Order P24-11

The CARDON Group

Lisa Siew
Adjudicator

October 21, 2024

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Summary: An applicant requested access to their personal information under the control of their former employer, the CARDON Group. The CARDON Group refused to disclose some information to the applicant under ss. 23(4)(c) and 23(4)(d) of the *Personal Information Protection Act* (PIPA). The applicant requested the Office of the Information and Privacy Commissioner review the CARDON Group's decision to refuse access and the matter was later forwarded to inquiry. During the inquiry, the applicant revealed they already had an unredacted copy of the documents at issue in the inquiry. As a result, the adjudicator had to decide whether it would be appropriate to exercise the discretion available under s. 50(1) of PIPA to cancel the inquiry because the issues to be decided at the inquiry were now moot. The adjudicator determined it was appropriate to cancel the inquiry because the CARDON Group's decision to refuse access to the information in dispute under ss. 23(4)(c) and 23(4)(d) was moot and there were no factors that warranted proceeding with the inquiry.

Statute and sections considered: *Personal Information Protection Act*, SBC 2003, c 63, ss. 23(1)(a), 50(1). *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 s. 56(1).

INTRODUCTION

[1] The CARDON Group is a portfolio and investment management company that invests, owns and operates companies across Canada. Under the *Personal Information Protection Act* (PIPA), an individual formerly employed by the CARDON Group (applicant) requested the CARDON Group provide her with access to her personal information. Section 23(1)(a) of PIPA gives individuals a right to access their personal information under the control of an organization, subject to any exceptions under ss. 23(3) and 23(4).

[2] During her employment, the CARDON Group received several complaints about the applicant. The CARDON Group eventually terminated the applicant's employment, and the parties disagree over the legitimacy of that termination. The applicant's request for access under PIPA to the CARDON Group includes information about those events.

[3] The CARDON Group provided the applicant with access to some of the applicant's personal information under its control but withheld other information under s. 23(4) of PIPA. The applicant was dissatisfied with the CARDON Group's response and requested the Office of the Information and Privacy Commissioner (OIPC) conduct a review of the CARDON Group's decision to withhold information under s. 23(4) of PIPA.

[4] During the OIPC's mediation process, the CARDON Group clarified that it was withholding information under ss. 23(4)(c) (personal information about another individual) and 23(4)(d) (identity of an individual who has provided personal information about another individual) of PIPA. The OIPC's mediation process did not resolve the dispute between the parties and the matter was forwarded to inquiry.

[5] Both parties provided submissions for the inquiry. After reviewing those submissions, I determined there was an additional issue which required further representations from the parties. In her inquiry submission, the applicant revealed she already has an unredacted copy of the documents at issue in the inquiry and provided a copy of those documents.[1] In similar circumstances, previous OIPC adjudicators had to determine whether the issues in the inquiry were now moot and supported cancelling the inquiry because there is no longer a live dispute between the parties.[2] Following that approach, I offered the parties an opportunity to make submissions about whether the inquiry should be cancelled because of mootness. Both parties provided submissions. In its additional submission, the CARDON Group requests the OIPC exercise its discretion under s. 50(1) of PIPA to cancel the inquiry because it says the issues in the inquiry are now moot.

Discretion to conduct an inquiry – s. 50(1) of PIPA

[6] Section 50(1) of PIPA provides that if a matter in dispute between the parties is not referred to a mediator or settled under s. 49, the Commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry. The question I must address at this point is whether s. 50(1) of PIPA provides me, as the Commissioner's delegate, with the authority

[1] Applicant's submission dated September 10, 2024 at p. 1 and Appendix A.
[2] Order F16-10, 2016 BCIPC 12 (CanLII) in relation to the *Freedom of Information and Protection of Privacy Act*. Order P21-07, 2021 BCIPC 61 (CanLII) at para. 4, footnote 2. Decision P12-01, 2012 BCIPC 11 (CanLII) at paras. 9-11.

to cancel an inquiry because of mootness. I am not aware of a PIPA order that has directly addressed this issue.[3]

[7] However, I note that in adjudications under PIPA regarding mootness or s. 50(1), previous OIPC adjudicators have adopted and applied the approach taken under s. 56(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).[4] The jurisprudence regarding s. 56(1) of FIPPA has concluded the following:

- Section 56(1) gives the Commissioner a broad discretionary power to determine whether or not to hold an inquiry.[5]

- Section 56(1) provides the Commissioner or their delegate with the discretion to discontinue or not conduct an inquiry that has already commenced.[6]

- The reasons for exercising discretion under s. 56(1) in favour of not holding an inquiry are open-ended and include mootness.[7]

- The burden is on the party asking that an inquiry not be held to demonstrate why that request should be granted.[8]

[8] While decisions made under FIPPA are not binding on issues to be decided under PIPA, previous OIPC orders have found that, when interpreting a statute, it is appropriate to refer to similar language or provisions in other statutes dealing with the same subject matter.[9] Both FIPPA and PIPA have provisions regarding access and exceptions to access and s. 56(1) of FIPPA is almost identical in wording to s. 50(1) of PIPA. Therefore, I find it appropriate to adopt the above-noted principles and the jurisprudence developed under s. 56(1) of FIPPA in interpreting and applying s. 50(1) of PIPA. Accordingly, based on that jurisprudence, I conclude I have the authority under s. 50(1) of PIPA to consider

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[3] Order P21-03, 2021 BCIPC 11 (CanLII) at paras. 10-16 applied a mootness analysis but did not discuss s. 50(1) of PIPA. Decision P12-01, 2012 BCIPC 11 (CanLII) at paras. 9-11 discussed s. 50 of PIPA but that decision did not involve the doctrine of mootness.
[4] RSBC 1996, c. 165. For example, Decision P12-01, 2012 BCIPC 11 (CanLII) at paras. 9-11 and Order P21-03, 2021 BCIPC 11 (CanLII) at para. 13, citing Order F16-10, 2016 BCIPC 12 at paras. 11-12 regarding mootness.
[5] *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 (CanLII) at para. 47.
[6] Order F16-10, 2016 BCIPC 12 (CanLII) at para. 10.
[7] Decision F05-05, 2005 CanLII 28522 (BCIPC) at para. 22 and Order F16-10, 2016 BCIPC 12 (CanLII) at para. 10.
[8] Order F16-10, 2016 BCIPC 12 (CanLII) at para. 8.
[9] For example, Order P19-03, 2019 BCIPC 42 (CanLII) at para. 23, quoting Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014) at para. 13.25.

the mootness doctrine in deciding whether to cancel an inquiry that has already commenced, as is the case here.

ISSUES AND BURDEN OF PROOF

[9] In this order, I will determine whether the inquiry into the CARDON Group's decision to refuse access under ss. 23(4)(c) and 23(4)(d) of PIPA should be cancelled because of mootness. To make this determination, I must answer the following questions:

1. Are the issues to be decided at the inquiry now moot?

2. If those issues are moot, are there any circumstances that warrant proceeding with the inquiry?

[10] Section 51 of PIPA identifies the burden of proof at an inquiry, but it does not specify which party has the burden to prove the above-noted issues. In the absence of a statutory burden of proof, previous OIPC adjudicators have relied on past precedents or determined which party should be assigned the burden of proof.[10] In making such a determination, previous decisions have considered the following factors:

1. Who raised the issue or invoked the relevant statutory provision to refuse access?

2. Who is in the best position to meet the burden of proof, including which party has the relevant expertise, evidence and knowledge to establish a provision applies?

3. What is fair in the circumstances?[11]

[11] In terms of past precedent, previous OIPC decisions that considered whether to cancel an inquiry because of mootness accepted that the burden is on the party requesting the cancellation to demonstrate why their request should be granted.[12] I agree that it is fair to place the burden on the party requesting the cancellation to prove and support its request. The requesting party would also be in the best position to provide the necessary evidence and facts to establish that the issues to be decided at the inquiry are moot.

