Decision F07-03

MINISTRY OF ECONOMIC DEVELOPMENT

David Loukidelis, Information and Privacy Commissioner

June 22, 2007

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Summary: The Ministry disclosed records in response to the applicant's request for access to records but withheld information under ss. 21 and 22. Two weeks before the inquiry, the Ministry notified the applicant that it would also rely on s. 17. The Ministry had originally considered whether s. 17 applies, but it decided to rely on s. 21 only. This is not a case where new relevant facts have been discovered. The Ministry is not permitted to change its mind now and rely on s. 17.

Authorities Considered: B.C.: Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order No. 106-1996, [1996] B.C.I.P.C.D. No. 32; Order 01-18, [2001] B.C.I.P.C.D. No. 19; Order 01-10, [2001] B.C.I.P.C.D. No. 11; Order 01-22, [2001] B.C.I.P.C.D. No. 23; Order 02-38, [2002] O.I.P.C.D. No. 38. **Ont.:** Order P-883, [1995] O.I.P.C. No. 102; Order PO-2113, [2003] O.I.P.C. No. 34; Order MO-2192-I, [2007] O.I.P.C. No. 95.

Cases Considered: *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.); *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. 2464 (Div. Ct.); *Rizzo & Rizzo Shoes (Re)*, [1998] 1 S.C.R. 27; *Golden Valley Golf Course Ltd. v. British Columbia (Minister of Transportation and Highways)*, [2001] B.C.J. No. 1146, 2001 BCCA 392; *Prassad v. Canada (Minister of Employment & Immigration)*, [1989] 1 S.C.R. 560, [1989] S.C.J. No. 25.

1.0 INTRODUCTION

[1] Stemming from an impending inquiry under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), this decision has to do with this Office's authority to exercise control over the inquiry process under Part 5 of FIPPA. Specifically, the public body involved, the Ministry of Economic Development ("Ministry"), takes the position that it should be allowed to rely on s. 17 of FIPPA,

an exception that it considered but rejected when it responded to the applicant's access request under FIPPA. The Ministry goes so far as to say that, regardless of what I decide here, it is nonetheless entitled to present evidence supporting the application of s. 17 and that I must give effect to s. 17 if the evidence supports it.

[2] The applicant sought access to certain records from the Ministry. The Ministry disclosed records in response, but severed and withheld information under ss. 21 and 22 of FIPPA. The applicant then requested a review of this response and, mediation by this Office having failed to resolve the matter, an inquiry has been scheduled under Part 5 of FIPPA.

[3] This Office issued a notice of written inquiry to the parties on April 3, 2007. The notice says the issue is "whether the public body is required by sections 21 and 22 to withhold information." The inquiry was originally scheduled for April 27, 2007, with initial submissions being due on April 19, 2007, but on April 12, 2007 it was adjourned until May 18, 2007 at the Ministry's request and with the applicant's consent.

2.0 ISSUE

[4] In a May 3, 2007 letter to the applicant, the Ministry told the applicant the Ministry would also be relying on s. 17 of FIPPA in the inquiry.[1] On May 7, 2007, I wrote to the Ministry and said the following:

> The Ministry's stated intention, at this very late date, to add s. 17 as a ground for refusal to disclose records raises a preliminary issue that should be resolved at this time. The Ministry is therefore invited to make written submissions to this office on why it should be entitled or permitted to argue the applicability of s. 17 of FIPPA at this stage.

[5] The Ministry made a written submission, as did the applicant.

3.0 DISCUSSION

[6] **3.1 Adding Discretionary Exceptions**—It is well known that, exercising the authority to control this Office's processes under FIPPA, a public body may not be permitted to argue the applicability of new discretionary exceptions at the inquiry stage. The Ministry knows this, certainly, since it relies on Order 01-15,[2] a case in which the public body was permitted to rely on a new discretionary exception.

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[1] There is no evidence before me that the Ministry at any time before this indicated to the applicant that it would seek to rely on another exception.

[2] [2001] B.C.I.P.C.D. No. 16.

[7] Order 01-15 was not the first case in which this issue was addressed. In Order No. 106-1996,[3] Commissioner David Flaherty rejected a public body's attempt to rely on s. 14 at the inquiry stage. He said that he was "not prepared to accept late arguments, of which the applicant did not have notice, that were not specified in the formal written Notice of Inquiry."[4] In Order 01-18,[5] I held that the Workers' Compensation Board could not at the inquiry stage argue the applicability of s. 17, saying this:

> [6] As a general proposition, the raising of additional discretionary exceptions at the inquiry stage is unacceptable. A public body must, at the time it considers an access request, assess which of the Act's exceptions to the right of access may, or must, be applied to information in requested records. Although I may, in appropriate circumstances, permit the raising of discretionary exceptions during the inquiry process, I am not generally inclined to do so, especially in a case such as this, where the public body raises a new discretionary exception for the first time in its initial submission and without explicitly giving any reason for doing so….

[8] In Order 01-22,[6] where she ultimately allowed the public body to rely on two new exceptions, Lorrainne Dixon, Executive Director of this Office, said this about attempts to add discretionary exceptions:

> [8] …The Commissioner has strongly discouraged the late application of discretionary exemptions by public bodies, and I echo his concerns here. It is not conducive to an effective mediation process between public bodies and applicants, if, late in the day when the matter proceeds to inquiry, new discretionary exceptions are applied. When an applicant requests a review of an access decision on the basis of a response under s. 8, the exceptions in issue should not be a moving target. Furthermore, since one of the aims of the mediation process is to narrow the issues that go to inquiry, to have the range of exceptions expanded once the mediation is finished and the inquiry notice is issued is counterproductive to say the least. There may be times when cogent and clear new evidence results in the public body applying a new, discretionary exemption, but these should be extremely limited….

[9] Many decisions under Ontario's *Freedom of Information and Protection of Privacy Act*, the scheme of which is similar to FIPPA's, have addressed this issue. In Order P-883,[7] Inquiry Officer Anita Fineberg said this about late reliance on discretionary exceptions:

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[3] [1996] B.C.I.P.C.D. No. 32.
[4] Para. 14.
[5] [2001] B.C.I.P.C.D. No. 19. Also see Order 01-10, [2001] B.C.I.P.C.D. No. 11, where I did not allow the applicant to rely on a new provision of FIPPA at the inquiry submission stage.
[6] [2001] B.C.I.P.C.D. No. 23.
[7] [1995] O.I.P.C. No. 102.

> In Order P-658, I explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. I indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act.
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> I also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, I made the point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

[10] In that case, Inquiry Officer Fineberg decided, applying a policy of the Ontario Information and Privacy Commissioner, not to allow the institution to rely on new exceptions. Her decision was upheld on judicial review by the Ontario Divisional Court.[8]

[11] The above British Columbia decisions, which date back more than ten years, establish that a public body will be permitted to rely on a new discretionary exception at the inquiry stage in only certain circumstances. They establish the default position that a public body cannot rely on a new discretionary exception at the inquiry stage unless permitted to do so.

[12] **3.2 Parties' Submissions**—In its submission, the Ministry apologizes for seeking to rely on s. 17 at this stage, but says its failure to invoke s. 17 earlier was due to an "oversight". It acknowledges that the relevant Ministry program area official told the Ministry's Acting Manager of Information Access and Records Services that s. 17 "potentially applied to information in the requested records".[9] The Ministry also acknowledges that its Acting Manager ultimately decided to recommend to the Ministry's head that only s. 21 be applied to the records, not s. 17 as well.[10]

[13] According to the Ministry, the Acting Manager did not become aware of circumstances that would lead her to believe that s. 17 applied to the records until preparing for the inquiry. It says that, during preparation for the inquiry, the Ministry program area official gave "detailed reasons"[11] as to why, in relation to

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[8] *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.). Also see *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. 2464 (Div. Ct.). For other examples from Ontario of such decisions, see Order PO-2113, [2003] O.I.P.C. No. 34, and Order MO-2192-I, [2007] O.I.P.C. No. 95.

[9] Para. 8, Acting Manager's affidavit.

[10] Para. 9, Acting Manager's affidavit.

[11] Para. 10, Ministry's submission.

s. 21, it was in the public interest that similar information should continue to be supplied to the Ministry. The Ministry says the Acting Manager then

> …learned for the first time that a result of similar information not being provided to the Ministry in the future would be harm to the Provincial Government's ability to manage the economy.[12]

[14] This was, the Ministry submits, when it was realized that it had been an "oversight" not to apply s. 17 in the Ministry's response to the applicant. The Ministry contends that, as was the case in Order 01-15, it should be permitted to rely on s. 17 because this will merely "correct an obvious oversight."[13]

[15] The applicant acknowledges that, in Order 01-15, the public body was permitted to rely on a new exception, but says there was no oversight here. The applicant says the Acting Manager made a conscious decision, after considering the matter, that s. 17 did not apply[14] and, whether or not that decision is correct, it "belies any notion that an oversight resulted in the section not being relied upon."[15] The applicant contends that the Ministry "is now attempting to reverse itself", and adds this:

> Such an argument suggests that anytime the Ministry changes its mind about what sections may be applicable, that it should be allowed to do so. Such an approach is fundamentally unfair to applicants, is detrimental to the mediative process, and is abusive to the process.[16]

[16] The applicant's argument concludes with this submission:

> Should the Ministry's request be granted, the door will be opened on all sorts of last minute changes to the grounds relied upon, leaving applicants in the untenable situation of expending time and resources to fight improper refusals to release never really knowing whether the grounds relied upon are final, or subject to last minute change. Such an approach is undisciplined and will lead to greater delays in the adjudicative process.[17]

[17] The Ministry's evidence is found in the Acting Manager's affidavit, the substantive portions of which follow:

> 2. I was involved in the Ministry of Economic Development's processing of the Applicant's request under the *Freedom of Information and Protection of Privacy Act* (the "Act").

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[12] Para. 11, Ministry's submission.
[13] Para. 12, Ministry's submission.
[14] Page 2, applicant's submission.
[15] Page 2, applicant's submission.
[16] Page 2, applicant's submission.
[17] Page 3, applicant's submission.

3. My role in processing requests under the Act includes seeking input from officials in the Ministry program areas responsible for the requested records.

4. Input from Ministry program area staff is invaluable because those individuals normally have the most knowledge about the contents of the records held by their program area. As such, those individuals are normally in the best position to articulate what the consequences would be of any public disclosure of the records requested under the Act.

5. Upon obtaining input from program area staff about the consequences of any disclosure of the requested records, as well as obtaining input from other relevant sources, my role is to provide advice to the Ministry's delegated head about the application of the Act to those records.

6. The Applicant requested records relating to applications by construction companies to the Provincial Nominee Program (the "Program Area").

7. In processing the Applicant's request, I consulted with a representative of the Program Area (the "Program Area Contact") because their program had physical custody of, and were responsible for, the requested records.

8. The Program Area Contact advised me during the initial processing of the Applicant's request that sections 17 and 21 potentially applied to information in the requested records. In light of that, I looked into whether or not one or both of those exceptions applied to those records.

9. I ultimately decided to recommend to the delegated head that only s. 21 applied to the requested records because I was not aware of any circumstances at the time that led me to believe that s. 17 of the Act applied to those records.

10. After the decision was made to not recommend the application of s. 17 to the requested records, our focus was entirely on the application of s. 21, not s. 17.

11. In preparing for this inquiry, I have engaged in discussions with Ministry legal counsel and the Program Area Contact concerning the application of s. 21(1)(c)(ii) to the requested records.

12. During those internal discussions the Program Area Contact provided detailed reasons as to why it was "in the public interest that similar information continue to be supplied".

13. I had already been aware that a result of disclosing the information in dispute in this inquiry would be that third parties would no longer provide similar information to the Ministry in the future. However, during my discussions with the Program Area Contact I learned that a result of similar

> information not being provided to the Ministry in the future would harm the Provincial Government's ability to manage the economy. As such, I realized at that time that it had been an oversight for the Ministry not to apply s. 17 at the time of the Ministry's initial response to the Applicant's request.
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> 14. In other words, in preparing for this inquiry I became aware of circumstances that I was not aware of at the time the Ministry originally responded to the request that led me to believe that s. 17 of the Act applied to the requested records.
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> 15. Upon learning that s. 17 applied to the requested records, the Ministry advised the Applicant that it would rely on s. 17 in the upcoming inquiry, in addition to s. 21 of the Act.

[18] **3.3 Ministry Cannot Rely on Section 17**—As she deposes, the Acting Manager's role in responding to the applicant's request was to seek input from program area officials and to advise the Ministry's head about FIPPA's application to the requested records. She deposes that "[i]nput from Ministry program area staff is invaluable" because they "normally have the most knowledge about the contents of the records" they hold.[18] The Acting Manager accordingly consulted the Ministry program representative, who told her that both s. 17 and s. 21 might apply. She was also at that time "aware that a result of disclosing the information in dispute…would be that third parties would no longer provide similar information to the Ministry in the future."[19]

[19] The Ministry considered the applicant's request over a full five-month period.[20] Having been told by the Ministry program official with knowledge of the records that s. 17 might apply, and appreciating that similar information might no longer be supplied to government, the Acting Manager decided not to recommend that s. 17 be applied. Section 8 required the Ministry, when responding, to tell the applicant whether the applicant was entitled to access, the reasons for the refusal to disclose information and the FIPPA provisions on which the refusal was based. When the Ministry responded, it did not apply s. 17.

[20] The Acting Manager deposes that it was not until she was involved in inquiry preparation that she became aware of "circumstances"[21] that led her to believe that a drying-up of information flows to government "would harm the Provincial Government's ability to manage the economy",[22] thus bringing s. 17 to bear. She also deposed, however, that she was aware when considering the

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[18] Para. 4 of the Acting Manager's affidavit.
[19] Para. 13 of the Acting Manager's affidavit. This mirrors the language of s. 21(1)(c)(ii) of FIPPA, indicating that the Acting Manager considered this specific aspect of s. 21. The Ministry's submission here suggests this is now at the heart of its contention that s. 17 applies.
[20] Whether this response time complied with FIPPA's requirements is not relevant here.
[21] Para. 14 of the Acting Manager's affidavit.
[22] Para. 13 of the Acting Manager's affidavit.

request that disclosure of the information would, she says, cause third parties to no longer provide similar information to the Ministry.

[21] The Ministry says the Ministry's program official gave "detailed reasons" during inquiry preparation as to why s. 17 applies. It says the Acting Manager was then made aware of "circumstances" of which she was not previously aware as to the application of s. 17. The Ministry provides no particulars or evidence about what it means by "circumstances". It does not say, certainly, that new relevant facts came into existence or were discovered after the Ministry's decision on the request. The Ministry refers to "circumstances" that are only now known, but I infer this to refer only to an apparently new-found appreciation of a link between s. 21(1)(c)(ii) and harm under s. 17. Nor does the Ministry provide particulars as to what "detailed reasons" its program official has lately given regarding s. 17. In this regard, the evidence is that the Acting Manager originally consulted this same official and I infer that the official had reasons for suggesting at that time that s. 17 might apply.

[22] This is not a case where a public body seeks to rely on a new discretionary exception because it has discovered relevant facts that it did not know when it made its decision and that it could not have known using due diligence. The Acting Manager's recent discussion with the Ministry's legal counsel and the Ministry program area official whom she originally consulted is not a reason to permit the Ministry to rely now on s. 17. I will not permit the Ministry to rely on s. 17 in the inquiry and that exception will not be considered. There is no unfairness in this to the Ministry.

[23] As for the Ministry's reliance on Order 01-15, the "oversight" involved there flowed from the Ministry's slip in failing to apply s. 19 to information that was found in more than one place in the records. The Ministry had turned its mind to the substance of s. 19 in relation to certain information, but had neglected to apply it to all instances where that same information was found in the records. This is not such a case.

[24] **3.4 Control of the Inquiry Process**—The Ministry raises another point that must be addressed. It argues that, even if I decide not to allow it to rely on s. 17, I must apply that exception if there is evidence properly before me establishing that it applies. This is its argument on the point:

> 14. This inquiry will deal with a decision of the head of a public body to refuse to give access to part of a record. As such, the Commissioner has to do one of the three things referred to in paragraphs 58(1)(a) to (c). The only option that permits the Commissioner to order the disclosure of all or part of a record is s. 58(2)(a), which says that the Commissioner can "require the head to give the applicant access to all or part of the record, if the commissioner determines that the head is not authorized or required to refuse access".

> 15. Even if the Commissioner were to not accept the Ministry's late addition of s. 17, the Ministry submits that there would still be evidence relevant to the s. 21 issue that would demonstrate that s. 17 properly applies to the information at issue. In such a case, it is the Ministry's submission that the Commissioner can only order the disclosure of some or all of the information at issue if he "determines that the head is not authorized or required to refuse access". However, the Ministry submits that if there is evidence properly before the Commissioner that demonstrates that not only the exception referred to in the notice of inquiry applies, but another exception that was added late by the public body as well, the Commissioner must consider the exception that was added late. How else can the Commissioner determine that "the head is not authorized or required to refuse access" to the information at issue?
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> 16. In this case, the Ministry will be tendering evidence that it believes demonstrates that s. 21 of the Act applies. Regardless of whether the Commissioner decides at this time to allow the addition of s. 17, the Ministry submits that the s. 21 evidence will demonstrate that s. 17 also applies. As mentioned, the only way that the Act will permit the Commissioner to order the disclosure of all or part of a record is if "the commissioner determines that the head is not authorized or required to refuse access". As such, even if the Commissioner were to find that s. 21 does not apply (the Ministry says it does), he would still only be able to order the disclosure of all or some of the information at issue if he is satisfied [th]at the head is not authorized or required to refuse access to that information. However, how could the Commissioner do that if he has evidence properly before him that demonstrates that s. 17 applies? The Ministry submits that the Commissioner cannot do so on the basis that if he has evidence that is properly before him (in this case, the s. 21 evidence) that shows that another exception that has been applied by the public body, late or otherwise, properly applies, the Commissioner will be precluded from ordering the disclosure of that information under s. 58(2)(a) because he will be unable to conclude that "the head is not authorized or required to refuse access". The Ministry submits that this is a further reason as to why it would be appropriate for the Commissioner to permit the Ministry to make submissions on the application of s. 17 in this inquiry.

[25] The applicant describes this argument as "audacious, insofar as it suggests that the Commissioner must accept the Ministry's reliance" on s. 17 and that "the Commissioner does not in fact have the authority to control the adjudicative process."[23] The applicant argues that, if correct, this would mean that I have "no choice but to consider the very section" that I have not allowed the Ministry to raise.[24] The applicant adds this:

[23] Page 2, applicant's submission.
[24] Page 2, applicant's submission.

> Putting aside the circular nature of the argument, such an approach would allow this Ministry, and others, carte blanche to change the grounds upon which they refuse production of documents. Such an approach is untenable at law, and should not be accepted by the Commissioner.[25]

[26] The Ministry's argument focuses on the language of s. 58(2) and gives it an interpretation that that is not in harmony with FIPPA's scheme or the objective and intention of the Legislature.[26] One of FIPPA's purposes is to provide for "an independent review of decisions made under this Act." Independent review of a public body's access decisions is at the core of this Office's duties and functions. Part 5, in which s. 58 is found and which provides mechanics for these reviews, is to be interpreted in light of FIPPA's goal of providing independent review of public body decisions.

[27] A review is initiated by a request under s. 52, which enables a requester to seek a review of any "decision" of the head of a public body. The "decision" under review here is the Ministry's decision under s. 8, respecting which the applicant requested a review. Section 55 empowers the commissioner to authorize a mediator to attempt to settle "a matter under review" and this was done in this case.

[28] Under s. 56, if mediation is not attempted or is attempted and fails, the commissioner can hold an inquiry and is empowered to "decide all questions of fact and law arising in the course of the inquiry." Section 58 requires the commissioner to make an order under that section once the inquiry is complete. Section 58(2) deals with inquiries into access decisions—it applies where the inquiry is into "a decision of the head of a public body to give or to refuse to give access to all or part of a record". Here, the "decision" of the Ministry's head was to refuse access under s. 21 and s. 22 and, after mediation, this Office issued a notice of inquiry that framed the issues as being s. 21 and s. 22 only.

[29] The Ministry's argument would enable a public body to change or backfill its access decisions whenever it likes—for whatever reason or no reason—and compel the commissioner to give effect to that decision if the inquiry evidence supports it. The argument holds the commissioner powerless to stop this, conferring on the public body the sole discretion to stipulate the inquiry issues.

[30] This Office is an administrative tribunal and, as the courts have affirmed, a tribunal has the authority, subject to certain conditions not engaged here, to control its own procedures.[27] As the Ministry is aware, FIPPA decisions dating

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[25] Page 2, applicant's submission.

[26] The modern rule of statutory interpretation requires FIPPA's language to be read in its grammatical and ordinary sense and its entire context, in harmony with FIPPA's scheme, its objective and the intention of the Legislature. See, for example, *Rizzo & Rizzo Shoes (Re)*, [1998] 1 S.C.R. 27, which was applied in, for example, Order 02-38, [2002] O.I.P.C.D. No. 38.

[27] See *Golden Valley Golf Course Ltd. v. British Columbia (Minister of Transportation and Highways)*, [2001] B.C.J. No. 1146, 2001 BCCA 392, citing *Prassad v. Canada (Minister of*

back more than ten years exercise the authority to control the inquiry process by permitting public bodies to rely on new discretionary exceptions at the inquiry stage in only certain circumstances. As those decisions show, a public body may rely on a new discretionary exception at the inquiry stage only where permitted. If the public body is not permitted to rely on a new discretionary exception, the "decision" under review is that made under s. 8 and it is to this decision that the s. 58(2) order relates. This approach is fair and it is conducive to fair, efficient and timely resolution of access to information disputes, whether at the mediation stage or through the inquiry process.

[31] Again, the "decision" under review, and in respect of which a s. 58(2) order will be made after the inquiry, is the Ministry's decision to rely on s. 21 and s. 22, not s. 17. My decision not to allow the Ministry to alter its decision is an exercise of the authority to control the inquiry process and there is, again, no unfairness to the Ministry in my so deciding.

4.0 CONCLUSION

[32] For the reasons given above, s. 17 will not be considered in the inquiry.

June 22, 2007

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

OIPC File: F06-30026

Employment & Immigration), [1989] 1 S.C.R. 560, [1989] S.C.J. No. 25. Also see, in relation to processes under Ontario's FIPPA, the Ontario Divisional Court decision in *Fineberg*, above.