OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Decision F10-08

MINISTRY OF EDUCATION

Celia Francis, Senior Adjudicator

August 16, 2010

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Summary: The complainant, an educational researcher, requested renewal of a research agreement under s. 35 of FIPPA with the Ministry. The Ministry refused to renew the agreement and the complainant complained to the OIPC about the refusal. The OIPC issued a notice of hearing to investigate the Ministry's exercise of discretion under s. 35 in deciding not to disclose personal information under s. 35. The Ministry raised a preliminary issue of whether or not the Commissioner has authority to investigate the Ministry's exercise of discretion under s. 35. The Senior Adjudicator concluded that the Commissioner does have such authority and directed that consideration of the merits of the complaint proceed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 35.

Authorities Considered: B.C.: Order F09-21, [2009] B.C.I.P.C.D. No. 27; Order F10-29, [2010] B.C.I.P.C.D. No. 41; Order No. 256-1998, [1998] B.C.I.P.C.D. No. 51; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Investigation Report F08-03, [2008] B.C.I.P.C.D. No. 29.

Cases Considered: *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53, *Conseil de la Magistrature du Québec v. Commission d'accès à l'information*, [2000] R.J.Q. 638 (Qué. C.A.); *British Columbia Development Corp. v. British Columbia (Ombudsman)*, [1984] 2 S.C.R. 477; *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner),* [2009] O.J. No. 90 (Ont. C.A.); *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner),* [2004] O.J. No. 4813; *Macdonell v. Québec (Commission d'accès à l'information),* [2002] 3 S.C.R.; *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, [2006] B.C.J. No. 155, (S.C.); *Architectural Institute of B.C. v. Information and Privacy Commissioner for B.C.*, 2004 BCSC 217.

1.0 INTRODUCTION

[1] This is one of a number of decisions arising from a request for review of the response of the Ministry of Education ("Ministry") to a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for access to an electronic copy of all Foundation Skills Assessment ("FSA") student summary data up to 2005/06. I issued the first decision, Order F09-21,[1] on November 21, 2009. A second decision, Order F10-29,[2] is a clarification of Order F09-21 which I am issuing concurrently with this decision.

[2] The access "applicant" in Order F09-21 and Order F10-29 is the "complainant" in this decision. He is an educational consultant who received FSA data under a research agreement with the Ministry under s. 35 of FIPPA, beginning in 2003 and ending when the research agreement expired on September 30, 2005. He requested a renewal of the research agreement so that he could continue to provide statistics to the "many schools and districts" that had come to rely on his research for school planning and district accountability, but the Ministry declined.

[3] The complainant responded to this situation by making a request under s. 4 of FIPPA to the Ministry on July 30, 2006 for access to the FSA data, either in a form that included students' Personal Education Numbers ("PENs") or, alternatively, with PENs encrypted (and certain other fields removed). The access request also referred to the issue of the Ministry's refusal to renew its research agreement with the complainant.

[4] The Ministry denied the access request for FSA data with the PENs on the basis that these records contained personal information protected by s. 22 of FIPPA. It also denied the requested alternative of FSA data with the PENs encrypted, on the basis that such records did not exist and creating the records would unreasonably interfere with its operations under s. 6(2).

[5] The complainant requested that the Commissioner review the Ministry's response to his access request. A senior portfolio officer in this Office wrote to the parties, framing the issues that had arisen out of the complainant's access request and the Ministry's response to it as follows:

1. Has the Ministry appropriately exercised its discretion in denying the applicant [complainant] a research agreement under s. 35 of FIPPA?
2. Is the Ministry required to apply s. 22 with respect to the personal information requested in the first access request?
3. Would creation of the record with encrypted PENs unreasonably interfere with the operations of the Ministry within s. 6(2) of FIPPA in relation to the alternative access request?

[1] [2009] B.C.I.P.C.D. No. 27.
[2] [2010] B.C.I.P.C.D. No. 41.

[6] Identifying the ss. 6 and 35 issues as complaints under s. 42 of FIPPA and the s. 22 issue as a request for review under s. 53, the senior portfolio officer said that a complaint file and a review file would be opened, but for all practical purposes the objective would be to deal with and attempt to find a resolution to all three issues at the same time. The matters were assigned to a single portfolio officer but, unfortunately, mediation was not successful.

