Order F23-109

MINISTRY OF ATTORNEY GENERAL

David S. Adams
Adjudicator

December 18, 2023

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Summary: An applicant requested records created pursuant to the Crown Counsel Policy Manual, which requires crown counsel to report adverse judicial comments on a peace officer's testimony. The Ministry of Attorney General (the Ministry) withheld information in two of the responsive records under s. 22 of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Ministry also decided that the name of the involved police officer could be disclosed, and notified the police officer's employer, who requested a review of this decision by the Office of the Information and Privacy Commissioner. The applicant and another party were also invited to participate in the inquiry.

Some of the parties argued that certain provisions of s. 3 of FIPPA applied to exclude the responsive records from FIPPA's scope. Some of the parties also argued that s. 182 of the *Police Act* applied to oust the application of FIPPA.

The adjudicator determined that s. 182 of the *Police Act* did not apply to either of the disputed records. The adjudicator determined that s. 3(3)(a) applied to exclude one of the records from the scope of FIPPA, but that s. 3(3)(f) did not apply to the other. Finally, the adjudicator determined that the Ministry was required to withhold the information it sought to withhold under s. 22 of FIPPA, in addition to the police officer's name.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 3(3)(a), 3(3)(f), 22(1), 22(2)(a), 22(2)(e), 22(2)(f), 22(2)(g), 22(2)(h), 22(3)(b), 22(3)(d), 22(3)(g), 22(4); *Police Act*, RSBC 1996, c 367, s. 182.

INTRODUCTION

[1] The applicant, a journalist, requested certain records from the Ministry of Attorney General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The request was for records created pursuant to the Crown Counsel Policy Manual (the Policy Manual), which requires crown counsel

to report (to the peace officer's employer) adverse judicial findings about the evidence a peace officer has given in court.[1]

[2] The Ministry released some responsive records to the applicant, but withheld some information from two of them. With respect to those two responsive records, the Ministry notified the police officer whose testimony was the subject of the judicial comment (the police officer) under s. 23(3) of FIPPA (third party notice). The Ministry also withheld some information under s. 22 of FIPPA (unreasonable invasion of third-party personal privacy).[2] The police officer and the police officer's employer, the Saanich Police Department (SPD), jointly requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision not to withhold the police officer's name, and other information that would identify the police officer, from the responsive records.

[3] The Ministry and the SPD each provided submissions. Although the SPD does not expressly say so, I understand that its submission is a joint submission with the police officer because the police officer did not provide an independent submission. The Office of the Police Complaint Commissioner (OPCC) and the applicant were both invited to make submissions as interested parties, and both did so.

ISSUES AND BURDEN OF PROOF

[4] The issues I must decide in this inquiry are:

1. Whether s. 182 of the *Police Act* applies to oust the application of FIPPA;

2. Whether s. 3(3)(a) of FIPPA applies to one or both of the responsive records;

3. Whether s. 3(3)(f) of FIPPA applies to one or both of the responsive records; and

4. Whether the Ministry is required to refuse to disclose certain information under s. 22(1) of FIPPA.

[5] Section 57 of FIPPA sets out who has the burden of proving that an applicant should or should not be given access to a particular piece of information. However, that section is silent about who has the burden of establishing that the *Police Act* applies or that s. 3 of FIPPA applies. I agree with

[1] The timeframe for the request was January 1, 2017 - May 9, 2019.
[2] I will explain the nature of the withheld information below, under 'Information in Dispute'.

the reasoning of previous orders, which have said that the public body bears the burden of establishing that records are excluded from the scope of FIPPA.[3]

[6] Under s. 57(2) of FIPPA, the applicant bears the burden of proving that disclosure of personal information would not be an unreasonable invasion of third-party personal privacy under s. 22(1). However, the Ministry has the initial burden of establishing that the information is personal information.

