPC's investigation file and report of the 2015 Privacy Complaint. According to the respondent, these Records comprise the investigator's case notes, notes of telephone calls with parties to the investigation, correspondence and documents received by the investigator from the Applicant and Ministry, and internal tracking sheets generated in the course of processing the Complaint.

[29] I have not examined the Records; it is evident, however, that they are, by their very nature, operational records. The Applicant expressed specific interest, for instance, in documents described by the investigator including details of events provided by legal counsel for the Ministry, a summary of findings concerning the Applicant's complaint, and replies to a number of questions the investigator had asked regarding the [Forest Practices Board] report. Such documents are clearly operational records. As a result, it follows that by virtue of s. 3(1)(c) of the *Act*, they are records to which the *Act* does not apply and therefore are not properly the subject of a request for access under s. 4: see, for instance, *Doe* at paras 44–45.

4.2 Should the Commissioner have exercised a discretion to disclose?

[30] The Applicant submits that, notwithstanding s. 3(1)(c), the Commissioner has discretion under s. 47(2) of the *Act* to disclose the Records, and that the Disclosure Decision erred in its conclusion to the contrary:

Moreover, the Commissioner would not have the legal discretion to disclose the records outside of the formal FOI request process. This is because s. 47 of [the *Act*] prevents the Commissioner from disclosing any information collected during the course of an investigation, except for the purposes of conducting the investigation or for establishing the findings and recommendations contained in a report under [the *Act*].

[31] By s. 47 of the Act:

- 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.

[32] The Applicant argues that a discretion to disclose the Records arises in this case under s. 47(2) because they would establish the grounds for the OIPC's findings that the personal information collected on the Applicant enabled the Ministry to effectively enforce government standards for forestry operations and ensured that forestry operations in the region would not be adversely impacted by the Ministry's hiring decision.

[33] The respondent concedes that although the Records are subject to the s. 3(1)(c) exclusion, the Commissioner has discretion to disclose them under s. 47(2), subject to the limits of that discretion set out in the subsection. But, as discussed in the previous section, regardless of how that discretion is exercised, the applicant has no *right* to access the documents pursuant to s. 4 of the Act.

[34] In this case, the respondent submits, the Commissioner exercised this discretion by (1) disclosing copies of records that the Applicant had himself originally provided in the course of the Privacy Complaint, and (2) declining to grant access to any further operational records. The respondent asserts that the Commissioner's exercise of this discretion is not reviewable in this adjudication and that the Commissioner is under no obligation to give reasons as to why he declined to exercise the discretion any further in favour of the Applicant.

[35] In *Adjudication (Vancouver Police Department)*, (12 April 2013) Vancouver, Adjudication Order No. 23 at paras. 21–22 and 28–29, Madam Justice Griffin (then of the Supreme Court) discussed the application of s. 47(2) in the context of records

that are subject to s. 3(1)(c). Justice Griffin explained that a decision to disclose or not to disclose records pursuant to s. 47 is not reviewable by an adjudicator:

[21] ... The point which appears to be missed by the VPD is that given that the record is excluded under s. 3(1)(c) of [the Act], 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 [the Act].

...

[28] The nature or 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.

[36] This rationale was cited with approval by Fitch J. (as he then was) in *Doe* at paras. 54–58.

[37] I agree with the reasoning of Justices Fitch and Griffin. It follows, I find, that to the extent the Commissioner had discretion under section 47(2) in the circumstances of this case, the exercise of that discretion is not open to review by me sitting as an adjudicator.

[38] As a result, the Applicant's submission pursuant to s. 47 fails.

4.3 Is disclosure required by s. 25 of the Act?

[39] Section 25 of the Act requires the head of a public body to disclose information without delay, where it is clearly in the public interest to do so:

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

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

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

(2) Subsection (1) applies despite any other provision of this Act.

[40] The Applicant submits that in light of the BCHRT's reasons in the *Timeliness Decision*, in which the Tribunal held that it was in the public interest to accept the late-filed Discrimination Complaint, the Records are in the public interest for the purpose of filling a gap in the jurisprudence and further defining what is covered by "political belief" in the *Human Rights Code*.

[41] The respondent contends, first, that s. 25 has no application to the Records because they are excluded from the *Act* by s. 3(1)(c); and second, that the disclosure of the Records is not "clearly in the public interest" within the meaning of s. 25.