[7] This Office ("OIPC") issued a Notice of Written Inquiry with respect to the request for review under s. 53 and a Notice of Hearing – Invitation for Written Representations for the s. 42 complaints. The Ministry provided notice that it intended to raise a preliminary objection to the Commissioner's authority to investigate the complaint under s. 42. The applicant then suggested that the submissions on the merits of the s. 42 matter be deferred until the preliminary issue was resolved. This is how the matter proceeded.

[8] The written inquiry on s. 22 proceeded before me as a delegate of the Commissioner under s. 49 of FIPPA and I issued Order F09-21 on November 10, 2009. I required the Ministry to disclose some of the FSA data to the complainant. The Ministry's compliance with Order F09-21 was extended, however, pending re-opening proceedings the Ministry initiated. These proceedings have now concluded and I am issuing Order F10-29 along with this decision.

[9] The parties concurrently made separate written submissions on whether the Commissioner has authority under s. 42 to investigate a complaint about the Ministry's decision not to renew the research agreement with the complainant under s. 35.[3] The complainant said that the Ministry initially denied his request for a new research agreement on the basis that he does not perform research and that it later referred to other reasons. The Ministry indicated that it did not "necessarily agree" with the complainant's characterization of those facts but would address them in due course if it was determined that the Commissioner had authority over the complaint.[4]

[10] The preliminary question was pending when Commissioner Loukidelis left office on January 19, 2010 for appointment as the Deputy Attorney General of British Columbia, effective February 1, 2010. It was reassigned to me pursuant to a delegation of the Commissioner's powers under s. 49 of FIPPA. I considered and decided this matter without consultation or input from Commissioner Loukidelis. For purposes of this decision, I have taken the relevant facts to be that the complainant previously received FSA data containing the PENs under a research agreement with the Ministry. The agreement expired on September 30, 2005 and the Ministry denied his request for renewal of the agreement.

[3] The complainant's request for review respecting the access request also attached five letters relating to his access request, which provided additional background to these matters.
[4] Ministry's reply.

2.0 ISSUE

[11] At this stage, I will consider and decide whether the Commissioner has authority to investigate the complaint about the Ministry's decision to refuse to enter into a new research agreement with him under s. 35 of FIPPA.

3.0 DISCUSSION

[12] **3.1 Complainant's Submission**—The complainant points out that the primary goal of access to information legislation is to make public bodies more effective, responsive and accountable by exposing their decision-making processes to public scrutiny.[5] The complainant characterizes the Ministry's refusal to enter into a new research agreement under s. 35 as the type of decision that warrants scrutiny.[6] He submits that the quasi constitutional nature of access and privacy legislation militates against a narrow interpretation of the Commissioner's authority in relation to s. 35.

[13] The complainant submits that, properly interpreted, ss. 42 and 58 of FIPPA confer sufficiently broad remedial jurisdiction not only to investigate a decision not to disclose information for a research purpose under s. 35, but also to order its disclosure. He argues that the terms "compliance" in s. 42(1)(a) and "duty" in ss. 42(2)(a) and 58(3)(a) should be broadly interpreted because: (i) s. 8 of the *Interpretation Act* requires that every enactment must be construed as remedial and must be given such "fair, large and liberal construction and interpretation as best ensures the attainment of its objects"; and (ii) the requirement for a broad interpretation is even more imperative when it involves the exercise of powers of an officer of the Legislature.[7]

[14] The complainant argues that a broad interpretation of "duty" includes consideration of the Ministry's decision whether or not to disclose personal information for research purposes. This approach, he argues, supports the goal of making public bodies accountable by exposing their decision-making processes to public scrutiny.

[15] The complainant also relies on the express legislative purposes set out in s. 2 of FIPPA which he characterizes as "a powerful expression of the core democratic values" that underlie this type of legislation. The Ministry, he claims, has a duty to apply its discretion fairly in deciding who is eligible for disclosure of personal information for research purposes and that duty forms an integral part of the public right of access to records in accordance with s. 2(1)(a).[8]

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[5] The complainant cites *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53, *Conseil de la Magistrature du Québec v. Commission d'accès à l'information*, [2000] R.J.Q. 638 (Qué. C.A.), para. 47, cited with approval by Bastarache and LeBel JJ. (dissenting but not on this point) in *Macdonell v. Québec (Commission d'accès à l'information)* 2002 SCC 71, and *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403.

[6] Paras. 3-12, complainant's reply.

[7] Paras. 13-16 & 20-23, complainant's reply. The complainant also referred to *British Columbia Development Corp. v. British Columbia (Ombudsman)*, [1984] 2 S.C.R. 477.

[8] Paras. 13-18, complainant's reply.

[16] While the complainant acknowledges that judicial review is available as a remedy to challenge the Ministry's decision not to renew the research agreement, he argues that resort to judicial review would be contrary to the legislative scheme which establishes the Commissioner to provide a "user-friendly, less formal, less expensive way to hold government accountable and to protect personal privacy". The complainant also points out that the availability of judicial review does not mean that there cannot be concurrent jurisdiction on the Commissioner's part to review the Ministry's decision.[9]

[17] According to the complainant, the Legislature did not intend to provide investigative power to monitor the administration of FIPPA and to ensure its purposes are achieved, while at the same time neglecting to provide a way to enforce that power. If, as the complainant submits, FIPPA is construed as a code regulating government information practices and the rights of citizens in this area, then a legislative intent to confer a wide ambit of remedial authority must be inferred.[10]

[18] **3.2 Ministry's Submission**—The Ministry submits that the Commissioner does not have jurisdiction to investigate its decision to refuse the complainant's request for a new research agreement under s. 35. It begins with the fundamental proposition that, as a statutory official, the Commissioner may only perform those tasks which the Legislature has assigned and that, in the performance of those tasks, the only powers at the Commissioner's disposal are those granted expressly or by necessary implication in FIPPA. The Ministry points out that the Commissioner's two main tasks under FIPPA are the performance of reviews under Part 5 and the general responsibility for monitoring the administration of FIPPA under s. 42. The Ministry argues that the performance of reviews under Part 5 does not engage s. 35 because a request for access to a record, or for correction of personal information, is a pre-condition for jurisdiction under Part 5.[11]

[19] The Ministry submits the Commissioner's jurisdiction to monitor the administration of FIPPA under s. 42 does not engage s. 35 because FIPPA does not expressly grant the power to investigate a decision not to disclose information for a research purpose under s. 35; nor can such a power be necessarily implied by FIPPA's wording, its structure and its purpose. The Ministry notes that s. 42(2)(a) is the only subsection that has any potential application, insofar as it provides that the Commissioner may investigate complaints that "a duty imposed under this Act has not been performed."[12]

[20] The Ministry maintains that s. 42(1) links the Commissioner's jurisdiction to "compliance with any provision of this Act" and that use of the terms "compliance" and "duty" indicates that the jurisdiction to investigate only extends to public body actions that are governed by a requirement, standard or positive obligation to do or not do something FIPPA imposes. It submits that s. 42 does not grant jurisdiction to

[9] Para. 19, complainant's reply.
[10] Paras. 20-29, complainant's reply.
[11] Paras. 3-7, Ministry's response.
[12] Paras. 8-10, Ministry's initial submission.

investigate a discretionary decision not to disclose information for a research purpose because "there is no duty or element of compliance with the Act that arises with regard to that type of decision." The Ministry argues that, where FIPPA does not impose an obligation or requirement, there can be no order under s. 58(3)(a).[13]

[21] The Ministry asserts that, where there is power to investigate a specific type of discretionary decision in ss. 42(2)(b)-(e), there is a corresponding order-making power in ss. 58(3)(b)-(f). The Ministry refers to the absence of an order-making power in relation to a decision not to disclose personal information for research purpose as further support for the position that there is no jurisdiction to review such a decision.[14]

[22] The Ministry also notes that s. 35 falls within Division 2 of Part 3 (Protection of Privacy) of FIPPA. Division 2 sets out the limited circumstances in which public bodies may disclose personal information, the collection of which is limited by the provisions of Division 1 of Part 3. The Ministry submits that the focus of Division 2 is on "preventing the unauthorized … use or disclosure of personal information by public bodies" which reflects the express purpose set out in s. 2(1)(d). The Ministry contrasts the placement of s. 35 in Part 3 with Division 1 in Part 2 where the focus is on the purpose of "giving the public a right of access to records." The Ministry maintains that the only right at play in s. 35 is the public's right to expect that personal information will only be disclosed by public bodies for authorized purposes and in accordance with the conditions set out in that section.[15]

[23] **3.3 Analysis**

Disclosure for Research and Statistical Purposes under FIPPA

[24] Disclosure of information for research and statistical purposes is addressed in both ss. 22(4)(d) and 35 of FIPPA. Section 22(4)(d) provides:

> 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if: …
>
> (d) the disclosure is for a research or statistical purpose and is in accordance with section 35,

[25] Section 35 of FIPPA provides:

> 35(1) A public body may disclose personal information or may cause personal information in its custody or under its control to be disclosed for a research purpose, including statistical research, only if
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> (a) the research purpose cannot reasonably be accomplished unless that information is provided in individually identifiable form or the research purpose has been approved by the commissioner,

[13] Paras. 11-13, 16-17, Ministry's initial submission.
[14] Paras. 14, 18-24, Ministry's initial submission.
[15] Paras. 25-28, Ministry's initial submission.

(a.1) the information is disclosed on condition that it not be used for the purpose of contacting a person to participate in the research,

(b) any record linkage is not harmful to the individuals that information is about and the benefits to be derived from the record linkage are clearly in the public interest,

(c) the head of the public body concerned has approved conditions relating to the following

(i) security and confidentiality;

(ii) the removal or destruction of individual identifiers at the earliest reasonable time;

(iii) the prohibition of any subsequent use or disclosure of that information in individually identifiable form without the express authorization of that public body, and

(d) the person to whom the information is disclosed has signed an agreement to comply with the approved conditions, this Act and any of the public body's policies and procedures relating to the confidentiality of personal information.

(2) Subsection (1)(a.1) does not apply in respect of research in relation to health issues if the commissioner approves

(a) the research purpose,

(b) the use of disclosed information for the purpose of contacting a person to participate in the research, and

(c) the manner in which contact is to be made, including the information to be made available to persons contacted.

[26] Section 35 is permissive in nature. The use of the word "may" in s. 35 reflects a legislative intention to confer discretion on the head of the public body which, by definition, permits a range of outcomes in response to a request. It also bears noting that s. 35 confers specific authority on the Commissioner in relation to two of the conditions for disclosure. Section 35(1)(a) gives the Commissioner authority to approve a research purpose. Section 35(2) says that the requirements of s. 35(1)(a.1) do not apply in respect of research in relation to health issues if the Commissioner concludes that certain enumerated conditions are met. This language is sufficiently broad to enable either a public body, or a person seeking a research agreement, to request the Commissioner's approval in this regard.

[27] Section 22 is located in Division 2 of Part 1 of FIPPA, which sets out exceptions to the right of access to information held by public bodies. Section 22(1) protects third-party privacy by providing that a public body must not disclose personal information if the disclosure would be an unreasonable invasion of third-party privacy. Section 22(4) then sets out a number of circumstances where disclosure of information is not an unreasonable invasion of third-party privacy.

[28] Section 35 is found within Division 2 of Part 3 of FIPPA which regulates the collection, use, disclosure, retention, correction and disposal of personal information by public bodies. Distilled to their basic elements, the disclosure provisions in Division 2 of Part 3 prohibit a public body from disclosing personal information in its custody or under its control unless such disclosure is authorized under one of four sections (ss. 33.1, 33.2, 35 or 36).[16]

[29] The Ministry relies on the placement of s. 35 in Division 2 of Part 3 to support its contention that this provision is concerned with privacy and that a decision to refuse to disclose personal information is beyond the Commissioner's authority to consider because it does not engage privacy rights. The Ministry contends that the complainant's argument ignores the bifurcated nature of FIPPA and the fact that research agreements fall within Part 3, rather than Part 2, of FIPPA.

