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

Decision F09-01

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

David Loukidelis, Information and Privacy Commissioner
January 8, 2009

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Summary: The Ministry's argument that the access applicant is not an "appropriate person" to whom notice of inquiry should be given under s. 54(b) is, for reasons given in Decision F08-07, rejected. The applicant in this case is an appropriate person and may participate in the inquiry respecting the applicant's own request for access to records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 54(b).

Authorities Considered: B.C.: Decision F08-07, [2008] B.C.I.P.C.D. No. 25; Decision F06-10, [2006] B.C.I.P.C.D. No. 34; Order 01-52, [2001] B.C.I.P.C.D. No. 55. **Ont.:** Order PO-2221-1, [2003] O.I.P.C. No. 281.

Cases Considered: *Bibeault v. McCaffrey*, [1984] 1 SCR 176; *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, [2004] B.C.J. No. 735, 2004 BCCA 210.

1.0 INTRODUCTION

[1] This decision arises out of a request for records, under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), by the owner or operator of a licensed pub. The applicant made a request to the Ministry of Public Safety and Solicitor General ("Ministry") for access to records "regarding the deactivation and reactivation and the transfer" of another pub licence. The Ministry notified the owners of the other pub, a numbered company and two individuals (collectively, "third parties"), of the request. The Ministry did this because it considered that the responsive records contained information that might affect the third parties' business or personal privacy interests.

[2] Through their legal counsel, the third parties objected to the disclosure of any of the responsive records on the grounds that ss. 21 and 22 of FIPPA

applied to the records. After considering the third parties' representations, the Ministry told the third parties and the applicant it had decided that only portions of the records had to be withheld under s. 21 or s. 22 and that it would disclose the remainder. The third parties requested a review of the Ministry's decision by this Office, objecting to the disclosure of specified information in the disputed records.

[3] During this time, the Ministry also gave notice of the request to the landlord of the property on which the pub is located. The landlord objected to the disclosure of any of the records about which he was notified. The Ministry then told the landlord that it had decided that s. 21 only required portions of the records to be withheld and that it would disclose the remainder. The landlord did not ask this Office for a review of that decision.

[4] Because mediation by this Office did not resolve the third parties' request for review[1] or the issue of whether s. 21 applies to certain information and records,[2] this Office issued a notice of inquiry under Part 5 of FIPPA, with representations being invited from the Ministry and the third parties. This Office also gave notice of the request for review and inquiry to the access applicant, as an appropriate person under s. 54(b) of FIPPA, and provided the applicant with a copy of the request for review. The applicant was also invited to make representations in the inquiry. The Office did not invite representations from the landlord.

[5] With its initial submission, the Ministry submitted a separate letter objecting to the participation of the applicant in this inquiry as an appropriate person under ss. 54(b) and 56(3) or as an intervenor.[3] I decided to consider this objection as a preliminary issue and invited the applicant and third parties to comment on the Ministry's objection, but none did so.

[6] The Registrar of Inquiries for this Office later wrote[4] to the Ministry to seek its position in light of Decision F08-07,[5] where I rejected a ministry's argument that an original access applicant was not an "appropriate person", as contemplated by s. 54(b) of FIPPA, to participate in an inquiry under Part 5 of FIPPA. The Ministry responded that its position in this case has not changed in light of Decision F08-07.[6]

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[1] The applicant did say, however, that it did not want information to which the Ministry had applied s. 22 and also would not pursue two other types of records.

[2] According to the portfolio officer's fact report that accompanied the notice for the inquiry that led to this preliminary issue, the records in dispute are an offer to lease premises, correspondence from the third parties to the Ministry and emails between the third parties and the Ministry.

[3] Letter of February 26, 2008.

[4] Letter of November 4, 2008.

[5] [2008] B.C.I.P.C.D. No. 25.

[6] Letter of November 13, 2008. The ministry involved in Decision F08-07 has filed a petition for judicial review of that decision. The petition does not attack my conclusions and finding on the issue at hand here.

2.0 ISSUE

[7] The issue here is whether the access applicant is an "appropriate person" for the purposes of s. 54(b) of FIPPA.

