



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

Decision F08-01

INTERIOR HEALTH AUTHORITY

Michael McEvoy, Adjudicator

January 14, 2008

Quicklaw Cite: [2008] B.C.I.P.C.D. No. 3

Document URL: <http://www.oipc.bc.ca/orders/section56/DecisionF08-01.pdf>

Summary: The Interior Health Authority's request that an inquiry under Part 5 not be held is denied. The doctrines of issue estoppel and *res judicata* do not apply and it is not clear that there is no arguable issue as concerns the disclosure of the record in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1), 56.

Authority Considered: B.C.: Order 03-01, [2001] B.C.I.P.C.D. No. 3; Order F06-20, [2006] B.C.I.P.C.D. No. 36; Decision F07-02, [2007] B.C.I.P.C.D. No. 4; Order F07-15, [2007] B.C.I.P.C.D. No. 21.

Cases Considered: *Carl Zeiss Stiftung v. Rayner and Keeler Ltd. et al. (No. 2)*, [1966] 2 All E.R. 536; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248.

1.0 INTRODUCTION

[1] The Interior Health Authority (“IHA”) makes an application under s. 56 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) that an inquiry under Part 5 of FIPPA not be held with respect to Retirement Concepts Seniors Services Ltd’s (“Retirement Concepts”) request for a review of IHA’s decision to disclose certain records to an applicant (referred to below as “D.R.”).

[2] For the reasons given below, I have decided to deny the IHA’s request and this matter will proceed to inquiry under Part 5 of FIPPA.

2.0 DISCUSSION

Background

[3] In Order F06-20,¹ the Commissioner required the IHA to disclose certain information severed from a contract between the IHA and Retirement Concepts. The Commissioner described the disputed information in the following way:

All of the contract in issue, a 28-page Residential Care Operating Agreement dated January 17, 2003 between the IHA and Retirement Concepts, has been disclosed to the applicant except for the amount of base funding in Schedule B and a revised calculation of that amount in a contract amendment dated May 19, 2004. The base-funding amount is, in both cases, the total annual contract fee payable to Retirement Concepts, minus estimated contributions by residents.²

[4] Subsequent to this Order being issued, D.R., who was not a party to the proceeding giving rise to Order F06-20, wrote the IHA, stating in part:

Pursuant to Order F-06-20 [*sic*] dated November 09 2006 issued by the Office Of The Information & Privacy Commissioner please provide the information as detailed in the order.

Specifically:

1. As described on page 2, section 1.4
2. Section 4.0 (22) page 8
3. All amendments and revisions since January 17 2003
4. New contracts – extensions or additions.³

[5] The IHA responded by releasing records pertaining to numbers one and two but took the position that items three and four were not covered by Order F06-20. Consequently, the IHA treated the latter two issues as a fresh access to information request under FIPPA and notified Retirement Concepts, the third party, of the request. In response, Retirement Concepts consented to the release of information concerning the additional number of care beds it operated. However, it objected to the release of information concerning the financial terms of operating the beds. After considering these submissions, the IHA decided to release the records the applicant requested. Retirement Concepts then asked this Office to review the IHA's decision.

¹ [2006] B.C.I.P.C.D. No. 36.

² Para 1.4.

³ D.R.'s letter to IHA, January 19, 2007.

[6] In the normal course of events, the matter would have proceeded to an inquiry. However, before this occurred, the IHA applied under s. 56 to request that the Commissioner exercise his discretion not to hold an inquiry under Part 5 of FIPPA with respect to Retirement Concept's request. D.R. was given notice of this proceeding as an appropriate person.

Parties' arguments

[7] The IHA argues that the Commissioner has already ruled in this matter, having issued Order F06-20. That Order concerned the disclosure of a contract between the IHA and Retirement Concepts. The IHA argues the record in dispute here is merely an amendment to that contract that contains essentially identical information to that already released under Order F06-20.

[8] Retirement Concepts argues that, although the Commissioner did make a ruling in Order F06-20, the release of the additional amendment to the contract would be harmful to its business interests. Retirement Concepts says that, as concerns Order F06-20, it was not well versed at that time in what constituted grounds for refusing release of the information and therefore did not present its case as strongly as it could have. Retirement Concepts says that the key factor to it securing residential care operating agreements is its pricing strategy. It describes this strategy as a trade secret. Retirement Concepts also says the financial information in the requested records was provided in confidence and that, if the financial information is disclosed without the reciprocal release of information belonging to its competitors, it will be at an unfair disadvantage. Furthermore, it says its negotiating position with the various unions with which it must deal will be compromised by the release of the records.

