



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F23-76

MINISTRY OF HEALTH

Lisa Siew
Adjudicator

September 20, 2023

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Summary: The Ministry of Health requested the Commissioner exercise his discretion, under s. 56(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA), to decline holding an inquiry into its decision to refuse an applicant access to two requested records. Among other things, the Ministry of Health argued an inquiry should not be held because it is plain and obvious that it does not have custody or control of those records. The adjudicator found it was plain and obvious the records sought by the applicant were not in the custody or under the control of the Ministry and, therefore, fall outside the scope of FIPPA. As a result, the adjudicator allowed the Ministry of Health's s. 56(1) application and the upcoming inquiry was cancelled.

Statute and sections cited in order: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 3(1), 4(1), 56(1).

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant, who is a journalist, requested the Ministry of Health (Ministry) provide access to copies of two records related to Dr. Bonnie Henry, the Provincial Health Officer for British Columbia. Specifically, the applicant requested the Ministry provide access to copies of the following:

- The most recent draft of the book, *Be Kind, Be Calm, Be Safe: Four Weeks that Shaped a Pandemic*, co-authored by Dr. Henry and her sister.
- The publishing contract for that book between Dr. Henry, her agents and representative, and the publisher.

[2] The Ministry denied the applicant access to the requested records. The Ministry informed the applicant those records relate to a matter undertaken by Dr.

Henry as a “private citizen and that there were no records under the Ministry’s custody or control.”¹

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry’s decision. The OIPC’s investigation and mediation process did not resolve the issue between the parties and the applicant requested the matter proceed to an inquiry.

[4] After the notice of inquiry was issued, the Ministry requested the Commissioner decline to hold an inquiry into this matter. Under s. 56(1) of FIPPA, the Commissioner has the discretion to choose whether to hold an inquiry if the matter is not settled during the OIPC’s investigation and mediation process. I am the Commissioner’s delegate assigned to decide the Ministry’s s. 56(1) application.

ISSUE AND BURDEN OF PROOF

[5] The issue I need to determine is whether to grant the Ministry’s request that the Commissioner should decline to hold an inquiry into the Ministry’s decision to refuse the applicant access to the requested records. The Ministry bears the burden of proving that its application under s. 56(1) should be granted.²

[6] As the respondent in this application, the applicant does not have to prove why the inquiry should proceed; however, as noted in earlier OIPC decisions, “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.”³

DISCUSSION

Discretion to conduct an inquiry – s. 56(1)

[7] Section 56(1) of FIPPA provides that if the matter in dispute between the parties is not referred to a mediator or settled under s. 55, the Commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry. It is well-established that s. 56(1) gives the Commissioner a “broad discretionary power to determine whether or not to hold an inquiry.”⁴

[8] As set out in earlier OIPC decisions, the Commissioner may decline to conduct an inquiry on a number of grounds, including that it is plain and obvious

¹ Ministry’s initial submission at para. 3.

² Order F16-37, 2016 BCIPC 41 (CanLII) at para. 10.

³ Decision F07-04, 2007 CanLII 67284 (BC IPC) at para. 18

⁴ *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 (CanLII) at para. 47.

that the disputed records fall outside the scope of FIPPA.⁵ Regardless of the basis for the s. 56 application, in each case, it must be clear that there is no issue which merits adjudication in an inquiry.⁶ Put another way, the party asking that an inquiry not be held must establish there is “no arguable case that merits an inquiry.”⁷

[9] The Ministry submits an inquiry should not be held because it is plain and obvious that it does not have custody or control of the requested records. Alternatively, the Ministry argues an inquiry should not be held because the applicant’s access request is an abuse of FIPPA’s processes and it would be unreasonable to hold an inquiry given the circumstances.

[10] I will first consider whether the Ministry has custody or control over the records requested by the applicant. If I find the Ministry does not have custody or control of those records, then that determines and concludes the matter and it will not be necessary to consider the Ministry’s alternative arguments.

Custody and control – ss. 3(1) and 4(1)

[11] Section 3(1) states that FIPPA applies to all records “in the custody or under the control” of a public body. Section 4(1) gives an applicant “a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant,” subject to any applicable exceptions or exclusions. Therefore, a record must either be in the custody or under the control of a public body for an applicant to access it under FIPPA. Both are not required since “either custody or control over a particular record will suffice to bring it within the scope of s. 3(1).”⁸

[12] The question is whether the records requested by the applicant are in the Ministry’s custody or under its control for the purposes of ss. 3(1) and 4(1). If so, then FIPPA applies and the applicant has a right to access them, subject to any exclusions under s. 3 or any exceptions under Part 2 of FIPPA. If not, then FIPPA does not apply and the applicant cannot use FIPPA to gain access to those records.

Does the Ministry have custody of the records?

[13] Although FIPPA does not define the term “custody”, it is well-established that the process for determining whether a public body has custody of a record involves the following steps:

⁵ For example, Order F23-23, 2023 BCIPC 27 (CanLII) at para. 32.

⁶ Decision F07-04, 2007 CanLII 67284 (BC IPC) at para. 16.

⁷ Decision F08-11, 2008 CanLII 65714 (BC IPC) at para. 8.

⁸ Order F18-45, 2018 BCIPC 48 (CanLII) at para. 15.

- The first step is to establish whether the public body has physical possession of the record.
- If the public body has physical possession of the requested record, then the second step is to determine whether the public body has any rights or responsibilities for the records.⁹

[14] Therefore, to establish custody, it is not enough that a public body has physical possession of the records. Prior jurisprudence has confirmed that a public body must also have “immediate charge and control of the records, including some legal responsibility for their safe keeping, care, protection or preservation.”¹⁰

[15] The Ministry submits that it does not have physical possession of the records requested by the applicant. It says the requested records are not stored amongst any of its own records or in any of its buildings and offices and that the records are in Dr. Henry’s personal possession. In support of its position, the Ministry provided an affidavit from Dr. Henry who confirms the Ministry does not hold any records that are responsive to the access request.

[16] Specifically, Dr. Henry deposes that she did not use any Ministry or government equipment, servers, platforms, programs or systems to store any drafts of the book. She explains the book was written and stored on her or her sister’s personal computers, equipment and systems. Dr. Henry also attests that it was her sister who negotiated the contract with the publishing company and that the Ministry does not have a copy of this contract.

[17] The applicant asserts the matter should be heard at an inquiry. Among other things, the applicant says “custody and/or control prevail and that should be argued by both sides” in an inquiry.¹¹ The applicant also questions the Ministry’s evidence. He says there is no “independent verification about the tools, timing and locations of creating” the book.¹² The applicant alleges Dr. Henry’s affidavit contains “widespread false, misleading and defamatory statements.”¹³ The applicant asserts his right to a review of the Ministry’s decision and argues he should not be deprived of that right. The applicant says the Ministry should not be allowed to “use false, misleading and defamatory statements” to prevent that right and to deprive him from “seeking public records under FIPPA.”¹⁴

⁹ Order F18-45, 2018 BCIPC 48 (CanLII) at para. 17.

¹⁰ *Minister of Small Business, Tourism and Culture et al v. The Information and Privacy Commissioner of the Province of British Columbia et al*, 2000 BCSC 929 (CanLII) at para. 14 and Order F15-65, 2015 BCIPC 71 (CanLII) at para. 12.

¹¹ Applicant’s submission at para. 49.

¹² Applicant’s submission at para. 45.

¹³ Applicant’s submission at para. 93.

¹⁴ Applicant’s submission at para. 109.

[18] In response, the Ministry rejects the applicant's assertion that it has not provided any "independently verified" evidence to support its arguments.¹⁵ The Ministry notes that it provided an affirmed and properly commissioned affidavit from Dr. Henry to prove that it does not have custody of the requested records. The Ministry contends the applicant has not provided any evidence or explanation that shows why this affidavit evidence is not credible and why the affirmed testimony should be rejected.

[19] I accept that the Ministry does not have physical possession of the requested records. I find the affidavit was affirmed by someone who is in the best position to attest to the physical location of the requested records and the events surrounding those records. Although the applicant appears to question the veracity of Dr. Henry's evidence, it is unclear and the applicant does not explain what other evidence would be more reliable or convincing. I understand the applicant believes this evidence is dishonest and should not be relied on; however, there is nothing in the materials before me that contradicts or undermines this evidence or the Ministry's explanations.

[20] To conclude, I am satisfied the Ministry does not have physical possession of the requested records. Under FIPPA, a public body cannot have custody of a record if it does not have physical possession of that record.¹⁶ Therefore, I conclude the Ministry does not have custody of the requested records.

Are the requested records under the control of the Ministry?

[21] FIPPA does not define the term "control"; however, previous OIPC orders have accepted that a public body has control of a record if it has "some power of direction or command over a document."¹⁷ Prior jurisprudence has also established that the process for determining whether a public body has control over records that are not in its physical possession involves the following steps:

1. Does the content of the records relate to a "departmental matter" or the public body's mandate or functions? If not, then that is the end of the analysis and the public body does not have control over the requested records under FIPPA.
2. However, if the records relate to a "departmental matter" or the public body's mandate or functions, then all relevant factors must be considered to

¹⁵ Ministry's reply submission at para. 13.

¹⁶ Order F23-08, 2023 BCIPC 10 (CanLII) at para. 9.

¹⁷ For example, Order F15-65, 2015 BCIPC 71 (CanLII) at para. 17, citing *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII) at para. 48.

determine whether the public body could reasonably expect to obtain a copy of the documents upon request.¹⁸

[22] The Ministry agrees with this two-part analysis for determining whether it has control over the requested records.¹⁹

[23] In terms of the Ministry's mandate and functions, Dr. Henry deposes that "the role of the Ministry is to act as steward of the public health system" which includes working with the provincial health officer and other agencies to address public health threats.²⁰ Dr. Henry also explains that as the provincial health officer, she is mainly responsible for monitoring the health of the BC population and providing independent advice to ministers and public officials on public health issues.²¹

[24] With that in mind, the Ministry submits the first part of the test is not met because the records are not about a Ministry or department matter. The Ministry argues the records relate to Dr. Henry and her sister's personal life, observations and experiences. For instance, the Ministry says the book contract is between Dr. Henry, her sister and the publisher which was "developed and agreed upon in Dr. Henry's personal life, not her professional life."²²

[25] Regarding the book itself, Dr. Henry describes the contents of the book as divided into three parts with each part sectioned into two narratives: one from Dr. Henry's perspective and the other from her sister's perspective. Dr. Henry says her part of the book "is filled with reflections of her previous work on the SARS pandemic in 2003 and the Ebola virus outbreaks in 2003" and her reflections on "scientific advancements, scientific policy, and public health measures generally, and explains her thinking about BC's response to the pandemic."²³

[26] The sister's narrative is described as including "her observations on Dr. Henry's personal and professional background with her take on Dr. Henry's decisions and actions during the first four weeks of the pandemic in Canada."²⁴ As a result, the Ministry says the book relates to Dr. Henry and her sister's personal, shared experiences during the early days of the pandemic. Therefore, the Ministry argues the book is not about the Office of the Provincial Health

¹⁸ Order F15-65, 2015 BCIPC 71 (CanLII) at paras. 17-20 and 26-31. *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII) at paras. 50, 54-56.

¹⁹ Ministry's initial submission at paras. 50-52.

²⁰ Dr. Henry's affidavit at paras. 5-6.

²¹ Dr. Henry's affidavit at para. 3.

²² Ministry's initial submission at para. 54.

²³ Dr. Henry's affidavit at para. 23.

²⁴ Dr. Henry's affidavit at para. 24.

Officer's mandates and functions or about Ministry business or departmental matters.

[27] The applicant asserts his right of access to the records on the basis those records relate directly to the job and the professional experience of the provincial health officer. The applicant argues Dr. Henry's book was not a "personal, private pursuit about a topic unrelated to her day job," but "it is all about her day job, a vehicle for self-promotion and brand-building, and is only marketable because of her high-profile job as the [provincial health officer]."²⁵ The applicant provided excerpts from the book to show the records are about Dr. Henry's job as the provincial health officer. The applicant submits "a public servant cannot credibly write a book about her public job and then claim she did so as a private citizen."²⁶

[28] The Ministry acknowledges the book details some of Dr. Henry's experiences during the beginning of the pandemic which "were undoubtedly informed by her job," but argues that an employee's personal experiences even when they relate to their professional role does not make it a Ministry or departmental matter.²⁷ The Ministry submits the book and its related contract were not part of Dr. Henry's employment responsibilities, but a personal memoir conceived and created by Dr. Henry and her sister to capture their personal, shared experiences during the early days of the pandemic.

[29] Although I was not provided with a copy of the requested records, the parties' submissions describe the content of those records and allow me to assess whether their contents relate to the mandate and functions of the Ministry or a departmental matter. From the Ministry's description of the book and the quoted excerpts provided by the applicant, I can see that parts of the book are written by Dr. Henry and capture her observations about the COVID-19 pandemic and her participation in BC's COVID-19 pandemic response plan.²⁸

[30] While it is clear that the contents of the requested records are related to Dr. Henry's role as the provincial health officer, there is nothing in the materials before me that indicates the book or its contract were related to the Ministry's mandate or function. There is no evidence that the Ministry or the provincial health officer's responsibilities included the creation, drafting or publishing of the book. Instead, the evidence indicates the book was a personal endeavour by Dr. Henry in collaboration with her sister. Therefore, although the book relies on Dr. Henry's professional experience, I conclude that the content of the requested records does not relate to the Ministry's functions or mandates or a departmental matter.

²⁵ Applicant's submission at para. 24.

²⁶ Applicant's submission at para. 34.

²⁷ Ministry's initial submission at para. 54.

²⁸ Applicant's submission at para. 26.

[31] Under the two-part “control” test set out previously, my conclusion about step one of the test determines the matter and ends the analysis. Therefore, it is not necessary for me to consider and address the second step of the analysis; however, for the sake of completeness, I will do so.

[32] As noted, if the analysis proceeds to step two, then all relevant factors and circumstances must be considered. Previous decision-makers have considered a non-exhaustive list of factors in determining whether a public body has control over a record, including the circumstances in which the record was created and whether the record was created by an officer or employee while carrying out their duties; the legal relationship between the public body and the record holder and whether the public body has a legal right to obtain a copy of the record; and whether the records are integrated with the public body’s other records.²⁹ However, the determination of what circumstances may be relevant in a particular case is fact-specific and contextual.³⁰

[33] The Ministry submits it has no legal right to obtain the most recent draft of the book or the contract. The Ministry notes that it did not commission the book, it had no contractual relationship with the publisher and that it did not have any involvement with the negotiation of the contract. The Ministry also says the requested records were never in its possession nor integrated with any Ministry records.³¹ The Ministry acknowledges the Minister of Health and other provincial officials knew Dr. Henry was writing the book, but says these individuals never expressed any concerns about the book or asked to review a draft of the book or a copy of the publishing contract.³² Dr. Henry’s affidavit confirms the Ministry’s statements.

[34] In further support of its position, Ministry cites a BC Supreme Court decision which judicially reviewed Order No. 308-1999 and overturned former Commissioner Flaherty’s finding that the public body in that case had custody or control of a record created by a public body employee.³³ The Ministry describes the BC Supreme Court decision and analysis as follows:

The Court considered whether a handwritten diary kept by the store manager of a Liquor Distribution Branch (“LDB”) retail center was in the public body’s custody and control. The public body employee kept the diary as a personal record of interactions with a difficult customer for a period of

²⁹ Order F15-65, 2015 BCIPC 71 (CanLII) at para. 18 and at para. 20, citing *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII) at para. 56. *Minister of Small Business, Tourism and Culture et al v. The Information and Privacy Commissioner of the Province of British Columbia et al*, 2000 BCSC 929 (CanLII) at para. 16.

³⁰ Order F15-65, 2015 BCIPC 71 (CanLII) at para. 18.

³¹ Ministry’s initial submission at para. 62.

³² Ministry’s initial submission at para. 28.

³³ *Minister of Small Business, Tourism and Culture et al v. The Information and Privacy Commissioner of the Province of British Columbia et al*, 2000 BCSC 929 (CanLII).

three months. During the period that the diary was maintained by the employee, the customer's behaviour and conduct was formally recorded in LDB Incident Reports and in the Store Log, which was a running account of events at the store.

The Commissioner's original finding was that the LDB had a legal right to obtain a copy of the diary because the employee kept the "record" about a customer in the context of her employment as store manager, and the records was created within the employment relationship, for purposes related to the store manager's role.

The Court disagreed. Although the record had been created by the employee during her employment as a LDB store manager, the Court found that the employee did not create the record in fulfillment of any employment duty, but rather as an aid memoir relating to her personal involvement with the customer. The employee never used or intended the diary to be used for any purpose related to her employment. She did not use the diary to prepare Branch Incident Reports or entries in the Store Log. The decision to maintain a diary or record, was solely that of the employee and what she included within it was entirely of her own choosing. The LDB had no authority to regulate or control her use or disposition of the diary. Given all this, the Court found the diary was not a record within the LDB's custody or under its control.³⁴

[35] I find the Ministry's description and summary of the BC Supreme Court decision to be accurate. Applying the Court's reasoning to the present case, the Ministry submits it is plain and obvious that it does not have control over the requested records because the facts here are like that court decision. It argues:

While Dr. Henry created the Book with her sister during her employment as the [Provincial Health Officer], the Book's creation was not in fulfillment of her employment duties. Instead, the sisters (one of whom is not even a public body employee) created the Book as a memoir. Additionally, Dr. Henry and [her sister] were the only ones who decided to write the Book and what they included in it was entirely of their own choosing. The sisters did not use the Book for any purpose related to Dr. Henry's employment, nor was that their intention. The Ministry has no legal authority to regulate or control their use or disposition of the Book or the Contract. Furthermore, Dr. Henry worked on the Book exclusively in her free time, not while working as [provincial health officer], and did not use any Ministry, Provincial Health Office, or Government of BC equipment while doing so.³⁵

[36] I agree with the Ministry's assessment of the law and accept the Ministry's affidavit evidence about the circumstances leading to the creation of the book, its completion and the location of the requested records. Dr. Henry deposes that her sister came up with the idea for the book, negotiated the publishing contract and

³⁴ Ministry's initial submission at paras. 56-58, citations omitted.

³⁵ Ministry's initial submission at para. 60.

that they worked on the book in their free time and stored any drafts on their personal computers.³⁶

[37] There is also no evidence the Ministry was involved in Dr. Henry's decision to write the book or the negotiations over the publishing contract or that it had any input into the book's contents or the publishing contract. Instead, Dr. Henry attests that the decision to write the book and determine its contents belonged to her and her sister and that the book does not contain any intellectual property belonging to the Ministry, the provincial government or the Office of the Provincial Health Officer.³⁷ Therefore, it is unclear how the Ministry could have any legal right to obtain a copy of the requested records.

[38] There is also nothing in the materials before me that indicates the Ministry has the authority to regulate or control Dr. Henry's use or disposition of the requested records. Dr. Henry confirms the Ministry's assertions that it does not have a copy of the requested records and no copies were stored on any Ministry computers or equipment.³⁸ Dr. Henry also attests to the fact that Ministry officials were aware she was involved in writing the book, but they did not ask to review a draft of the book or a copy of the publishing contract.³⁹ Therefore, the evidence indicates Dr. Henry did not need or seek the Ministry's approval to write the book and that the book and its contract were not integrated with any Ministry records.

[39] It is also clear the requested records were not created by Dr. Henry as part of her employment responsibilities or that she used, or intended to use, those records for a purpose related to her employment. Dr. Henry explained the role and responsibilities of the provincial health officer, which did not include the writing of the book, and there is no indication Dr. Henry later used the book to prepare or complete any work-related reports or functions. Dr. Henry deposes that it was understood between her and Ministry officials that the book was being written as a memoir of her and her sister's experiences during the pandemic and as private citizens.⁴⁰

[40] Therefore, in addition to my determination that the content of the requested records does not relate to the Ministry's mandate or functions or a departmental matter, I also find the relevant circumstances satisfactorily demonstrate the Ministry does not have control over the records requested by the applicant.

³⁶ Dr. Henry's affidavit at paras. 12-20.

³⁷ Dr. Henry's affidavit at paras. 26-27.

³⁸ Dr. Henry's affidavit at paras. 17-20.

³⁹ Dr. Henry's affidavit at para. 28.

⁴⁰ Dr. Henry's affidavit at para. 28.

CONCLUSION

[41] To conclude, I find the legal authorities, the Ministry's evidence and the relevant circumstances support the Ministry's position that it does not have custody or control of the requested records, and so those records are clearly outside the scope of FIPPA. As a result, I find there is no arguable case that merits further adjudication at another inquiry. Given this finding, it is not necessary to also consider the Ministry's alternative arguments about an abuse of process and how holding an inquiry would be unreasonable in the circumstances.

[42] Therefore, for the reasons discussed previously, I find the Ministry has proven that any further adjudication of this matter is not warranted. I conclude another inquiry under Part 5 of FIPPA should not be held into this matter because it is plain and obvious the requested records are not in the custody or under the control of the Ministry for the purposes of ss. 3(1) and 4(1) of FIPPA. Accordingly, the Ministry's s. 56(1) application is allowed and the upcoming inquiry is cancelled.

September 20, 2023

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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