



OFFICE OF THE  
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COMMISSIONER  
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Order F16-15

## DISTRICT OF WEST VANCOUVER

Ross Alexander  
Adjudicator

March 15, 2016

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**Summary:** An applicant requested that the District of West Vancouver provide all records two arbitrators generated regarding the applicant's harassment complaint against the West Vancouver Police Department. The District responded that the records were not in its custody or under its control within the meaning of ss. 3(1) or 4(1) of FIPPA. The adjudicator determined that the records are not in the custody or under the control of the District within the meaning of s. 3(1) of FIPPA, so they are outside of the scope of FIPPA.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 3(1).

**Authorities Considered: B.C.:** Order F15-26, 2015 BCIPC 28 (CanLII); Order F15-65, 2015 BCIPC 71 (CanLII); Order F11-31, 2011 BCIPC No. 37 (CanLII).

**Cases Considered:** *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25.

## INTRODUCTION

[1] The applicant is a former member of the West Vancouver Police Department (the "Police Department"). This inquiry relates to the applicant's request to the District of West Vancouver (the "District") for all materials generated by two arbitrators who the District retained to address the applicant's harassment complaints against the Police Department.

[2] The District denied access to the requested records under s. 21 (harm to business interests of third party) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). Specifically, it responded to the applicant as follows:

[The arbitrators] were consulted. [They] informed [the District] that any records they may have in their possession are not required to be released under the terms of [FIPPA]. Sections 21(1)(a)(ii), (b) and (c)(iv) of the Act applies regarding protection from disclosure of the requested records.<sup>1</sup>

[3] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the District’s decision to withhold the records.

[4] The District subsequently reconsidered its decision to rely on s. 21, and it advised the applicant that it did not have access to, or possession or control of, the requested records. The issue thus became whether the requested records were in the custody or under the control of the District for the purposes of ss. 3(1) and 4(1) of FIPPA.<sup>2</sup> Mediation did not resolve this matter, and the applicant requested that it proceed to inquiry.

[5] The District provided its inquiry submissions. The applicant advised that he wants to pursue this inquiry and that this matter is extremely important to him, but he is unable to provide submissions. The OIPC decided that this inquiry would proceed, even though the applicant had not provided submissions.

## ISSUES

[6] The Notice of Inquiry states that the issues to be considered are whether the records requested by the applicant are in the custody or under the control of the public body for the purposes of ss. 3(1) and 4(1) of FIPPA.

[7] FIPPA only applies to records in “the custody or under the control of a public body” within the meaning of s. 3(1) of FIPPA. Therefore, I will only consider s. 4(1) if I find that the records are within the scope of FIPPA.

[8] Previous orders have established that the public body has the burden of establishing that the records are excluded from the scope of FIPPA.<sup>3</sup> Therefore, the District has the burden of proof in this case.

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<sup>1</sup> Letter dated August 2, 2013 from the District to the applicant.

<sup>2</sup> This inquiry involves one of eight requests for access to records the applicant made to the District. In response to those other requests, the District disclosed 697 records that were in the custody or under the control of the District.

<sup>3</sup> For example, Order F15-26, 2015 BCIPC 28 (CanLII) at para. 5.

## DISCUSSION

[9] **Background** – The applicant is a former member of the Police Department. While the applicant was still an employee, he filed a harassment complaint against the Police Department. The allegations are wide ranging, and involve several representatives of the Police Department, the West Vancouver Police Board (the “Board”) and the West Vancouver Police Association (the “Union”).<sup>4</sup>

[10] The District notes it is a separate body from the Police Department, and that the applicant’s harassment complaint was not against the District. However, the District says it took on the role of facilitating the investigative/adjudicative process for the applicant’s complaint due the complexity of the matter and the wide scope of the allegations.

[11] The District attempted to have the applicant, Union, Police Department and Board sign a Terms of Reference regarding the appointment of two arbitrators to investigate, mediate and adjudicate the complaint.<sup>5</sup> While the applicant and the Union did not sign the Terms of Reference (or any other agreement regarding the arbitrators’ investigation), the mediation and investigation proceeded<sup>6</sup> largely as envisioned in the Terms of Reference.<sup>7</sup>

[12] The District was not a party to the Terms of Reference, but the District states that it considers itself to be bound by a provision in the Terms of Reference which provides that the parties will not seek production of the arbitrators’ notes.<sup>8</sup>

[13] **Analysis** – Section 3(1) states that FIPPA applies to “all records in the custody or under the control of a public body”, except for certain types of excluded records as set out in s. 3(1). Therefore, by implication, FIPPA does not apply to records that are neither in the “custody” nor “under the control” of a public body.

[14] The District submits that the requested records are neither in its custody, nor under its control.

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<sup>4</sup> The District’s submissions at p. 9.

<sup>5</sup> The District was not a party to the proposed Terms of Reference.

<sup>6</sup> The District paid the arbitrators.

<sup>7</sup> However, there are a few exceptions. The applicant was not bound by the outcome of the investigation or adjudicative process undertaken by the arbitrators, and he and the Union received copies of the arbitrators’ investigation report.

<sup>8</sup> The District’s submissions at p. 9 and 10; Section 6 of the Terms of Reference: Appendix I to the District’s submissions.

[15] FIPPA does not define the terms “custody” or “control”. However, previous orders have addressed the issue of whether records are in the custody or control of a public body. I will address each of these issues in turn.

“*Custody*”

[16] “Custody” within the meaning of s. 3(1) requires physical possession of a record, plus some legal right or obligation to the information in its possession.<sup>9</sup>

[17] In this case, the District does not possess the requested records that are at issue, so I find that they are clearly not in the District’s custody within the meaning of s. 3(1).

“*Control*”

[18] In interpreting s. 3(1) of FIPPA, the word “control” must be given “a broad and liberal meaning in order to create a meaningful right of access to government information.”<sup>10</sup> In general, a public body has “control” if it has some power of direction or command over a document, even if it is only on a “partial” basis, a “transient” basis, or a “*de facto*” basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the FIPPA.

[19] As stated in Order F15-65,<sup>11</sup> previous orders and court cases list a series of indicators of control to be considered. These indicators include whether: the record was created by an officer or employee in the course of carrying out his or her duties; the public body has statutory or contractual control over the records (*i.e.*, is there a contract that allows the public body to inspect, review, possess or copy the records); the public body has possession of the records; the public body has relied on the records; the records are integrated within the public body’s other records; the public body has the authority to regulate the use and disposition of the records; and the content of the record relates to the public body’s mandate and functions. The list of indicators is not exhaustive and all factors will not apply in every case.

[20] The District did not create – and has never possessed – the records. Given this, the most important factor in this case for determining whether the

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<sup>9</sup> For example, see Order F15-65, 2015 BCIPC 71 (CanLII) at paras. 11 to 13.

<sup>10</sup> *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 [National Defence] at para. 48 for this entire paragraph. The Supreme Court of Canada made these statements in interpreting the word “control” under the federal *Access to Information Act*. BC Orders have since used this decision to interpret the meaning of “control” under s. 3 of FIPPA. For example, see Order F15-65, 2015 BCIPC 71 (CanLII) and Order F11-31, 2011 BCIPC No. 37 (CanLII).

<sup>11</sup> Order F15-65, 2015 BCIPC 71 (CanLII) at para. 18.

District has “control” over the requested records is whether it has a contractual or statutory right to compel the records from the arbitrators. The District says it “consulted” with the arbitrators about the applicant’s request, but the arbitrators did not give them to the District. The District submits that it believes it has no legal right to the arbitrators’ notes for any purpose, and that it considers itself bound by the Terms of the Reference which states that the parties will not seek production of the arbitrators’ notes.

[21] There are few materials before me about the District’s legal authority to compel the records from the arbitrators. For example, I do not have a contract, documents or other evidence about the agreement between the District and the arbitrators’ regarding the arbitrators’ work.<sup>12</sup> Further, I do not have a copy of the collective agreement that governed the applicant’s employment, and I was not referred to any statutory authority that might impact the District’s rights or powers with respect to the records created by the arbitrators. However, for the reasons that follow, I have nonetheless concluded on a balance of probabilities that the District does not have the right to compel the requested records from the arbitrators.

[22] In my view, the fact that a public body retained and paid for services would ordinarily indicate that it has control over the resulting work product (and notes), absent direct evidence to the contrary. However, in my view, this is not necessarily the case for arbitrators appointed to conduct an independent investigation, mediation and arbitration process.<sup>13</sup>

[23] In this case, the applicant’s complaint was a highly contentious one in a labour relations sphere involving multiple represented parties. The District is undeniably connected to two of the parties (*i.e.* the Board and Police Department), and the evidence clearly establishes that the District made a concerted effort to establish an independent and impartial resolution process. This effort is expressly reflected in its proposed Terms of Reference.<sup>14</sup> In my view, it is unlikely that the District would have undermined this independence by retaining control over the arbitrators’ work, given that doing so may have raised questions regarding the arbitrators’ impartiality and the integrity of the process.<sup>15</sup>

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<sup>12</sup> I do possess the Terms of Reference, although neither the District nor the arbitrators are listed as parties to this non-ratified agreement.

<sup>13</sup> For clarity, I am not suggesting that an independent external investigator’s notes are not ordinarily within the control of the public body that retains or appoints the investigator. See Order 04-19, 2004 CanLII 45529 (BC IPC) in which it was determined that an independent investigator’s notes arising from an independent, external investigation were within the control of the public body.

<sup>14</sup> For example, s. 4 of the Terms of Reference states that the arbitrators will “ensure that interviews are conducted in a fair and impartial manner and that pressure or influence from others do not in any way compromise the integrity of the process, and the investigation will respect the rules of procedural fairness and justice...”.

<sup>15</sup> I note that the applicant, the District and the other parties were entitled to a copy of the arbitrators’ finalized report.

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[24] In summary, based on the District's evidence that it believes it has no legal right to the arbitrators' notes for any purpose, which is consistent with the surrounding circumstances and evidence, I find that the records requested by the applicant are not under the control of the District.

[25] Since the records requested by the applicant are neither in the "custody" nor "under the control" of the District within the meaning of s. 3(1), I find that records are outside of the scope of FIPPA.

### **CONCLUSION**

[26] For the above reasons, pursuant to s. 58 of FIPPA, I confirm the District's decision to refuse the applicant access to the requested records because they are not in the custody or under the control of the District under s. 3(1). Therefore, the records are outside of the scope of FIPPA.

March 15, 2016

### **ORIGINAL SIGNED BY**

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Ross Alexander, Adjudicator

OIPC File No.: F13-54536