Order F23-70

(Partial reconsideration of Order F23-07)

INDEPENDENT INVESTIGATIONS OFFICE

D. Hans Hwang
Adjudicator

September 11, 2023

CanLII Cite: 2023 BCIPC 83
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 83

Summary: In a court-approved partial reconsideration of Order F23-07, the adjudicator determined that s. 3(3)(a) applies to the records at issue, thus they fall outside the scope of the *Freedom of Information and Protection of Privacy Act* (FIPPA). Therefore, the applicant has no right to access those records under FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 3(1), 3(3)(a).

INTRODUCTION

[1] This order is a partial reconsideration of Order F23-07.[1] In Order F23-07, I determined, among other things, that the *Freedom of Information and Protection of Privacy Act* (FIPPA) applied to certain records that the Independent Investigations Office (IIO) argued were outside the scope of FIPPA under s. 3(3)(a) (a court record). I found the records at issue were not "court records" under s. 3(3)(a) and, therefore, the IIO was required to give the applicant access to those records unless an exception to access under FIPPA applied.

[2] The IIO disagreed with my decision regarding s. 3(3)(a) and brought an application for judicial review challenging that part of my order. By way of consent order, the IIO and the Office of the Information and Privacy Commissioner (OIPC) agreed that my findings regarding s. 3(3)(a) would be set aside and that issue sent back to the OIPC for reconsideration.[2]

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[1] 2023 BCIPC 08 (CanLII).
[2] The consent order is dated May 5, 2023.

The parties were invited to provide further submissions on whether the records at issue are excluded from the scope of FIPPA under s. 3(3)(a). The OIPC received new submissions from both the IIO and the applicant on that issue.

Preliminary matter – a new issue

[3] What the applicant says in his submission indicates that he believes s. 25 (disclosure in the public interest) should be considered as an issue in this inquiry. He says that if there were errors in law concerning the IIO obtaining a search warrant, then uncovering those errors is in the public interest.[3]

[4] Section 25 was not an original issue in the inquiry that led to Order F23-07, nor was it part of the judicial review proceedings or the consent order. Nothing before me suggests that it would be fair to add this new issue now or that there is any exceptional circumstance that warrants doing so. Therefore, I decline to add or consider s. 25.

ISSUE AND BURDEN OF PROOF

[5] The issue I must decide in this inquiry is whether the IIO is authorized to withhold the records at issue because they fall outside the scope of FIPPA pursuant to s. 3(3)(a).

[6] Section 57 of FIPPA establishes the burden of proof in an inquiry. Although s. 57 is silent about which party bears the burden for inquiries involving s. 3, previous orders have established that the public body bears the burden of proving that the records are excluded from the scope of FIPPA under s. 3.[4] I adopt that approach here.

DISCUSSION

Background

[7] The IIO is a civilian-led agency, which investigates incidents of serious harm and death involving police officers in BC. The IIO was instituted under the *Police Act*[5] and is directed by a Chief Civilian Director (Director). Although the IIO is established within the Ministry of Justice, it is a public body in its own right pursuant to Schedule 2 of FIPPA.[6]

[8] In 2019, the applicant was the officer being investigated by the IIO in relation to a motor vehicle collision during which an individual sustained serious

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[3] Applicant's supplemental response dated May 25, 2023 ("supplemental response") at para 6; and Applicant's supplemental reply dated July 3, 2023 ("supplemental reply") at paras 3-4.
[4] See, for example, Order F16-15, 2016 BCIPC 17 (CanLII); Order F17-30, 2017 BCIPC 32.
[5] RSBC 1996, c 367.
[6] Schedule 2 of FIPPA "Public Bodies".

injury (IIO Investigation). Based on the findings of the IIO Investigation, the Director concluded that there were no grounds to consider any charges against the applicant and determined the matter would not be referred to Crown Counsel for consideration of criminal charges.

[9] In 2020, the applicant requested a copy of all records about the IIO Investigation.

Records at issue

[10] The three records at issue in this partial reconsideration concern the IIO Investigation and consist of the following:

- A search warrant signed by a Judicial Justice of the Provincial Court.[7]
- A sealing order signed by the same Justice which prohibits disclosure of the records relating to the search warrant.[8]
- A package of information to obtain the search warrant and the sealing order (Information to Obtain).[9]

Court record, s. 3(3)(a)

[11] Section 3 is about the scope and application of FIPPA. The parts of s. 3 that are relevant here read as follows:

> 3 (1) Subject to subsections (3) to (5), this Act applies to all records in the custody or under the control of a public body, including court administration records.
>
> […]
>
> (3) This Act does not apply to the following:
> (a) a court record;
> […]

[12] The IIO does not dispute that the records at issue are in its custody or under its control. It says the records at issue are court records within the meaning of s. 3(3)(a), so those records are not subject to FIPPA's application. The applicant disputes the IIO's assertion about s. 3(3)(a).

[13] The question I must determine is whether any of the records at issue are "court records" under s. 3(3)(a). If they are court records, then they fall outside the scope of FIPPA and the applicant has no right of access to them under FIPPA.

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[7] Pages 300 of the records in dispute (duplicate on p 541).
[8] Pages 301 of the records in dispute (duplicate on p 540).
[9] Pages 526-539 of the records in dispute.

[14] FIPPA does not define "court record". Also, aside from Order F23-07, this is the first order of the OIPC that has interpreted what that the term means. There are three previous BC Orders that considered the former language of s. 3(1)(a) which was "a record in a court file".[10] That is not the language of the current version of s. 3(3)(a) that applies in this case,[11] so I find those previous orders are not applicable or persuasive. I am also not aware of any court decision that said what the term "a court record" means in FIPPA, and the parties did not refer me to any. Therefore, in my view, it is necessary to rely on the principles of statutory interpretation to find the meaning of "a court record" under FIPPA.

[15] The Supreme Court of Canada has repeatedly affirmed the modern rule of statutory interpretation as the correct approach to statutory interpretation. It requires me to read the words of a statute "in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[12]

[16] The Supreme Court of Canada also stated that the grammatical and ordinary sense of a provision is not, on its own, determinative and a statutory interpretation analysis is incomplete without consideration of context and purpose, no matter how plain the meaning might appear when the provision is viewed in isolation.[13] In addition, the words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context and the possibility of the context revealing a latent ambiguity is a logical result of the modern approach to statutory interpretation.[14]

[17] The modern rule of statutory interpretation is consistent with s. 8 of the *Interpretation Act,* which states that every statute must be construed as remedial and "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objectives".[15]

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[10] Order 234-1998 *Ministry of Health, Re*, 1998 CanLII 3535 (BC IPC); Order 01-27, *Ministry of Attorney General, Re*, 2001 CanLII 21581 (BC IPC) and Order 01-51, *Ministry of Attorney General*, 2001 CanLII 21605 (BC IPC).
[11] When the IIO made its access decision in May and July 2021 it did not rely on s. 3. However, in August 2022, IIO sought, and received, permission from the OIPC to add s. 3(3)(a) as an issue in the inquiry.
[12] *R. v. Breault*, 2023 SCC 9, at para. 25; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para 21 [*Rizzo*]; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para 26.
[13] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 48; *R. v. Alex*, 2017 SCC 37 at para 31.
[14] *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at para 10.
[15] RSBC 1996, c 238.

[18] Thus, in interpreting the meaning of "a court record", I must consider not only the grammatical and ordinary sense of the term, but also the intention of the legislature and the scheme and object of FIPPA.

Parties' submissions – meaning of "court record" in s. 3(3)(a)

[19] The IIO says that court records "are created as part of the judicial process and subject to the oversight of the courts, with reference to statutory and common law exceptions."[16] The IIO says that the term court record must be interpreted having regard to the supervisory jurisdiction courts have over their records.

[20] The IIO further explains that documents filed in court are presumptively available to the public, but the right of access is not absolute and is controlled by the courts. The IIO says, "the Court must be able to manage and restrict access to its records without copies of those records held by public bodies being subject to the disclosure obligations present in the Act."[17] The IIO submits, "To allow the courts to exercise its supervisory authority, the term "court record" must be interpreted to exclude from the scope of the *Act*, at minimum, those records that are filed with or emanate from the court itself."[18] In support, the IIO cites several cases where the courts have said that a feature of the jurisdiction of all courts is authority over their own records and access to court records is subject to the court's supervisory and protecting power over its own records.[19]

[21] The applicant says the natural meaning of the term "a court record" should be narrowly interpreted. To support this, he relies on Black's Law Dictionary which defines a court record as "the official written documentation of what happened during a trial or a hearing". He also cites Collins' Dictionary which defines a court record as "a record of court proceedings."[20] Therefore, the applicant says the term "a court record" in s. 3(3)(a) does not include file materials held by an investigative public body such as the IIO.

Analysis – meaning of a "court record" in s. 3(3)(a)

[22] The starting point of this analysis is consideration of the grammatical and ordinary meaning of the term "a court record". The ordinary meaning refers to the reader's first impression; that is, the natural meaning that appears when the

[16] IIO's supplemental submission at para. 11.
[17] IIO's supplemental submission at para 17.
[18] IIO's supplemental submission at para. 20.
[19] *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para. 37; *R. v. Moazami, 2020 BCCA 350 at para 4.*
[20] Applicant's supplemental response at para 3.

provision is simply read through.[21]

[23] Having considered the natural meaning that appears when the provision is simply read through, in my view, the grammatical and ordinary meaning of the term "a court record" is a record relating to court proceedings. I am satisfied that the grammatical and ordinary meaning of the term "a court record" shows that this exemption applies to the records that have been created for a trial or a hearing relating to the court proceedings, for instance records filed or sent to the court, orders made or granted by the court and supporting or related documents, transcripts or audio recordings of proceedings, and clerks' notes of proceedings.

[24] In addition, in the context of grammatical and ordinary meaning, there is nothing to suggest that "a court record" is exempt from FIPPA's application only if the record is physically located in the court. This interpretation is assisted by considering the fact that s. 3(1) specifically says that FIPPA applies to all records in the custody or under control of a public body subject to ss. 3(3) to (5). There are no words in s. 3 generally or in 3(3)(a) specifically indicating that if records are in the custody or under the control of a public body, they are *not* court records.

[25] When viewed in context of s. 3 as a whole, the intention of s. 3(3)(a) is clearly to have s. 3(3)(a) apply to court records which are in the custody or under the control of public bodies. I find that the context of s. 3(3)(a) supports that the Legislature did not intend to limit application of s. 3(3)(a) to only records that are physically in the custody of the courts.

[26] Further, the legislative history of s. 3(3)(a) reveals the intention of the Legislature regarding s. 3(3)(a), which I find supports the above interpretation of "a court record". The FIPPA amendment in 2011 replaced "a record in a court file" with "a court record" in s. 3(1)(a). The amendment, however, did not change the remaining phrases of this section. Subsequent FIPPA amendments in 2021 did not change the wording of s. 3(1)(a) other than to reorganize it so each of the records stated in 3(1)(a) was separately listed in ss. 3(3)(a) to (d).

[27] The three versions of s. 3(1) read as follows [emphasis added]:

> Before the amendment in 2011:
>
> 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:
>
> (a) a record in a court file, a record of a judge of the Court of Appeal,

[21] *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, 1993 CanLII 31 (SCC), [1993] 3 S.C.R. 724 at 735.

> Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts;

As amended in 2011:

> 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:
>
> (a) a court record, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts;

As amended in 2021:

> 3 (1) Subject to subsections (3) to (5), this Act applies to all records in the custody or under the control of a public body, including court administration records.
>
> …
>
> (3) This Act does not apply to the following:
>
> (a) a court record;
>
> (b) a record of
>
> (i) a judge of the Court of Appeal, Supreme Court or Provincial Court,
>
> (ii) a master of the Supreme Court, or
>
> (iii) a justice of the peace;
>
> (c) a judicial administration record;
>
> (d) a record relating to support services provided to a judge of a court referred to in paragraph (b)(i);

[28] I have also considered what the explanatory note that accompanied the 2011 amendments of s. 3(1)(a) reveals about legislative intent.[22] The Supreme Court of Canada has found explanatory notes are less authoritative, but they provide some insight into the legislative purpose.[23]

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[22] When the purpose of a bill is to amend an existing Act, the drafters will often insert notes to explain the amendments made by the bill. Among other things, these notes reproduce the original text of the provisions affected by the bill. They are not considered to be part of the bill, and they disappear from subsequent reprints. House of Commons Procedure and Practice, Third Edition, 2017 (Available online: https://www.ourcommons.ca/procedure/procedure-and-practice-3/ch_16_4-e.html).

[23] *R. v. Telus Communications Co.*, 2013 SCC 16 at para 138, citing R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008) at p 272.

[29] In this case, I find that explanatory note helps explain why the term "a record in a court file" was changed to "a court record". The explanatory note reads:[24]

> [*Freedom of Information and Protection of Privacy Act*, section 3] expands the types of records to which the Act does not apply.

[30] It is reasonable to infer that the Legislative Assembly would not have changed the term "a record in a court file" to "a court record" without an intention to affect its meaning. For that reason, I find that this explanatory note suggests that the change was intended to expand the types of records exempted from the application of FIPPA. This intention to expand the types of records s. 3(1)(a) and now s. 3(3)(a) apply to is also evident from the removal of the words that limited where the records must be located, i.e., "in a court file". This provides greater certainty that the term court records are not meant to only apply to court records in the custody or under the control of the courts but also to court records located elsewhere.

[31] Therefore, I am satisfied that the Legislature intended to expand the types of records to which FIPPA does not apply to include court records even when those records were not physically located in the court but were in the hands of a public body. In my view, the applicant's proposed interpretation of s. 3(3)(a) that "a court record" excludes the records held by a public body is not supported by the legislative intent behind the 2011 amendment.

Summary, meaning of s. 3(3)(a)

[32] In summary, I find the term "a court record" in s. 3(3)(a) means a record relating to a court proceeding. Further, the term "a court record" is not limited to records in the custody or under the control of a court because there is no wording or context of s. 3 that indicates s. 3(3)(a) is limited to a court record physically located in the court. I am satisfied that a court record can mean a court record in the custody or under the control of a public body.

Does s. 3(3)(a) apply to the records at issue?

[33] For the reasons that follow, I am satisfied that s. 3(3)(a) applies to the records at issue.

[34] I find that the Judicial Justice of the Provincial Court (Justice) signed the search warrant which authorized an IIO investigator to conduct search and seizure on a property in relation to the IIO Investigation and the search warrant is

[24] IIO's supplemental submission at para 7; Bill 3 – 2011: *Freedom of Information and Protection of Privacy Amendment Act*, 2011, Explanatory Note Section 1.

an order granted pursuant to s. 21 of the *Offence Act.*[25] The same Justice also signed the sealing order in which the Provincial Court granted an order that prohibits disclosure of the records relating to the search warrant. That order was granted pursuant to s. 487.3 of *Criminal Code*.[26] I can also see that a peace officer provided the Information to Obtain to the Justice to consider when deciding whether to grant the search warrant and sealing order.

[35] I am satisfied that all of the records relate to a court proceeding. As a result, I am satisfied that these records are court records within the meaning of s. 3(3)(a).

CONCLUSION

[36] For the reasons above, I conclude each of the records at issue are court records and s. 3(3)(a) applies to those records. Therefore, the applicant has no right to access the records at issue under FIPPA.

September 11, 2023

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: F20-83711

[25] RSBC 1996, c 338.
[26] RSC 1985, c C-46.