



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F17-09

PUBLIC GUARDIAN AND TRUSTEE OF BRITISH COLUMBIA

Trevor Presley
Investigator

February 23, 2017

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Summary: An applicant asked the Public Guardian and Trustee of British Columbia (“PGT”) for records related to a deceased individual. The PGT refused to disclose the personal information under s. 22 (unreasonable invasion of personal privacy) of FIPPA. The applicant was not satisfied with this response and asked that this matter proceed to inquiry. The PGT requested the Commissioner exercise his discretion under s. 56 to not hold an inquiry. The investigator found that it was not plain and obvious that disclosure of the deceased’s information would be an unreasonable invasion of the deceased’s personal privacy under s. 22; therefore, the PGT’s request that an inquiry not be held was denied.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22 and 56.

Authorities Considered: B.C.: Decision F11-02, 2008 CanLII 19 (BC IPC) Order F07-25, Decision F08-11, 2008 CanLII 65714 (BC IPC), Decision F11-01, 2011 CanLII 11 (BC IPC), Decision F10-13, 2010 CanLII 56 (BC IPC).

INTRODUCTION

[1] This order decides the PGT’s 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 hold an inquiry under Part 5 of FIPPA. The access request in question was requested by a lawyer (“applicant”) who is seeking records from the PGT about an individual who died in 2007 (“deceased”). The applicant requested a review of the PGT’s

decision to refuse to disclose the requested records in their entirety under s. 22 (unreasonable invasion of personal privacy) of FIPPA. The PGT submits that it is plain and obvious that the information must not be disclosed because s. 22 applies.

ISSUE

[2] Should the Commissioner exercise his discretion under s. 56 of FIPPA to not hold an inquiry because it is plain and obvious that s. 22 of FIPPA applies? Under section 56 of FIPPA the PGT has the burden to show why an inquiry should not be held.

Records in dispute

[3] The applicant requested records that contain the following information:

- Marital status, legal name, date of birth of the deceased and any other names that were used by the deceased,
- Name, place and date of birth of the father, mother and any siblings of the deceased;
- Any other information that may be of assistance in locating the legal heirs of the estate of the deceased.

The PGT responded by informing the applicant that it had responsive records but it was withholding them in their entirety under s. 22 of FIPPA.

DISCUSSION

Analysis

[4] Section 56(1) of FIPPA reads as follows:

Inquiry by Commissioner

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.

[5] A number of previous orders have set out the principles for the exercise of discretion under s. 56 of FIPPA, including Decision F08-11 which stated the following:

- the public body must show why an inquiry should not be held;
- the respondent (the applicant for records) does not have a burden of showing why the inquiry should proceed; however, where it

appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide “some cogent basis for arguing the contrary”;

- the reasons for exercising discretion under s. 56 in favour of not holding an inquiry are open-ended and include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope of FIPPA, and the principles of abuse of process, res judicata and issue estoppel;
- it must in each case be clear that there is no arguable case that merits an inquiry.¹

[6] I have followed this approach in this case.

[7] Section 22 of FIPPA requires public bodies to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party’s personal privacy. It reads:

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.

[8] Past orders have discussed how s. 22 is applied.² First, it must be determined whether the information at issue is personal information. Personal information is defined in Schedule 1 of FIPPA as “recorded information about an identifiable individual other than contact information”, and contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”

[9] Next, one must consider s. 22(4), which identifies situations where disclosure of personal information is not unreasonable. If s. 22(4) does not apply, one must consider s. 22(3), which sets out certain types of personal information whose disclosure is presumed to be an unreasonable invasion of a third party’s personal privacy. These presumptions may be rebutted. Whether or not a presumption applies, one must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosure would constitute an unreasonable invasion of a third party’s privacy.

¹ Decision F08-11, 2008 CanLII 65714 (BC IPC), at para. 8.

² See, for example, Order 01-53, 2001 CanLII 21607 (BCIPC).

[10] I will apply the above approach to determine whether, as the PGT submits, the application of s. 22 is plain and obvious or open to argument.

Parties' submissions

[11] The PGT submits that it is plain and obvious that s. 22 applies to the records and that an inquiry should, therefore, not be held. The PGT claims disclosure of the personal information would be contrary to s. 22(3)(j) of FIPPA, as "...the information requested is for commercial purposes of soliciting clients on behalf of an heir tracing business..." In addition they argue the respondent "...has no authority to make the request and he has no connection to any of the persons involved. His only possible argument is that s. 22(2)(i) is a factor favouring disclosure given passage of time since death..." Section 22(2)(i) of FIPPA states that a public body must consider the amount of time a person has been deceased in determining whether or not the disclosure of the personal information would be an unreasonable invasion of that person's privacy under s. 22(1).

[12] The respondent submits that s. 22 should not apply to the personal information in this case.³ He cites Order F07-25 where the PGT was ordered to disclose personal information of the deceased it had withheld under section 22 of FIPPA. Given this, the respondent argues that he "respectfully disagrees with the submission of the solicitor of the Public Guardian and Trustee of British Columbia that it is "plain and obvious" that we will not succeed at inquiry..." As the PGT has suggested, the respondent has indeed cited s. 22(2)(i) as a relevant factor in favour of his argument that s. 22 does not apply to the information in dispute in this case.

Findings

[13] Much of the information of the type requested by the applicant would, in my view, be personal information because it is recorded information about identifiable individuals and it is not "contact information" because it is not their business or work contact information. However, it is also important to note that PGT is withholding the records in their entirety. It seems likely that there is information in them that would not meet the definition of personal information. For instance, there may be headings, dates, pages numbers, general form or template details and even PGT work contact information that does not meet the definition of personal information.

[14] Further, in my view, and without reaching any determination on the final merits of this case, it is at least arguable that there are relevant s. 22(2) circumstances that need to be considered and weighed before any determination

³ I note the respondent also raised the issue of s. 25 of FIPPA, however this would have to be addressed during the Part 5 inquiry, because it is the applicant's argument why the information in dispute should be disclosed.

could be made. For example, the length of time the deceased has been dead (s. 22(2)(i)). Indeed the PGT concedes that s. 22(2)(i) is relevant in their own submission as noted above. Also, the records contain the personal information of several individuals, so whether disclosure would be an unreasonable invasion of their personal privacy has to be considered in light of the relevant circumstances pertaining to each.

[15] As noted above it must be plain and obvious that the s. 22 exception applies to the records. While it is clear that the PGT makes a case for the application of s. 22, this is not sufficient for the purposes of demonstrating it is plain and obvious that a public body has applied the section appropriately. In my view, and without reaching any determination on the final merits of this case, it is at least arguable that disclosure of some of the information in dispute may not be an unreasonable invasion of third party personal privacy under s. 22. An inquiry is the proper forum to decide this matter.

[16] For the reason above, the PGT has not established that it is plain and obvious that s. 22 of FIPPA applies to all of the information that it is withholding from the records.

CONCLUSION

[17] The PGT has the burden of demonstrating why the Commissioner should exercise his discretion not to hold an inquiry in this case. In my opinion, it has not met that burden. It is not plain and obvious that the PGT is required to withhold the records in their entirety under s. 22 of FIPPA. Therefore, the PGT's request that the Commissioner exercise his discretion under s. 56 to not hold an inquiry is denied. An inquiry will therefore be held.

[18] Nothing in this decision reflects any opinion or decision as to the relative merits of the parties' positions. The merits remain to be decided in the Part 5 inquiry, on the basis of the evidence and argument the parties submit at that time.

February 23, 2017

ORIGINAL SIGNED BY

Trevor Presley, Investigator

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