

Date: 20250117  
Place: Vancouver

**In the Matter of:**

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

And in the Matter of:

An Adjudication Under Section 62 of the *FIPPA*,  
Requested by Justin Martin on September 17, 2024

## **Reasons for Decision**

**of the**

**Honourable Mr. Justice Crossin  
(Sitting as an adjudicator appointed under s. 60 of *FIPPA*)**

Counsel for the Commissioner:	K. R. Phipps
The Requesting Party on his own behalf:	J. Martin
Written Submissions of the Commissioner dated:	December 6, 2024
Written Submission of the Office of the Information and Privacy Commissioner dated:	December 6, 2024
Place and Date of Judgment:	January 17, 2025

**Introduction**

[1] Mr. Justin Martin applies 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 of the Information and Privacy Commissioner (the “Commissioner”) dated September 17, 2024 (the “decision”) denying Mr. Martin's access to information request for a certain document that the Office of the Commissioner (“OIPC”) had distributed to municipalities throughout British Columbia.

[2] My review is undertaken pursuant to s. 60 of *FIPPA*. The review enables me to investigate and rule upon the application of Mr. Martin.

[3] There is a feature to this review that is, at least in my experience, somewhat unusual. The decision of September 17, 2024 concluded that access would be denied as a result of finding the record is an internal record related to an investigation undertaken by OIPC and excluded from access pursuant to s. 3(3)(f) of *FIPPA*.

[4] The decision concerning the request determined that the requested record, and its context, related to the Commissioner's function under *FIPPA* and, as it was a record created for the sole purpose of the investigation undertaken pursuant to s. 42(1)(a) of *FIPPA*, was an operational record and thus excluded from the scope of *FIPPA* pursuant to s. 3(3)(f) of *FIPPA*.

[5] On the same day of the decision, Mr. Martin applied for review of the decision.

[6] On October 17, 2024 however, the OIPC corresponded with Mr. Martin and advised that, notwithstanding the record was exempt pursuant to s. 3(3)(f) of *FIPPA*, the Commissioner was exercising his discretion to disclose the record to Mr. Martin, and enclosed the record sought accompanying the correspondence. Notwithstanding the fact Mr. Martin now has the requested record in his possession, he nevertheless wishes to pursue the review.

**The Relevant Background**

[7] In September 2024 OIPC launched an investigation into municipal disclosure of records. The evidence reveals the file relating to the investigation is entitled “Investigation File F24–97698”. In pursuit of the investigation, the Commissioner distributed a survey document to municipalities throughout British Columbia for the purpose of collecting data and information about the types of records each municipality historically makes available to the public. It is this blank survey document the applicant sought and now possesses (the “requested document”). Once the investigation is complete, OIPC will publish a report informing the public about its findings.

[8] On this review, the Commissioner submits the review is now moot. In relation to the requested document, there is no longer a live controversy. Mr. Martin has the document he seeks.

[9] The Commissioner advises however that Mr. Martin has indicated it is his current intention to seek access, at some point in the future, of other material associated with the investigation, and in particular the completed survey documentation. The Commissioner submits that in these circumstances I ought to exercise my discretion and proceed with the review for the specific purpose of providing reasons that would address whether not only the requested document, but all future records associated with the investigation, are excluded from the scope of *FIPPA*. The Commissioner submits that to do so would be in the interests of administrative economy by foreclosing future applications by Mr. Martin.

[10] Mr. Martin generally agrees. Mr. Martin states the controversy that is the subject matter of the review is not moot; but, in the alternative, suggests a decision in relation to the requested document may well dictate the outcome of any future application. In that sense, Mr. Martin submits a decision concerning this particular document could determine the future rights of the parties concerning potential applications.

### Analysis

[11] *FIPPA* provides a right of access to records in the custody and control of public bodies; however also imposes limitations on the ability of a public body to disclose records.

[12] In this regard s. 4 of *FIPPA* creates a right of access to records in the custody and control 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.

[13] However, the public has no right of access to records that are outside the scope of *FIPPA*. Section 3 confirms that *FIPPA* applies to all records in the custody or control of a public body, subject to certain enumerated exceptions. Section 3(3)(f), confirms that *FIPPA* does not apply to “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”.

[14] The public however has recourse to a denial of access. In the event a person is dissatisfied with a public body's response to the access request, the individual may ask the Commissioner to conduct a review of that decision (s. 52), and 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*.

[15] In this event, *FIPPA* has established a procedure for the appointment of an adjudicator to conduct a review. Section 62 of *FIPPA* specifically affords individuals the right to request a review by an adjudicator; and, in accordance with s. 60(1) of *FIPPA* a judge of the Supreme Court of British Columbia may be designated to review the Commissioner's decision pursuant to s. 60(1) of *FIPPA*.

[16] Finally, pursuant to s. 65 of *FIPPA*, an adjudicator has the same powers, duties and functions as the Commissioner in relation to inquiries.

[17] In relation to the circumstances before me, *FIPPA* authorizes the Commissioner to conduct investigations and audits to ensure compliance with any provision of this Act or the regulations.

[18] It is pursuant to this investigative power that the Commissioner is now undertaking the municipal investigation with a view to appreciating essentially the landscape concerning the disclosure of records by municipalities. The investigation involves collecting information from municipalities to better understand the nature of the records each municipality in the Province makes available to the public, whether through freedom of information, proactive disclosure, or for purchase.

[19] The OIPC is facilitating the collection of that information by the use of the requested record. The record is a blank survey and consists of questions created by the delegates of the Commissioner for the purposes of municipal investigation.

[20] The requested record also contains the following preamble:

The Office of Information and Privacy Commission (OIPC) is conducting an investigation under the *Freedom of Information and Protection of Privacy Act (FIPPA)* into municipal governments disclosure records. This investigation includes a survey of all BC municipalities. Survey questions cover FOI requests for records, records made available for purchase, records available without a request, FOI application fees, and business contact information. This information is collected under section 42(1) of *FIPPA*.

[21] As previously referenced, the applicant's request for access was declined by the OIPC. Those reasons included:

Under *FIPPA*, a public body such as the OIPC is required to respond to requests for records, if the response of records exists 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 section 3(3)(f) of *FIPPA*. This provision reads as follows:

**Scope of This Act**

Section 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 the Commissioner and relate to the Commissioner's functions under *FIPPA*. As operational records they fall within section 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 applications 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: (bracket search details supplied)

[22] Again, as previously referenced, on October 17, 2024, the Commissioner exercised his discretion to disclose the requested record notwithstanding it being exempt from disclosure.

[23] I begin with this observation. The entire exercise of the authority of an adjudicator to undertake a review is discretionary. There is in fact no obligation to undertake the review. It is clearly open to an adjudicator to exercise his or her discretion and not undertake a review.

[24] In my view the adjudication concerning the requested record is in fact moot.

[25] In this regard, Mr. Martin raises, upon the review, a discrete point concerning the merits of the decision of the Commissioner. Mr. Martin submits that to characterize the requested record as an operational record in the context of the investigation is "not entirely justified". Mr. Martin suggests the requested record is more 'akin' to a research instrument; rather than a record created for the purpose of investigation.

[26] Mr. Martin says the issue will be back before the commission in the future as he says he intends to seek access to the results of the survey. In my view, the possibility that the present issue may arise in the future is simply too remote and hypothetical to characterize the issue before me, at present, as a live controversy.

[27] Mr. Martin has the requested record. The resolution of this issue will have no practical effect upon Mr. Martin's request. His request has been fulfilled. The review is moot.

[28] There is nevertheless a discretion to proceed to determine the merits of the review notwithstanding the issues determined to be moot.

[29] The leading jurisprudential guidance on this issue remains *R. v. Morgentaler*, [1988] 1 S.C.R. 30. The factors to be considered by the court, as outlined by Justice Sopinka in *Morgentaler*, are neatly summarized by Justice Saunders in *Independent Contractors and Businesses Association v. British Columbia (Attorney General)*, 2020 BCCA 245 at para. 9:

After providing examples of moot cases and concluding at the first step that the case before the court was moot, Justice Sopinka considered the discretion open to a court to hear the appeal - the second step. He identified three rationales for departing from the usual practice of declining to hear a moot case: the requirement for an adversarial context (at 358-59), concern for judicial economy (at 360-361), and concern for the proper law-making function of the court (at 362-363).

[30] The parties both urged me to exercise my discretion and render a decision concerning the issue Mr. Martin has raised upon this review. I am asked to craft a decision that would serve as a template in the event of further requests by Mr. Martin, or any member of the public for that matter, concerning material that may be created in the context of this investigation. As submitted by the Commissioner "if records related to municipal investigations are outside the scope of *FIPPA*, then the adjudicator's guidance may serve administrative economy by preventing future access requests and adjudications".

[31] In relation to the *Morgentaler* considerations, there is no doubt there exists an adversarial context should the matter proceed at this time. That said, there are numerous decisions of adjudicators, in similar circumstances, that clearly support the position of the Commissioner on the merits of this particular review. There does not appear to be any support that the requested record is more akin to a research instrument, nor, in any event, could not also be properly characterized as a operational record created for the purpose of investigation and thus exempt.

[32] In my view however, with the greatest of respect, the considerations of judicial economy, and the proper role of the court, in these circumstances, weighs against the exercising of discretion as urged by the parties.

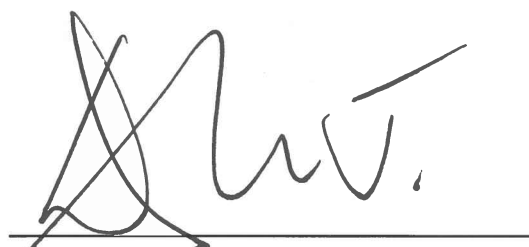
[33] The issue raised by Mr. Martin is not simply whether a particular record is related to the investigation. The issue raised by Mr. Martin is whether the requested record is more properly characterized as a document in the nature of the survey or poll pursuant to s. 13(2) of *FIPPA*; such that it must be disclosed; whether or not it was created for the purpose of an investigation. In addition, Mr. Martin raises questions as to whether certain policy considerations exist that may have relevance in this regard.

[34] The resolution of the issue raised by Mr. Martin is only properly resolved, in my view, upon a case-by-case analysis on the whole of the circumstances as informed by the particular nature and context of any given record. Whether all documents produced during an investigation, regardless of character or content are immune from access, is a question that ought to be decided in relation to a record squarely before the adjudicator; and determined by submissions focused on the particular record.

[35] With deference, it is not consistent with judicial economy or the appropriate role of the court to determine a question that is on the one hand currently moot, and, on the other hand, prospectively entirely hypothetical.

**The Decision**

[36] For these reasons I decline to hear the review. The issue is moot.



Mr. Justice Crossin