



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Decision F13-01

VANCOUVER COASTAL HEALTH AUTHORITY

Hamish Flanagan, Adjudicator

May 30, 2013

CanLII Cite: 2013 BCIPC No. 13

Quicklaw Cite: [2013] B.C.I.P.C.D. No. 13

Summary: Vancouver Coastal Health Authority asked that the OIPC not hold an inquiry into its decision to withhold information in response to an applicant's request. The adjudicator granted VCHA's request because it was plain and obvious that FIPPA did not apply to the information requested and therefore the information could be withheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 56, 3(1)(c).

Authorities Considered: B.C.: Decision F08-11, [2008] B.C.I.P.C.D. No. 36; Order 01-43, 2001 CanLII 21597; Decision F06-06, 2006 CanLII 32975; Order 02-12, 2002 CanLII 42437.

INTRODUCTION

[1] An applicant made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Vancouver Coastal Health Authority ("VCHA") for a copy of the proposed submission and affidavits related to a section 43 application to the Office of the Information and Privacy Commissioner ("OIPC") that VCHA had subsequently withdrawn. When VCHA decided to withhold the information, the applicant made a request to the OIPC to review that decision. In response, VCHA asked the OIPC to exercise its discretion under s. 56(1) of FIPPA to decline to hold an inquiry into VCHA's decision. VCHA argued an inquiry was not needed because it was plain and obvious that FIPPA did not apply to the withheld information, or, in the alternative, that it was plain and obvious solicitor-client privilege applied to the records.

ISSUES

[2] Should the OIPC exercise its discretion under s. 56 of FIPPA to not hold an inquiry to review VCHA's decision to withhold information requested by the applicant?

[3] Specifically:

1. Is it plain and obvious that the requested information is outside the scope of FIPPA under s. 3(1)(c) because it was created for and relates to the functions of an officer of the Legislature?
2. Alternatively, is it plain and obvious that the information requested is subject to solicitor-client privilege under s. 14 of FIPPA?

DISCUSSION

[4] **Records in Issue**—The records at issue consist of four documents that VCHA says were either drafted by a co-op law student (under the supervision of VCHA legal counsel) or are subsequent versions of these documents revised by VCHA legal counsel. VCHA says the documents were prepared to advance a VCHA application to the OIPC under s. 43 of FIPPA to disregard the applicant's future freedom of information requests. VCHA later withdrew its application after some interaction with the OIPC, so the documents in issue were neither submitted to the OIPC nor shared with the applicant.

[5] **Section 56 Principles**—Decision F08-11¹ summarizes the principles for the exercise of discretion not to hold an inquiry under s. 56(1):

- the public body must show why an inquiry should not be held
- the respondent (the applicant for records) does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide “some cogent basis for arguing the contrary”
- the reasons for exercising discretion under s. 56 in favour of not holding an inquiry are open-ended and include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope of FIPPA, and the principles of abuse of process, *res judicata* and issue estoppel
- it must in each case be clear that there is no arguable case that merits an inquiry

¹ [2008] B.C.I.P.C.D. No. 36, at para.8.

[6] VCHA argues that it is plain and obvious that the withheld information is:

- outside the scope of FIPPA under s. 3(1)(c); and/or
- is subject to legal advice privilege under s. 14.

[7] I will deal with each in turn.

[8] **Records Outside Scope of FIPPA**—Under s. 3(1)(c), FIPPA does not apply to records when:²

1. an “officer of the Legislature” is involved; and
2. The record was either:
 - a. created by or for the officer of the Legislature; or
 - b. is in the custody or control of the officer of the Legislature; and
3. The record relates to the exercise of the officer’s functions under an Act.

[9] VCHA submits that the information comprises draft submissions created for an application to the OIPC as an officer of the Legislature and that these draft submissions relate to the exercise of OIPC’s functions under FIPPA. In an affidavit, VCHA’s legal counsel says that the requested information comprises drafts of s. 43 submissions prepared by a co-op law student (under supervision) that she subsequently revised.

[10] The respondent’s submissions that relate to s. 3(1)(c) simply state “it is plain and obvious the records are within the scope of FIPPA...”. The balance of the respondent’s submissions for this decision relate to the issue of solicitor-client privilege and allegations that the applicant has behaved inappropriately, the latter which are not relevant to this decision and therefore will not be discussed further.

[11] I will now consider whether it is plain and obvious that the requirements under s. 3(1)(c) are met for the information. If they are, the Act does not apply.

[12] The records clearly involve an officer of the Legislature as defined in Schedule 1 of FIPPA; in this case the “Information and Privacy Commissioner”, or OIPC.

[13] It is also plain from reviewing the records that they were created for the OIPC and that the records relate to the OIPC’s functions. All of the records take the form of, and appear in substance to be, submissions prepared to support a s. 43 application. Two of the four records contain the email address and the names of particular staff at the OIPC whom the documents were intended to be

² Order 01-43, 2001 CanLII 21597; Decision F06-06, 2006 CanLII 32975, at para. 5.

sent to, the other two documents are variations of these two documents. They are clearly the draft submissions of VCHA to support the s. 43 FIPPA application that was made to the OIPC and subsequently withdrawn.

[14] Therefore, it is clear that the records, being draft submissions for a s. 43 application to the OIPC, were created for the OIPC and relate to the OIPC's functions under FIPPA, in this case considering VCHA's s. 43 request.

[15] In this case the records in issue were never sent to the OIPC. However, s. 3(1)(c) does not require that records need actually be sent to this Office. This conclusion is reinforced by findings in previous orders³ that a public body's internal records such as a memorandum about an OIPC investigation or a review are captured by s. 3(1)(c).

[16] To summarize, it is plain and obvious that the three requirements for s. 3(1)(c) are met for the records so that they are excluded from FIPPA. The types of documents the respondent requested, prepared for an application to the OIPC, are clearly outside the scope of FIPPA. The respondent has not provided any cogent basis for arguing that VCHA has not properly applied FIPPA to the records. There is no arguable case that merits an inquiry.

[17] **Privilege Under Section 14**—Given my conclusion regarding s. 3(1)(c), it is not necessary to consider VCHA's submission that it is plain and obvious the information is subject to legal advice privilege, and therefore appropriately withheld, under s. 14 FIPPA.

CONCLUSION

[18] It is plain and obvious that the records in issue requested by the applicant are excluded from FIPPA by s. 3(1)(c). Therefore, I exercise the discretion under s. 56 of FIPPA to decide that this matter will not proceed to an inquiry under Part 5 of FIPPA.

May 30, 2013

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

OIPC File No.: F12-49440

³ See for example Order 01-43, 2001 CanLII 21597, at paras. 13-14; Order 02-12, 2002 CanLII 42437; Decision F06-06, 2006 CanLII 32975.