[42] With respect to the first submission, there are conflicting authorities on whether s. 25 applies to records excluded by s. 3(1)(c). First, in *G.R.*, Levine J. (as she then was) wrote that:

[30] ... Section 25(2) makes it clear that section 25(1) applies despite any other provision of the Act. Section 25 is accordingly paramount over section 3. However, only information, not the entire operational record, that satisfies either the significant harm or clear public interest tests must be disclosed by the Commissioner pursuant to section 25.

[43] However, in *Adjudication (D.)*, (12 July 2007) Vancouver, Adjudication No. 19 at paras. 10–14 [D.], Bauman J. (now C.J.B.C.) noted that the *Act* had been amended since the *G.R.* decision. Justice Bauman ultimately held that s. 25(2) is only paramount to any otherwise applicable provision of the *Act*, and as a result, s. 25 has no effect on records that are excluded by s. 3(1)(c):

[10] Counsel then urges me not to follow Adjudication Order No. 3 on this point, arguing:

The words in section 25(2)—"despite any other provision of this Act"—make public interest disclosure under section 25(1) paramount to *any otherwise applicable provision of the Act*, such as the requirement to protect personal privacy in Part 3 of the Act. Those words have no effect on section 3 or records that are excluded from the scope of the Act by section 3(1).

[Emphasis in original]

[11] I respectfully agree.

[12] Counsel notes that the “scope defining” provisions of s. 3(1)(c) have been expressly qualified by the legislature adding s-s. 3(3) in 2004. Ms. Ross then submits:

22. Section 3(3) demonstrates that when the Act intends provisions to apply in relation to records that are otherwise excluded from the scope of the Act by section 3(1)(c), it does so unequivocally within section 3.

It is noted that this amendment postdates Justice Levine’s earlier decision.

[13] Ms. Ross concludes:

24. ... [S]ection 25(2) does not displace the express jurisdiction-defining effect of section 3(1) or expand public interest disclosure under section 25(1) so that it applies to records that section 3(1) has already expressly excluded from the scope of the Act’s application (including the application of s. 25).

25. On the contrary, the words in section 25(2)—“despite any other provision of the Act”—make public interest disclosure under section 25(1) paramount to any otherwise applicable provision of the Act, such as a requirement to protect personal privacy in Part 3 of the Act. Those words do not effect section 3 or records that are excluded from the scope of the Act by section 3(1).

[Emphasis in original]

[14] Once again, I respectfully agree with each of these submissions.

[44] I prefer the reasoning of Justice Bauman in *D.*, which considers a more current version of the *Act*, to that of Justice Levine in *G.R.* In my view, the former is consistent with sound principles of statutory interpretation and produces a more logical result. It follows that this ground for review fails. But even on Justice Levine’s interpretation, I consider that, for reasons discussed by her and others, disclosure of the Records would not be “clearly in the public interest” within the meaning of s. 25.

[45] In *G.R.*, at paras. 32–33, Levine J. discussed public interest disclosure in the following terms:

[32] Sopinka and Cory JJ. in *RJR – Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 344 considered the phrase “public interest” in the context of an application for interlocutory relief and stated that: “Public interest’ includes both the concern of society generally and the particular interests of identifiable groups.”

[33] The determination of public interest is made on a case by case basis and requires an assessment of the public interest in disclosure versus the public interest in nondisclosure. To satisfy the subsection, the public interest must be “clear”, which *Black’s Law Dictionary*, 6th ed (St. Paul: West Publishing, 1990) at 250 defines as “Obvious, beyond reasonable doubt; perspicuous; plain.”

[46] In *Officer of the Premier and Executive council operations and Ministry of Skills Development and Labour, Re*, 2002 CanLII 42472 (BC IPC) at para. 53, Commissioner Loukidelis discussed the standard for disclosure under s. 25:

[53] As the applicant notes, in Order 01-20 and other decisions, I have indicated that the disclosure duty under s. 25(1)(b) is triggered where there is an urgent and compelling need for public disclosure. The s. 25(1) requirement for disclosure “without delay”, whether or not there has been an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.

