



OFFICE OF THE
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COMMISSIONER
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Order F16-23

SUPERINTENDENT OF REAL ESTATE

Celia Francis
Adjudicator

April 25, 2016

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Summary: The adjudicator found that the public body was authorized to refuse access to the identity of a complainant, as its disclosure could reasonably be expected to reveal the identity of a confidential source of law enforcement information under s. 15(1)(d).

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

Authorities Considered: B.C.: Order F15-26, 2015 BCIPC 28 (CanLII); Order F11-03, 2011 BCIPC 3 (CanLII); Order 00-18, 2000 CanLII 7416 (BC IPC); Order 00-52, 2000 CanLII 14417 (BC IPC); Order F10-37, 2010 BCIPC 55; Order No. 36-1995, [1996] B.C.I.P.C.D. No. 8; Order No. 76-1996, [1996] B.C.I.P.C.D. No. 2.

INTRODUCTION

[1] This case began more than 10 years ago, in September 2005, with a complaint to the Financial Institutions Commission (“FICOM”) that the applicant was selling real estate without a licence. Early in 2006, the applicant made a request to FICOM under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) for the complaint file. FICOM disclosed records but withheld some information from them under s. 15(1) (harm to law enforcement) and s. 22(1) (harm to third-party privacy) of FIPPA.

[2] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review FICOM’s decision to deny access to some of the

information.¹ Mediation by the OIPC led to the disclosure of more information but did not resolve the review and the applicant requested an inquiry. FICOM then disclosed some more information, including a summary of its investigation of the complaint. Ultimately, in mid-2006, the applicant decided not to proceed with the inquiry.

[3] In early 2012, the applicant made a new FIPPA request to FICOM for a copy of the complaint file. FICOM said that it would not respond to this request, as it was much the same as her 2006 request and the applicant had accepted a mediated settlement of that matter.

[4] In mid-2013, the applicant asked that FICOM provide the name of the complainant and received a similar response. The applicant then complained to the OIPC about the way FICOM had responded to her 2013 request.² The OIPC investigator told the applicant that he did not consider FICOM obliged to respond to her 2013 request because it was essentially the same as her previous request, which had been settled in mediation with the OIPC. The applicant was dissatisfied with this response and requested a reconsideration. In early 2014, Assistant Commissioner Fedorak issued a reconsideration decision that agreed with the investigator's conclusions.³

[5] The applicant then commenced judicial review proceedings which were resolved by the OIPC's agreement to review FICOM's decision not to process the applicant's 2013 request.⁴ However, in late 2014, before the OIPC's review was complete, FICOM processed the 2013 request, denying access to the complainant's name under ss. 15(1) and 22(1). The applicant requested a review of that decision. Mediation did not resolve this matter either and it proceeded to inquiry. The OIPC received submissions from the applicant and the Superintendent of Real Estate ("SRE"), which is now the responsible public body.

[6] The Notice of Inquiry lists the s. 15 issues as s. 15(1)(d) (disclosure could reasonably be expected to reveal identity of confidential source of law enforcement information) and s. 15(2)(b) (disclosure could reasonably be expected to expose an individual to civil liability). However, the material before me does not indicate when the SRE decided to apply these sections in place of s. 15(1) alone.

¹ OIPC File F06-27781.

² OIPC File F13-53911.

³ OIPC File F13-55548.

⁴ OIPC File F14-58717.

ISSUES

[7] The issues before me are whether the SRE is

- required by s. 22(1) to refuse access to the complainant's name and
- authorized by s. 15(1)(d) and s. 15(2)(b) to refuse access to the complainant's name

[8] Under s. 57(1) of FIPPA, the SRE has the burden of proof respecting s. 15. Under s. 57(2), the applicant has the burden respecting third-party personal information.

DISCUSSION

Record in dispute

[9] The information in dispute is the complainant's name in a letter FICOM sent the complainant in October 2005.

The Superintendent of Real Estate

[10] Under the *Real Estate Services Act* ("RESA") and regulations, the SRE protects consumers from unlicensed real estate activities. In BC, providers of real estate services must be licensed with the Real Estate Council of BC, unless exempt. Real estate services providers must, among other things, carry errors and omissions insurance and meet educational and professional standards. The SRE receives complaints and may investigate and take enforcement action. It may also refer complaints to other regulatory bodies.⁵

Section 15(1)(d) – reveal identity of confidential source

[11] The SRE is withholding the information in dispute under s. 15(1)(d) which 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

...

