



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

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Order F16-25

## BC SECURITIES COMMISSION

Elizabeth Barker  
Senior Adjudicator

May 17, 2016

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**Summary:** The applicant requested copies of his text messages the BC Securities Commission obtained during the course of its investigation of the applicant and others. The adjudicator confirmed BC Securities Commission's decision to refuse the applicant access to the records under s. 15(1)(a) on the basis that disclosure would harm a law enforcement matter.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 15(1)(a) and Schedule 1 definition of "law enforcement".

**Authorities Considered: B.C.:** Order 00-52, 2000 CanLII 144417 (BCIPC); Order 01-48, 2001 CanLII 21602 (BC IPC); Order F05-24, 2005 CanLII 28523 (BC IPC).

**Cases Considered:** *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875.

## INTRODUCTION

[1] This inquiry involves an applicant's request for access to his personal text messages, which the BC Securities Commission ("BCSC") obtained during the course of its investigation of contraventions of the *Securities Act*.<sup>1</sup> BCSC is

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<sup>1</sup> [RSBC 1996], c. 418.

refusing the applicant access to all the requested records under s. 15(1)(a) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) on the basis that disclosure could reasonably be expected to harm a law enforcement matter.

[2] The applicant requested the Office of the Information and Privacy Commissioner (“OIPC”) review BCSC’s decision. Investigation and mediation by the OIPC did not resolve the matters in dispute, and the applicant requested a written inquiry.

## ISSUE

[3] The issue to be decided in this inquiry is whether BCSC is authorized to refuse to disclose the requested information to the applicant under s. 15(1)(a) of FIPPA. Section 57 of FIPPA states that the burden is on BCSC to prove that the applicant has no right of access to the information it is withholding under s. 15.

## DISCUSSION

[4] **Background** - BCSC is a provincial government agency incorporated under the *Securities Act*. It reports to the provincial legislature through the Minister of Finance. BCSC’s responsibilities include, amongst other things, regulating the capital markets in British Columbia (“BC”) and taking action against those who contravene BC’s securities laws.

[5] The applicant is the president and chief executive officer of a publicly-traded company (“Company”). In 2012, BCSC began investigating the Company and the applicant for alleged manipulation of the Company’s share price contrary to s. 57(a) of the *BC Securities Act* (“Investigation”).

[6] BCSC has not yet interviewed the applicant as part of the Investigation. The applicant refused to comply with a summons issued by BCSC under s. 144 of the *Securities Act*.<sup>2</sup> In response, BCSC filed a petition for contempt against the applicant in BC Supreme Court. The applicant then countered with a challenge to the constitutional validity of s. 144. The petition and constitutional challenge (“Court Proceedings”) have not yet been heard by the Court.

[7] The applicant says that he wants access to the requested records “in defense of active allegations currently before the courts in both Canada and the United States.”<sup>3</sup>

[8] BCSC states that it believes that the applicant’s request is premature. It says:

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<sup>2</sup> Section 144 provides BCSC investigators the power to summon and enforce attendance of witnesses and to compel them to give evidence and produce records.

<sup>3</sup> Applicant’s submissions, para. 1.

The Commission position is that disclosure should be delayed until Commission staff have interviewed the Applicant and the notice of hearing is amended. Once the notice of hearing is amended, all respondents will receive full disclosure of all relevant material.

Therefore, if the Applicant is a respondent, he will receive disclosure of all material, including the Text Messages, with sufficient time to prepare for a hearing. The Applicant, will not suffer any prejudice and would be in the same position as any other respondent.<sup>4</sup>

[9] **Records** - During the inquiry submission phase, BCSC disclosed some records to the applicant. I will refer to the records remaining in dispute as the “text messages”. A CD-ROM with a copy of the text messages in PDF format was provided to me by BCSC for the purpose of this inquiry.

[10] **Harm to a law enforcement matter, s. 15(1)(a)** - BCSC submits that the Investigation is a law enforcement matter under s. 15, and that allowing the applicant access to the text messages would compromise the integrity of the Investigation. The applicant disputes that disclosure would cause the harm that BCSC alleges.

[11] Section 15(1)(a) states:

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

...

[12] The Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*<sup>5</sup> said the following about the standard of proof for exceptions that use the language “reasonably be expected to harm” and the type of evidence required to meet that standard:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground... This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the

<sup>4</sup> BCSC’s initial submissions, para. 88-89.

<sup>5</sup> 2014 SCC 31 at para. 54.

allegations or consequences”: *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[13] Further, in *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*,<sup>6</sup> Bracken, J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm, and that the burden rests with the public body to establish that the disclosure of the information in question could result in the identified harm.

#### *Law enforcement matter?*

[14] The first step in determining whether s. 15(1)(a) applies is to determine whether the matter, which the public body fears would be harmed, is a “law enforcement” matter.<sup>7</sup> If it is, then it is necessary to consider whether disclosure of the information could reasonably be expected to harm the law enforcement matter.

[15] Schedule 1 of FIPPA defines “law enforcement” as follows:

“law enforcement” means

- (a) policing, including criminal intelligence operations,
- (b) investigations that lead or could lead to a penalty or sanction being imposed, or
- (c) proceedings that lead or could lead to a penalty or sanction being imposed;

[16] BCSC submits that the “law enforcement” exception under s. 15(1)(a) is available to the BCSC because the Investigation “could lead to proceedings in which a penalty or sanction could be imposed.”<sup>8</sup>

[17] BCSC alleges that the applicant and the Company violated s. 57(a) of the *Securities Act* (i.e., manipulation and fraud). It says that it issued an Investigation Order under s. 142 of the *Securities Act*, and obtained the text messages through a Demand for Production issued to TELUS under s. 144 of the *Securities Act*. BCSC also says that an investigation in relation to alleged violations of the *Securities Act* can lead to BCSC holding an administrative hearing (s. 161) and imposing sanctions (s. 162). Specifically, ss. 161 and 162 empower BCSC to order a variety of sanctions and penalties, ranging from a ban on trading activity to a \$1 million administrative penalty.

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<sup>6</sup> 2012 BCSC 875 at para. 43.

<sup>7</sup> Order 01-48, 2001 CanLII 21602 (BC IPC) at para. 15.

<sup>8</sup> BCSC initial submissions, para. 73.

[18] The applicant makes no submissions regarding whether the Investigation is a law enforcement matter.

[19] Based on the information provided about BCSC's investigatory and order making powers under the *Securities Act*, and my review of the statutory provisions referenced, I find that the Investigation in this case is a "law enforcement" matter for the purposes of s. 15 of FIPPA. This is not the first time that the OIPC has considered whether a BCSC investigation under the *Securities Act* is a law enforcement investigation under s. 15 of FIPPA. In Order 00-52,<sup>9</sup> former Commissioner Loukidelis also found that BCSC was engaged in law enforcement activities when it investigated a possible violation of the *Securities Act*.

*BCSC's evidence and submissions regarding harm*

[20] BCSC says the content of the text messages is related to the matter still under investigation, and that there is a risk that the applicant will share, and discuss, the text messages with others in advance of their giving evidence. BCSC believes the applicant and others would use the text messages to "tailor their evidence."<sup>10</sup>

[21] BCSC provides affidavit evidence from its Lead Investigator involved in the Investigation. He has been a BCSC investigator for 13 years. He says that he issued TELUS a Demand for Production pursuant to s. 144 of the *Securities Act* for the text messages from the applicant's cellphone. He explains that the Investigation is still ongoing and BCSC investigators are waiting for the Court Proceedings to end before they can interview the applicant and others. He says that BCSC does not disclose evidence to witnesses before an investigative interview because it can undermine the integrity of the investigation in the following ways:

- Witnesses may be influenced by the evidence, or the evidence may alter their recollection of events;
- Witnesses may tailor their testimony to match the evidence;
- Witnesses may collude with others on their testimony, undermining the ability of BCSC staff to corroborate testimony;
- Witnesses may destroy evidence that the witness knows is not in BCSC's possession.<sup>11</sup>

<sup>9</sup> Order 00-52, 2000 CanLII 144417 (BCIPC), pp. 4-5.

<sup>10</sup> BCSC's initial submissions, para. 84.

<sup>11</sup> Lead Investigator's affidavit #1, para. 22.

[22] The Lead Investigator says that in late 2013 he wrote a memorandum to BCSC's Chair requesting a non-disclosure order for the Investigation under s. 148 of the *Securities Act*.<sup>12</sup> His request was based on his belief that the applicant and others were colluding on evidence provided to BCSC and there were risks to the integrity of the investigation. He had obtained information that led him to conclude that the applicant had provided suggestions or directions to witnesses about how to deal with BCSC staff, and that some witnesses had communicated about what they had been saying to BCSC staff.<sup>13</sup>

[23] BCSC issued the non-disclosure order under s. 148 of the *Securities Act*. The applicant applied to have it varied or revoked, but his application was denied. The BCSC panel that heard his application found that the integrity of the Investigation remained at risk because the applicant had an intimate knowledge of the current state of the Investigation, he acknowledged frequent conversations with potential witnesses, and there was clear evidence of witnesses communicating among themselves as to what was said to BCSC staff.<sup>14</sup>

[24] With the OIPC's prior approval, BCSC provided some of its submissions and a second affidavit of its Lead Investigator *in camera*. I have reviewed the *in camera* material, which provides specific details of the text messages and the Investigation.

