Office of the Information & Privacy Commissioner for British Columbia

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Order F18-25

MINISTRY OF ADVANCED EDUCATION, SKILLS & TRAINING

Chelsea Lott
Adjudicator

July 9, 2018

CanLII Cite: 2018 BCIPC 28
Quicklaw Cite: [2018] B.C.I.P.C.D. No. 28

Summary: Order F16-24 authorized a crown agency to disregard access requests from the applicant over and above one access request at a time. The agency was later dissolved and its assets were transferred to the government pursuant to s. 68(1)(b) of the *Private Training Act*. The applicant subsequently made an access request under FIPPA to the Ministry. The Ministry disregarded the access request; relying on Order F16-24. The Ministry argued that Order F16-24 was an asset which was transferred to it by s. 68(1)(b) of the *Private Training Act*. The adjudicator found that Order F16-24 was not an asset within the meaning of the *Private Training Act*. The Ministry was required to respond to the applicant's access request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 43; *Private Training Act*, s. 68(1)(b).

INTRODUCTION

[1] The Private Career Training Institutions Agency (PCTIA) was a crown agency which regulated privately run career training institutions in British Columbia.[1] The applicant made a number of requests under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for records from PCTIA. In May 2016, the Office of the Information and Privacy Commissioner (OIPC), under s. 43 of FIPPA, issued Order F16-24, authorizing PCTIA to disregard all access requests from the applicant over and above one open access request at a time.

[1] Order F16-24, 2016 BCIPC 26 at para. 4.

[2] In September 2016, PCTIA was dissolved and its mandate was taken over by the Ministry of Advanced Education (Ministry).[2] In November 2016, the applicant requested records from the Ministry. The Ministry disregarded the applicant's request, on the basis that it was entitled to rely on Order F16-24.[3] The applicant complained to the OIPC that the Ministry was not permitted to rely on Order F16-24 because the Order only applied to PCTIA. The applicant requested that the OIPC review the Ministry's decision to not respond to his access request. Mediation did not resolve the matter and the applicant requested an inquiry.

ISSUE

[3] The issue for inquiry is whether Order F16-24 authorizes the Ministry to disregard the applicant's access request.

DISCUSSION

Background

[4] Order F16-24 addressed the applicant's requests to PCTIA related to the registration and regulatory compliance of two private training institutions, Rutherford College and ClearMind International Institute.[4] The adjudicator authorized PCTIA to disregard five requests because they were frivolous or vexatious within the meaning of s. 43(b) which states:

> 43 If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 or 29 that
> …
>
> (b) are frivolous or vexatious.

[5] The adjudicator also authorized PCTIA, for a period of two years from the date of the order, to disregard all access requests made by the respondent over and above one open access request at a time.

[6] At the time Order F16-24 was granted, PCTIA and the Ministry were recognized as distinct public bodies under FIPPA.[5] The *Private Training Act* removed PCTIA's designation as a public body under FIPPA in September 2016.[6] The applicant requested records from the Ministry two months later.

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[2] Now titled the Ministry of Advanced Education, Skills & Training.
[3] The Ministry has relied on the order to disregard other access requests from the applicant according to the Ministry's evidence, however, only request AED-2016-64793 is in issue in this inquiry.
[4] Order F16-24 at paras. 13–26. The applicant was also evidently making similar requests to the Ministry at the same time. See para. 40.
[5] The definition of "public body" in schedule 1 specifically includes ministries. Schedule 2 designated PCTIA as a public body of FIPPA.
[6] OIC 375/16 brought s. 85 into force.

The Ministry's Argument

[7] The Ministry argues that s. 68(1)(b) of the *Private Training Act* transferred PCTIA's rights under Order F16-24 to the Ministry. The Ministry's submissions hinge on the following provisions and definitions (emphasis added):

> Private Training Act
>
> 65 In this Division:
>
> "*agency*" means the *Private Career Training Institutions Agency* established under section 2 (1) of the former Act as that Act read immediately before its repeal by this Act;
>
> "*asset*" includes a *right* and property;
> …
>
> 68(1) On the date this section comes into force,
>
> (a) the agency is dissolved, and
>
> (b) all the *assets* and liabilities of the agency except the fund are transferred to the government.
>
> (2) An asset that is transferred under this Act to the government is also vested in the government.
> …
>
> Interpretation Act
>
> 29 In an enactment:
> …
>
> "*right*" includes a power, *authority*, privilege and licence;
>
> FIPPA
>
> 43 If the head of a public body asks, the commissioner may *authorize* the public body to disregard requests …
>
> Black's Law Dictionary
>
> The definition of "authorize" includes "To give legal *authority*; to empower"[7]

[8] The Ministry reasons that an "asset" under the *Private Training Act* includes an "authority" because "asset" is defined as including a "right" in the *Private Training Act* and a "right" is defined as including an "authority" in the

[7] Ministry submissions at para. 27 citing Black's Law Dictionary (10th ed. 2014).

