



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

Decision F09-02

MINISTRY OF ATTORNEY GENERAL

Michael McEvoy, Adjudicator

February 3, 2009

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Summary: The Ministry's request that an inquiry under Part 5 of FIPPA not be held is denied. The Ministry argued that disclosure of the records would reveal information relating to or used in the exercise of prosecutorial discretion. Section 15(1)(g) is a discretionary provision. The Ministry's application was denied because it provided no evidence, one way or the other, that would allow the Adjudicator to determine whether the Ministry properly exercised its discretion in relation to the withheld records.

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

Authorities Considered: B.C.: Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38; Order 00-02, [2000] B.C.I.P.C.D. No. 2; Decision F07-02, [2007] B.C.I.P.C.D. No. 4.

1.0 INTRODUCTION

[1] The Ministry of the Attorney General ("Ministry") 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 request made by the respondent.

[2] I have considered the submissions of the parties and, for the reasons that follow, have decided to deny the Ministry's request. Accordingly, this matter will proceed to an inquiry.

2.0 DISCUSSION

The access request

[3] The respondent made a request to the Ministry for Crown counsel records relating to a stay of proceedings in connection with a number of criminal charges against her.

[4] The Ministry refused to release the records under s. 15(1)(g) of FIPPA, stating that their disclosure might reasonably be expected to reveal information used in the exercise of prosecutorial discretion.

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

The party's positions

[6] The Ministry argues that, where it is “plain and obvious” that records in dispute are subject to an exception under FIPPA, discretion should be exercised in favour of not holding an inquiry. The Ministry submits that this is such a case.¹

[7] It argues that the records in dispute, concerning four charges against the respondent, relate to and were used in the exercise of its prosecutorial discretion to stay those charges.²

[8] The respondent's position is that she was wrongly prosecuted. She argues that the Ministry is “abusing” s. 15(1)(g) of FIPPA in an attempt to cover up facts which, in essence, would demonstrate that she was improperly charged. The respondent also submits that the Ministry's Criminal Justice Branch has issued a “Crown Counsel Policy Manual” (“Manual”) which compels it to disclose the records.

[9] **2.1 Merits of the Ministry's Request**—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.

¹ Ministry's initial submission, para. 5.

² Affidavit of Shannon Halyk, para. 8.

[10] Numerous decisions, including Decision F07-02³, set out the kinds of cases where discretion will be exercised not to proceed to inquiry. It is also well established that in an inquiry of this kind under s. 56, it is the party asking that an inquiry not be held who bears the burden of demonstrating why that request should be granted.

[11] Section 15(1)(g) reads as follows:

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

[12] Section 15 is a discretionary provision. The Commissioner discussed FIPPA's discretionary sections in Order No. 325-1999⁴:

In inquiries that involve discretionary exceptions, public bodies must be prepared to demonstrate that they have exercised their discretion. That is, they must establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception.

[13] The Commissioner has discussed circumstances where it would be appropriate for public bodies to consider exercising discretion in favour of disclosing Crown records.⁵

[14] However, even if s. 15(1)(g) applies here, and I make no finding and express no view as to whether the disputed record's contents are in whole or in part protected under s. 15(1)(g) of FIPPA, I must, as set out above, be satisfied that the Ministry exercised its discretion in the manner described in Order No. 325-1999. The Ministry has not provided any evidence upon which I could determine this issue one way or the other.

[15] This case stands in contrast to Decision F07-05⁶ on which the Ministry relied. In that case the Vancouver Police Department both acknowledged the discretionary nature of s. 15(1)(g) and provided evidence that it had exercised its discretion in respect of the records in dispute. Here, the Ministry failed to do either.

³ [2007] B.C.I.P.C.D. No. 4.

⁴ [1999] B.C.I.P.C.D. No. 38.

⁵ Order 00-02, [2000] B.C.I.P.C.D. No. 2.

⁶ [2007] B.C.I.P.C.D. No. 24.

3.0 CONCLUSION

[16] The Ministry 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.

[17] Nothing in this decision reflects any opinion or decision as to the merits of the Ministry's case. The merits remain to be decided in the Part 5 inquiry, on the basis of the evidence and argument the respondent and the Ministry submit.

February 3, 2009

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

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