[47] In *Public Body Disclosure of Information Under Section 25 of the Freedom of Information and Protection of Privacy Act*, Investigation Report F13-05, 2013 PCIPC No. 33, Commissioner Denham noted that “[t]he high threshold for s. 25(1) precludes mandatory disclosure in all but the most urgent and compelling situations” (at 11). At 9–10, Commissioner Denham wrote that

In considering whether to disclose information pursuant to s. 25(1)(b), a public body must conduct a two-step analysis. First, there must be an urgent or compelling need for disclosure of the information. Second, there must be a sufficiently clear public interest in disclosure of the information in question.

In order for there to be a clear public interest, the information must contribute in a substantive way to the body of information that is already available to enable or facilitate effective use of various means of expressing public opinion and making political choices. Section 25(1)(b) does not apply to information that will add little or nothing to that which the public already knows.

The potential interest of the public in learning about an issue does not necessarily make disclosure of that information “clearly” in the public interest; rather, it must further the education of or debate among the public on a topical issue.

While information rights are an essential mechanism for holding government to account, s. 25(1)(b) is not intended to be used by the public to scrutinize public bodies. In these circumstances, the public may still use its general right to access records under FIPPA.

[48] Commissioner Denham noted that, at the date of the Report, the OIPC had not once ordered a public body to disclose information pursuant to s. 25(1). Upon review of case studies in which s. 25 had been considered by public bodies, the Commissioner held that s. 25(1)(b) ought to have been applied by a public body to disclose the imminent failure of a dam, as it would have likely resulted in the local citizenry, at the very least, pressuring the government to take remedial action.

[49] I am not bound by the comments of the Commissioner. I find, however, that the public interest at stake in relation to the disclosure of the Records is not of the character contemplated under the *Act*. The Applicant's requirement is not so clear, plain, urgent, or of such compelling public need, to justify disclosure. Furthermore, the public interest in allowing a late-filed human rights complaint is an entirely separate question—with a different legal test and standard—to the public interest in disclosing the Records. Disclosure is not supported by comparing the two, and the rejection of the Disclosure Request would not limit the utility of having the Discrimination Complaint heard by the BCHRT in accordance with that Tribunal's evidentiary and disclosure procedures.

[50] As a result, the Records are not subject to disclosure pursuant to s. 25, both because s. 25 does not apply to records outside the scope of the *Act*, and because disclosure is not, in this case, in the public interest within the meaning of s. 25.

4.4 What is the relevance of solicitor-client privilege?

[51] In submissions to the Court dated May 29, 2018, the Applicant contends that the OIPC is withholding certain documents and correspondence between the Ministry and OIPC on the basis solicitor-client privilege. However, the Applicant states that he is not clear what aspect of the correspondence would attract the protection of solicitor-client privilege.

[52] The respondent submits that it does not rely on solicitor-client privilege as a ground for refusing disclosure, and that the OIPC has very limited information about the claim of privilege aside the apparent refusal of the Ministry to disclose documents to the Applicant on the basis of solicitor-client privilege.

[53] In my view, as no privilege has been asserted, the issue is irrelevant. In any event, the exclusion contained in s. 3(1)(c) of the *Act* is a full answer to the Applicant's Disclosure Request for the reasons discussed above, and therefore is dispositive of the issue.

5.0 SUMMARY AND CONCLUSION

[54] The Records sought by the Applicant in his March 30, 2018 Disclosure Request are in the custody or control of an officer of the Legislature and relate to the exercise of that officer's functions under the *Act*. The OIPC was correct in its determination that the Records are operational records and therefore excluded from the right of access, pursuant to s. 3(1)(c) of the *Act*.

[55] The OIPC understood it has the discretion under the *Act* to release the requested Records; however, with the exception of certain records, it declined to do so. The *Act* imposes no duty or obligation on the OIPC to provide such disclosure, nor does it impose any obligations on the OIPC to give reasons for exercising its discretion in a particular way. In the circumstances, it is not open to me, as adjudicator, to review the OIPC's exercise of discretion.

[56] As the Records are excluded from the scope of the *Act* by s. 3(1)(c), the public interest disclosure requirements under s. 25 do not apply. However, even if s. 25 were applicable, the Applicant's request would not satisfy the public interest threshold for disclosure set out in that section.

[57] Pursuant to ss. 65(2) and 58(1) of the *Act*, I dispose of this adjudication by confirming the Commissioner's decision to refuse access to the Records requested by the Applicant.



The Honourable Christopher Grauer