



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F15-24

MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

Michael McEvoy
Deputy Commissioner

June 18, 2015

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Summary: In Order F14-32 it was held that the Ministry was not authorized to sever and withhold portions of responsive records on the basis that those portions were “out of scope of request”. The Ministry sought a reconsideration of Order F14-32 on that issue. FIPPA does not authorize the Ministry to withhold portions of responsive records on the basis that they are outside the scope of the applicant’s request. It is ordered to consider the request as it relates to those portions and disclose them except with respect to information to which exceptions to disclosure set out in Division 2 of Part 2 of FIPPA apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3, 4, 6 and 7.

Authorities Considered: B.C.: Order F14-32, 2014 BCIPC 35 (CanLII); Order F14-27, 2014 BCIPC 30; Order F15-22, BCIPC 24 (CanLII); Order F08-03, 2008 CanLII 13321 (BC IPC); Order F15-23, 2015 BCIPC (CanLII).

INTRODUCTION

[1] The applicant made a request to the Ministry of Children and Family Development (the “Ministry”), under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), for access to records regarding the details and circumstances of her daughter’s death while in care. The daughter became a permanent ward of the Province in 1977 and died in 1980 at the age of seven, while in care. The applicant is receiving counselling and continues to try to deal with grief related to her daughter’s death.

[2] The records in question are from the daughter's child service file. They include medical and health assessment information, as well as information relating to the daughter's care and development in foster care. The records include child care activity forms, which document the daughter's changes in living arrangements, as well as medical records, social worker reports and other assessment information. The records include invoices and billing records relating to foster care expenses.

[3] In Order F14-32,¹ Adjudicator Ross Alexander held that the Ministry was not authorized to withhold portions of records from its response to the applicant's request on the basis that they were "out of scope of request", to use the Ministry's term.² He gave the example of page 000043, which contains a review written by a social worker. Part of the page was disclosed to the applicant, part was withheld under s. 22, and part was withheld as out of scope.³

[4] Adjudicator Alexander concluded that, since the supposedly out of scope portions were found in records that were responsive to the request, the Ministry could not withhold portions on the basis they were out of scope. He noted that s. 4 of FIPPA confers a right of access to records, citing this passage from Order F14-27:

[12] The requirement for a public body to disclose an entire responsive record to an applicant, as opposed to only the responsive information in that record, may result in the public body disclosing more information than if it was only required to disclose responsive "information". This broader disclosure makes it less likely that there will be a misunderstanding about the real weight or meaning of the disclosed information due to it being out of context. It also helps prevent access requests from being interpreted too narrowly. This more fulsome disclosure is consistent with the stated purpose in s. 2 of FIPPA to make public bodies more accountable, as well as the requirement in s. 6 of FIPPA that public bodies must respond to applicants openly, accurately and completely.⁴

¹ Order F14-32, 2014 BCIPC 35.

² Adjudicator Alexander also determined that invoices and billing records for foster care expenses did not respond to the request, as they did not relate to the daughter's cause of death or to care she received. These have the following page numbers: 000059, 000081 to 000084, 000089, 000090, 000095 to 000098, 000164, 000178 to 000194, 000196 to 000209, 000211, 000212, 000218, 000220 to 000222, 000253, and 000271 to 000279. Neither the Ministry nor the applicant has taken issue with Adjudicator Alexander's determination that these records are in their entirety outside the scope of the applicant's request. I therefore do not need to consider them here.

³ The Ministry did not provide a copy without severing, so Adjudicator Alexander could not review whether it was, in fact, out of scope.

⁴ 2014 BCIPC 30 (footnotes have been omitted). Order F14-27 was reconsidered in Order F15-23.

[5] He concluded that the Ministry is required to process the request in relation to portions of the records marked as “out of scope of request” and ordered the Ministry to “give the applicant a decision under FIPPA about whether she is entitled to have access to the information in the records before me that the Ministry has marked ‘out of scope of request’ by October 16, 2014.”⁵

[6] On October 14, 2014, the Ministry asked, through its legal counsel, that Order F14-32 be re-opened, on the basis that the issue of whether out of scope portions of records could be withheld had not been identified in the Notice of Inquiry. The Ministry took the position that the inquiry leading to Order F14-32 could be re-opened to address the issue afresh. This Office later advised the parties that the inquiry would be re-opened.

ISSUE

[7] A Notice of Inquiry was issued on January 6, 2015, stating the issue to be decided as “whether information marked as ‘out of scope of request’ must be processed by MCFD under Part 2 of FIPPA.”

