



Order F22-02

## MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

Jay Fedorak  
Adjudicator

January 7, 2022

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**Summary:** An applicant requested copies of any complaints a named third party may have made to the Ministry of Public Safety and Solicitor General (Ministry), Security Programs Division regarding the applicant during a three-year period. The Ministry refused to confirm or deny the existence of any responsive records, in accordance with s. 8(2). The adjudicator found that the Ministry had correctly applied s. 8(2).

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 8(2)(a), 8(2)(b), 15(1)(d).

### INTRODUCTION

[1] A licenced private investigator (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Public Safety and Solicitor General (Ministry), Security Programs Division (SPD) for copies of any complaints that a named third party may have made against her. The Ministry licences and regulates private investigators. The Ministry refused to confirm or deny the existence of any records, in accordance with s. 8(2), on the grounds that any response would reveal information excepted from disclosure under ss. 15(1) and 22(1).

[2] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision to refuse to confirm or deny the existence of any records in accordance with s. 8(2).

[3] Mediation by the OIPC did not resolve the matter and the applicant requested it proceed to an inquiry.

## ISSUE

[4] The issue to be decided in this inquiry is:

- Whether s. 8(2) of FIPPA permits the Ministry to refuse to confirm or deny the existence of any responsive records.

[5] Section 57(2) of FIPPA stipulates the burden of proof with respect to the exceptions to disclosure but does not assign a burden in cases where public bodies invoke s. 8(2). Previous BC Orders have established that the public body must bear the burden of proof with respect to their invoking of s. 8(2).<sup>1</sup> For example, in Order F15-01, the adjudicator asserted:

... [The public body] is in the best position to explain why it has refused to confirm or deny the existence of a record requested by the applicant. This is particularly the case when s. 8(2) is at issue, since public bodies often submit and rely on in camera evidence and argument that the applicant does not have access to (thus is not able to fully respond to) when this provision is at issue.<sup>2</sup>

[6] The Ministry suggests that it is in the interest of both parties to provide submissions on the application of s. 8(2).<sup>3</sup> Nevertheless, I still find that the Ministry has the burden of proof in this case.

## DISCUSSION

[7] **Background** – The applicant is a licenced private investigator who has taken legal action against the named third party for defamation. The applicant has received judgments against the third party for comments that the third party had posted on the internet, including allegations about the applicant's business practices as a private investigator. The posts also indicated that the third party had complained to the Ministry, as the licencing body for private investigators, about the applicant. The applicant is seeking access to copies of any such complaints, as one of the court judgments prohibits the third party from making them.

[8] **Preliminary matters** – The applicant's submission suggests that she believes that her two different requests to the Ministry should be at issue in this inquiry. The first request was for complaints the third party may have made. The second request was for a copy of the applicant's own entire licencing file.<sup>4</sup>

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<sup>1</sup> The most recent is Order F19-30, 2019 BCIPC 32 (CanLII).

<sup>2</sup> Order F15-01, 2015 BCIPC 1 (CanLII), para. 8

<sup>3</sup> The Ministry's initial submission, para. 8.

<sup>4</sup> Applicant's response submission, paras. 2 and 22.

[9] The notice of inquiry that the registrar of inquiries issued for this hearing refers only to the application of s. 8(2) to the personal information of a third party. The OIPC investigator's fact report identifies only one access request as being at issue, specifically the request for complaints the third party may have made. The fact report and the notice of inquiry do not refer to the applicant's request for her own licencing file.<sup>5</sup>

[10] The Ministry asserts that, as the second request was not included in the investigator's fact report, it should not be at issue in this inquiry.

[11] The notice of inquiry cites the OIPC's *Instructions for Written Inquiries*, which restrict parties from adding new issues without obtaining the prior consent of the OIPC before the date for initial submissions. Past OIPC orders have held that a party may only introduce a new issue into an inquiry with the permission of the OIPC.<sup>6</sup>

[12] Parties must have a valid reason to introduce new issues at the inquiry stage. Expanding the scope of the inquiry after the completion of the investigation and mediation phase of the FIPPA review process deprives the parties of the opportunity to resolve the matter informally or to determine if the issues warrant proceeding to inquiry.

[13] The applicant offers no explanation for why she did not raise the second request earlier or why she did not request the OIPC's permission to add it into the inquiry. Nor has she provided reasons why it should be included at this late point. Therefore, I find that there is no justifiable reason for including the second request into the inquiry, and I decline to do so.

***Does s. 8(2) authorize the Ministry to refuse to confirm or deny the existence of any responsive records?***

[14] The Ministry submits that both ss. 8(2)(a) and (b) apply.

[15] Section 8 reads as follows:

- 8 (1) In a response under section 7, the head of the public body must tell the applicant
- (a) whether or not the applicant is entitled to access to the record or to part of the record,
  - (b) if the applicant is entitled to access, where, when and how access will be given, and
  - (c) if access to the record or to part of the record is refused,

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<sup>5</sup> Applicant's response submission, para. 5.

<sup>6</sup> For a recent example see Order F20-38, 2020 BCIPC 44 (CanLII).

- (i) the reasons for the refusal and the provision of this Act on which the refusal is based,
- (ii) the contact information of an officer or employee of the public body who can answer the applicant's questions about the refusal, and
- (iii) that the applicant may ask for a review under section 53 or 63.

- (2) Despite subsection (1) (c) (i), the head of a public body may refuse in a response to confirm or deny the existence of
- (a) a record containing information described in section 15 [*information harmful to law enforcement*], or
  - (b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of that party's personal privacy.

[16] Sections 8(2)(a) and (b) are exceptions to the general right of access for applicants and the general requirements for public bodies with respect to responding to requests. They apply only in cases where the mere confirmation of the existence of responsive records would reveal certain law enforcement information or constitute an unreasonable invasion of the privacy of a third party.

[17] I will first address the Ministry's submission regarding s. 8(2)(a).

[18] A public body may only apply s. 8(2)(a) in cases where the disclosure of the mere existence or non-existence of the requested records would convey to the applicant information subject to s. 15.

[19] **Would disclosure of the existence of records reveal information described in s. 15(1)?** – The Ministry cites the application of ss. 15(1)(d) and 15(2)(b) in conjunction with s. 8(2)(a). The first provision permits a public body to refuse to disclose information to an applicant if the “disclosure could reasonably be expected to reveal the identity of a confidential source of law enforcement information”. The second provision permits a public body to refuse to disclose information that “is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record”.

[20] I first will deal with the application of s. 15(1)(d).

[21] FIPPA defines “law enforcement” as follows:

**"law enforcement"** means

- (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;

[22] The Ministry submits that the request at issue relates to complaints to the SPD under the *Security Services Act* (SSA).<sup>7</sup> The SPD's Registrar of Security Services (Registrar) has the authority to investigate complaints against licensees in accordance with conditions of their licence, the SSA and Regulations. In the event of a finding of contravention, the Registrar may impose a penalty on the licensee.<sup>8</sup> The penalties can range from a verbal warning to a suspension of a licence.<sup>9</sup>

[23] The Ministry notes that previous BC Orders have held that complaints that initiate an investigation qualify as law enforcement matters. In addition, previous BC Orders have found complaints to regulatory bodies to be "law enforcement" for the purposes of s. 15(1)(d).<sup>10</sup>

[24] The Ministry submits further that the SPD treats any complaints it receives as confidential. It also treats the identity of complainants as confidential.

[25] The Ministry cites previous BC Orders that have found that requests for the identities of complainants that are made to regulatory bodies should be refused in accordance with s. 15(1)(d).<sup>11</sup>

[26] The applicant contests the Ministry's description of the complainant as a confidential source. She submits that the third-party complainant is a particular private investigator. She asserts that the fact the third party posted the substance of the complaints on the internet indicates that the third party was not treating the complaint as confidential. The applicant also submits that, in the course of an investigation of at least one of the complaints, an SPD employee had already disclosed to the applicant that the third party had made a complaint.<sup>12</sup>

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<sup>7</sup> Security Services Act [SBC 2007] Chapter 30.

<sup>8</sup> The Ministry's initial submission, paras. 23-25.

<sup>9</sup> The Ministry's initial submission, Affidavit #1 of the Deputy Registrar, SPD, para. 17.

<sup>10</sup> The Ministry's initial submission, paras. 27-29, citing Order F16-23, 2016 BCIPC 25 (CanLII) (investigation of a complaint by the Superintendent of Real Estate); Order F18-15, 2018 BCIPC 18 (CanLII) (Pharmacare audit investigations); Order F18-10, 2018 BCIPC 12 (CanLII); Decision F07-01, 2007 BCIPC 3 (CanLII) and Order F18-31, 2018 BCIPC 34 (CanLII) (bylaw investigations); Orders F163-1997 and F02-20, 2002 BCIPC 20 (CanLII) (Law Society of BC investigations and disciplinary procedure); Orders F05-13, 2005 BCIPC 14 (CanLII) and F05-18, 2005 BCIPC 26 (CanLII) (investigation into complaints by College of Psychologists); Order F00-08 (investigation by the College of Physicians and Surgeons).

<sup>11</sup> The Ministry's initial submission, para. 32 citing Order F18-15 and Order F16-23, *supra* note 10.

<sup>12</sup> Applicant's response submissions, paras. 17, 19, 22.

[27] The Ministry contests the relevance and the evidentiary basis of the applicant's assertion that the particular SPD employee had disclosed the identity of the third party as a complainant. The Ministry indicates that it has been unable to locate any documentary evidence of this disclosure. It also asserts that the applicant has not provided any evidence to support her assertion. Moreover, the Ministry notes that the date the applicant supplied for the alleged conversation is outside the date range of the applicant's request. Furthermore, the Ministry asserts that the third party in this inquiry did not make the complaint against the applicant that she stated the SPD employee was investigating. Therefore, the alleged disclosure by the SPD employee to the applicant has no bearing on whether the third party submitted any complaints during the date range of the request.<sup>13</sup>

[28] The applicant also submits that she made a similar request to Consumer Protection BC (CPBC) for copies of any complaints the third party made about her in the third party's capacity as a consumer. CPBC responded by providing access to the records, except for information it withheld under ss. 14 and 22.<sup>14</sup> I understand the applicant to be suggesting that the disclosure of similar information by another public body undermines the Ministry's assertion that s. 8(2) should apply in the case before me. The Ministry submits that what CPBC did is irrelevant to this case.<sup>15</sup>

### **Analysis**

[29] To assess whether confirming or denying the existence of the record would reveal a confidential source of law enforcement information in accordance with s. 15(1)(d) I must determine the following:

- 1) Whether the SPD proceedings constitute law enforcement;
- 2) Whether the third party qualifies as a source of law enforcement information; and
- 3) Whether the source is confidential.

[30] Previous BC Orders have found that investigations in complaint-based regulatory and other types of law enforcement or bylaw enforcement proceedings qualify as "law enforcement".

[31] The Ministry has established that the SPD has the authority to investigate alleged contraventions of the SSA and its regulations. The Ministry has also established that these investigations can lead to the SPD imposing

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<sup>13</sup> The Ministry's reply submission, paras. 5-7.

<sup>14</sup> Applicant's response submission, para. 11 and Affidavit #1 of the Applicant, para. 15 and Exhibit D.

<sup>15</sup> The Ministry's reply submission, para. 4.

penalties and sanctions, in accordance with the definition of law enforcement. I find that investigations by the SPD qualify as law enforcement. Therefore, I find that the SPD proceedings constitute law enforcement.

[32] The applicant alleges that the third party made complaints against her under the SSA. As the SPD may initiate an investigation after receiving a complaint, such complaints consist of law enforcement information. The Ministry submits that it investigates all complaints that it receives, though in some cases it may take no further action. Therefore, I find that, if the third party made a complaint under the SSA, the third party would be a source of law enforcement information.

[33] The Ministry has provided affidavit evidence in support of its contention that it treats all complaints under the SSA and its regulations in confidence. The affidavit attests to the policies and procedures in place to ensure this confidentiality.<sup>16</sup> The fact that the third party may have stated publicly that they have made complaints does not nullify the confidentiality of the SPD process. Therefore, if the third party made a complaint to the SPD under the SSA and the SPD investigated the complaint, the third party would qualify as a confidential source of law enforcement information.

[34] In summary, I find that the complaint-based investigative process of the SPD under the SSA and its regulations constitutes law enforcement for the purposes of s. 15(1)(d). I find that, if the third party made a complaint as part of this process, the third party qualifies as a source of law enforcement information. I also find that the SPD treats the identities of complainants as confidential. Therefore, s. 15(1)(d) would apply to the identities of any complainants who may have made complaints against the applicant to the SPD.

[35] The fact that the applicant identified the third party as a putative complainant has created a situation where disclosure of the existence or non-existence of any records would necessarily reveal the identity of the third party as a source of law enforcement information. This would undermine the discretion that s. 15(1)(d) gives the Ministry to protect a confidential source of law enforcement information. Therefore, to protect the information that FIPPA authorizes public bodies to protect, the only recourse for the Ministry is to refuse to confirm or deny the existence of the requested records.

[36] The applicant's reference to CPBC's response to what she asserts to be a similar request has no bearing on this case. It is necessary to assess each case on its own facts, circumstances and merits.

[37] In conclusion, I find that the Ministry was authorized under s. 8(2)(a) to refuse to confirm or deny the existence of the requested records.

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<sup>16</sup> The Ministry's initial submission, Affidavit #1 of the Deputy Registrar, paras. 18-19.

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[38] In light of my finding that s. 8(2)(a) applies, I do not need to decide whether s. 8(2)(b) also applies.

**CONCLUSION**

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

- Under s. 58(2)(b), I confirm the decision of the Ministry to refuse to confirm or deny the existence of the requested records under s. 8(2)(a).

January 7, 2022.

**ORIGINAL SIGNED BY**

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Jay Fedorak, Adjudicator

OIPC File No.: F19-80860