Decision F26-01

MINISTRY OF ATTORNEY GENERAL

Rene Kimmett
Adjudicator

April 8, 2026

CanLII Cite: 2026 BCIPC 33
Quicklaw Cite: [2026] B.C.I.P.C.D. No. 33

Summary: The Ministry of Attorney General (Ministry) asked the Office of the Information and Privacy Commissioner to not conduct an inquiry under s. 56(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Ministry argued an inquiry should not be held because it is plain and obvious that it is authorized to withhold the entirety of the record in dispute under s.15(1)(g) (exercise of prosecutorial discretion) of FIPPA. During a court-ordered reconsideration of this application, the adjudicator found it is not plain and obvious that the Ministry is authorized to withhold all the information in the record under s. 15(1)(g), dismissed the Ministry's s. 56(1) application, and directed the matter to proceed to inquiry.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c. 165, ss. 15(1)(g), 15(3), 15(4), and 56(1).

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant asked the Ministry of Attorney General (Ministry) for access to records related to a specific Surrey RCMP police file.

[2] The Ministry informed the applicant that it was entirely withholding the responsive records under several of FIPPA's exceptions to disclosure.[1]

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to withhold the responsive records.

[4] The Ministry provided an updated response to the applicant, advising that the charge assessment had concluded, and the investigation file had been

[1] Ministry's letter to the applicant dated May 16, 2023.

returned to the investigating police agency. The Ministry informed the applicant that the only responsive records remaining in its custody or control "consist of internal, confidential Crown Counsel memoranda regarding [the] charge assessment decision." [2] The Ministry withheld these records under ss. 14 (solicitor-client privilege), 15(1)(g) (exercise of prosecutorial discretion),16(1)(b) (harm to intergovernmental relations), and 22(1) (harm to third-party personal privacy) of FIPPA.[3]

[5] While the Ministry initially described the responsive records in the plural, the Fact Report refers to only a single record[4] and the Ministry referred to a single record in its s. 56 application. Accordingly, in this decision, I will refer to the record in dispute in the singular (the Record).

[6] The OIPC-led mediation did not resolve the issues in dispute, and the matter proceeded to inquiry. The OIPC issued a Notice of Inquiry which stated that, at the inquiry, the adjudicator will determine whether the Ministry:

1. is required to refuse to disclose the information at issue under s. 22 of FIPPA.

2. is authorized to refuse to disclose the information at issue under ss. 14, 15(1)(g), and/or 16(1)(b) of FIPPA.

[7] The Ministry then made an application, under s. 56(1) of FIPPA, asking the OIPC to not conduct an inquiry. Under s. 56(1), the Commissioner has the discretion to choose whether or not to hold an inquiry. In its application, the Ministry argued an inquiry should not be conducted because it is plain and obvious that s. 15(1)(g) applies to the Record. The Ministry did not include the Record in support of this application and instead relied on affidavit evidence describing the Record.

[8] In response, the Director of Adjudication (Director) made the following decision (Decision):

> In a preliminary way, it is my view that it is necessary for the Commissioner to review the records to make an informed and independent decision about the application of s. 15(1)(g). As you are aware, this very issue is before the Courts in the judicial review of Order F24-52 which is still to be heard.
>
> In conclusion, I have decided that the OIPC will not consider the Ministry's application that the commissioner decide if it is plain and obvious that s. 15(1)(g) applies to the records in dispute. The Ministry will have a full opportunity during the inquiry to provide its arguments and evidence in

[2] Ministry's letter to the applicant dated June 26, 2023.
[3] *Ibid.*
[4] Fact Report at para 7.

> support of its claims about the application of the exceptions it has applied to the records, including s. 15(1)(g).