[12] However, if the requesting party proves the inquiry issues are moot, then the second step is to consider whether there any circumstances that warrant

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[10] Order F21-35, 2021 BCIPC 43 (CanLII) at para. 20.
[11] Order F21-35, 2021 BCIPC 43 (CanLII) at para. 20, and the cases cited at footnote 13.
[12] For example, Order F16-10, 2016 BCIPC 12 (CanLII) at para. 8 and Order F24-30, 2024 BCIPC 37 (CanLII) at para. 10.

proceeding with the inquiry. In my opinion, the party resisting the cancellation of the inquiry would be in the best position to show why the inquiry should proceed because they would have the relevant knowledge, evidence and motivation to oppose the cancellation.

[13] Therefore, when considering whether to cancel an inquiry under s. 50(1) of PIPA because of mootness, I conclude the burden is on the party requesting the cancellation (in this case, the CARDON Group) to prove and support its request to cancel the inquiry. However, if the requesting party proves the issues are moot, then the party resisting the cancellation (in this case, the applicant) has the burden to prove the inquiry should still proceed even though the issues to be decided are moot.

DISCUSSION

Doctrine of mootness

[14] The doctrine of mootness is a common law principle that allows courts and tribunals to decline to decide issues that are moot.[13] The doctrine of mootness has been partly described by Justice Sopinka of the Supreme Court of Canada in *Borowski v. Canada (Attorney General)* 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....
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> 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...In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.[14]

[15] I will refer to this court decision as *Borowski*, which has been described as the “leading Canadian case on mootness.”[15] In *Borowski*, Justice Sopinka explained and applied the two-step analysis mentioned above to determine whether an appeal to the Supreme Court of Canada was moot. This two-step analysis looks at whether the issues to be decided at the inquiry are now moot,

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[13] Order F24-30, 2024 BCIPC 37 (CanLII) at para. 16.
[14] *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at p. 353.
[15] Order F16-10, 2016 BCIPC 12 (CanLII) at para. 11.

and if so, whether there are any circumstances that nonetheless warrant proceeding with the inquiry. Previous OIPC decisions have applied this approach for adjudications under both PIPA and FIPPA.[16] I will discuss and apply this two-step approach in my analysis below.

Are the issues to be decided at the inquiry now moot?

[16] The first step is to determine whether the issues to be decided at the inquiry are now moot. An issue is moot where a court or tribunal's decision will not have the effect of resolving a live controversy between the parties but is merely an academic exercise that would have no practical impact on the parties' rights.[17]

[17] The CARDON Group submits the inquiry issues are moot because the applicant already has an unredacted copy of the documents at issue in the inquiry. Therefore, it says there is no longer a live dispute between the parties.

[18] On the other hand, the applicant submits the inquiry issues are not moot because the CARDON Group has not provided her with all the information responsive to her access request. The applicant says the documents at issue in the inquiry are email correspondence that are complaints made against her. The applicant contends the CARDON Group provided her with a copy of those complaints outside the OIPC process but failed to provide other documents that were used to "defame" her and "justify" her termination.[18]

[19] The applicant also says a determination of whether or not ss. 23(4)(c) or 23(4)(d) apply to the information at issue "is critical in determining what rights violation the employer has committed."[19] The applicant argues such a decision would prove one of the following is true:

1. If neither ss. 23(4)(c) or 23(4)(d) apply, then the CARDON Group violated PIPA by refusing to provide the applicant with access to that information;

2. If either ss. 23(4)(c) or 23(4)(d) apply, then the CARDON Group violated PIPA by providing her with the documents at issue; or

3. If both ss. 23(4)(c) or 23(4)(d) apply, then the CARDON Group breached the confidentiality of the individuals who made the complaints about the applicant.

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[16] For example, Order P21-03, 2021 BCIPC 11 (CanLII) at paras. 10-16 and Order F24-30, 2024 BCIPC 37 (CanLII) at paras. 15-17.
[17] *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at p. 353 and Order F24-61, 2024 BCIPC 71 CanLII at para. 34.
[18] Applicant's supplemental submission received by the OIPC on October 8, 2024.
[19] Applicant's supplemental submission received by the OIPC on October 8, 2024.