DISCUSSION

Background

[7] The Ministry employs crown counsel, whose role is governed by the Policy Manual.[4] The Policy Manual provides, in a section entitled "Police Witnesses – Adverse Judicial Comments":

> Where a member of the judiciary makes an adverse finding on the court record about the reliability of the evidence given by, or the credibility of, a peace officer short of an allegation of perjury, Crown Counsel should provide written notification of such finding to the senior officer in charge, or equivalent, of the officer's agency. The notification should be copied to a Regional Crown Counsel, Director, or their deputy, and include the following:
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> - the police agency file and court file number
> - the date of the officer's testimony
> - the date and nature of the adverse finding
> - the judge or justice who made the finding
> - a covering memo briefly outlining the matter sufficient to facilitate ordering transcripts or other reasonable steps by the officer in charge
>
> Crown Counsel's role in this process is to notify the senior officer in charge of the judicial finding, rather than to offer an opinion regarding the judicial finding.[5]

[8] On April 23, 2018, the Provincial Court delivered a set of reasons (Reasons for Judgment). The Reasons for Judgment dealt critically with the reliability of the police officer's evidence at the trial of a criminal defendant (the criminal defendant). On the same day, a crown counsel sent a letter (the Letter)

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[3] Order F23-08, 2023 BCIPC 10 (CanLII) at para 6; Order F15-61, 2015 BCIPC 67 (CanLII) at para 7; Order 03-06, 2003 CanLII 49170 (BC IPC) at para 6.

[4] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual

[5] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/pol-1-1.pdf

to the SPD's chief constable pursuant to the Policy Manual, advising the chief about the adverse judicial comment.

[9] The OPCC is an independent officer of the Legislature. The OPCC oversees complaints and discipline proceedings under Part 11 of the *Police Act*, although the proceedings themselves are carried out by municipal police departments.[6]

[10] In May 2018, the SPD provided the Letter and the Reasons for Judgment to the OPCC. The OPCC oversaw the SPD's investigation of the police officer's conduct pursuant to Part 11 of the *Police Act*.[7]

Information in dispute

[11] The information in dispute consists of information withheld from the Letter and the Reasons for Judgment. The withheld information consists of the name of the criminal defendant who was on trial in the matter giving rise to the Reasons for Judgment, the name of the police officer who testified at the trial and about whom adverse comments were made, as well as the court file number and SPD file number associated with the matter.

Where FIPPA does not apply – Police Act *s. 182*

[12] The OPCC and SPD say that s. 182 of the *Police Act* applies to oust the application of FIPPA.[8] The applicant submits that s. 182 does not apply.[9] The Ministry does not take a position on the application of s. 182.[10] I will set out the parties' positions in more detail below.

Provisions of Police Act

[13] The relevant parts of the *Police Act* say as follows:

> ***Freedom of Information and Protection of Privacy Act* does not apply**
>
> **182** Except as provided by this Act and by section 3(4) of the *Freedom of Information and Protection of Privacy Act*, that Act does not apply to
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> > (a) any record of a complaint concerning the conduct of a member that is made, submitted, registered or processed under this Part [Part 11],

[6] OPCC's initial submission at paras 3-10.
[7] SPD's initial submission at 4-6.
[8] OPCC's initial submission at paras 61-63; SPD's initial submission at 8 and 13.
[9] Applicant's response submission at paras 11-12.
[10] Ministry's initial submission at para 60.

> (b) any record related to a record described in paragraph (a), including, without limitation, any record related to a public hearing or review of the record in respect of the matter,
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> (c) any information or report in respect of which an investigation is initiated under this Part, or
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> (d) any record related to information or a report described in paragraph (c), including, without limitation, any record related to a public hearing or review on the record in respect of the matter,
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> whether that record, information or report is created on or after a complaint is made, submitted or registered or the investigation is initiated, as the case may be.

[14] Section 182 is in Part 11 of the *Police Act*. Part 11 is entitled "Misconduct, Complaints, Investigations, Discipline and Proceedings". It contains provisions governing how the OPCC must oversee complaints and investigations of a member's misconduct.

