



Order P05-03

FASKEN MARTINEAU DUMOULIN LLP

David Loukidelis, Information and Privacy Commissioner
May 27, 2005

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Summary: The same respondent as in Order P05-02 also requested all information relating to him from this organization. The organization correctly responded that the applicant's personal information in its files is not subject to the *Personal Information Protection Act*. The personal information is in records under the control of two different public bodies, which had been clients of the organization. The 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 P05-02, [2005] B.C.I.P.C.D. No. 19; Order 04-19, [2004] B.C.I.P.C.D. No. 19; Order 04-25, [2004] B.C.I.P.C.D. No. 25.

1.0 INTRODUCTION

[1] This decision deals with the applicant's request for access to any of his personal information in the possession of Fasken Martineau & DuMoulin LLP ("FMD"), a law firm in Vancouver. The request was made in the same terms as two other August 15, 2004 requests that the applicant made to two other law firms. The applicant's other requests are dealt with in Order P05-02,¹ and Decision P05-01,² both of which are also released today. In each of these cases, the applicant made a request under PIPA for "all materials in possession" of the recipient law firm or "its affiliates or employees, and which relate to myself, and which should be permissible to obtain as indicated under the rules of the Act." As in Order P05-02, 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.

¹ [2005] B.C.I.P.C.D. No. 19.

² [2005] B.C.I.P.C.D. No. 18.

[2] FMD responded to the request it received by telling the applicant, in a September 28, 2004 letter, that FMD possessed personal information of the applicant in connection with two separate solicitor-client relationships between FMD and two public bodies. FMD said that it had personal information of the applicant “as a result of our retainer with the Provincial Health Services Authority” (“PHSA”) and also as a result of “our retainer with the University of British Columbia” (“UBC”).

[3] In each case, FMD told the applicant, the client is a public body covered by the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) and, by virtue of s. 3(2)(d) of PIPA, PIPA does not apply to personal information to which FIPPA applies. FMD added, in the alternative, that the personal information it possessed is protected by solicitor-client privilege by virtue of s. 23(3)(a) of PIPA. FMD also cited, in the alternative, other exceptions to the right of access to personal information found in s. 23(4) of PIPA. Last, FMD told the applicant that it had identified personal information of the applicant that it possessed in connection with an earlier solicitor-client relationship between FMD and the applicant and it disclosed severed copies of documents containing the applicant’s personal information to him. Those records are not in issue in this matter.

[4] The applicant complained about FMD’s response in an October 11, 2004 letter to this office. Mediation of the dispute having failed, a written hearing was held on the issue of whether the requested personal information is excluded from PIPA’s scope 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 requested personal information because FIPPA applies to it.

3.0 DISCUSSION

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

Application

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”.

[8] **3.2 PIPA’s Scope**—As discussed in Order P05-02, s. 3(2)(d) of PIPA is clearly designed to dovetail PIPA’s scope with FIPPA’s and the key issue in a case like this is whether a public body has custody or control of records containing personal information. In considering this case, I have taken the same approach as in Order P05-02 without repeating that discussion here.

[9] **3.3 Does FIPPA Apply to the Personal Information?**—The material before me establishes that the PHSA and UBC are public bodies covered by FIPPA. The PHSA is listed as a public body in Schedule 2 to FIPPA and UBC is, as a university under the *University Act*, an educational body and thus public body, as both those terms are defined in Schedule 1 of FIPPA. As noted in Order P05-02, 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 is in records—or documents, to use the PIPA term—that are “in the custody or under the control of a public body”.

[10] FMD’s submissions on the meaning of “control” are consistent with those made by the organization in Order P05-02. FMD adds that, in Order 04-25,³ 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. Order P05-02 argues that Order 04-25, “necessarily implies” that records produced or received during the course of a legal retainer are within a public body’s “control” for the purposes of FIPPA (para. 30, initial submission).

[11] In interpreting and applying the concept of control, I have taken the same approach, without repetition, as in Order P05-02.

[12] To support its position on the control issue, FMD filed affidavits from officials of PHSA and UBC speaking to the issue of control. As regards PHSA, Michael Marchbank, Executive Vice President, attested to the existence of a solicitor-client relationship between the PHSA and FMD in matters involving the applicant. He deposed that PHSA received an access request under FIPPA from the applicant dated October 30, 2003. The applicant’s request for records included any communications with regard to the applicant between a lawyer then working with FMD and others. Michael Marchbank deposed that he instructed FMD to review its records and to provide copies of all records that fell under the applicant’s FIPPA request. He also instructed FMD to provide those records to another law firm for the purpose of severing them and disclosing them under FIPPA. Last, he deposed that it is PHSA’s standard practice to instruct its outside legal representatives to search their records and provide copies of them whenever they fall within the scope of an access request that is made to PHSA under FIPPA.

[13] FMD provided an affidavit from Hubert Lai, who is University Counsel for UBC. He deposed that UBC had retained FMD to provide legal advice regarding an access request the applicant had made to UBC under FIPPA. He also deposed that, if an access request were made to UBC under FIPPA, UBC would instruct its outside legal counsel to search for and deliver to UBC copies of all records held by external counsel that were within the request’s scope. UBC would then comply with FIPPA in reviewing and disclosing information.

[14] Kathy Marr, a lawyer with FMD, deposed that the applicant’s October 30, 2003 FIPPA access request to PHSA is duplicated by the present request under PIPA as it

³ [2004] B.C.I.P.C.D. No. 25.

relates to PHSA records in FMD's possession up to the date of the FIPPA request. She deposed that, if PHSA were to instruct it to do so, FMD would provide PHSA with copies of all of the documents in FMD's possession that contain the applicant's personal information, so that the PHSA would be able to meet its obligations under FIPPA.

[15] Kathy Marr also deposed that, as regards records relating to UBC, a lawyer formerly with FMD took the relevant files with him when he moved to another firm. She deposed that she had searched through FMD's records and systems in relation to the applicant's PIPA request in order to identify documents that would respond to the request. She identified six documents in FMD's document management system which contain the applicant's personal information. All of these, she deposed, were received or produced during the course of FMD's retainer by UBC. She deposed that, if UBC were to instruct FMD to do so, FMD would make all of those documents available to UBC so that UBC could meet its obligations respecting any access request under FIPPA.

4.0 CONCLUSION

[16] I have no hesitation in finding, on the basis of the affidavits and other material before me, that personal information of the applicant in FMD's possession is, as regards their separate client files, under the "control" of the PHSA and of UBC, as applicable. The personal information is in records possessed by FMD, but each public body has indicated that it asserts control over those records. Further, court decisions indicate that a client has a right to her or his lawyer's client files even where the retainer has terminated (subject to any lawyer's lien to secure payment of unpaid fees, of which there is no suggestion here). Control factors in FIPPA decisions, notably those I mentioned above, also support the conclusion that the public bodies control the records in which the applicant's personal information is found.

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

May 27, 2005

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia