



Order F20-07

BC ASSESSMENT AUTHORITY

Celia Francis
Adjudicator

February 14, 2020

CanLII Cite: 2020 BCIPC 08

Quicklaw Cite: [2020] B.C.I.P.C.D. No. 08

Summary: An applicant requested Property Record Cards for 10 properties, including his own, from BC Assessment Authority (BCA). BCA withheld all of the records except those related to the applicant's own property. BCA said it was withholding the records related to the nine other properties under ss. 3(1)(j) (records available for purchase), 21(2) (information gathered for the purpose of collecting a tax) and 22(1) (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA), s. 16(3) of the *Assessment Act* and because some of the information was publicly available without a charge. The adjudicator found that BCA was authorized to withhold some information under s. 21(2). The adjudicator also found that BCA had no authority to withhold the rest of the information on the grounds that s. 3(1)(j) applied or that it was publicly available without a charge and ordered BCA to disclose this information to the applicant. It was not necessary to consider s. 22(1) of FIPPA or s. 16(3) of the *Assessment Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(j), 21(2).

INTRODUCTION

[1] In July 2016, an applicant made a request to the BC Assessment Authority (BCA) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for the 2011-2016 Property Record Cards (PRCs) for 10 properties in his neighbourhood. He told the BCA that he was the owner of one of the 10 properties and wanted the records "for the purposes of analysis of the assessment roll in this area." He also requested that BCA sever any personal information from the PRCs.

[2] In September 2016, BCA responded by disclosing the PRCs related to the applicant's own property.¹ It said it was withholding the remaining PRCs because they fell within the scope of the *Assessment Act* and/or s. 22(3)(e) of FIPPA applies (disclosure is presumed to be an unreasonable invasion of third-party personal privacy because the information was obtained on a tax return or gathered for the purpose of collecting a tax). The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC). During mediation, BCA clarified that the provision in the *Assessment Act* that applied was s. 16(3), which limits the disclosure of information or records obtained or created under that Act.

[3] Mediation did not resolve the issues and, in September 2017, the applicant requested they proceed to inquiry. The OIPC's notice of inquiry said that the inquiry would consider whether s. 22 of FIPPA and s. 16(3) of the *Assessment Act* apply to the information in dispute.

[4] After the OIPC issued the notice of inquiry, the parties engaged in further communications in an attempt to resolve the issues in dispute. Ultimately, this was unsuccessful. The submission phase of the inquiry resumed and concluded in mid-2019.

Preliminary Issues

Late addition of s. 21(2)

[5] In its initial submission, BCA raised s. 21(2) of FIPPA.² Section 21(2) states that the head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax. The OIPC decided that s. 21(2) would be included as an issue in the inquiry because it is a mandatory exception to disclosure.³

Should s. 3(1)(j) be included as an issue?

[6] After the inquiry commenced, BCA also told the OIPC that it wished to add the issue of whether or not s. 3(1)(j) of FIPPA applies to some of the information.⁴ Section 3(1)(j) says that FIPPA does not apply to "a record that is available for purchase by the public." The OIPC told the parties that deciding whether to add s. 3(1)(j) would be left to the adjudicator assigned to the inquiry. The applicant

¹ According to the Investigator's Fact Report for this inquiry, BCA disclosed 25 pages of records related to the applicant's own property and withheld another 266 pages about the other nine properties.

² BCA's initial submission, November 17, 2017, para. 35.

³ Adjudicator C. Lott's June 18, 2019 letter to the parties.

⁴ OIPC Registrar's note to file, June 20, 2019; Adjudicator's note to file, July 8, 2019.

was told to include in his reply submission whether he thinks s. 3(1)(j) should be added and, if so, whether it applies.⁵

[7] BCA did not explicitly refer to s. 3(1)(j) in its initial response to the applicant's access request but it did tell him that some information in the PRCs is available for purchase.⁶ I can also see that, in a subsequent communication, BCA told the applicant that it was prepared to disclose the PRCs in severed form and that it would charge a fee for data in the PRCs which is currently available for purchase, in accordance with s. 3(1)(j) of FIPPA.⁷ BCA also referred to this offer in its initial inquiry submission.

[8] The applicant protested in his reply submission that BCA should not be allowed to add new issues at this late date.⁸ I understand the applicant's frustration. It undermines the integrity of the mediation and inquiry processes when a public body adds a new issue late in the day. Indeed, it would have been preferable if BCA had relied explicitly on s. 3(1)(j) from the outset or, at least, had asked that this issue be added during mediation.

[9] However, BCA did refer (albeit obliquely) to this issue early on as a reason for not disclosing information and later referred explicitly to s. 3(1)(j) as authority for doing so. Moreover, the applicant has had an opportunity to make a submission on this provision. I have, therefore, decided to add s. 3(1)(j) to this inquiry and I deal with it below.

Information that is publicly available without a charge

[10] In its initial response, BCA told the applicant that some information in the PRCs was available publicly, through other means.⁹ BCA also told the applicant in a later email that it was prepared to disclose information that was publicly available.¹⁰

[11] This issue does not appear in the notice for this inquiry. There is also no indication that BCA ever formally asked that it be added to this inquiry. The applicant had the opportunity to comment on this issue, although he did not do so. I have therefore considered this argument, as BCA appears to have relied on it as authority to deny the applicant access to information in the PRCs.

⁵ Adjudicator C. Lott's July 8, 2019 letter to the parties.

⁶ BCA's letter of September 8, 2016.

⁷ BCA's October 17, 2017 email to the applicant.

⁸ Applicant's reply submission of July 24, 2019.

⁹ BCA's response of September 8, 2016.

¹⁰ BCA's October 17, 2017 email to the applicant. Affidavit of BCA's Manager of Information Access & Privacy, para. 3. BCA's response submission, p. 3.

ISSUES

[12] The issues to be decided in this inquiry are these:

1. Is BCA required by s. 21(2) or s. 22(1) to withhold the information?
2. Does s. 16(3) of the *Assessment Act* apply to the information?
3. Is BCA authorized to refuse to disclose the records because they are outside the scope of FIPPA pursuant to s. 3(1)(j)?
4. Is BCA authorized not to disclose information that is publicly available without a charge?

[13] Under s. 57(1) of FIPPA, BCA has the burden of proving that the applicant has no right of access to the information in dispute under s. 21(2) and s. 3(1)(j) of FIPPA and s. 16(3) of the *Assessment Act*, as well as to information it says is publicly available without a charge.

[14] 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(1).

DISCUSSION

Background

[15] BCA is a crown corporation with the responsibility of establishing and maintaining uniform assessments for approximately 2 million assessable properties in BC. BCA must create an assessment roll annually. Taxing jurisdictions use the assessment roll to determine tax liability of a property's owner or occupier by applying the mill rate¹¹ that it has decided is appropriate for each class of property.¹²

Records in dispute

[16] The records in dispute are the PRCs for nine properties in the applicant's neighbourhood, for the years 2011-2016. The PRCs contain details about each property for each year, for example: name of owner; address; land and house values; past sales figures; depreciation; any improvements; construction materials; square footage; any outbuildings (e.g., boathouse, garage, car port, greenhouse, shed, games room, heated solarium); year built and remodelled; number of fireplaces; number of bedrooms, living rooms and kitchens; number and type of bathrooms (e.g., full, half); type of kitchen cabinets; type of heating; roof material; sketches of house layouts, including locations of bedrooms and

¹¹ The mill rate is generally the amount of tax payable per \$1,000 value of the property.

¹² BCA's initial submission, paras. 12, 15, 24.

bathrooms; photographs; any showers, saunas, whirlpools, decks, patios, tennis courts or covered porches.

[17] BCA has taken the position that it must withhold the records in their entirety because of ss. 3(1)(j), 21(2) and 22(1) of FIPPA and s. 16(3) of the *Assessment Act* and because some of the information is publicly available free of charge. The applicant has therefore not received any of the records in dispute.

[18] BCA has placed red boxes around some of the information in the records.¹³ I understand from BCA's submissions that it believes ss. 21(2) and 22(1) of FIPPA and s. 16(3) of the *Assessment Act* apply equally to all of this boxed information.¹⁴

[19] BCA said that it is withholding the rest of the information because it is either available free of charge or is available for purchase and thus falls outside the scope of FIPPA under s. 3(1)(j).¹⁵ BCA did not indicate on the records which of the unmarked information is available free of charge as opposed to available for purchase. I have, however, decided it is not necessary to know which information is which, given my findings below.

Section 21(2) – gathered for determining tax liability or collecting a tax

[20] Section 21(2) states that the head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.¹⁶

[21] In Order F05-29,¹⁷ former Commissioner Loukidelis explained the purpose of s. 21(2) as follows:

In my view, the purpose of s. 21(2) is to protect information that a public body obtains from a taxpayer (on the taxpayer's tax return) or otherwise gathers relating to the taxpayer for the purpose of determining tax liability or collecting a tax. The policy of this disclosure exception is to protect

¹³ This information includes the following: number and type of rooms; type of fireplaces, cabinets, plumbing and yard improvements; measurements of rooms in layout sketches; type of heating; various percentage figures; roof materials; types of outbuildings (e.g., boathouse, barn, garage).

¹⁴ BCA's letter of July 3, 2019. I make my decision in this order based on the annotated records that BCA provided to the OIPC with this letter, as these records comprise the complete set of PRCs in dispute and show in red boxes the information that BCA considers falls under ss. 21(1) and 22(1) of FIPPA and s. 16(3) of the *Assessment Act*. All references below to the PRCs and in my order are to this set of records.

¹⁵ I understand from BCA's submission that it considers these to be two separate categories. BCA's initial submission, para. 27.

¹⁶ Section 21(3) says that s. 21(2) does not apply if the third party consents to the disclosure. There is no indication that the other property owners have consented to disclosure of the PRCs related to their properties.