[15] Section 182 provides that s. 182 is subject to the other provisions of the *Police Act* and s. 3(4) of FIPPA. No party submitted that a provision of the *Police Act* overrides or modifies the application of s. 182, and on my review of the *Police Act*, I am unable to find any that would do so. No party argued, and I do not find, that s. 3(4) of FIPPA applies.[11]

Parties' positions

[16] The SPD submits that Part 11 of the *Police Act* is a comprehensive code governing the OPCC's oversight of complaints about police conduct. It says that "a robust police complaint system is fundamental to ensuring that the public has confidence in police" and that if the applicant were to obtain copies of records used in a Part 11 investigation through FIPPA, this would undermine the Legislature's intent to exclude such records from FIPPA's scope.[12]

[17] The OPCC helpfully describes the procedure it follows in Part 11 proceedings.[13] It says the *Police Act* as a whole "evinces an intention for investigations and certain other proceedings conducted under the Act to remain

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[11] Section 3(4) of FIPPA says:

> Despite subsection 3(f), in respect of a record that is created by or for, or is in the custody or under the control of, an officer of the Legislature and that relates to the exercise of functions under an Act, the following sections apply to the officer of the Legislature…

None of the listed sections is relevant to this inquiry.

[12] SPD's initial submission at 3-4.

[13] OPCC's initial submission at paras 3-14.

confidential" such that records related to those proceedings are outside the scope of FIPPA.[14]

[18] The applicant says that even if the responsive records were related to a disciplinary investigation, the Reasons for Judgment are already part of the public record and "should not be retroactively rendered secret" because of that fact alone. He says that Reasons for Judgment were "generated separate and apart from any disciplinary process".[15] He does not make a submission about the Letter.

[19] The Ministry does not take a position on whether s. 182 of the *Police Act* applies.[16]

Analysis

[20] Several previous OIPC orders have interpreted s. 182 of the *Police Act* and its predecessor, s. 66.1. Those orders have established a two-part test that must be met in order for records to be excluded from the scope of FIPPA:

> 1. The record, information, or report must fall within one or more of the categories set out in s. 182(a), (b), (c), or (d);
>
> 2. The record, information, or report must have been created on or after the making, submission, or registration of the complaint, or the initiation of the investigation, as the case may be.[17]

[21] No party challenged this formulation of the test. I will adopt it here. As a result, I must first decide whether the Letter and Reasons for Judgment fit into one or more of the categories set out in s. 182(a), (b), (c), or (d).

Categories set out in s. 182(a), (b), (c), and (d)

[22] The SPD submits that the investigation in this case was initiated under Part 11, and that the Letter and the Reasons for Judgment were information in respect of which an investigation was initiated.[18]

[23] The OPCC, while accepting the formulation of the two-part test,[19] does not say why the responsive records in this case satisfy one or more of the requirements in s. 182(a), (b), (c), or (d).

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[14] *Ibid* at para 14.
[15] Applicant's response submission at paras 11-12.
[16] Ministry's initial submission at paras 24 and 60.
[17] Order F15-05, 2015 BCIPC 5 (CanLII) at paras 22-23; Order F15-30, 2015 BCIPC 33 (CanLII) at para 56; Order F15-61, 2015 BCIPC 67 (CanLII) at para 20.
[18] SPD's initial submission at 6-7.
[19] OPCC's initial submission at para 63.

[24] The Letter is written by a crown counsel and is addressed to the SPD's Chief Constable. The crown counsel says that they are sending the Letter to comply with their obligations under the Crown Counsel Policy Manual. The Letter then goes on to describe the judge's characterization of the police officer's testimony in court.

[25] As I mentioned above,[20] the OPCC oversaw the SPD's investigation of the police officer's conduct. Based on the SPD's evidence and argument, I am satisfied that the investigation was conducted pursuant to Part 11 of the *Police Act* and the Letter and the Reasons for Judgment were the impetus for that investigation.

[26] Taking all this into account, while I agree with the applicant's assertion that the Letter and Reasons for Judgment were generated separately from any disciplinary proceeding, I find that an investigation under Part 11 was initiated, and that both the Letter and the Reasons for Judgment are information and/or reports in respect of which it was initiated, as contemplated by s. 182(c). They therefore satisfy the first branch of the test.

Created on or after the initiation of the investigation

[27] Unfortunately, no party made a submission specifically about the timing of the creation of the Letter and the Reasons for Judgment.

