Order F11-20

MINISTRY OF EDUCATION

Elizabeth Denham, Information and Privacy Commissioner

August 18, 2011

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Summary: The applicant requested access to electronic copies of fields of Foundation Skills Assessment student summary data, in order to carry out statistical research on the data. This included a more recent set of the same data that Order F09-21 and Order F10-29 required the Ministry to disclose to him, plus a second set of data. Despite the previous orders, the Ministry refused access to both sets under s. 22 of FIPPA. The Commissioner found that the doctrine of issue estoppel applied to the first set of data, because the previous orders had decided the issue and that the Ministry could not seek a different result from the previous case. The Commissioner also found that the second set of data did not constitute personal information. The Ministry is not authorized to withhold any of the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 22(1).

Authorities Considered: B.C.: Order F09-21, [2009] B.C.I.P.C.D. No. 27; Order F10-29, [2010] B.C.I.P.C.D. No. 41; Decision F10-08, [2010] B.C.I.P.C.D. No. 42; Order 01-03, [2001] B.C.I.P.C.D. No. 3; Order No. 315-1999, [1999] B.C.I.P.C.D. No. 28; Order 01-01, [2001] B.C.I.P.C.D. No. 1; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

Cases Considered: *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44.

INTRODUCTION

[1] This case follows Order F09-21[1] and Order F10-29[2] in which Adjudicator Celia Francis ordered the Ministry of Education ("Ministry") to disclose some Foundation Skills Assessment (FSA) student summary data to a consultant. The Ministry complied with the orders. The consultant then requested the same kinds of FSA data for subsequent

[1] [2009] B.C.I.P.C.D. No. 27.
[2] [2010] B.C.I.P.C.D. No. 41.

years, as well as another set of data. The Ministry refused to disclose any of the data to him, saying its disclosure would unreasonably invade students' privacy.

[2] Despite Adjudicator Francis' earlier orders and the Ministry's compliance with those orders, the Ministry is now asking this Office to arrive at a different result in this inquiry. With respect to the first request, Adjudicator Francis has already held that the disclosure of this data would not constitute an unreasonable invasion of students' privacy. I have concluded that the doctrine of issue estoppel applies to this request and that there is no reason to exercise my discretion not to apply it in this case. I have also found that the Ministry cannot refuse access to the second set of data because it is not personal information and disclosure would therefore not unreasonably invade students' privacy.

ISSUE

[3] The issue before me is whether the Ministry is required under s. 22(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to refuse access to two sets of FSA student summary data because disclosure would be an unreasonable invasion of students' privacy.

DISCUSSION

[4] **Background**—Order F09-21, Order F10-29 and Decision F10-08[3] provide background information on the FSA process and the consultant's work with FSA data. I summarize it briefly here.

[5] The consultant has degrees in mathematics and education. Over a number of years, 1999-2006, he worked first for, and later with, the Ministry on its FSA data. He received the data via a number of mechanisms, latterly, through a research agreement under s. 35 of FIPPA. The Ministry decided not to renew the research agreement in 2005. The consultant complained about this refusal to this Office. This complaint was the subject of associated proceedings with this Office, resulting first in Decision F10-08. The related hearing on this complaint will be the subject of a separate decision.

[6] During this time, the consultant also submitted requests under FIPPA to the Ministry for the same data he had been receiving through the research agreement. His original request was for 70 fields of FSA student summary data for 1999-2006. The Ministry refused access to these data under s. 22(1) of FIPPA, saying their disclosure would be an unreasonable invasion of students' privacy.

[7] During the inquiry which resulted from his request for review of that decision, the consultant agreed to drop his request for fields associated with the students' age, sex, ethic origin, English as a second language, aboriginal status, special needs and French immersion. He said he would instead narrow his request to 12 of the 70 fields of data

[3] [2010] B.C.I.P.C.D. No. 42.

he had originally requested. The 12 fields were mainly those associated with grade, school year, FSA results and school name, together with encrypted Personal Education Numbers (PENs) for the students. The Ministry agreed that disclosure of these narrowed data, with encrypted PENs, would not be an unreasonable invasion of students' privacy, if it were disclosed in any one of three ways.

[8] Adjudicator Francis concluded that one of the solutions the Ministry had agreed was acceptable to it would provide the consultant with useful data. In Order F09-21, she found that disclosure of the "narrowed data", including encrypted PENs, under the terms of that solution, would not be an unreasonable invasion of the students' privacy. Adjudicator Francis ordered the Ministry to give the consultant access to the narrowed data, with the proviso that the Ministry was to suppress (*i.e.*, not provide) data on populations of students (those in a given grade and given school) where those populations were fewer than five.

[9] Just before the Ministry was due to comply with Order F09-21, the Ministry raised some possible concerns about its ability to comply. Adjudicator Francis suspended compliance and requested submissions from the consultant and the Ministry. The Ministry expressed concern that her order could result in an unreasonable invasion of students' privacy. The consultant argued that her order adequately protected students' privacy. The Adjudicator then issued Order F10-29, in which she clarified her intentions and confirmed her earlier order to the Ministry to disclose the narrowed data to the consultant. The Ministry complied with the order.

[10] Meanwhile, the consultant had submitted two new requests to the Ministry, which he called Request 3 and Request 4. Request 3 was for the same 12 fields of narrowed FSA data for the years 2006-2007 to 2009-2010, to be disclosed on the same terms as those under which Adjudicator Francis had earlier ordered the FSA data disclosed (*i.e.*, encryption of the PEN, using the same encryption key as before, and suppression, *i.e.*, non-disclosure, of data on populations of students fewer than five). He requested one additional field, "analysis code", for the period 2007-2008 to 2009-2010.

[11] Request 4 was for seven fields of data for the period from 1999-2010, including FSA data, grade and school year, with an additional field, analysis code, for the period 2007-2008 to 2009-2010. The consultant specified that he did not want student, school or school district identifiers in this request. The consultant said that, since this request did not involve PENs or other identifiers and it would therefore be impossible to link these data to records in Request 3, suppression of data on populations of students fewer than five would not be necessary.

[12] The Ministry refused access to all of the data for both requests under s. 22(1) of FIPPA. After the consultant had requested a review of this decision, the Ministry later disclosed some data, in February 2011, but the consultant was not satisfied. Accordingly the two matters proceeded jointly to inquiry under Part 5 of FIPPA.

ANALYSIS

Issue estoppel

[13] Order 01-03[4] considered the doctrine of issue estoppel at some length. In that case, an applicant requested four agreements for services between the BC Lottery Corporation ("Lottery Corporation") and an actor.

[14] The same applicant had previously requested two of the agreements and the Lottery Corporation had denied access to them, saying disclosure could reasonably be expected to harm its financial interests and those of the actor under s. 17(1) and s. 21(1). In Order No. 315-1999,[5] former Commissioner Flaherty found that s. 17(1) applied to the two agreements but that s. 21(1) did not.

[15] In Order 01-03, Commissioner Loukidelis said that issue estoppel can apply to administrative tribunals such as this one. He noted that its purpose is

> … to prevent a party from attempting, in a proceeding, to prove the contrary of that which has been proved in a previous proceeding.

[16] He said three criteria must be satisfied for issue estoppel to apply:

> [32] … (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. …

[17] Commissioner Loukidelis found that the applicant was estopped from seeking a different result from the previous case because the parties were the same as in Order No. 315-1999, the issues were the same and Order No. 315-1999 was a final decision that had determined the issues. He said the four agreements were substantially the same and that they differed only in a few minor details. Thus, while the earlier order dealt with the first two agreements and the later case dealt with all four, the issues were the same. The commissioner then said that, given this finding, he need not consider the merits of the Lottery Corporation's s. 17 or s. 21 arguments.

[18] Finally, Commissioner Loukidelis considered whether fairness prevented the application of issue estoppel. He concluded that it did not.

[19] Shortly after Order 01-03 was issued, the Supreme Court of Canada confirmed the applicability of issue estoppel to the decisions of administrative tribunals in *Danyluk v. Ainsworth Technologies Inc.*[6] ("*Danyluk*"). In that case, Justice Binnie stated:

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[4] [2001] B.C.I.P.C.D. No. 3.
[5] [1999] B.C.I.P.C.D. No. 28.
[6] 2001 SCC 44.

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is entitled to only one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs and inconclusive proceedings are to be avoided.[7]

[20] Justice Binnie went on to hold that estoppel is a doctrine of public policy, designed to advance the interests of justice. As a result, even if the conditions of applying the doctrine are met, it is necessary to go on to consider whether, in a particular case, the usual operation of issue estoppel would work an injustice.

Does issue estoppel apply to Request 3?

[21] The consultant argues that *res judicata* applies in this case because the issues are the same as in the previous case, the parties are the same and there was a final decision disposing of the issues. The consultant says that Request 3 is for data from years following those in the previous case, with the addition of an analysis code, which he says many students receive and is non-identifying. He also says the Ministry disclosed analysis codes in February 2011. He argues that the minor differences between Request 3 and the data Adjudicator Francis ordered disclosed in Orders F09-21 and F10-29 are not determinative here.

[22] The Ministry did not argue Request 3 was in some way different from the previous requests in a manner which would lead to a different result. Rather, the Ministry disputed the consultant's arguments by saying that the previous orders were wrongly approached. The Ministry also says it was an error for it to have suggested the approach for disclosing the narrowed data that it offered earlier.

[23] *Res judicata* applies to prevent parties from re-litigating the same cause of action. Issue estoppel is a form of *res judicata* and prevents parties from litigating the same issue. I have considered the parties' arguments in light of whether issue estoppel applies.

[24] Order F09-21 and Order F10-29 involved the same consultant and the same Ministry as this case. I therefore find that this criterion for establishing issue estoppel is present.

[25] The previous orders were also final. The Ministry did not apply for judicial review of the two orders but complied with them. The element that the previous decision be final is thus also satisfied. As set out in Order 01-03, the nature of an order made in

[7] *Danyluk*, para 18.

resolving requests for review through the inquiry process is judicial, involving findings of fact and the application of an objective legal standards to those facts.[8]

[26] In *Danyluk*, Justice Binnie described the requirement that the previous decision address the same issue in the following way:

> Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be re-litigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.[9]

[27] Order F09-21 and Order F10-29 dealt with the issue of whether disclosure of the "narrowed data" would unreasonably invade students' privacy. Adjudicator Francis found that it would not. Request 3 involves the same fields of data to be disclosed under the same terms as the previous case, but for subsequent years. In my view, the issues in Request 3 are substantially the same as those decided in the earlier cases. I agree with the consultant that the minor differences between Request 3 and the previous case are not determinative. I find that the final element is also satisfied.

[28] The Ministry argues that the previous decisions were "wrongly approached", because they did not explicitly consider ss. 4(2) and 6(2) of FIPPA. However, it was clearly open to the Ministry to raise those sections of FIPPA in the previous inquiry. The Ministry's argument now seems to be that the s. 22 analysis should be conducted as if the request were for the release of data which were neither narrowed from the applicant's original requests which gave rise to the previous order, nor masked. However, the request was for narrowed data which was masked. That set of data narrowed and masked or suppressed in accordance with the previous orders, is what Adjudicator Francis had already held would not constitute an unreasonable invasion of students' privacy. The issues raised by the Ministry now, about masking, and about the form and the breadth of the data requested, were all "bound up" in the previous determination and the Ministry had a full opportunity in the previous inquiry to argue for a different "approach" to the issue.

[29] I therefore find that the consultant has established that the preconditions to issue estoppel are met. I must next consider whether the interests of justice require that I exercise my discretion to not apply the doctrine in the usual way. In *Danyluk*, the court held that this discretion must be exercised with a view to achieving fairness according to the circumstances of the case. The court set out a non-exhaustive list of seven factors to be considered and, applying those factors, held that it should exercise its discretion to not apply issue estoppel in that case.

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[8] Order 01-01, paras. 39-44, *Danyluk*, para. 41.
[9] *Danyluk*, para 54.

[30] Many of the factors listed in *Danyluk* involve a consideration of the type of proceeding and the legislative framework under which the previous decision was made. The previous decision was made in the same type of inquiry, only a short time ago, with the same interests at stake and the parties in the same circumstances as they are currently – all of this militates against exercising my discretion not to apply the doctrine. The overarching consideration is whether the application of issue estoppel would work an injustice. I do not think that any injustice or unfairness will flow from the parties being bound by the previous determination of this issue. To the contrary, I find that it would be unfair to the applicant if the Ministry were allowed to try to re-litigate the issue after fully participating in the extended inquiry which resulted in the previous orders.

[31] I thus find that the Ministry is estopped from seeking a different result from the previous case. I need not therefore consider the Ministry's arguments on s. 22(1), s. 6(2) and s. 4(2). Nor do I need to consider the consultant's arguments on *stare decisis* (*i.e.*, that the Ministry is bound by previous decisions) or his arguments on exercise of discretion in the application of s. 22(1).

Is the Ministry required to refuse access to the data in Request 4?

[32] FIPPA requires public bodies to withhold personal information under s. 22 where its disclosure would be an unreasonable invasion of a third party's personal privacy. In determining whether s. 22 applies, a public body must first determine if the information in dispute is "personal information". Then, it must consider whether disclosure of any of that personal information is not an unreasonable invasion of third-party privacy (s. 22(4)). The public body must then determine whether disclosure of the personal information is presumed to be an unreasonable invasion of third-party privacy (s. 22(3)). Finally, the public body must consider all relevant circumstances, including those listed in s. 22(2), in deciding whether disclosure of the personal information in dispute would be an unreasonable invasion of third-party privacy.[10]

[33] The consultant says Request 4 is for "results data without any PEN, personal, school, district, demographic or other identifying information".[11] He says he requested it, not to track individual cases, but to "give statistical completeness to the data as a whole".[12] He argues that disclosure of this data would therefore not be an unreasonable invasion of students' privacy.

[34] The Ministry lumps Request 4 together with Request 3 in arguing that disclosure of the various FSA data would unreasonably invade students' privacy under s. 22. It also approaches the s. 22 question as if the consultant were asking for access to all 70 fields of data he originally requested, rather than the 12-13 fields he is actually requesting.

[10] Order 01-53, [2001] B.C.I.P.C.D. No. 56.
[11] Para. 14, consultant's initial submission.
[12] Para. 14, consultant's initial submission.

[35] The first step is to determine if the information the consultant is requesting under Request 4 is "personal information", that is, information about an identifiable individual. I readily conclude that it is not.

[36] The consultant is not requesting students' PENs, encrypted or otherwise, nor any demographic information about students. Rather, he wants access to a series of FSA scores and codes for several years, with no identifying information attached. I reject the Ministry's arguments insofar as they may apply to Request 4.

[37] I see no way of identifying individual students from the data involved in Request 4. There are therefore no s. 22 concerns with disclosure of these data.

CONCLUSION

[38] For reasons given above, under s. 58 of FIPPA, I make the following orders:

1. I require the head of the Ministry to give the consultant access to the information he requested in Request 3, under the terms as set out in Order F09-21 and Order F10-29 and which he specified in his request, *i.e.*, encryption of the PEN, using the same encryption key as the Ministry used to disclose data under Order F09-21 and Order F10-29, and suppression (non-disclosure) of data on populations of students fewer than five.

2. I require the head of the Ministry to give the consultant access to the information he requested in Request 4.

3. I require the head of Ministry to give the consultant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before September 30, 2011 and, concurrently, to copy me on its cover letter to the consultant.

August 18, 2011

ORIGINAL SIGNED BY

Elizabeth Denham
Information and Privacy Commissioner
for British Columbia

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