Office of the Information & Privacy Commissioner for British Columbia

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Order F16-10

MINISTRY OF ENERGY AND MINES

Elizabeth Barker
Senior Adjudicator

March 3, 2016

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Summary: The applicant requested access to records related to the Ministry of Energy and Mines' investigation of a workplace fatality. An inquiry commenced into the Ministry's decision to refuse to disclose some information to the applicant. During the course of the inquiry, the applicant revealed that he already had the information in dispute. As a result, the Ministry requested that the OIPC exercise its discretion under s. 56 of FIPPA to not hold the inquiry because the issues are moot. The adjudicator determined that the matter of the Ministry's refusal to disclose the information in dispute was moot and no factors warranted continuing the inquiry. The inquiry was cancelled.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 56.

Authorities Considered: B.C.: Decision F05-05, 2005 CanLII 28522 (BC IPC); Decision F07-04, 2007 CanLII 67284 (BC IPC); Decision F08-11, 2008 CanLII 65714 (BC IPC); Decision F09-02, 2009 CanLII 3224 (BC IPC); Decision F11-02, 2011 BCIPC 17 (CanLII). **Ont:** Order M-271, 1994 CanLII 6918 (ON IPC).

Cases Considered: *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342.

INTRODUCTION

[1] This decision deals with the Ministry of Energy and Mines' ("Ministry") request that the Office of the Information and Privacy Commissioner ("OIPC") exercise its discretion under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to not conduct an inquiry on the basis that the

issues are moot. The Ministry's request is in direct response to the applicant's admission that he already has a complete copy of the information in dispute.

[2] The background to this matter is the applicant's request for records related to the Ministry's investigation of a workplace fatality.[1] He requested a copy of the investigation report ("Report") as well as any records related to the Ministry's investigation or the Report. The Ministry responded by providing some information but refusing to disclose other information under s. 13 (policy advice or recommendations), s. 15 (harm to law enforcement), s.17 (harm to financial or economic interests of a public body) and s.22 (harm to personal privacy) of FIPPA. The applicant disagreed and requested the OIPC review the Ministry's decision.

[3] As a result of mediation by the OIPC, the Ministry released additional information to the applicant, including all the information that was previously withheld under s. 13 of FIPPA. As mediation did not resolve the ss. 15, 17 and 22 matters, the applicant requested that they proceed to inquiry. The only information remaining in dispute is contained in the Report.

[4] In its initial inquiry submission, the Ministry explained that it was no longer relying on ss. 15 and 17 to withhold information from the Report. It also requested permission to add s. 16 (harm to intergovernmental relations or negotiations) as an issue in the inquiry. The OIPC has not yet responded to the Ministry's request to add s. 16. However, for the purposes of this s. 56 application, I have proceeded on the basis that both ss. 16 and 22 are at issue.

[5] In his inquiry submission, the applicant reveals that he already has the Report:

> The applicant has obtained a complete copy of the report some time ago. While the Ministry's rationale for severing so much of it can be argued as above, that point is now moot. What remains is the failure of the regulator responsible for workplace safety to implement best practices... To make sure that preventable deaths like this one stop happening, it is crucial to build pressure on government to change the rules regarding workplace safety in mines…The report should be made public to start a process that is long overdue.[2]

[6] In light of the applicant's acknowledgment that he already has the Report, the Ministry submits the issues in this inquiry are moot, and it requests that the OIPC exercise its discretion under s. 56 of FIPPA to not hold this inquiry.

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[1] In October 2012, while working on a mine exploration project, a surveyor's helper was caught in an avalanche and swept over a cliff to his death.

[2] Applicant's submission, p. 3.

ISSUES

[7] The issues to be addressed in this decision are as follows:

1. Does the inquiry raise only moot issues?

2. If so, should the OIPC exercise its discretion under s. 56 of FIPPA to conduct the inquiry or to cancel it?

[8] It is well established that in an inquiry under s. 56, it is the party asking that an inquiry not be held who bears the burden of demonstrating why that request should be granted.[3]

DISCUSSION

[9] Section 56 of FIPPA enables, but does not require, the Commissioner to conduct inquiries. It reads as follows:

> 56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[10] Previous decisions regarding s. 56 have stated that the reasons for exercising discretion in favour of not conducting an inquiry are open-ended and include mootness.[4] In this case, the inquiry process has begun, but it is not yet concluded. It has been adjourned, pending the outcome of the Ministry's request regarding mootness. In my view, s. 56 provides me, as the Commissioner's delegate, with the discretion to discontinue or not conduct an inquiry that has already commenced.

[11] The leading Canadian case on mootness is *Borowski v. Canada (Attorney General)*[5] [*Borowski*], and previous BC Orders have applied its principles in the context of adjudications under FIPPA.[6] Sopinka J. said that following about mootness in *Borowski:*

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case... The

[3] Decision F09-02, 2009 CanLII 3224 (BC IPC); Decision F08-11, 2008 CanLII 65714 (BC IPC).
[4] See, for example, Decision F07-04, 2007 CanLII 67284 (BC IPC) and also Decision F05-05, 2005 CanLII 28522 (BC IPC).
[5] *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at paras. 15 and 16.
[6] Decision F05-05, 2005 CanLII 28522 (BC IPC) at para. 10.

