

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20141030
Place: Vancouver

In the Matter of:

The Freedom of Information and Protection of Privacy Act,
R.S.B.C. 1996, c. 165 (the "Act")

And in the Matter of:

An Adjudication Under Section 62 of the *Act*,

Requested by J.P. on March 22, 2013

Reasons for Decision of the Honourable Mr. Justice Pearlman

Counsel for the Commissioner: Catherine Boies Parker

On his own behalf: J.P.

Written Submissions Received:
(on behalf of the Commissioner) July 30, 2013

Written Submissions Received:
(on behalf of the Applicant) July 1, 2013,
August 8, 2013
& March 7, 2014

Introduction

[1] J.P. (the "Applicant") has applied pursuant to s. 62 of the *Freedom of Information and Privacy Act*, R.S.B.C. 1996, c. 165 (the "Act") for review of a

decision made by the Information and Privacy Commissioner (the “Commissioner”) of March 8, 2013 refusing him access to records used by the Office of the Commissioner (“OIPC”) in its investigation into his complaint that the Post 83 Housing Cooperative Association had disclosed his personal information contrary to the *Personal Information Protection Act*, S.B.C. 2003, c. 63 (“*PIPA*”).

Background

[2] The Applicant complained to the OIPC that Post 83 Housing Association had disclosed his personal information in breach of s. 6 of *PIPA* through an affidavit Post 83 submitted to the British Columbia Human Rights Tribunal in response to a human rights complaint brought against Post 83.

[3] Acting under s. 43 of *PIPA*, the Commissioner delegated the authority to investigate the complaint to an Investigator, Trevor Presley.

[4] In his letter of January 22, 2013 to the Applicant, the Investigator set out the background:

There is currently a complaint before the BC Human Rights Tribunal (“HRT”) involving a complainant and Post 83. The complainant is a resident of Post 83 and you previously resided with her at Post 83. On August 8, 2012, the lawyer for Post 83 filed an application to dismiss this complaint. As part of their application to dismiss, Post 83 included some of your personal information as evidence. The evidence included your previous applications for Post 83 membership and your Notice of Assessment containing your financial information. You complained to Post 83 about this disclosure of your personal information. Not satisfied with their response, you complained to our office about this disclosure of personal information by Post 83.

[5] Sections 6(1)(c), 6(2)(b) and 18(1)(o) of *PIPA* provide:

Consent required

6 (1) An organization must not

...

(c) disclose personal information about an individual.

...

(2) Subsection (1) does not apply if

...

(b) this Act authorizes the collection, use or disclosure without the consent of the individual, or

...

Disclosure of personal information without consent

18 (1) An organization may only disclose personal information about an individual without the consent of the individual, if

...

(o) the disclosure is required or authorized by law, or

...

[6] The Investigator concluded that the Rules of Practice and Procedure of the Human Rights Tribunal required Post 83 to disclose the personal information to the Tribunal under the authority of s. 27.3 of the *Human Rights Code*, R.S.B.C. 1996, c. 210. Accordingly, Mr. Presley found that Post 83 was authorized by s. 6(2)(b) and 18(1)(o) of *PIPA* to disclose the Applicant's personal information to the Human Rights Tribunal without his consent.

[7] The issue that the Investigator was required to decide, and did decide, was whether Post 83's disclosure of the Applicant's personal information contravened s. 6 of the *PIPA*. His statement that the Applicant had previously resided at Post 83 with the complainant in the Human Rights proceedings formed part of his discussion of the background to the privacy complaint. That statement was not a finding of fact necessary to the Investigator's determination of the privacy complaint. The Investigator's statement that the Applicant had previously resided at Post 83 was not a determination binding on the Human Rights Tribunal or any court or other tribunal adjudicating the various complaints and claims made by the Applicant against Post 83, its officers or legal advisors.

[8] The Applicant requested a review of the Investigator's decision. The Applicant took issue with the Investigator's statement that he had previously resided at Post 83, asserted Mr. Presley had provided no evidence for that statement and disputed the Investigator's determination that Post 83 was required by law to

disclose his personal information as evidence it intended to use before the Human Rights Tribunal.

[9] By letter dated February 19, 2013, Assistant Commissioner Jay Fedorak affirmed the conclusions of the Investigator and found that there was no basis to re-open the investigation.

[10] On March 5, 2013, the Applicant made a request for access to the documents considered by the Investigator in the course of his investigation. The Applicant requested access to the documents the Investigator relied upon to conclude that J.P. had previously resided at Post 83. Subsequently, the Applicant limited his request to documents received by the OIPC in the course of its investigation, rather than documents created by the OIPC as part of its investigation or deliberations.

[11] The Applicant believed that the documents he sought would assist him in his dispute with Post 83, and were relevant to the resolution of matters before the Human Rights Tribunal

[12] The Commissioner treated the Applicant's request for documents reviewed by the Investigator as an access to information request under the *Act*. The Commissioner denied that request on March 8, 2013 on the ground that the documents were exempt from disclosure under s. 3(1)(c).

[13] The Applicant then requested a review of the Commissioner's decision under s. 62(1) of the *Act*.

Issue

[14] As an adjudicator appointed under s. 62(1) of the *Act*, the issue I am required to address on this adjudication is whether the Commissioner was correct in refusing the Applicant access to the records he requested on the ground that the requested records are exempt from disclosure under of s. 3(1)(c) of the *Act*.

The Jurisdiction of an Adjudicator

[15] My role as an Adjudicator appointed under s. 62(1) of the *Act* is confined to reviewing the decision of the Commissioner to determine whether or not that decision was made in accordance with the *Act*: *Y. v. Information and Privacy Commissioner* (D. Smith J., October 8, 2003) at para. 11; *J. & D.S. v. Information and Privacy Commissioner* (Pearlman J., December 5, 2008) at para. 12. As an adjudicator appointed under the *Act*, I have no jurisdiction to inquire into or determine J.P.'s complaint against Post 83 Housing Cooperative Association, or to conduct a judicial review of the process by which OIPC determined the Applicant's privacy complaint. It is not my role as an Adjudicator to review the adequacy of the OIPC investigation.

[16] In his submissions on this adjudication, the Applicant asserted that he had recently come into possession of documents that Post 83 had deliberately withheld from the OIPC, and suggested that Post 83 had fabricated evidence, and had attempted to mislead the Human Rights Tribunal. The Applicant requested an investigation into those allegations through this adjudication. All of those matters fall outside the scope of an adjudicator's statutory authority under s. 62(1) of the *Act* to determine whether or not the Commissioner's decision to deny access to documents received in the course of the OIPC investigation was made in accordance with the *Act*. In his written submissions the Applicant indicated he was pursuing those allegations through other proceedings. Those matters were beyond the scope of this adjudication, were disposed of in separate proceedings. Accordingly, I make no findings with respect to them.

[17] As Madam Justice Griffin observed in *C.S. v. Information and Privacy Commissioner* (November 12, 2009) at para. 22:

To be clear, as an adjudicator in this matter, I have no jurisdiction to inquire into C.S.'s privacy complaint against the VPD, or to review the OIPC's decision not to investigate the complaint, or to review any of the procedures taken by the OIPC with regard to the C.S.'s complaint, aside from the access to information request. These inquiries and reviews might be appropriate in a judicial review of the matter but this is not a judicial review hearing.

[18] Further, as I explained in *J. & D.S. v. Information and Privacy Commissioner* at para. 13:

An Adjudicator acting under ss. 60 and 62 of the *Act* reviews a decision by the Commissioner as “head of a public body” and in doing so, performs a statutory function similar to the investigation and review by the Commissioner of decisions by other heads of public bodies: *RG v. Information and Privacy Commissioner* (Bauman J., November 10, 1997) at para. 23. My jurisdiction as an Adjudicator does not extend to reviewing decisions of the Commissioner or his delegates for procedural fairness or any alleged breach of the requirements of natural justice.

Discussion

[19] The Commissioner treated the Applicant’s request for disclosure of the records considered by the investigator as an access request made pursuant to s. 4 of the *Act*.

[20] I repeat here what I said in *J. & D.S.* at paras. 14 to 18 respecting the statutory framework for determination of access to information requests made to the Commissioner:

[14] ... Section 4(1) of the *Act* provides:

Information rights

4. (1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[15] Under Schedule 1 of the *Act*, a “public body” is defined as follows:

“**public body**” means

...

(b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, ...

[16] Schedule 2 of the *Act* lists the OIPC as a “public body”. Therefore, a person may make a request for records from the OIPC under s. 4(1).