[30] Section 35 prescribes conditions that are designed to protect personal privacy but it is important to recognize that it is intended to operate as a discretionary authority for disclosure. It provides a vehicle for authorizing access to information for research or statistical purposes, if the prescribed conditions are met. While a decision refusing disclosure of personal information under a research agreement does not, at least directly, engage privacy concerns, it does engage a citizen's right to request access to information for legitimate research or statistical purposes.

[31] The Ministry's argument is predicated on the view that the access provisions in Part 2 and the privacy provisions in Part 3 operate as watertight compartments. I find this approach difficult to reconcile with the requirement, codified in s. 8 of the *Interpretation Act,* to interpret s. 35 in a purposive manner in the context of FIPPA as a whole. Moreover, the existence and scope of s. 35 research agreements are essential to the operation of s. 22(4)(d), which is part of how access rights are delineated under FIPPA.

[32] In this case, the applicant made an access request for information for research or statistical purposes. Section 22(4)(d) provides that disclosure of information for these purposes will not be an unreasonable invasion of third-party privacy if it is "in accordance with section 35." In Order F09-21, I held that, in order to rely on s. 22(4)(d), the applicant must be signatory to a written research agreement which is in force at the time the access request is made. Thus, the question of whether the applicant is entitled to be a party to a research agreement may, in this case, be a component of the ultimate answer to the question of whether s. 22 requires the Ministry to refuse access to the information to the applicant.

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[16] Commissioner Flaherty considered the discretionary nature of s. 33 in Order No. 256-1998, [1998] B.C.I.P.C.D. No. 51, which involved a request by the British Columbia College of Teachers to the Vancouver Police Department for access to a victim statement in relation to the investigation of a teacher under s. 33(n) [now s. 33.1(l)] of FIPPA. Although he concluded that the record fell outside the scope of FIPPA by virtue of s. 3(1)(h), he said that it was regrettable that the police department had declined to provide the record to the College.

[33] While the considerations of the ss. 22 and 35 issues were temporarily separated procedurally in this case, when this applicant's overall position is considered, they are inextricably intertwined. In Orders F09-21 and F10-29, I considered whether s. 22 required the Ministry to refuse access in circumstances where there is no research agreement. The applicant was entitled to have the question of his access to the data in the absence of any research agreement determined and, in the result, in those orders, I found that he is entitled to access to some of the data at this time. However, as noted in Order F10-29, if it is subsequently determined that the applicant is entitled to be a party to a research agreement, he may be entitled to access to additional data.

[34] Because any decision not to disclose information for research or statistical purposes will impact not just privacy but also access, it is important to keep in mind the overall legislative framework. While it is undoubtedly important to consider the placement of s. 35 in Part 3 of FIPPA in discerning legislative intention, the scope of the Commissioner's authority in relation to research agreements must be considered in the context of FIPPA as a whole.

[35] The analysis must involve a consideration of the purpose and intention of the legislation. The purposes of FIPPA, as set out in s. 2(1), are to make public bodies more accountable by providing a right of access to records and to protect personal privacy by preventing the unauthorized collection, use or disclosure of personal information in the custody or control of public bodies. The cases the complainant cites speak to the fundamental importance of access and privacy rights.[17] In *Dagg v. Canada (Minister of Finance)*,[18] the Court held that the overarching purpose of access to information rights is to facilitate democracy by ensuring that citizens have the information required to participate meaningfully in the democratic process, while privacy rights are designed to protect the privacy of individuals with respect to personal information held by government institutions and to provide individuals with a right of access to that information. The Ontario Court of Appeal also discussed the role of privacy rights in *Cash Converters Canada Inc. v. Oshawa (City)*:[19]

> The right to privacy of personal information is interpreted in the context of the history of privacy legislation in Canada and of the treatment of that right by the courts. The Supreme Court of Canada has characterized the federal *Privacy Act* as quasi-constitutional because of the critical role that privacy plays in the preservation of a free and democratic society. In *Lavigne v. Canada (Office of the Commissioner of Official Languages),* [2002] 2 S.C.R. 773, Gonthier J. observed that exceptions from the rights set out in the act should be interpreted narrowly, with any doubt resolved in favour of preserving the right and with the burden of persuasion on the person asserting the exception (at paras. 30-31). In *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403, the court articulated the governing principles of privacy law including that protection of privacy is a fundamental value in modern democracies and is enshrined in ss. 7 and 8 of the

[17] See also *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner),* [2009] O.J. No. 90 (Ont. C.A.).
[18] [1997] 2 S.C.R. 403.
[19] 2007 ONCA 502, at para. 29.

Charter, and privacy rights are to be compromised only where there is a compelling state interest for doing so (at paras. 65, 66, 71).

[36] It is in the context of those fundamental, but sometimes countervailing, values of protection of privacy and access to information held by public bodies that FIPPA carves the disclosure of data relating to research and statistical analysis out from s. 22's protection of third-party privacy. Section 22(4)(d) is a legislative recognition of the importance and value of research and analysis involving data held by public bodies. The value accorded to such research requires a means to allow such activity to continue even when it involves disclosure of personal information. The s. 35 research agreement is a mechanism for disclosure of personal information, notwithstanding the exceptions that might otherwise apply to an access request for those records. The requirement for a research agreement enables the public body to exercise a degree of control over the security, confidentiality and use of the information that it discloses--control it could not exercise if it disclosed the information under Part 2 of FIPPA without a research agreement. Sections 22(4)(d) and 35 together create authority to disclose third-party personal information for research or statistical purposes, in recognition of the importance of such activities, but with restrictions which recognize the importance of protecting third-party privacy.

[37] **3.4 Section 42**—Section 42, which sets out the Commissioner's general powers for monitoring the administration of FIPPA, provides in part as follows:

> 42(1) In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is generally responsible for monitoring how the Act is administered to ensure that its purposes are achieved, and may
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> (a) conduct investigations and audits to ensure compliance with any provision of this Act,
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> (b) make an order described in section 58(3), whether the order results from an investigation or audit under paragraph (a) or an inquiry under section 56,
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> …
>
> (j) bring to the attention of the head of a public body any failure to meet the prescribed standards for fulfilling the duty to assist applicants.
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> (2) Without limiting subsection (1), the commissioner may investigate and attempt to resolve complaints that
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> (a) a duty imposed under this Act has not been performed,
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> …
>
> (e) personal information has been collected, used or disclosed in contravention of Part 3 by
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> (i) a public body or an employee, officer or director of a public body, or

(ii) an employee or associate of a service provider.

[38] As the opening language of s. 42(1) makes clear, the Commissioner's statutory responsibility for monitoring how FIPPA is administered is exceptionally broad. The research agreements which FIPPA contemplates can act as a mechanism by which FIPPA's overarching purpose, of making public bodies more accountable by facilitating access to information while protecting personal privacy, is achieved. The operation of FIPPA to balance the competing values of privacy and access is a matter which the Commissioner is tasked with overseeing. The courts have repeatedly recognized that the Commissioner is a specialized decision-maker with expertise in balancing the objectives of protection of personal privacy and access to information in the context of reviewing government decisions regarding access.[20]

[39] The powers set out in ss. 42(1)(a) to (j) and s. 42(2) are not an exhaustive list of powers, but rather examples of the types of remedial tools available to the Commissioner to ensure that FIPPA is administered in a manner that achieves its intended purposes. Section 42(1)(a) confers specific power to conduct investigations and audits "to ensure compliance with any provision of the Act". This power extends to all provisions of FIPPA, not just those dealing with access provisions in Part 2. Section 42(2)(a) provides that, without limiting the powers under s. 42(1), the Commissioner may investigate and attempt to resolve complaints that a "duty imposed under this Act has not been performed".

[40] The Ministry focuses on the terms "compliance" in s. 42(1)(a) and "duty" in s. 42(2)(a) to suggest that the Legislature intended to limit the Commissioner's investigation powers to public body actions that are governed by a requirement, standard or positive obligation to do or not to do something that FIPPA imposes. However, this narrow construction of s. 42 fails to reflect the dual purposes and spirit of FIPPA. There is nothing in the language of s. 42 that suggests an intention to immunize discretionary decisions under s. 35 from consideration under FIPPA. On the contrary, ss. 42 and 58(3) appear to reflect an intention to confer investigative and remedial authority in the broadest terms.

[41] The Supreme Court of Canada has recently emphasized the importance of ensuring that a statutory discretion is properly exercised. The Court confirmed that discretionary decisions under privacy and access legislation must not be made in bad faith or for an improper purpose, must not take into account irrelevant considerations and must take into account relevant considerations.[21] When a public body exercises its statutory discretion in a manner that results in information being withheld from disclosure, that discretion is properly reviewed by the Commissioner.

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[20] See, for example, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner),* [2004] O.J. No. 4813; *Macdonell v. Québec (Commission d'accès à l'information),* [2002] 3 S.C.R.; *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, [2006] B.C.J. No. 155, (S.C.); *Architectural Institute of B.C. v. Information and Privacy Commissioner for B.C.*, 2004 BCSC 217.

[21] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

[42] In the context of reviews under Part 5, adjudicators routinely review the exercise of discretion by heads of public bodies in relation to the application of discretionary exceptions under Part 2 of FIPPA. I agree with the complainant's contention that it is possible to have concurrent jurisdiction to review the exercise of discretion, on grounds normally available in administrative law, under FIPPA and by way of judicial review. As Commissioner Loukidelis said in Order 02-50:[22]

> [143] The word "may" in provisions such as s. 16 or 17 confers on the head of a public body a discretion to disclose information that can be withheld under one of the Act's exceptions to the right of public access. In Order 02-38, at para. 149, I affirmed once again that the head of a public body should always consider the public interest in disclosure of information that is technically protected from disclosure and cited some of the relevant factors in considering the public interest in disclosure. I will not repeat that non-exhaustive list of factors here.
>
> [144] The head must exercise that discretion in deciding whether to refuse access to information, and upon proper considerations. If the head of the public body has not done so, he or she can be ordered to re-consider the exercise of discretion. See, for example, Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, at p. 4. The commissioner can require the head to reconsider her or his exercise of discretion if it has been exercised in bad faith, has been exercised perversely or unfairly, where irrelevant or extraneous grounds have been considered or relevant ones have not been considered. See Order 02-38, at para. 147.

[43] Similarly, in Investigation Report F08-03,[23] he observed:

> [38] Discretion can only be said to be properly exercised if the public body has addressed the relevant considerations in the circumstances of the particular request. Some factors will play a greater role in some cases and less in others. …

[44] Although Commissioner Loukidelis made these observations in the context of discretionary exceptions to disclosure in Part 2, they are apposite to the discretionary authority to disclose in s. 35. In this case, it would undermine the important objective of making public bodies more accountable if the heads of public bodies could refuse to exercise their discretion to consider disclosing personal information for research or statistical purposes or if they exercised their discretion on the basis of improper considerations. Such a result would be contrary to the scheme the Legislature contemplated.

[45] Recognizing the discretionary nature of s. 35, I accept that the head of a public body has the discretion to refuse to enter into a research agreement, even if the conditions enumerated in that section are met. However, I do not accept that the head of the public body can refuse to exercise its discretion or exercise its discretion on the basis of unlawful considerations (*i.e.*, for an improper purpose or on the basis of considerations which are extraneous to the legislative scheme). I am satisfied that the

[22] [2002] B.C.I.P.C.D. No. 51.
[23] [2008] B.C.I.P.C.D. No. 29.

refusal to exercise, and the unreasonable exercise of, discretion constitute non-compliance with FIPPA within the meaning of s. 42(1)(a). Such an approach to the review of discretionary powers is consistent with the views expressed in *Dagg.*

