Order F25-53

MINISTRY OF ATTORNEY GENERAL

Carol Pakkala
Adjudicator

June 30, 2025

CanLII Cite: 2025 BCIPC 61
Quicklaw Cite: [2025] B.C.I.P.C.D. No. 61

Summary: An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records regarding a criminal matter. The Ministry of Attorney General (Ministry) withheld the records in their entirety under ss. 15(1)(g) (exercise of prosecutorial discretion), 16(1)(b) (harm to intergovernmental relations), and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The Ministry declined to produce the responsive record for the purposes of OIPC review. The adjudicator ordered the Ministry, under s. 44(1)(b), to produce the record to the OIPC so it can decide whether ss. 15(1)(g), 16(1)(b), or 22(1) apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 15(1)(g), 15(3), 15(4), 16(1)(b), 22(1), 44(1)(b) and Schedule 1 (Definition of "exercise of prosecutorial discretion").

INTRODUCTION

[1] An individual applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records regarding a criminal matter. The Ministry of Attorney General (Ministry) denied the applicant access.

[2] The Ministry initially withheld what it identified as the responsive record under ss. 14 (solicitor client privilege),15(1)(g) (exercise of prosecutorial discretion), 16(1)(b) (harm to intergovernmental relations), and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA.[1]

[1] From this point forward, whenever I refer to section numbers, I am referring to sections of FIPPA unless otherwise specified.

[3] In its inquiry submission, the Ministry says it reconsidered its severing of the responsive record and now no longer relies on s. 14.[2] For this reason, s. 14 is no longer an issue.

[4] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. The OIPC's investigation and mediation process did not resolve the matter, and it proceeded to this inquiry. Both parties provided written submissions.

ISSUES AND BURDEN OF PROOF

[5] The issues I must decide in this inquiry are whether:

1. The Ministry is authorized to refuse to disclose the information at issue under ss. 15(1)(g) and 16(1)(b).

2. The Ministry is required to refuse to disclose the information at issue under s. 22(1).

[6] Under s. 57(1), the Ministry has the burden of proving the applicant does not have the right to access the information withheld under ss. 15(1)(g) and 16(1)(b).[3]

[7] Section 57(2) places the burden on the applicant to establish that disclosure of the information at issue under s. 22(1) would not unreasonably invade a third party's personal privacy. However, the Ministry has the initial burden of proving the information at issue qualifies as personal information.[4]

BACKGROUND[5]

[8] The British Columbia Prosecution Service (Prosecution Service) operates within the Criminal Justice Branch which is an independent branch of the Ministry. The Prosecution Service conducts prosecutions of offences pursuant to the *Crown Counsel Act*.[6] Crown counsel are lawyers with the Prosecution Service who are authorized to decide whether and how to prosecute offences, including whether to continue prosecutions.

[9] Police agencies investigate alleged crimes and submit a report to Crown Counsel (Report) if they believe an allegation supports a charge. The Report provides a description of the available evidence that supports the recommended

[2] Ministry's initial submission at para 13.
[3] Schedule 1 "Definition".
[4] Order 03-41, 2003 CanLII 49220 (BCIPC) at paras 9-11.
[5] The background facts are based on the parties' submissions and are not in dispute.
[6] R.S.B.C. 1996, c. 87.

charges. Crown Counsel review Reports and decide whether to proceed with criminal charges.

[10] The separation of roles between the Prosecution Service and police agencies is because the Attorney General, not the police agency, is responsible for charge approval in BC. Crown Counsel approves charges in accordance with the Prosecution Service's charge assessment standard. This standard applies throughout a prosecution to ensure its continuation is warranted in the interests of justice.

[11] Crown Counsel approved criminal charges against the applicant (Charges) and later decided to stay its prosecution of those Charges.

RECORD AND INFORMATION AT ISSUE

[12] The Ministry did not provide the responsive record for review. The Ministry describes the record as a memo to file detailing the reasons for the stay of proceedings against the applicant (the "Crown Memo").

[13] The Ministry says the Crown Memo includes the details that formed part of the police investigation that was disclosed to the Prosecution Service in the Report. The Ministry says the Crown Memo also provides a legal analysis of why the Charges should be stayed.[7]

[14] The Ministry withheld the entire Crown Memo which totals two pages.

Evidentiary basis for this inquiry

[15] The OIPC routinely conducts its independent review of a public body's application of FIPPA by reviewing the records as well as other evidence. The OIPC's usual procedure requires public bodies to provide an unredacted copy of the records in dispute to the OIPC on an *in camera* basis, which means that only the OIPC may see them.[8]

[16] If a public body does not provide the records for review, the Commissioner's delegate considers whether to order production of those records under s. 44(1). Since the Ministry did not provide the records, I will consider next whether to order production of the records for my review in this inquiry in order to fulfill my statutory mandate.

[7] Ministry's initial submission at para 43.
[8] OIPC, *Instructions for Written Inquiries* (February 2021) at pp. 6-7.

Parties' positions

[17] The Ministry's position is that I should decide this inquiry solely on the basis of its affidavit evidence. The Ministry says I should depart from the OIPC's usual inquiry procedure and instead adopt the procedure typically used for s. 14 records.

[18] The Ministry's position is that I do not need to see the Crown Memo because the evidence of its staff member, the Prosecution Service's Information and Privacy Crown Counsel (Information Counsel), is conclusive that the claimed FIPPA exceptions apply.

[19] The Ministry says that disclosing the Crown Memo to the Commissioner for review purposes would be an unnecessary and unjustified abrogation of what it calls "prosecutorial privilege."

[20] The Ministry also says that disclosing the record to the Commissioner would "constitute political interference by the Legislature" because the Commissioner, as an officer of the Legislature, must report to the partisan elected officials in the Legislature who are responsible for setting his budget.[9]

[21] The applicant says the Ministry's arguments appear to suggest that the Commissioner is partisan. The applicant says that while the Commissioner is recommended by the legislative assembly, he is appointed by the Lieutenant Governor for the specific purpose of independently reviewing a public body's decision regarding access to information.[10]

Analysis

[22] The Ministry's position that it should not have to provide the Crown Memo for my review in this inquiry, is two-fold. First, the Ministry says as a matter of principle, it should not have to produce it because to do so would interfere with prosecutorial independence. Second, the Ministry says the OIPC should deal with the prosecutorial discretion exception to disclosure in the same way as solicitor client privilege. For the reasons that follow, I disagree with the Ministry's position on both points.

[23] The OIPC's usual procedure in an inquiry is to review the actual records. The records are the best available evidence for adjudicators to discharge their adjudicative function under FIPPA. This function is to independently determine whether the exceptions to disclosure relied upon by the public body to refuse the applicant access to the information apply. If the information cannot be withheld, then it must be disclosed to the applicant.

[9] Ministry's initial submission at para 84 and reply submission at para 56.
[10] Applicant's submission at para 44.

[24] FIPPA does not create a system of self-regulation where public bodies have the final word on whether they have complied with their obligations under the statute. Rather, FIPPA establishes the Commissioner as an independent officer of the Legislature, tasked with safeguarding the public's right to access to information in the custody and under the control of public bodies like the Ministry.

[25] The Ministry says I should decide this inquiry on the basis of the affidavit of Information Counsel. In that affidavit, she expresses her opinion on the very issues that FIPPA tasks the Commissioner with forming an opinion about and deciding. The Commissioner and his delegates are both entitled and required to independently determine whether the disclosure exceptions apply. They are not, and ought not to be, relegated to merely endorsing the opinion of public bodies.

[26] While the Ministry claims that s. 16(1)(b) and s. 22 apply to the Crown Memo, its arguments about not producing the Crown Memo in this inquiry center on the issue of s. 15(1)(g). What the Ministry argues however, fails to show how my reviewing a record to see if it was properly withheld under FIPPA interferes with prosecutorial independence. Independence from political and judicial interference does not, in my view, require a public body be exempt from the Commissioner's independent review of the records during an inquiry.

[27] I am also confused by the fact that for many years, the Ministry had been providing copies of prosecutorial discretion information to the OIPC for its *in camera* review with no apparent impact on prosecutorial independence.[11] Without explaining what has changed, the Ministry is now refusing to provide this information to the OIPC, even on an *in camera* basis.

