



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Decision F06-06

CITY OF VANCOUVER

Celia Francis, Adjudicator
September 22, 2006

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Summary: Respondent requested correspondence between this office and the City of Vancouver. Records in dispute were created by or for this office and relate to the exercise by this office of its functions under FIPPA. As numerous decisions by adjudicators appointed under Division 2 of Part 5, and this office, clearly state, such records are excluded from the scope of FIPPA under s. 3(1)(c). No inquiry to be held.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 56.

Authorities Considered: **B.C.:** Order No. 170-1997, [1997] B.C.I.P.C.D. No. 31; Order 280-1998, [1998] B.C.I.P.C.D. No. 75; Order 01-43, [2001] B.C.I.P.C.D. No. 45; Order 00-48, [2000] B.C.I.P.C.D. No. 52; Order 02-57, [2002] B.C.I.P.C.D. No. 59; Order 01-03, [2001] B.C.I.P.C.D. No. 3; Decision F05-07 [2005] B.C.I.P.C.D. No. 43; Decision F05-03, [2005] B.C.I.P.C.D. No. 21; Order 02-12, [2002] B.C.I.P.C.D. No. 12; Adjudication Order No. 1, (September 6, 1996); Adjudication Order No. 10, (August 4, 1998).

1.0 INTRODUCTION

[1] This decision stems from a request by the City of Vancouver (“City”) that this Office decline, under s. 56 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), to hold an inquiry under Part 5 of the Act respecting a request, which I describe below, made by the respondent, who is the access applicant (“respondent”).

[2] For reasons which follow, no inquiry will be held respecting the respondent’s request for review.

2.0 DISCUSSION

Access request

[3] The respondent requested, under FIPPA, copies of the City's correspondence, both internal and with this Office, which he had not received and which pertained to his FIPPA requests to the City. The City responded by providing copies of some responsive records and denying access to correspondence with this Office under s. 3(1)(c). (It also denied access to other records which are not in issue here.) The City and the respondent engaged in a further exchange of letters which culminated in the respondent requesting a review by this Office of the City's decision to apply s. 3(1)(c) to correspondence with this Office.

[4] It appears that mediation through this Office did not resolve the issue under review as the City later asked that this Office decide, under s. 56 of FIPPA, not to hold an inquiry regarding its s. 3(1)(c) decision.

The City's arguments

[5] The City takes the position that the records in question, which it described as correspondence between the City and this Office about the respondent's FIPPA requests, is excluded from the scope of FIPPA under s. 3(1)(c). It said previous orders have confirmed that s. 3(1)(c) applies to both an officer of the Legislature and his or her staff, referring to a number of orders¹ in support of this position. In Order 280-1998, for example, the City said that the previous Information and Privacy Commissioner found that an exchange of correspondence between this office and a public body is clearly covered by s. 3(1)(c). The City also pointed to Order 01-43, a case involving records of a complaint to the Ombudsman, where the present Commissioner set out the three components of s. 3(1)(c) that must be met before a record is excluded from the scope of FIPPA:

[13] The components of s. 3(1)(c) as it now reads can be summarized as follows:

1. The section only applies where an "officer of the Legislature" is involved. Schedule 1 to the Act defines that term and it includes "the Ombudsman".
2. The record must either:
 - (a) be created by or for the officer of the Legislature; or
 - (b) be in the custody or control of the officer of the Legislature.

¹ Order No. 170-1997, [1997] B.C.I.P.C.D. No. 31, Order No. 280-1998, [1998] B.C.I.P.C.D. No. 75, and Order 01-43, [2001] B.C.I.P.C.D. No. 45.

3. In all cases, the record must relate to the exercise of the officer's functions under an Act (e.g., the Ombudsman's exercise of his functions under the *Ombudsman Act*).

[14] All of the above requirements must be met before the disputed record is excluded from the Act by s. 3(1)(c). They are discussed in more detail below.

[6] The City noted that, in that order, the Commissioner concluded that correspondence between the Ombudsman and the public body was excluded from the scope of FIPPA under s. 3(1)(c).

[7] In this case, the City said, the records in dispute meet all of the above components: they involve the Information and Privacy Commissioner, who is an officer of the Legislature; the records were created by or for the Commissioner or his staff; and the records relate to the Commissioner's functions, *i.e.*, dealing with the respondent's FIPPA requests.

[8] The City then said that the Commissioner has declined to hold an inquiry where the application of FIPPA to records in dispute is "plain and obvious" and referred to relevant decisions on this point.² It concluded by saying that it is plain and obvious that the records in dispute are excluded from the scope of the Act under s. 3(1)(c).

The respondent's arguments

[9] The respondent said that the City had in the past disclosed to him copies of its correspondence with this Office. He said that the City had consulted this Office about the past disclosure and that this Office had consented to the disclosure. He is now apparently only asking for records that post-date that disclosure. The respondent did not provide particulars to support his claims about past actions of the City or this Office in this respect.

