

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20150106
Registry: Vancouver

In the Matter of:

The Freedom of Information and Protection of Privacy Act,
R.S.B.C. 1996, c. 165 (the "Act")

And in the Matter of:

An Adjudication Under Section 62 of the Act,

Requested by Jane Doe

Reasons for Decision of the Honourable Mr. Justice Fitch

Counsel for the Commissioner:

Catherine J. Boies Parker

On her own behalf:

Jane Doe

Written Submissions received:
(on behalf of the Commissioner)

October 24, 2014

Written Submissions received:
(on behalf of the Applicant)

September 29, 2014

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A. Introduction

[1] Jane Doe (the "Applicant") has applied under s. 62 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*], for a review of a decision made by the Office of the Information and Privacy Commissioner of British Columbia (OIPC) on January 10, 2014. This decision refused the Applicant's request on January 9, 2014, for disclosure of certain information in the custody and control of the OIPC and used in its handling of a privacy complaint made by the Applicant.

[2] I have been designated as an adjudicator under s. 60 of *FIPPA* to rule on the application for review of the January 10, 2014 decision of the OIPC. I advised both parties that the hearing would proceed by way of written submissions. I received written submissions from the Applicant, who is self-represented, and from counsel for the OIPC. This is my decision with respect to this adjudication.

[3] Jane Doe has been assisted in pursuing this matter by her spouse. These reasons nonetheless treat the application for review as being personal to her.

[4] The Applicant requested that her identity not be disclosed in these reasons by anonymizing her identity and that of the other subjects involved, the local bargaining unit of her union and her employer. I have honoured that request throughout the judgment by calling her the Applicant. I use the name Jane Doe in the style of cause to refer to the Applicant.

B. Background

[5] In a complaint dated February 22, 2013, the Applicant caused a complaint to be filed with the OIPC that the bargaining representative for her local bargaining unit improperly collected her personal medical information beyond what was necessary for the purposes of representing her with her employer, contrary to the *Personal Information Protection Act*, S.B.C. 2003, c. 63 [*PIPA*]. The complaint also alleged that her local bargaining unit improperly disclosed this information to its Regional Office and her employer, and that the information was shared between numerous

people via email and texts. The Applicant denies giving consent to her local bargaining unit to obtain or disclose her personal medical information.

[6] In response to the February 22, 2013 complaint, the OIPC opened an investigative file. On August 12, 2013, Tiell Raffard, the OIPC Investigator (the "Investigator") assigned to the file under s. 43 of *PIPA*, issued a decision letter. The Investigator found that the local bargaining unit was authorized to act as it did. Its collection of information was found to be reasonable in the circumstances, given that it was representing the Applicant with her employer. The local bargaining unit's disclosure of this information to its Regional Office to receive labour and legal assistance regarding the Applicant's representation was consistent with *PIPA*, and the Investigator found that the Applicant's consent was implied in the circumstances. Finally, the Investigator found that the disclosure of the Applicant's information to her employer was minimal and restricted to information necessary to negotiate her return to work. This disclosure was for a purpose that a reasonable person would consider obvious and so consistent with *PIPA*.

[7] On August 29, 2013, the Applicant wrote to the OIPC asking for a reconsideration of the Investigator's decision on a number of grounds. Chief among these complaints was that the Investigator "arbitrarily narrowed" the complaint. Deputy Registrar/Assistant Commissioner Jay Fedorak (the "Assistant Commissioner") issued a decision on reconsideration on September 19, 2013, upholding the Investigator's decision. The Assistant Commissioner did not find any evidence of bias, errors of fact or law, or any evidence of a violation of the rules of natural justice or the principles of administrative fairness.

[8] On September 23, 2014, the Applicant called the Investigator to inquire whether a particular email between her local bargaining unit and her employer was considered in reaching a decision on the *PIPA* complaint. The Investigator responded in a letter dated October 8, 2013, indicating that she considered the email in question in her investigation.