> general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
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> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[12] When deciding whether to depart from the general policy of not hearing a moot case, the Court in *Borowski* said that consideration should be given to the three rationales underlying the mootness doctrine. They are: the need for an adversarial context, the concern for judicial economy, and the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.[7] Sopinka J. also said that considering the extent to which each of these three rationales is present is not a mechanical process, and "the presence of one or two of the factors may be overborne by the absence of the third, and vice versa."[8]

Ministry's submissions

[13] The Ministry submits that this case is moot and the OIPC should exercise its discretion to not hear it. The Ministry says that the doctrine of mootness, as summarized in *Borowski,* applies to the present case.[9] It also submits that an inquiry will have no practical effect, and ought to be denied, since the applicant already has the Report and there are no special factors that would justify adjudication.[10]

[14] Regarding the first part of the *Borowski* test and whether the inquiry is moot, the Ministry submits that there are no live issues to be adjudicated because the applicant admits he already has the Report. The Ministry points out that the applicant acknowledges that the issue of how the Ministry severed the Report is moot.[11] It also submits that "it does not appear to be the case where

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[7] *Borowski* at para. 42.
[8] *Borowski* at para. 42.
[9] The Ministry also cites Decision F05-05 where the approach taken in *Borowski* was also followed.
[10] Ministry's submissions, para. 6, citing Ontario Order M-271, 1994 CanLII 6918 (ON IPC) at p.2.
[11] Ministry's submissions, para. 11.

the Applicant has received the record but his use of the record is limited", thus causing him to seek the record through FIPPA so he can use it without restriction.[12]

[15] As for the second part of the *Borowski* test, the Ministry submits that the OIPC should exercise its discretion not to hear the inquiry for several reasons. The Ministry submits that there is no useful purpose to proceeding with the inquiry because a decision regarding the Ministry's severing of the Report will have no effect on the parties' rights and would serve no practical benefit to them or others. The Ministry submits that this is not a case "capable of repetition yet evasive of review,"[13] and the issues are not particularly novel, so they can certainly be raised again in future cases. The Ministry also submits that there are no special factors that make resolution of the issues in the public interest.

[16] Further, the Ministry submits that the only issues in this inquiry are about the Ministry's decision to withhold particular information in the Report under ss. 16 and 22, and it is not a case where it is necessary to proceed in order to clarify the law on an issue that is of major public importance. It submits that the OIPC's scarce resources can be used more efficiently and effectively to deal with other applicants' files.

[17] Finally, the Ministry also says that the applicant's concerns with the nature and content of the Report, and his desire to pressure the government to change the rules regarding workplace safety in mines, are not issues in this inquiry. It submits that his concerns about such matters do not raise the inquiry issues to a level requiring disclosure in the public interest (s. 25).[14] The Ministry also submits that any order would only relate to whether the Ministry is required to disclose the withheld information to the applicant; it could not result in the outcome the applicant says he seeks (i.e., an order that Ministry disclose the Report to the public).

Applicant's submissions

[18] In responding to the Ministry's request that the inquiry be cancelled, the applicant explains why, despite already having the Report, he believes the inquiry should proceed:

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[12] Ministry's submission para. 11. It cites Decision F11-02, 2011 BCIPC 17 (CanLII) which involved a request to the Ministry of Finance for records that the applicant had already obtained through the BC Human Rights Tribunal process. The disclosure through the human rights process, however, was conditional on the applicant not using or disclosing the records for any other purposes. He made his request under FIPPA because he wanted to be able to use the records for his union grievance. The adjudicator found that the inquiry in that case was not moot.
[13] Ministry's submission, para. 13.
[14] Ministry's submission, paras 13, 15 and 16.

> Once a report is released, it is considered to be in the public domain. The applicant would be free to distribute it, and it would most likely be published on the Ministry's website. Currently, the applicant is restricted from doing so. He has obtained the report by confidential means and undertaken to protect his source. The applicant is concerned about possible legal or other consequences if he was to release the material currently in his possession.[15]

[19] After describing what he believes was a conflict of interest in the investigation of the fatality, the applicant says the following about why the inquiry should proceed:

> The Ministry then used its legal and administrative resources to block access to this information. I submit that exposing and adjudicating this ongoing abuse of process and power on the part of the Ministry is a worthy object for the Commissioner's resources. The saving of OIPC resources would also be minimal at this point, as the only remaining step is for the Ministry to make their reply submission and for the OIPC to render its decision. Stopping the process now, so close to its end, would actually waste all the effort that has gone into the process so far. As a citizen without access to the legal and administrative resources that the Ministry has, the applicant would be deprived of the fruit of many days of his effort spent in the public interest.[16]

Analysis and findings

Is the inquiry moot?

[20] The issue in the inquiry is whether the Ministry is authorized or required by FIPPA to refuse the applicant access to the information he requested. The applicant acknowledges that he has a full, unredacted copy of the Report, so it is evident that he already possesses the information he is seeking in this inquiry.

[21] I have carefully considered the applicant's explanation about why, despite already having the sought-after Report, he wishes to pursue this inquiry. The applicant says that he is "concerned about possible legal or other consequences" if he personally releases the Report. However, he does not explain the consequences he alludes to, and they are not apparent to me. He also states that he "obtained the report by confidential means and undertaken to protect his source", but there is no evidence before me that he is under any obligation or undertaking, legal or otherwise, to not use the Report currently in his possession. Further, it is not evident to me, and the applicant does not explain, how using the Report he already has would result in disclosing the identity of the individual who gave it to him. Therefore, the evidence does not demonstrate that the applicant's ability to use the Report in his possession is restricted or is any

[15] Applicant's February 14, 2016 submission, p. 1.
[16] Applicant's February 14, 2016 submission, p. 2.

different than it would be if he received the same information pursuant to an inquiry order.

[22] Section 4 of FIPPA gives the applicant the right of access to the requested record subject only to information excepted from disclosure under Part 2 of FIPPA. A decision about whether the Ministry is authorized or required by exceptions under FIPPA to refuse the applicant access to the information in dispute is, in my view, purely academic. The applicant has already accomplished the hoped-for and best outcome for any access request under FIPPA, namely a complete copy of the requested record and unfettered access to the information it contains.

[23] In my view, there is no longer any "live controversy", and any tangible and concrete dispute has disappeared. I conclude that the issues in the inquiry are now solely theoretical and the inquiry is moot.

Should the OIPC conduct this moot inquiry?

[24] The fact that the inquiry is moot, however, does not end the matter. It is still necessary to decide if the OIPC should exercise its discretion to conduct the inquiry. I have considered the parties' submissions and the rationales for the mootness doctrine set out in *Borowski* and, for the reasons below, have determined that the OIPC should not conduct this inquiry.

[25] Despite the case being moot, the parties still disagree over the fundamental question of whether the FIPPA exceptions at issue apply to the information in dispute. The applicant continues to want the Ministry to disclose the Report to him and, presumably, the Ministry still asserts that it is authorized or required by FIPPA to refuse to disclose the information in dispute. Before the Ministry knew that the applicant already had a complete copy of the Report, it provided an initial submission in the inquiry, with its argument and evidence supporting its decision to refuse to disclose information in dispute. Therefore, in my view, there is still a sufficient adversarial context to ensure that an informed decision could be made about the applicability of the FIPPA exceptions at issue to the information in dispute.

[26] However, given that the applicant already has unrestricted access to the information he wants, it would be a waste of resources to conduct this inquiry. Sopinka J. said the following in *Borowski* about the role that judicial economy plays in moot cases:

> The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

> The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action…
>
> Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, *supra*. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case that was moot. Accordingly, this Court exercised its discretion to hear the case…
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> There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law.... [17]

[27] In this case, I do not see how proceeding with the inquiry would have any practical effect on the rights of either party. Their submissions and evidence do not indicate that they would be in any different position if the applicant were to obtain an unsevered copy of the Report by way of the inquiry.

[28] Also, this is not a case where the expenditure of scarce judicial resources on a moot matter is warranted because the issues are recurring yet evasive of review in the way described in the quote from *Borowski* above. Clearly, public bodies' decisions regarding ss. 16 and 22 have been, and continue to be, before the Commissioner for decision in OIPC inquiries. It is not necessary to hear this case out of concern that otherwise the issues related to the interpretation of ss. 16 and 22, and their applicability to a public body's records, might evade being addressed on inquiry.

[29] Finally, based on what the applicant says in his submission, it appears that he may misapprehend the Commissioner's order making powers under FIPPA and he is seeking a remedy that is beyond the jurisdiction of the OIPC. The Commissioner's order making powers, which are set out in s. 58 of FIPPA, do not include ordering a public body to publish the disputed information in a public forum. In addition, FIPPA does not authorize the Commissioner to adjudicate what the applicant describes as the "ongoing abuse of process and power on the part of the Ministry". The most favourable order, from the

[17] *Borowski* at paras. 34-36

perspective of this or any other access applicant at an inquiry, is to receive an order that the public body disclose to the applicant the information in dispute.

[30] In conclusion, I find that this case is moot, and that continuing this inquiry would further consume the OIPC's time and resources with no prospect that it would have any practical effect on the parties' rights or alter the applicant's situation with regards to the Report. In my view, this is not a case where there are special circumstances making it worthwhile expending scarce judicial resources to hear.

CONCLUSION

[31] For the reasons provided above, pursuant to s. 56 of FIPPA, I have decided that the inquiry regarding the applicant's request for records will not proceed. The inquiry has been cancelled and the OIPC's file will be closed.

March 3, 2016

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F14-57001