



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-82

MINISTRY OF FORESTS

Alexander Corley
Adjudicator

September 6, 2024

CanLII Cite: 2024 BCIPC 94
Quicklaw Cite: [2024] B.C.I.P.C.D. No. 94

Summary: An applicant asked the Ministry of Forests (Ministry) for access to a draft report regarding a wildfire. The Ministry refused access on the basis that the report was not in the custody or under the control of the Ministry pursuant to s. 3(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and, in the alternative, pursuant to ss. 15 (disclosure harmful to law enforcement) and 16 (disclosure harmful to intergovernmental relations or negotiations) of FIPPA. The applicant argued that disclosure was clearly in the public interest pursuant to s. 25(1)(b) of FIPPA. The adjudicator determined the report was not in the custody or under the control of the Ministry and the applicant had no right to access it under FIPPA. Therefore, there was no need to decide if ss. 15, 16, or 25(1)(b) applied.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* [RSBC 1996, c. 165] at ss. 3(1) and 4(1).

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA),¹ an applicant requested the Ministry of Forests (Ministry) provide access to a draft BC Wildfire Service report regarding the origin and cause of a wildfire (Report).

[2] The Ministry denied the applicant access to the Report. The Ministry informed the applicant that the Report is not in the custody or under the control of the Ministry and, therefore, it falls outside the scope of FIPPA pursuant to s. 3(1) (application). The Ministry further advised the applicant that if the Report does fall within FIPPA's scope, the Ministry would withhold it in full pursuant to ss. 15 (disclosure harmful to law enforcement) and 16 (disclosure harmful to intergovernmental relations or negotiations).

¹ For the remainder of this Order, when I refer to a section of an enactment, I am referring to FIPPA unless otherwise specified.

[3] The applicant requested that 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 issues between the parties and the applicant requested that the matter proceed to an inquiry.

[4] After the notice of inquiry was issued, the Ministry requested, under s. 56(1), that the Commissioner decline to hold an inquiry into the matters at issue. Section 56(1) gives the Commissioner the discretion to decide whether to hold an inquiry. As the Commissioner's delegate assigned to decide the Ministry's s. 56(1) application, I determined in Order F24-32² that the matter would proceed to a full inquiry under Part 5 of FIPPA. The current inquiry is the result of my decision in Order F24-32.

[5] During the submissions phase of this inquiry, the OIPC granted the applicant's request that s. 25(1)(b) (information clearly in the public interest) be added as an issue in the inquiry.³

[6] Both parties made written submissions regarding the issues in this inquiry.

ISSUES

[7] In this inquiry I must decide the following issues:

1. Is the Report outside of FIPPA's scope pursuant to s. 3(1)?
2. Is the Ministry required by s. 25(1)(b) to disclose the Report without delay?
3. Is the Ministry authorized to withhold the Report under ss. 15(1) or 16(1)?

[8] FIPPA does not specify which party bears the burden of proof in cases involving s. 3(1). In the absence of a statutory burden, prior orders have established that the public body resisting disclosure of a disputed record bears the burden of demonstrating that the record is excluded from the scope of FIPPA under s. 3.⁴ I adopt that approach here.

[9] Turning to s. 25(1)(b), FIPPA also does not say which party has the burden of proving that the section does or does not apply. However, past orders have said that it is in the best interest of all parties to provide the adjudicator with

² 2024 BCIPC 39.

³ OIPC's May 3, 2024, letter to the parties.

⁴ See, for example, Order F13-23, 2013 BCIPC 30 at para. 10 and Order F17-13, 2017 BCIPC 14 at para. 5.

whatever argument and evidence they can to support their position and I adopt this same approach here.⁵

[10] Meanwhile, s. 57(1) places the burden on the Ministry to demonstrate that it is authorized to withhold the Report under ss. 15(1) or 16(1).

