



OFFICE OF THE
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Order F15-55

MINISTRY OF JUSTICE

Celia Francis,
Adjudicator

September 30, 2015

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Summary: The applicant requested a copy of the report from the police to the Criminal Justice Branch (“Report to Crown counsel”) related to his criminal case. The Ministry denied access to the report under s. 15(1)(g) (disclosure could reasonably be expected to reveal information related to or used in the exercise of prosecutorial discretion), among other provisions. The adjudicator found that s. 15(1)(g) applies to the information in the report and that the Ministry exercised its discretion properly in withholding the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 15(1)(g).

Authorities Considered: B.C.: Order 331-1999, 1999 CanLII 4600 (BC IPC); Order 00-02, 2000 CanLII 8819 (BC IPC).

INTRODUCTION

[1] In early 2014, the applicant made a request under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) to the Criminal Justice Branch, Ministry of Justice (“Ministry”), for a copy of the “Report From Police in its entirety” related to a specified RCMP file. He stated that he was contemplating filing a civil suit and “the Report From Police is necessary and significant for civil counsel to review”.¹

[2] The Ministry responded by telling the applicant that the RCMP had provided the requested record (*i.e.*, the “Report to Crown Counsel”) to Crown counsel “for the

¹ Applicant’s request of February 19, 2014.

sole purpose of prosecution”. It added that Crown counsel had provided the RCC to the applicant’s lawyer in February 2013, under criminal law disclosure rules, for the conduct of the applicant’s defense at trial. The Ministry told the applicant that it was refusing access to the RCC under the following sections of FIPPA: ss. 15(1)(g) (records relating to the exercise of prosecutorial discretion), 16 (records received in confidence from another government) and 22(1) (disclosure harmful to third party personal privacy).²

[3] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the Ministry’s decision to deny access to the RCC. Mediation did not resolve the dispute and the matter proceeded to inquiry. The OIPC received submissions from the Ministry and the applicant.

ISSUES

[4] The issues before me are these:

1. Whether the Ministry is authorized by ss. 15(1) and 16 of FIPPA to refuse access to the information in the RCC.
2. Whether the Ministry is required by s. 22 of FIPPA to refuse access to this information.

[5] Under s. 57(1) of FIPPA, the public body has the burden of proving that the applicant has no right of access to all or part of the requested records, under ss. 15 and 16, including portions of the records that contain the applicant’s own personal information. Under s. 57(2), the applicant has the burden of proving that disclosure of third-party personal information would not be an unreasonable invasion of the third party’s personal privacy under s. 22.³

DISCUSSION

Background

[6] Under s. 1(2) of the *Attorney General Act*, the Attorney General is responsible for the management and direction of the Ministry, including the conduct of prosecutions in British Columbia.⁴

[7] The Criminal Justice Branch (“CJB”) is part of the Ministry and holds the responsive records in this case. The CJB has a number of responsibilities and

² Ministry’s response letter of March 13, 2014.

³ See Order 331-1999, 1999 CanLII 4600 (BC IPC), at pp. 3-4, and Order 00-02, 2000 CanLII 8819 (BC IPC), at p. 3, where former Commissioner Loukidelis discussed the general burden of proof in s. 57(1) on the public body, including with respect to the applicant’s own personal information, and the burden of proof in s. 57(2) on the applicant respecting third-party personal information.

⁴ Paragraphs 4.01-4.02, Ministry’s initial submission.

functions under the *Crown Counsel Act*, including approving and conducting all prosecutions within the province, and initiating and conducting all appeals and other proceedings respecting any prosecution. Crown counsel in the CJB are responsible for conducting prosecutions, under the direction of the Assistant Deputy Attorney General. According to the Ministry, “the checks and balances in the *Crown Counsel Act* are designed to ensure that the independence of the prosecutorial function is respected”. The Attorney General and Deputy Assistant Attorney General may provide general policy direction of the approval or conduct of prosecutions.⁵

[8] The applicant and his wife had an altercation while they were driving in their car. The applicant stopped the car, pushed his wife out of the car and drove off before she had fully exited the car. The applicant was subsequently charged under the *Criminal Code* with assault and dangerous operation of a vehicle.⁶ The material before me indicates that the matter was resolved by the applicant entering into a Peace Bond under s. 810 of the *Criminal Code*.⁷

Record in Dispute

[9] The record in dispute, the Report to Crown Counsel and its attachments (“RCC”), relates to the charges laid against the applicant. It comprises the following:

- an audio CD of the wife’s 911 call following the incident
- a summary and a detailed narrative (“Report to Crown Counsel Narratives”) that the investigating RCMP constable prepared
- a summary that a second RCMP constable prepared
- the victim’s (wife’s) statement
- a photograph
- Promise to Appear and Undertaking
- the two RCMP constables’ handwritten notes

Exercise of prosecutorial discretion – s. 15(1)(g)

[10] This provision reads as follows:

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

⁵ Paragraphs 4.03-4.06, Ministry’s initial submission.

⁶ Paragraphs 4.08-4.10, Ministry’s initial submission.

⁷ Paragraph 10, McMorran affidavit; para. 4, applicant’s submission.

- (g) reveal any information relating to or used in the exercise of prosecutorial discretion,

...

[11] The Ministry relied on paragraph (a) of the definition of “exercise of prosecutorial discretion” in Schedule 1 of FIPPA, which reads 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,
 - (ii) to stay a proceeding,
 - (iii) to prepare for a hearing or trial,
 - (iv) to conduct a hearing or trial,
 - (v) to take a position on sentence, and
 - (vi) to initiate an appeal, or

...

Parties’ submissions

[12] The Ministry submitted that s. 15(1)(g) applies to the information in the RCC. The Ministry said that the RCMP provided the RCC to the CJB for the purpose of Crown counsel deciding whether or not to approve a prosecution in relation to the applicant. It added that Crown counsel used the RCC for this purpose and in the ongoing assessment as to whether to continue the prosecution. The Ministry provided affidavit evidence in support of its position from Lori McMorran, Crown counsel and Information Access and Privacy Coordinator for the CJB.⁸

[13] The applicant said he reviewed the RCC while it was in his criminal lawyer’s hands. After his lawyer’s death, the applicant was unable to obtain a copy of the RCC from his lawyer’s office because, he was told, there had been an implied undertaking given at the time of disclosure to the lawyer. He said he later attempted to obtain a copy of the RCC from the CJB, as he was contemplating a civil suit against the RCMP, but was denied access.⁹ The applicant said he also requested the records from the RCMP but received only procedural documents and unusable “heavily redacted” documents. The applicant said that the time limit for filing a notice of civil claim respecting this matter has expired. Nevertheless, he wishes his current lawyer to have a copy of the RCC, in case future custodial and access proceedings respecting his children arise.¹⁰

⁸ Paragraph 4.20, Ministry’s initial submission; para. 14, McMorran affidavit.

⁹ The applicant appears to be referring here to the access request which is the subject of this inquiry.

¹⁰ Applicant’s affidavit.

Finding on s. 15(1)(g)

[14] I am satisfied from the Ministry's evidence that the responsible Crown counsel reviewed the information in the RCC and considered it in exercising her discretion in deciding whether to lay criminal charges against the applicant. I find that s. 15(1)(g) applies to the information in the RCC.

[15] I find support for this conclusion in Order 00-02, in which former Commissioner Loukidelis had evidence that Crown counsel had used an RCC and other records in deciding whether to lay charges against an applicant. He found that s. 15(1)(g) applied to the records.¹¹

Exercise of discretion

[16] While I have found that s. 15(1)(g) applies to the RCC in this case, this is not the end of the matter. Section 15(1)(g) is a discretionary exception and so the Ministry must consider the relevant factors in exercising its discretion in favour of withholding or disclosing the requested records. See Order 00-02 for a discussion of the factors public bodies should consider in the exercise of discretion in relation to s. 15(1)(g), including the previous disclosure of records under criminal law disclosure rules.¹²

[17] In this case, the Ministry said it considered the previous disclosure of the RCC to the applicant in the context of the criminal proceeding. The Ministry argued that, if the applicant received the records under FIPPA, however, he would not be bound by any undertaking not to further use or disclose the RCC, as he was in the criminal proceeding, and the RCC would not be subject to judicial controls limiting its use.¹³

[18] The Ministry provided affidavit evidence on other factors it had considered in exercising its discretion in favour of withholding the RCC. These included the sensitivity, nature and age of the records, whether there was a sympathetic or compelling reason for disclosure and whether previous Commissioner's orders have found that similar information should be withheld or disclosed.

[19] I am satisfied that these are appropriate factors to consider and that the Ministry exercised its discretion properly in deciding to withhold the RCC under s. 15(1)(g).

¹¹ 2000 CanLII 8819 (BC IPC), at p. 4.

¹² 2000 CanLII 8819 (BC IPC), at p. 5.

¹³ Paragraphs 4.21-4.22, Ministry's initial submission; para. 11, McMorran affidavit.

Conclusion on s. 15(1)(g)

[20] I found above that s. 15(1)(g) applies to the record in dispute in this case. I also found that the Ministry exercised its discretion properly in withholding the information in the RCC. I find that the Ministry has met its burden of proof under s. 57(1).

Sections 15(1)(f), 16(1)(b) and 22

[21] In its initial submission to this inquiry, the Ministry also relied on ss. 15(1)(f), 16(1)(b) and 22(1). In light of my finding that s. 15(1)(g) applies to the record in dispute in this case, I do not need to consider the applicability of these other sections.

CONCLUSION

[22] Under s. 58(2)(b) of FIPPA, I confirm that the Ministry is authorized by s. 15(1)(g) to refuse the applicant access to the record in dispute in this case.

September 30, 2015

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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