



Order P05-02

## **BULL HOUSSER & TUPPER**

David Loukidelis, Information and Privacy Commissioner  
May 27, 2005

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**Summary:** Respondent had requested all information relating to him. Organization correct to respond that personal information of the applicant in its files is not subject to the *Personal Information Protection Act*. The applicant's personal information is in records under the control of a public body that is a client of the organization. The applicant's personal information is subject to the *Freedom of Information and Protection of Privacy Act* and not the *Personal Information Protection Act*.

**Statutes Considered:** *Personal Information Protection Act*, ss. 3(1) & (2)(d); *Freedom of Information and Protection of Privacy Act*, s. 3(1).

**Authorities Considered:** Decision P05-01, [2005] B.C.I.P.C.D. No. 18; Order P05-03, [2005] B.C.I.P.C.D. No. 20; Order 04-19, [2004] B.C.I.P.C.D. No. 19; Order 03-19, [2003] B.C.I.P.C.D. No. 19; Order 04-25, [2004] B.C.I.P.C.D. No. 25.

**Cases Considered:** *Ferguson v. Arctic Transportation Ltd.*, [1995] F.C.J. No. 1061 (T.D.); *Jones, Gable & Co. Ltd. v. Price and South Side Properties Limited* (1977), 5 B.C.L.R. 103 (S.C.); *General Electric Capital Canada Inc. v. Deloitte & Touche*, [2004] O.J. No. 4123 (Master); *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.); *Wolansky v. Davidson*, [1992] B.C.J. No. 635 (S.C., Master); *Lacker v. Lacker*, [1982] B.C.J. No. 1514 (S.C.).

### **1.0 INTRODUCTION**

[1] This decision deals with the applicant's request for access to his personal information in the possession of Bull Housser & Tupper ("BHT"), a Vancouver law firm. The request was in the same terms as the applicant's August 15, 2004 access requests to two other Vancouver law firms, dealt with in Decision P05-01,<sup>1</sup> and Order P05-03,<sup>2</sup> both of which are released concurrently with this decision. In each case, the applicant made a request under the *Personal Information Protection Act* ("PIPA") dated August 15, 2004 for "all materials in possession" of the recipient law firm, "its affiliates or employees, and which relate to myself,

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<sup>1</sup> [2005] B.C.I.P.C.D. No. 18.

<sup>2</sup> [2005] B.C.I.P.C.D. No. 20.

and which should be permissible to obtain as indicated under the rules of the Act.” As in Order P05-03, the question here is whether the *Personal Information Protection Act* (“PIPA”) applies to that personal information. For the reasons that follow, I have decided that PIPA does not apply to that personal information.

[2] BHT responded to the request by telling the applicant, in an August 31, 2004 letter, that it possessed personal information of the applicant in connection with a solicitor-client relationship between BHT and a public body client of BHT. BHT said it holds personal information of the applicant “as a result of our retainer with the Provincial Health Services Authority” (“PHSA”). BHT said the client is a public body covered by the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) and that, by virtue of s. 3(2)(d) of PIPA, PIPA does not apply to personal information to which FIPPA applies. BHT added that the personal information is in any case protected by solicitor-client privilege and that, under s. 23(3)(a) of PIPA, BHT is not required to disclose that information. BHT also relied on other exceptions to the right of access to personal information found in s. 23(4) of PIPA. These exceptions are not in issue here.

[3] BHT also told the applicant that it had identified personal information of the applicant that it possessed in connection with a complaint the applicant had made to another body and disclosed copies of documents containing the applicant’s personal information in relation to that matter. Those records are not in issue in this matter.

[4] The applicant wrote to this Office on September 8, 2004 to complain about BHT’s response. Mediation of the dispute having failed, a written inquiry was held under PIPA on the issue of whether the requested personal information is excluded from the scope of PIPA by virtue of s. 3(2)(d).

## 2.0 ISSUE

[5] The only issue here is whether, by virtue of s. 3(2)(d) of PIPA, PIPA does not apply to the personal information in issue because FIPPA applies to it.

## 3.0 DISCUSSION

[6] **3.1 Relevant Provisions**— Section 3(2)(d) of PIPA reads as follows:

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3(1) Subject to this section, this Act applies to every organization.

(2) This Act does not apply to the following: ...

(d) personal information if the *Freedom of Information and Protection of Privacy Act* applies to the personal information; ... .

[7] Section 3(1) of FIPPA provides that FIPPA “applies to all records in the custody or under the control of a public body”. The PHSA is listed in Schedule 2 of FIPPA as a public body.

[8] **3.2 PIPA's Scope**—Section 3(2)(d) of PIPA is designed to dovetail PIPA's scope with FIPPA's, the Legislature's intent being to avoid overlap between FIPPA and PIPA. Section 3(2)(d) of PIPA ensures that, where a private sector organization that is subject to PIPA possesses personal information that is in the custody or under the control of a public body covered by FIPPA, only the FIPPA applies to that personal information. As regards privacy protection in the private sector, moreover, I note in passing that s. 3(2)(c) of PIPA provides that PIPA does not apply to the collection, use or disclosure of personal information if the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") applies to the collection, use or disclosure of that personal information. This provision is similarly intended to dovetail PIPA's application with PIPEDA's.

[9] In deciding whether FIPPA applies to personal information, such that PIPA does not, it is necessary to determine, as s. 3(1) of FIPPA provides, whether the personal information in question is found in records—or documents, to use the PIPA term—that are “in the custody or under the control of a public body”.

[10] The concept of “control” has been interpreted in many FIPPA decisions including in British Columbia Supreme Court decisions. A recent decision is Order 04-19,<sup>3</sup> in which Adjudicator Celia Francis reviewed the earlier decisions, and various factors relevant to determining “control”, in some detail. As she indicated at para. 44, it is not possible to be precise and exhaustive in defining what is meant by “control”. I agree with what she said at para. 46:

[46] Control is to be given a liberal and purposive meaning that promotes the objectives of British Columbia's access and privacy legislation [*i.e.*, FIPPA]. The nature of requested records and all aspects of their generation and use must be assessed in relation to the public body's mandate and functions. Records that are created or acquired by or for a public body as part of its mandate and functions will be under the public body's control. That control need not be exclusive. For example, a preliminary ruling respecting Order 03-19, [2003] B.C.I.P.C.D. No. 19, concluded that both the College of Pharmacists of British Columbia and the Ministry of Health had control of records in PharmaNet. The duty to provide access to records under the Act is not defined by the willingness of the public body or its staff, contractors or agents. It also prevails over outsourcing of the public body's functions and contractual silence or wording that would negate rights or obligations under the Act.

[11] BHT argues that court decisions regarding ownership of, or entitlement to, the documents in a lawyer's client file support the conclusion that the PHSA has “control” of documents in BHT's client files in issue here.

[12] In considering whether the PHSA has “control”, I have considered the control factors discussed in Order 04-19 and other such decisions. I have also considered court decisions on the control question, notably the British Columbia court decisions mentioned in Order 04-19.

[13] BHT argues that common law principles regarding ownership of documents in a lawyer's client files support the view that its client, public body, has “control” over

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<sup>3</sup> [2004] B.C.I.P.C.D. No. 19.

documents in BHT's files that contain the applicant's personal information. It relies on *Ferguson v. Arctic Transportation Ltd.*,<sup>4</sup> *Jones, Gable & Company Limited. v. Price and South Side Properties Limited*,<sup>5</sup> *General Electric Capital Canada Inc. v. Deloitte & Touche*<sup>6</sup>, *Wolansky v. Davidson*,<sup>7</sup> and *Lacker v. Lacker*.<sup>8</sup>

[14] BHT also argues, at para. 25 of its initial submission, that, in Order 04-25,<sup>9</sup> Adjudicator Celia Francis, in reviewing the adequacy of PHSA's search for records in response to an access request under FIPPA, ordered the PHSA to ask its outside legal counsel for records responsive to the access request in that case. BHT argues that Order 04-25, "specifically determined that the PHSA's legal counsel's records are in the PHSA's control for the purposes of access requests pursuant to FIPPA."

[15] On the issue of whether PHSA controls the documents containing the applicant's personal information, BHT relies on an affidavit sworn by Penny Washington, a BHT partner. She deposed that BHT provides legal services to the PHSA and that she is primarily responsible for the solicitor-client relationship between them. In response to the access request, she reviewed the BHT files relating to the applicant and identified two classes of information, one relating to the applicant's complaint, mentioned earlier, and "personal information in files held by BHT within the scope of its retainer" with the PHSA (para. 3). BHT disclosed the former class of personal information to the applicant, she deposed.

[16] At para. 5 of her affidavit, Penny Washington deposed that the "agreement between BHT and PHSA" includes terms that give the PHSA the "power and authority to regulate the use and disclosure of records" in BHT's client file, while BHT "has no such power or authority without PHSA's instruction". She also deposed that BHT has no independent right to possession, but only possesses records under the PHSA-BHT agreement. Control over disclosure of file contents rests with the PHSA, she deposed, and BHT will not disclose documents without the PHSA's instructions or as required by law. The PHSA client file is organized separately and is not integrated with BHT's records.

[17] Penny Washington also deposed that the PHSA received previous access requests from the applicant under FIPPA relating to PHSA records. She deposed that, in relation to those requests, the PHSA instructed BHT to review BHT's files for any personal information of the applicant. As a result, BHT found and delivered records to counsel retained by PHSA respecting the applicant's FIPPA requests.

[18] Last, she deposed that, "as in the past, if PHSA asked BHT to provide PHSA with any record in the client file, for the purposes of replying to a request made pursuant to FIPPA or otherwise, BHT would provide to PHSA any record it requested."

[19] In *Jones, Gable*, Anderson J. applied the law of agency in holding that, for the purposes of document disclosure under the *Rules of Court*, documents possessed by the plaintiff's lawyer were in the plaintiff's "control" and should therefore have been included in

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<sup>4</sup> [1995] F.C.J. No. 1061 (T.D.).

<sup>5</sup> (1977), 5 B.C.L.R. 103 (S.C.).

<sup>6</sup> [2004] O.J. No. 4123 (Master).

<sup>7</sup> [1992] B.C.J. No. 635 (S.C., Master).

<sup>8</sup> [1982] B.C.J. No. 1514 (S.C.).

<sup>9</sup> [2004] B.C.I.P.C.D. No. 25.

the plaintiff's list of documents and disclosed to the defendant. *Arctic Transportation* referred to *Jones, Gable* with approval on this issue. BHT says that the agency approach should apply to the documents it possesses, "for the purposes of this inquiry and on the particular facts of this inquiry" (para. 37, initial submission). BHT says it holds the documents only within the scope of its agreement with the PHSA and, since it has no right to hold the documents outside that relationship, the PHSA controls them (para. 38, initial submission).

[20] Citing *Jones, Gable* and *Arctic Transportation*, BHT relies on what it describes as its agency relationship with its client, the PHSA, to support its contention that the PHSA controls documents in BHT's files. Citing *Wolansky* and *Lacker*, BHT also relies on its contract with the PHSA as the source of the PHSA's control over those documents.

[21] In addition to the cases BHT has cited regarding an enforceable right to obtain documents, I note that, in a FIPPA decision about control of records, *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*,<sup>10</sup> L. Smith J. considered *Wolansky* and *Lacker* and accepted that a contractual right to obtain records could establish "control".

[22] The evidence shows that the contractual retainer between the PHSA and BHT requires BHT to deliver the documents to the PHSA on request by the PHSA (para. 5, Washington affidavit). It also demonstrates that the PHSA has already exercised this right in connection with an access request under FIPPA and that BHT has complied with such a request (paras. 7 and 8, Washington affidavit). The contract between PHSA and BHT, in other words, gives the PHSA an enforceable right to obtain the documents in question here. This is enough to establish the PHSA's control over the documents in this case.

#### **4.0 CONCLUSION**

[23] For these reasons, I find that the applicant's personal information in BHT's files is personal information to which FIPPA applies, as contemplated by s. 3(2)(d) of PIPA. Accordingly, PIPA does not apply to that personal information and BHT is not required to disclose it to the applicant.

May 27, 2005

#### **ORIGINAL SIGNED BY**

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David Loukidelis  
Information and Privacy Commissioner  
for British Columbia

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<sup>10</sup> [1999] B.C.J. No. 198 (S.C.).