



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 01-43

UNIVERSITY OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
October 3, 2001

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Summary: The applicant requested access to records related to his complaint to the Ombudsman of British Columbia. The issue of whether records created as a result of any communications between a retired UBC professor and the Ombudsman's office are in UBC's custody or control not considered. The applicant is not entitled to records sent to UBC by the Ombudsman office during its investigation, as such records are excluded from the Act by s. 3(1)(c). The applicant is also not entitled, on that basis, to notes made by UBC employee of telephone conversations with the investigating Ombudsman officer, disclosing what the Ombudsman officer had said about the Ombudsman investigation. UBC is also entitled to withhold internal UBC records that relate to UBC's organization or conduct of its response to Ombudsman inquiries during the investigation.

Key Words: 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 No. 170-1997](#), [1997] B.C.I.P.C.D. No. 31; [Adjudication Order No. 3](#) (June 30, 1997); [Order No. 216-1998](#), [1998] B.C.I.P.C.D. No. 9; [Order No. 247-1998](#), [1998] B.C.I.P.C.D. No. 41; [Order No. 297-1999](#), [1997] B.C.I.P.C.D. No. 10; [Order 01-42](#), [2001] B.C.I.P.C.D. No. 44.

Cases Considered: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

1.0 INTRODUCTION

[1] As is the case in Order 01-42, [2001] B.C.I.P.C.D. No. 44, 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, this decision stems from a complaint the applicant made to

the Ombudsman of British Columbia (“Ombudsman”) about the University of British Columbia (“UBC”). After investigating the complaint under the *Ombudsman Act*, the Ombudsman’s office found that it was not substantiated. The applicant is plainly not happy with that and, in this case, the applicant made two requests to UBC, under the *Freedom of Information and Protection of Privacy Act* (“Act”). They were both dated February 26, 2001 and both sought access to records related to the Ombudsman complaint and investigation.

[2] The first request sought access to all records in a file the applicant believed was kept by a specific UBC professor between December 1999 and March 2000. The second sought the applicant’s personal information in UBC records, in the following terms:

Therefore, I am writing to you to request kindly to collect for me the following personal information related to either the formal evaluation of my academic work or the opinions of these officials about my situation at UBC or statements provided by them to other parties or any information that is personal or public in their files on me for the period of October 1998 to January 1999 as follows:

- a) any document/information exchanged between Dr. ... [A] and Mr. ... [B] and Dr. ... [C]; and between Mr. ... [B] and Dr. ... [C] for this period;
- b) any document/information exchanged between Dr. ... [A], Mr. ... [B] and Dr. ... [C] with the BC Ombudsman for this period.

(I have disguised the identities of the UBC staff named in the applicant’s request in order to protect his privacy, not theirs.)

[3] In its April 5, 2001 response to the first request, UBC denied access on the ground that it did not have custody or control of any records described in the request. This is because the Act only applies, according to s. 3(1), to records in the custody or under the control of a public body. UBC said the UBC professor in question had retired in June of 1999 and that, as a result, any letters he may have exchanged with the Ombudsman’s office between December 1999 and March 2000 “are between these two parties.” UBC said it was not involved in any discussions between the retired professor and the Ombudsman’s office and did not have any of the requested records. Its response went on to say that

... records created during an Ombudsman’s investigation are confidential. UBC would not be able to provide you with any records, as the records you are requesting are excluded from the Act under Section 3(1)(c).

[4] UBC’s April 6, 2001 response to the second request took the position that any records created during an Ombudsman’s investigation are “confidential” and are excluded from the Act by s. 3(1)(c). It denied access to records on this basis, but disclosed 26 pages of other records. It also disclosed two more records to the applicant at the time it made its initial submission in this inquiry.

[5] The applicant requested reviews of both of these decisions in letters dated April 12, 2001 and, because the matters did not settle during mediation, I held a written inquiry under s. 56 of the Act. The Ombudsman was given notice of the inquiry under s. 54(b) of the Act and made submissions.

2.0 ISSUES

[6] The only issue properly before me is whether the records that respond to the applicant's requests are excluded from the Act by s. 3(1)(c). The Notice of Written Inquiry that this Office issued to the parties says that UBC bears the burden of establishing that the applicant has no right of access to the disputed records. No issue was taken with this allocation of the burden of proof. I agree with my predecessor's view, first expressed in Order No. 170-1997, [1997] B.C.I.P.C.D. No. 31, that the public body bears the burden of establishing that s. 3(1)(c) applies.

[7] In his request for review, the applicant disputed UBC's contention that any records that respond to the first request are excluded from the Act because they are not in the custody or under the control of UBC. The Notice of Written Inquiry, however, says that only the s. 3(1)(c) issue will be considered in the inquiry. The applicant nonetheless addressed this issue in his submissions. UBC did so as well, although it clearly takes the position that the issue is not before me.

[8] That issue is, very clearly, not properly before me in this inquiry. If it were before me, however, I would almost certainly find that the records are not covered by the Act. The introductory words of s. 3(1) provide that the Act applies only to records that are "in the custody or under the control" of a public body, in this case UBC. In this case, the applicant levels the serious allegation that UBC's University Counsel was "lying" when he told the applicant, in writing, that any correspondence between the named retired professor and the Ombudsman's office post-dated the professor's retirement and was (as UBC says) purely a private matter. As proof of this supposed misrepresentation, the applicant says the professor was listed in the UBC phone book for 2000, although the professor supposedly retired in 1999. I would not be inclined to place much weight at all on that.

[9] At all events, on the material before me, and on the authority of Order No. 247-1998, [1998] B.C.I.P.C.D. No. 41, I would almost certainly find that any correspondence between the retired professor and the Ombudsman's office would not be in the custody or under the control of UBC for the purposes of s. 3(1). In Order No. 247-1998, the previous Commissioner found that a diary possessed by a retired school principal, which he had created during his work hours before retirement, was a purely private document and was not under the school board's control. Here, any correspondence between the retired professor and the Ombudsman's office would not have been created by the retired professor in the course of his employment duties, since the correspondence would have post-dated his retirement.

[10] For these reasons, if the question were before me, I would very likely find that the records are excluded from the Act. In any case, the records would, for the reasons given

below, be excluded from the Act under s. 3(1)(c), as correspondence to and from the Ombudsman's office.

3.0 DISCUSSION

[11] **3.1 Relevant Aspects of Section 3(1)** – The relevant portions of s. 3(1) read 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;

[12] Because the Ombudsman's submissions refer to how s. 3(1)(c) read before it was amended in 1998, I reproduce the earlier version here:

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 is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

[13] The components of s. 3(1)(c) as it now reads can be summarized as follows:

1. The section only applies where an "officer of the Legislature" is involved. Schedule 1 to the Act defines that term and it includes "the Ombudsman".
2. The record must either:
 - (a) be created *by* or *for* the officer of the Legislature; or
 - (b) be in the *custody* or *control* of the officer of the Legislature.
3. In all cases, the record must relate to the exercise of the officer's functions under an Act (*e.g.*, the Ombudsman's exercise of his functions under the *Ombudsman Act*).

[14] All of the above requirements must be met before the disputed record is excluded from the Act by s. 3(1)(c). They are discussed in more detail below.

[15] **3.2 Parties' Arguments** – It is convenient in this case first to summarize the parties' arguments.

Applicant's Arguments

[16] The applicant's submissions for the most part describe how UBC has allegedly mistreated him, as well as his reasons for arguing that, since the Ombudsman and UBC have allegedly acted in bad faith, I should order full disclosure of all records. It should be said at once that the applicant's allegations of impropriety are not relevant to my disposition of this case and I will say nothing about them. In any event, s. 3(1)(c) either applies to the disputed records or it does not. If it does apply to them, the Act does not apply and that is the end of it. Any supposed wrongdoing by UBC or the Ombudsman cannot change that fact.

[17] I will note here that the applicant pointed out that the delegation instrument submitted in evidence by the Ombudsman's office, by which the Ombudsman delegated to Eileen Diersch the authority to conduct investigations, post-dated the Ombudsman's investigation of the applicant's complaint. I wrote to the Ombudsman's office about this. Counsel to the Ombudsman clarified the matter. I was told that the 2000 delegation that had originally been provided to me updated earlier delegations to Eileen Diersch, made in 1992, 1997 and 1999. I should also note that the applicant sought to make a further submission about the delegation issue and alleged misfeasance by the Ombudsman's office. Those further arguments are not properly before me and the allegations in the further submission are in any case not relevant to the issues before me.

UBC's Arguments

[18] In its initial submission, UBC said, at para. 9, that the records withheld from the applicant are:

... our correspondence either directly to or from the Office of the BC Ombudsman in the conduct of their investigation or our memoranda which record discussions with the BC Ombudsman's office during that investigation.

[19] UBC also made the following arguments in its initial submission:

10. UBC has been advised by the BC Ombudsman of the confidential nature of investigations conducted by their office and of the requirement of such confidentiality mandated by Section 9 of the *Ombudsman Act* and protected under Section 3(1)(c) of the *Freedom of Information and Protection of Privacy Act*.
11. UBC understands that the Office of the BC Ombudsman has made detailed submissions on the application of Section 3(1)(c) to the records at issue in this Inquiry and supports and adopts those submissions. UBC further relies upon Order No. 297-1999, *Inquiry re: Request for Records in the Custody of the Ministry of Forests that had been sent to the Ombudsman [March 3, 1999]* for the proposition that a record created by a public body for the

purposes of an Ombudsman investigation is covered by Section 3(1)(c) of the *Act*. It is submitted that the documents withheld by UBC in this Inquiry clearly meet that criteria and therefore fall outside the scope of the *Act*.

UBC did not deliver a reply submission.

Ombudsman's Office Arguments

[20] In its initial submission, the Ombudsman's office says that its role under the *Ombudsman Act* in investigating, settling and making recommendations with respect to citizens' complaints about government administration is unique. It also stresses the central importance of confidentiality to the Ombudsman's work, noting that s. 9 of the *Ombudsman Act* buttresses this with confidentiality obligations for the Ombudsman and his or her staff. The critical importance of confidentiality to the Ombudsman's work has also, the Ombudsman says, been underscored by the courts. It also points to s. 20 of the *Ombudsman Act*, which (with certain exceptions) makes inadmissible in a proceeding of a judicial nature any evidence given in proceedings before the Ombudsman.

[21] At para. 8 of its initial submission, the Ombudsman's office argues as follows:

The Ombudsman process is interactive. Beginning with first contact that involves providing information about alternate remedies or aspects of the complaint situation through to settlement or report, there is an ongoing dialogue between the Ombudsman and the authorities over which the Ombudsman has jurisdiction. This interactive process is essential to Ombudsman work and parties must be able to develop positions and discuss them candidly with the Ombudsman and his delegates in an effort to resolve complaints. Documents created in the course of this process are essential to the integrity of Ombudsman work.

As such, it is the Ombudsman's position that para. 3(1)(c) of the *Freedom of Information and Protection of Privacy Act*, both as amended and in its previous wording, includes all records that come into existence as part of an investigation or that relate to his work or that of his delegates.

[22] The Ombudsman's office also argues as follows, at para. 14 of its initial submission, regarding my predecessor's decision in Order No. 216-1998, [1998] B.C.I.P.C.D. No. 9:

It is understood that Order 216-1998 maintained that internal memoranda of an authority relating to an Ombudsman investigation were not necessarily excluded from access by virtue of para. 3(1)(c) but it is respectfully submitted that any information within the memoranda which pertains to the Ombudsman's investigation and reveals information provided by and to the Ombudsman ought to be excluded from access and, if appropriate, severed from any record containing such information.

[23] The Ombudsman says this case involves "records related to the work of an Ombudsman Officer" who had the delegated authority to investigate and otherwise deal with complaints to the Ombudsman (para. 4, initial submission). The

Ombudsman's office argues that, in this case, *any* correspondence between UBC and the Ombudsman is excluded from the Act by s. 3(1)(c). This includes, the Ombudsman says, copies of letters from the Ombudsman to UBC that are in the custody or under the control of UBC.

[24] The Ombudsman's office contends, at para. 9 of its initial submission, that "a broad and purposive interpretation must be given to para. 3(1)(c)" because it "is clearly designed to respect both the independence and autonomy of the Ombudsman, and to facilitate his work according to the terms" of the *Ombudsman Act*. Accordingly, the Ombudsman argues, s. 3(1)(c) excludes from the Act "all records that come into existence as part of an investigation or that relate to his work or that of his delegates."

[25] **3.3 Scope of the Section** – Section 3(1)(c) does not turn on the status of an officer of the Legislature or such independence or autonomy as is enjoyed by an officer of the Legislature as a characteristic of office. The section is designed to facilitate the exercise by an officer of the Legislature of her or his functions under an enactment. The provision is, in other words, functional, in the sense that it relates to the exercise of statutory functions. What is the scope of the protection it affords to statutory functions?

[26] The Supreme Court of Canada has said that the words of a statute must be interpreted in their entire context and in their grammatical and ordinary sense, in harmony with the scheme of the Act, the purposes of the Act and the intention of the Legislature. See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 22. Further, s. 12 of the *Interpretation Act* requires me to interpret s. 3(1)(c) as a "remedial" enactment and to give it "such fair, large and liberal construction and interpretation as best insures the attainment of its objects."

[27] I will deal first with the context in which s. 3(1)(c) appears. The purposes of the Act, as expressed in s. 2(1), are to "make public bodies more accountable to the public and to protect personal privacy" by giving the public a right of access to records and by "specifying limited exceptions to the right of access". The Ombudsman is a public body under the Act. The Legislature, therefore, clearly intended certain of the Ombudsman's records to be subject to the Act, in furtherance of the Act's goal of openness and accountability.

[28] A distinction has been drawn between administrative and operational records of an officer of the Legislature, with the former being subject to the Act and the latter being excluded from the Act. This distinction has been accepted in a number of adjudication decisions of judges of the British Columbia Supreme Court, conducted under Division 2, Part 5 of the Act, regarding appeals from decisions on access requests to this office. An example is Adjudication Order No. 3 (June 30, 1997), a decision of Levine J. (as she then was). (A copy of that decision can be found on this office's website.)

[29] The distinction between administrative and operational records was also referred to during debate in the Legislature surrounding enactment of the present version of s. 3(1)(c). During the July 16, 1997 Committee of the Whole debate on that amendment,

which was effected by s. 51 of the *Police Amendment Act 1997*, the then Attorney General told the House that the change was necessary to make s. 3(1)(c) consistent with s. 3(1)(c.1) which was enacted by s. 35 of the *Children's Commission Act*. During the June 5, 1997 debate on s. 35 of the *Children's Commission Act*, the then Attorney General said the following:

Hon U. Dosanjh: If one used words such as “management” and “educational work” and “advocacy work,” and if all of that came under the administrative records, I think that’s disclosable. But all of the records that are created in relation to the exercise of the functions, such as investigations, reviews, and all of the information and data that are collected with respect to the individual files – that is not disclosable. I understand, and I’m led to believe by the legislative counsel sitting next to me, that this is the language that accomplishes that so that privacy is protected.

G. Wilson: Okay, so we can take comfort in the fact that if we want to find out about matters with respect to general administration, function and operation of the commission itself, excluding individual case files and those sorts of things, all of that will be available. The only thing protected here is the specifics of individual cases, and I can understand why you’d want to do that. Clearly there is a need to protect the rights of children and families. If that’s what I’m understanding, then I guess my objections are satisfied.

Hon. U. Dosanjh: That is exactly the case.

[30] Of course, these comments by the Minister responsible also shed light on the meaning of s. 3(1)(c) of the Act, as indicated in the later *Police Amendment Act 1997* debate. The new version of s. 3(1)(c) applies to all officers of the Legislature and the above comments must be taken to extend across the board. What is said in legislative debate is by no means determinative of the meaning of a provision, but it can offer some interpretive guidance.

[31] Turning to previous decisions dealing with s. 3(1)(c), in Order No. 216-1998, [1998] B.C.I.P.C.D. No. 9, my predecessor dealt with a case involving a request to the Law Society of British Columbia for records relating to an Ombudsman investigation. My predecessor concluded without hesitation that letters to and from the Ombudsman’s office were excluded by s. 3(1)(c). The Law Society and the Ombudsman both argued that s. 3(1)(c) also excluded a memorandum to file written by the Law Society’s in-house counsel. Although he acknowledged the force of their arguments, he ultimately concluded that the language of s. 3(1)(c), as it then read, did not exclude such internal records from the Act’s reach.

[32] My predecessor again dealt with the issue of internal public body records in Order No. 297-1999, [1997] B.C.I.P.C.D. No. 10. That case also arose under the old version of s. 3(1)(c). At p. 5, he agreed with the acting Ombudsman’s argument that the previous version of s. 3(1)(c) covered internal public body “records created specifically for the purposes of an Ombudsman investigation”. In passing, he also expressed the view that the language of s. 3(1)(c) as it now reads “includes all

records that come into existence as part of an investigation.” The Ombudsman has made this same argument in this inquiry.

[33] I have already referred to the legislative purpose that underlies s. 3(1)(c), as confirmed during debate in the Legislature on the present version of the section. In that light, and bearing in mind the Supreme Court’s guidance in *Rizzo*, I agree with my predecessor’s view of the amended s. 3(1)(c) as expressed in Order No. 297-1999.

[34] It should also be said, at this point, that I share his doubt that s. 3(1)(c) was intended to catch public body records created in the ordinary course of business, before an Ombudsman investigation began, simply because they have been copied to the Ombudsman in connection with an investigation. Any *copies* of such records that have been sent to the Ombudsman will be excluded under s. 3(1)(c) if they are in the Ombudsman’s custody or control and relate to the exercise of the Ombudsman’s statutory functions, even where those copies are in a file kept by the public body for the Ombudsman’s investigation. To be clear, the reach of s. 3(1)(c) almost certainly does not extend to records that came into existence in the ordinary course of a public body’s activities simply because copies of those records are at some stage sent to the Ombudsman’s office in connection with a complaint. Copies of those routine records kept in a separate public body file for the Ombudsman matter may well be excluded under s. 3(1)(c), but I very much doubt that originals or other copies located in regular public body files are protected.

[35] **3.4 Which Records Are Excluded?** – I will describe the records before discussing whether s. 3(1)(c) applies to them. Thirteen pages are in dispute.

[36] UBC has withheld a three-page October 30, 1998 memorandum from a UBC professor to two UBC employees. That record has already been disclosed to the applicant. UBC apparently withheld the copy because it has some handwritten notes on it that, it appears, pertain to the Ombudsman’s investigation. In my view, only those notes are properly in issue here.

[37] The remaining records include a letter from UBC to the Ombudsman’s office, three letters from the Ombudsman’s office to UBC, an internal UBC memorandum from one UBC employee to two other employees, as well as a copy of that same memorandum with some initials on it. There is also a memorandum to file by an unidentified UBC employee that records the substance of a telephone conversation with Eileen Diersch, the Ombudsman officer who conducted the investigation. Another record is a copy of one of the Ombudsman’s office letters to UBC described above, with some handwritten notes on it.

Correspondence Between UBC and the Ombudsman’s Office

[38] I have no hesitation in concluding that the correspondence between UBC and the Ombudsman’s office is excluded from the Act by s. 3(1)(c). For one thing, originals and copies of this correspondence are located in the Ombudsman’s investigation file.

Because they are in the Ombudsman's custody and relate to the exercise of the Ombudsman's functions under the *Ombudsman Act*, those records are excluded by s. 3(1)(c) (including the copies or originals in UBC's hands). This finding is based on my finding in Order 01-42, released concurrently with this order, and the material before me.

October 30, 1998 Memorandum

[39] I have decided the handwritten notes on the October 30, 1998 UBC memorandum are excluded from the Act by s. 3(1)(c), even though the applicant has been given the memorandum itself. The notes clearly were created in the context of, and for, the Ombudsman's investigation.

Handwritten Notes

[40] I also find that the handwritten notes found at the bottom of the UBC file copy of a letter to UBC from the Ombudsman officer records are excluded by s. 3(1)(c). These notes were made by two different individuals at UBC and they relate to UBC's response to the Ombudsman's investigation.

Memorandum on Investigation's Progress

[41] I am also persuaded that s. 3(1)(c) excludes both copies of an internal UBC memorandum from one UBC employee to two others regarding the Ombudsman's investigation. The memorandum records the author's views about what the investigation Ombudsman officer had said about the investigation.

Employee's Note to File

[42] The same conclusion applies with respect to a UBC employee's memorandum to file regarding a telephone conversation with the Ombudsman officer.

4.0 CONCLUSION

[43] For the reasons given above, I confirm UBC's decision that the disputed records are excluded from the Act by s. 3(1)(c). Accordingly, no order is necessary under s. 58 of the Act.

October 3, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia