



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

Decision F10-12

MINISTRY OF ATTORNEY GENERAL

Jay Fedorak, Adjudicator

October 21, 2010

Quicklaw Cite: [2010] B.C.I.P.C.D. No. 52

CanLII Cite: 2010 BCIPC No. 52

Document URL: <http://www.oipc.bc.ca/orders/section56/DecisionF10-12.pdf>

Summary: The respondent requested all of his personal information from the Ministry, including information collected under the FMEA. The Ministry denied access, citing the prohibition on disclosure in s. 43 of the FMEA, which overrides the right of access under Part 2 of FIPPA. The Ministry asked that an inquiry concerning the respondent's request for review not be held, because it was "plain and obvious" that FIPPA does not apply to the requested records. The Ministry's request that an inquiry not be held is granted.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 56 and 79; *Family Maintenance Enforcement Act*, ss. 8 and 43.

Authorities Considered: B.C.: Order F04-01, [2004] B.C.I.P.C.D. No. 1; Order F06-15, [2006] B.C.I.P.C.D. No. 22; Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Decision F08-08, [2008] B.C.I.P.C.D. No. 26; Decision F08-11, [2008] B.C.I.P.C.D. No. 36.

1.0 INTRODUCTION

[1] The Ministry of Attorney General ("the Ministry") has asked that, under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), an inquiry on the respondent's request for review not proceed respecting his application for records. For reasons that follow, I have exercised my discretion to grant the Ministry's request.

2.0 DISCUSSION

The access request

[2] The respondent made a request for all information about him that the Ministry held, including specific reference to his Family Maintenance Enforcement Program (“FMEP”) case. The Director of Maintenance Enforcement responded to the request by denying access, citing s. 43 of the *Family Maintenance Enforcement Act* (“FMEA”). This provision prohibits the disclosure of any information obtained under the FMEA, except in certain circumstances, and contains a clause stipulating that it applies despite FIPPA. The respondent was dissatisfied with this response and requested a review from the Office of the Information and Privacy Commissioner (“OIPC”).

[3] Mediation failed to resolve the matter. When the respondent requested that the matter proceed to inquiry under Part 5 of FIPPA, the Ministry asked, under s. 56, that the inquiry not proceed.

Issue

[4] 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.

[5] A number of previous decisions have laid out the principles for the exercise of discretion under s. 56.¹ In Decision F08-11, Senior Adjudicator Francis summarized the principles that govern the discretion in s. 56:

- 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

¹ See, for example, Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Decision F08-08, [2008] B.C.I.P.C.D. No. 26; and Decision F08-11, [2008] B.C.I.P.C.D. No. 36.

- it must in each case be clear that there is no arguable case that merits an inquiry.²

[6] I have taken the same approach here.

[7] The relevant provision of FIPPA is as follows:

Relationship of Act to other Acts

79 If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

[8] One of the relevant provisions of the FMEA is s. 8 governing access to information. A reading of that section discloses that the right of access is not a public right of access to information, but rather the right of the Director to access information for the purpose of enforcing maintenance orders.

[9] The only provision in section 8 allowing the Director to share information collected under that section is in s. 8(4), which allows information sharing with maintenance enforcement officials in reciprocating jurisdictions. Sections 8(3) and 8(4) provide as follows:

Access to Information

8(3) Despite any other enactment or any common law rule of privilege or confidentiality, any person or public body, including the government, that receives a demand under subsection (1), (1.1), (1.2) or (1.3) must within 10 days provide any of the demanded information that is in any record in the possession or control of the person or public body.

(4) The director may disclose information provided under subsection (3) to a person in a reciprocating jurisdiction performing functions similar to those of the director.

[10] The other relevant provision in the FMEA is section 43, a confidentiality clause that applies despite FIPPA. Section 43 provides as follows:

Information confidential

43(1) Despite the *Freedom of Information and Protection of Privacy Act*, a person must not disclose information obtained under this Act except

(a) to the extent necessary for purposes relating to the enforcement of a maintenance order,

² Decision F08-11, para. 8.

- (b) as provided in section 8 (4), or
- (c) in accordance with an information-sharing agreement that is entered into
 - (i) under and for the purposes of the administration of the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act*, and
 - (ii) with the minister responsible for the administration of this Act.(2) Subsection (1) does not apply to information for research purposes disclosed in accordance with section 33.2 (k) of the *Freedom of Information and Protection of Privacy Act*.
- (3) Despite subsection (1), the director in prescribed circumstances may disclose to a reporting agency, as defined in section 106 of the *Business Practices and Consumer Protection Act*, the fact that a debtor is in arrears under a maintenance order filed with the director.
- (4) Section 109(1)(o) of the *Business Practices and Consumer Protection Act* does not apply to a disclosure under subsection (3).

