

Date: February 7, 2019  
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 F.T. on August 21, 2018

**Reasons for Decision  
of the  
Honourable Mr. Justice Kelleher**

Sitting as an adjudicator appointed under Section 60 of the *Act*

Counsel for the Commissioner:

C.B. Parker, QC  
K.R. Phipps

The Applicant Appearing on His Own Behalf:

F.T.

Written Submissions of F.T. Received:

October 30; November 6, 27;  
December 4, 6 and 15, 2018

Written Submissions of the Office of  
The Information and Privacy Commissioner  
Received:

December 6, 2018

Date of Decision:

February 7, 2019

[1] F.T. (the "applicant") has applied for review of decisions of the Information and Privacy Commissioner pursuant to s. 62 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (the "Act" or "FIPPA").

[2] I was designated under s. 60 of the *Act* to investigate and rule on the application.

[3] I have reviewed the written submissions of the applicant, dated October 30, November 6, November 27, December 4, December 6, and December 15, 2018, and the submission from counsel for the Commissioner, dated December 6, 2018. The submission of the Commissioner includes an affidavit of the Deputy Commissioner, Caroline Twiss, outlining the circumstances of this case.

### **Background**

[4] On July 14, 2017, the applicant was involved in a motor vehicle accident in the parking lot of the Cascades Casino in Langley. It was a minor accident. There is apparently a video recording of the accident captured by cameras operated by the casino. The applicant disputes the conclusion of his insurer, Insurance Corporation of British Columbia ("ICBC"), that he and the other driver were equally at fault. He has been attempting to view the video recording.

### **Jurisdiction of the Adjudicator**

[5] *FIPPA* creates a specialized legal regime which provides a right of access to records in the custody and control of public bodies. As well, the legal regime imposes limitations on the ability of public bodies to disclose records.

[6] The Office of the Information and Privacy Commissioner ("OIPC") administers *FIPPA*. It investigates and adjudicates complaints and requests for review of decisions made by public bodies.

[7] The OIPC is itself a public body that is subject to *FIPPA*. It is not reasonable or appropriate for the OIPC to adjudicate its own compliance with *FIPPA*. For that

reason, no doubt, the legislature enacted s. 62 of the *Act* which creates a process for an adjudicator to rule on complaints made against the OIPC as a public body.

[8] As the adjudicator, I am essentially carrying out the role that the OIPC would perform if the complaint were made against a different public body. This is different from the role of the Supreme Court of British Columbia in judicial review. In a judicial review, the Court oversees the OIPC's discharge of its responsibilities as a statutory decision-maker under *FIPPA* and the *Personal Information Protection Act*, S.B.C. 2003, c. 63. By contrast, in a s. 62 adjudication, the adjudicator reviews the OIPC's compliance with its obligations as a public body under *FIPPA*.

[9] As an adjudicator, I have authority to investigate and decide some issues but not others. I can only review issues that are within my jurisdiction. The provincial legislature has set out the scope of my jurisdiction in s. 60 of *FIPPA*:

**Adjudicator to investigate complaints and review decisions**

**60** (1) The Lieutenant Governor in Council may designate a person who is a judge of the Supreme Court to act as an adjudicator and

(a) to investigate complaints made against the commissioner as head of a public body with respect to any matter referred to in section 42 (2),

(b) to determine, if requested under section 60.1, whether the commissioner as head of a public body is authorized to disregard a request made under section 5 or 29, and

(c) to review, if requested under section 62, any decision, act or failure to act of the commissioner as head of a public body.

[10] I am a Judge of the Supreme Court who has been designated by the Lieutenant Governor in Council to act as an adjudicator. Section 61 of the *Act* provides:

**Powers, duties and protections of adjudicator**

**61** (1) For the purposes of section 60, an adjudicator has the powers, duties and functions given to the commissioner by sections 42 (2) (a) to (d), 43 to 44.2 and 47 (1), (2) (a) and (3) to (5).

(2) Sections 45, 46, 48 and 50 apply for the purposes of an investigation, inquiry or review by an adjudicator.

(3) Section 47 (2.1) to (2.3) applies to an adjudicator and the staff of an adjudicator.