¹⁷ Order F05-29, 2005 CanLII 32548 (BC IPC).

information obtained or gathered relating to the taxpayer for the purpose of determining tax liability or collecting a tax, without, unlike s. 21(1), requiring the establishment of confidentiality of the information or a reasonable expectation of harm to the taxpayer from its disclosure.¹⁸

[22] Order F05-29 also found that s. 21(2) “does not cover information that is generated, or created, by a public body by applying skills, techniques and professional judgement to information that it has gathered (even where underlying information that is analyzed to create the disputed information has been gathered directly from a taxpayer).”¹⁹ That order also found that, for the purposes of s. 21(2), “gathered” includes “information relating to the taxpayer that is gathered by the public body without the taxpayer’s positive or consensual involvement, or even knowledge.”²⁰

[23] I agree with and adopt the former Commissioner’s reasoning in Order F05-29 for the purposes of this case.

[24] There is no suggestion or evidence that the information at issue was “obtained on a tax return”. The question is, therefore, whether the information was “gathered for the purpose of determining tax liability or collecting a tax”.

[25] BCA said that the information in question was “gathered for the purpose of determining a tax liability or collecting a tax” from a variety of sources, including the Provincial Ministry of Finance, local governments, the Land Title and Survey Authority, building plans and permits, on-site property inspections by BCA representatives, the property owners and Multiple Listing Services. BCA said that it had not generated or created the information.²¹

[26] The applicant disputed BCA’s argument that it gathered the information. In his view, BCA made up the information.²²

[27] I accept BCA’s evidence on this point and find that the information in dispute was “gathered for the purpose of collecting a tax”. I find, therefore, that s. 21(2) applies to the information boxed in red.

[28] In light of this finding, it is not necessary to consider whether the information was also gathered for the purpose of determining tax liability. I also do not need to consider if s. 22 of FIPPA and s. 16(3) of the *Assessment Act* apply to the same information.

¹⁸ Order F05-29, 2005 CanLII 32548 (BC IPC), at para. 92.

¹⁹ Order F05-29, 2005 CanLII 32548 (BC IPC), at para. 96.

²⁰ Order F05-29, 2005 CanLII 32548 (BC IPC), at para. 95.

²¹ BCA’s initial submission, paras. 20, 46-49; Affidavit of BCA’s Manager of Information Access & Privacy, paras. 6-7, 10-11.

²² Applicant’s reply submission.

Does s. 3(1)(j) apply?

[29] Section 3(1)(j) states that FIPPA applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to a record that is available for purchase by the public. I find, for reasons that follow, that s. 3(1)(j) does not apply to the PRCs.

[30] BCA said that I should refuse to order BCA to disclose “redacted PRCs, since the information the Applicant is entitled to is available to the Applicant by other means, outside the scope of this inquiry.”²³ The applicant said that the requested information is not available for purchase.²⁴

[31] Section 3(1)(j) refers to “a *record* that is available for purchase.” The records at issue here are the entire PRCs associated with properties other than the applicant’s. There is no evidence that PRCs are available for purchase. On the contrary, BCA said that, under its fee schedule, PRCs are available, without charge, to the property owner or to someone other than the property owner, with the owner’s written consent.²⁵ I find, therefore, that BCA cannot rely on s. 3(1)(j) to refuse the applicant access to portions of the PRCs.²⁶

Information publicly available free of charge

[32] Previous orders have said that other methods for gaining access to information do not oust or displace the right of access under FIPPA.²⁷ BCA did not explain how it has authority under FIPPA to deny the applicant access to some of the information in the PRCs, simply because that information may be “publicly available” free of charge, through some other means. BCA did not refer to any exceptions to disclosure in FIPPA that might apply to this information. Moreover, BCA did not refer to any relevant orders in support of its position.

[33] I find that BCA has no authority to deny the applicant access to information in the PRCs that is “publicly available” free of charge through other avenues. It must, therefore, disclose this information to the applicant.

²³ BCA’s initial submission, para. 6; Affidavit of BCA’s Manager of Information Access & Privacy, para. 16; BCA’s response submission, p. 3.

²⁴ Applicant’s reply submission.

²⁵ BCA’s initial submission, para. 33; Affidavit of BCA’s Manager of Information Access & Privacy, paras.16-18.

²⁶ See Order F15-13, 2015 BCIPC 13, in which the adjudicator arrived at a similar finding.

²⁷ Order F17-40, 2017 BCIPC 44 (CanLII), Order F14-24, 2014 BCIPC 47 (CanLII), Order 01-27, 2001 CanLII 21581 (BC IPC).

CONCLUSION

[34] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. I find that BCA is required by s. 21(2) of FIPPA to refuse the applicant access to the information it boxed in red in the copies of the PRCs it provided to the OIPC with its letter of July 3, 2019.
2. I find that BCA is not authorized under s. 3(1)(j) to refuse the applicant access to information in the PRCs.
3. I find that BCA is not authorized to refuse the applicant access to information in the PRCs that BCA said is publicly available free of charge.
4. I require BCA to give the applicant access to all of the information in the PRCs that was not boxed in red.

[35] Under s. 59 of FIPPA, I require BCA to give the applicant access to the information that is not boxed in red by March 30, 2020. BCA must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

February 14, 2020

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F16-67575