3.0 DISCUSSION

[8] **3.1 Legislative Framework**—I discussed FIPPA's statutory scheme for requests for review, notice to third parties and inquiries in Decision F08-07[7] and that discussion applies here. The relevant sections of FIPPA for the purposes of this decision are as follows:

> **Notifying others of review**
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> 54 On receiving a request for a review, the commissioner must give a copy to
>
> (a) the head of the public body concerned, and
>
> (b) any other person that the commissioner considers appropriate.
>
> **Inquiry by commissioner**
>
> 56(3) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review must be given an opportunity to make representations to the commissioner during the inquiry.

[9] **3.2 Is the Applicant an Appropriate Person?**—The Ministry's arguments on this issue are much the same as those made in Decision F08-07 and they can be summarized as follows:

- the commissioner has the authority under s. 54(b) to notify "any other person that the commissioner considers appropriate" of a request for review;
- the applicant could only have standing in an inquiry as an "appropriate person" or an intervener;
- the broad wording of s. 54(b) does not limit the commissioner's "jurisdiction" to add participants to an inquiry;
- discretion under s. 54(b) must, however, be exercised for each inquiry and parties cannot be added as a matter of course;
- section 54 and s. 56(3) do not include the applicant among those who are automatically entitled to receive notice of a review and make representations in an inquiry;

[7] At paras. 9-22.

- sections 54 and 56 of FIPPA should be interpreted in light of the Supreme Court of Canada's decision in *Bibeault v. McCaffrey*;[8]
- FIPPA "divests the applicant in a third party review of the status of an interested party" and, "given the implicit intention of the Legislature to limit the participation of an applicant", the commissioner should only exercise his powers under s. 54(b) after considering the facts of each case;
- the applicant must have privacy or personal financial interests that would be affected by the commissioner's decision, with *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*[9], Decision F06-10,[10] Order 01-52[11] and Ontario Order PO-2221-I[12] all said to support the Ministry's position on this point;[13]
- this request for review does not engage any special or particular interest of the applicant;
- the third parties' rights to have information withheld under s. 21 are the basis of the request for review, although the commissioner's decision on s. 21 will be reflected in the record the applicant receives; and
- the Ministry's interpretation of the commissioner's discretion under s. 54(b) does not prejudice the applicant's rights as the applicant still has a right to request a review on the s. 21 severing once it receives a response from the Ministry and may at that time bring any evidence to the commissioner's attention that s. 21 was not properly applied.

[10] Decision F08-07 was the first time, so far as I could tell, that a public body had challenged the appropriateness of an access applicant's participation in a third-party review of a decision by the public body to disclose information to the applicant. This is the second occasion on which a public body has taken this position. FIPPA has been in force since 1993. The Ministry maintains its position here despite my ruling in Decision F08-07.

[11] It is worth affirming here what I said in Decision F08-07 about the implications of the Ministry's position:

> [47] The implications of the Ministry's challenge are significant. Clearly, if an applicant is not allowed to participate in an inquiry flowing from a third-party review of a public body decision to disclose information, there will be no opportunity for the applicant to respond to the third party's submissions that responsive information must be withheld under s. 21. An access applicant would only have the opportunity to respond where the

[8] [1984] 1 SCR 176.
[9] [2004] B.C.J. No. 735, 2004 BCCA 210.
[10] [2006] B.C.I.P.C.D. No. 34.
[11] [2001] B.C.I.P.C.D. No. 55.
[12] [2003] O.I.P.C. No. 281.
[13] As I said in Decision F08-07, the orders on which the Ministry relies do not support its position that only applicants whose personal privacy or personal financial interests are affected should receive notice under s. 54(b). They also do not support the proposition that an applicant does not have a significant interest to attract a right to participate.

> public body has withheld requested information under s. 21 and the applicant has requested a review of the Ministry's decision. In such a case, the third party is typically joined as an appropriate person under s. 54(b) and can if it wishes participate to oppose disclosure of information.

[12] As to the merits of the Ministry's position, the following passages from Decision F08-07, with footnotes omitted, are apposite and merit quotation at some length for ease of reference:[14]

> [48] The Ministry and IBM, citing the discretionary nature of s. 54(b), say the commissioner must, in relation to every inquiry, satisfy herself or himself that a particular applicant's rights are sufficiently affected to merit the giving of notice and the participatory rights that flow from it. They say applicants should not be automatically notified under s. 54(b) or even accorded participatory status simply because they wish to participate. They say this despite the fact that it is the applicant's access request that is the very subject of the third-party review that triggers the inquiry. The Ministry and IBM rely on the Court of Appeal's decision in *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, as well as s. 54 of FIPPA (which only requires notice of all review requests to be given to the public body in question), and s. 56(3) (which lists those persons who must be given the opportunity to make representations at an inquiry (such as the public body), but does not specifically refer to an applicant.
>
> [49] The Ministry argues that the absence of specific reference in ss. 54 and 56(3) signals a legislative intent to "avoid the unnecessary complication of the commissioner's administrative function in deciding on an issue not directly impacting on the applicant" and "divest the applicant of status as an interested party". The Ministry puts it this way:
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> > … – in other words, the participation of the complainant (i.e. in this case the Third Party) and of the public body concerned is sufficient. This is a similar interpretation to that taken by the Supreme Court of *Bibeault v. McCaffrey*, [1984] 1 SCR 176 … where the court was asked to determine whether the Quebec *Labour Code* recognized employees as "interested parties" at an investigation of the Labour Commissioner.
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> [50] From this, the Ministry argues that ss. 54 and 56 should be interpreted in a way similar to that in *Bibeault*, with the result that these sections divest access applicants of the status of an interested party in third-party reviews. The Ministry also submits that the threshold for establishing whether notification to a person or organization is "appropriate" under s. 54(b) is whether "the interests of the person or organization are affected by the inquiry." The Ministry suggests that an applicant must have personal privacy or personal financial interests that are affected before it s. 54(b) notice is appropriate. The Ministry relies here on Order 01-52, Decision F06-10 and Ontario Order PO-2221-I.

[14] To reduce length only, I have not reproduced here passages from Decision F08-07 addressing arguments made by the third party involved in that case.

[51] I will say at once that the orders on which the Ministry relies do not support its position that only applicants whose personal privacy or personal financial interests are affected should receive notice under s. 54(b). Nor do they support the proposition that an applicant does not have a sufficient interest to attract a right to participate. Further, in Ontario Order PO-2221-I, the applicant was in fact a participant. Assistant Commissioner Mitchinson simply agreed with the applicant, who was seeking access to some videotapes, that it was not necessary for the public body involved to provide notice to media representatives depicted in the videos on the basis that what was depicted was not their personal information.

[52] The Ministry goes on to argue that,

> …[w]hile the Commissioner's decision on the contested s. 21 severing will be eventually reflected in the record released to the applicant, it is the third party's right to have information withheld under s. 21 which formed the request for review. Put another way, the Ministry submits that the parties should reflect the scope of issues.

[53] The Ministry says that its interpretation of s. 54(b) does not prejudice the applicant's interests in this inquiry because the applicant can request a review of "the s. 21 severing" after the Ministry has made its "final decision" under s. 8 of FIPPA. At that juncture, the Ministry says, the applicant "would have at least seen portions of the contract, leaving [the applicant] in a far better position to evaluate the severing and make argument" (unless of course the information in issue has been found to have been properly withheld). The Ministry also says that, at this stage, the applicant can bring any evidence it might have "that s. 21 was not properly applied to the attention of the Commissioner at that time".

…

[63] IBM argues, and I agree, that whether the applicant is an "appropriate" person for s. 54(b) purposes is ultimately a question of statutory interpretation. IBM reviews at some length the common law principles governing standing, including public interest standing, but they are of limited, if any, assistance in interpreting the language of s. 54(b). For similar reasons, it is not necessary for me to consider the Ministry's submissions about whether the applicant should participate in the third-party inquiry as an intervener. In any event, even if these common law principles do inform interpretation of s. 54(b), my view is that the kinds of factors identified at common law would lend support to an applicant's participation in a third-party inquiry. In saying this, I have in mind factors such as the desire to avoid multiplicity of proceedings and meeting the needs of the adversarial system.