(d) reveal the identity of a confidential source of law enforcement information,

...

⁵ Affidavit of Chris Carter, Deputy Superintendent of Real Estate, Office of the Superintendent of Real Estate, paras. 6-10.

[12] Schedule 1 of FIPPA defines “law enforcement” as follows:

- (a) policing, including criminal intelligence operations,
- (b) investigations that lead or could lead to a penalty or sanction being imposed, or
- (c) proceedings that lead or could lead to a penalty or sanction being imposed;

[13] Section 15(1)(d) has been the subject of a number of orders.⁶ They have found that it is necessary to show that the public body was engaged in “law enforcement”, that the complainant provided “law enforcement information” to the public body and did so in confidence. In assessing the SRE’s arguments under s. 15(1)(d), I have taken the approach as set out above.

Is the complainant a “source” of law enforcement information?

[14] The SRE said that it has authority, under s. 48 of the RESA, to investigate complaints⁷ and to conduct a hearing. The SRE said that, should it find that a person who requires a real estate licence does not have such a licence, it may require that the person cease the activity and pay a penalty.⁸ The SRE added that there are other provisions of the RESA for provincial offences which may attract penalties.⁹ Thus, the SRE argued, its investigation under the RESA into the complaint against the applicant could have led to a penalty or sanction being imposed and it was therefore engaged in law enforcement for the purposes of s. 15(1)(d). The SRE also pointed to previous orders which have found that information gathered by regulatory bodies falls into the category of law enforcement information.¹⁰

[15] The applicant acknowledged that FICOM had authority to conduct investigations into violations of the RESA. However, she disputed that FICOM had actually conducted an investigation into the complaint in this case because the investigator did not take certain steps that, in her view, are essential to an investigation.¹¹ The SRE countered that it was not up to the applicant to determine how an investigation should proceed and that not every investigation requires the complex steps the applicant submits are necessary to show that an investigation took place.¹²

⁶ See, for example, Order F15-26, 2015 BCIPC 28 (CanLII), Order F11-03, 2011 BCIPC 3 (CanLII) and Order 00-18, 2000 CanLII 7416 (BC IPC).

⁷ For example, a complaint that someone who does not hold a licence has engaged in any activity for which a licence under the RESA is required.

⁸ See s. 49 of the RESA.

⁹ For example, ss. 118-119 of the RESA.

¹⁰ SRE’s initial submission, paras. 11-19, 66-70; Carter Affidavit, paras. 6-10.

¹¹ Applicant’s submission, pp. 3, 7-8.

¹² SRE’s reply submission, paras. 14-20.

[16] I am satisfied from my review of ss. 48, 49 and 118-119 of the RESA that FICOM had authority to investigate possible violations of that Act and that such investigations could lead to the imposition of penalties and sanctions under the RESA. I also accept the SRE's evidence that, in 2005, FICOM received a complaint that the applicant had violated the RESA, investigated the complaint, gave the applicant an opportunity to respond, sent the applicant a letter and then closed the file.¹³

[17] Although I recognize that the applicant takes a different view, I readily conclude that, in conducting this investigation, FICOM was engaged in "law enforcement" for the purposes of paragraph (b) of the definition of "law enforcement" and s. 15(1)(d).¹⁴ I am also satisfied the complainant provided this "law enforcement information" (*i.e.*, the complaint of a possible violation of the RESA) to FICOM. It follows that I find that the complainant was a source of "law enforcement information".

Is the complainant a "confidential" source?