[46] The Ministry suggests that there is no order-making power in relation to a discretionary decision to refuse to enter into a research agreement. However, s. 42(1)(b) provides that the Commissioner may make an order described in s. 58(3), whether the order results from an investigation or audit under s. 42(1)(a) or an inquiry under s. 56. Section 58(3)(a) provides that the Commissioner may, by order, confirm that a duty imposed under FIPPA has been performed or require that a duty imposed under FIPPA be performed. That power would seem to extend to an order requiring the head of a public body to exercise his or her discretion under s. 35 of FIPPA or to re-consider the exercise of his or discretion under s. 35 on the basis of proper principles. In addition, as the complainant noted, the Commissioner, as an independent officer of the legislature, has a variety of means at her disposal for following up on an investigation. The Commissioner, in addition to her order-making powers, performs a variety of other tasks, including providing policy recommendations and engaging in public education. As the complainant also noted, even if the Commissioner does not have authority to make a particular order, this does not mean that an investigation and findings on a matter involving the administration of FIPPA would be "toothless."[24]

[47] At this time, the question before me is whether the Commissioner has authority to investigate the complaint, not whether there is jurisdiction to make a particular order. The question of whether any specific order is within the Commissioner's powers under FIPPA is more appropriately determined once the factual matrix has been established through the investigation process.

[48] **3.5 Section 52**—Section 52 provides that a person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Commissioner "to review any decision, act or failure to act of the head that relates to that request, including any matter that could be the subject of a complaint under s. 42(2)". Section 56(1) provides that, if the matter is not referred to a mediator or is not settled under s. 55, the Commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry. An order is then made under s. 58. That is what happened with the complainant's request for review of the Ministry's response to his access request, with the result being Order F09-21 and Order F10-29.

[49] The Ministry correctly points out that there must be a request for access to records, or a request for correction of personal information, to engage the review jurisdiction under s. 52(1). In the absence of either of those, I would agree with the Ministry that, if there is oversight jurisdiction in relation to a public body's decision to

[24] Para. 21, complainant's submissions.

refuse to enter into a research agreement under s. 35, it must be found in s. 42 of FIPPA.

[50] The complainant made his request to the Ministry for access to the FSA data because it declined to renew a research agreement with him under s. 35 and he raised that in his request to the Commissioner for a review of the Ministry's response to the access request. The senior portfolio officer told the parties that the issues all arose out of the complainant's request for access under s. 4. She procedurally separated the complainant's grievances into a complaint under s. 42 and a request for review under s. 52, but proposed for all practical purposes to attempt to resolve them together, no doubt because of their connectedness. I do not mean to suggest that any issue that a person includes in a request for the Commissioner to review a public body's response to her or his request for access to records or correction of personal information is thereby swept into the words of s. 52(1), "any decision, act or failure to act of the head that relates to that request, including any matter that could be the subject of a complaint under s. 42(2)". That could not be so. On the facts of this case, however, I would consider it an open question whether the complainant's combined grievances could not have been considered together in a single inquiry under s. 56, with all the issues relating to his request for access to the FSA data or, for that matter, perhaps in a complaint under s. 42 that combined all issues including whether the Ministry complied with FIPPA in its response to the complainant's access request.

4.0 CONCLUSION

[51] In my view, the decision to refuse to release information for statistical or research purposes pursuant to s. 35 of FIPPA is properly reviewable by the Commissioner. I do not accept that the Ministry's decision not to renew a research agreement with the complainant is immune from complaint investigation under s. 42, in view of the Commissioner's overarching responsibility to monitor the proper administration of FIPPA and ensure compliance, if necessary, by order under s. 58(3). In many cases, a decision with respect to s. 35 may also be appropriately considered in a request for review under s. 52.

[52] As set out above, if it is found that the public body did improperly exercise its discretion under s. 35, one possible result is that the matter will be sent back to the public body for reconsideration. Because of the time which this may take, it may be appropriate for an applicant to have his or her entitlement to information in the absence of the research agreement determined in an inquiry, as was done in this case. This decision is issued concurrently with Order F10-29, a clarification of the applicant's entitlement under Order F09-21, and the decisions should all be read together.

[53] Consideration of the merits of the complaint respecting s. 35 will therefore proceed. As set out in Order F10-29, the complainant has requested that the investigation of this matter proceed along with an investigation into some of the Ministry's conduct leading up to that Order. Whether that is appropriate is better left to

be determined by the individual who conducts the investigation. Nothing in this Order should be taken as suggesting that the two issues should not be considered together.

August 16, 2010

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File No. F06-29952 & F06-30310