OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Decision F10-01

UNIVERSITY OF BRITISH COLUMBIA

Jay Fedorak, Adjudicator

February 10, 2010

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Summary: The complainant, a former employee of UBC, requested a psychiatric report about him that a doctor created, as a service provider to his employer, and supporting documents. Complainant alleged UBC did not meet its duty to assist under s. 6 of FIPPA by failing to produce the doctor's interview notes. UBC argued that it did not have custody or control of the notes. This preliminary decision determined that the notes are not in the custody or under the control of UBC. As the notes were the only matter at issue, the hearing on the issue of whether UBC met its duty to assist will not proceed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 6.

Authorities Considered: B.C.: Order 02-29, [2002] B.C.I.P.C.D. No. 29; Order 04-19 [2004] B.C.I.P.C.D. No. 19; Order 04-27 [2004] B.C.I.P.C.D. No. 28; Order F06-01 [2006] B.C.I.P.C.D. No. 2; Order No. 247-1998, [1998] B.C.I.P.C.D. No. 41.

Cases Considered: *Greater Vancouver Mental Health Services Society v. British Columbia Information and Privacy Commissioner* [1999] B.C.J. No. 198 (S.C.); *British Columbia (Minister of Small Business, Tourism and Culture) v. British Columbia (Information and Privacy Commissioner)* [2000] B.C.J. No. 1494; *Neilson v. British Columbia (Information and Privacy Commissioner)* [1998] B.C.J. No. 1640.

1.0 INTRODUCTION

[1] This decision arises out of a request for records under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") by a former employee of the University of British Columbia ("UBC"). The complainant made a request to the College of Physicians and Surgeons of British Columbia ("College") for a doctor's

psychiatric report about him and all submissions that the doctor considered in completing the report. The College responded that it was transferring the request under s. 11 of FIPPA to UBC, as UBC had commissioned the report and had a copy, which the College did not.

[2] UBC accepted the transfer and its initial response was to indicate that the applicant had already received a copy of the report from his union. The applicant was dissatisfied with this response and made a complaint to the Office of the Information and Privacy Commissioner ("OIPC"). UBC subsequently provided him with a copy of the report and copies of submissions provided to the doctor for the preparation of the report. The complainant remained dissatisfied with UBC's response. Mediation was unsuccessful in resolving the matter, and the OIPC issued a notice of hearing to the complainant and UBC. By this time, the only issue was the adequacy of UBC's search for the notes the doctor took when assessing the complainant, which relates to UBC's compliance with its duty to assist applicants under s. 6(1) of FIPPA.

[3] In its initial submission, UBC took the position that it did not have custody or control of the notes, which are in the possession of the doctor. As a result, the OIPC identified the issue of custody or control of the notes as one that warranted resolution before completion of the hearing concerning whether UBC met its s. 6(1) duty. The OIPC then invited and received submissions on the preliminary issue of whether the notes are in the custody or under the control of UBC.

2.0 ISSUE

[4] The issue is whether the doctor's notes are in the custody or under the control of UBC in accordance with ss. 3(1) and 4(1) of FIPPA.

3.0 DISCUSSION

[5] **3.1 Record in Dispute**—The record in dispute is the handwritten notes that the doctor took during a four-hour psychiatric assessment of the complainant that occurred in the doctor's private office.

[6] **3.2 Does UBC have control over the notes?**—Section 3(1) of FIPPA provides that the right of access to records under FIPPA only applies to records "in the custody or under the control" of a "public body". The parties agree that the doctor has custody of the record, so the issue is whether UBC has control over the record.

[7] UBC is a public body under FIPPA, which means that FIPPA applies to all records in UBC's custody. FIPPA will also apply to records that UBC does not possess, if UBC has control of them. If the notes are not "under the control of" UBC, the right of access to records under s. 4(1) does not arise. UBC and the

doctor take the position that UBC does not exert any control over the record.[1] The complainant's submission concentrates on what he considers to be inaccuracies in the doctor's report and details of the history of his employment with UBC, including the contents of other medical reports about him. His submissions do not directly address the issue as to whether the doctor's notes are under the control of UBC. He mentions that he considers the doctor to be an employee of UBC, but does not elaborate on that argument in the context of whether UBC has control over the notes within the meaning of s. 3(1).