[9] The Applicant wrote to the Information and Privacy Commissioner for British Columbia, Elizabeth Denham, requesting her personal review of the Investigator's findings and conclusions, alleging a number of errors in the Investigator's investigation. These included that the Investigator overlooked some information until after issuing the August 12, 2013 decision on the *PIPA* complaint.

[10] In a letter dated November 6, 2013, Commissioner Denham stated that there was no procedure in the OIPC for a further reconsideration of the Investigator's decision. She indicated that the OIPC's decision was only reviewable by the court. Commissioner Denham indicated that, from the perspective of the OIPC, the matter was now closed.

[11] Following receipt of Commissioner Denham's letter, the Applicant wrote to the Investigator on January 9, 2014, requesting documents in the custody and control of the OIPC containing her personal information, obtained in the course of its investigation into the *PIPA* complaint. The Applicant also requested the response from her local bargaining unit and any other evidence submitted by this body containing her personal information.

[12] The OIPC treated this request as a request for access to records under ss. 4 and 5 of *FIPPA* and, specifically, for records pertaining to the OIPC's investigation and disposition of the Applicant's privacy complaint under *PIPA*. The Assistant Commissioner denied the Applicant's request in a brief letter issued January 10, 2014. The denial was based on the Assistant Commissioner's determination that the requested records were excluded from the scope of the s. 4 right of access established under *FIPPA*. The Assistant Commissioner explained that these records were excluded under s. 3(1)(c), noting:

The information that you have requested is contained in a record relating to the functions of the OIPC under *FIPPA*. This means that *FIPPA* does not apply to the records you requested and the OIPC does not have to disclose them.

The Assistant Commissioner indicated to the Applicant that she could make a request for review to the Minister responsible for *FIPPA* if she was dissatisfied with this response.

[13] The Applicant then wrote to the Minister of Technology, Innovation, and Citizens' Services on February 1, 2014, to request a review of the OIPC's response to her January 9, 2014 request for information, pursuant to s. 62(1) of *FIPPA*. The Applicant asserted that the OIPC's investigative process lacked transparency and did not meet the principles of natural justice. She also complained she had not been advised of the evidence relied on by the OIPC in reaching its disposition in the *PIPA* privacy complaint.

[14] This matter was then referred to me, as an adjudicator, to review the OIPC's January 10, 2014 decision. The January 10, 2014 decision denying a request for disclosure by the OIPC is the only decision currently under review.

C. The Jurisdiction of an Arbitrator

[15] Before proceeding with adjudication of the OIPC's January 10, 2014 decision regarding the access to information request, I wish to outline my jurisdiction as an adjudicator in this matter.

[16] *FIPPA* provides for an independent review of decisions made under it. These reviews are conducted by the OIPC, except in the case of decisions made by the Information and Privacy Commissioner as head of a public body. For these decisions, *FIPPA* provides that an independent review may be conducted by a judge of the Supreme Court, acting as an adjudicator and having been designated as such under s. 60 of *FIPPA*. Section 62(1) of *FIPPA* outlines the role of an adjudicator:

62(1) A person who makes a request to the commissioner as head of a public body for access to a record or for correction of personal information may ask an adjudicator to review any decision, act, or failure to act of the commissioner as head of a public body that relates to the request, including any matter that could be the subject of a complaint under section 42(2)(a) to (d).

[17] My role in this adjudication is confined to reviewing the OIPC's January 10, 2014 decision, and determining whether this decision was made in accordance with *FIPPA: Mr. and Mrs. Y. v. Information and Privacy Commissioner, Adjudication Order No. 17* (October 8, 2003) at para. 11 [*Mr. and Mrs. Y.*]; *J. and D.S. v. Information and Privacy Commissioner, Adjudication Order No. 21* (December 5, 2008) at para. 12 [*J. and D.S.*]; *Vancouver Police Department v. Information and Privacy Commissioner, Adjudication Order No. 23* (April 12, 2013) at para. 21 [*Vancouver Police Department*].

[18] The Applicant's submission makes clear that access to the files in the custody and control of the OIPC was the core focus of the January 9, 2014 request. However, her submission expresses broader concerns about the way the OIPC treated her original *PIPA* complaint and the subsequent review procedures. The Applicant provided detailed submissions on the events giving rise to the initial *PIPA* complaint. It is clear from the Applicant's submission that her perception of the events leading up to and following her original *PIPA* complaint has caused her great distress. She complains about the procedure followed by the OIPC in disposing of her complaint, including narrowing the complaint. The Applicant expresses concern that she did not have the opportunity to respond to information provided by her local bargaining unit to the OIPC and that the former may have misrepresented matters to the OIPC in responding to the *PIPA* complaint. The Applicant also raises concerns about a failure of natural justice and the lack of transparency in the OIPC's treatment of the original complaint.

[19] My jurisdiction as an adjudicator appointed under s. 60 of *FIPPA* is not to review the adequacy of the OIPC's investigation into the *PIPA* complaint. Similarly, my role does not extend to reviewing the decisions of the OIPC for procedural fairness or any alleged breach of the requirements of natural justice: *J. and D.S.* at para. 13. I cannot inquire into the Applicant's complaints against her local bargaining unit or its Regional Office. I cannot review any procedures taken by the OIPC with regard to the Applicant's complaint, such as narrowing her complaint, aside from considering the January 9, 2014 access to information request and the

OIPC's response to this request on January 10, 2014. A review of such matters related to the OIPC's handling of the Applicant's *PIPA* complaint would require initiation of a judicial review application. The Applicant takes the position that she requires documents and information in the OIPC's possession to determine whether to commence judicial review proceedings.

D. Issues

[20] I will now turn to the issue before me: adjudication of the Applicant's request for a review of the OIPC's refusal, by way of its decision letter of January 10, 2014, to grant access to information in the custody and control of its office that was requested by the Applicant. The issue is whether the OIPC correctly refused to grant this access. The information requested pertains to the OIPC's investigation of the Applicant's 2013 *PIPA* complaint about her local bargaining unit. Specifically, this adjudication addresses whether the OIPC correctly concluded that the requested records are exempt from the *FIPPA* disclosure requirements by virtue of s. 3(1)(c). These reasons also consider whether s. 3(3) of *FIPPA* gives a right of access to the records the Applicant seeks and whether she is entitled to relief on grounds that the OIPC ought to have exercised its discretion to permit access to the records requested, or given more detailed reasons for its refusal to do so.

E. Positions of the Parties

1. The Applicant's Position

[21] The Applicant seeks access to the information relied on by the OIPC in reaching its decision on the original *PIPA* complaint. She argues that, without such records or information, it is impossible to understand the OIPC's disposal of her initial complaint. In addition, the Applicant argues that access to such information would also enable her to correct any records as necessary.

[22] The Applicant submits that the OIPC erred in its refusal to disclose the requested records on the basis of s. 3(1)(c). She argues that this section means the OIPC is not compelled to disclose information falling within s. 3(1)(c), but does not

represent an absolute bar to the disclosure of this information. In her written submission, the Applicant explained, "We believe the OIPC, if intending to rely on this section, should have identified a reason they would not disclose the requested records." Instead, the Applicant notes that the only reason given by the OIPC was the legislation itself.

[23] The Applicant also submits that s. 3(1)(c) is subject to s. 3(3) of *FIPPA*. She argues that s. 3(3) enables a complainant to review records of his or her personal information that are submitted as part of an OIPC investigation. Access to such information, she argues, is consistent with the principles of natural justice and necessary for the complainant to respond to the information submitted by the organization subject to the privacy complaint. The Applicant points, in particular, to ss. 33, 33.1, and 33.2, arguing that a public body like the OIPC may disclose information where the individual whom the personal information is about has identified it and consented to its release, and where there is a reasonable and direct connection between its release and the purpose for which it has been collected. Where these conditions for disclosure are met, the Applicant says the OIPC should either exercise its discretion in favour of disclosure or should provide an explanation for its decision to not exercise its discretion.

[24] Finally, the Applicant argues that the OIPC erred in not providing more detailed grounds for its decision to not exercise the discretion granted to it in s. 47(2)(b) to release the requested records. Section 47(2)(b) of *FIPPA* grants the OIPC discretion to disclose information in its control that is necessary to establish the grounds for findings and recommendations contained in a report under the Act. The Applicant points specifically to the words "that is necessary" to argue that s. 47(2)(b) imposes what in this case amounts to a duty on the OIPC to release the information requested.

[25] The Applicant argues that the adjudicator has the jurisdiction to review matters related to the OIPC's decision in refusing to release records under *FIPPA*, including the OIPC's exercise of the discretion granted to it under the statute. She

points to s. 62, which provides that an adjudicator may review any act or failure to act by the OIPC, in support of this position. Any act or failure to act includes, she argues, exercises of discretion by the OIPC.

2. The Respondent's (OIPC) Position

[26] The Respondent, the OIPC, asks me to confirm its decision to deny access to the records requested by the Applicant. The OIPC argues that the Commissioner properly denied the Applicant's request to access the records in question through the application of s. 3(1)(c). Records in the custody and control of the OIPC are subject to *FIPPA*, including the right of access provided in s. 4, unless they fall within the exception set out in s. 3(1)(c). The OIPC takes the position that operational records, consisting of case-specific records created by or received by the Commissioner in the course of carrying out her duties, fall within the s. 3(1)(c) exemption and are thus excluded from the scope of *FIPPA*. Such operational records are not subject to a right of access under s. 4 of *FIPPA*.

[27] The OIPC notes that in this case, the Applicant specifically requested documents received and considered by the Investigator in determining her privacy complaint under *PIPA*. According to the OIPC, these files are clearly operational records, which are excluded from the scope of *FIPPA* by s. 3(1)(c).

[28] The OIPC acknowledges the Applicant's submissions that in some circumstances, documents excluded from the scope of *FIPPA* by s. 3(1)(c) may be disclosed by the OIPC. Section 3(1)(c) of *FIPPA* is subject to s. 3(3). However, the OIPC argues that s. 3(3) does not provide that the requested records are subject to a s. 4 right of access. The OIPC argues that the provisions of *FIPPA* applying to records otherwise excluded from *FIPPA* (such as those excluded under s. 3(1)(c)) impose obligations on the OIPC with respect to the protection of its records from disclosure, and with respect to the collection and use of information. The effect of s. 3(3), however, is not to provide any right of access for applicants or any obligation on the OIPC to disclose them. While the OIPC may have the discretion to release records referenced under s. 3(3), the fact that such records are not subject to s. 4

means that an applicant has no right to the record. The OIPC's exercise of this discretion is not reviewable on this adjudication.

[29] Similarly, the OIPC notes that s. 47 grants the Commissioner discretionary authority to disclose information to conduct an investigation, audit or inquiry, or to establish the grounds for findings and recommendations contained in a report, according to the conditions set out in that section. However, the OIPC points to the judgment of Madam Justice Griffin in *Vancouver Police Department* at para. 29, where she commented that the OIPC's exercise of its discretion under s. 47 is not subject to adjudicative review, as it is not a decision about a record that anyone has a right to request under *FIPPA*.

F. Discussion and Findings

1. Did the OIPC err in finding the requested records fall within s. 3(1)(c) of *FIPPA*?

[30] In outlining the statutory scheme of *FIPPA*, I draw from the judgment of Mr. Justice Pearlman in *J. and D.S.* at paras. 14-18 and highlighted by counsel for the OIPC.

[31] Individuals may make a written request for records from a public body under s. 5 of *FIPPA*. Section 4(1) establishes this right of access under the Act, stating:

4(1) A person who makes a request under section 5 has a right of access to any record in the custody or control of a public body, including a record containing personal information about the Applicant.

[32] Schedule 1 of *FIPPA* defines a public body as:

'public body' means

...

(b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2...

[33] Schedule 2 of *FIPPA* lists the OIPC as a 'public body'. Individuals can therefore make a request for records from the OIPC under s. 4(1) of *FIPPA*.

[34] *FIPPA* establishes a broad right of access to information held by a public body. However, this entitlement to information is not an at-large entitlement, but one defined by *FIPPA* itself: *Vancouver Police Department* at para. 17.

[35] Section 3(1) of *FIPPA* outlines various categories of records to which the Act does not apply. In particular, s. 3(1)(c) excludes records of an officer of the Legislature relating to the exercise of that officer's functions. The section provides, in part:

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(c) subject to subsection (3), a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under the Act.

[36] The Information and Privacy Commissioner is an officer of the Legislature as defined in Schedule 1 of *FIPPA*:

'officer of the Legislature' means the Auditor General, the Commissioner appointed under the *Members' Conflict of Interest Act*, the police complaint commissioner appointed under Part 9 of the *Police Act*, the Information and Privacy Commissioner, the Chief Electoral Officer, the merit commissioner appointed under the *Public Service Act*, the Representative for Children and Youth or the Ombudsperson;

[37] The Applicant in this adjudication applies for a review of a decision by the Assistant Commissioner, a delegate of the Information and Privacy Commissioner. The exercise of the Information and Privacy Commissioner's functions under *FIPPA* includes acts carried out by the Commissioner's delegates in the OIPC: *Mr. and Mrs. Y.* at para. 17.

[38] I turn now to whether the OIPC erred in finding that the records requested by the Applicant fall within s. 3(1)(c) of *FIPPA* and, consequently, are excluded from the s. 4 right of access.

[39] The case law recognizes that the OIPC may have two classes of records in its custody or control: administrative records and operational records.

[40] Administrative records are those not relating to the OIPC's functions under *FIPPA* and, as such, are not excluded from the Act by virtue of s. 3(1)(c). An individual has a right to access these records under s. 4 of *FIPPA*: *Mr. and Mrs. Y.* at para. 20; *C.S. v. Information and Privacy Commissioner, Adjudication Order No. 22* (November 12, 2009) at para. 31 [C.S.].

[41] Operational records are those records relating to the Commissioner's powers, duties, and functions under *FIPPA*. These records are, by s. 3(1)(c), excluded from the right of access under s. 4: *J. and D.S.* at para. 21; *C.S.* at para. 32. As explained in *Mr. and Mrs. Y.* at paras. 20 - 23:

[20] "Operational" records, by contrast, are captured by s. 3(1)(c) and are exempt from the legislative scheme as they do relate to the Commissioner's functions under the Act. Accordingly, operational records cannot validly be the subject of a request under s. 4 and need not be disclosed if such a request is made.

...

[22] In *Mr. R. v. Information Privacy Commissioner* (April 22, 1996), Madam Justice Levine as Adjudicator discussed the nature of "operational" records for the purposes of s. 3(1)(c). Levine J. found that any record specific to a case file is an operational record related to the Commissioner's functions under the Act and is therefore excluded from the legislative scheme. Records specific to a case file were held by Levine J. to include (at ¶ 16 - 18):

Case management or tracking sheets and lists, notes and working papers (including draft documents) of the Commissioner or his staff, or any other case specific records received or created by the Commissioner's Office in the course of opening, processing, investigating, mediating, settling, inquiring into, considering, taking action on, or deciding a case.

[23] This description of what constitutes operational records within a case file has been adopted in other reported adjudications under s. 62 of the Act: [citations omitted].

[42] This definition of operational records was offered in the context of the application of s. 3(1)(c) to records relating to an investigation of a privacy complaint made under *FIPPA*. In the present case, the requested records relate to the investigation of a privacy complaint made under *PIPA*. However, I agree with the

OIPC's position that this definition of operational records also applies to records received or created by the OIPC in the course of carrying out investigative duties under *PIPA*.

[43] The records requested by the Applicant from the OIPC's files are properly excluded from the right of access set out in s. 4 of *FIPPA* and not subject to production to the extent that these are "operational" records.

[44] I have not examined the records that are subject to the Applicant's request. Based on the description of the requested records, there can be no doubt that the records are, by their very nature, "operational" records. It is clear to me from the context of the request made by the Applicant to the OIPC that she wishes to see "operational" content from the OIPC's file relating to the handling of her complaint against her local bargaining unit. In her submission, the Applicant also made it clear that the information she is seeking are the records of her local bargaining unit's response to her initial *PIPA* complaint. These records would allow the Applicant to pursue her suspicion that the local bargaining unit may have misled the OIPC.