[11] These provisions of *FIPPA* dictate the scope of my authority. I cannot investigate or decide complaints that fall outside the issues set out in these sections.

[12] It is not my role to consider the conduct of ICBC, Cascades Casino, its parent company Gateway Casinos, or the British Columbia Lottery Corporation ("BCLC"). They are not parties to this proceeding. Nor could they be. Section 62, as I explained above, empowers me to review the conduct of the OIPC as it relates to its obligations as a public body under *FIPPA*.

[13] If F.T. takes issue with the OIPC's decisions regarding complaints against ICBC, Gateway, or BCLC, his remedy would come from seeking judicial review of the OIPC's decisions in the Supreme Court. If F.T. takes issue with ICBC's adjudication of the assignment of fault in the motor vehicle accident, the arbitrator's decision in the Claim Assessment Review states in the final paragraph:

If either of these parties to this accident do not agree or are dissatisfied with this decision and assessment of liability, they are at liberty to proceed with a civil court action asking the court to determine the liability of each party, if any, for the crash.

[14] The limitation date for such an action is likely July 14, 2019.

### **Insurance Corporation of British Columbia**

[15] The OIPC has opened five files in respect of complaints by F.T. regarding ICBC. Three have been closed. Two remain open.

#### **1. OIPC File F17-72003**

[16] On October 23, 2017, F.T. complained to the OIPC. He had sought information from ICBC. He wanted documents related to the July 2017 accident released to him. The OIPC opened file F17-72003. It investigated. It found ICBC had wrongly withheld certain information. ICBC released that information to F.T. The OIPC also concluded that ICBC was correct in withholding other information from F.T. pursuant to ss. 13 and 22(1) of *FIPPA*.

[17] The OIPC communicated these conclusions to F.T. by letter, dated July 10, 2018. The OIPC closed this file.

## **2. OIPC Files F18–75596 and F18–74573**

[18] On March 28, 2018, F.T. raised two issues respecting ICBC. He had made another access request to ICBC. First, he complained about the adequacy of ICBC's search for information. Second, he sought review of a decision denying him access to certain records. The OIPC opened a new file for the "adequate search" complaint (F18–75596) and a separate file for the request for review (F18–74573).

### **A. F18-75596**

[19] On June 22, 2018, the OIPC advised F.T. that he had to describe the issues to ICBC regarding the adequacy of the search and required him to do so before the OIPC would accept his complaint. The OIPC followed its usual practice and closed the file.

### **B. F18-74573**

[20] On May 4, 2018, the OIPC sought further information from F.T. The OIPC told him that the file would be closed if the OIPC did not hear from him by May 25, 2018. On May 21, 2018, F.T. wrote to both the OIPC and the BC Office of the Ombudsperson, complaining that the OIPC's time limits were unfair (among other things).

[21] The OIPC initially closed this file because the information had not been received. However, on May 30, 2018, Ms. Twiss extended the deadline by four further weeks.

[22] On June 21, F.T. provided additional information to the OIPC. File F18–74573 is still open. It has been assigned to an investigator.

**3. OIPC File F18-76435**

[23] On August 23, 2018, F.T. resubmitted his complaint about the adequacy of ICBC's search. On September 5, the OIPC accepted the complaint and sent formal notice of it to ICBC and F.T.

[24] Ms. Twiss deposed that file F18-76435 remains open. It has been assigned to an investigator.

**4. OIPC File F18-73492**

[25] On February 12, 2018, F.T. wrote to the OIPC. His complaint was that ICBC improperly collected his personal information from Cascades Casino. The OIPC opened a file. The OIPC's Case Review Officer found no indication that F.T. had contacted ICBC to give it an opportunity to resolve the concerns. The officer advised F.T. to do this and to contact the OIPC if he did not receive a satisfactory answer. The OIPC closed its file because there were no further steps to be taken at that time.

**Cascades Casino Langley**

[26] The OIPC opened three files concerning Cascades Casino. All of them are now closed.

**1. OIPC File P18-73739**

[27] F.T. complained on February 12, 2018 that Cascades Casino had disclosed his personal information to ICBC. This was alleged to be in violation of the *Personal Information Protection Act*. The OIPC determined that there was no evidence the applicant had contacted Cascades Casino first. On March 6, 2018, the OIPC case review officer advised F.T. that he had to do this first. As there was no further action, the OIPC followed its standard procedure and closed the file.

**2. OIPC File P18-73951**

[28] F.T. received the above decision, advising that he needed to contact the casino first. He wrote on March 18 to the OIPC saying he had in fact written to the

casino on February 12 and again on February 28 and that the casino had not replied.

[29] The OIPC replied on March 20, 2018, advising that the casino had 30 business days to reply, that is, until March 26, 2018. Therefore this file was closed as well.

### **3. OIPC File P18-74447**

[30] On March 30, 2018, F.T. complained once again. The 30 business days had expired and he had not received a reply to his February 12 and 28 letters to the casino.

[31] On April 25, 2018, an OIPC case review officer wrote to F.T. advising that she had contacted Gateway Casinos and Entertainment Limited, the owner of Cascades Casino Langley, and that she understood that the casino replied to his complaint on April 24, 2018. In light of that, the OIPC closed this file.

[32] Gateway did indeed reply. On April 26, 2018, F.T. received an undated letter from Gateway apologizing for the delay. Gateway explained that the video was only available from the BCLC which "owns and controls the video surveillance".

### **British Columbia Lottery Corporation**

[33] The OIPC opened three files respecting BCLC. Two of these files have been closed.

#### **1. OIPC Files F18-75763 and F18-75764**

[34] On June 21, 2018, F.T. wrote to the OIPC with two complaints. The first complaint was that he had requested access to the video footage in question and that BCLC had failed to release the information.

[35] The second complaint was that BCLC had improperly disclosed records to an ICBC adjuster and an ICBC claims manager. Neither of these individuals was a peace officer.

[36] The OIPC, in accordance with its standard procedure, opened two files for these two complaints (F18-75763 and F18-75764, respectively).

[37] The first complaint was accepted for review. Ms. Twiss, the Deputy Commissioner, deposed that this file has been assigned to an investigator. The investigator wrote to F.T. and BCLC on October 29, 2018. The investigator advised that she would be conducting mediation for the request for the information. This file remains open.

[38] The second complaint, regarding improper disclosure, was dealt with as follows: the OIPC required F.T. to submit the details of his complaint to the BCLC and provide them with 30 business days to reply. The file was then closed.

## **2. OIPC File F18-76481**

[39] On August 6, 2018, F.T. wrote to the OIPC complaining about the responses to the "improper disclosure" complaint. BCLC admitted its error:

BCLC mistakenly concluded that allowing viewing of the footage, rather than issuing a copy, was permissible.

[40] F.T. was dissatisfied with this response. The OIPC therefore opened file F18-76481.

[41] On September 26, 2018, a case review officer wrote to F.T. She advised him that BCLC had acknowledged that its disclosure was not authorized by *FIPPA*. BCLC had conducted privacy awareness training. The case review officer was therefore satisfied that appropriate steps had been taken to address the circumstances and the file was closed.

## **The Applicant's Complaints**

[42] F.T. advances four complaints before me. I will address them in turn:



**Complaint 1**

[43] The applicant complains that the OIPC uses a confusing filing system that produces too many file numbers. He expressed this concern in a letter, dated May 21, 2018 to the Ombudsperson and the Information and Privacy Commissioner:

I address the fact why so many file numbers to my original two complaints and suspect this is just a manner of "creating widgets" to show how many files (six 6 in my case) are created to count work done when in fact all the work is contained to two (2) files one being ICBC and the other Cascades Casino. The letter received dated 11 MAY 2018 from OIPC confirm this and further confuse who is working on what and where are the documents. This is a government policy within the Information & Privacy Commission as per the 11 MAY 2018 letter.

This is totally mind boggling to any normal "common person". I have worked as a Member of Parliament and Privacy Co-ordinator within my extended career as Police Officer/Peace Officer and find this as a total misleading and efficient manner of utilizing the taxpayers' resources or continuity of any investigation.

[44] The applicant's complaint is that the opening and closing of files creates confusion and is unfair to him. He says the opening of multiple files makes it difficult to track his initial requests and complaints. He also submits that the OIPC has closed files without his knowledge.