[20] As I will explain, I find the inquiry issues are now moot. The issues to be decided at the inquiry are whether the CARDON Group is required to refuse the applicant access to the requested information under ss. 23(4)(c) and 23(4)(d) of PIPA. The result of such an inquiry would be for an adjudicator to order the organization, pursuant to s. 52 of PIPA, to do one of the following:

- Give the applicant full or partial access to their personal information; or
- Require the organization to refuse the applicant access to all or part of their personal information.

[21] Therefore, the best available remedy to the applicant at the end of an inquiry into an organization's decision to refuse access under ss. 23(4)(c) and 23(4)(d) of PIPA, as is the case here, is for the adjudicator to order the organization to give the individual access to all their personal information at issue in the inquiry.

[22] The applicant already has an unredacted copy of the documents at issue in the inquiry and I was not provided with any evidence or arguments that the applicant is restricted from using or sharing that information. Therefore, I find ordering the CARDON Group to give the applicant full access to the personal information at issue would be an academic exercise that would have no practical impact on the applicant's right of access under s. 23(1)(a) to her personal information. The applicant has already obtained the best outcome for any access request under PIPA, namely a complete copy of the documents which contain the personal information at issue.

[23] The applicant argues the inquiry is needed to determine whether the CARDON Group provided all the requested information related to her access request and whether the CARDON Group breached PIPA and the privacy rights of the complainants by disclosing the documents at issue in the inquiry to her. However, those issues are not part of the inquiry which, as noted, only deals with the CARDON Group's decision to refuse access under ss. 23(4)(c) and 23(4)(d) of PIPA. Therefore, proceeding with the inquiry would not provide the applicant with a decision about those matters which I note engages entirely different provisions of PIPA than the ones at issue in the inquiry.[20]

[24] Ultimately, for the reasons given, I am satisfied continuing with the inquiry would not resolve any live controversy between the parties and that the tangible and concrete dispute over the CARDON Group's decision to refuse access under ss. 23(4)(c) and 23(4)(d) has disappeared, rendering the inquiry issues moot. My conclusion is consistent with previous OIPC decisions that considered similar

[20] For instance, those matters may engage s. 28 (duty to assist), and whether the applicant can make a complaint on behalf of those individuals under s. 46(2) and likely Part 6 of PIPA regarding the disclosure of personal information by an organization.

circumstances where the access applicant already has an unredacted copy of the documents at issue in the inquiry.[21] I see no reasons or circumstances in the present case that would warrant reaching a different conclusion.

Are there any circumstances that warrant proceeding with the inquiry?

[25] Having found the inquiry issues are moot, it is necessary to move to the second stage of the analysis by deciding if the OIPC should exercise its discretion to conduct the inquiry even though the issues are moot. A court or tribunal may exercise its discretion to address a moot issue if there are circumstances that warrant proceeding with the inquiry.

[26] In *Borowski*, Justice Sopinka said the three basic reasons underlying the mootness doctrine should be considered at this stage of the analysis. Those three underlying reasons 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.

[27] Those three rationales can be explained and summarized as follows:

- The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. However, even if a party no longer has a direct interest in the outcome, there may be collateral consequences justifying a decision which offers the necessary adversarial context.[22]

- The second rationale is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. These circumstances may exist where:

    - A decision will nonetheless have a practical impact on the parties' rights even if it will not determine the dispute that gave rise to the proceedings in the first place.

    - The case is of a "recurring nature but brief duration" so that the issue to be determined will almost always be moot by the time it reaches the court for a decision. The example provided by Justice Sopinka is the validity of a temporary injunction prohibiting certain

[21] For example, Order F16-10, 2016 BCIPC 12 (CanLII) at para. 23; Decision F05-05, 2005 CanLII 28522 (BCIPC) at para. 24; Order F24-30, 2024 BCIPC 37 (CanLII) at para. 22 and Order F24-61, 2024 BCIPC 71 (CanLII) at para. 34.
[22] *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at pp. 358-359.

strike action where the labour strike had been settled by the time of the hearing.