[45] The Applicant requests case-specific records received or created by the OIPC relating to, among other things, the processing, investigating, and determination of matters specific to her case. The requested records are "operational", as they relate directly to the OIPC's functions under *FIPPA*. They are therefore excluded under s. 3(1)(c) of *FIPPA*. The requested records are not properly the subject of a request for access under s. 4 of *FIPPA*.

2. Does s. 3(3) of *FIPPA* give a right to access to the records?

[46] I turn now to whether s. 3(3) of *FIPPA* creates a right of access to the records requested by the Applicants.

[47] Section 3(3) states:

(3) The following sections apply to officers of the Legislature, their employees and, in relation to their service providers, the employees and

associates of those service providers, as if the officers and their offices were public bodies:

- (a) section 30 (protection of personal information);
- (b) section 30.1 (storage and access must be in Canada);
- (c) section 30.2 (obligation to report foreign demand for disclosure);
- (d) section 30.3 (whistle-blower protection);
- (e) section 30.4 (unauthorized disclosure prohibited);
- (e.1) section 30.5 (notification of unauthorized disclosure);
- (f) section 33 (disclosure of personal information);
- (g) section 33.1 (disclosure inside or outside Canada);
- (h) section 33.2 (disclosure inside Canada only);
- (i) section 74.1 (privacy protection offences).

[48] The Applicant highlights the provisions listed in s. 3(3) to argue that the OIPC should have granted access to the requested records. In particular, she relies on ss. 33, 33.1, and 33.2. Section 33 permits a public body, such as the OIPC, to disclose personal information in its custody and control under the limited circumstances defined in ss. 33.1 and 33.2.

[49] The sections listed in s. 3(3) are contained in or related to Part 3 of *FIPPA*. Part 3 of the Act is entitled "Protection of Privacy". In contrast, s. 4, which establishes a right of access to information held by public bodies, is located in Part 2 of the Act, entitled "Freedom of Information". The Part 3 sections enumerated in s. 3(3) oblige public bodies, including the OIPC, to protect personal information contained in records in their custody and control. It further limits these bodies' discretion to collect, use, or voluntarily disclose this personal information.

[50] I agree with the parties that s. 3(1)(c) is subject to s. 3(3). I disagree, however, with the Applicant's argument that the effect of s. 3(3) of *FIPPA* is to establish a right of access to operational records falling into s. 3(1)(c).

[51] Section 3(3) applies to records otherwise excluded from *FIPPA*. The effect of s. 3(3) is not to create an independent right of access for records excluded from the s. 4 right of access pursuant to s. 3(1)(c), namely operational records. Rather, in

making s. 3(1)(c) subject to s. 3(3), the Legislature opted to further the privacy protection purpose of *FIPPA* by ensuring that records containing personal information that are otherwise excluded from the Act are subject to protection from disclosure. Section 3(3) establishes a limit on the ability of a public body, including the OIPC, to collect, use, or voluntarily disclose operational records in its possession and control.

[52] In sum, I agree with the OIPC's position on this issue. Section 3(3) of *FIPPA* does not provide any right of access to the records sought by the Applicant. Similarly, the section does not impose any obligation for disclosure of these records on the OIPC.

3. Did the OIPC err in failing to exercise its discretion to grant access to the records?

[53] The Applicant argues that even if s. 3(3) does not grant a right of access, the OIPC erred, first, in failing to exercise its discretion under the provisions enumerated in s. 3(3) and under s. 47(2)(b) to grant access to the requested records and, second, in not providing reasons for failing to exercise its discretion in a particular way.

[54] Some of the provisions enumerated in s. 3(3) as applicable to records otherwise excluded by s. 3(1)(c) contemplate a discretion in the public body, here the OIPC, to voluntarily disclose them. These records are not, however, subject to the s. 4 right of access. This means the Applicant has no right to the requested records, regardless of whether the OIPC has the discretion to disclose them. As Griffin J. explained in *Vancouver Police Department*:

[21] ... The point which appears to be missed by the VPD is that given that the record is excluded under s. 3(1)(c) of *FIPPA*, the VPD has no right to access the record, regardless of whether or not the OIPC has the discretion to produce it.

[22] Since there is no right of access to the document in question, the decision by the Commissioner not to produce the document does not give rise to any error subject to an adjudicator's review under *FIPPA*.

[55] The OIPC clearly understood that it had the discretion to grant access to the requested records. In declining to grant access to the requested records, the OIPC declined to exercise this discretion in the Applicant's favour. The question is whether the OIPC was obliged to give reasons for failing to exercise its discretion in a particular way. In my respectful view, s. 3(3) does not oblige the OIPC to provide reasons for declining to exercise its discretion to grant access to the requested records. As the OIPC is under no legal obligation to provide reasons, this section does not give rise to a legal error subject to adjudicative review.

[56] Since the Applicant also made submissions regarding s. 47(2)(b), I will comment briefly on that section of *FIPPA*. Section 47(2)(b) states:

47. (2) The commissioner may disclose, or may authorize anyone acting on behalf of or under the direction of the commissioner to disclose, information that is necessary to

...

(b) establish the grounds for findings and recommendations contained in a report under this Act.

[57] The Applicant argues that the OIPC erred in not providing reasons for declining to exercise the discretion granted to it in s. 47(2)(b) to release the requested records.

[58] As in the case of s. 3(1)(c), the language of s. 47(2)(b) does not oblige the OIPC to exercise its discretion in a particular way or to provide reasons for declining to exercise its discretion to grant access to the requested records. The rationale behind s. 47, discussed by Griffin J. in *Vancouver Police Department* at paras. 27-28, illustrates why the OIPC is under no obligation to provide such reasons to the Applicant. To ensure the effectiveness of the OIPC's operational functions, the Legislature protected the confidentiality of these functions through s. 3(1)(c) and prohibited the disclosure of any of these records, under s. 47(1), subject only to limited exceptions. As Griffin J. explained:

[29] When in the judgment of the OIPC it is necessary to disclose information to conduct an investigation, audit or inquiry, or to establish the grounds for findings and recommendations contained in a report, then it may

disclose such information pursuant to s. 47(2). However, such a decision to disclose or not disclose the otherwise excluded information is not subject to adjudicative review by an adjudicator, as it is not a decision about a record that anyone has a right to request under the *Act*.

[59] In sum, the Legislature has seen fit to grant the OIPC discretionary authority to permit access to its records, including operational records, in limited circumstances, through ss. 3(3) and 47(2). This discretionary authority imposes no duty on the OIPC to disclose these records, nor does it impose on this body an obligation to provide reasons for declining to exercise its discretion to do so.

G. Conclusion

[60] The records sought by the Applicant in her January 9, 2014 letter to the OIPC are case-specific records related to the processing, investigation, and determination of her *PIPA* complaint against her local bargaining unit. The OIPC was correct in its determination that the records at issue are operational records, and thus excluded from the s. 4 right of access pursuant to s. 3(1)(c) of *FIPPA*. *FIPPA* provides no right of access to the Applicant to operational records in the possession and control of the OIPC.

[61] The OIPC clearly understood that it has the discretion under *FIPPA* to release the requested records; however, it declined to do so in this case. While *FIPPA* grants the OIPC discretionary authority to disclose operational records in limited circumstances, the *Act* imposes no duty or obligation on the OIPC to do so. Similarly, the *Act* imposes no obligations on the OIPC to give reasons for failing to exercise its discretion in a particular way. In the absence of such an obligation, there is no legal error that falls within my adjudicative review power.

[62] For these reasons, the decision of the OIPC's delegate, the Assistant Commissioner, to deny the Applicant access to the records sought is confirmed.

A handwritten signature in black ink, appearing to read "J. Fitch". The signature is written in a cursive style with a large initial "J" and a distinct "F".

FITCH J.