[9] The Ministry sought judicial review of the Decision, asking the Court to find that it was unreasonable because the Director failed to engage with the Ministry's evidence or the relevant law under s. 15(1)(g) of FIPPA. The Ministry also sought a declaration that it bears no obligation to produce the Record for the Commissioner's delegate to review for the purpose of conducting an inquiry.[5]

[10] In *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*, 2025 BCSC 2497 (CanLII), the Honourable Justice Forth found that the Decision was unreasonable because the Director refused to consider the Ministry's s. 56(1) application, including the evidentiary record in support of it, and required the Record to be reviewed by the OIPC without providing an explanation or justification.[6] Justice Forth concluded the Director should have considered whether the Record is covered by prosecutorial discretion and should have provided a justification for requiring the Ministry to produce the Record.[7] Ultimately, Justice Forth ordered the OIPC to reconsider the Ministry's s. 56(1) application and provide a set of reasons that:

a) explicitly considers the Ministry's affidavit evidence and the nature of the Record; and

b) having regard to those considerations, explains the reasoning process and rationale used in determining whether the Commissioner must conduct an *in camera* review of the Record.[8]

[11] I am the Commissioner's delegate assigned to conduct this reconsideration.

ISSUES AND BURDEN OF PROOF

[12] In this decision, I must consider the Ministry's application, made under s. 56(1), that there is no issue that merits adjudication at an inquiry because it is plain and obvious that the Ministry is authorized to withhold the entirety of the Record under s. 15(1)(g). I agree with previous orders that have found, when a public body makes an application of this kind, the public body has the burden of demonstrating that an inquiry should not be held.[9]

---

[5] *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*, 2025 BCSC 2497 (CanLII) [Justice Forth's Decision] at paras 23, 59, and 79.
[6] *Ibid* at paras 77-78.
[7] *Ibid* at para 65.
[8] *Ibid* at para 89.
[9] For example, Decision F07-04, 2007 CanLII 67284 (BC IPC) at para 17.

[13] I must also consider whether to make a s. 44(1)(b) production order requiring the Ministry to produce the Record to the OIPC for the purpose of conducting an inquiry.

DISCUSSION

Record at issue

[14] The Record is a charge assessment memorandum, which the Ministry says totals 14[10] or 15[11] pages. The Ministry has not provided the Record for my review and instead relies on an affidavit from its Information and Privacy Crown Counsel (Lawyer) to describe the Record.

Section 15 – harm to law enforcement

[15] Section 15 is a discretionary exception that allows the head of a public body to withhold information on the basis that disclosure could reasonably be expected to harm law enforcement. The relevant portions of s. 15 read as follows:

> 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, […]
>
> (3) The head of a public body must not refuse to disclose under this section
>
> (a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act,
>
> (b) a report, including statistical analysis, on the degree of success achieved in a law enforcement program or activity unless disclosure of the report could reasonably be expected to interfere with or harm any of the matters referred to in subsection (1) or (2), or
>
> (c) statistical information on decisions under the *Crown Counsel Act* to approve or not to approve prosecutions.
>
> (4) The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute

[10] Ministry's application at para 8.
[11] Ministry's submission dated January 16, 2026 at para 10.

> (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or
>
> (b) to any other member of the public, if the fact of the investigation was made public.

[16] In the judicial review of Order F24-52, the Honourable Justice Thomas of the BC Supreme Court summarized the mechanics of s. 15(1)(g) as follows:

> Subsection 15(1)(g) allows a public body to refuse to disclose information which, if disclosed, could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion. However, a public body must not rely on s. 15 to refuse to disclose certain information specified in ss. 15(3) and (4).[12]

[17] Similarly, in two recent orders, Order F25-62 and Order F26-13, Commissioner Harvey found that ss. 15(3) and 15(4) must be understood as exceptions to ss. 15(1) and 15(2).[13] In other words, Commissioner Harvey found that information that falls under ss. 15(1) or 15(2) cannot be withheld if it also falls under ss. 15(3) or 15(4).

[18] The requirement to consider ss. 15(3) and 15(4) does not depend on an applicant raising these subsections and these subsections must be considered in every case where a public body cites ss. 15(1) or 15(2) as its authority to withhold information.

[19] Given this analytical framework, I find that, to establish it is plain and obvious it is authorized to withhold the entirety of the Record under s. 15(1)(g), the Ministry must establish it is plain and obvious that: 1) s. 15(1)(g) applies and 2) the information to which s. 15(1)(g) applies is not the kind of information set out in ss. 15(3) or 15(4).

Section 15(1)(g) – exercise of prosecutorial discretion

[20] In order for s. 15(1)(g) to apply, the Ministry must establish that disclosure could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion. The phrase "could reasonably be expected to" imposes a standard of proof that is "a middle ground between that which is probable and that which is merely possible."[14]

---

[12] *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*, 2025 BCSC 1365 (CanLII) at para 27(b). See also para 69.
[13] Order F25-62, 2025 BCIPC 72 (CanLII) at paras 22-28; Order F26-13, 2026 BCIPC 17 at para 36.
[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paras 94 and 195-206.

[21] Schedule 1 of FIPPA defines the term "exercise of prosecutorial discretion". The relevant parts of that definition read as follows:

> "exercise of prosecutorial discretion" means the exercise by
>
> a) Crown counsel, or a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power
>
> (i) to approve or not to approve a prosecution, […]

[22] The Lawyer deposes:

> Police agencies, including the RCMP, investigate crimes and gather evidence. The investigating officer then prepares and submits a Report to Crown Counsel ("RCC"). A RCC is a report that provides a complete description of the available evidence in support of the charges recommended by the police agency.
>
> […]
>
> In those situations where the legal advice of Crown Counsel is to <u>not</u> approve a charge BCPS confidentially communicates the assessment and analysis to the relevant police agency in a charge assessment memorandum.
>
> […]
> I have reviewed the Record. The Records are the Crown Counsels' charge assessment in response to the RCC.
>
> Based on my experience as Crown Counsel, my knowledge of Crown Counsel operations, policy, and practices and the role of Crown Counsel under the [*Crown Counsel Act*], and because I am duly qualified to practice law in the Province of British Columbia, I believe that the Record is entirely comprised of information relating to or used in the exercise of prosecutorial discretion.
>
> I cannot be more specific about the nature of the Record without disclosing their contents and infringing the independence of Crown Counsel in exercising their prosecutorial discretion.[15]

[23] Based on the Lawyer's evidence, I find the Ministry has established it is plain and obvious that the Record could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion, specifically the decision not to approve prosecution.

[15] Lawyer's affidavit #1 at paras 15, 20, and 24-26.

Sections 15(3) and 15(4) – must not refuse to disclose

[24] As noted above, ss. 15(3) and 15(4) are exceptions to s. 15(1)(g). As a result, to establish it is plain and obvious that the Record can be entirely withheld under s. 15(1)(g), the Ministry must establish it is plain and obvious that none of the information in the Record is information that the Ministry must not refuse to disclose under ss. 15(3) or 15(4), specifically:

- a report prepared in the course of routine inspections by an agency (s. 15(3)(a)),
- a report on the degree of success achieved in a law enforcement program or activity (s. 15(3)(b)),
- statistical information on decisions under the *Crown Counsel Act* to approve or not to approve prosecutions (15(3)(c)), or
- reasons for a decision not to prosecute (s. 15(4)).

[25] The Ministry's evidence is that the Record is a charge assessment memorandum, which is a document sent to the relevant police agency when Crown counsel decides not to approve charges. The Lawyer indicates that the Record communicates "the assessment and analysis" used to reach the conclusion not to approve charges. The Lawyer does not say whether any information in the Record is the kind of information listed under ss. 15(3) or 15(4).

[26] Given the nature and description of the Record, I find it unlikely that the Record is the type of report listed under ss. 15(3)(a) or 15(3)(b).

[27] However, I find that I do not have enough information to conclude that the Record does not contain statistical information on decisions to approve or not to approve prosecutions under s. 15(3)(c). It is possible that Crown counsel could have included such information in their assessment of whether to approve the charges relevant to the Surrey RCMP police file.

[28] Lastly, I find it is likely that the Record includes "reasons for a decision not to prosecute" within the meaning of s. 15(4) since the purpose of the Record, as described by the Lawyer, was to share the assessment and analysis that led to the decision not to approve charges.

[29] The Ministry submits that it has already provided the applicant with written reasons for the decision not to prosecute and that, as a result, the applicant is not entitled to any information actually in the Record under s. 15(4).[16] The

[16] Ministry's application at para 39.

Commissioner rejected a similar argument in Order F26-13 and said:

> […] the s. 15(4)(a) analysis is not concerned with records or information that the Ministry has provided to the applicant in the past. Whether the Ministry already provided the applicant with "reasons" for Crown counsel's decision not to prosecute has no bearing on whether s. 15(4)(a) requires the Ministry to disclose the specific information at issue in the Crown Memo. Therefore, I reject the Ministry's argument that my jurisdiction is limited to confirming that written reasons have already been provided to the applicant.[17]

[30] I find this reasoning is applicable here. I reject the Ministry's assertion that it is plain and obvious that s. 15(4) does not require it to disclose the reasons for a decision not to prosecute contained in the Record because it previously provided the applicant with separate written reasons. If there is s. 15(4) information in the Record, the Ministry would not be authorized to refuse access to that information under s. 15(1)(g) and would be required to provide the Record to the applicant with that information unsevered, unless another FIPPA exception applies to that information. It does not matter that the Ministry may have already provided the applicant with separately documented written reasons about the decision not to prosecute.

[31] For the reasons above, the Ministry has not established it is plain and obvious that ss. 15(3)(c) and 15(4) do not apply to any information in the Record.

Conclusion

[32] In conclusion, the Ministry has established it is plain and obvious that s. 15(1)(g) applies to the information in the Record. However, I find it has not established that it can refuse to disclose the entirety of the Record under s. 15(1)(g) because it is not plain and obvious that ss. 15(3)(c) and 15(4) do not apply to the information in the Record. I conclude the issue of whether ss. 15(3) and 15(4) apply to the Record merits adjudication at inquiry.

[33] For the reasons above, I deny the Ministry's s. 56(1) application. The inquiry process will resume and the issues in dispute will be decided by the Commissioner or his delegate. I emphasize that none of the findings in this decision will bind the decision-maker assigned to conduct the inquiry. This person will make their own findings of fact and law based on the evidence and submissions the parties make during the inquiry.[18]

---

[17] Order F26-13, 2026 BCIPC 17 (CanLII) at para 41.
[18] Order F24-03, 2024 BCIPC 4 (CanLII) at para 23.

The Ministry argues for a different interpretation of s. 15(1)(g)

[34] The Ministry appears to take issue with Justice Thomas and Commissioner Harvey's current interpretation of ss. 15(3) and 15(4) as exceptions to s. 15(1)(g).[19]

[35] I understand the Ministry to be arguing that, when considering whether it is plain and obvious that s. 15(1)(g) applies to the Record, I should not consider ss. 15(3) or 15(4). This approach deviates from the OIPC's current interpretation of s. 15(1)(g), which I have set out above. In effect, the Ministry is arguing for a new interpretation of ss. 15(1)(g), 15(3) and 15(4).

[36] In my view, interpretations of law that are new or deviate from the current approach typically merit adjudication in an inquiry.[20] For this reason, I have considered and applied the law as it has been previously interpreted by past OIPC orders and by Justice Thomas and have not entertained the Ministry's arguments about how the law ought to be interpreted. However, the Ministry is free to make submissions about how s. 15(1)(g) should be interpreted and applied in its inquiry submissions.

Section 44(1)(b) production order

[37] If a public body does not provide the records in dispute to the OIPC, the Commissioner, or a delegate, can make an order, under s. 44(1)(b), requiring the public body to produce the record to the OIPC for the purpose of conducting an inquiry.

