



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

Decision F07-05

**VANCOUVER POLICE DEPARTMENT**

Michael McEvoy, Adjudicator

August 29, 2007

Quicklaw Cite: [2007] B.C.I.P.C.D. No. 24

Document URL: <http://www.oipc.bc.ca/orders/section56/DecisionF07-05.pdf>

**Summary:** The Vancouver Police Department's application to request that an inquiry under Part 5 not be held is granted.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 15 (1)(g); s. 56.

**Authorities Considered:** B.C.: Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 01-03, [2001] B.C.I.P.C.D. No. 3; Order 02-57, [2002] B.C.I.P.C.D. No. 59; Order 04-13, [2004] B.C.I.P.C.D. No. 13; Decision F07-02, [2007] B.C.I.P.C.D. No. 4.

## 1.0 INTRODUCTION

[1] The Vancouver Police Department ("VPD") requests pursuant to s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") that an inquiry under Part 5 of FIPPA not be held with respect to an access to information request made by the respondent.

[2] I have considered the submissions of the parties and, for the reasons that follow, I have exercised my discretion to grant the VPD's request that this matter not proceed to inquiry.

## 2.0 DISCUSSION

### *The access request*

[3] The respondent made a request to the VPD under FIPPA for a police file containing records about him.

[4] The VPD provided the respondent with a severed version of the requested records, relying upon ss. 16(1)(b) and 22(3)(b) and (i) of FIPPA in refusing access to the severed portions. This prompted the respondent to ask this Office for a review under Part 5 of FIPPA of the VPD's decision to sever the requested records.

[5] The VPD subsequently advised the respondent and this Office that the VPD also relied upon ss. 15(1)(g) and 19(1) of FIPPA in its decision to refuse access to the severed portions of the records.

[6] This matter did not settle in mediation and therefore was to proceed to an inquiry under Part 5 of FIPPA. The VPD then initiated this application under s. 56, requesting that the Information and Privacy Commissioner exercise his discretion not to hold an inquiry.

### ***The parties' positions***

[7] The VPD submits that where it is "plain and obvious" that the records in dispute are subject to an exception to disclosure, discretion should be exercised in favour of not holding an inquiry. The VPD says the circumstances in this case support the conclusion that it is "plain and obvious" that s. 15(1)(g) authorizes it to refuse to disclose the information the respondent requested.<sup>1</sup> The VPD says the undisclosed information in question relates to, or was used in, the exercise of prosecutorial discretion, citing in support of this, three affidavits, including that of Crown Counsel Henry Reiner.<sup>2</sup> Mr. Reiner swears in part:

In or around July of 1997 to in or around November of 1997, I was the Crown Counsel assigned conduct of the prosecution of the Information.

...As part of the exercise of my duty under the Crown Counsel Act, and as Crown Counsel dealing with the Information, I would have, and did, review the Responsive Records to conduct the prosecution in pursuance of the duties defined in s. 15(1)(g) of the Freedom of Information and Protection of Privacy Act as part of my preparations for and conduct of the trial related to the Matter.<sup>3</sup>

[8] The VPD argues that Orders 00-02<sup>4</sup> and 04-13<sup>5</sup> have determined this type of prosecutorial function to be within the disclosure exception under s. 15(1)(g).<sup>6</sup>

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<sup>1</sup> VPD's submission, paras. 9 to 10.

<sup>2</sup> VPD's submission, paras. 18 to 19.

<sup>3</sup> Affidavit of Henry J.R. Reiner, Q.C., paras. 6 to 7.

<sup>4</sup> [2000] B.C.I.P.C.D. No. 2.

<sup>5</sup> [2004] B.C.I.P.C.D. No. 13.

<sup>6</sup> VPD's submission, paras. 13 to 17.

[9] The VPD also submits that, if it has properly characterized the requested records as those falling under s. 15(1)(g), then any discretion the VPD exercises under the provision should be left to it to determine. It adds that the VPD recognizes that s. 15(1)(g) is a discretionary provision and as such exercised its discretion when it disclosed some records and refused to disclose others.<sup>7</sup>

[10] The respondent's submissions were received *in camera*. However, I can say in general terms, without disclosing specific information, that he does not believe his actions should have been the subject of review by a Crown prosecutor. The respondent's submission does not deny that a Crown prosecutor would have reviewed the requested records with a view to approving or not approving a prosecution.

