Order F08-09

MINISTRY OF ATTORNEY GENERAL

David Loukidelis, Information and Privacy Commissioner

May 5, 2008

Quicklaw Cite: [2008] B.C.I.P.C.D. No. 15
Document URL: http://www.oipc.bc.ca/orders/OrderF08-09.pdf

Summary: The Ministry was authorized under s. 19(1)(a) to refuse to disclose information to the applicant, who sought information about his access to courthouses in the province. Disclosure of the withheld information could reasonably be expected to threaten the safety or mental or physical health of others. The Ministry's argument under s. 19(1)(b) amounted to a chilling argument which did not establish a reasonable expectation that disclosure would interfere with public safety. It is not necessary to deal with ss. 15 or 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 19(1)(a) & (b).

Authorities Considered: B.C.: Order 01-01, [2001] B.C.I.P.C.D. No. 1; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order F08-03, [2008] B.C.I.P.C.D. No. 6; Order F05-18, [2005] B.C.I.P.C.D. No. 26; Order F05-02, [2005] B.C.I.P.C.D. No. 2; Order 03-34, [2003] B.C.I.P.C.D. No. 34; Order 00-18, [2000] B.C.I.P.C.D. No. 21; Order 00-11, [2000] B.C.I.P.C.D. No. 13.

1.0 INTRODUCTION

[1] The applicant in this case made the following request to the Ministry of Attorney General ("Ministry") under the *Freedom of Information and Protection of Privacy Act* (FIPPA"):

> Records relating to myself which prompt a physical search of me when I attend court at provincial court houses and any background information about my risk rating.

[2] In response, the Ministry denied access to all of the responsive records under ss. 15, 19 and 22 of FIPPA and the applicant asked for a review of this decision. Mediation through this Office did not resolve the request for review, so an inquiry was held under Part 5 of FIPPA. This Office issued the notice of written inquiry to the applicant, the Ministry and a third party. The applicant and Ministry both made submissions, but the third party did not.

2.0 ISSUES

[3] These are the issues in the notice of inquiry:

1. Is the Ministry authorized by ss. 15 and 19 to refuse access to information?

2. Is the Ministry required by s. 22 to refuse access to information?

[4] Given my decision regarding s. 19(1), I need not consider ss. 15 and 22.

3.0 DISCUSSION

[5] **3.1 Application of Section 19(1)**—The Ministry relies on ss. 19(1)(a) and (b), which read as follows:

> **Disclosure harmful to individual or public safety**
>
> 19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
>
> (a) threaten anyone else's safety or mental or physical health, or
>
> (b) interfere with public safety.

[6] This passage from Order 01-01[1] usefully sets out my views on s. 19(1):

> [17] At p. 5 of its initial submission, CWHC [the public body] sets out the following passage from Order No. 323-1999 (at p. 4) as a statement of the test under s. 19(1) of the Act:
>
> > Section 19(1) requires the head of a public body to be satisfied there is a reasonable expectation that disclosure of the requested information will threaten anyone else's mental or physical health or their safety or interfere with public safety. A reasonable expectation of a threat to health or safety requires something more than mere speculation. By importing into s. 19(1) the concept of 'reasonable expectation', the Legislature signalled its intention that speculation will not suffice to justify withholding of information. When faced with the reasonable

[1] [2001] B.C.I.P.C.D. No. 1.

> expectation criterion – wherever it appears in the Act – the head of a public body must decide if a reasonable person who is unconnected with the matter would conclude that release of the information is more likely than not to result in the harm described in the relevant section of the Act. There must be a rational connection between the requested information and the harm contemplated by the Act, in this case as set out in s. 19(1).

[18] CWHC also refers to the statement, in Ontario Order P-1499, that the "harm must not be fanciful, imaginary or contrived but rather one that is based on reason", as shown by "sufficient evidence" submitted by the public body.

[19] In Order 00-02, I made the following observations, at p. 5, about s. 19(1):

> Although s. 19(1) involves the same standard of proof as other sections of the Act, the importance of protecting third parties from threats to their health or safety means public bodies in the Ministry's position should act with care and deliberation in assessing the application of this section. A public body must provide sufficient evidence to support the conclusion that disclosure of the information can reasonably be expected to cause a threat to one of the interests identified in the section. There must be a rational connection between the disclosure and the threat. See Order No. 323-1999.