Interpretation Act. The Ministry submits that because the Commissioner gave PCTIA a legal "authority" under s. 43 of FIPPA, and because an "asset" includes an "authority", then s. 68(1)(b) of the *Private Training Act,* which transferred PCTIA's assets to the Ministry, also transferred PCTIA's s. 43 authorization.

[9] The Ministry also notes that s. 70(1) of the *Private Training Act* provides that assets transferred to government "include records." The Ministry argues that s. 70 is evidence that the legislature turned its mind to the management of records and contemplated the "transfer of authorities such as the one granted under s. 43 of FOIPPA."[8]

Analysis

[10] The goal of statutory interpretation is to reveal the intention of the legislature.[9] Statutory interpretation requires that the words of an act are read in their entire context and in their grammatical and ordinary sense; harmoniously with the scheme of the act, the object of the act and the intention of the legislature.[10] The *Interpretation Act* requires legislation "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."[11]

[11] Section 43 empowers the Commissioner to "authorize" a public body to disregard access requests and by doing so the Commissioner confers a legal "authority" on the public body. The *Interpretation Act* says that an "authority" is a "right." In turn, the explicit definition of "asset" in the *Private Training Act* includes a "right."

[12] The definitions in the *Interpretation Act*, however, do not apply where a contrary intention appears in the subject enactments.[12] Therefore, I have considered what FIPPA and the *Private Training Act* reveal about the intention of the legislature, specifically whether an authority under s. 43 is a "right" that can be transferred as an asset from PCTIA to the government under s. 68(1)(b). In my view, the Ministry's interpretation is not supported by either piece of legislation.

[13] FIPPA is a comprehensive statutory code which governs the public's access to information rights and creates an administrative body, headed by the Commissioner, with specialized jurisdiction over access to information. The Commissioner is an officer of the legislature appointed based on the unanimous recommendation of a special Committee of the Legislative Assembly.[13] The

[8] Ministry submissions at para. 31.
[9] *R v Multiform Manufacturing Co*, [1990] 2 SCR 624 at p. 630, 1990 CanLII 79 (SCC).
[10] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 21.
[11] *Interpretation Act*, RSBC 1996, c 238, s. 8.
[12] *Ibid*, s. 12.
[13] FIPPA, s. 37(1).

Commissioner provides independent oversight and enforcement of British Columbia's access to information and privacy laws.

[14] The legislature has chosen to provide the Commissioner with the sole discretion to determine whether a public body is entitled to relief under s. 43 instead of permitting public bodies to decide if access requests can be disregarded.[14] In *Crocker v British Columbia (Information and Privacy Commissioner)*, the court described s. 43 as "an important remedial tool in the Commissioner's armoury to curb abuse of the right of access."[15] However, former Commissioner Loukidelis has said that any decision to grant a s. 43 authorization must be carefully considered, "since relief under that section curtails or eliminates the rights of access to information."[16] Another past Commissioner has cautioned that, "[g]ranting section 43 requests should be the exception to the rule and not a routine option for public bodies to avoid their obligations under the legislation."[17] Given s. 43's effect on access to information rights, and the potential for abuse of a power to disregard access requests, it is in keeping with the Commissioner's oversight function to maintain the sole discretion to grant relief under s. 43 as opposed to granting that power to public bodies.

[15] The analysis as to whether a public body is entitled to relief, as well as the appropriate remedy, is considered in the context of the particular public body which applies for the remedy. With regards to s. 43(a), the Commissioner is required to consider whether requests "would unreasonably interfere with the operations of the public body because of the repetitious or systematic nature of the requests." The determination of what constitutes an unreasonable interference in the operations of a public body depends on the size and nature of the public body's operations.[18] The Commissioner's findings regarding the operations of one public body could not therefore be applied to a public body with a different configuration.

[16] Even under s. 43(b), the decision to grant relief as well as the remedy is based on the particular public body applying for the authorization. This was evidenced in Order F16-24, when the adjudicator held that, "PCTIA has satisfied me that responding to the respondents' access requests causes a significant burden in terms of staff time and effort."[19] The analysis that the adjudicator took to arrive at Order F16-24 would not apply to a different public body because it

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[14] I note that in some jurisdictions, legislatures have provided that authority to public bodies. See, for example: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s. 10(1)(b); *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990 c M.56, s. 4(1)(b); *Personal Health Information Act*, SNL 2008 c P-7.01, s. 58(3)(a).
[15] *Crocker v British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC) at para. 33 [*Crocker*].
[16] Auth (s 43) 99-01, https://www.oipc.bc.ca/decisions/170 at p. 3.
[17] Auth (s 43) (19 December 1997), https://www.oipc.bc.ca/decisions/168 at p. 1. Petition for judicial review filed but never set for hearing.
[18] *Crocker, supra* note 14 at para. 37.
[19] Order F16-24 at para. 44.

was based on evidence regarding the impact of requests on PCTIA. In other words, an applicant public body must establish – through the evidence which it submits – that it is entitled to relief under s. 43. It is not sufficient to rely on the evidentiary foundation which the Commissioner concluded was satisfactory to grant a different public body relief.

