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Order F15-05

## WEST VANCOUVER POLICE DEPARTMENT

Ross Alexander  
Adjudicator

February 18, 2015

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**Summary:** A former West Vancouver Police Department police officer requested records relating to an internal WVPD investigation that led to the termination of his employment. WVPD denied access to some of the records on the basis that they were outside the scope of FIPPA due to s. 182 of the *Police Act*. The adjudicator determined that s. 182 of the *Police Act* did not apply because the investigation into the applicant was not initiated under Part 11 of the *Police Act*. The adjudicator therefore found that the records were within the scope of FIPPA and ordered WVPD to process the applicant's request.

**Statutes Considered:** *Police Act*, s. 182.

**Authorities Considered: B.C.:** Order 03-06, 2003 CanLII 49170 (BC IPC); Order F08-16, 2008 CanLII 57359 (BC IPC); F14-10, 2014 BCIPC 12 (CanLII); Order F10-36, 2010 BCIPC 54 (CanLII).

**Cases Considered:** *John Doe v. Ontario (Minister of Finance)*, 2014 SCC 36.

## INTRODUCTION

[1] This inquiry relates to an applicant's request to the West Vancouver Police Department ("WVPD") for copies of all records used in the preparation of an investigation report completed by a WVPD police inspector (the "investigator")

about the applicant. The applicant was a WVPD police officer at the time of the investigation.

[2] WVPD responded to the applicant's request by denying access and asserting that the records were out of scope of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) pursuant to s. 182 of the *Police Act*.

[3] The applicant requested a review by the Office of the Information and Privacy Commissioner (“OIPC”).

[4] WVPD revised its response to the applicant during the OIPC review process. It decided that some records are within the scope of FIPPA. For those records, it released some of the information, while withholding the rest of it under ss. 12, 14, 15, 16, 17 and 22 of FIPPA. It continued to withhold other responsive records on the basis that they are out of the scope of FIPPA due to s. 182 of the *Police Act*.

[5] The applicant requested that this matter proceed to inquiry under Part 5 of FIPPA for the records WVPD continues to withhold as out of the scope of FIPPA due to the *Police Act*. The information WVPD is withholding under ss. 12, 14, 15, 16, 17 and 22 of FIPPA is not at issue because the applicant is no longer seeking that information.

[6] The applicant and WVPD each provided initial and reply submissions for this inquiry. The Office of the Police Complaint Commissioner (“OPCC”) was invited to participate in the inquiry as an intervener, but it declined.

## ISSUE

[7] The issue in this inquiry is whether the records in dispute are outside of the scope of FIPPA due to s. 182 of the *Police Act*.

## DISCUSSION

[8] **Records in Dispute** – The records in dispute are:

- (a) notebook entries by the investigator who created the investigation report; and
- (b) emails between the investigator and other WVPD employees in relation to the investigation about the applicant, with attachments.

[9] **Background** – The applicant is a former WVPD police officer.

[10] While the applicant was a WVPD employee, the WVPD chief constable assigned a police inspector to conduct an internal discipline investigation regarding the applicant. The investigation focused on the applicant's conduct, attitude and ability or willingness to discharge his duties as a member of the WVPD.

[11] The applicant was a unionized employee whose employment relationship was set out in a collective agreement between the West Vancouver Police Board and the West Vancouver Police Association (the "collective agreement"). The collective agreement states that procedures for dealing with complaints against police officers and disciplinary action will be as specified in the regulations issued by the police board and by direction of the *Police Act*.

[12] Part 11 of the *Police Act* contains provisions regarding police officer misconduct, and complaints, investigations, discipline and proceedings in relation to police officers<sup>1</sup> and municipal police departments. One of the types of investigations referred to in Part 11 is "internal discipline matters".

[13] For internal discipline matters, the *Police Act* requires that municipal police departments establish procedures that are "not inconsistent with" the *Police Act*.<sup>2</sup> It also requires police departments to file these procedures with the OPCC.<sup>3</sup>

[14] At the start of the investigation about the applicant, WVPD's chief constable delegated authority to the investigator for all matters up to and including the submission of a final investigation report.<sup>4</sup> Further, the investigator confirmed with the OPCC that WVPD administrative policy AC 0375 titled "Complaints Against Members – Internal Discipline Rules" (the "Policy") was the policy WVPD filed with the OPCC for internal discipline matters. The investigator conducted the investigation of the applicant pursuant to this Policy.

[15] The applicant was suspended without pay during the investigation, which led to a union grievance and hearing.

[16] After completing the investigation, the investigator provided a 99-page investigation report containing his findings to the WVPD. As a result of the investigation, WVPD terminated the applicant's employment.

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<sup>1</sup> In general, the *Police Act* refers to "members", which it defines as "a municipal constable, deputy chief constable or chief constable of a municipal police department". For simplicity, this order refers to the term "police officer" rather than "constable" or "member".

<sup>2</sup> Section 175(1). Further, s. 175(3) states that the chief constable of the police department, a person with delegated authority, the police board and any arbitrator that may be appointed under the grievance procedure of the collective agreement may use, but are not restricted by, specific provisions of the Act regarding police officer standards and discipline.

<sup>3</sup> Section 175(2) of the *Police Act*.

<sup>4</sup> Section 176 of the *Police Act* relates to the delegation of authority.

*Section 182 of the Police Act*

[17] The issue in this inquiry is whether the investigator's notes and certain emails (and their attachments) relating to the investigation into the applicant are outside of the scope of FIPPA due to s. 182 of the *Police Act*. This section states:

Except as provided by this Act and by section 3 (3) of the *Freedom of Information and Protection of Privacy Act*, that Act does not apply to

- (a) any record of a complaint concerning the conduct of a member that is made, submitted, registered or processed under this Part,
- (b) any record related to a record described in paragraph (a), including, without limitation, any record related to a public hearing or review on the record in respect of the matter,
- (c) any information or report in respect of which an investigation is initiated under this Part, or
- (d) any record related to information or a report described in paragraph (c), including, without limitation, any record related to a public hearing or review on the record in respect of the matter,

whether that record, information or report is created on or after a complaint is made, submitted or registered or the investigation is initiated, as the case may be.

[18] The leading case on the scope of the exceptions to FIPPA that are contained in the *Police Act* has been Order 03-06.<sup>5</sup> However, the *Police Act* has been substantially amended since that order was issued.

[19] WVPD states that much of the analysis in Order 03-06 is not immediately transferable to the present case due to amendments to the *Police Act*.<sup>6</sup> However, it submits that the essence of the analysis in that order creates a two-part test that can be applied using the current wording in the *Police Act*. For his part, the applicant did not provide submissions regarding the interpretation of s. 182.

[20] The modern approach to statutory interpretation requires the words of legislation "to be read in their entire context and according to their grammatical

<sup>5</sup> Order 03-06, 2003 CanLII 49170 (BC IPC).

<sup>6</sup> The *Police Act* was materially amended prior to the investigation into the applicant in this case.

and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature”.<sup>7</sup>

[21] Section 182 of the *Police Act* expressly states that it is subject to other provisions of the *Police Act* and s. 3(3) of FIPPA. Therefore, when considering s. 182, it is first necessary to determine whether s. 3(3) of FIPPA or other provisions of the *Police Act* apply. In this case, it is clear that s. 3(3) of FIPPA does not apply<sup>8</sup> and that there are no provisions of the *Police Act* that override s. 182. As such, I will now consider the substance of s. 182.

[22] I agree with WVPD that for s. 182 to apply, the information at issue must meet a two-part test. This two-part test is as follows:

1. The record, information or report must fall within one of the categories denoted in s. 182(a), (b), (c) or (d).
2. The record, information or report must be created on or after a complaint is made, submitted or registered, or the investigation is initiated, as the case may be.

[23] Therefore, the issue is whether the records fall within the two-part test. Both parts of the test must be met for s. 182 to apply. I will begin by addressing the first part.

#### *Submissions of the parties*

[24] WVPD submits that the records at issue are excluded from the scope of FIPPA due to ss. 182(c) and (d) of the *Police Act*. It states that s. 182 of the *Police Act* creates a clear and unequivocal exception to the application of FIPPA to records related to all investigations initiated under Part 11 of the *Police Act*, and that it is plain and obvious that the investigation was conducted under and in compliance with Part 11, Division 6 of the *Police Act*. It further submits that Part 11 demonstrates that the Legislature clearly considered a robust police complaint, investigatory and independent oversight system fundamental to ensuring public confidence in the police. In WVPD’s view, the applicant is attempting to use FIPPA to obtain records he could not obtain directly for any legitimate purpose under the *Police Act*.

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<sup>7</sup> *John Doe v. Ontario (Minister of Finance)*, 2014 SCC 36 at para. 18 citing (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1 and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

<sup>8</sup> Section 3(3) of FIPPA specifies certain provisions of FIPPA that apply to officers of the Legislature, their employees and, in relation to their service providers, the employees and associates of those service providers, as if the officers and their offices were public bodies.

[25] The applicant submits that he was suspended under "labour law", not the *Police Act*. He states that he was suspended without any of the protections afforded under the *Police Act*, and that WVPD and its police board resisted his attempts to reference the *Police Act* in the disciplinary proceedings against him. In the applicant's view, WVPD is now attempting to arbitrarily and retroactively apply *Police Act* provisions and related investigations procedures it did not apply during its investigation of him.

*Overview of s. 182 of the Police Act*

[26] Section 182(c) relates to "any information or report in respect of which an investigation is initiated under" Part 11 of the *Police Act*. Section 182(d) relates to any record related to information or a report described in s. 182(c).

[27] For ss. 182(c) or (d) to apply, the record or information at issue must relate to an investigation initiated under Part 11 of the *Police Act*. The primary difference between the views of the parties in this case is that WVPD submits the investigation was an "internal discipline matter" conducted in accordance with Division 6 of Part 11, while the applicant submits that it was conducted under labour law rather than the *Police Act*.

[28] WVPD's investigation of the applicant was conducted pursuant to the Policy. The Policy is the one the WVPD had filed with the OPCC as required by the *Police Act*.<sup>9</sup> It is also consistent with the terms of the collective agreement that applies to the applicant's employment with WVPD, which states that disciplinary action will be as specified in the regulations issued by the police board and the *Police Act*.

[29] I find that WVPD conducted its investigation of the applicant as an internal discipline matter as provided in Division 6 of the *Police Act*.<sup>10</sup> The investigation was conducted by an investigator with the delegated authority to conduct the investigation as required by Division 6, pursuant to the Policy that was filed with the OPCC as required by this division. Further, I also note that the WVPD informed the OPCC of the investigation at the start of the investigation.<sup>11</sup>

[30] However, in my view, ss. 182(c) or (d) do not apply to records or information simply because the investigation was conducted in compliance with

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<sup>9</sup> The Policy references old provisions of the *Police Act* that have since been changed.

<sup>10</sup> I note that the protections under the *Police Act* the applicant complains that he did not receive in WVPD's investigation of him are for Division 3 matters (which are explained below), not Division 6 investigations.

<sup>11</sup> Section 174(4) requires police departments to provide the OPCC with its decision at the end of the investigation. This division does not require the police departments to consult with the OPCC at the start of the investigation. However, in my view, the fact that WVPD corresponded with the OPCC at the start of the investigation in this case corroborates that it viewed the investigation as one falling under the *Police Act*.

Part 11 of the *Police Act*. Section 182(c) applies to “any information or report in respect of which an investigation is initiated under [Part 11]”.<sup>12</sup> Therefore, the investigation must be *initiated under Part 11* for ss. 182(c) or (d) to apply, in order to give meaning to the phrase “initiated under [Part 11]”.<sup>13</sup> I will therefore consider below whether the investigation was initiated under Part 11 of the *Police Act*.

[31] The *Police Act* does not define the term “initiated”. The *Webster’s New World College Dictionary* defines the word “initiate”, in part, as: “to bring into practice or use; introduce by first doing or using; start [to *initiate* a new course of studies]...”<sup>14</sup> This definition is consistent with the use of the word initiated in the *Police Act*, which consistently uses the term to denote starting or commencing an investigation.

[32] In the context of this inquiry, the issue of whether the investigation was initiated – or started – under the *Police Act* turns on whether the authority used to commence the investigation was under the *Police Act*. However, this is not straightforward in this case because the investigation was conducted pursuant to the Policy, which is consistent with both the *Police Act* and the collective agreement.

[33] I have considered the words of s. 182 in their grammatical and ordinary sense, in their context in the *Police Act* and harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature. For the reasons given below, in my view, the internal discipline matter at issue here was not initiated under Part 11. While the investigation in this case was conducted in compliance with the *Police Act*, in my view it was initiated by WVPD pursuant to authority arising from the applicable collective agreement and the employment relationship between the applicant and WVPD. I therefore find that s. 182 of the *Police Act* does not apply to the records at issue.

*Do ss. 182(c) and (d) of the Police Act apply?*

[34] The *Police Act* sets out duties and obligations with respect to police forces in British Columbia. It also establishes, among other things, the role and duties of the OPCC in providing independent oversight of complaints involving municipal police in British Columbia.

[35] Part 11 of the *Police Act* is titled “Misconduct, Complaints, Investigations, Discipline and Proceedings.” It is comprised of over 100 sections, and is

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<sup>12</sup> Section 182(d) applies to information or a report described in s. 182(c).

<sup>13</sup> This is similar, in my view, to how s. 182(a) does not necessarily apply to all complaints. A complaint must be *made, submitted, registered or processed under Part 11* for s. 182(a) to apply.

<sup>14</sup> *Webster’s New World College Dictionary*, 5<sup>th</sup> ed., s.v. “initiate”.

organized into 7 Divisions. The three primary types of complaints or investigations in Part 11 of the *Police Act* relate to:

- a) complaints and investigations alleging police officer misconduct<sup>15</sup> (Division 3).<sup>16</sup> For example, an investigation into an allegation of unnecessary use force by a police officer would be conducted under this division;
- b) complaints and investigations to the police complaint commissioner about a service or policy of a municipal police department (Division 5); and
- c) internal discipline matters for municipal police departments (Division 6). These investigations relate to matters that do not directly involve or affect the public.<sup>17</sup>

[36] Division 6 of the *Police Act* regarding internal discipline matters is materially different than Divisions 3 and 5. Divisions 3 and 5 contain provisions that grant the right to make complaints and prescribe specific procedures for handling investigations,<sup>18</sup> including specific provisions with respect to the disclosure of information.<sup>19</sup> Further, they use the same terminology or language that is in s. 182 about initiating complaints.<sup>20</sup> Division 6, on the other hand, does not expressly confer the right to make a complaint or initiate an investigation, and it does not contain any provisions with respect to the disclosure of information. Instead, it provides some general parameters for police departments with respect to Division 6 investigations.

[37] In my view, the differences between Division 6 and these other divisions are telling of the Legislature's intention about whether s. 182 applies. Considering the entirety of these divisions and s. 182, it is apparent that the Legislature intended for investigations under Division 3 and 5 to operate outside

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<sup>15</sup> Section 77 defines the term "misconduct" for Part 11.

<sup>16</sup> Division 4 relates to resolution of Division 3 complaints by mediation or other informal means.

<sup>17</sup> The definition of "internal discipline matter" is at s. 76 of the *Police Act* (and is quoted below in this order at para. 38).

<sup>18</sup> For example, s. 78 in Division 3 of Part 11 states that "a complaint concerning any conduct of a member that is alleged to constitute misconduct may be made to and registered with the police complaint commissioner", and ss. 78 and 79 set out who can make such a complaint, how to make a complaint and the time limit for making a complaint. Similarly, s. 168 of Division 5 states that "any person may make a complaint to the police complaint commissioner about" a service or policy of a municipal police department.

<sup>19</sup> Division 3 is comprised of more than 70 sections, and it contains a number of provisions regarding the disclosure of information. Further, s. 172 in Division 5 requires the police department to send the complainant, the director of police services and the police complaint commissioner an explanation of the action taken under s. 171 in relation to the service or the policy that is the subject of the complaint.

<sup>20</sup> For example, s. 90 for Division 3 or ss. 171(1) and (2) for Division 5.



of FIPPA. However, in my view, this is not the case for Division 6 investigations that police departments commence on their own volition to manage their employer-employee relationships.

[38] There are policy considerations that may explain why there are differences between Division 6 compared to Divisions 3 and 5. A primary purpose of Part 11 of the *Police Act* and the OPCC's oversight is to ensure public confidence in the police. Complaints and investigations arising under Divisions 3 and 5 of the *Police Act* generally relate to matters in the public interest. However, Division 6 of the *Police Act* specifically relates to those investigations that do not directly involve or affect the public, as the *Police Act* defines an "internal discipline matter" as follows:

"internal discipline matter" means a matter concerning the conduct or deportment of a member that

- (a) is not the subject of an admissible complaint or an investigation under Division 3 [*Process Respecting Alleged Misconduct*], and
- (b) does not directly involve or affect the public;<sup>21</sup>

[39] In my view, there is a difference between the labour-management issues that do not directly involve or affect the public (such as job performance concerns, absenteeism, etc.) and those issues that are ordinarily addressed under Division 3 (such as an investigation into an allegation of a police officer using excessive force).

[40] Internal discipline matters under Division 6 are in many respects analogous to investigations into labour-management issues in which non-law enforcement public bodies investigate the conduct of their employees (which are, in general, subject to FIPPA).<sup>22</sup> This is to some extent encapsulated in Legislative debate regarding an earlier iteration of the *Police Act*, which is quoted in Order 03-06 as follows:

**G. Plant:** I have heard from time to time the concern about the difficulty of distinguishing between public trust complaints and internal discipline complaints. I think the question in its simplest form goes something like this: why should the presence or absence of a complainant be a terribly significant factor? Why not process all discipline defaults as if they were public trust complaints?

**Hon. U. Dosanjh:** I think the essential concern is that we allow the police bodies to deal with issues around labour-management and internal discipline issues in a way that leaves them with some management on their own, although you might

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<sup>21</sup> Section 76 of the *Police Act*.

<sup>22</sup> For example: Order F08-16, 2008 CanLII 57359 (BC IPC) (an investigation into a school teacher); F14-10, 2014 BCIPC No. 12 (an investigation into a university professor); Order F10-36, 2010 BCIPC 54 (CanLII) (an investigation into a workplace death).

say that those are issues of public interest. There's no question about that. That's why I believe that the police complaint commissioner has access to information with respect to all of those proceedings. But they have to be dealt with separately so that the public realizes that a public trust complaint is a complaint that's different from an internal discipline complaint and is dealt with very differently. The complainant would have access to all of that information through the complaint commissioner, whereas the information may not be as readily available because of labour-management issues involved in internal procedures...<sup>23</sup>

[41] In my view, it is apparent that the Legislature views access to information around internal police labour-management issues to be different than those that directly affect the public.

[42] Further, it is also apparent that the Legislature intended for the *Police Act* and labour law (ie. collective agreements and the *Labour Relations Code*) to operate in conjunction, to enable both the protection of the public interest in policing matters and the protection of the rights of police officers as unionized employees under a collective agreement. For example, Division 6 itself contemplates that internal discipline matters may result in an arbitrator being appointed under the grievance procedure of the collective agreement.<sup>24</sup> The reference to the appointment of an arbitrator suggests that the Legislature viewed internal discipline matters to be part of the labour process. In my view, Division 6 in Part 11 of the *Police Act* is drafted to work in harmony with – not override – the *Labour Relations Code*, by providing parameters and safeguards to ensure that a collective agreement does not undermine the public interest of ensuring that there is adequate oversight of police officers.

[43] A difference between employee disciplinary issues involving a police officer and employee discipline issues in most other unionized work environments is that the Legislature recognized that the issue of police discipline is of sufficient public interest – even if it is not a matter that directly involves or affects the public – to warrant the special restrictions and obligations on the conduct of internal discipline of police personnel. In my view, this is a primary reason for Division 6 of Part 11 of the *Police Act*.

[44] Division 6 requires municipal police departments to establish procedures not inconsistent with the *Police Act* for dealing with internal discipline matters.<sup>25</sup> They must then file a copy of these procedures with the OPCC. Further, when police departments conduct an internal discipline investigation, they must provide the OPCC with copies of recommended disciplinary measures and the final

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<sup>23</sup> Order 03-06, 2003 CanLII 49170 (BC IPC) at para. 26 citing Debates of the Legislative Assembly of British Columbia (Hansard), vol. 6, no. 24, July 16, 1997 (Afternoon Sitting), at pp. 5822-23. I note that provisions of the *Police Act* being discussed and the some of the language used in the *Police Act* at the time is materially different that the current *Police Act*.

<sup>24</sup> Section 175(3) of the *Police Act*.

<sup>25</sup> Section 175 in Division 6 of the *Police Act*.

decision arising from the investigation. Division 6 strikes a balance by allowing police departments to run their own internal discipline processes, but with a measure of OPCC oversight at the end of the investigation. This arrangement provides more independent oversight than in most labour relations situations, but less oversight than for investigations under Division 3 when a matter directly affects the public. Division 6 of Part 11 of the *Police Act* in effect overlays parameters and a degree of oversight into otherwise typical labour relations matters.

[45] The Legislative debate quoted above refers to the disclosure of information to complainants in an investigation. It is not apparent to me from that discussion, or the wording of the current *Police Act*, that the Legislature intended to deprive police officers of their rights under FIPPA when they are attempting to receive records related to an investigation their employer decided to conduct into their work performance for matters that do not directly involve or affect the public.<sup>26</sup>

[46] The records at issue arise in relation to a WVPD internal discipline investigation about whether the applicant was fulfilling his employment obligations to WVPD. The terms of this relationship between the applicant as an employee and WVPD as his employer are set out by the collective agreement.<sup>27</sup> This is consistent with the Policy itself, which states:

The internal discipline process will be governed by the provisions of the *Labour Relations Code* of British Columbia, jurisprudence thereunder and principles expressed and implied in arbitral case law in the Province of British Columbia.

[47] In my view, Part 11 of the *Police Act* was not the source of WVPD's authority to conduct an internal investigation of the applicant. In my view, WVPD initiated the investigation pursuant to the Policy to manage its employment relationship with the applicant, under the terms of the collective agreement. This investigation may have been in compliance with, but was not initiated under, Part 11 of the *Police Act*.

[48] In summary, I find that the records at issue do not fall under ss. 182(c) or (d) of the *Police Act* because WVPD's investigation was not initiated under Part 11 of the *Police Act*. Given this finding, it is not necessary for me to consider part two of the test, which is whether the records, reports or information that otherwise would fall under ss. 182(c) or (d) was created on or after the investigation was initiated. Since s. 182 of the *Police Act* does not exclude the

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<sup>26</sup> For clarity, I am not stating or suggesting that WVPD is required to disclose the records at issue to the applicant, even assuming they fall within the scope of FIPPA.

<sup>27</sup> I note that the *Labour Relations Code* also applies, and that s. 179(1)(b) of the *Police Act* expressly states that: "Nothing in this Act or the regulations prohibits... (b) proceedings under the *Labour Relations Code* as to the interpretation, application or operation of a collective agreement."

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records at issue from the scope of FIPPA, WVPD must process the applicant's request with respect to these records.<sup>28</sup>

## **CONCLUSION**

[49] For the reasons given above, under s. 58 of FIPPA, I order that WVPD is required to process the applicant's request and give him a decision under FIPPA about whether he is entitled to have access to the information in the records before me by **April 1, 2015**.

February 18, 2015

## **ORIGINAL SIGNED BY**

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Ross Alexander, Adjudicator

OIPC File No.: F13-51977

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<sup>28</sup> For clarity, this does not mean that WVPD is required to disclose the records to the applicant. It must, however, provide a response to the applicant pursuant to s. 8 of FIPPA with respect to these records.