[28] Further, I am not persuaded by the Ministry's argument that letting the Commissioner review the records would allow the Legislature to politically interfere in the Crown's exercise of prosecutorial discretion. I am also not persuaded that it would create a reasonable perception that the Commissioner lacks independence when deciding cases. The Ministry provided no evidence to raise this claim out of the realm of speculation.

[29] I fail to see how an *in camera* review of information to determine if it relates to the exercise of prosecutorial discretion can amount to political or judicial interference or abrogate the independence of Crown Counsel.

[30] In conclusion, the Ministry has not convinced me that the Commissioner or a delegate reviewing the records would interfere with prosecutorial independence in any way.

---

[11] See, e.g. Order 00-02, 2000 CanLII 8819 at sections 3.2 and 3.4, a 2000 case which the Attorney General provided the OIPC with the records under review. See also: Order F16-21, 2016 BCIPC 23; Order F15-72, 2015 BCIPC 78; Order F15-55, 2015 BCIPC 58.

Section 14 departure from OIPC procedure

[31] The OIPC has adopted a different approach to s. 14 issues because of the direction it has received from the courts. For those issues, the Commissioner's delegate often decides on the basis of affidavit evidence without seeing the records. The delegate can, and does, however, order production of s. 14 records where necessary to decide the issue. This power is used sparingly because of what the courts have said about solicitor client privilege.

[32] The courts have highlighted the importance of solicitor client privilege to the proper functioning of the legal system as a whole and have noted that FIPPA does not expressly abrogate solicitor client privilege.[12] The courts have made it abundantly clear that solicitor client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary, including by a privacy commissioner.[13]

[33] To the best of my knowledge, the courts have not made similar statements about the exercise of prosecutorial discretion. Despite the Ministry's submissions to the contrary, it has not convinced me that the courts treat prosecutorial discretion the same as solicitor client privilege.

[34] The exercise of prosecutorial discretion protects the independence of Crown Counsel in conducting criminal prosecutions. It allows prosecutors to fulfil their professional obligations without fear of judicial or political interference.[14] There have been *public* inquiries which examined the exercise of prosecutorial discretion, without apparent objection or ill effect on prosecutorial independence.[15]

[35] An inquiry before the OIPC is not a public inquiry. Section 47(1) clarifies that the Commissioner and his delegates must not disclose any information obtained in performing their duties or exercising their powers and functions under FIPPA. I fail to see, and the Ministry has not convinced me, how an *in camera* review of a record could interfere with the independence of Crown counsel.

[36] Previous orders clearly establish that the OIPC does not treat information protected by prosecutorial discretion in the same manner as that which is protected by solicitor client privilege.[16] I agree with and adopt the same reasoning as in those orders.

---

[12] Order F19-14, 2019 BCIPC 16 (CanLII) at para 10; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para 17.
[13] *Canada (Privacy Commissioner)* v. *Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 SCR 574.
[14] *Krieger v. Law Society of Alberta*, 2002 SCC 65; *R v. Anderson,* 2014 SCC 41.
[15] *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337 (Davies), leave to appeal ref'd [2009] S.C.C.A. No. 421 at para 83.
[16] Order F24-52, 2024 BCIPC 61 (CanLII) and Order F25-10, 2025 BCIPC 11 (CanLII).

[37] The Ministry points out that the issue of producing records allegedly protected by the exercise of prosecutorial discretion is currently before the BC Supreme Court.[17] The court may dispose of those matters in a way that curtails the Commissioner's power to review such records. It equally may not. If those matters proceed through appeals, it could take years before this issue is resolved in a way requiring a change in OIPC procedure.

[38] The present dispute about the Ministry's decision to refuse the applicant access to the requested record, and the OIPC's review of that decision, is now several years old. In my view, it is not in the interests of fairness to wait for the court proceedings to run their course before deciding this inquiry.

[39] For all of the above reasons, I find that records related to the exercise of prosecutorial discretion should be treated in the same way as any other non s. 14 records. I turn now to whether to order production of the Crown Memo for this independent review.

Production of records – s. 44

[40] The Ministry did not provide the Crown Memo for my review. I have the power to order production of that record for review under s. 44. That section provides:

> 44 (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:
>
> (a) attend, in person or by electronic means, before the commissioner to answer questions on oath or affirmation, or in any other manner;
>
> (b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.