[17] Throughout its submissions, the Ministry refers to s. 68(1) as transferring assets to the Ministry. However, s. 68(1) states that all assets are transferred to "the government", as in the Government of British Columbia, not the Ministry.[20] This is an important distinction because the Government of British Columbia is not a public body under FIPPA while the individual ministries are.[21] Section 85 of the *Private Training Act* expressly removed PCTIA as a public body from FIPPA, so it is clear that the legislature turned its mind to the significance of the term "public body" in FIPPA when it dissolved PCTIA and transferred its assets and liabilities. If s. 68(1)(b) was intended to include an order under s. 43, it would have express language that refers to FIPPA as it does elsewhere in the *Private Training Act*.

[18] Furthermore, if the intention was that the s. 43 authorization was part of the transfer of PCTIA's assets and liabilities under s. 68(1)(b) to the "government", presumably any public body which makes up the government would be able to rely on it. That would be an overly broad restriction on the applicant's access to information rights.

[19] An interpretation of "assets" which excludes a s. 43 authorization does not interfere with the objectives of the *Private Training Act*. That Act creates a regulatory scheme which governs private institutions that provide career training in the province and which protects students who attend, or are considering attending those institutions. Section 68 and its related transitional provisions are concerned with moving responsibilities and functions of PCTIA to the government as well as ensuring continuity between the transitioning regulatory schemes. In my view, transferring PCTIA's authorization would not assist in fulfilling any of these objectives.

[20] FIPPA is a comprehensive statutory scheme governing access to information. In the absence of express language ousting its application, FIPPA prevails over subsequent legislation on the same topic because it is intended to exhaustively govern access to information.[22] To the extent that there is any legislative inconsistency about whether s. 43 relief is authorized, FIPPA must govern unless there is express statutory language indicating otherwise.

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[20] *Interpretation Act*, s. 29.
[21] See definition of "public body" in Schedule 1 of FIPPA.
[22] Sullivan R, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc, 2014) at p. 341.

[21] This principle was expressed in *BC Teachers' Fed v AGBC* where the court held that a Treasury Board directive under the *Financial Administration Act* was not effective to override the *School Act* without express language:

> Where the legislature, as in the case on appeal, has established a comprehensive statutory code encompassing all aspects of a particular subject matter, subsequent legislation will not prevail over that code unless the subsequent legislation is framed in express terms to achieve that purpose…[23]

[22] Section 68 of the *Private Training Act* does not contain express language to override FIPPA's application. Section 68 provides:

> 68(1) On the date this section comes into force,
>
> (a) the agency is dissolved, and
>
> (b) all the assets and liabilities of the agency except the fund are transferred to the government.
>
> (2) An asset that is transferred under this Act to the government is also vested in the government, …

[23] The term "assets" is very broad. It is further defined in the *Private Training Act* as including "a right and property".[24] While the *Interpretation Act* defines a right as including an "authority", in my opinion, none of these terms are specific enough to include a s. 43 authorization under FIPPA. As a result, the requirement under FIPPA that a public body must apply to the Commissioner for relief under s. 43 governs because s. 68(1)(b) does not contain sufficiently express language altering that mechanism.

[24] In summary, the legislature has chosen to create a regulatory scheme in which the Commissioner, independent of government, oversees access to information in this province. That oversight role includes deciding whether a public body can disregard access requests from a particular applicant. The Ministry's suggested interpretation of s. 68(1)(b) would circumvent oversight by the Commissioner and is contrary to the legislative intent behind FIPPA. I conclude that an authorization under s. 43 of FIPPA is not an "asset" within the meaning of s. 68(1)(b) of the *Private Training Act*. As a result, Order F16-24 was not "transferred" to the Ministry by s. 68(1)(b), and the Ministry is not entitled to rely on it to disregard the applicant's request for records.

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[23] *BC Teachers' Fed v AGBC*, 1985 CanLII 281 (BC CA) at para. 37.
[24] *Private Training Act,* section 65.

CONCLUSION

[25] For the reasons above, under s. 58(3) of FIPPA, I require the Ministry to process the applicant's access request it identifies as AED-2016-64793 in accordance with Part 2, Division 1 of FIPPA.

July 9, 2018

ORIGINAL SIGNED BY

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Chelsea Lott, Adjudicator

OIPC File No.: F17-68899