[9] The IHA replies that any claim that the contract's pricing information is a trade secret is without merit because the Commissioner recently ruled in Order F07-15⁴ that such information does not meet the definition of a "trade secret" under s. 21 of FIPPA. The IHA also argues that the Commissioner determined in Order F06-20 that the release of existing contract pricing does not pose a significant interference with a company's competitive position. As well, the IHA contends that the Commissioner has written extensively to the effect that information contained in contracts between a public body and a third party is not normally considered "supplied" under s. 21(1)(b) of FIPPA. Finally, it argues that the Commissioner determined in Order F06-20 there was no evidence that there was any intention or commitment to hold the contract in confidence.

[10] D.R. supports the argument of the IHA. He says the purpose of his request for the information is to determine whether or not the public interest has been served by and through the privatization and monopolization of seniors' care and housing in the community of Williams Lake.

⁴ [2007] B.C.I.P.C.D. No. 21, para.29.

Discussion

[11] Section 56(1) of FIPPA reads as follows:

If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[12] Section 56 confers discretion as to whether to hold a Part 5 inquiry respecting a request for review. The IHA acknowledges that, as the party asking that an inquiry not be held, it bears the burden of demonstrating why that request should be granted.

[13] As Adjudicator Austin-Olsen noted in Decision F07-04:⁵

[T]here are a variety of reasons why this discretion might be exercised in favour of not holding an inquiry. These include circumstances where the principles of abuse of process, *res judicata* or issue estoppel clearly apply. Other circumstances are where it is plain and obvious that the records in dispute are subject to an exception to disclosure or that they fall outside FIPPA's scope. In each case, however, it must be clear that there is no arguable issue which merits adjudication in an inquiry.⁶

[14] I conclude that neither *res judicata* nor issue estoppel applies here.

[15] Dickson J. (as he then was) described the legal doctrine of *res judicata* in *Angle v. Minister of National Revenue*⁷ as a rule that:

precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction.

[16] The disputed records in this case are related to those Commissioner Loukidelis considered in Order F06-20 but they are not the same. The records here post-date Order F06-20 and therefore give rise to a different "cause of action". The IHA acknowledged this, in effect, by responding to items three and four of D.R.'s request as being outside the scope of Order F06-20 warranting treatment as a new information request under FIPPA.

⁵ [2007] B.C.I.P.C.D. No. 20.

⁶ Para. 16.

⁷ [1975] 2 S.C.R. 248.

[17] With respect to issue estoppel, Commissioner Loukidelis adopted the following passage from the House of Lords judgement in *Carl Zeiss Stiftung v. Rayner and Keeler Ltd. et al. (No. 2)*⁸ in Order 03-01:⁹

The requirements of issue estoppel still remain (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final, and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[18] It is not necessary for me to canvass the first two requirements of this test because the IHA concedes that the parties to this case are not the same as those in Order F06-20. Therefore issue estoppel does not apply in this case.

[19] The IHA also fails to clearly demonstrate there is no arguable issue which merits adjudication in an inquiry. While the Commissioner held that the pricing strategy at issue in Order 07-15¹⁰ did not constitute a trade secret, I do not understand his finding, as the IHA implies, to be a blanket ruling that a pricing strategy can never be a trade secret. Rather, I read the Commissioner's decision to mean that the facts of each case must be assessed before making a determination under s. 21(1)(a)(i). That factual analysis has not yet happened with respect to the record in dispute in this case.

[20] The IHA's contention that information found in contracts between a public body and a third party is not normally considered "supplied" does not assist it. Like the approach to determining a trade secret, the facts of each case must be analyzed to determine whether contract information is "supplied" under s. 21(1)(b) of FIPPA. Here there is no evidence before me one way or the other concerning this issue and the record in dispute.

[21] Similarly, an evidentiary foundation must be laid to support the conclusion that there is no arguable issue as to whether the disputed record was supplied in confidence. The IHA asks me to apply the Commissioner's findings on this issue in Order F06-20 to the record in this case. In order for me to accede to this assertion, I would first have to be satisfied that the circumstances surrounding the execution of the amendment to the contract were the same as or similar to those giving rise to the original contract. I have not been provided any evidence on this point and therefore reject the IHA's argument.

[22] None of my above comments should be taken as expressing any view, let alone findings, on the merits of Retirement Concepts' arguments. The onus was on the IHA to demonstrate why the s. 56 request should be granted and for the reasons stated above it has not provided the requisite evidence to do so.

⁸ [1966] 2 All E.R. 536.

⁹ [2001] B.C.I.P.C.D. No. 3, para. 18.

¹⁰ [2007] B.C.I.P.C.D. No. 2, paras. 29 – 33.

3.0 CONCLUSION

[23] This is not an appropriate case in which to decline to hold an inquiry under Part 5 of FIPPA. This matter will proceed to an inquiry.

January 14, 2008

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File No. F07-31333