### ***Discussion***

[11] Section 56(1) of FIPPA states:

If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[12] The application of s. 56(1) has been considered in a number of decisions. Adjudicator Austin-Olsen aptly summarized the approach to this provision in Decision F07-02:

Section 56 confers discretion as to whether to hold a Part 5 inquiry respecting a request for review. As noted in earlier decisions, there are a variety of reasons why this discretion might be exercised in favour of not holding an inquiry. These include circumstances where the principles of abuse of process, *res judicata* or issue estoppel clearly apply.<sup>8</sup> Other circumstances are where it is plain and obvious that the records in dispute are subject to an exception to disclosure or that they fall outside FIPPA's scope. In each case, however, it must be clear that there is no arguable issue which merits adjudication in an inquiry.<sup>9</sup>

[13] The VPD relies upon the "plain and obvious" criteria to support its request that this matter not proceed to an inquiry.

[14] To determine whether this test applies here, it is first necessary to consider s. 15(1)(g) of FIPPA.

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<sup>7</sup> VPD's submission, para. 24.

<sup>8</sup> Adjudicator Austin-Olsen referred to the following Orders in support of this proposition: Order 01-03, [2001] B.C.I.P.C.D. No. 3 and Order 02-57, [2002] B.C.I.P.C.D. No. 59.

<sup>9</sup> [2007] B.C.I.P.C.D. No. 9.

**Disclosure harmful to law enforcement**

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

- (g) reveal any information relating to or used in the exercise of prosecutorial discretion

[15] Schedule 1 to FIPPA provides the following definition of “exercise of prosecutorial discretion” found in s. 15(1)(g) of FIPPA:

**"exercise of prosecutorial discretion"** means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power

- (a) to approve or not to approve a prosecution,
- (b) to stay a proceeding,
- (c) to prepare for a hearing or trial,
- (d) to conduct a hearing or trial,
- (e) to take a position on sentence, and
- (f) to initiate an appeal;

[16] The Commissioner said the following about the application of s. 15(1)(g) in relation to the facts before him in Order 00-02:

The Ministry was clearly authorized to apply s. 15(1)(g) to records 9 through 125 of the disputed records. This section covers record 9 because it contains information related to the activities of Crown counsel in preparing for or conducting a trial or in taking a position on sentencing. See, for example, Order No. 244-1998. The rest of the records are covered because they comprise the police report to Crown counsel – and associated material given to Crown counsel – and the evidence clearly supports the conclusion that Crown counsel reviewed that material and considered it in exercising the discretion to lay criminal charges.<sup>10</sup>

[17] Given this consideration, the applicable statutory language and the VPD’s affidavit evidence before me, I find that it is “plain and obvious” that the records requested by the respondent are subject to an exception to disclosure under s. 15(1)(g) of FIPPA.

[18] I note in particular the affidavit evidence of Crown counsel, Henry Reiner, who states that he reviewed the requested records as part of his preparations for,

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<sup>10</sup> [2000] B.C.I.P.C.D. No. 2.

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and conduct of, a criminal proceeding. This brings the requested records squarely within the s. 15(1)(g) exception.

[19] As noted above, the respondent does not deny that a Crown prosecutor would have considered the requested records with a view to approving or not approving a prosecution. Rather, the respondent believes that his actions should not have been the subject of a prosecutorial review to begin with. This issue is not one which I have authority to consider and does not bear on the question of whether it is plain and obvious that the requested records are subject to an exception to disclosure under FIPPA, as is the case.

[20] Finally, I am satisfied based on the VPD's submissions and affidavit evidence that the VPD understood s. 15(1)(g) to be a discretionary provision and that its discretion was exercised in this case.

### **3.0 CONCLUSION**

[21] For the reasons given above, this matter will not proceed to inquiry under Part 5 of FIPPA.

August 29, 2007

#### **ORIGINAL SIGNED BY**

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Michael McEvoy  
Adjudicator