

Date: 20240412
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 S.V. on January 5, 2023**

Reasons for Decision

Of the

The Honourable Justice G.C. Weatherill

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

Counsel for the Commissioner:	Kate R. Phipps
The Requesting Party, on his own behalf:	S.V.
Written Submissions of the Commissioner dated:	February 29, 2024
Written Responsive Submissions of the Requesting Party dated:	March 28, 2024
Written Reply Submissions of the Commissioner dated:	April 9, 2024

Introduction

[1] The Information and Privacy Commissioner (“Commissioner”) is an officer of the Legislature that exercises statutory authority to enforce the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA* or the *Act*]. In that capacity, the Commissioner’s delegates hear and decide complaints that public bodies have not fulfilled their duties under *FIPPA*, and undertakes an independent review of public bodies’ responses to access to information requests.

[2] The applicant, S.V. (the “Applicant”), applies, pursuant to s. 62 of *FIPPA*, for review of a decision of the Commissioner dated December 7, 2022 in which the Commissioner refused his request to be provided with copies of “Affidavits from TransLink submitted to the [Office of the Information and Privacy Commissioner] by him” (the “Decision”).

[3] As the Commissioner is unable to review their own decisions I have been designated, pursuant to s. 60 of *FIPPA*, to adjudicate the Applicant’s application for a review of the Decision.

[4] The Commissioner provided written submissions setting out its position on this adjudication, together with the affidavit of Ethan Plato, legal counsel for the Commissioner, sworn February 29, 2024, which sets out his evidence and attached relevant documents concerning the basis for the Decision.

[5] For his part, the Applicant submitted a USB containing what he described as a “large amount of supporting evidence” comprising “roughly three decades of files” of news articles and other materials. The USB contained over 61,000 items, many of which were repeated files, that did not relate to any of submissions made by either party. The files, many of which were unfinished writing samples from the Applicant, were exceedingly and painstakingly tedious to review. His “submission” was largely a rambling, confused, and disorganized hodgepodge of unintelligible, disconnected information that had no bearing on this issue before me.

[6] In contrast, the submissions of the Commissioner were succinct, on point, and helpful. I agree with them in their entirety. They are repeated, in large part, below.

The Statutory Scheme and the Role of the OIPC

[7] The Commissioner is an officer of the legislature with duties and responsibilities for oversight and enforcement of both B.C.'s private sector privacy legislation, the *Personal Information Protection Act*, S.B.C. 2003, c. 63 [*PIPA*] and its public sector access to information and privacy legislation, *FIPPA*.

[8] *FIPPA* provides a right of access to records in the custody and control of a public body. It also sets out limited mandatory and discretionary exceptions to disclosure.

[9] *FIPPA*'s purposes are twofold, and are set out in s. 2 of the *Act*. It both makes public bodies more accountable to the public and protects personal privacy by doing all of the following:

- a) giving the public a right of access to records,
- b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
- c) specifying limited exceptions to the right of access,
- d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
- e) providing for an independent review of decisions made under the *Act*.

[10] Further to *FIPPA*'s purpose of making public bodies more accountable, s. 4 of *FIPPA* creates a right of access to records in the custody and control of public bodies:

- 4** (1) Subject to subsections (2) and (3), an applicant who makes a request under section 5 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.
- (2) The right of access to a record does not extend to information that is excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[11] 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 [...]

[12] The Office of the Information and Privacy Commissioner (“OIPC”) is one such public body, as per Schedule 2 of *FIPPA*. Accordingly, persons have a right of access to records held by the OIPC pursuant to s. 4 of the *Act*.

[13] However, the public has no right of access to records that are outside the scope of *FIPPA*. Section 3 provides that *FIPPA* applies to all records in the custody or control of a public body, subject to certain enumerated exclusions. Section 3(3)(f) specifically excludes from *FIPPA*’s scope “a record that is created by or for, or is in the custody or under the control of, an officer of the Legislature and that relates to the exercise of functions under an Act”. Section 37 of *FIPPA* confirms that the Commissioner is an officer of the Legislature.

[14] When a person is dissatisfied with a public body’s response to their access request, the individual may ask the Commissioner to conduct a review of that decision, as per s. 52 of the *Act*. Additionally, s. 42(2)(a) grants the Commissioner the authority to investigate and attempt to resolve complaints that a duty imposed under the Act has not been performed. For example, a person may make a complaint if they believe the head of a public body has not complied with the requirement that it assist applicants and respond to their requests for records of that public body as per their duty found in s. 6 of the *Act*. The Commissioner is empowered to mediate, investigate, conduct inquiries and issue orders into whether the public body has met its obligations under the *Act* in accordance with Division 1 of Part 5 of *FIPPA*.

The Role of an Adjudicator Under s. 62 of *FIPPA*

[15] Where a person is dissatisfied with the Commissioner’s response to their access request, the Commissioner does not review that decision. Instead, *FIPPA* establishes a procedure for the appointment of an adjudicator to conduct the review. Section 62 specifically affords individuals the right to request a review by an adjudicator:

62 (1) A person who makes a request to the commissioner as head of a public body for access to a record or for correction of personal information may ask an adjudicator to review any decision, act or failure to act of the commissioner as head of a public body that relates to the request, including any matter that could be the subject of a complaint under section 42 (2) (a) to (d).