DISCUSSION

Background and Record at Issue

[11] Over the past several years there have been a series of serious wildfires across British Columbia. The causes and origins of some of these wildfires have been or are being investigated by various law enforcement agencies, including the Royal Canadian Mounted Police (RCMP). The BC Wildfire Service, which is a branch of the Ministry, has also opened its own investigations into the causes and origins of many of these wildfires.

[12] The applicant made an access to information request for, what was at the time, the most recent draft of the Report. The Report concerns the “cause and origin” of a specific wildfire which is under investigation by the RCMP.

[13] In response to the access request, the Ministry identified a draft of the Report, titled “Wildfire Origin and Cause Report,” written by a BC Wildfire Service investigator (investigator), as the only responsive record.⁶

Custody and Control – s. 3(1)

[14] Section 3(1) states that FIPPA applies to all records “in the custody or under the control” of a public body. In addition, s. 4(1) gives an applicant “a right of access to a record in the custody or under the control of a public body,” 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).”⁷

⁵ See, for example, Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 39 and Order F07-23, 2007 CanLII 52748 (BC IPC) at para. 9.

⁶ Affidavit #1 of the Ministry’s Wildfire Enforcement Superintendent (Superintendent) at para. 4. The applicant does not dispute that the Report was the only draft in existence within the date range specified in the access request: July 1, 2021 – June 23, 2022 (Applicant’s submission at paras. 9-10).

⁷ Order F18-45, 2018 BCIPC 48 at para. 15.

[15] As a result, if I find the Report is not in the custody or under the control of the Ministry, then FIPPA does not apply and it is not necessary for me to consider whether ss. 15, 16, or 25(1)(b) apply to the Report.⁸

[16] Neither “custody” or “control” is a defined term in FIPPA. However, the processes for determining whether a public body has custody or control of a record are well-established by past orders.

[17] The process for determining whether a public body has custody of a record involves the following steps,

- The first step is to consider whether the public body has physical possession of the record.
- If the public body has physical possession of the record, the second step is to consider whether the public body has legal rights or responsibilities related to the record.⁹

[18] Therefore, physical possession alone is insufficient to establish custody of records. Further, past orders have found that a public body does not have custody of records it physically possesses where the public body does not have a legal “right to those records that would allow it to deal with them as it wishes” or a “responsibility for the records, including as to their use, disclosure, or destruction, as [the public body] considers necessary or desirable.”¹⁰

[19] Turning to control, prior orders have found that a public body has control of a record where it has “some power of direction or comment” over the record.¹¹ The contents of the record and the circumstances in which it came into being are also relevant in determining whether it is under the control of a public body.¹² Further, prior OIPC orders have also established certain indicia of control, including:

- Whether the record was created by an officer or employee of the public body in carrying out their duties;
- Whether the public body has statutory or contractual control over the record;
- Whether the public body has physical possession of the record;

⁸ See Order F24-40, 2024 BCIPC 48 at para. 20, citing OIPC Adjudication Order No. 27 (September 10, 2018) at paras. 42-44 and OIPC Adjudication Order No. 19 (July 12, 2007). The Adjudication Orders referenced in this note may be accessed at <https://www.oipc.bc.ca/rulings/adjudications/>.

⁹ See Order F18-45, *supra* note 7 at para. 17 and Order 02-30, 2002 CanLII 42463 (BC IPC) at paras. 21-24.

¹⁰ Order 02-30, *ibid* at para. 24.

¹¹ Order F15-65, 2015 BCIPC 71 at para. 17, citing *Canada (Information Commissioner) v. Canada (Ministry of National Defence)*, 2011 SCC 25 [*Canada MND*] at para. 48.

¹² *Canada MND, ibid.*

- Whether the public body has relied on the record;
- Whether the record is integrated with the public body's other records;
- Whether the public body has authority to regulate the use and disposition of the record; and,
- Whether the contents of the record relate to the public body's mandate and functions.¹³

[20] This list is non-exhaustive and not all factors will necessarily apply in each case.¹⁴

Positions of the parties

[21] The Ministry's affidavit evidence sets out the following chronology of events and asserts the following facts:

- The investigator is an internationally credentialed and experienced expert in wildfire investigation.¹⁵
- After the wildfire occurred and prior to deployment of the investigator to the site of the wildfire, the RCMP were already investigating the causes and origin of the wildfire.¹⁶
- Given the RCMP has continuously been investigating the wildfire as a criminal matter, the RCMP has at all times been the lead investigation agency and its investigation takes precedence over any administrative investigation of the wildfire conducted by the Ministry.¹⁷
- During its investigation of the wildfire, the RCMP approached the investigator to leverage the investigator's expertise and request their assistance in investigating the wildfire, including by directly requesting that the investigator draft the Report for the "sole purpose" of assisting with the RCMP's investigation.¹⁸
- During its investigation of the wildfire, the RCMP obtained a search warrant and seized evidence relevant to its investigation from third parties under the warrant (Warrant Evidence). The Warrant Evidence is subject to a sealing order issued by the court.¹⁹
- In furtherance of the RCMP's criminal investigation, the RCMP provided the Warrant Evidence to the investigator who relied heavily on it in drafting the Report.²⁰

¹³ Order F17-20, 2017 BCIPC 21 at para. 26. See also Order F23-68, 2023 BCIPC 79 at para. 18.

¹⁴ Order F17-20, *ibid.*

¹⁵ Superintendent's Affidavit #1 at para. 5.

¹⁶ Superintendent's Affidavit #3 at para. 2.

¹⁷ Superintendent's Affidavit #1 at para. 9.

¹⁸ Superintendent's Affidavit #1 at paras. 6 and 12.

¹⁹ Superintendent's Affidavit #1 at para. 7 and Affidavit of the Ministry's Natural Resources Officer (Officer) at para. 5.

²⁰ Officer's Affidavit at para. 5 and Superintendent's Affidavit #1 at para. 10.

- Although the Report is in the Ministry's physical possession, the Ministry had to obtain a search warrant and serve it on the RCMP to obtain access to the contents of the Report for use during the Ministry's administrative investigation of the wildfire.²¹
- The Report is not integrated with the Ministry's other records but is kept in a restricted access folder and can only be viewed by the investigator and nine other Ministry employees who either work on the same small team as the investigator or are the investigator's immediate superiors.²² This also means that the Ministry's Legal Counsel and Executive are not able to access or review the Report.
- The Ministry has at all times considered the Report to be an RCMP record, not a Ministry record, and has dealt with the Report accordingly.²³

[22] Relying on this evidence, the Ministry says the following regarding whether it has custody or control of the Report.

[23] The Ministry acknowledges that it has physical possession of the Report, the Report was drafted by the investigator who is an employee of the Ministry, and the contents of the Report relate to the Ministry's mandate and functions concerning the investigation of wildfires. However, the Ministry submits it does not have statutory or contractual control over the Report, it has not relied on the Report, and the Report is kept separate from the Ministry's other records. The Ministry also says that its only responsibility for the Report is a general responsibility to not be careless or negligent regarding the Report and the sensitive information reproduced therein.

[24] Most importantly, the Ministry says, it has no right to deal with the Report or regulate its use and disposition according to its own wishes or as it considers necessary or desirable. This is because the Report was only drafted in response to a request by the RCMP that the investigator assist with the RCMP's investigation and was created solely for that purpose, not for the Ministry to use or distribute at its own discretion. Additionally, the Ministry submits that the Report is "heavily" based on the Warrant Evidence which, because it was collected pursuant to the RCMP's search warrant, the Ministry says is subject to an "implied undertaking" to the Court by the RCMP that it will not be used for any purposes unrelated to the RCMP investigation.²⁴

²¹ Officer's Affidavit at paras. 7-12 and Superintendent's Affidavit #1 at paras. 12 and 16. The parties agree that the Ministry's search warrant was related to a later draft of the Report which is not in dispute in this inquiry.

²² Superintendent's Affidavit #1 at paras. 13-14.