[17] However, s. 3(1) of the *Act* specifies various categories of records to which the *Act* does not apply. In particular, s. 3(1)(c) provides in part:

Scope of this Act

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:

...

custody or control of, an officer of the Legislature and that relates to the exercise of that officer's function under an Act;

[18] Under Schedule 1 of the *Act*, "an officer of the Legislature" is defined as:

"officer of the Legislature" means the Auditor General, the Commissioner appointed under the *Members' Conflict of Interest Act*, the police complaint commissioner appointed under Part 9 of the *Police Act*, the Information and Privacy Commissioner, the Chief Electoral Officer, the merit commissioner appointed under the *Public Service Act*, the Representative for Children and Youth or the Ombudsman.

[21] Under the *Act*, records in the custody and control of the Commissioner are subject to disclosure under s. 4 unless they come within the exception set out in s. 3(1)(c) of the *Act*.

[22] The *Act* creates two classes of records in the custody and control of the OIPC: operational records and administrative records.

[23] As I held in *J. & D.S.* at paras. 20-23:

[20] Administrative records, which do not relate to the Commissioner's functions under the *Act*, are not excluded from the *Act* by s. 3(1)(c), and may be requested by a person under s. 4.

[21] Operational records fall within s. 3(1)(c), and are exempt from production under s. 4 because they relate to the Commissioner's functions under the *Act*: *RG v. Information and Privacy Commissioner* (Bauman J., November 10, 1997) at paras. 11-16; *C.M. v. Information and Privacy Commissioner* (Smith J., January 5, 1998) at paras. 14-15.

[22] In *Mr. R. v. Information and Privacy Commissioner* (April 22, 1996) at paras. 16 to 18, Madam Justice Levine, sitting as an Adjudicator under the *Act*, held that any record specific to a case file is an operational record relating to the Commissioner's functions under the *Act* and is excluded from the *Act*. She described records specific to a case file as including:

Case management or tracking sheets and lists, notes and working papers, (including draft documents) of the Commissioner or his staff, and any other case-specific records received or created by the Commissioner's Office in the course of opening, processing, investigating, mediating, settling, inquiring into, considering, taking action on, or deciding a case.

[23] This definition of operational records has been consistently followed and applied in subsequent adjudications under s. 62 of the *Act*: *RG v. Information and Privacy Commissioner* (November 10, 1997); *Mr. M. v. Information and Privacy Commissioner* (January 5, 1998); *C.J. v. Information*

and Privacy Commissioner (July 28, 2003); *F.G.B. v. Information and Privacy Commissioner* (May 17, 2000).

[24] Here, the records requested by the Applicant are records received by the OIPC in the course of its investigation into the privacy complaint made by J.P. under *PIPA*, rather than a privacy complaint made under the *Act*. I agree with the submission of counsel for the Commissioner that the definition of operational records first stated by Madam Justice Levine in *Mr. R. v. Information and Privacy Commissioner*, and consistently applied in subsequent adjudications under s. 62 of the *Act* is equally applicable to records received or created by the OIPC in the investigation and determination of a complaint under *PIPA*. Section 3(1)(c) exempts from the application of the *Act* records in the custody or control of an officer of the Legislature that relate to “the exercise of that officer’s function under an Act.” The Commissioner is an officer of the Legislature and performs functions under both the *Act* and *PIPA*. Under s. 1 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, “Act” means an Act of the Legislature, which includes both the *Act* and *PIPA*.

[25] The Commissioner is an officer of the Legislature and her “functions under an Act” include acts carried out by her delegates, see: *Mr. and Mrs. Y v. Information and Privacy Commissioner* (Smith J., October 8, 2003), at para. 17.

[26] If the records requested by the Applicant from the OIPC file are operational records, they will be excluded from the *Act*, and are not subject to production.

[27] Here, the Applicant has requested documents received by the Investigator in the course of investigating, inquiring into and deciding J.P.’s privacy complaint. The records sought are records specific to the OIPC’s case file concerning J.P.’s privacy complaint.

[28] The documents sought by the Applicant are operational records received by the OIPC in the exercise of its investigative and adjudicative functions in determining the Applicant’s complaint, and as such are excluded from the *Act* under s. 3(1)(c).

Conclusion

[29] Pursuant to sections 65(2) and 58(1) of the *Act*, I conclude this adjudication by confirming the decision of the Commissioner to deny the complainant access to the records he requested.


PEARLMAN J.