



Order 01-42

OMBUDSMAN OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
October 3, 2001

Quicklaw Cite: [2001] B.C.I.P.C.D. No. 44
Document URL: <http://www.oipcbc.org/orders/Order01-42.pdf>
Office URL: <http://www.oipcbc.org>
ISSN 1198-6182

Summary: The applicant, who had made a complaint to the Ombudsman about UBC, requested access to records in the custody of the Ombudsman related to investigation and disposition of that complaint under the *Ombudsman Act*. The Ombudsman's office properly declined to respond, on the basis that the responsive records are excluded from the Act under s. 3(1)(c) because they are in the custody of the Ombudsman, an officer of the Legislature, and relate to the exercise of the Ombudsman's functions under an enactment, the *Ombudsman Act*.

Key Words: officer of the legislature – a record that is created by or for – relates to the exercise of functions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 3(1)(c).

Authorities Considered: B.C.: [Order 01-43](#), [2001] B.C.I.P.C.D. No. 45.

1.0 INTRODUCTION

[1] This decision arises from access requests by the same applicant as in Order 01-43 [2001] B.C.I.P.C.D. No. 45, Order 01-44, [2001] B.C.I.P.C.D. No.46 and Order 01-45, [2001] B.C.I.P.C.D. No.47, which are released concurrently with this order. In this case, the applicant on March 1, 2001, made an access request, under the *Freedom of Information and Protection of Privacy Act* (“Act”) to the Ombudsman of British Columbia (“Ombudsman”) – who is appointed and acts under the *Ombudsman Act* – in the following terms:

Therefore, based on my rights to personal information, which include information on those people collecting information about me and using it to make decisions that affected me negatively, I am requesting the list of names and positions of all the

officials in the BC Ombudsman's office, in Vancouver and Victoria, who participated in the different discussions of my situation that culminated with the decision to declare my true complaints unsubstantiated. As well I am seeking access to any other information, personal and public, which all these officials who were involved in the deliberations may have on me.

[2] This request followed the Ombudsman's investigation of the applicant's complaint about the University of British Columbia ("UBC"), which the Ombudsman investigated and found to be not substantiated.

[3] In a letter dated March 14, 2001, the Ombudsman's office declined to disclose information to the applicant. Regarding his request for the names of Ombudsman officers who handled his UBC complaint, the letter identified one Ombudsman officer who had been responsible for the file. It also confirmed that the Ombudsman, Howard Kushner, was ultimately responsible for the conduct of the office's business and that he was aware of the letter the Ombudsman officer had sent indicating that the complaint against UBC was not substantiated. Last, the letter expressed the view that the applicant is not "entitled to know who participated in all discussions related to your complaint" within the Ombudsman's office, since that information "relates to the investigative process of the Office and is excluded" from the Act under s. 3(1)(c).

[4] In relation to the second element of the applicant's access request, the Ombudsman's response was as follows:

In regard to the second request, any information pertaining to you is only held in the [Ombudsman's] complaint file related to your complaint, FOI request files and any legal file related to your complaint or your FOI request. Any information in your complaint is excluded from FIPPA [the Act] by virtue of paragraph 3(1)(c). Any legal advice given with respect to your previous FOI request is withheld pursuant to section 14 of the FIPPA. The correspondence in respect to your FOI request (past and present) is already in your possession and it is unnecessary to release anything in this respect.

[5] The applicant requested a review, under s. 53 of the Act, of the Ombudsman's response. Because the matter did not settle in mediation, I held a written inquiry under s. 56 of the Act.

2.0 ISSUE

[6] The only issue here is whether s. 3(1)(c) of the Act applies to records that are responsive to the applicant's access request. As I noted in Order 01-43, previous decisions have established that the public body bears the burden of proof on that issue.

[7] In his initial submission, the applicant made arguments relating to ss. 28 and 32(a) of the Act. Neither of these provisions is mentioned in the applicant's request for review. Neither is relevant to the issues before me. I have not considered them in this inquiry.

3.0 DISCUSSION

[8] **3.1 Nature of Section 3(1)(c)** – Section 3(1)(c) of the Act reads as follows:

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:

...

- (c) 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; ... ,

[9] I do not need to repeat here what I have said in Order 01-43 about the policy underlying s. 3(1)(c) or the components of that section. This case presents a relatively straightforward application of those principles. The only question here is whether the responsive records, which are clearly in the Ombudsman's custody, are excluded from the Act by s. 3(1)(c).

[10] **3.2 Applicant's Allegations of Wrongdoing** – The position taken by the Ombudsman in this inquiry is essentially the same as that taken in Order 01-43. I do not propose to outline those arguments again in this case. Consistent with his approach in Order 01-43 (and Order 01-44), the applicant's initial submission catalogues alleged unfairness, bias and unethical conduct towards him, in this case on the part of the Ombudsman's office. In his reply submission, moreover, the applicant asks me to require the Ombudsman to confirm, or substantiate, a number of things related to the applicant's allegation that the Ombudsman did not conduct an "independent investigation" of his complaint against UBC. In its reply submission, the Ombudsman's office says the applicant's allegations are "spurious and vexatious". The applicant's allegations, including his contention that the Ombudsman has failed to conduct an independent investigation or otherwise to properly exercise the powers under the *Ombudsman Act*, are matters over which I have no authority and I make no comment on their substance or lack thereof in any case.

[11] One thrust of the allegations, however, is the contention that s. 3(1)(c) cannot be used to hide alleged institutional bias against, and "persistent inappropriate treatment" of, the people a public body is supposed to serve. The applicant pleads with me to act with compassion and responsibility "for victims of institutional abuse" and to protect his rights under the Act by denying the Ombudsman's "request for protection under section 3(1)(c) because it can not be used to hide biased institutional behaviour." He says that allowing the Ombudsman to "claim protection under this section" would be "a flagrant disrespect of the purpose for which the FOI act was created."

[12] I have no authority under the Act to do as the applicant asks even if his very serious allegations are true. The Act's application, and therefore my jurisdiction, turn on the simple question of whether, on the evidence before me, the responsive records fall under s. 3(1)(c) or not. If they do fall under that section, the Act does not apply and the

matter ends. The applicant's allegations of wrong-doing against the Ombudsman, UBC or anyone else have no bearing on even that narrow question and it would be an error of law for me to do as he asks even if he had proved his very serious, broad-ranging allegations.

[13] **3.3 Are the Records Excluded?** – The situation here is straightforward. I have already noted that the disputed records are in the custody of the Ombudsman, a fact that is confirmed in the Portfolio Officer's Fact Report and the evidence provided by the Ombudsman's office. The only other issue is whether those records relate to the exercise of the Ombudsman's functions under an enactment. As the following discussion indicates, I have decided, without difficulty, that the records are excluded under s. 3(1)(c) because they are investigative records that relate to the exercise of the Ombudsman's functions under the *Ombudsman Act*.

[14] The Ombudsman's office relies on affidavits sworn by Eileen Diersch and by the Ombudsman, Howard Kushner. Eileen Diersch deposed that, as an Ombudsman officer with investigative authority delegated to her by the Ombudsman under the *Ombudsman Act*, she conducted an investigation of the applicant's complaint about UBC. That complaint was made under the *Ombudsman Act*. She deposed that she "had carriage of his file throughout the Office's involvement with" the applicant. She also deposed that she only gathered information about the applicant in the context of his complaint and her investigation of that complaint in her capacity as an Ombudsman officer. She acknowledged that, in the course of her investigation, she gathered information from a variety of sources as was necessary to evaluate, assess and analyze the applicant's complaint.

[15] In his affidavit, the Ombudsman deposed that Eileen Diersch had investigated the applicant's complaint against UBC and that she had conduct of that matter throughout the involvement of the Ombudsman's office with the applicant. He also deposed that he was aware of the investigation and discussed the case with Eileen Diersch, and others in his office, as he determined was appropriate. He deposed that she had the conduct of the investigation under the authority delegated to her.

[16] The applicant raised some doubt about Eileen Diersch's status as a delegate of the Ombudsman, pointing out that the copy of the delegation instrument was dated after the investigation of the applicant's complaint. I asked the Ombudsman's office to respond to this concern, which it did. As is noted in Order 01-43, [2001] B.C.I.P.C.D. No. 45, the 2000 delegation that had originally been provided to me updated earlier delegations to Eileen Diersch, made in 1992, 1997 and 1999. There is no doubt, in my mind, that Eileen Diersch was, in fact, acting under authority delegated by the Ombudsman in investigating the applicant's complaint against UBC.

[17] There is no doubt the Ombudsman is an "officer of the Legislature" as defined in Schedule 1 to the Act. The material before me in this case readily supports the finding, which I make, that the responsive records in the custody of the Ombudsman are found in the complaint file maintained by the Ombudsman's office in relation to its investigation of the applicant's complaint against UBC under the *Ombudsman Act*. It is also clear the

Ombudsman's office only gathered information about the applicant in the context of, and for the purpose of, investigation of the applicant's complaint under the *Ombudsman Act* by a delegate of the Ombudsman. I have no hesitation in concluding that the responsive records relate to the exercise of the Ombudsman's functions under the *Ombudsman Act*, *i.e.*, they relate to the investigation and disposition of the applicant's complaint against UBC under that Act. Those records are in the custody of the Ombudsman and, because they relate to the exercise of his functions under an enactment (directly or through his delegate, Eileen Diersch), the Act does not apply to the disputed records.

[18] The applicant's request for the names of all Ombudsman staff who worked on his complaint, or who were involved in it, is on its face a request for information and not a request for access to records. To the extent that any records in the custody or under the control of the Ombudsman might disclose that information, however, such records would, for the reasons just given, be excluded from the Act by s. 3(1)(c).

4.0 CONCLUSION

[19] For the reasons given above, I find that the Act does not apply to the disputed records. No order is called for under s. 58 of the Act.

October 3, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia