

Date: 20250618
Place: Vancouver

In the Matter of:

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

And in the Matter of:

An Adjudication Under Section 62 of the *Act*

Requested by Derek Pyne on November 3, 2024

Reasons for Decision

of the

Honourable Chief Justice Skolrood

Counsel for the Office of the Information
and Privacy Commissioner for BC:

K.R. Phipps

The Requesting Party:

Derek Pyne

Written Submissions of the Office of the
Information and Privacy Commissioner for
BC:

February 21, 2025

Written Submissions of Derek Pyne:

March 6, 2025

Introduction

[1] The applicant, Derek Pyne, is a former member of the faculty of Thompson Rivers University (“TRU”), a post-secondary institution located in Kamloops, BC.

[2] It is apparent from the record that Mr. Pyne had a fractious relationship with TRU, both during and after his employment. The current matter arises out of a workplace harassment complaint brought by another TRU faculty member against Mr. Pyne (the “Complaint”). TRU retained the services of an independent lawyer (the “Lawyer”) to conduct an investigation into the Complaint.

[3] Mr. Pyne submitted an access to information request to TRU for documents exchanged between TRU and the Lawyer in connection with the investigation of the Complaint.

[4] TRU disclosed certain documents to Mr. Pyne but withheld approximately 137 pages pursuant to ss. 14 (solicitor client privilege), 19 (threat to safety or health) and 22(1) (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [Acf].

[5] Mr. Pyne applied to the Office of the Information and Privacy Commissioner of BC (“OIPC”) for a review of TRU’s decision.

[6] On September 18, 2024, an OIPC adjudicator issued Order F24-81 confirming that TRU was authorized to withhold information under s. 14 and required to withhold information under s. 22. In light of those findings, the adjudicator found it unnecessary to consider s. 19: *Re Thompson Rivers University*, 2024 BCIPC 93, [2024] B.C.P.C.D. No. 93.

[7] Upon receipt of the adjudicator’s decision, Mr. Pyne submitted an access to information request to the OIPC dated October 6, 2024, seeking disclosure of:

... records of exchanges between OIPC and TRU (or its lawyers) regarding OIPC file F23-92053/Order F24-81 between August 1, 2024 and September 18, 2024.

[8] It is this request that gives rise to the current application.

The OIPC Decision

[9] On October 9, 2024, the OIPC responded by letter to Mr. Pyne denying his request (the “Denial Decision”), citing s. 3(3)(f) of the *Act*, which states:

Application

3 (3) This *Act* does not apply to the following:

...

- (f) a record that is created by or for, or is in the custody or under the control of, an officer of the Legislature and that relates to the exercise of functions under an Act...

[10] The OIPC stated its denial in these terms:

The records that you requested were created by or for the Commissioner and relate to the Commissioner’s functions under FIPPA. As operational records they fall within s. 3(3)(f) of FIPPA. As a result, FIPPA does not apply to these records and the OIPC is not required to disclose them to you.

In addition, the Commissioner would not have the legal discretion to disclose such records of the formal FOI request process. This is because s. 47 of FIPPA prevents the Commissioner or delegates from disclosing any information collected out of the duties, powers and functions under FIPPA, except in limited circumstances.

[11] The OIPC then advised Mr. Pyne of his right to request a review of the decision. The OIPC concluded the letter by saying:

Please note that OIPC has been through over 25 separate adjudications concerning the application of FIPPA to operational records. In each of those hearings, a Justice of the Supreme Court of British Columbia, acting as an Adjudicator, has affirmed that operational records are exempt from disclosure...

The Review Application and the OIPC’s Preliminary Objection

[12] On November 3, 2024, Mr. Pyne submitted a request for a review of the Denial Decision pursuant to s. 62 of the *Act* in the prescribed manner (by letter addressed to the Minister of Citizens’ Services). Reviews of this nature are conducted by justices of the Supreme Court of British Columbia, appointed as adjudicators pursuant to s. 60 of the *Act*.

[13] Mr. Pyne submitted that the information he was seeking is necessary to determine whether he has grounds to appeal Order F24-81. I will return to the grounds advanced by Mr. Pyne in support of his request below.

[14] In response, the OIPC submitted an application seeking to have the adjudicator exercise their discretion to decline to proceed with the review on the ground that it is plain and obvious that s. 3(3)(f) applies to the requested records.

[15] Justice Mayer was originally appointed as the adjudicator to hear this matter. However, on March 3, 2025, Justice Mayer was translated to the Court of Appeal, and I have been appointed to replace him.

The Parties' Positions

[16] The OIPC notes that an adjudicator appointed to conduct a s. 62 review has the same powers afforded to the Commissioner conducting a review, pursuant to s. 65 of the *Act*, including the discretion to decide whether or not to hold an inquiry (see s. 56(1) of the *Act*). The OIPC submits that an adjudicator may decline to hold an inquiry where it is “plain and obvious that the records fall under a particular exception or outside the scope of FIPPA”: *Re Law Society of British Columbia*, 2008 CanLII 65714 (BCIPC) at para. 8, [2008] B.C.I.P.C.D. No. 36 [*Re LSBC*].

[17] The OIPC submits further that it is plain and obvious that the records sought by Mr. Pyne are operational records that are excluded from the scope of the *Act*. The OIPC cites the decision of Justice Grauer, then of this Court, sitting as an adjudicator in *Adjudication (B.F.)* (30 August 2018) Adjudication Order No. 27 [*B.F.*] who said:

[27] Operational records have been held to include any record specific to a case file, such as case management or tracking sheets and lists, notes and working papers (including draft documents) of the Commissioner or his/her 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...

[18] As noted above, Mr. Pyne seeks the records in issue in order to assess whether he has grounds to appeal Order F24-81. He submits that the documents sought are not merely operational records but rather are central to his concern that there was improper *ex parte* communication between TRU and the OIPC which effectively denied him a fair hearing.

[19] Of particular concern to Mr. Pyne is the fact that in its initial submission in response to his original access request, TRU took the position that communications between it and the Lawyer were protected by solicitor/client privilege, and therefore were not subject to disclosure by virtue of s. 14 of the Act. In its submission, TRU stated that it declined to produce the privileged materials but instead relied on affidavit evidence and a Table of Privileged Records.

[20] In the adjudicator's reasons issued in support of Order F24-81, however, the adjudicator (at para. 38) indicated that they had reviewed "the communications and agreements between TRU and the Lawyer" which supported the Lawyer's position that they had been hired to provide TRU with legal advice.

[21] According to Mr. Pyne, this apparent incongruity raised the question of whether the adjudicator improperly relied on materials that she in fact did not have access to or whether there was improper communication between TRU and the OIPC. In order to address this concern, Mr. Pyne made an inquiry of the OIPC about whether there had been *ex parte* communications and whether TRU had in fact provided the privileged records to the OIPC. In an email dated October 4, 2024, a representative of the OIPC confirmed that "TRU provided the s. 14 information to the OIPC".

[22] Again, Mr. Pyne's position is that he requires disclosure of communications between TRU and the OIPC in order to assess whether he can challenge Order F24-81 on procedural fairness grounds.

[23] Mr. Pyne also takes issue with the OIPC's reliance on s. 47 of the Act. He submits that the records he seeks fall within the exception set out in s. 47(2) which

permits disclosure of information necessary to conduct an investigation, audit or inquiry under the *Act*.

Analysis

[24] As set out above, pursuant to s. 65(1) of the *Act*, an adjudicator appointed pursuant to s. 60 of the *Act* has the powers of the Commissioner, including the power conferred under s. 56(1) which grants the Commissioner the discretion to determine whether to conduct an inquiry: *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 at para. 39, rev'd on other grounds 2014 BCCA 259.

[25] The OIPC has cited a number of decisions in which a first level adjudicator under s. 65 of the *Act* has declined to conduct an inquiry where it was determined that it was plain and obvious that the records sought were excluded from the *Act*: *Re LSBC* at paras. 8, 12; *Re Elections BC*, 2020 BCIPC 13, [2020] B.C.I.P.C.D. No. 13. However, the OIPC acknowledges that in all other similar cases where a review is sought under s. 62, the request has gone forward to a review by a s. 60 adjudicator.

[26] The OIPC submits that a s. 60 adjudicator should similarly exercise the discretion to decline to proceed with a review in circumstances in which the outcome is plain and obvious. It argues that this is the situation here. It notes that numerous adjudication decisions have been rendered by justices of this Court, sitting as s. 60 adjudicators, in which it has been found that documents of the type sought by Mr. Pyne are operational records exempt from disclosure. These decisions include Justice Grauer's decision in *B.F.*, referred to above at para. 17 of these Reasons, as well as *Adjudication (S.V.)*, (12 April 2024) Adjudication Order No. 31 (Weatherill J.); *Adjudication (R.M.)*, (17 January 2024) Adjudication Order No. 30 (Mayer J.) and numerous others.

[27] I note that past adjudication decisions are not binding on me and each adjudication must be considered and determined on its own unique facts and circumstances. Nonetheless, these prior adjudication decisions are useful in terms of identifying the relevant principles and informing the applicable analysis. Of particular

note is the consistent treatment of “operational records” and the findings that such records are excluded from disclosure pursuant to s. 3(3)(f) of the *Act*.

[28] In my respectful view, there can be no issue that the records requested by Mr. Pyne, comprising all exchanges between TRU and the OIPC in connection with the OIPC’s consideration and determination of Mr. Pyne’s access request leading to Order F24-81, are records that were created by, for, or are in the custody of the OIPC in connection with its investigative and adjudicative functions and are therefore excluded pursuant to s. 3(3)(f). Such records fall within the description provided by Justice Grauer in *B.F.* as case-specific records received or created by the Commissioner’s office in the course of investigating, inquiring into, considering or deciding a case.

[29] I do not understand Mr. Pyne to argue otherwise. Rather, his position is that the records in issue are not merely operational records, but go to the question of whether there were *ex parte* communications between TRU and the OIPC in breach of his procedural fairness rights.

[30] Respectfully, Mr. Pyne’s position and the fact that he wishes disclosure of the records to assess whether he can appeal (or, more properly, judicially review) Order F24-81 does not fundamentally change the character of the records as being operational in nature. Again, using the language of s. 3(3)(f) of the *Act*, the requested records are ones that were created for or are in the custody or control of the Commissioner, and relate to the exercise of his functions under the *Act*.

[31] I would make one final point. While the OIPC has brought this matter forward as a preliminary application seeking the exercise of discretion under s. 56(1) of the *Act* to decline to proceed with an inquiry, there is no meaningful difference between this process and an actual inquiry into Mr. Pyne’s review request. Specifically, both parties have been given the opportunity to make submissions on the central question of whether the records sought by Mr. Pyne are excluded from disclosure pursuant to s. 3(3)(f) which is what would have occurred had the OIPC not brought

its application. Thus, dismissing the application and proceeding with an inquiry would serve no useful purpose and would not lead to a different result.

Conclusion

[32] For the foregoing reasons, the OIPC has established that the records sought by Mr. Pyne are excluded from disclosure pursuant to s. 3(3)(f) of the *Act*. Mr. Pyne's request for a review of the Denial Decision is therefore denied.

"The Honourable Chief Justice Skolrood"