[64] Many of the arguments made by the Ministry and IBM are based on an interpretation of FIPPA's provisions that I have already rejected. Moreover, in relation to the argument that the applicant will be disadvantaged in the third-party inquiry because it will not be able to see any of the requested records in order to make its submissions, my

interpretation of s. 7 is that the applicant should already have in its possession some of the responsive information.

[65] Turning to the discretionary nature of s. 54(b), it is important to recognize that Guide Outfitters involved the application of s. 54(b) to an organization that was neither an access applicant nor a third party within the meaning of FIPPA. The organization wanted to participate in the inquiry in order to support the Ministry's decision to withhold information under s. 18 of FIPPA and it argued that to deny it that opportunity amounted to a breach of the rules of natural justice. I had held that the organization did not have a sufficient interest to warrant its participation and that it is not tenable for every person who is interested generally in the outcome of an inquiry to be permitted to participate. The Court of Appeal, in upholding my decision, found that s. 54(b) was expressed in general terms and afforded "a fair measure of discretion to the Commissioner". As the Ministry points out in this case, the Court went on say that this requires the commissioner to "engage in a process of consideration and analysis to reach an informed decision on such an issue" and that use of the phrase "that the commissioner considers appropriate" in s. 54(b) is "an indication that the Commissioner is to exercise his judgment as to who might reasonably be thought to be affected by his decision".

[66] The Ministry and IBM challenge routine s. 54(b) notice to applicants of third-party reviews or inquiries as an inappropriate fettering of discretion. I have carefully considered their arguments, but can think of no circumstance in which an access applicant's rights would not be affected by exclusion from the third-party review process triggered by, and relating to, information that responds to the applicant's access request. The interpretation advanced by the Ministry and IBM, excluding as it does the participation of the applicant, is one that results in procedural unfairness. Further, in light of my conclusion that the Ministry's s. 24 decision is a final one, the s. 52(1) review process would not afford another way for the applicant to be heard later as to the application of s. 21 to the records at issue in the third-party review. The effect of any order made in that review, relating as it would to information that is only at issue because it responds to the applicant's access request, is such that there will be nothing for the applicant to be heard about later.

[67] In addition, the exclusion of applicants from third-party reviews unless the applicant's own financial information or personal privacy interests are at stake—the Ministry's position—flies in the face of the burden of proof in s. 57(2). Section 57(2) provides that, in cases involving third-party personal information, "it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy". In other words, if a third-party individual requests a review of a public body's decision to disclose her or his personal information, the burden of demonstrating it should be released rests squarely on the access applicant. The Ministry's interpretation of s. 54(b) would preclude the applicant from participating, even though s. 57(2) explicitly places the burden of proof on the applicant in that very same inquiry.

> [68] For the reasons above, I conclude that the applicant is an appropriate person for s. 54(b) purposes, such that it may participate in the review requested by IBM.

4.0 CONCLUSION

[13] Nothing in the material before me distinguishes the situation here in any meaningful way from the circumstances in Decision F08-07. Based on the material at hand, I have decided that my reasoning in Decision F08-07 applies here and thus, for the same reasons as given in Decision F08-07, I conclude that the applicant is an appropriate person for the purposes of s. 54(b), such that it may participate in the third parties' request for review and inquiry.

[14] Given my finding on this issue, I need not consider the Ministry's arguments that the applicant should not participate in this inquiry as an intervener.

[15] The inquiry will proceed with the participation of the applicant, the Ministry and the third parties. This said, there is, as noted earlier, an outstanding petition for judicial review of Decision F08-07. Although that petition does not take issue with my conclusions on s. 54(b), if the Ministry or a third party wishes to make submissions about whether this inquiry should proceed before disposition of the judicial review proceeding respecting Decision F08-07, they have until January 23, 2009 to make them to me in writing, to the attention of the Registrar of Inquiries.

January 8, 2009

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

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