²³ Superintendent's Affidavit #1 at para. 11 and Superintendent's Affidavit #2 at para. 5.

²⁴ An "implied undertaking" to the Court arises where a party is required by law to provide information to their adversary in a court proceeding or to law enforcement during an investigation or prosecution. The purpose of the implied undertaking is to ensure that information which someone is compelled by the Court to provide to another party is not put to any uses extraneous

[25] The Ministry says the restrictions imposed by the implied undertaking flowed from the RCMP to the Ministry when the RCMP shared the Warrant Evidence with the investigator. Further, that those restrictions impact the Ministry's rights to use or dispose of the Report in a way that demonstrates the Report is not in its custody or under its control for purposes of FIPPA.²⁵

[26] The applicant questions whether the Report was created for the "sole purpose" of assisting with the RCMP investigation and whether it is appropriate to find the entire Report is outside of FIPPA's scope simply because it may be "based on" information collected pursuant to the RCMP's search warrant and subject to a sealing order. In this regard, the applicant suggests that any information subject to an implied undertaking can be severed from the Report with the remaining information falling within FIPPA's scope. The applicant also says that the authorities relied on by the Ministry to establish the scope and effect of the implied undertaking "should be given little weight," primarily on the basis that those authorities did not concern an implied undertaking arising from a court issuing a search warrant and associated sealing order.

[27] In reply, the Ministry says it has clearly established that the Report was prepared for the "sole purpose" of the investigator assisting with the RCMP investigation.²⁶ Further, the Ministry says that any obligation to sever information from the Report and provide the remainder to the applicant under s. 4(2) is not engaged in this case because the Report falls outside of FIPPA's scope pursuant to s. 3(1). Finally, the Ministry says that the authorities it cites are persuasive in this case notwithstanding they dealt with different circumstances giving rise to an implied undertaking.

Analysis and findings

Impact of the "implied undertaking"

[28] The Ministry's evidence, which I accept, persuades me that the Report is substantively based on the Warrant Evidence. I am also persuaded by the authorities cited by the Ministry that the Warrant Evidence is subject to an implied undertaking to the Court that it will not be used for purposes unrelated to the

to the proceeding or investigation it was divulged in relation to unless or until the information is introduced in open court. The implied undertaking is enforceable by the Court at common law and breach of the undertaking may result in legal sanction, up to and including contempt proceedings: see *Juman v. Doucet*, 2008 SCC 8 at paras. 20, 23, 25-27, and 29. See also *R v. Basi*, 2011 BCSC 314 at paras. 31 (quoting *R v. Basi*, 2009 BCSC 755 at paras. 7-10) and 40-45.

²⁵ On this point, the Ministry relies on the Ontario Court of Appeal's decision in *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241 which the Ministry says establishes that records containing information that is subject to an implied undertaking remain under the control of the Court and therefore are not in the custody or under the control of a public body which physically possesses those records.

²⁶ Ministry's Reply Submission at para. 5. See also Superintendent's Affidavit #1 at para. 12.

RCMP's criminal investigation into the wildfire. Further, I am persuaded that the Warrant Evidence only came into the investigator's (and therefore the Ministry's) hands in the context of the RCMP's request that the investigator draft the Report to assist with that investigation and that the restrictions imposed by the implied undertaking flowed through to the Ministry at the time the RCMP shared the Warrant Evidence with the investigator.²⁷

[29] Given this, I accept that the Warrant Evidence is subject to an implied undertaking and, therefore, that the uses to which the Ministry may put the Warrant Evidence and the circumstances under which the Ministry may distribute it are significantly restricted. However, it is not clear to me based on the Ministry's submissions, evidence, and cited authorities that those restrictions also apply to the Report itself on the basis that it "heavily" incorporates the Warrant Evidence. Without more, I am not prepared to find that the presence, even the significant presence, of information which is subject to an implied undertaking in a record is sufficient to ground a finding that the entire record falls outside of FIPPA's scope.

[30] Notwithstanding this, I find, for the following reasons, that the totality of the Ministry's evidence establishes that the Report is not in the Ministry's custody or under the Ministry's control in this case.

Custody

[31] As noted above, the Ministry acknowledges that it has physical possession of the Report. Therefore, the first stage of the custody analysis is satisfied in this case and whether the Report is in the Ministry's custody turns on whether the Ministry has sufficient legal rights or responsibilities related to the Report to support such a finding.

[32] For the following reasons, I find that the Ministry does not have legal rights or responsibilities over the Report that would allow it to deal with the Report as it wishes or as it feels is necessary or desirable and, therefore, it does not have custody of the Report for purposes of FIPPA.²⁸

[33] The Ministry's evidence, which I accept, demonstrates that the investigator only drafted the Report in response to a direct request by the RCMP that they do so to assist with the RCMP's investigation of the wildfire.²⁹ Further, I find that the RCMP shared the Warrant Evidence with the investigator to facilitate the investigator's work in drafting the Report and that the investigator relied heavily

²⁷ Officer's Affidavit at para. 5; Superintendent's Affidavit #1 at paras. 7 and 10 and Affidavit #2 at para. 5.

²⁸ Order 02-30, *supra* note 9 at para. 24.

²⁹ Superintendent's Affidavit #1 at paras. 6 and 12.

on the Warrant Evidence in drafting the Report.³⁰ The Ministry's evidence and cited authorities also clearly establish that at the time the RCMP shared the Warrant Evidence with the investigator, it was subject to a sealing order and the RCMP was subject to an implied undertaking to the Court that it would not use the Warrant Evidence for any purposes unrelated to the RCMP investigation.

[34] Given the Warrant Evidence was subject to a sealing order and implied undertaking at the time the RCMP shared it with the investigator, I find the RCMP reasonably expected that the Warrant Evidence would only be used by the investigator, and therefore the Ministry, for purposes related to the RCMP investigation.³¹ I also find that the Ministry was aware that the Warrant Evidence was subject to a sealing order at the time the investigator received it and incorporated it into the Report.³²

[35] Taking the above together, I find the Ministry's evidence demonstrates that the investigator drafted the Report at the direction of the RCMP, in order to assist with an RCMP investigation, and relied on material which the RCMP was legally restricted from sharing with the investigator for any other purpose in doing so. Given this, it is clear to me that the sole reason the investigator drafted the Report was to assist with the RCMP's criminal investigation into the causes and origin of the wildfire and not for the Ministry to deal with at its own discretion.

[36] Further, the Ministry's affidavit evidence establishes the Ministry's view has always been that the Report is an RCMP record that was created in the context of the RCMP investigation and may only be dealt with by the Ministry in a manner that directly furthers that investigation. In this regard, I note that to access the Report's contents for the purpose of its own administrative investigation into the wildfire, the Ministry applied to the Court for a search warrant and executed it against the RCMP as opposed to relying on the version of the Report that was already in the Ministry's physical possession.³³ In my view, this clearly demonstrates the Ministry's, and the Court's, consistent understanding that the Ministry has a significantly restricted authority to direct how the Report is dealt with.

[37] Taking all of this together, I find that the Ministry has established that it does not have a legal right or responsibility to deal with the Report according to its wishes or as it considers necessary or desirable but may only deal with the Report in a manner that furthers the RCMP investigation or as the RCMP

³⁰ Officer's Affidavit at para. 5 and Superintendent's Affidavit #1 at para. 10

³¹ I make this finding on the basis that if the RCMP did not have such an expectation, then sharing the Warrant Evidence with the investigator would itself have constituted a breach of the implied undertaking and potentially opened the RCMP to sanction by the Court.

³² Superintendent's Affidavit #1 at para. 7.

³³ Officer's Affidavit at paras. 7-12 and Superintendent's Affidavit #1 at paras. 12 and 16.

otherwise directs the investigator.³⁴ On that basis, I find the Ministry does not have custody of the Report for purposes of FIPPA.

Control

[38] As noted above, there is no dispute between the parties that the Ministry physically possesses the Report, that the Report was created by an employee of the Ministry, and that the Report relates to the Ministry's mandate and functions regarding the investigation of wildfires. Each of these factors weighs in favour of a finding that the Report is under the Ministry's control.

[39] Turning to factors weighing against a finding that the Report is under the Ministry's control, I find the Ministry's evidence establishes that the Report is kept separate from other records held by the Ministry and can only be accessed by a small number of Ministry staff who are aware that they cannot share or distribute the Report.³⁵ I also find that the Ministry has no statutory or contractual control over the Report and has not relied on the Report.³⁶ Further, for the following reasons, it is clear to me based on the totality of the Ministry's evidence and submissions that the Ministry does not have authority to regulate the use and disposition of the Report.

[40] As noted throughout, I accept that the impetus for the Report was the RCMP's request that the investigator draft the Report to assist with the RCMP investigation.³⁷ I also accept that the Report is substantively based on the Warrant Evidence and that the Warrant Evidence was obtained by the RCMP under a search warrant issued by the Court in the context of the RCMP's investigation, was subject to a sealing order, and was only shared with the investigator to facilitate the investigator assisting with that investigation.³⁸ Further, that the Warrant Evidence is covered by an implied undertaking to the Court that restricts the RCMP from using or distributing the Warrant Evidence for any purpose unrelated to its own investigation. Given all of this, I find, as above, that the investigator created the Report solely to assist the RCMP with its investigation into the wildfire and not for the Ministry to use or distribute at its own discretion.

[41] It is also clear to me that the Ministry has at all times acted in a manner consistent with the RCMP, and not the Ministry, maintaining the authority to regulate the use and disposition of the Report. For instance, as noted above, I accept that when it came time for the Ministry to conduct its own administrative

³⁴ Order 02-30, *supra* note 9 at para. 24.

³⁵ Superintendent's Affidavit #1 at paras. 13-15.

³⁶ As noted above, the version of the Report used by the Ministry in conducting its administrative investigation of the wildfire is not in dispute in this inquiry.

³⁷ Superintendent's Affidavit #1 at paras. 6 and 12.

³⁸ Superintendent's Affidavit #1 at paras. 7 and 10 and Officer's Affidavit at para. 5.

investigation into the wildfire, the Ministry did not use the Report itself, even though it was in its physical possession, but applied to the Court for a search warrant which it served on the RCMP to obtain access to the contents of the Report, which by that point in time had been superseded by a later draft.

[42] Given all of the above, I find that the Ministry has established that it does not have the authority to regulate how the Report is used or distributed. Rather, I find that the Ministry may only use the Report for the purpose of furthering the RCMP's criminal investigation into the wildfire. I also find that the Ministry has always understood that the RCMP has the authority to regulate the circumstances, if any, under which the Ministry may distribute the Report and acted accordingly.

[43] Taking all of the above together and weighing the relevant factors holistically, I find that the Ministry has established that the RCMP, and not the Ministry, has the power to direct how the Report is used and to comment on the Report's content.³⁹ Therefore, I find that the Report is not under the Ministry's control for purposes of FIPPA.

Summary

[44] I have found above that the Report is not in the custody or under the control of the Ministry for purposes of s. 3(1) of FIPPA. Therefore, I find that the Report falls outside of FIPPA's scope. Given this, it is not necessary for me to consider whether ss. 4(2), 15, 16, or 25(1)(b) apply to the Report and I decline to do so.

CONCLUSION

[45] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry's decision that the applicant has no right to access the record at issue in this inquiry because it falls outside of FIPPA's scope pursuant to s. 3(1).

September 6, 2024

ORIGINAL SIGNED BY

Alexander Corley, Adjudicator

OIPC File No.: F22-90606

³⁹ Order F15-65, *supra* note 11 at para. 17, citing *Canada MND*, *supra* note 11 at para. 48.