Parties' positions – s. 44

[41] The Ministry says it is not required to produce the Crown Memo because it "does not merely relate to the exercise of prosecutorial discretion, *it is the exercise of prosecutorial discretion."*[18]

---

[17] Vancouver Registry Files VLC-S-S-244398 and VLC-S-S-248454 between the Minister of Attorney General of British Columbia, Petitioner and: Information and Privacy Commissioner for British Columbia, Respondent.
[18] Ministry's initial submission at para 72.

[42] The Ministry says it should not be required to produce the Crown Memo for the purposes of this inquiry unless there is cogent and credible evidence that the Crown Memo is *not* related to the exercise of prosecutorial discretion.[19]

[43] The Ministry also says the OIPC should adjust its standard procedure and only order the production of the Crown Memo if the applicant provides a credible and cogent argument that s. 15 does not apply.[20]

[44] To support its position, the Ministry provided an affidavit from the Information Counsel, who provides the following evidence:

- For s. 15: she says the Crown Memo relates to Crown Counsel's decision to stay the proceedings and not prosecute the applicant.[21] She also says it is not any of the items that may not be withheld as described in s. 15(3)[22] and 15(4).[23]
- For s. 16(1)(b): she says disclosure of the Crown Memo would indirectly reveal or allow inferences to be drawn about confidential information received from an agency of the government of Canada.[24]
- For s. 22: she says the Crown Memo contains sensitive personal information of third parties that was provided in confidence.[25]

Analysis – s. 44(1)

[45] The Ministry's position is that I should make my decision in this inquiry on the basis of the affidavit evidence it provided from its own staff member, the Information Counsel. I considered whether this affidavit is sufficient for me to decide the inquiry issues. For the reasons that follow, I find it is not.

[46] The affidavit describes the Crown Memo in very general terms. The relevant portions of the affidavit relating to this record are based on information and belief, as Information Counsel was not directly involved in this matter. Further, the affidavit is, in my view, presented as if it is an expert opinion on the application of FIPPA. I do not require an "expert opinion" on the application of FIPPA. I need to see the record to decide what weight, if any, to give her opinion.

[47] In my view, Information Counsel's opinion cannot form the entire basis of this review because that approach would mean that this is not, in fact, an

[19] Ministry's initial submission at paras 72 and 80.
[20] Ministry's initial submission at para 80.
[21] Affidavit #2 of Information Counsel at para 38.
[22] Affidavit #2 of Information Counsel at para 10.
[23] Affidavit #2 of Information Counsel at para 36. Sections 15(3) and 15(4) are exceptions to the exception to disclosure for information related to the exercise of prosecutorial discretion.
[24] Affidavit #2 of Information Counsel at paras 40-43.
[25] Affidavit #2 of Information Counsel at paras 44-50.

independent review but instead a self-regulating decision by the Ministry. My opinion about the application of FIPPA to that record may be different than that of Information Counsel.

[48] The Ministry also submits that in circumstances such as this inquiry, where there is clear evidence that a record is related to prosecutorial discretion, production under s. 44(1) should only be ordered if the applicant provides a credible and cogent argument to the contrary.[26] I disagree. First, I do not agree there is clear evidence. I only have the affiant's opinion. Second, I see nothing in FIPPA or OIPC orders imposing such a burden on an applicant. I also cannot see, and the Ministry does not say, how the applicant might provide evidence and argument to credibly dispute its assertions about a record that only the Ministry can see.

[49] Deciding whether and how ss. 15, 16, and 22 apply requires me to conduct an independent, line-by-line review of the disputed information. I find the affidavit evidence is insufficient to allow me to perform my statutory duty. As a result, I consider it necessary and appropriate to order the Ministry to produce to me the Crown Memo.

CONCLUSION

[50] For the reasons given above, under s. 44(1)(b), I require the Ministry to produce to the OIPC the Crown Memo so I can decide if ss. 15(1)(g), 16(1) and 22(1) apply. Under s. 44(3), the Ministry must produce this record by **July 15, 2025.**

June 30, 2025

ORIGINAL SIGNED BY

Carol Pakala, Adjudicator

OIPC File No.: F23-93986

[26] Ministry's initial submission at paras 72 and 80.