DISCUSSION

[8] This is the second time this issue has arisen recently, as it was recently addressed in Order F15-23.⁶ This Office has also, in the past, issued orders in which the withholding of out of scope, or non-responsive, portions of records was approved. The Ministry cites a number of such orders as examples. Yet, as was pointed out in Order F15-23, none of the cited orders appears to have dealt with the issue in any depth as an issue arising for determination. The Ministry also acknowledges that, although consistency in decisions is to be sought, these previous orders do not, technically, bind this Office.⁷

[9] Here, the Ministry argues that this is a sensible approach and that, in reliance on these orders, provincial government ministries have in recent years adopted the practice of withholding information that is not responsive to a request. This, the Ministry says, is consistent with the scheme of the Act as a whole, including ss. 6 and 7, and the Commissioner’s authority to control the inquiry process.⁸ I will deal with each of these points in turn.

[10] I apply here the reasoning set out in Order F15-23 and, for reasons given in that decision and below, conclude that the Ministry is not authorized under FIPPA to refuse to disclose portions of records on the basis that they are not responsive to, or are out of scope of, the applicant’s request.

⁵ Order F14-32 at paras. 17 and 52.

⁶ Order F15-23, 2015 BCIPC 25 (CanLII).

⁷ Ministry’s written submissions, para. 4.31-4.34.

⁸ Ministry’s written submissions, paras. 4.04 and 4.05.

Does FIPPA authorize the Ministry to withhold out of scope portions of records?

[11] The applicant observes that the Ministry cited only ss. 5 and 22 of FIPPA, and s. 3 of the *Freedom of Information and Protection of Privacy Regulation*, in withholding information. Citing Order F14-32 and Order F14-27, the applicant also notes that the Ministry has cited no legislative authority.

[12] In support of its arguments, the Ministry relies on the January 26, 2015 affidavit of the Manager of Information Access Operations with the Ministry of Technology, Innovation and Citizens' Services ("Manager"). The evidence of the Manager goes to the impact on the Ministry that he believes would result from a finding that there is no such authority. The issue before me is one of statutory interpretation: properly interpreted, does FIPPA authorize the Ministry to withhold portions of records on the basis that, in the Ministry's view, they do not respond to the applicant's request? Setting aside the (perhaps necessarily) speculative nature of many aspects of the affidavit, this evidence is of little relevance, and thus weight, to my task in interpreting FIPPA. I have, nonetheless, considered this evidence with care in reaching my decision.⁹

[13] The Ministry submits that applicants "will normally request information relating to a specific issue, as opposed to identifying specific records", calling this "unsurprising", since they will generally not have previously had access to such records or know how public bodies manage and create records." Yet records "often" will contain information about multiple issues: they may contain information about the issue identified by the applicant, but also information about other issues.¹⁰

[14] According to the Ministry, allowing public bodies to decide which information is non-responsive and to withhold it, a practice that it notes has been countenanced in previous orders, is practical. This would, the Ministry argues, promote timeliness in responses, citing a 2014 special report by this Office expressing concern about delays in responses. The Ministry says that requiring public bodies to assess whether non-responsive information is protected by disclosure exceptions in Part 2 of FIPPA will lead to "additional time and resources" being expended on review of information. Doing this can "involve significant amounts of time in cases where the issues are complex", the Ministry says.

⁹ As noted in Order F15-23, the Supreme Court of Canada has indicated that, in interpreting the federal *Access to Information Act*, expert evidence about the structure and workings of government could be considered to help understand the machinery of government. To be sure, this can help contextualize the statutory provisions being interpreted. It is something else, though, to seek to use evidence of the apprehended practical impact of a particular interpretation to overcome the language that the Legislature has actually used.

¹⁰ Ministry's written submissions, para. 4.11.

[15] The process may require significant time where the issues are complex, or it may not. The process may also be simple and straightforward, requiring little more time. It is simply not possible to determine with anything approaching confidence what the practical impact might be for any particular public body, or public bodies generally, of any additional review, in any given case or in the aggregate. The same observation applies to the Ministry's argument that public bodies will have to spend more time and resources deciding whether third-party consultations are required, and to conduct those consultations. So, too, is this the case in relation to the Ministry's contention that there is likely to be an increase in the number of requests for review to this Office, including by third parties.

[16] These submissions are supported by the affidavit of the Manager. Based on an unspecified number of conversations he had with other unidentified managers in his own department, he estimates that the issue of non-responsive information arises in "25 to 40% of FOI requests they process."¹¹ According to the Manager, having to assess whether non-responsive information is protected under an access exception "would increase the work required to process FOI requests containing non-responsive information by 20 to 30%".¹² This is because of the need to consult third parties, review the information, make recommendations, and deal with additional requests for review to this Office.

[17] The Manager also estimated that applicants challenge the withholding of non-responsive information in only "one to five percent of the requests the IAO processes."¹³ He deposed that in "almost all cases", applicants are satisfied and do not challenge the decision to withhold that which the public body deems non-responsive.

[18] This evidence does not permit me to read into FIPPA language that is not there. Practical implications may well arise if there is no authority in FIPPA to deem that which is non-responsive and withhold it. My role, however, is to determine what the statutory language in question means, interpreted in light FIPPA's objects, the statutory context and the scheme of FIPPA. Statutory language obviously must not be interpreted in an absurd manner - the Legislature does not set out to enact absurdities. The evidence of practical impact does not, however, mean that the interpretation explained below is absurd.¹⁴

¹¹ Para. 10. This is, to say the least, a broad range. Perhaps not surprisingly, no attempt was made to estimate the volume of information involved within this range.

¹² Para. 12.

¹³ Para. 11. He also deposed that the experience of "other IAO managers" is "substantially similar."

¹⁴ I will note here the Ministry's similar argument, at para. 4.27, that, if an applicant does not accept the withholding of non-responsive information, he or she can always make another access request for that information. The Ministry says this would be efficient and practical, no doubt because of the Manager's, necessarily somewhat rough, estimate that only one to five per cent of

[19] To the contrary, nothing in FIPPA's language explicitly or implicitly confers on the Ministry or other public bodies the authority to determine which portions of records are non-responsive, or out of scope. The Ministry acknowledges that ss. 3 and 4 of FIPPA apply to "records", not "information". But it says that neither provision should be interpreted in what it terms "an 'all or nothing' way."¹⁵ As is noted in Order F15-23, s. 4 expressly addresses the withholding of portions of records, but does so, in s. 4(2), with specific reference to the access exceptions in Part 2. For the reasons given in Order F15-23, I decline to read into FIPPA an implied authority that goes further and enables the Ministry to decide which portions of which records are out of scope or non-responsive and withhold them.

Commissioner's authority to control the inquiry process

[20] The Ministry argued that, since the Commissioner has authority to control her own processes, specifically, the inquiry process, this Office is able to permit the Ministry to do what it has done. The Ministry relies on Order F08-03,¹⁶ which accepted that the Commissioner has the authority to control the inquiry process. According to the Ministry, the Orders that, without discussion, permitted the withholding of non-responsive information represent an attempt

...to control the inquiry process, namely, to ensure that the Office's available resources that are allocated to the inquiry process be devoted to dealing only with information meeting the informational needs of applicants.¹⁷

[21] If any of the adjudicators who decided those Orders thought they were acting in furtherance of the authority to control the inquiry process, or in the interests of resource efficiency for this Office, I have not been able to find any statements to that effect in the Orders.

[22] Order F08-03 does not assist the Ministry's position on the interpretation of FIPPA. In that case, former Commissioner Loukidelis relied on his authority to control the inquiry process in order to consider whether s. 22 of FIPPA applied to third-party personal information that the public body had not yet considered or severed. He did so noting that s. 22 is a mandatory exception aimed at protecting third parties. He received submissions from the public body and the applicant on s. 22 and proceeded to consider its application.

applicants object to the withholding of non-responsive information. As with the other aspects of the Ministry's contention that practicality should drive to its interpretation of FIPPA, I conclude that this would involve my reading language into the statute that is not there.

¹⁵ Ministry's written submissions, para. 4.21.

¹⁶ Order F08-03, 2008 CanLII 13321 (BC IPC).

¹⁷ Ministry's submission, para. 4.26. I pause here to note that the Ministry's assertion that it, or this Office on review, is best placed to decide what are the "informational needs of applicants" is problematic, for reasons discussed in Order F15-23.

[23] If the Commissioner's authority to control the inquiry process influenced the reasoning underlying the earlier Orders on non-responsive information, I have not been able to see that in the decisions themselves. If that were so, I would disagree with those who decided those earlier Orders. The authority to control process is not a proper basis for interpreting FIPPA the Ministry's way any more than are the Ministry's other arguments.

CONCLUSION

[24] For the above reasons, I find that the Ministry is not authorized to refuse access to the portions of records that the Ministry withheld on the basis that they are non-responsive (out of scope). The Ministry is required to respond to the applicant's request as it relates to those portions, withholding only information that it is authorized or required to withhold under Part 2 of FIPPA. Under s. 58(3)(a) of FIPPA, therefore, I require the Ministry to perform its duty to respond to that portion of the applicant's request by July 31, 2015.

June 18, 2015

ORIGINAL SIGNED BY

Michael McEvoy, Deputy Commissioner

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