[8] Previous Orders and court decisions have established the principles for determining issues of custody or control.[2] Together they establish the following as relevant criteria to be weighed and balanced in the process of assessing whether or not a public body exercises "control" of records:

1. the record was created by a staff member, an officer, or a member of the public body in the course of his or her duties;
2. the record was created by an outside consultant for the public body;
3. the public body possesses the record;
4. an employee of the public body possesses the record for the purposes of his or her duties;
5. the record is specified in a contract as being under the control of a public body;
6. the content of the record relates to the public body's mandate and functions;
7. the public body has a right of possession of the record;
8. the public body has the authority to regulate the record's use and disposition;
9. the public body has relied upon the record to a substantial extent;
10. the record is closely integrated with other records held by the public body; or,
11. the contract permits the public body to inspect, review, possess or copy records produced, received or acquired by the contractor as a result of the contract.

[1] Hearing submission of UBC, June 1, 2009, para. 36; Third party hearing submission, paras. 19-25.
[2] For example, Order 02-29, [2002] B.C.I.P.C.D. No. 29; Order 04-19 [2004] B.C.I.P.C.D. No. 19; Order 04-27 [2004] B.C.I.P.C.D. No. 28; Order F06-01 [2006] B.C.I.P.C.D. No. 2; *Greater Vancouver Mental Health Services Society v. British Columbia Information and Privacy Commissioner*, [1999] B.C.J. No. 198 (S.C.).

[9] This list is not exhaustive and not all of these criteria are relevant in every case.

Was the record created by an employee or consultant of the public body in the course of his or her duties?

[10] It is first necessary to determine whether the doctor was acting in the capacity of an employee or a consultant when she assessed the complainant. Previous orders have demonstrated that, depending on the circumstances of the case, records in the possession of consultants may be treated differently than those in the possession of employees.

[11] UBC takes the position that the doctor was acting as an "outside expert" providing a service that none of the employees of UBC could perform.[3] In addition, UBC's stated objective in engaging the doctor as an external consultant was to obtain an independent and objective opinion about the fitness of one of its employees.[4]

[12] One difficulty with UBC's argument is that the psychiatrist that it engaged was also an employee of UBC, albeit in a different capacity. According to a page from her assessment report on the complainant, which the complainant submitted to this hearing, the doctor indicates that, in addition to being a psychiatrist in private practice, she is a clinical assistant professor of psychiatry at UBC.[5] UBC neither admits this nor denies it.

[13] The other issue is that the definition of "employee" in FIPPA includes a "service provider", which is defined in Schedule 1 of FIPPA as "a person retained under contract to perform services for a public body". This means that the provisions in FIPPA that specify the term "employee" must be read to include service providers.[6] UBC claims that this definition of "employee" applies only to Part 3 of FIPPA, which governs the management of personal information by public bodies. UBC asserts that there is an

> …inherent danger in the OIPC extending the "service provider" and "employee" definitions in Schedule 1 of FIPPA beyond what was intended by the Legislature. The OIPC cannot artificially create employment relationships and change the nature of the dependence or interdependence of the parties through a statutory definition which was intended to ensure that those providing services to a public body protect public body records, only use and disclose those records for the purposes intended, and ensure those records not go outside of Canada.

[3] Hearing submission of UBC, June 1, 2009, para. 41.
[4] Hearing submission of UBC, June 1, 2009, paras. 44, 52.
[5] Hearing submission of the complainant, May 30, 2009, p. 24.
[6] The term "employee" is used in the follow sections 3(1); 3 (3); 5(1); 8(1); 22(4); 27(2); 30.2; 30.3; 30.4; 30.5; 31.1; 33.1; 33.2; 41(1); 42(2); 70(1); 74.1(2); 74.1(3); and 76(2).

> This issue goes to the very heart of the matter of custody or control; one cannot be an independent expert retained primarily for their independence and yet have all of the records they produce fall under the custody or control of the public body. This would strike at the very ability of the public body to enter into relationships with independent third parties where it was required or necessary to do so.[7]

[14] UBC is leaping to some incorrect conclusions here. First, the OIPC does not create employment relationships. As UBC notes, Schedule 1 of FIPPA defines the term "employee" only with respect to FIPPA. This does not create any kind of relationship for the purposes of other legislation or in any other context. The fact that someone is deemed an "employee" under FIPPA does not mean, for example, that she is an employee for the purposes of the *Employment Standards Act* (which has its own definition) or that this interpretation places any obligations on the public body as an employer. Second, the term "employee" appears throughout FIPPA. The term is not restricted to an "employee" in Part 3 of FIPPA, but rather must be read as including service providers wherever it appears in FIPPA. If the Legislature had intended the defined term "employee" to apply only under Part 3, surely it could have said so explicitly, as is commonly done in legislation. It is important to note, however, that the fact that the doctor, as a service provider, is considered an "employee" for certain purposes under FIPPA does not necessarily mean that UBC has control over all of her records.

