Protecting privacy. Promoting transparency.

Order F15-23

VANCOUVER ISLAND HEALTH AUTHORITY

Michael McEvoy
Deputy Commissioner

June 18, 2015

CanLII Cite: 2015 BCIPC 25
Quicklaw Cite: [2015] B.C.I.P.C.D. No. 25

Summary: In Order F14-27 it was held that VIHA could not sever and withhold portions of responsive records on the basis that those portions were 'outside the scope' of the applicant's request. A reconsideration was sought and this order decides that issue. FIPPA does not authorize a public body to sever and withhold portions of responsive records on the basis that they are outside the scope of an applicant's request. VIHA is ordered to consider the applicant's request as it relates to those portions and disclose them with the exception of any information to which exceptions to disclosure set out in Division 2 of Part 2 of FIPPA apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 12(3)(b), 13, 14 and 22.

Authorities Considered: AB: Order 97-020, 1998 CanLII 18626 (AB OIPC). **ON**: Ontario (Community and Social Services) (Re), 1990 CanLII 3840 (ON IPC); Ontario (Health) (Re), 1995 CanLII 6444 (ON IPC); Ontario (Attorney General) (Re), 1995 CanLII 6411 (ON IPC).

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25 (CanLII); *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII); *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII).

INTRODUCTION

[1] Order F14-27 dealt with a request for records made to the Vancouver Island Health Authority ("VIHA") for access to records related to VIHA's decision-making process from February 2008 to August 16, 2010 concerning fixed site needle exchange services in Greater Victoria.

[2] While it disclosed some records in response, VIHA withheld information under ss. 12(3)(b), 13, 14 and 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). Order F14-27held that VIHA was required to disclose the information it withheld under s. 12(3)(b), but confirmed that it was authorized to withhold the information it withheld under s. 13 and s. 14 of FIPPA. It also held that VIHA was required to make a decision under FIPPA about whether the appellant is entitled to have access to the information in the records that it had marked "out of scope" and required this to be done by September 10, 2014.

[3] On September 9, 2014, VIHA filed a petition for judicial review of Order F14-27, in part on the basis that the notice of inquiry leading to Order F14-27 did not squarely raise the 'non-responsive' information issue and this Office did not invite submissions on that issue. It was later agreed by all involved that the inquiry leading to Order F14-27 should be re-opened to address the non-responsive information issue. Written submissions were then received from the applicant and VIHA on that issue.

ISSUE

[4] The only issue to be decided here is whether FIPPA authorizes VIHA to decide that portions of responsive records are out of scope of the request and on that basis withhold those portions it deems non-responsive. In terms of VIHA's duties under FIPPA, the question can be framed as whether VIHA may decline to make a decision under FIPPA respecting those portions of responsive records it considers are non-responsive.

[5] Before addressing the issue raised here, I must first deal with VIHA's argument that this Office has no jurisdiction to deal with the issue through this process.

DISCUSSION

VIHA's objection to jurisdiction

[6] VIHA submits that this Office has no authority to make an order to process "out-of-scope or non-responsive records."[1] It says that, if an inquiry is about

[1] VIHA's submissions, para. 89.

something other than a public body's decision to give access to all or part of a record, this Office can "only require that a duty imposed under FIPPA be performed."[2] It then refers to s. 6(1), saying that this section "outlines the duty of the public body".[3] There is no duty under FIPPA for a public body to "produce information or records which have not been requested", VIHA argues, and unless the public body has failed to comply with its duty, VIHA says there is no jurisdiction to make an order against it."[4] This Office could only become involved, VIHA argues, if an applicant believes "relevant information has not been provided", with the matter proceeding as a complaint under s. 42(2), not an inquiry such as this.

[7] VIHA's position amounts to contending that the issue cannot be properly determined through a Part 5 process—it can only be addressed through a complaint and investigation under Part 4. VIHA does not say what this might achieve that cannot be achieved here. Its point, rather, is about what it says is proper process under FIPPA.

[8] I do not find this argument persuasive. Again, VIHA characterizes the issue to be decided as whether it has met its s. 6(1) duty to the applicant, adding that, since it has no duty to disclose non-responsive records, there is no jurisdiction to make an order against it. But this argument begs the question, since it presumes that no duty exists under s. 6(1). Yet the very question arising in the inquiry is, at its core, whether s. 6(1), and other aspects of FIPPA, excuse VIHA from responding in relation to what it considers are non-responsive portions of records. Put another way, the very question to be determined here is whether VIHA has authority under FIPPA to refuse to disclose portions of records that it considers are outside the scope of the applicant's request. Or does FIPPA only authorize VIHA to refuse access on the basis of the exceptions to access set out in Part 2 of FIPPA?

[9] Section 52(1) provides that an applicant who has made a request for access to a record "may ask the commissioner to review any decision, act or failure to act" of the public body, "including any matter that could be the subject of a complaint under section 42(2)." Section 56 provides that the commissioner is authorized to "decide all questions of fact and law arising in the course of an inquiry".[5] The question stated here is plainly a question of law, involving as it does interpretation of FIPPA (and not just s. 6(1), as VIHA appears to suggest). This is clear beyond doubt.

---

[2] *Ibid.*, para. 83.
[3] *Ibid.*, para. 84.
[4] *Ibid.*, para. 86.
[5] I note here that s. 58(3)(a) authorize the commissioner to confirm a duty imposed under FIPPA has been performed, or require it to be performed. This would, of course, include the s. 6(1) duty emphasized by VIHA here.

