



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

Decision F07-06

VANCOUVER POLICE DEPARTMENT

David Loukidelis, Information and Privacy Commissioner

August 29, 2007

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Summary: The VPD's request under s. 56 that an inquiry not be held is denied. The issue of whether certain records are excluded from the *Freedom of Information and Protection of Privacy Act* by s. 66.1 of the *Police Act* will proceed to inquiry.

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

Authorities Considered: B.C.: Order F03-06, [2003] B.C.I.P.C.D. No. 6; Decision F07-04, [2007] B.C.I.P.C.D. No. 20.

1.0 INTRODUCTION

[1] This decision deals with a request by the Vancouver Police Department ("VPD") under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") that an inquiry not be held under Part 5 of FIPPA respecting a request for access to records that an access applicant made to the VPD. (I refer below to that applicant as the "respondent".)

[2] The respondent's April 18, 2006 request for access to records sought "any and all documents related to the death of" an individual whose body was found in an alley in downtown Vancouver in 1998. The request covered records relating to "subsequent investigation(s)" and "created or received by, or for, the Vancouver Police Department. The request also specified by name some of the records that the respondent expected to receive.

[3] In its April 24, 2006 response to the respondent's request, the VPD refused to disclose any information at all, citing s. 22(1) of FIPPA. The respondent asked this office to review this decision and, after mediation under s. 55 of FIPPA, an inquiry was scheduled under Part 5.

[4] On May 16, 2007, the VPD requested, under s. 56 of FIPPA, “that an inquiry under Part 5 of the Act not be held with respect to the access to information request made” by the respondent. The VPD’s request went on to say the following:

As part of the section 56 application, the Vancouver Police Department intends to rely on section 3(1)(c) of the *Freedom of Information and Protection of Privacy Act* and section 66.1 of the *Police Act*, RSBC 1996, Chapter 367.

2.0 DISCUSSION

[5] **2.1 Records in Dispute**—The VPD’s material lists 68 records that it says are excluded from the scope of FIPPA by virtue of s. 66.1 of the *Police Act*, which reads as follows:

Except as provided by this Act and by section 3 (3) of the *Freedom of Information and Protection of Privacy Act*, that Act does not apply to any record that

- (a) arises out of or is otherwise related to the making, submitting, lodging or processing of a conduct complaint under this Part, and
- (b) is created on or after the conduct complaint is made, submitted or lodged.

[6] The VPD says a member of its Internal Investigation Section (“IIS”) submitted a complaint under the *Police Act* on May 20, 1999 and says the Police Complaint Commissioner confirmed the VPD’s characterization of that complaint as a “public trust” complaint on August 12, 1999.

[7] The VPD delivered the records to me and I have reviewed them in making my decision under s. 56.

Records in the “Report D.A. Approved 00.02.24”

[8] According to the VPD, the records described in a list of records that forms Exhibit “D” to the affidavit of a Civilian Analyst in the VPD’s Information and Privacy Unit are the contents of the “complaint file” maintained by the IIS and thus are excluded from FIPPA’s scope by s. 66.1(a) of the *Police Act*. The VPD says these records were all created on or after the lodging of the complaint, which the VPD dates as August 12, 1999, and submits that these records all arise out of or are otherwise related to the making, submitting, lodging or processing of a conduct complaint, which includes a public trust complaint.¹ The VPD also argues that, although they are not listed among the records just mentioned, all “memoranda authored” by the IIS in relation to this file “pertain to” records “properly excluded” from the operation of FIPPA in accordance with s. 66.1 of the *Police Act*.

¹ See para. 28 of Order F03-06, [2003] B.C.I.P.C.D. No. 6.

[9] The VPD further contends that the records it has labelled MM and PP are subject to s. 66.1 of the *Police Act* and thus excluded from FIPPA's scope.

[10] The VPD also makes this submission about a 31-page record that is not part of the IIS file contents:

Specifically, in addition to the documents contained in the I.I.S. Records, the Vancouver Police Department submits that the 31 page document titled "At Issue: Whether it is Required in the Public Interest That a Public Inquiry Be Opened Into the Death of ... and the Police Investigation that Followed", and the Office of the Police Complaint Commissioner's 23 page "Legal Analysis" pertain to records properly excluded from the Act's operation in accordance with section 66.1 of the *Police Act*. The aforementioned documents are located at Part 5 and Part D, respectively, to the Office of the Police Complaint Commissioner's binder titled "Report on the Death of ... and Support Materials" and dated February 10th, 2004 ("OPCC Binder").²

OPCC Request

[11] In relation to other records, the VPD argues that "any documents contained in the OPCC Binder that were created on or after the lodging of the I.I.S. Complaint" are excluded from FIPPA's coverage by s. 66.1 of the *Police Act*.

[12] **2.2 Merits of VPD's Request**—In relation to all of the records covered by this s. 56 application, the VPD says that, if I find that the VPD properly applied s. 66.1 of the *Police Act*, "then there is no remaining arguable issue which merits adjudication in an inquiry, with respect to these aforementioned responsive records."³

[13] I will note here that the VPD also argues that "these aforementioned records must be excluded from the scope of any further inquiry requested by the Applicant [respondent]."⁴ The VPD does not explain this allusion to a possible "further inquiry" and I have not been able on the material before me to say what that might be. The VPD also indicates in its submission that it "may rely on section 3(1)(c) at a future inquiry before the Information and Privacy Commissioner", but it is not clear on the present material what such a "future inquiry" might be.

[14] A number of decisions on s. 56 applications offer guidance on the exercise of the s. 56 discretion to not hold an inquiry under Part 5. Here, the VPD relies on the observation in Decision F07-04⁵ that an inquiry may not be held 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."⁶

² Para. 23, VPD initial submission.

³ Para. 25, VPD initial submission.

⁴ Para. 26, VPD initial submission.

⁵ [2007] B.C.I.P.C.D. No. 20.

⁶ Para. 16, Decision F07-04.

[15] As Adjudicator Austin-Olsen affirmed in Decision F07-04, in a s. 56 application, the party asking that an inquiry not be held—in this case the VPD—bears the burden of demonstrating why its request that an inquiry not be held should be granted. In each case, it “must be clear that there is no issue which merits adjudication in an inquiry.”⁷

[16] I am not able to say, on the basis of the material before me, that it is, as the VPD contends, plain and obvious that all of the records the VPD says are excluded from FIPPA’s scope by virtue of s. 66.1 of the *Police Act* are in fact so excluded. In its submission, the VPD has qualified its s. 66.1 argument by saying that it

...acknowledges that several of the records included for completeness in the I.I.S. Complaint file were created prior to the lodging of the I.I.S. Complaint, or otherwise did not arise out of or are related to the lodging of the I.I.S. Complaint and accordingly, these specific records may not be excluded by way of this section 56 application.⁸

[17] The VPD has not specified on a record-by-record basis which of the IIS records “may not be excluded by way of this section 56 application” and it is not appropriate for me to attempt to do that. At the very least, I am left in considerable doubt as to the scope of the VPD’s submissions respecting which records are or are not covered by its s. 56 application.

4.0 CONCLUSION

[18] The VPD has the burden of demonstrating why its s. 56 request should be granted and it has not done so in this case. An inquiry will therefore be held.

[19] Nothing in this decision reflects any opinion or decision as to the merits of the VPD’s case respecting s. 66.1 of the *Police Act* or other issues. The merits remain to be decided.

August 29, 2007

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

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⁷ Para. 16, Decision F07-04.

⁸ Para. 21, VPD initial submission.