[20] I commented on s. 19(1) in Order 00-28, at p. 3, as follows:

> As I have said in previous orders, a public body is entitled to, and should, act with deliberation and care in assessing – based on the evidence available to it – whether a reasonable expectation of harm exists as contemplated by the section. In an inquiry, a public body must provide evidence the clarity and cogency of which is commensurate with a reasonable person's expectation that disclosure of the information could threaten the safety, or mental or physical health, of anyone else. In determining whether the objective test created by s. 19(1)(a) has been met, evidence of speculative harm will not suffice. The threshold of whether disclosure could reasonably be expected to result in the harm identified in s. 19(1)(a) calls for the establishment of a rational connection between the feared harm and disclosure of the specific information in dispute.
>
> It is not necessary to establish certainty of harm or a specific degree of probability of harm. The probability of the harm occurring is relevant to assessing whether there is a reasonable expectation of harm, but mathematical likelihood is not decisive where other contextual factors are at work. Section 19(1)(a), specifically, is aimed at protecting the health and safety of others. This consideration focusses on the reasonableness of an expectation of any threat to mental or physical health, or to safety, and not on mathematically or otherwise articulated probabilities of harm. See Order 00-10.

[7] In Order 00-10,[2] I said this about the standard of proof under FIPPA:

> …the standard of proof for harms-based exceptions is to be found in the wording of the Act—here, whether the disclosure of information could reasonably be expected to cause the specific harm to be protected against. Evidence of speculative harm will not meet the test, but it is not necessary to establish certainty of harm. The quality and cogency of the evidence must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception. The probability of the harm occurring is relevant to assessing the risk of harm, but mathematical likelihood will not necessarily be decisive where other contextual factors are at work. [3]

[8] I have applied here the principles set out above and in other orders on s. 19(1).

[9] **3.2 Threat to Health or Safety**—The Ministry's arguments on s. 19(1)(a) spring from concern about the applicant's past behaviour:

> 29. … Namely, he has a history of being verbally abusive, reacting with an inappropriate level of anger and frustration, and voicing violent and suicidal thoughts. He has brought weapons to courthouses in the past and he has also threatened staff who he has interacted with. He blames his ex-wife and the court system for many of his perceived troubles.
>
> 30. The Ministry cannot predict exactly what actions the Applicant might take in reaction to the release of the records at issue. However, based on his prior behavior it is reasonable to expect that the contents of the records would anger or upset the Applicant. The Ministry submits that when the Applicant is angry and/or upset, he reacts by verbally or physically threatening staff and he experiences suicidal and violent thoughts. The applicant has a well-documented history of threatening violence and … [phrase received *in camera*] he is known to have resentment towards those he perceives as having "done him wrong".

[10] The Ministry argues that the kind of language the applicant uses goes beyond unpleasantness and could cause mental distress to the individuals dealing with the applicant. Ministry employees believe that disclosure of records or information that identifies them could lead to them becoming targets of the applicant's "hostility and obsessive behavior", fears which the Ministry submits are reasonable. The Ministry also believes it is reasonable to make a connection between release of the records and an escalation of the applicant's "negative behaviors", which would be a threat to the safety of courthouse staff, judges and the public. The Ministry says the applicant's past behaviour and actions support

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[2] [2000] B.C.I.P.C.D. No. 11.
[3] At pp. 9-10.

its concerns and experienced staff believe the applicant is not just troublesome or unpleasant, but dangerous.[4]

[11] The Ministry says the applicant's ex-wife was granted a restraining order against him, ordering him to stay away from her and their two children. The applicant has a criminal history, the Ministry continued, including charges for assault, possession of a restricted weapon, uttering threats, uttering threats to cause death or bodily harm and breach of probation. The Ministry says the applicant also had his firearms certificate revoked after he was convicted of uttering threats against his ex-wife and was prohibited from possessing a weapon as a condition of his bail.[5] The Ministry has also provided details of staff concerns about the applicant's "angry and physically aggressive" behaviour.[6] The Ministry further describes a number of interactions between the applicant and court services staff which have, among other things, involved the applicant:

- Losing control of his emotions and becoming very angry or upset;
- Verbally threatening staff and using abusive language;
- Making suicidal comments;
- Attempting to bring weapons into the courthouse; and
- Encouraging the sheriffs to use their weapons on the applicant.[7]

[12] The Ministry says the applicant has "an emotional, disproportionate, and often abusive response to interactions with the members of the court that do not 'go his way'" and that he fixates on events. For example, despite a restraining order, the Ministry says, the applicant still tries to make contact with his ex-wife and children and he believes the court system condones, and is complicit in, "child abuse" by his ex-wife. The Ministry says the applicant is "a known person to the RCMP" because of his past criminal charges and complaints to the RCMP about his behaviour. In the professional opinion of a Ministry employee who has "a great deal of experience dealing with difficult people", there is a risk of the applicant reacting violently or abusively towards those he perceives as "against him". The Ministry believes that disclosure of the disputed records relating to his interactions with court services staff might inflame the applicant or lead him to harass staff further, which would threaten the staff's health or safety.[8]

[13] The Ministry also provided me with a copy of the "Notice of Revocation of Firearms Licence", a 12-page document which describes in detail the firearms officer's reasons for revoking the applicant's firearms certificate, together with copies of the applicant's notice of appeal of the revocation. It has also provided

[4] Paras. 31-35, initial submission.
[5] Paras. 7-10, affidavit.
[6] Paras. 11-15, affidavit.
[7] Para. 10, affidavit.
[8] Paras. 16-26, affidavit.

me with a copy of the restraining order against the applicant.[9] The Ministry told me that it had disclosed copies of these three records to the applicant.[10]

[14] The applicant argues that the Ministry's reasons for denying him access to the records are "simply absurd". He says he has only one "misdemeanor charge or conviction", that it is over 13 years old and had nothing to do with violence. He does not see how disclosure of the records would have any of the effects the Ministry claims. He believes he is capable of handling any information about himself "even if it does include false allegations or unsupported assertions". He believes he knows all the other individuals involved and so it should not cause any concern if he receives the records.[11]

[15] The applicant rejects the Ministry's evidence, asserting that it is "full of misleading and incorrect information as well as lies" and that he is not physically violent or threatening. Rather, the applicant says, it is Ministry court staff who are physically abusive to him, by pushing him around in the court building. He disputes the contents of the decision revoking his firearms certificate and, among other things, says his ex-wife has made death threats against him. He expresses frustration at being searched whenever he goes to a courthouse and at the behaviour of probation officers who, he perceives, attempt to control him.[12]

[16] Much of the Ministry's argument and evidence on s. 19(1)(a) has properly been submitted *in camera*. This means I am constrained in terms of how much I can reveal of the Ministry's case. I am also not able to discuss my reasoning in this case as fully as I ordinarily would. Having carefully considered the parties' submissions, I find that the Ministry has established a connection between disclosure of the information and the possible harms it argues could flow from that disclosure. This is clearly a case where the possible effects go well beyond the inconvenience, upset or unpleasantness of dealing with a difficult or unreasonable person, distinguishing this case from Order 01-15[13] and establishing a threat to mental health through mental distress. I also find that the evidence establishes a reasonable expectation that disclosure could threaten the physical health or safety of others. For these reasons, I find that s. 19(1)(a) authorizes the Ministry to refuse to disclose information.

[17] **3.3 Interference with Public Safety**—The Ministry is concerned about the potential future loss of intelligence information from individuals and its "partner agencies" if the disputed records are disclosed and says s. 19(1)(b) authorizes it to refuse to disclose all of the records. The Ministry's submission on s. 19(1)(b) boils down to a fear that disclosure of the disputed records might have

[9] Appendix 2, Ministry's initial submission.
[10] Para. 11, initial submission.
[11] Initial submission.
[12] Reply submission
[13] [2001] B.C.I.P.C.D. No. 16.

a "chilling effect" on individuals, other employees and other agencies who provide the Ministry with "intelligence" (whatever the Ministry means by this). There will, the Ministry argues, be "an erosion of trust and a decreased willingness to share information" from outside agencies and individuals if the records are disclosed. Because the Ministry's court services program staff have no power to conduct investigations outside the courthouse, the loss of intelligence would limit their ability to "assess emergent situations".[14]

[18] This "chilling effect" argument has become well worn under various FIPPA exceptions but it has had little success.[15] The Ministry provided no evidence to support its position that disclosure could reasonably be expected to result in the harm it asserts. As with many "chilling effect" arguments, the Ministry is engaging in speculation about the supposedly detrimental impact in this case of the public's right of access to information under FIPPA. I reject the Ministry's assertions on this point and find that s. 19(1)(b) does not authorize the Ministry to refuse disclosure.

4.0 CONCLUSION

[19] For reasons given above, under s. 58 of FIPPA, I confirm that the Ministry is authorized to refuse the applicant access to the records it withheld under s. 19(1)(a).

May 5, 2008

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

OIPC File No. F06-29582

[14] Paras. 41-50, initial submission; paras. 26-38, affidavit.
[15] See, for example, Order F08-03, [2008] B.C.I.P.C.D. No. 6; Order F05-18, [2005] B.C.I.P.C.D. No. 26; Order F05-02, [2005] B.C.I.P.C.D. No. 2; Order 03-34, [2003] B.C.I.P.C.D. No. 34; Order 00-18, [2000] B.C.I.P.C.D. No. 21; Order 00-11, [2000] B.C.I.P.C.D. No. 13. Section 21(1)(c)(ii) speaks to the issue in a way other FIPPA provisions do not, explicitly at least.