



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

Order F16-13

OFFICE OF THE POLICE COMPLAINT COMMISSIONER

Ross Alexander

March 15, 2016

CanLII Cite: 2016 BCIPC 15

Quicklaw Cite: [2016] B.C.I.P.C.D. No. 15

Summary: A journalist asked the Office of the Police Complaint Commissioner for records related to a named police psychologist. The OPCC withheld some records on the basis that they are outside of the scope of FIPPA due to s. 182 of the *Police Act* and/or s. 3(1)(c) of FIPPA. It disclosed portions of the remaining records, but it withheld some information in them on the basis that it is exempt from disclosure under FIPPA. At inquiry, the OPCC withdrew its reliance on the exemptions to disclosure under FIPPA, and the adjudicator ordered the OPCC to disclose this withheld information to the applicant. For the records withheld as outside of the scope of FIPPA, the adjudicator confirmed the OPCC's decision that these records are outside of the scope of FIPPA because they fall within the meaning of s. 3(1)(c) of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 3(1)(c), Schedule 1 (definition of "officer of the legislature").

Authorities Considered: B.C.: Order F07-07, 2007 CanLII 10862 (BC IPC); Order 02-30, 2002 CanLII 42463 (BC IPC).

Cases Considered: *British Columbia (Information and Privacy Commissioner) v. British Columbia (Police Complaint Commissioner)*, 2015 BCSC 1538 (CanLII); *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII).

INTRODUCTION

[1] This inquiry relates to an applicant journalist's request to the Office of the Police Complaint Commissioner ("OPCC") for all records related to a named

police psychologist created between September 1, 2011 and October 1, 2012. The psychologist's work during this time period was about a 2007 police-citizen interaction that culminated in the death of the citizen.¹

[2] The OPCC responded to the applicant's request by withholding all responsive records pursuant to s. 182 of the *Police Act*, and by creating and providing the applicant with a record containing the total amount of money the OPCC paid the psychologist. The applicant then requested that the Office of the Information and Privacy Commissioner ("OIPC") review the OPCC's decision to withhold the responsive records.

[3] During the OIPC review process, the OPCC provided the applicant with a revised response. In its new decision, the OPCC withheld some records, which it stated are outside of the scope of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") due to s. 182 of the *Police Act* and s. 3(1)(c) of FIPPA. The OPCC disclosed parts of other records, but it withheld some information in those records under FIPPA on the basis that disclosure could reasonably be expected to harm its negotiating position (s. 17), could reasonably be expected to harm the business interests of a third party (s. 21), or would be an unreasonable invasion of a third party's personal privacy (s. 22).

[4] The applicant requested that this matter proceed to inquiry under Part 5 of FIPPA. However, he did not dispute the OPCC's decision to withhold information under s. 22, so that information is not at issue.

[5] The applicant, the OPCC and the police psychologist's employer provided submissions for the inquiry. However, the OPCC did not provide the OIPC with copies of the records it argues are outside of the scope of FIPPA. Instead, the OPCC provided a one-paragraph description of these records that is contained in an affidavit of the OPCC Deputy Commissioner (the "Inquiry Affidavit").

[6] After reviewing the materials, I ordered the OPCC under s. 44(1) of FIPPA to produce the records to the OIPC for the purposes of the inquiry. The OPCC did not comply with the order, but it provided a second affidavit from the OPCC's Deputy Commissioner that describes the records in more detail (the "Second Affidavit").² Shortly thereafter, the OIPC filed a petition in the Supreme Court of British Columbia to enforce the s. 44(1) production order.

[7] In *British Columbia (Information and Privacy Commissioner) v. British Columbia (Police Complaint Commissioner)*,³ Cullen A.C.J. ultimately remitted

¹ Force Science Institute Ltd. ("FSI") – which is the police psychologist's employer – provided this background detail and context about the psychologist's work for the OPCC.

² This affidavit was submitted wholly *in camera*.

³ *British Columbia (Information and Privacy Commissioner) v. British Columbia (Police Complaint Commissioner)*, 2015 BCSC 1538 (CanLII) [*British Columbia (Police Complaint Commissioner)*].

this matter back to me for “determination of the jurisdictional issue based on the information, descriptions, and explanations advanced by the [Police Complaint Commissioner] in support of his position that the [OIPC] has no jurisdiction to deal with the requested records.”⁴ The jurisdiction issue is whether certain responsive records are within the scope of FIPPA, which arises in the context of the unique provisions of the *Police Act* (notably s. 182). Section 3(1)(c) of FIPPA is also at issue.

ISSUES

[8] The jurisdiction issues are as follows:

- (1) Do the records fall outside the scope of FIPPA pursuant to s. 182 of the *Police Act*?
- (2) Do the records fall outside the scope of FIPPA pursuant to s. 3(1)(c) of FIPPA?

[9] The OPCC is also withholding information that does not relate to jurisdictional issues. The Notice of Inquiry lists ss. 17 and 21 of FIPPA as the issues in dispute for this information. However, the OPCC states that it no longer relies on ss. 17 or 21 for this information, and that it will disclose this information if ordered to do so.⁵ Further, it is not apparent that any of the mandatory exceptions to disclosure apply. Therefore, the OPCC is required to disclose this information to the applicant.

DISCUSSION

[10] **Records** - The remaining records at issue in this inquiry are:

- a) an expert opinion on use of force that the Vancouver Police Department (“VPD”) commissioned from the psychologist, which the VPD provided to the OPCC regarding an OPCC complaint;
- b) a supplemental expert opinion the OPCC commissioned from the psychologist; and
- c) written correspondence.

(collectively, the “records”)

[11] I have not reviewed the remaining records in dispute. However, I find that the *in camera* descriptions of the records contained in the Second Affidavit are sufficiently detailed to enable me to make informed, evidence-based decisions

⁴ *British Columbia (Police Complaint Commissioner)* at para. 133.

⁵ In its submissions, FSI consents to disclosure of the invoice it submitted to the OPCC.

about whether s. 3(1)(c) of FIPPA applies to each of the records that are at issue.⁶

[12] **Analysis** - The issues in this inquiry are whether the records are outside of the scope of FIPPA, due to s. 182 of the *Police Act* or s. 3(1)(c) of FIPPA. I will first address s. 3(1)(c) of FIPPA.

[13] Section 3(1)(c) of FIPPA states:

- (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:

...

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 an Act...

[14] For s. 3(1)(c) of FIPPA to apply to a record, it must be created by or for, or be in the custody or control of, an officer of the Legislature. The record must also relate to the exercise of that Legislative officer's functions under an Act.⁷ Previous orders have determined that this provision applies to a Legislative officer's operational records, but not his or her administrative records.⁸ Operational records include records that are specific to a case file, while administrative records include records such as personnel, competition and office management files.⁹

[15] The Police Complaint Commissioner is clearly an officer of the Legislature. The definition of "officer of the legislature" in Schedule 1 of FIPPA includes "the police complaint commissioner appointed under Part 9 of *the Police Act*".

[16] For s. 3(1)(c) to apply, the records must also either be "created by or for", or be "in the custody or control of", the Police Complaint Commissioner. I find the evidence before me establishes that all of the records at issue are "in the custody" of the Police Complaint Commissioner within the meaning established by previous orders of this Office.¹⁰

⁶ I find that descriptions of the records in the Second Affidavit are consistent with the principles set out in *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII).

⁷ Section 3(1)(c) is also subject to s. 3(3), so s. 3(1)(c) does not apply to the matters listed in s. 3(3) of FIPPA. Section 3(3) of FIPPA clearly does not apply in this inquiry.

⁸ Order F07-07, 2007 CanLII 10862 (BC IPC) at para. 13.

⁹ Order F07-07, 2007 CanLII 10862 (BC IPC) at paras. 14 and 15.

¹⁰ For example, see Order 02-30, 2002 CanLII 42463 (BC IPC) at para. 21 regarding "custody" under s. 3(1)(c). Further, I find that the supplemental expert opinion was "created for" the Police Complaint Commissioner as contemplated by s. 3(1)(c).

[17] Section 3(1)(c) applies to the OPCC's operational records, but not its administrative records. Based on the materials before me, and in particular the *in camera* materials in the Second Affidavit, I find that the records at issue are operational records of the Police Complaint Commissioner because they are part of a specific OPCC case file. These records all relate to the exercise of the Police Complaint Commissioner's functions under the *Police Act*.

[18] Therefore, for the reasons above, I find that the remaining records are outside of the scope of FIPPA pursuant to s. 3(1)(c). Given this, it is not necessary for me to consider whether s. 182 of the *Police Act* applies to also exclude these records.¹¹

CONCLUSION

[19] For the above reasons, pursuant to s. 58 of FIPPA, I order as follows:

1. The OPCC's decision to withhold records because they are outside of the scope of FIPPA pursuant to s. 3(1)(c) of FIPPA is confirmed.
2. The OPCC is required to give applicant access to the information that it refused to disclose to him under s. 17 and s. 21 of FIPPA by April 28, 2016, pursuant to s. 59 of FIPPA. The OPCC must concurrently copy the Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

March 15, 2016

ORIGINAL SIGNED BY

Ross Alexander
Adjudicator

OIPC File No.: F12-51784

¹¹ I note, for completeness, that nothing in *British Columbia (Police Complaint Commissioner)* requires me to decide the s. 182 issue in addition to the s. 3(1)(c) issue here adjudicated.