[45] At paragraphs 2 to 6 of Ms. Twiss's affidavit, she explains the OIPC's system for opening and closing files:

2. The OIPC received over 500 requests for review and over 600 complaints in 2017/18 from persons who are dissatisfied with public bodies' and private sector organizations' responses to their access to information requests and handling of their person information. One applicant may submit correspondence with several distinct elements that the OIPC will treat differently. The OIPC's practice is to open a new file for each individual request for review or complaint made by a person. If a complaint involves more than one public body or private sector organization, the OIPC opens a separate file for each public body or organization since the outcomes may be different for each public body or organization in relation to their statutory responsibilities.
3. The OIPC has several file types for access to information complaints. For example, an adequate search complaint may follow a different process than a fee complaint. It likewise has several file types for privacy complaints, such as those respecting collection, use, disclosure, or failure to protect personal information. Requests for review of severing follow a different timeline than complaints.

4. From time to time, and for various reasons, the OIPC declines to investigate a complaint or request for review. For example, the OIPC may decline a request for review of a public body's response to an access request if the statutory time limit for the public body to respond to the applicant has not yet expired. The OIPC may also close a request for review where it receives information that the matter has been resolved.
5. The OIPC may also decline to accept a complaint where the complainant has not first informed the public body or organization of the issue, and attempted to resolve it with the public body. Where the OIPC declines to investigate for this reason, OIPC practice is to inform applicants of the decision, the steps he or she could take to resolve the complaint, if any, and the circumstances in which the applicant may resubmit his or her complaint to the OIPC.
6. In the majority of cases, after the OIPC explains the steps applicants can take to resolve the complaint, the OIPC does not hear from applicants again. For that reason, the practice of the OIPC is to close the file where there are no outstanding steps for the OIPC to take with respect to the complaint. If the OIPC did not close these files, then it would be left with a number of outstanding open files on its books, which could result in unnecessary confusion in file management practices.

[46] I have concluded that I do not have jurisdiction to address this complaint. It does not concern a request to the Commissioner as head of a public body for access to a record or any of the matters referred to in s. 42(2)(a) to (e) of *FIPPA*. Those matters are:

- (2) Without limiting subsection (1), the commissioner may investigate and attempt to resolve complaints that
  - (a) a duty imposed under this Act has not been performed,
  - (b) an extension of time for responding to a request is not in accordance with section 10 (1),
  - (c) a fee required under this Act is inappropriate,
  - (d) a correction of personal information requested under section 29(1) has been refused without justification, and
  - (e) personal information has been collected, used or disclosed in contravention of Part 3 by
    - (i) a public body or an employee, officer or director of a public body, or
    - (ii) an employee or associate of a service provider.

[47] The OIPC argues that its procedure could only be challenged by way of judicial review. I make no comment with respect to that argument. I do not know

whether judicial review would be available or not. But I am satisfied that it is not open to me as the adjudicator to address this complaint on its merits.

**Complaint 2**

[48] The second complaint of F.T. is that the OIPC has breached its duty to assist him in obtaining information from ICBC, Cascades, and BCLC.

[49] I agree with the submission of the OIPC that there is no statutory duty to assist the applicant to access the records in the possession or control of public bodies and organizations.

[50] F.T. also refers to a moral duty to assist him. I have no jurisdiction to inquire into a breach of a moral duty.

[51] The OIPC is subject to a duty to assist applicants pursuant to s. 6 of *FIPPA*:

**Duty to assist applicants**

6 (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

(2) Moreover, the head of a public body must create a record for an applicant if

(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

[52] This duty applies when the OIPC is operating as a public body responding to access requests. So, as the OIPC submits, the s. 6 duty is limited to a duty to assist F.T. when it responds to access requests for its own records, in its capacity as a public body.

[53] The OIPC has complied with this duty. There is no allegation that it has failed to assist F.T. to access its own records. It is the merits of its decision to deny access that are in issue.

**Complaint 3**

[54] The third complaint appears to be that ICBC has not disclosed documents relating to the accident which F.T. wishes to have. F.T. has provided extensive written argument on the reasons why, in his submission, he is entitled to disclosure of the video recording as well as other information.

[55] This complaint is not within my jurisdiction as an adjudicator. If it is a complaint about ICBC, that corporation is not a party to this proceeding. If it is about the OIPC's handling of F.T.'s complaint, F.T.'s remedy is to seek judicial review of the OIPC's actions. This does not come within my jurisdiction under s. 60 of the *Act*.

[56] I must add that in any event, the OIPC is still proceeding with F.T.'s request for review, file F-18-74573. It has been assigned to an investigator.

[57] In his rebuttal submission, F.T. questions the OIPC's advice to him that a mediation process will take place as part of the investigation. He raises objections about this and cites various authorities about the formal steps mediation must take.

[58] I do not read the OIPC's reference to mediation as anything formal. Instead, I read it as a process followed by many statutory tribunals: an attempt by an officer to seek a mutually acceptable solution through discussion.

**Complaint 4**

[59] The fourth complaint is that the OIPC has not disclosed the content of its files with respect to F.T. He argues that he has a right to see the correspondence between the OIPC and the three organizations.

[60] I accept that this issue is within my jurisdiction because it is a complaint about the OIPC's refusal to disclose its own records.

[61] F.T. may apply for records in the custody or control of the OIPC. The burden is then on the OIPC to prove that there is no right of access pursuant to s. 3(1)(c): *FIPPA*, s. 57.

[62] Section 3(1)(c) provides:

**Scope of this 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;

...

[63] Section 3(3) of the *Act* then provides:

...

(3) The following sections apply to officers of the Legislature, their employees and, in relation to their service providers, the employees and associates of those service providers, as if the officers and their offices were public bodies:

- (a) section 30 (protection of personal information);
- (b) section 30.1 (storage and access must be in Canada);
- (c) section 30.2 (obligation to report foreign demand for disclosure);
- (d) section 30.3 (whistle-blower protection);
- (e) section 30.4 (unauthorized disclosure prohibited);
- (e.1) section 30.5 (notification of unauthorized disclosure);
- (f) section 33 (disclosure of personal information);
- (g) section 33.1 (disclosure inside or outside Canada);
- (h) section 33.2 (disclosure inside Canada only);
- (i) section 74.1 (privacy protection offences).

[64] I am satisfied that s. 3(1)(c) is engaged here.

[65] The Information and Privacy Commissioner is an officer of the Legislature as set out in Schedule 1 of *FIPPA*:

**"officer of the Legislature"** means the Auditor General, the Commissioner appointed under the *Members' Conflict of Interest Act*, the police complaint commissioner appointed under Part 9 of the *Police Act*, the Information and Privacy Commissioner, the Human Rights Commissioner, the Chief Electoral

Officer, the merit commissioner appointed under the *Public Service Act*, the Representative for Children and Youth or the Ombudsperson;

[66] The files are in the custody or control of the Commissioner.

[67] The third requirement of paragraph (c) is that the files relate to the exercise of the Commissioner's functions under the *Act*.

[68] The files that F.T. seeks are operational records. That is, records specific to a case file: see *Jane Doe v. Information and Privacy Commissioner, Adjudication Order No. 26* (January 6, 2015) at para. 45, a decision of Mr. Justice Fitch.

[69] For these reasons, I confirm the decision of the Commissioner that the records are excluded from the application of *FIPPA* by s. 3(1)(c). The Commissioner lacked the discretion to disclose those records.


#### **Other Submissions of the Applicant**

[70] The applicant makes additional submissions about the way the OIPC has investigated and made decisions about his files. He says that the OIPC has not adequately considered what, in his submission, are violations of his rights, including his entitlement to a fair trial. He submits that the OIPC has a legal and moral obligation to reopen any closed files and investigations.

[71] These issues are also outside of my jurisdiction. It is not within my role as an adjudicator to consider whether the OIPC, in making a decision, has complied with procedural fairness or alleged requirements of the laws of natural justice: *J. and D.S. v. Information and Privacy Commissioner, Adjudication Order No. 21* (December 5, 2008) at para. 13. Again, if the applicant takes issue with the OIPC's decisions regarding his complaints against ICBC, Cascades, or BCLC, the proper legal process is to seek judicial review in the BC Supreme Court.

**Decision**

[72] For these reasons, I dismiss the complaint of F.T.



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Mr. Justice Kelleher