[10] Similarly, the Commissioner's authority under s. 58 is engaged on this issue. Section 58(1) requires the Commissioner to dispose of the issues in an inquiry into a refusal to give access to records in whole or in part. VIHA has refused access to information on the basis that FIPPA authorizes it to do so where it deems information to be non-responsive to a request. Where the decision under review is to refuse access to part of a record, s. 58(2)(a) provides that the Commissioner is to determine whether the public body is "authorized or required to refuse access". The issue, again, is whether FIPPA authorizes VIHA to refuse access other than on the basis of exceptions under Part 2. Section 58(3)(a) authorizes the Commissioner to require a public body to perform a duty under FIPPA. These provisions enable me to require VIHA to perform its duty to respond to the applicant without withholding material that VIHA deems non-responsive.

[11] To sum up, this Office has the authority to determine the issue stated in the notice of inquiry and to require VIHA to perform its duty in relation to the withheld portions of records. Before dealing with that issue, I will address the admissibility of an affidavit that VIHA submitted.

Admissibility of VIHA's evidence

[12] VIHA has submitted an affidavit sworn by its Director of Information Stewardship, Access and Privacy (the "Director"). This affidavit provides an overview of how VIHA responds to access requests, but also speaks to the alleged impact on VIHA if it has to process what it considers to be non-responsive portions of records. The applicant has not objected to the admissibility of this affidavit *per se*, but contends that its contents are speculative, exaggerated and in some respects erroneous.

[13] No attempt was made to qualify the Director as an expert.[6] In any case, I have considered the affidavit, but it does not alter the interpretation of FIPPA, discussed below, that flows from application of the principles of statutory interpretation. Nor do the portions of the affidavit describing the practical implications for VIHA carry much weight, as I will now discuss.

[6] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 SCR 306, 2011 SCC 25, the Supreme Court of Canada noted, at para. 32, that expert evidence could be used "to better appreciate the day-to-day workings of the government and to situate his [the judge's] interpretation of the *Access to Information Act* within its proper context." The Court also noted that the Federal Court had not relied "on any expert opinion on the meaning of the words used by Parliament as contended" (para.32).

Assessment of the VIHA affidavit

[14] Paragraphs 23(a)-(c) and (e) of the affidavit describe harms that, VIHA asserts, will flow from its having to process more portions of more records. It argues that, if it has to process more portions of records, it might inadvertently invade third-party privacy by virtue of the mosaic effect. That is, disclosing more portions of records might reveal information that an applicant could use to piece together personal information of third parties, the disclosure of which would unreasonably invade their personal privacy. Solicitor client privilege might also be unknowingly breached through this mosaic effect, and corporate confidentiality might also be compromised through advice or recommendations, or financially sensitive information, being inadvertently disclosed.

[15] The affidavit also speaks, more broadly, to possible "[r]eputational harm" to VIHA through inadvertent disclosure of "disparate, incomplete and non-related portions of information, resulting possibly in inaccurate inferences and conclusions being drawn about VIHA in the absence of the appropriate and meaningful context". How this "reputational harm" argument fits within the framework of the explicit Part 2 exceptions that seek to protect against specific, identified, harms is not at all clear.

[16] VIHA's 'mosaic effect' and "reputational harm" arguments are not persuasive. This Office's decisions have recognized the 'mosaic effect' in specific, well-defined cases. VIHA's concern is, by contrast, hypothetical and speculative. VIHA does not explain why processing more portions of more records—the extent of which depends on each case—would necessarily lead to these harms. This may be an argument that assessment of a greater volume of records increases the risk of error. Even if I assume that VIHA would have to process considerably larger volumes of records, it does not follow that VIHA's mosaic effect concerns necessarily will come to pass. For one thing, VIHA's in-house access and privacy staff would be as able to guard against that risk situation as they are now. The same point goes for the other harms VIHA alleges would arise if it had to process portions of records it considers non-responsive.

[17] This takes me to the portions of the affidavit which assert that having to process what VIHA deems non-responsive portions of records would have an impact on VIHA's budget. The Director deposed (at para. 23(d)) that, to perform the analysis and processing work that

> … naturally flow from the adjudicator's newly expanded interpretation of 'responsive' information and records, there will be a significant increase in the type, scope, retrieval, assessment, processing, and production of records now subject to requests. As a result, there will be a concomitant increase in the allocation and expenditure of human resources required to perform these functions.

[18] The Director then estimates that VIHA "projects" that it will need to hire at least two additional staff, with a total cost of $181,728.00 per year, all-in. This is a very precise projection.

[19] Even assuming for discussion purposes only that evidence of this kind is properly considered in interpreting FIPPA, this figure can only be described as conjectural. No factual basis was cited for its calculation. VIHA did not, for example, purport to quantify what the volume increase in work would be for its staff. VIHA simply asserts that there would be a "significant increase" in the work, but does not go further than this broad contention. At the end of the day, again assuming relevance, the alleged impact is hardly amenable to meaningful estimation at this point. Accordingly, even assuming that these aspects of the affidavit could properly be considered in discerning the meaning of the relevant FIPPA provisions, they would be of no meaningful assistance.

[20] Another aspect of the affidavit, para. 22, is of interest:

> In the interest of the applicant's right to this information, and public access rights, VIHA will provide the relevant information to the applicant but will not disclose the non-responsive and unrelated portions of the record *when they provide no contextual enhancement to the meaning of information contained in the responsive information* [*sic*] *and will be processed as set out above.* [my emphasis]

[21] As the emphasized portions suggest, VIHA is arguing that it has the right to determine which portions of records are 'contextually enhancing' in relation to information contained in responsive portions. This puts a public body in the position of judging contextual relevance where it may well not be well-positioned to know what is contextually relevant. The possibility that a complaint or request for review might be made to this Office is not a real answer. Further, VIHA's argument illustrates that the interpretation it urges would be ill-defined at best, as opposed to being prescribed in clear statutory language.

Statutory interpretation principles

[22] Over the past 20 years this Office has issued thousands of adjudication decisions interpreting FIPPA's language and applying it. Yet I am aware of no decision in which the issue has been put so squarely into play. One might expect this issue to have arisen much earlier in the life of this law, but it has not.

[23] The words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of FIPPA, the object of FIPPA and the intention of the Legislature.[7] The Supreme Court of Canada has repeatedly affirmed this approach to statutory interpretation, as it did last year in interpreting Ontario's *Freedom of Information and Protection of Privacy Act*.[8]

[24] Citing this interpretive approach, the applicant says that FIPPA's provisions "are clear and unambiguous", and that they require a public body to "disclose an entire responsive record to an applicant unless a specific exception to disclosure listed under Part 2" applies".[9] He argues that both the "grammatical and ordinary sense" of FIPPA's relevant provisions, and "a contextual and purposive analysis" of those provisions within the scheme of FIPPA, support this interpretation.[10] Although it does not explicitly acknowledge the *Rizzo Shoes* approach, VIHA does refer to the purposes of FIPPA in introducing its arguments on the interpretation of FIPPA.

[25] As I have noted, VIHA has made a number of detailed arguments, and provided an affidavit, addressing what it says would be the impact for its own operations, for other public bodies and for the right of access to information if FIPPA is interpreted as the applicant argues it should. The ordinary principles of interpretation do not permit me to ignore the plain language of the law. If an interpretation of legislative language would be absurd, that is one thing, but I cannot shape or tailor the statute by reading in language in order to avoid perceived harm or advance supposed benefits.[11]

[26] This perspective is consistent with the decision of the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*.[12] In that case, the Information Commissioner of Canada argued that the quasi-constitutional status of the federal *Access to Information Act* meant the Act should be interpreted broadly, to give effect to that status. Charron J. said, at para. 40, that "[t]he Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted." This is equally so in relation to

---

[7] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 [*Rizzo Shoes*], citing with approval Elmer Driedger, C*onstruction of Statutes* (2nd ed. 1983) at p. 87. As previous Orders have noted, this approach is consistent with the interpretive direction of s. 8 of the *Interpretation Act*: "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[8] *John Doe v. Ontario (Finance)*, 2014 SCC 36.

[9] Applicant's submission, para. 10.

[10] Applicant's submission, para. 12.

[11] Even if I assume for discussion purposes that VIHA's arguments and evidence are relevant, I find that they are speculative—in some cases, highly speculative—and the evidence offered in support is far from persuasive, such that this material is, overall, of little if any assistance. I return to this later.

[12] [2011] 2 SCR 306, 2011 SCC 25.

VIHA's arguments about the harm it says could possibly result if public bodies cannot set aside information or records that are out of scope.

Legislative purposes of FIPPA

[27] In the result, in interpreting FIPPA, which is the enabling statute of this Office, I must apply FIPPA's language in its grammatical and ordinary sense, in a manner that is harmonious with FIPPA's scheme, its object and the intention of the Legislature.

[28] Both parties acknowledge the statement of legislative purposes and intent found in FIPPA. Section 2(1)(a) provides that one of FIPPA's purposes is "to make public bodies more accountable to the public…by giving the public a right of access to records". Section 2(1)(c) elaborates on the legislative purposes by stating that the overall goal of enhancing public body accountability also is to be advanced by "specifying limited exceptions to the rights of access".

[29] It is still relatively unusual for the Legislature to enact statutory statements of legislative purpose, and FIPPA's statement aligns with what Canadian courts have time and again affirmed is the purpose of freedom of information laws. As the Supreme Court of Canada put it in *Dagg v. Canada (Minister of Finance)*, the "overarching purpose of access to information legislation" is to "facilitate democracy":

> It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31*Can. J. of Econ. and Pol. Sci.* 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.[13]

[30] Accordingly, *Dagg* tells us, access to information laws recognize "a broad right of access to 'any record under the control of a government institution'", and "it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted."[14]

---

[13] [1997] 2 SCR 403 [*Dagg*] at para. 61. These observations were made in dissent by La Forest J., but have since been approved of by the Supreme Court, as noted below.

[14] *Dagg* at para. 63. More recently, the Supreme Court said that "[a]ccess to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society": *Ontario (Public Safety and Security) v.*

[31] As the Supreme Court acknowledged more recently in *John Doe v. Ontario (Finance)*, the legislative purpose statement in s. 1 of Ontario's similar FIPPA acknowledges that "the public interest in access to information…establishes a presumption in favour of granting access", and "recognizes that the presumption must be rebuttable in a limited number of specific circumstances according to the mandatory or optional exemptions provided".[15]

Interpreting FIPPA

[32] The rights of access are twofold: there is the right of individuals to have access to their own personal information and there is the public's right of "access to records". As regards these rights, FIPPA provides that both "personal information" and other "information" are recorded information. The focus on access to recorded information makes sense. It is difficult to see how legislation such as FIPPA could in any practical sense, certainly, attempt to confer rights of access, and imposed related obligations and functions, in relation to unrecorded information. FIPPA defines "personal information" as "recorded information about an identifiable individual" (Schedule 1). Similarly, Schedule 1 of FIPPA defines the term "record" as follows, with emphasis added below to highlight the point:

> "record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and *any other thing on which information is recorded or stored* by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records.

[33] Section 2(1), again, distinguishes between a right of access to personal information and a right of access to other information. FIPPA's operative provisions embody both concepts, but take a unitary approach, since both rights are exercised by making a written request for access (s. 5.) A person who makes a request "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 (s. 4(1)).[16]

Criminal Lawyers' Association, 2010 SCC 23 at para. 1. Also see *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25.