[38] In her decision, Justice Forth found:

> It is my view that the Commissioner, in denying the application of the [Ministry], made a decision in the first instance that it needs to view the [Record] to make a further decision on disclosure to the Applicant.
>
> In the Decision, the [Director] clearly states, "it is my view that it is necessary for the Commissioner to review the records to make an informed and independent decision about the application of s. 15(1)(g)". This statement is qualified with, "[i]n a preliminary way," but neither the intent nor meaning of that phrase is clear, given the conclusion that the records must be reviewed.
>
> In its supplementary submissions, the Commissioner argued that the Decision is preliminary because there remains the issue of whether the Office of the Information and Privacy Commissioner needs to review the records themselves on an *in camera* basis. I am not persuaded by this

[19] Ministry's submission dated January 16, 2026 at para 25.
[20] For a similar conclusion, see F22-27, 2022 BCIPC 30 (CanLII) at paras 32-33.

> characterization of the Decision. I find that the question of whether the [Record] must be provided to the Commissioner was answered [in the affirmative] in the Decision.[21]

[39] Justice Forth ordered the OIPC to explain "the reasoning process and rationale used in determining whether the [OIPC] must conduct an *in camera* review of the [Record]."[22]

[40] Based on the above, I conclude Justice Forth found that the Decision required the Ministry to produce the Record to the OIPC for it to determine whether the Ministry is authorized to withhold the Record under s. 15(1)(g). I also understand Justice Forth has ordered the OIPC to reconsider this aspect of the Decision and provide reasons for finding, or not finding, that the Ministry is required to provide the Record for the OIPC's review.

[41] At the start of every inquiry process, the OIPC directs the parties to review the OIPC's *Instructions for Written Inquiries* guidance document. This document sets the expectation that public bodies will provide an unredacted version of the records in dispute to the OIPC for the purpose of conducting the inquiry. The reason the OIPC has this expectation is because, under s. 42(1), the Commissioner "is generally responsible for monitoring how [FIPPA] is administered to ensure that its purposes are achieved." The purposes of FIPPA are to make public bodies more accountable to the public and to protect personal privacy by, among other things, providing for an independent review of decisions made under FIPPA.[23] It is the Commissioner's view that an independent review of a public body's decision to withhold information under FIPPA is best achieved through a line-by-line examination of the information in dispute.[24]

[42] There are some exceptions to this expectation that have been stipulated by case law. For example, when a public body asserts it is withholding information that is subject to solicitor-client privilege under s. 14, OIPC adjudicators will, subject to few exceptions, permit public bodies to rely on affidavit evidence rather than producing the records in dispute.[25] This approach is meant to minimally infringe solicitor-client privilege in recognition that this privilege is of central importance to our legal system.

---

[21] Justice Forth's Decision, *supra* note 5 at paras 61-63.
[22] *Ibid* at para 89.
[23] FIPPA, ss. 2(1)(e).
[24] Order F25-53, 2025 BCIPC 61 (CanLII) at paras 23-24.
[25] Order F24-52, 2024 BCIPC 61 (CanLII) at para 17, citing *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 17; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 68. See also *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner),* 2021 BCSC 266 (CanLII) at paras 45-94.

[43] I note that, in addition to s. 15(1)(g), the Ministry is also withholding the Record under s. 14. For this reason, I find it is not appropriate, at this stage, to require the Ministry to produce the Record to the OIPC for the purpose of conducting an inquiry. The Commissioner or his delegate assigned to conduct the inquiry is not bound by this finding and may revisit this issue during the inquiry.

CONCLUSION

[44] For the reasons above, I dismiss the Ministry's s. 56(1) application requesting the Commissioner not hold an inquiry into the Ministry's decision to refuse the applicant access to the Record.

[45] I conclude the issues in dispute between the parties will proceed to an inquiry under Part 5 of FIPPA, so that the Commissioner or his delegate can consider the parties' submissions and evidence and decide whether FIPPA authorizes or requires the Ministry to refuse access to the information in the Record.

[46] The registrar of inquiries will issue a revised submission schedule for the upcoming inquiry to the parties in due course.

April 8, 2026

ORIGINAL SIGNED BY

Rene Kimmett, Adjudicator

OIPC File No.: F23-93436