



Order F24-61

MINISTRY OF TOURISM, ARTS, CULTURE AND SPORT

Allison J. Shamas
Adjudicator

July 12, 2024

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Summary: An applicant requested records from the Ministry of Tourism, Arts, Culture and Sport (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Ministry disclosed the records but withheld some information under s. 21(1) (harm to business interests of a third party) of FIPPA. At the inquiry, the Ministry withdrew its reliance on s. 21(1), disclosed the withheld information to the applicant, and requested that the Office of the Information and Privacy Commissioner (OIPC) cancel the inquiry on the basis that the issues were moot. The applicant submitted that the inquiry should proceed. The adjudicator determined that the matter of the Ministry's refusal to disclose the information in dispute was moot and no factors warranted continuing the inquiry. The adjudicator cancelled the inquiry.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165 s. 56(1).

OVERVIEW

[1] This decision concerns the Ministry of Tourism, Arts, Culture and Sports' (the Ministry) request that the Office of the Information and Privacy Commissioner (OIPC) exercise its discretion under s. 56(1) to not conduct an inquiry on the basis that the issues are moot.

Background

[2] The applicant requested access to two contracts related to the sale of the historical Wing Sang building located in Vancouver, BC from the Ministry.

[3] The Ministry provided the contracts but withheld some information on the basis of ss. 17(1) (harm to public body financial interests) and 21(1) (harm to business interests of a third party) of the *Freedom of Information and Protection*

of Privacy Act (FIPPA). The applicant requested that the OIPC review the Ministry's decision to withhold the disputed information.

[4] During the OIPC's mediation process, the Ministry withdrew its reliance on s. 17(1) and clarified that it was solely relying on s. 21(1) to withhold the information in dispute. Mediation did not resolve the s. 21(1) issue, and the applicant requested that the OIPC conduct an inquiry into it.

[5] The OIPC issued a Notice of Inquiry which stated that the sole issue in dispute was whether the Ministry was required by s. 21(1) of FIPPA to refuse to disclose the information in dispute.

[6] During the inquiry, the Ministry advised the applicant and the OIPC that it was no longer withholding information under s. 21(1) and gave the applicant access to the records. The Ministry requested that the OIPC cancel the inquiry because it was now moot.

[7] Soon after the applicant acknowledged receipt of the records but identified several concerns about the completeness of one of the records. In email correspondence, the parties discussed these concerns and the Ministry provided explanations. At the end of these discussions, the applicant identified two concerns that formed the basis for his position that the inquiry should proceed notwithstanding the Ministry's disclosure of the information in dispute.

[8] Upon reviewing the parties' email correspondence and the Ministry's cancellation request, I wrote to the parties to offer them the opportunity to provide additional submissions about the mootness issue. Both parties filed additional submissions. It is on the basis of the information in the parties' emails and submissions that I arrive at this decision.

Responsive Records

[9] The applicant's access request was limited to copies of two contracts: an Agreement of Purchase and Sale (Purchase Agreement) and a Shared Cost Arrangement (Shared Cost Agreement) related to the sale of a historical building.¹

[10] The Purchase Agreement sets out the terms of the sale of the building between the vendors and purchaser. The Ministry is not party to the Purchase Agreement. The Shared Cost Agreement sets out the terms and conditions of the

¹ The language of the applicant's access request is as follows: "Regarding the Feb. 11, 2022 announcement of the Wing Sang Building at 51 E. Pender in Vancouver becoming the home of the Chinese Canadian Museum Society of B.C.'s Chinese Canadian Museum: Copy of the agreement for the announced \$27.5 million grant and a copy of the agreement to purchase the property from Bob Rennie and the Rennie Foundation."

Province's funding for the purchase of the building between the Ministry as representative of the Province and the Chinese Canadian Museum Society of British Columbia.

Preliminary Issues

[11] The applicant submits the inquiry should proceed notwithstanding the Ministry's disclosure of the records in dispute because he is entitled to:

1. Copies of the documents listed in schedule C of the Purchase Agreement (Listed Documents); and
2. A copy of the Purchase Agreement with yellow highlighting instead of in greyscale.

[12] To support his submission that he is entitled to the Listed Documents, the applicant points to article 1.2 of the Purchase Agreement which states that the schedules are an integral part of the Purchase Agreement. The applicant also argues that the Listed Documents are in the Ministry's custody or under its control within the meaning of s. 4(1) of FIPPA.

[13] In response to the applicant's position that he is entitled to the Listed Documents, the Ministry submits that the Listed Documents are outside the scope of the inquiry because they were not described in the applicant's access request. In this regard, the Ministry explains that the copy of the Purchase Agreement it provided to the applicant is a complete, executed copy, and that the Listed Documents are not attached to it.²

[14] Regarding the issue of highlighting, the Ministry states that the reason the applicant's copy is in greyscale is because the applicant's copy of the Purchase Agreement is a photocopy of the Ministry's copy.

[15] The concerns identified by the applicant and the Ministry's responses to those concerns raise three preliminary issues. I will address each in turn.

Are the Listed Documents outside the scope of the applicant's access request?

[16] It is well-established that an applicant's entitlement to records in an inquiry is limited to those records described in the access request.³ Equally well-

² The Ministry also argues that the applicant should not be permitted to add the new issue of custody and control under s. 4(1) of FIPPA at the inquiry stage.

³ Order F09-23, 2009 CanLII 66962 (BC IPC) at para 11; Order F15-25, 2015 BCIPC 27 at para. 32; Order F17-55, 2017 BCIPC 60 (CanLII) at para 10; and Order F19-15, 2019 BCIPC 17 (CanLII) at para 12.

established is that a public body cannot refuse to disclose part of a responsive record on the basis it is non-responsive or outside of the scope of the access request.⁴ I find that the applicant's access request was limited to copies of the Purchase Agreement and Shared Cost Agreement. Therefore, the only question is whether the Listed Documents are part of the Purchase Agreement and fall within the scope of the applicant's access request.

[17] The Ministry's states it provided the applicant a complete copy of the Purchase Agreement and the Listed Documents are not attached. Other than to point to the statement that the schedules are an integral part of the Purchase Agreement in article 1.2, the applicant does not dispute the Ministry's statement.

[18] In my view, the language of the Purchase Agreement does not support the applicant's position. Schedule C is a numbered list of documents, not the documents themselves. While article 1.2 of the Purchase Agreement states that the schedules to the Purchase Agreement are an integral part of the Purchase Agreement, article 1.2 says nothing about the documents referred to in those schedules. Further, there is no indication elsewhere in the Purchase Agreement that the Listed Documents are part of the agreement. Finally, article 7.3 of the Purchase Agreement requires the vendor to provide copies of the Listed Documents to the purchaser within three days of the execution of the Purchase Agreement.⁵ In my view, this provision confirms the Ministry's submission that the Listed Documents are not part of the agreement.

[19] Considering all of the above, I find that the most reasonable interpretation is that the Listed Documents are not part of the Purchase Agreement. As the applicant's access request was only for the Purchase Agreement and the Shared Cost Agreement, I find that the Listed Documents are outside of the scope of the applicant's access request. Accordingly, consistent with past orders,⁶ I find that the applicant is not entitled to seek access to the Listed Documents in this inquiry.

Should the s. 4(1) issue be added to the inquiry?

[20] The applicant's sole reason for seeking to add s. 4(1) to the inquiry is to seek access to the Listed Documents. I have already found that the applicant is not entitled to seek access to the Listed Documents in this inquiry. Accordingly, I decline to add s. 4(1) as a new issue as doing so would serve no practical purpose.

⁴ For a fulsome discussion of this issue, see Order F15-23, 2015 BCIPC 25 (CanLII) at paras 22 - 74. See also, Order F17-55, 2017 BCIPC 60 (CanLII) at para 10; and Order F23-91, 2023 BCIPC 107 (CanLII) at para 12.

⁵ Records page 13.

⁶ Order F09-23, 2009 CanLII 66962 (BC IPC) at para 11; Order F15-25, 2015 BCIPC 27 at para. 32; Order F17-55, 2017 BCIPC 60 (CanLII) at para 10; and Order F19-15, 2019 BCIPC 17 (CanLII) at para 12.

Should the applicant's request for a copy of the records with yellow highlighting rather than greyscale be added to the inquiry?

[21] The applicant's request for a copy of the records with yellow highlighting rather than greyscale (the highlighting) is a new issue that the applicant raised at the inquiry stage.

[22] The Notice of Inquiry states parties may not add new exceptions or issues without the OIPC's prior consent. Furthermore, even where an applicant does request consent to add a new issue, the OIPC will only allow a party to add a new issue at the inquiry stage where there are exceptional circumstances to justify the late addition. One of the reasons for this policy is that adding new issues at the inquiry stage circumvents and undermines the OIPC's early resolution procedures, with the result that matters which could have been addressed more efficiently through mediation, end up in the more formal process of an inquiry where the resolution can be more time consuming and costly for both the OIPC and the parties.

[23] The applicant raised the issue of the yellow highlighting late. He did not request the OIPC's consent to add the issue to the inquiry, and he did not identify any exceptional circumstances that would justify adding the highlighting issue at the inquiry stage. I find that the applicant's failure to seek the OIPC's consent to add the issue or to explain why it should be added at this late stage weighs against adding the highlighting issue.

[24] The highlighting issue affects a single marking. The words "THIS LEASE is dated as of _____, 2022" appear at the top of an agreement that forms schedule D to the Purchase Agreement.⁷ In both the Ministry's copy and the applicant's copy there is a blank space before 2022. However, in the Ministry's copy the blank space is highlighted in yellow, while in the applicant's copy the highlighting is in greyscale. During their May 6, 2024, email communications, the Ministry explained to the applicant that the reason the applicant's copy was in greyscale was because it was a photocopy of the Ministry's copy. Further, I have reviewed the responsive records in their entirety, and I confirm that the marking described above is the sole instance where colour appears in the records.

[25] In my view, the applicant received what he requested – a complete copy of the Purchase Agreement. With the exception of the colour of a single, highlighted blank space, the applicant's copy of the Purchase Agreement is identical to that of the Ministry. The applicant provided no submissions or information to support his position that he was entitled to a yellow, rather than grey blank space, or to explain why he wanted a colour copy. Absent some explanation from the applicant about why he wants a copy with the blank space

⁷ The highlighting is found at page 33 of the responsive records.

highlighted in yellow rather than grey, I am unable to find that adding the issue to the inquiry would have any meaningful impact on the applicant's rights.

[26] For all these reasons, I find that there are no exceptional circumstances that would justify adding the highlighting issue at this stage of the inquiry, and I decline to do so.

DISCUSSION

Issues in dispute and burden of proof

[27] The issues to be addressed in this decision are as follows:

1. Does the inquiry raise only moot issues?
2. If so, should the OIPC conduct the inquiry or cancel it?

It is well established that in an inquiry under s. 56, the party asking that the inquiry not proceed bears the onus.⁸

Doctrine of mootness

[28] Section 56(1) of FIPPA enables, but does not require, the Commissioner to conduct inquiries. It reads as follows:

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.

[29] Previous decisions regarding s. 56 have recognized mootness as a basis for exercising discretion to cancel a review at the inquiry stage.⁹ I agree with this conclusion.

[30] The leading Canadian case on mootness is *Borowski v. Canada (Attorney General)* where Justice Sopinka explained the principle as follows:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case... The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant

⁸ See for example Order F24-30, 2024 BCIPC 37 at para 10 and Order F16-10, 2016 BCIPC 12 (CanLII) at para. 7.

⁹ Order F07-04, 2007 CanLII 67284 (BC IPC), and Order F05-05, 2005 CanLII 28522 (BC IPC).

factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case...¹⁰

[31] When deciding whether to depart from the general policy of not hearing a moot case, the Court said that consideration should be given to the three rationales underlying the mootness doctrine. These rationales are the need for an adversarial context, the concern for judicial economy, and the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

Parties' submissions

[32] The Ministry asserts that the inquiry is moot because the applicant has received the records that are responsive to the access request in their entirety. It further submits that in the circumstances, it would be a waste of the OIPC's limited resources as well as those of the Ministry to continue with this inquiry, and that to add new issues at this late stage would be unfair to the Ministry and would flout concerns for judicial economy.

[33] The applicant does not address the mootness issue beyond his arguments about the Listed Documents and the highlighting issue.

Analysis

[34] I find that the s. 21(1) issues set out in the Notice of Inquiry are moot. The Ministry no longer relies on s. 21(1) or any other FIPPA exceptions to refuse access to any information in the responsive records, and it has provided the applicant complete, unredacted copies of those records. For these reasons, I find that deciding whether the Ministry is required by s. 21(1) to refuse access to the information in the responsive records would be a purely academic exercise that would not resolve any live controversy. The s. 21(1) issue is therefore moot.

[35] I also do not find that this is an appropriate case to depart from the general policy of not hearing a moot case. There is no adversarial context here. The applicant requested access to two specific contracts, and the Ministry provided him with complete, unredacted copies of those two contracts.

¹⁰ *Borowski v. Canada (Attorney General)*, 1989 1 SCR 342 at paras. 15 and 16. The OIPC has also previously applied these principles, for example: Order F24-30, 2024 BCIPC 37, Order F16-10, 2016 BCIPC 12 (CanLII), and Order F05-05, 2005 CanLII 28522 (BC IPC).

[36] I further find that the applicant's arguments about the Listed Documents and the highlighting issue do not create an adversarial context. These issues have been fully and finally resolved above. Moreover, I note that the OIPC has previously held that an allegation that a public body has not provided all the information related to an access request is not a sufficient adversarial context to warrant continuing an inquiry in circumstances similar to those before me.¹¹

[37] Furthermore, the issue of whether a public body is required to refuse access to information under s. 21(1) is regularly before the Commissioner and the OIPC has issued many orders that interpret and apply s. 21(1). Therefore, it is not necessary to hear this case out of concern that the interpretation or application of s. 21(1) will evade being addressed at inquiry. As the s. 21(1) dispute has been resolved, and as there is no broader social value in deciding the inquiry, I find that conducting the inquiry would be contrary to the interests of judicial economy.

[38] Accordingly, I find that it would not be appropriate to spend the OIPC's limited resources to decide whether the Ministry is required to refuse access to information that it has already fully disclosed to the applicant.

CONCLUSION

This inquiry is hereby cancelled.

July 12, 2024

ORIGINAL SIGNED BY

Allison J. Shamas, Adjudicator

OIPC File No.: F22-90494

¹¹ Order F24-30, 2024 BCIPC 37 at para 25.