(2) A third party notified under section 24 of a decision to give access may ask an adjudicator to review any decision made about the request by the commissioner as head of a public body.

[16] A judge of the Supreme Court may be designated to review the Commissioner's decision, act, or failure to act under s. 60(1):

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.

[17] When reviewing the Commissioner's access decision as head of a public body under *FIPPA*, an adjudicator appointed to conduct a s. 62 review can exercise the same powers the Commissioner may exercise when reviewing decisions taken by other public bodies:

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.

[18] In other words, the scope of an adjudicator's review under s. 62 of the *FIPPA* is limited to what the Commissioner could do in fulfilling the same function under s. 52: ensuring that the Commissioner has met their obligations as the head of a public body pursuant to *FIPPA*. As Justice Kelleher put it in *Adjudication (F.T.)*, (7 February 2019) Adjudication Order No. 28:

[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. [...]

[19] The task of the adjudicator on this review is to review the decision made in response to the access request. The task of an adjudicator under s. 62 is not to review the substantive reasonableness of any of the OIPC's decisions with respect to the underlying complaints.

Background

[20] The Applicant has initiated over 30 complaint files with the OIPC regarding the South Coast British Columbia Transportation Authority, also known as TransLink. In the course of some of those proceedings, TransLink relied on affidavit evidence sworn by its officers and employees. In later proceedings, the Applicant relied on TransLink's earlier affidavits.

[21] On November 22, 2022, the Applicant wrote to the OIPC requesting copies of all affidavits from TransLink he had submitted to the OIPC in the process of pursuing complaints under *FIPPA* (the "Requested Records").

[22] Legal counsel for the OIPC, exercising authority delegated by the Commissioner, reviewed the Applicant's request and wrote to him declining to provide access to the Requested Records on the basis they were operational records excluded from the scope of *FIPPA* by s. 3(3)(f). He provided the following explanation to the Applicant:

Under *FIPPA*, a public body such as the OIPC is required to respond to requests for records, if the responsive records exist and are under its custody or control. However, *FIPPA* provides that operational records of the Commissioner, as an officer of the Legislature, are excluded by virtue of s.3(3)(f) of *FIPPA*. This provision reads as follows:

Scope of this Act

3(3) This Act does not apply to the following:

[...]

(f) a record that is created by or for, or is in the custody or under the control of, an officer of the Legislature and that relates to the exercise of functions under an Act;

The records that you requested were created by or for, or are in the custody or under the control of the Commissioner and relate to the Commissioner's functions under *FIPPA*. As operational records they fall within 3(3)(f) of *FIPPA*. As a result, *FIPPA* does not apply to these records and the OIPC is not required to disclose them to you.

[...]

Please note that the OIPC has been through over 25 separate adjudications concerning the application of *FIPPA* to operational records. In each of those hearings, a Justice of the Supreme Court of British Columbia, acting as an Adjudicator, has affirmed that operational records are exempt from disclosure. A list of those adjudications can be found at <http://www.oipc.bc.ca/rulings/adjudications.aspx>.

[23] The Applicant responded to this letter and sought a reconsideration of the decision on the basis that the records he was seeking were ones that he himself had provided to the OIPC. Counsel, in his role as the Commissioner's delegate, declined to reconsider his decision, and explained his conclusion that the fact that the Applicant had submitted the records to the OIPC was irrelevant to whether the records are operational records.

Issue

[24] In this review, I am not to consider the merits of the Decision. My function as an adjudicator is limited to determining whether the Commissioner's delegate, Mr. Plato, was correct in concluding that the Requested Records fall outside of the scope of *FIPPA* pursuant to s. 3(3)(f), and are therefore exempted from disclosure.

Analysis

[25] Pursuant to s. 57 of *FIPPA*, the burden is on the Commissioner to prove that the applicant has no right of access to the Requested Records.

[26] There are numerous decisions of judges of this court acting as adjudicators under the *Act* where s. 3(3)(f) of *FIPPA* (and its identically worded predecessor,

[27] As Justice Grauer explained in *Adjudication (B.F.)*, (30 August 2018) Adjudication Order No. 27,

[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] Operation 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.

[...]

[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 [citations omitted].

[28] The Requested Documents are clearly "operational records". They are specific to a case file and were received by the OIPC in the course of investigating a case related to the exercise of the Commissioner's investigative and adjudicative functions. The mere fact that they had been submitted to the OIPC by the Applicant is irrelevant to the question of whether or not they are operational in nature.

[29] The Applicant argued that the disclosure of the Requested Records is in the public interest, and therefore required pursuant to s. 25 of *FIPPA*. Section 25 of *FIPPA* requires proactive disclosure of information where the disclosure is "clearly in the public interest".

[30] I reject the Applicant's argument in this regard in its entirety because s. 25 of the *FIPPA* has no effect on records that fall under the exclusions listed in s. 3(3)(f), see for example *Adjudication (B.F.)*, (30 August 2018) and j) *Adjudication (D.)*, (12 July 2007). Even if s. 25 did apply, the disclosure of the Requested Records would not meet the threshold of being clearly in the public interest.

Decision

[31] I find that the Commissioner has satisfied their burden of proving that the Applicant has no right of access to the Requested Records as, pursuant to s. 3(3)(f), as they fall outside of the scope of documents required to be produced under *FIPPA*.

[32] The Applicant's application for a review of the Commissioner's decision is dismissed.



Justice Gordon C. Weatherill