- A case raises an issue of public importance of which a resolution is in the public interest and there is a social cost in leaving the matter undecided.[23]

- The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness of judicial intervention and to demonstrate a measure of awareness of the judiciary's role in our political framework. Deciding issues without there being a dispute affecting the rights of the parties can be seen as intruding into the legislative branch's role and inappropriately departing from the Court's traditional adjudicative role.[24]

[28] Justice Sopinka also said considering the extent to which each of these three rationales is present is not a mechanical process and these principles may not all support the same conclusion such that, "The presence of one or two of the factors may be overborne by the absence of the third, and vice versa."[25]

[29] Previous OIPC decisions have applied those three non-exhaustive factors as part of the mootness analysis, and I will do so as well where relevant to the circumstances of the present case.[26] None of the parties in the present case made any identifiable arguments about this second stage of the analysis. I have, however, considered the entirety of the applicant's submissions about mootness for this stage of the analysis as well.

[30] The applicant believes the outcome of the inquiry will show whether the CARDON Group provided all the requested information related to her access request and whether the CARDON Group violated PIPA or the privacy rights of the individuals who submitted complaints about her by disclosing the documents at issue in the inquiry to her. However, as previously discussed, those issues are not part of the inquiry and engage entirely different PIPA provisions than the ones to be decided at the inquiry. Therefore, if the inquiry were to proceed, I do not find there is a sufficient adversarial context because the applicant is interested in matters that are not at issue in the inquiry.

[31] I am also not satisfied this is a case where it is worthwhile to allocate scarce judicial resources to resolve the now moot issues. None of the exceptions identified in *Borowski* that would justify allocating resources to hear a moot issue

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[23] *Ibid* at pp. 360-362.
[24] *Ibid* at pp. 362-363.
[25] *Ibid* at p. 363.
[26] For example, Order F16-10, 2016 BCIPC 12 (CanLII) and Decision F05-05, 2005 CanLII 28522 (BCIPC).

apply here. For example, I do not see how proceeding with the inquiry would have any practical effect on the rights of either party. If the inquiry were to proceed, the applicant's concerns about the sufficiency of the CARDON Group's access response and the potential breach of privacy would still not be addressed or resolved.

[32] Moreover, I note that some of the applicant's concerns are normally dealt with under the OIPC's complaint process, which includes investigation in order to reach a resolution of the issues.[27] For example, the sufficiency of the CARDON Group's access response would fall under s. 28(b) as a complaint that the organization failed in its duty to respond openly, accurately and completely to their access request. Where an applicant complains that an organization has not performed a duty under PIPA, the OIPC requires the applicant to first submit a written complaint to the organization to allow the organization an opportunity to respond and attempt to resolve the complaint, prior to making a complaint to the OIPC. If the applicant is not satisfied with the CARDON Group's response, then the applicant has the option of seeking a resolution through the OIPC's complaint process. Therefore, I find there is a process for the applicant to address or resolve some of their concerns if the inquiry were not to proceed.

[33] Lastly, I find the inquiry does not raise an issue of public importance which has a social cost if left undecided. The OIPC has issued many decisions about the proper interpretation of ss. 23(4)(c) and 23(4)(d) and will continue to do so. Therefore, it is not necessary to hear this case out of a concern that if the inquiry did not proceed, then the interpretation of ss. 23(4)(c) and 23(4)(d) would never be addressed at an inquiry and result in a lack of guidance or jurisprudence about those provisions.

[34] Ultimately, applying some of the *Borowski* factors to the present case and considering the parties' submissions and evidence, I find there are no circumstances that warrant proceeding with the inquiry which I found deals with issues that are now moot.

[27] The PIPA complaint process is set out under the OIPC's guidance document titled, *Guide to OIPC Processes (PIPA)*.

CONCLUSION

[35] For the reasons discussed above, I have decided that it is appropriate to exercise the discretion available under s. 50(1) of PIPA to cancel the inquiry because the CARDON Group's decision to refuse access to the information in dispute under ss. 23(4)(c) and 23(4)(d) is now moot and there are no factors that warrant proceeding with the inquiry.

October 21, 2024

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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