[10] The respondent conceded that the records are excluded from the scope of FIPPA by s. 3(1)(c). What is in dispute however, he said, is "their commitments to have these records released to me. The City's commitments were made in their responses to my requests to have these records released". He also said that s. 3(1)(c) does not require a public body to withhold records. In Order 00-48,³ he said, the Commissioner's decision did not focus on the fact that s. 3(1)(c) applied to the records in dispute but "on the public body's commitment to release those records". He concluded by saying that an

² Decision F05-07 [2005] B.C.I.P.C.D. No. 43, and Decision F05-03, [2005] B.C.I.P.C.D. No. 21.

³ [2000] B.C.I.P.C.D. No. 52.

adjudication decision of September 6, 1996 and the City have both set a precedent of releasing records that fall under s. 3(1)(c).⁴

Discussion

[11] Section 56(1) of the Act reads as follows:

Inquiry by Commissioner

56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[12] Section 56 confers discretion as to whether to hold a Part 5 inquiry respecting a request for review. As noted in earlier decisions, there may be a variety of reasons why this discretion might be exercised in favour of not holding an inquiry. These include the factors expressed in Order 02-57⁵ and Order 01-03.⁶

[13] Section 3(1)(c) of FIPPA reads as follows:

Scope of this Act

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following: ...

- (c) subject to subsection (3),⁷ a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

[14] A number of orders⁸ have confirmed that s. 3(1)(c) excludes from the scope of FIPPA such records as letters to and from the Ombudsman related to an Ombudsman complaint or letters between this Office and a public body related to the investigation of a complaint to this office or the mediation by this

⁴ Order 00-48 concerns s. 6(1) of FIPPA, specifically the efforts of the City of Vancouver to search for records, and its application of s. 22 to some information. There is no mention of s. 3(1)(c) in this order. The Adjudication decision of September 6, 1996, Adjudication Order No. 1, <http://www.oipc.bc.ca/orders/adjudications/Adj1a.html>—a review of a decision by the previous Commissioner in his capacity as head of a public body—notes at para. 13 that this office disclosed copies of correspondence between this office and the Ministry of Social Services to the applicant, “without conceding that any of the documents were properly subject to disclosure ...”

⁵ [2002] B.C.I.P.C.D. No. 59.

⁶ [2001] B.C.I.P.C.D. No. 3.

⁷ Subsection 3(3) is not relevant here.

⁸ See, for example, Order 01-43 and Order 02-12, [2002] B.C.I.P.C.D. No. 12.

Office of a request for review. A public body's internal records created for such an investigation or review, such as notes to file of telephone conversations between the public body and this office, or an internal memorandum, about such an investigation or review, are also captured by s. 3(1)(c).

[15] The records in this case are the City's copies of correspondence between this Office and the City dealing with the respondent's requests for review and complaints under FIPPA to this Office. They were clearly created by or for this Office and relate to the exercise of this office's functions under FIPPA. In view of the numerous previous decisions on this point, it is clear beyond doubt that they fall under s. 3(1)(c) of FIPPA and, as such, are excluded from the scope of FIPPA.

[16] It is irrelevant for the purposes of this case whether the City disclosed such records to the respondent in the past, for which, in any case, the respondent provided no evidence. *Esson C.J.S.C.* said this in Adjudication Order No. 1,⁹ which was a review of a decision by this Office to deny access to records under s. 3(1)(c):

14. I see no legal significance in the matter of the Commissioner's office having made voluntary disclosure of some documents. That cannot preclude the Commissioner from taking the position that other records are not subject to disclosure, even if they be of the same kind or class. Before the passage of the Act, it was open to a public office to make voluntary disclosure if it saw fit to do so. That continues to be the case subject to the qualification that, because the purposes of the Act include protection of privacy, care must be taken to avoid prejudicing a third party who may be entitled to protection of privacy. That was done here by obtaining consent of the Ministry of Social Services.

[17] It is, again, abundantly clear that the disputed records are excluded from the scope of the Act.

⁹ Other adjudication decisions have also affirmed that s. 3(1)(c) excludes from FIPPA letters between this Office and a public body related to the investigation of a complaint to this Office or the mediation by this Office of a request for review. See, for example, Adjudication Order No. 10, <http://www.oipc.bc.ca/orders/adjudications/Adj10a.html>. In this decision, Levine J., as she then was, also rejected the applicant's argument that this Office had disclosed such records in the past:

[30] I reject this submission. The fact that the Commissioner has voluntarily disclosed documents or information on one occasion does not create any obligation, enforceable by an adjudicator, that the Commissioner disclose the same type of documents or information on any subsequent occasion: *[Mr. H.]* at para. 14 [*Adjudication Order No. 1*]. In particular, the fact that the Commissioner may have previously disclosed records similar to the records sought here by Mr. B. does not convert any of those records from operational to administrative in nature and does not bring them within the scope of the access rights established by the Act.

4.0 CONCLUSION

[18] In these circumstances, where it is plain and obvious—including in light of previous orders respecting similar information—that the requested information is excluded by s. 3(1)(c), I have decided that no inquiry should be held under Part 5 of FIPPA respecting the respondent's request for access to information. This Office's file for the respondent's request for review will be closed.

September 22, 2006

ORIGINAL SIGNED BY

Celia Francis
Adjudicator

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