[11] The Ministry has the burden of demonstrating why its s. 56 application should be granted.

[12] I note that the respondent's original request was for all records about him held by the Ministry of Attorney General and/or the Family Maintenance Enforcement Program. It appears that from the affidavit and the submissions that both parties have interpreted this request as focusing on records pertaining to his FMEP case. This decision applies only to those records. If the respondent wishes to pursue records other than records pertaining to his FMEP case, he will be required to make that clear in a fresh request to a public body.

Submissions

[13] The Ministry submits that the information the respondent has requested was obtained under the FMEA and, therefore, s. 43 of the FMEA applies. The Ministry argues that the respondent's right of access under Part 2 of FIPPA explicitly does not apply to this information and the Ministry cannot disclose the information, except where provided under s. 43 of the FMEA. The Ministry reviews the three exceptions to the general prohibition on disclosure outlined in s. 43 of the FMEA and submits that none applies in this case.

[14] With respect to s. 43(1)(a), it argues: "It is not necessary to disclose the information found in the Records to the Requestor for the purposes relating to the

enforcement of a maintenance order.”³ The Ministry provides affidavit evidence that only the Director of the FMEP or his delegates can release information in the records for the purposes of enforcement. Moreover, according to the Ministry, the Director may only disclose this information to the people to whom they are issuing enforcement measures. These would be third parties other than the “payor” (the respondent in this case) or the recipient, the Ministry submits.⁴ These disclosures would only occur in cases where the “payor” refuses voluntarily to make payments under a maintenance order. In such case, program staff may resort to the following:

- Notices of attachment, including garnishment for wages and bank accounts;
- Notice of attachment for federal payments such as employment income benefits and income tax returns;
- Liens against real estate;
- Maintenance liens against personal property; and
- Reports to a credit reporting agency.⁵

[15] I interpret the Ministry’s submission to be suggesting that Director or his delegate would, pursuant to s. 43(1)(a), only disclose information to the relevant officials necessary to collect the payments through these processes.

[16] The Ministry also submits that ss. 43(1)(b) and (c) do not apply in this case: the respondent is not an official in another jurisdiction performing the function of the director; and disclosure would not be pursuant to an information sharing agreement.⁶

[17] The Ministry concludes that “it is plain and obvious” that the respondent has no right of access to the requested information and requests that an inquiry not be held.⁷

[18] The respondent disagrees with the Ministry that it is “plain and obvious” that he has no right of access to the information. He believes that the Ministry is incorrect about the application of s. 43(1)(a).⁸ He submits that the purpose for which he has requested the information relates to the enforcement of a maintenance order. He states: “The records that have been requested are legal evidence necessary for proceeding with litigation relating to the enforcement of a maintenance order”.⁹ He appears to be suggesting that he is involved in

³ Ministry’s initial submission, para. 10.

⁴ Ministry’s initial submission, para. 11 and Affidavit of Enforcement Manager, para. 10; Ministry reply submission, para. 5.

⁵ Ministry’s initial submission, Affidavit of Enforcement Manager, para. 4.

⁶ Ministry’s initial submission, paras. 12-15.

⁷ Ministry’s initial submission, para. 16.

⁸ Respondent’s submission, p. 4.

⁹ Respondent’s submission, p. 2.

litigation, or contemplating litigation (it is not clear which) with respect to the Ministry having wrongly (according to him) garnisheed money from him. He submits that staff at the FMEP recommended that he seek redress in the courts to address his concerns.¹⁰ The Ministry reiterates that recommendation in its response submission.¹¹ I interpret the respondent as contending that, in the pursuit of such litigation, it is in the interest of judicial fairness that he should have access to the same records the Ministry has that are relevant to the enforcement matter.¹² He submits that the reason the FMEP refuses to disclose the records is that it wants to withhold proof of misconduct and mishandling of the files of which he alleges took place.¹³

[19] His interpretation of s. 43 of the FMEA is that it was intended to protect recipients and “payors”. He submits that there is no information in the file that poses a risk to the recipient. He suggests that, if the FMEP has concerns about safety, it could provide severed copies of the records. He states that he does not object to the FMEP severing all of the names within the records.¹⁴

Analysis

[20] My role in this case is to determine whether there is an arguable issue that merits an inquiry, that is, whether it is, as the Ministry contends, “plain and obvious” that s. 43 of the FMEA prohibits the Ministry from disclosing the information in question in response to a request under FIPPA. Previous orders have held that where other legislation prohibits the disclosure of information and has a provision stating that this prohibition applies despite FIPPA, that legislation in conjunction with s. 79 of FIPPA prevails over the applicant’s right of access under s. 4 of FIPPA.¹⁵

[21] It is clear that, if s. 43 of the FMEA applies to the requested records, it overrides an applicant’s right of access to records under Part 2 of FIPPA.

[22] The respondent argues that s. 43(1)(a) of the FMEA applies in this case. Although he does not say so explicitly, I interpret him to be saying that using the records to assist in litigation for the purpose of addressing the wrongful collection of his money in the enforcement of a maintenance order would be a “purpose relating to the enforcement of a maintenance order” that would trigger the application of s. 43(1)(a) of the FMEA.

[23] I reject this submission. In my view, it is plain and obvious that this submission cannot succeed and this matter should not proceed to a full inquiry.

¹⁰ Respondent’s submission, p. 5.

¹¹ Ministry’s response submission, para. 4.

¹² Respondent’s submission, p. 3.

¹³ Respondent’s submission, p. 5.

¹⁴ Respondent’s submission, pp. 4-5.

¹⁵ Order F06-15, [2006] B.C.I.P.C.D. No. 22; Order F04-01, [2004] B.C.I.P.C.D. No. 1.

[24] Section 43 operates to oust FIPPA in relation to records obtained under the FMEA (subject only to s. 43(2), which does not apply here). Where FIPPA is ousted, the “right of access” in Part 2 of FIPPA is ousted, as is Commissioner’s jurisdiction to enforce that right of access. That is the end of the matter.

[25] I note that section 43 is framed as a universal prohibition (it encompasses any person, including the director) and is subject only to the listed exceptions. It is obvious that, given the unique purposes of family maintenance enforcement, the Legislature has created in section 43 its own code for information disclosure, apart from FIPPA. As such, persons seeking to hold the Director (or any other person) accountable for decisions to disclose or not disclose information under section 43 must proceed elsewhere. FIPPA does not apply to these records.

[26] The respondent expresses concern that the Ministry’s reliance on s. 43 would allow it to “operate in secrecy”. It would be more accurate to say however that the Ministry’s reliance on s. 43 would allow it to operate despite FIPPA. That is the very purpose of a despite clause. Whether there are other rights of disclosure is an issue for another forum. FIPPA makes clear that its provisions are not exhaustive of all disclosure issues in our legal system:

2(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

[27] Section 2(2) of FIPPA recognizes, among other things, that where parties are seeking to vindicate legal rights, there are other avenues for information disclosure, even where FIPPA does not apply.

[28] I cited above in para. 14 the purposes for which the Ministry submits that the Director may disclose information collected under s. 43(1)(a) of the FMEA and to whom they may disclose that information. The Ministry adds:

Aside from such disclosures to third parties, some information concerning enforcement measures must, of necessity, be sometimes disclosed to payors and recipients as part of the case management process. However, it is not necessary to disclose the information found in the Records to the Applicant for those purposes under these circumstances.¹⁶

[29] It is not for the Commissioner to decide whether disclosure is necessary for the purpose of enforcing the maintenance order in this case, let alone whether it can or should be used to challenge the validity a maintenance order previously issued. It is sufficient to say that it is plain and obvious, given the wording of s. 43(1), that such disclosure was never contemplated under the FMEA in response to an FOI request. Whether disclosure is necessary for purposes relating to the enforcement of a maintenance order is something to be decided in

¹⁶ Ministry’s response submission, para 5.

another forum. Once FIPPA ceases to apply, it is not for the Commissioner to decide whether a discretionary exception that operates outside FIPPA has been interpreted or exercised correctly.

[30] For these reasons, I conclude that respondent has no arguable case that disclosing the information to the respondent in response to his formal request would be a disclosure “for a purpose relating to the enforcement of a maintenance order”. Therefore, I find that it is plain and obvious that s. 43 of the FMEA applies and the respondent has no right of access to the information under FIPPA.

3.0 CONCLUSION

[31] As I have found that it is plain and obvious that s. 43 of the FMEA applies overriding the right of access under FIPPA, there will be no inquiry.

October 21, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

OIPC File: F09-40259