*Applicant's evidence and submissions regarding harm*

[25] The applicant disputes BCSC's claim that disclosure of the text messages will result in harm.<sup>15</sup> He says that BCSC has already disclosed over 20,000 pages of records consisting of interview transcripts, brokerage accounting records, personal information, including social insurance numbers, passports, banking records, emails and photographs.<sup>16</sup> He submits that in light of that disclosure, BCSC's claims about the harm that might flow from disclosing information such as the text messages to him before an investigative interview are "not valid or applicable".<sup>17</sup>

[26] He also says that the text messages are not relevant to the Investigation because they are outside the date range of the alleged contraventions of the *Securities Act*.<sup>18</sup> Although he does not directly say so, I understand him to mean that if the text messages are not relevant to the Investigation, there can be no

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<sup>12</sup> In essence, the non-disclosure order prohibits disclosing the existence of the Investigation, the identity of witnesses and the inquiries made by investigators.

<sup>13</sup> Lead Investigator's affidavit #1, para. 43

<sup>14</sup> BCSC's initial submissions, paras. 62-67.

<sup>15</sup> Applicant's submission, para. 33.

<sup>16</sup> Applicant's submission, para. 14 and 34.

<sup>17</sup> Applicant's submission, paras. 8, 30-34.

<sup>18</sup> Applicant's submission, para. 21.

harm in disclosing them. He does not, however, explain how he knows the date range of the text messages, given that BCSC has not disclosed them to him.

[27] The applicant's submissions also detail his concerns with the merits of BCSC's enforcement action and the fairness of its investigation and hearing disclosure procedures. However, those matters do not relate to the issue of whether disclosure of the information in dispute could reasonably be expected to harm a law enforcement matter under s. 15(1)(a) of FIPPA. While I have reviewed all of his submissions and evidence, I find those which pertain to the administrative fairness of BCSC's investigation and hearing processes are not relevant here as they provide no assistance in the analysis regarding whether s. 15(1)(a) of FIPPA applies.

#### *BCSC's reply*

[28] BCSC denies that it disclosed 20,000 pages of records to the applicant. It says that the United States Securities and Exchange Commission ("SEC") disclosed these records to the applicant during its proceedings against him. BCSC says that the SEC obtained the information from BCSC pursuant to s. 169.1 of the *Securities Act* and international agreements, which provide for cooperation between securities regulators.<sup>19</sup> BCSC also provides a copy of the applicant's affidavit in the Court Proceedings where he deposes that the 20,000 pages were provided to him by the SEC.<sup>20</sup>

[29] BCSC says that the SEC matter has been concluded by way of settlement and a United States District Court judgement, so there is no longer any active allegation in the United States. BCSC says its Investigation, however, is still ongoing and disclosure will not take place until it is substantially completed.<sup>21</sup> When the Investigation is substantially concluded, BCSC says, it will disclose the text messages to the applicant regardless of whether he is named as a respondent in an amended Notice of Hearing.<sup>22</sup>

#### *Analysis and findings regarding harm*

[30] The fact that an Investigation is ongoing is not enough on its own for s. 15(1)(a) to apply.<sup>23</sup> BCSC needs to show that disclosure of the text messages could reasonably be expected to harm the Investigation.

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<sup>19</sup> BCSC provides copies of two memoranda of understanding relating to Canada's cooperation with the United States: Lead Investigator's affidavit #3, exhibits A, B and C.

<sup>20</sup> Lead Investigator's affidavit #3, exhibit F.

<sup>21</sup> The Lead Investigator deposes that the information that BCSC provided to the SEC was only a portion of the evidence gathered during BCSC's Investigation (Lead Investigator's affidavit #3, para. 8).

<sup>22</sup> BCSC's reply, para. 17.

<sup>23</sup> Order F05-24, 2005 CanLII 28523 (BC IPC) at para. 19.

[31] I have reviewed the text messages. Based on that review, and the parties' submissions and evidence about the Investigation, it is obvious that the text messages relate to the matters under investigation. I am restricted in how much I can say on this point given the *in camera* nature of some of the evidence and submissions. In addition, BCSC's *in camera* submissions and affidavit material provide details of the Investigation, which illustrate and lend support to its assertion that the integrity of the Investigation will be impaired if the applicant is given the text messages before he and the remaining witnesses are interviewed.

[32] In my view, BCSC has established a clear link between disclosure of the text messages and harm to the Investigation, which has not yet concluded. Based on the facts of this case, I find that disclosing the text messages before witnesses have been interviewed could reasonably be expected to lead to discussion and collusion amongst witnesses. Therefore, I am satisfied that disclosure of the text messages prior to completion of the Investigation could reasonably be expected to harm the Investigation.

[33] In conclusion, I find that s. 15(1)(a) applies to the text messages and BCSC is authorized to refuse to give the applicant access to them on that basis.

## **CONCLUSION**

[34] For the reasons above, under s. 58 of FIPPA, I confirm BCSC's decision to refuse to give the applicant access to the text messages under s. 15(1)(a) of FIPPA.

May 17, 2016

## **ORIGINAL SIGNED BY**

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Elizabeth Barker, Senior, Adjudicator

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