[18] The SRE said that its policy has always been to treat the identities of complainants as confidential. It said that, when it receives a complaint, it tells the complainant it will keep his or her identifying information confidential, to the extent permitted by FIPPA, and that it did so in this case.¹⁵ The SRE then explained how disclosing complainants' identities would undermine its ability to regulate unlicensed real estate services activity, as it relies on complainants to come forward with complaints. The SRE argued that "it is imperative" that complainants be able to submit complaints "without fear of retribution, reprisal or influence, by the subject of the complaint". The SRE acknowledged that, in "exceptional cases", disclosure of a complainant's identity may be appropriate or necessary but argued that disclosure was not necessary in this case.¹⁶

[19] The applicant acknowledged that FICOM had sent the complainant a letter offering confidentiality "after the fact"¹⁷ but argued that there was no evidence that the complainant had requested or expected confidentiality.

¹³ Carter affidavit, paras. 5, 12 & 23, Exhibit C.

¹⁴ My finding is consistent with previous orders on the law enforcement activities of regulatory bodies, for example, Order 00 52, 2000 CanLII 14417 (BC IPC). Former Commissioner Loukidelis noted there that the BC Securities Commission had authority under the *Securities Act* to conduct an investigation and impose restrictions on individuals. He found as a result that the Commission was engaged in law enforcement for the purposes of s. 15(1)(d) of FIPPA.

¹⁵ Exhibit C, Carter affidavit — the record in dispute.

¹⁶ SRE's initial submission, paras. 40-53; Carter affidavit, paras. 11-23.

¹⁷ The applicant received a copy of this letter with the SRE's initial submission, from which the complainant's name and address had been severed.

[20] I am satisfied by the SRE's evidence that it receives and treats complainants' identities confidentially, for the reasons it gave. The SRE's evidence is that FICOM undertook to keep the complainant's identity in confidence.¹⁸ The record in dispute also tells the complainant that FICOM will keep his or her "name and any identifying information" confidential. I find that the complainant in this case was a "confidential" source of law enforcement information.

[21] The applicant referred to past orders which found that confidentiality of complainants' names had not been established, for example, Order F10-37¹⁹ and Order No. 76-1996.²⁰ However, these orders concerned different circumstances and do not, in my view, assist the applicant. In Order F10-37,²¹ I found that there was no evidence that witnesses had requested or received assurances of confidentiality during the investigation. In this case, however, there is evidence that the public body has always had a policy of treating complainants' identities in confidence and that it gave assurances of confidentiality to the complainant. In Order No. 76-1996, former Commissioner Flaherty relied on his reasoning in Order No. 36-1995²² to order disclosure of a complainant's identity. However, the order for disclosure of the complainant's identity in Order No. 36-1995 was quashed in a judicial review decided after Order No. 76-1996.

Would disclosure reveal the identity of a confidential source?

[22] The disclosed portions of the record in dispute tell the complainant that FICOM has received her or his complaint. The name and address of the complainant have been removed from the copy of the letter before me. However, for the reasons given above and from my review of the record in dispute, I am satisfied that disclosure of the complainant's name in this letter would reveal the identity of a confidential source of law enforcement information.

Conclusion on s. 15(1)(d)

[23] The SRE has, in my view, met its burden of proof in this case. I find that s. 15(1)(d) applies to the complainant's name. This finding is consistent with previous orders on this issue, which have also found that s. 15(1)(d) applies to the identity of a complainant who provided information in confidence to a body engaged in law enforcement activities.²³

¹⁸ Carter affidavit, paras. 5 & 12.

¹⁹ 2010 BCIPC 55.

²⁰ [1996] B.C.I.P.C.D. No. 2. Applicant's submission, pp. 5-7.

²¹ 2010 BCIPC 55.

²² [1996] B.C.I.P.C.D. No. 8.

²³ See, for example, Order 00-18, 2000 CanLII 7416 (BC IPC), Order F15-26, 2015 BCIPC 28 (CanLII), Order 00-52, 2000 CanLII 14417 (BC IPC), Order F11-03, 2011 BCIPC 3 (CanLII).

Other exceptions

[24] The SRE argued that ss. 22(1) and 15(2)(b) apply to the information in dispute. In light of my finding that s. 15(1)(d) applies to this information, it is not necessary for me to decide if ss. 22(1) and 15(2)(b) also apply to it.

CONCLUSION

[25] For reasons given above, under s. 58(2)(c) of FIPPA, I confirm that the SRE is authorized to refuse the applicant access to the information in dispute, under s. 15(1)(d) of FIPPA.

April 25, 2016

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F14-58717