[15] 2014 SCC 36 at para. 41.

[16] Section 3(1) provides that FIPPA applies to all records in the custody or under the control of a public body such as VIHA. There are important exceptions to this. As an example, FIPPA does not apply to "a court record" or "a record of a judge of the Court of Appeal, Supreme Court or Provincial Court", or other specified judicial officers (s. 3(1)(a)). Another example is the exclusion for "a personal note, communication or draft decision" of someone acting in "a judicial or quasi-judicial capacity" (s. 3(1)(b)).

[34] A request must contain "sufficient detail" to enable an experienced employee of the public body to, with a reasonable effort, "identify the records sought" (s. 5(1)(a)). The process of identifying and finding requested records may be understood to involve identifying and compiling 'responsive records'. In responding to a request by compiling responsive records, a public body "must make every reasonable effort to assist" the applicant, and "to respond without delay…openly, accurately and completely" (s. 6(1)).[17]

[35] The public body must respond to the access request within times stipulated in FIPPA (s. 7). The response must, among other things, tell the applicant "whether or not the applicant is entitled to access to the record or to part of the record" (s. 8(1)(a)). If "access to the record or to part of the record is refused", the response must include "the reasons for the refusal and the provision of this Act on which the refusal is based" (s. 8(1)(c)).[18]

[36] At para. 33 of its initial submission, VIHA emphasizes the words "part of a record" in s. 8(1).[19] The rest of s. 8(1) provides context, however, making it clear that the phrase "part of a record" acknowledges that various provisions in FIPPA—notably the access exceptions in Part 2—may justify a refusal of access to parts of records.

[37] It is true that, whereas s. 8 refers to refusal of access to "part of a record", s. 4(2) provides that the right of access "does not extend to information excepted from disclosure under Division 2 of this Part" (s. 4(2)). If the excepted information "can reasonably be severed from a record", the applicant has a "right of access to the remainder of the record" (s. 4(2)). Use in s. 4 of the terms "information" and "part of a record" does not, however, mean the Legislature intended s. 8 to authorize public bodies to withhold non-responsive information.

---

[17] The "head" of the public body is commonly referred to in FIPPA as having the statutory powers, functions and duties of the public body. Of course, the designated "head" of a public body will often delegate her or his powers, functions and duties to others, notably those with expertise in information and privacy. For ease of reference, I refer to the public body as having powers, duties and functions under FIPPA.

[18] Section 8(2) authorizes a public body to refuse to confirm or deny the existence of "a record containing information" falling under s. 15 or "a record containing personal information of a third party" where disclosure of the personal information would be, in essence, prohibited under s. 22. This invokes the concept of a record, not merely information within a record or only portions of a record, in authorizing a non-response respecting the existence of the record as a whole. Second, the s. 8(1)(c) reference to refusal of access based on a "provision of this Act" recognizes that a public body may refuse access to a record if s. 3(1) provides that FIPPA does not apply to the record.

[19] VIHA's submissions also fasten on use of this phrase in several other FIPPA provisions. For the same reasons as those given below in relation to s. 8, I do not accept that use of this phrase in other FIPPA provisions supports VIHA's interpretation.

[38] Sections 4 and 8 must be read together in relation to each other and in the overall context of the statutory scheme in which they appear. Section 4(1), again, creates a right of access to a "record", not a right of access to "information". Consistent with the fact that the right of access relates to records, ss. 5, 6 and 8 in their entirety use the term "record" (FIPPA does not attempt to define 'information').

[39] Under s. 5(1), "to obtain access to a record", an applicant must provide the public body with sufficient detail that an experienced employee can identify the "records sought". When someone requests access to records, the public body uses the request to identify and compile records that respond to the request.[20] If any of the contents of a record reasonably relate to the request, the "record" is responsive to the request. The duty to respond as provided in ss. 7 and 8 then applies, on the face of those provisions, to the responsive records, and the public body must assess what, if any, information may or must be severed and withheld under s. 4(2) and Part 2.

[40] This brings me back to s. 8 and its use of the phrase "part of a record". Section 8 addresses the contents of a public body's response to a request for records, stipulating the timing of access, requiring reasons for the public body's decision, and more. Section 4(2) says that the "right of access to a record does not extend to information excepted from disclosure", while s. 8(1) refers to refusal to give access to a "part of a record". The s. 8 duties flow from the s. 4(1) right of access to records, with s. 8 particularizing how the public body must respond.

[41] The purpose of s. 8(1) is, in other words, to implement the right created by s. 4(1), the right of access to records. Again, the operative concept in FIPPA is that of a "record", which Schedule 1 of FIPPA defines.[21] Section 8 merely affirms that, as the statute as a whole contemplates, the right of access is to a thing (a record) that embodies information in physical form. This is why, for example, s. 8 requires a public body to tell an applicant "where, when and how access will be given".[22] The language of all of s. 8(1)—not just the phrase that VIHA emphasizes—makes it clear that "access to the record or to part of a record" may, consistent with the language of the s. 4(2) derogation, be refused only

[20] It is open to a public body to clarify a request with an applicant, something that may assist both the applicant and the public body. This can help ensure that the true aim of the request is known, thus better serving both the public body and applicant.

[21] In my view, it is not necessary in the circumstances to delve into FIPPA's definition of "record" in order to decide the issue before me.

[22] At para. 34 of its initial submission, VIHA cites s. 9 in support of its position. It refers to use of the phrase "part of the record" in that section. Like s. 8, s. 9 implements the s. 4(1) right of access to records (as do the other FIPPA provisions using that phrase). For reasons given above in relation to s. 8(1), I do not find this persuasive. Among other things, s. 9(1) provides that if an applicant is told under s. 8(1) that access will be given, the rest of s. 9 must be complied with. Accordingly, s. 9 must be read with close reference to s. 8(1), which itself must be read in light of its role and place in the structure of FIPPA, particularly Part 2, in which both these provisions appear.

where a "provision of this Act" authorizes or requires refusal. This can only plausibly refer to an explicit provision of FIPPA as authority to refuse access, not unwritten, or read-in, language that the Legislature did not state.

[42] The Legislature might in theory have said in s. 8(1) that a public body must tell an applicant whether the applicant is "entitled to access to the record or to information". It might also have used the phrase "entitled to access to the record or to information in the record". It is plain, however, that either formulation could create uncertainty. The latter formulation risks tautology. The language that the Legislature has used is not a warrant for reading in language that is not there, which at its heart is what VIHA asks me to do. To sum up, s. 8(1) refers to refusal of access to "part of a record" but does so with close and specific reference to the "provision of this Act on which the refusal is based". There is no provision of FIPPA authorizing a public body to withhold portions of records because the public body decides they do not respond to the request (or that they do not provide meaningful context or meaningful disclosure, as VIHA would have it). FIPPA does not contain a qualitative criterion, a principle that authorizes public bodies to, as VIHA argues, decide what a "substantive" or "meaningful" response to a request is.

[43] VIHA's position is perhaps best illustrated by para. 51 of its initial submission:

> VIHA is not proposing that contextual information should not be included in a response; rather, it should be and is included in VIHA's responses to applicants. Public bodies have to review information subject to access before disclosure to ensure compliance with the mandatory and discretionary obligations to withhold information contained in records determined to be responsive to the request. The public body must consider what equates to a substantive, meaningful response in order to meet its section 6 duty to assist applicants. In the instant case, however, there are records where significant portions of information are clearly not responsive to the request, do not provide context or meaningful disclosure, and do not warrant the time or resources it would take to process for exceptions. To do so would unreasonably interfere with the operations of the public body. Meaningful disclosure can be made by providing access to records, with some records absent the not-responsive information.

[44] This is not what s. 6 contemplates. It does not confer a mandate on public bodies to themselves decide what would be "substantive" or "meaningful" disclosure, or which portions of which records do not "provide context or meaningful disclosure" and "thus do not warrant the time or resources", to echo VIHA's perspective, that are necessary to process the entirety of the records.

[45] Nothing in FIPPA supports the position that a record is responsive to, and therefore caught by, a request only where the public body determines that the majority, most or all of its contents respond to the request as interpreted by the public body. There is no quantitative criterion. Even if only a portion of a record is within the request's scope, the record is responsive and must be assessed.

[46] VIHA has relied on decisions from Ontario and Alberta to support its position. As I will now explain, these decisions do not support VIHA's interpretation of the language found in FIPPA.

Decisions from Ontario and Alberta

[47] VIHA relies on Alberta Order 97-020. In that case, the then Commissioner, Bob Clark cited Ontario Order P-880 on the issue of "responsiveness" as opposed to "relevancy" in determining which documents are captured by a request. He held that what are now ss. 7 and 12 of Alberta's *Freedom of Information and Protection of Privacy Act* provide legislative authority for deciding that records or portions of records are not responsive to a request. He concluded that a public body is authorized to withhold non-responsive portions. In doing so, he noted that the public body had argued that it should be able to remove non-responsive portions "because of the amount of work and time that would be required to sever everything and to provide the required third party notices under section 29 of the Act."

[48] He adverted to, at para. 38, Ontario Order P-880, which I address later. He noted that it interpreted the language conferring "a right of access to a record or a part of a record" to

> … mean two things: (i) the legislation recognized that only portions of a record may be responsive to a request, and (ii) institutions must entertain requests for information that may be contained in part of a record, as opposed to the record itself.

[49] Regarding the Alberta law, he went on to say the following (the emphasis below being Commissioner Clark's):

> [40.] Section 6(1)[23] refers only to "a right of access to any record", and does not refer to "a right of access to...a part of a record [my emphasis]", which is the wording of the Ontario legislation.
>
> [41.] However, section 11(1) of the Act reads:
>
> > 11(1) In a response under section 10, the applicant must be told

[23] This is now s. 7(1) of the Alberta Act.

> (a) whether access to the record or part of it [my emphasis] is granted or refused,
>
> (b) if access to the record or part of it [my emphasis] is granted, where, when and how access will be given, and
>
> (c) if access to the record or to part of it [my emphasis] is refused,
>
> (i) the reasons for the refusal and the provision of this Act on which the refusal is based,
> (ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and
> (iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.
>
> [42.] Section 11(1)(a) and section 11(1)(b) appear to contemplate that there may be situations in which a public body would provide an applicant with access to a part of a record, rather than the entire record. …
>
> [44.] How do I reconcile section 6(1) of the Act, which speaks only of access to a record, and section 11(1) of the Act, which speaks of access to a record or part of a record?
>
> [45.] Section 6(1) and section 11(1) are both contained in that part of the Act dealing with the process of obtaining access. Those sections should be read in such a manner that they do not conflict. Consequently, I intend to read section 6(1) and section 11(1) together as supporting an interpretation that a public body may grant access to part of the record that contains the responsive information, and may remove the non-responsive information from that record.

[50] As paras. 44 and 45 make plain, Commissioner Clark concluded that s. 7(1) of the Alberta Act conflicts with s. 11(1). The former refers to access to "any record", while the latter refers in several places to access to a "part" of a record. He thus concluded that the Legislature intended to authorize public bodies to decide that a "part" of a record was not responsive and to withhold it on that basis.

[51] Consistent with what I have already said in relation to FIPPA's comparable provisions, and with great respect, this analysis discerns conflict where none exists. Like s. 8(1)(c) of FIPPA, s. 11(1)(c)(i) of the Alberta Act says that, where access is refused to a record or part of it, the public body must tell the applicant "the provision of this Act on which the refusal is based". As I explained earlier,

FIPPA—and the Alberta Act is not materially different—confers a right of access to a record (FIPPA, s. 4(1), Alberta, s. 6(1)). This is explicitly subject to removal of information that is protected by an exception under the law (FIPPA, s. 4(2), Alberta, s. 6(2)). Provisions such as ss. 7 and 11 of the Alberta Act must be interpreted within their statutory context and in light of the legislative scheme. In my view, it is clear that the s. 11 reference to a "provision of this Act" refers to exceptions expressly set out in Part 2 of the Act. This explains the s. 11 references to a "part" of the record. With deference, I see no conflict.

[52] As Alberta Order 97-020 indicates, there are relevant decisions under Ontario's *Freedom of Information and Protection of Privacy Act*, notably Order P-880. In that decision, Adjudicator Anita Fineberg ultimately decided that an institution may, under Ontario's Act, withhold information that it considers is not responsive to a request as framed.

[53] It is interesting that her analysis began with a close interpretation of how the requester in that case happened to express the request for access. She concluded, at p. 11, that the request was

> …clearly one for **information** as opposed to one for specified **records** or documents. The request does not describe a document by date, title, author or the like; nor does it ask for an entire file or "all the information related to" a particular matter. Rather, it describes the nature of the information sought and the types of documents in which such information may be contained. [original emphasis].

[54] Adjudicator Fineberg also adverted to the distinction in the Ontario Act, which exists in FIPPA, between requests for access to one's own personal "information" and requests for "records". She noted that an individual's personal information might be found scattered in a number of records, adding that this might also be the case with non-personal information, at pp. 11-12:

> Requests for general information, as in the present case, are governed by section 24(1) of the Act. It is interesting to note that this section refers to requests for **records** as opposed to **information** as is the case in section 48(1). Section 10(1) of the Act refers to rights of access to records or **a part of a record**. In effect, the legislation recognizes that only portions of a document may be responsive to requests for general information. Thus, Institutions must entertain requests for information which may be contained in a part of a record, as opposed to the record itself. In some cases, the requests may be in the form of questions. In others, they may be framed, as here, as requests for information.
>
> In the latter case, it is possible, just as in the personal information example, that the Information being sought is contained in various documents and that the balance of one or more of these records neither has a bearing on, nor is related to, the information at issue. The Ministry

> expresses this concept thusly: The fact that some irrelevant information is located next to some relevant information does not make the irrelevant information relevant. I agree.
>
> I do not believe it follows that merely because responsive information is contained in a larger document, one must "reinterpret" the request to find that the balance of the document is also responsive to the request. I also do not believe that the fact that this approach may result in a particular record being parsed and examined line by line offends the spirit of the legislation. [original emphasis][24]

[55] In the above passage, Adjudicator Fineberg emphasized the words "or a part of a record", concluding that the "legislation recognizes that only portions of a document may be responsive". The legislative purpose of freedom of information legislation such as the Ontario Act, and the language of the s. 10(2) severance authority, are such that use of the phrase "or a part of a record" is not a particularly compelling basis on which to conclude that institutions are free to determine what is responsive and what is not within a record. This is of special importance because, as a practical matter, institutions may be mistaken in their interpretation of a request's terms, and requesters often will approach formulation of their request's terms in the dark.[25]

[56] By contrast to the Ontario Act, s. 4(1) of FIPPA confers a right of access to "any record". It does not qualify the foundational right of access by referring to "a part of a record". Section 4(2) qualifies that right, but only by explicit reference to the access exceptions in Part 2. The two statutes are not framed in the same terms. Quite apart from my reservations about the significance Order P-880 places on the phrase "part of a record", this difference is significant in assessing the persuasiveness of the Ontario decisions.

[57] In Order P-913, Adjudicator John Higgins similarly said, at p. 2, that it was "significant" that s. 10(1), the Ontario provision that confers the right of access to records, explicitly provides that the right of "access to a record or a part of a record … unless the record or the part of the records falls within one of the exemptions under sections 12 to 22." At pp. 2 and 3, Adjudicator Higgins concluded that, while the s. 10(1) language is "a completely sufficient rationale" for interpreting the Ontario law to permit non-disclosure of parts of records,

---

[24] By the same token, as I discuss elsewhere, conferring on public bodies an authority—authority not expressly granted under FIPPA—to decide which portions of a record are responsive and which are not presents risks for the public's right of access.

[25] I am also concerned by Adjudicator Fineberg's comment, at p. 12, that "one should consider whether the information which is responsive is meaningful when it is only portions of a larger document." If this was intended to mean, consistent with principles applicable to severing under exemptions, that an institution might withhold even responsive information because it is only a small portion of a record that is otherwise non-responsive, I disagree. If this was her intent, it would permit institutions to knowingly withhold information that is responsive and not protected by exemptions. I see no warrant for this in the Ontario Act.

a "more compelling reason" existed, one of "a practical nature". His specific concern was that any other approach might require public bodies to give notice to third parties and that this would force them to "expend scarce resources to comply" even though the portions in question were not responsive. Last, Adjudicator Higgins found comfort in a "comment" by the Divisional Court in *Re Attorney General of Ontario and Fineberg et al*:

> In our opinion, the [Inquiry] Officer must have the jurisdiction to consider the information and the records at issue, in light of the wording of the request. Such jurisdiction necessarily entails a right to determine the scope of the request *and the related relevance of the information at issue*.[26] [emphasis is from Order P-913]

[58] The relevant passage from *Fineberg* reads in full as follows:

> The request was "for information on funding by the Attorney General's Ministry of Project 80". The Officer determined that certain records were not relevant to the request. The cross-applicant submits that the Officer has no jurisdiction to determine relevancy and, alternatively, that the failure to seek representations from him, and from the Ministry we might add, before making such a determination, was contrary to s. 52(13).
>
> In our opinion, the Officer must have the jurisdiction to consider the information and records at issue, in light of the wording of the request. Such jurisdiction necessarily entails a right to determine the scope of the request and the related relevance of the information at issue. However, s. 52(13) imposes a mandatory obligation on the Officer to provide the person making the request, and others as specified, with an opportunity to make representations. This was not done and it does not now lie in counsel's mouth to submit that Mr. Donovan, or the Ministry, could not have made meaningful representations. Section 52(13) contains no such qualification. In the result, this portion of the Officer's order is set aside and the matter is remitted back for a redetermination of the issue of relevancy and, potentially, for a consideration of whether any of the exemptions apply, all with the benefit of representations from the parties to the request proceedings.

[59] As can be seen, the Divisional Court referred to determining the "relevancy" of records and information having noted that the Inquiry Officer had determined the relevance of "certain records". This comment is not as unequivocally supportive as Adjudicator Higgins seems to have thought. Certainly, it does not appear that the Court in that judicial review proceeding was

[26] 19 0.R. (3d) 197 [*Fineberg*] at p. 202. He also alluded to previous Ontario decisions taking this approach, but cited only Order 154, a decision of then-Commissioner Sidney Linden. Now re-numbered Order P-154, this decision contains no analysis of the issue here at hand. It merely states that the institution properly declined to disclose three entire records that did not respond to the request and were "presumably" included "in error" (p. 6). The institution had also withheld the last nine pages of a single record as non-responsive and this was permitted, without discussion.

asked to review the decision specifically, and it sent the matter back because of a breach of procedural fairness.[27]

[60] As I noted earlier, institutions may be mistaken in their interpretation of a request's terms, and requesters often will approach formulation of their request's terms in the dark. The approach taken in Ontario and Alberta heightens the risks to the public's right of access, and FIPPA's overall goals, as stated in s. 2 of FIPPA.[28] By discerning a conflict where none exists, the Alberta cases read in language that is not there. The interpretation given to the Alberta legislation in my respectful view reads in language that the Legislature used neither expressly or implicitly. The Ontario decisions spring from statutory language about the right of access that differs from ours and Alberta's. Yet even the Ontario language does not inevitably drive to the conclusion reached there. Both approaches imply language that the Legislature could have explicitly used had it wanted to.

[61] This not a fanciful concern. Access applicants are not required to explain why they are requesting access to records. They often will not fully understand what records or portions might respond to the motive or goal of their access request. Public bodies may not appreciate, based on the language of a request, the overall context in which the applicant makes it. A request may be framed, for example, in a way that inadvertently leads a public body into thinking that an applicant is interested in records about topic A, but the applicant may actually be interested in topic B (or topics A *and* B, and so on). It is no answer to say that the public body's s. 6(1) duty to assist will meet this concern. The public body may not know that it is mistaken, making it difficult to see how s. 6(1) is likely to come into play. Nor is the possibility that the public body might seek clarification an answer. The same can be said of s. 5, which in effect obliges an applicant to provide sufficient detail about what is being sought. The fact that the applicant has a duty to provide sufficient detail does not mean that all will be clear, that there will be no mistakes or confusion about purpose or context, and thus scope.

[62] As noted earlier, VIHA itself acknowledges that, as part of its duty, it should disclose information that may not be responsive as VIHA determines it, but that provides context to responsive information in the record. At para. 31 of its initial submission, VIHA suggests that, if portions of a record—it uses the example of the minutes of a meeting—"do not add any context or further the goal of meaningful disclosure", portions of the minutes may be withheld as non-responsive. Since these portions "do not assist the applicant", they may be withheld (para. 31). At para. 79(d) of its initial submission, it says that for

[27] In addition to the Ontario orders discussed above, I have considered Order 154 and Order P-2661. Neither of these advances VIHA's position.

[28] I note here, also, that these Ontario decisions did not benefit from the more recent exposition in Supreme Court of Canada decisions of the importance of access to records, or the interpretive approaches laid down by the Court.

"processing purposes, it is more straightforward and procedurally less complicated to remove information irrelevant to the request and its background or context, than to process irrelevant information".

[63] Setting aside the fact that the applicant in this case *is* interested in the non-responsive portions of records that VIHA argues are not responsive, it has to be noted that very often the background, context or relevance of portions of records will be a mystery to the public body. None of this may be apparent on the face of the request or through other contextual indicators.[29] A public body will not always know why an applicant is seeking records and thus will not be able to properly determine what is "contextually meaningful" or what disclosure is "meaningful".[30]

[64] Last, there is the risk that the applicant will not be in a good position to decide whether information a public body has redacted as non-responsive is in fact non-responsive. In some cases the context in which the redactions appear may help, but even then an applicant may be largely in the dark. If the public body does not explain the situation further, in its response or before responding, the requester's only recourse would be to appeal to this Office or to make a fresh access request for the supposedly non-responsive portions.

[65] An example helps to illustrate the challenges raised by VIHA's position. Suppose that a group of residents in a rural watershed is concerned about the watershed's environment, particularly the water quality of a large local lake. The group makes a request to the environment ministry for access to records containing information about the lake's water quality. The ministry possesses a comprehensive 342-page scientific report on all aspects of the watershed's environment. The report deals with the lake's water quality, but also contains information about the water quality of other nearby lakes and information about the watershed's broader environmental health (air quality, soil contamination, wildlife populations, and so on). The ministry notes that the access request expressly targets water quality results for the one lake, so it withholds the rest of the report, including all of the information about other environmental indicators.

[66] It does so on the basis that the information is non-responsive to the request as framed. It considers that disclosure of the rest of the report would not provide meaningful context given the scope of the request. Nor would it provide meaningful disclosure, since the rest of the report is not directly about the lake. The ministry does disclose the title page, table of contents and two pages about

[29] It is no answer to point to s. 5(1), which requires an applicant to provide sufficient detail to "identify the records sought". This may provide sufficient context to the request, including in light of the contents of identified records, but there will be cases where this is not sufficient to do that.

[30] This assumes that the purposes of FIPPA would be respected by conferring on public bodies such a potentially broad, ill-defined, unwritten discretion. Nor is it clear how such a principle of this kind would work in practice.

the lake. The remainder of the report provides context for the disclosed portions, to say the least, and the ministry's refusal to disclose the balance to some observers would appear not to be meaningful disclosure. The fact that the community group might, having noted the report's title and table of contents, make a second request for the balance of the report is a happenstance. It does not advance VIHA's argument, or the analysis in the Alberta and Ontario decisions, respecting the proper interpretation (or administration) of FIPPA in light of its legislative goals.

Conclusion under FIPPA

[67] None of this Office's decisions decide the point definitively. In the decisions VIHA cites, it has been said that public bodies have appropriately withheld portions of records on the basis of non-responsiveness. As VIHA fairly concedes, however, in none of these decisions was the issue squarely raised for decision. None of them analyzes the issue. In effect, they merely reflect the circumstances of past decisions ultimately made on the merits of decisions to refuse access under Part 2.[31]

[68] As I have indicated, the interpretation VIHA advances would require me to read into FIPPA language that it is not open to me to imply. The provisions enabling severance and withholding of protected information in my view define the limits of what a public body is authorized to do. The only "part" of a record that may be removed is that which is protected by an exception under Division 2 of Part 2.

[69] There may be practical implications for public bodies. In some cases they may have to process portions of records that they deem non-responsive, although no one can in any case meaningfully predict how often this will be so or how extensive the task will be. In some cases, a public body may have to issue third-party notices under s. 23, although, again, no one can say how often that will be so. By the same token, it has to be underscored that permitting public bodies to deem portions of otherwise responsive records as non-responsive, or 'out of scope', has implications for the public's right of access, including in the ways I have already discussed.

[70] The interpretation explained here is by no means absurd, as VIHA seems to suggest it would be on the grounds of practicality. Rather, FIPPA's plain, explicit, language, viewed in light of its statutory purposes, leads to the conclusion that a public body may not refuse access on the basis that it has determined portions of records are non-responsive. While the practical implications of a particular statutory interpretation may be a consideration in discerning legislative intention and in analyzing the words of a statute, one can

[31] There is, of course, merit in consistency and predictability in decisions, but it is trite that the principle of *stare decisis* does not strictly apply to administrative tribunals.

only take this so far. It is not a warrant for implying—more accurately, reading in—language that the Legislature has not put on the page. The Legislature may see fit to deal with the issue, but it is not open to me to do so here in the manner that VIHA urges.

[71] As for possible practical implications, realistic and meaningful responses are already available to assist both public bodies and access applicants. As already noted, s. 5(1) requires applicants to provide enough detail to enable identification of responsive records. A public body's response to a request will surely be better where the applicant has explained the reasons, and context, for the request. The applicant has no obligation to do this, but where they are willing and able, the process will be improved. This can be achieved, where necessary, by dialogue between the public body and the applicant at the outset of the request process.

[72] The public body may thus be better able to identify portions of records that are not responsive to the request. It can advise the applicant of this fact and tell the applicant why the public body believes the applicant might not be interested in non-responsive portions. It can also explain to the applicant the cost implications for the public body in having to respond. Many applicants will surely agree at that point to agree that the public body need not process the non-responsive portions of records.[32] An applicant in this position also might recognize that a second request for the non-responsive portions can be made after assessing the initial disclosure.[33]

[73] Further, if an applicant is not prepared for whatever reasons to agree that the public body may remove non-responsive portions—thus effectively clarifying or modifying the request—the public body can charge fees for processing the request, as a whole or in relation to processing the non-responsive portions. FIPPA authorizes the charging of fees and if an applicant insists on pursuing the entirety of the records, the public body may charge accordingly.

---

[32] I say "many applicants", but acknowledge it is not clear how many cases across the entirety of all public bodies will involve non-responsive portions of records, or what the volume of material would be. It is also not possible to say whether the handful of decisions of this Office over the last 20 years that mention this point are any indication of the frequency or volume of the issue.

[33] The public body would not necessarily have to contact the applicant during the request's processing. It could explain what it has done in its response, and invite the applicant to either drop the issue or pursue it. Public bodies have a duty under s. 6(1) to respond openly, accurately and completely to access requests, but a properly framed *initial response* would not necessarily put the public body off-side of this duty.

CONCLUSION

[74] For the above reasons, I find that VIHA is not authorized to refuse access to the portions of records that VIHA withheld on the basis that they are non-responsive. VIHA is required to respond to the applicant's request as it relates to those portions, withholding only information that it is authorized or required to withhold under Part 2 of FIPPA. Under s. 58(3)(a) of FIPPA, therefore, I require VIHA to perform its duty to respond to that portion of the applicant's request by July 31, 2015.

June 18, 2015

ORIGINAL SIGNED BY

Michael McEvoy
Deputy Commissioner

OIPC File No.: F11-44947