[15] The next question is whether the doctor was acting in her capacity as a professor at UBC or a psychiatrist in private practice providing services as a consultant, when creating her notes. The principal indicator of the nature of the relationship between UBC and the doctor was a letter of retainer from UBC that outlined the terms of her services. It was addressed to her at her private office off campus and reads as follows, edited to protect the identity of the individuals involved:

> Further to our recent communications, we confirm that we are the lawyers for the University of British Columbia in this matter. [The complainant] is an employee of the University ... .
>
> We confirm that the University wishes to retain you to conduct a psychiatric assessment of [the complainant]. We confirm that [the complainant] is to attend at your office ... for this assessment on ... . We understand that [the complainant] is willing to undergo this psychiatric assessment and that he plans to attend at your scheduled appointment.
>
> [The complainant] is currently on a leave of absence with pay from the University and has been so since ... . The University removed [the

[7] Reply submission of UBC, paras. 11-12.

> complainant] from the workplace due to concerns that he may pose a risk to the safety of members of the University community.
>
> We enclose for your review a cerloxed package with documents that may be relevant to your assessment. The culminating incident which caused the University to place [the complainant] on a paid leave of absence was receipt of a copy of his e-mail ... .
>
> After conducting your assessment of [the complainant], we would ask that you provide us with your advice with respect to the following questions:
>
> 1. Does it pose a risk to the safety of any person to have [the complainant] return to the workplace?
> 2. Does [the complainant] have any condition which may affect his ability to carry out his employment duties in an appropriate manner or which may affect his suitability to be present in the workplace?
> 3. If the answer to question 2 is "yes", what course of treatment would you recommend to allow [the complainant] to return to his full duties at the University without posing a risk of harm to the safety of any members of the University community?
>
> If you believe that these questions are inappropriate or that there are more appropriate or pertinent questions that you should be asked, please contact me to discuss your views.
>
> We thank you for your assistance in this matter. Would you kindly send your invoice to our firm, care of the undersigned.

[16] One consideration is that the letter of retainer is addressed to the doctor at her private office off-campus. Another factor is that UBC invited her to invoice UBC for her services, indicating that conducting the assessment was separate from her duties as an assistant professor. Moreover, as UBC and the doctor point out, she conducted the assessment in her private office.[8] Had UBC, as her employer, sent a memo to her UBC office asking her to conduct the assessment and had UBC not paid her in addition to her usual salary, such circumstances would have indicated that she was acting in her capacity as a UBC employee. The terms of the letter of retainer persuade me that she was acting in her capacity as a psychiatrist in private practice, as an independent consultant, rather than a UBC staff member, in creating the notes.[9]

[17] I conclude that the doctor, as an external consultant to the public body, created the notes during a course of business for which the public body engaged her, that is, assessing the complainant in preparation for writing the report.

[8] Third party hearing submission, para. 5.
[9] Hearing submission of UBC, June 1, 2009, paras. 34, 50.

This does not mean, however, that she created her working notes *for* the public body. She certainly created the assessment report for the public body, and UBC has provided the complainant with a copy of that record. However, there is no evidence that she created the notes specifically for UBC or that UBC expected she would create the notes and provide them to UBC. As a result, I accept UBC's argument that the doctor's notes themselves were not created for UBC.[10]

[18] This conclusion is consistent with Commissioner Loukidelis's decision in Order 04-27, with respect to the working materials produced by external experts that the City of Vancouver hired to review and analyze a property appraisal. In that Order, the Commissioner stated, with respect to the consultants' working materials:

> While the contents of the instruction letters relate, indirectly at least, to the City's functions, in that they pertain to the City's landlease prepayment program (a voluntary program), this does not mean that any of the Other Experts' "working materials" are under the City's control. Unlike the investigator in Order 04-19, the Other Experts in this case were not acting on the City's behalf in carrying out an activity statutorily or contractually required of the City but providing expert and independent comment on a report provided voluntarily by the applicant in the course of discussions on the landlease prepayment issue.[11]

[19] I consider the doctor's notes in this case to be analogous to working papers.

[20] By contrast, in Order 04-19, which concerned an external investigator that a school district had hired to perform a function that one of its employees also performed, the adjudicator determined that the investigator's notes (or working papers) were under the control of the school district.[12] It exercised considerable control over the investigation through setting strict parameters that required the investigator to follow its policies and procedures, as well as the requirements of the collective agreement. In this case, however, the consultant did not perform a function that UBC employees normally performed, and UBC set no parameters on the doctor, other than to provide responses to three issues that it identified.

[21] Another consideration that has played an important role in previous orders is whether the record was created specifically for the use of the public body or was created for the use of the professional in carrying out his or her expert work. In Order No. 247-1998,[13] the Commissioner found that the principal's diary was not within the control of the school district because he created it for personal reflection and a memory aid and never had any intention that the school use it.

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[10] Hearing submission of UBC, June 1, 2009, para. 38.
[11] Order 04-27 [2004] B.C.I.P.C.D. No. 28, para. 26.
[12] Order 04-19 [2004] B.C.I.P.C.D. No. 19.
[13] Order No. 247-1998, [1998] B.C.I.P.C.D. No. 41.

Shabbits J. came to a similar conclusion in *British Columbia (Minister of Small Business, Tourism and Culture) v. British Columbia (Information and Privacy Commissioner)* with respect to a personal diary a ministry employee created. He stated:

> The decision to maintain a diary or record, was solely that of Ms. Fisher. What she included within it was entirely of her own choosing. The L.D.B. had no authority to regulate or control her use or disposition of the diary. I see no basis on which the L.D.B. had a legal right to obtain a copy of Ms. Fisher's diary. I am of the opinion that the store manager's diary has never been in the custody or in the control of the L.D.B., nor has the L.D.B. ever had the right to compel its production. The diary is not a record within the scope of section 3 of the Act.[14]

[22] In this case, I am persuaded that the notes were not created for UBC, but for the doctor in carrying out her expert work.

What do the terms of the contract say about UBC's rights with respect to possessing, regulating, using or disposing of the record?

[23] UBC claims that it has no contract with the doctor that gives UBC "the right to inspect, review, possess or copy the Record".[15] The doctor supports this argument.[16] The letter of retainer makes reference only to the doctor addressing three issues that UBC identified.[17] UBC asserts that the letter of retainer required the doctor to create the report, but it did not require the doctor to take notes of her discussion with the complainant or give UBC the right to inspect or in any other way exercise control over them.[18] Nothing about the way the parties actually conducted themselves contradicts this assertion.

[24] While there is no requirement in the letter of retainer for the doctor to create notes, might there be an implied expectation to create notes? There is a case in which there was such an implied expectation. Madame Justice Dorgan in *Neilson v. British Columbia (Information and Privacy Commissioner)* said the following with respect to the notes of a school counsellor:

> The petitioner counsellor is not an independent contractor; she is an employee of the School District. During the course of her employment she makes notes. These notes are relied upon in the preparation of school records, which preparation is a requirement of her employment. The notes

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[14] *British Columbia (Minister of Small Business, Tourism and Culture) v. British Columbia (Information and Privacy Commissioner)* [2000] B.C.J. No. 1494, para. 25.
[15] Hearing submission of UBC, June 1, 2009, para. 39.
[16] Third party hearing submission, para. 19.
[17] Hearing submission of UBC, June 1, 2009, Affidavit of C.U., Exhibit G.
[18] Hearing submission of UBC, June 1, 2009, para. 47.

> are created by an employee of a public body and used to make periodic reports, possession of which is held by the public body.[19]

[25] I believe that the case before me is distinguishable from *Neilson* in a few respects. The doctor in this case was operating in her capacity as an independent contractor, and not an employee, when she created her notes. UBC engaged her to conduct a one-time assessment, and this contractual relationship with UBC ceased after she provided a copy of the report. The counsellor in *Neilson*, as an employee, had an ongoing connection with the school district and the student who was the subject of the notes. These notes remained of operational value over time for the counsellor, the school district and the student, as the counsellor would continue to provide counselling services to the student that could require reference to the notes of previous sessions. Thus the notes would have an enduring value beyond simply functioning as a temporary reference for the writing of an individual report.

[26] Returning to the terms of the letter of retainer, there is nothing in the letter that gives UBC a legal right to possess a copy of the record or the authority to regulate the doctor's use or disposition of her notes.[20] There is no documentation before me of any authority that UBC might have to regulate the use and disposition of the record.

[27] In a similar case, Madam Justice Lynn Smith considered the terms of a retainer to be significant in determining whether the public body has control of a record in *Greater Vancouver Mental Health Services Society v. British Columbia (Information and Privacy Commissioner)*. She stated the following:

> Could the GVMHSS be said to be in a position to "manage the record throughout its life cycle, including restricting, regulating and administering its use or disclosure"? The evidence did not support a positive answer. ...
>
> The record did not establish that the report produced by Dr. Roe fell within the definition of "materials" in the agreement between the GVMHSS and the Ministry. That report was given to the GVMHSS only on condition that it would be returned, uncopied. There was no evidence that the GVMHSS had the right to ask, or did ask, Dr. Roe to produce such a report, or had the right to claim possession or control of it. The evidence did not establish that Dr. Roe was acting for the GVMHSS in producing the document. These circumstances mean that the document cannot reasonably be described on the basis of the record before the Commissioner as one "produced or developed by the Agency". Mr. Mitha on behalf of Ms. Doe argued that, as in the Neilson case, supra, the GVMHSS had legal control over the activities performed by Dr. Roe and accordingly it had control over the report he prepared. However, there was little evidence that the

[19] *Neilson v. British Columbia (Information and Privacy Commissioner)* [1998] B.C.J. No. 1640, para 35.

[20] Hearing submission of UBC, June 1, 2009, para. 39.

> GVMHSS did have legal control over his activities and none that the control extended to the report in question.[21]

[28] The same considerations apply in this case.

Does the content of the record relate to the public body's mandate and functions?

[29] UBC claims that, while the report the doctor produced relates to the mandate and functions of UBC, the doctor's notes do not, though it does not explain why.[22] The doctor takes the position that even the report itself is only tangentially related to the research mandate of UBC.[23] In my opinion, it is apparent that the assessment that led to the creation of the notes arose out of a human resources function of UBC: managing its employment relationship with the complainant. While this is not an operational issue related to the mandate of a university, it is a core administrative function common to all public bodies. In that sense, the substance of the notes does relate to one of UBC's functions.

Has the public body relied upon the record to a substantial extent?

[30] UBC has relied on the doctor's report, but it claims that it has not relied on the doctor's notes.[24] There is no evidence that UBC has relied directly on the doctor's notes. This is not surprising, given the terms and explicit objective of the retainer. The objective was to get expert answers to specific questions in a report, not have recourse to raw working notes. UBC made a human resources decision respecting the complainant after reviewing the assessment report.

Conclusion on control

[31] On balance, I conclude from my analysis of the indicators of control in this case that the doctor's notes are not in the custody or under the control of UBC. UBC is not required to produce the record.

[32] Parenthetically, I suggest that this case raises another issue with respect to assisting complainants in the spirit of FIPPA. Without prejudging any other matters arising out of these facts, UBC and the doctor may be aware that, in addition to having a right of access under FIPPA to their personal information held by public bodies, individuals, in certain cases, have a right of access to their personal information held by private-sector organizations, including doctors in private practice, under the *Personal Information Protection Act* ("PIPA").

[21] [1999] B.C.J. No. 198 (S.C.), paras. 49 and 52.
[22] Hearing submission of UBC, June 1, 2009, para. 38.
[23] Third party hearing submission, para. 22.
[24] Hearing submission of UBC, June 1, 2009, para. 39.

Having taken the position that the doctor's notes were not subject to FIPPA, UBC could have assisted the complainant by mentioning that he could request them directly from the doctor under PIPA. There is no evidence before me that UBC communicated this option to the complainant. I acknowledge that the issue of the control of the records did not arise until the hearing and that the application of PIPA would be subject to my decision as to whether FIPPA applied to the record. However, I offer this observation with a view to assisting in the resolution of similar situations in future.

4.0 CONCLUSION

[33] For the reasons given above, I find that UBC does not have custody or control of the requested record for the purposes of FIPPA. FIPPA therefore does not apply to this record. Under s. 58(3)(a) of the Act, I confirm that UBC performed its duties in responding to the complainant as it did. Given that UBC has now disclosed the remaining two sets of records that the complainant was seeking, there is no further matter at issue stemming from this complaint. Therefore, the hearing on the issue of whether UBC met its duty to assist in accordance with s. 6(1) of FIPPA by conducting an adequate search for responsive records is now moot and will not proceed.

February 10, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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