[28] As I mentioned above, the OPCC accepts the formulation of the two-part test, but it does not make a submission about how the records in this case satisfy the second branch of that test. It says only that s. 182 should be interpreted expansively to ensure that the OPCC's investigations remain confidential as the Legislature intended.[21]

[29] In my view, the provision at the end of s. 182 is awkwardly drafted (i.e., "whether that record, information or report is created on or after a complaint is made, submitted or registered or the investigation is initiated, as the case may be"). I cannot see how a record, piece of information, or report can be created "on…a complaint is made" or "on…the investigation is initiated". Nevertheless, the OIPC's orders have been consistent in interpreting s. 182 (and its predecessor) as requiring records to have been created on or after - not before - the making of a complaint or the initiation of an investigation in order for them to be excluded from the scope of FIPPA.[22] I see no reason to depart from this interpretation, nor have the parties advanced any.

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[20] At para 10.
[21] OPCC's initial submission at paras 43-46 and 61-63.
[22] See footnote 17, *supra*; Order 03-06, 2003 CanLII 49170 (BC IPC) at paras 33-34; Order F09-20, 2009 CanLII 63563 (BC IPC) at para 35.

[30] In this case, both the Letter and the Reasons for Judgment are dated April 23, 2018. Although some of the evidence and argument before me was given on an *in camera* basis, so that I am constrained in what I can say about it, there is no evidence or argument that a Part 11 investigation was initiated on or before April 23, 2018. The OPCC and SPD do not explain how even an expansive interpretation of s. 182 would capture either of the responsive records. I conclude that it does not, and that neither the Letter nor the Reasons for Judgment were created on or after the initiation of the investigation under Part 11. While I accept that the Legislature intended for the OPCC to have a zone of privacy around its investigations, I cannot see, and the parties do not explain, how the exclusion of pre-investigation records from the application of s. 182 would compromise that zone of privacy or those investigations.

Conclusion on s. 182 of the Police Act

[31] I have found that while both of the responsive records contain information in respect of which an investigation was initiated under Part 11, as contemplated by s. 182(c), they were both created before that investigation began. Section 182 of the *Police Act* therefore does not apply to them.

[32] Next, I will turn to consider whether s. 3 of FIPPA applies.

Scope of FIPPA – s. 3

[33] Section 3 sets out FIPPA's scope. It provides, among other things, that FIPPA does not apply to certain categories of records. The following parts of s. 3 are relevant in this case:

> **3** (1) Subject to subsections (3) to (5), this Act applies to all records in the custody or under the control of a public body, including court administration records.
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> …
>
> (3) This Act does not apply to the following:
>
> (a) a court record;
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> …
>
> (f) a record that is created by or for, or is in the custody or under the control of, an officer of the Legislature and that relates to the exercise of functions under an Act;

Court records – s. 3(3)(a)

[34] Section 3(3)(a) of FIPPA provides that FIPPA does not apply to "a court record". If the Letter and/or the Reasons for Judgment are court records, they are outside the scope of FIPPA and the applicant has no right of access to them under FIPPA.

[35] "Court record" is not defined in FIPPA and few OIPC orders have considered its meaning. Before 2011, the former s. 3(1)(a) provided that FIPPA did not apply to "records in a court file". Several OIPC orders have considered the meaning of that phrase,[23] but I do not find them helpful in ascertaining the meaning of "court record".

[36] In its initial submission, the Ministry takes no position on the application of s. 3(3)(a) but submits in passing that the meaning of "court record" should encompass a broader range of records than "records in a court file".[24]

[37] The SPD says that the Reasons for Judgment are "clearly a 'court record'".[25] The OPCC does not make a submission on the application of s. 3(3)(a).

[38] The applicant says that the Reasons for Judgment are not a court record because they would have been created by a third party hired by the court, would not be under the control of court staff, and would not have been held in the court's file. He says that the Reasons for Judgment are "merely a byproduct of a legal proceeding, no different than a courtroom sketch published in a newspaper".[26]

[39] The applicant stresses the importance of the open court principle, referring to the Supreme Court of Canada's ruling in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2:

> The open court principle is of crucial importance in a democratic society. It ensures citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.[27]

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[23] Order No. 234-1998, 1998 CanLII 3535 (BC IPC); Order 01-27, CanLII 21581 (BC IPC) at paras 9-15; Order 01-51, 2001 CanLII 21605 (BC IPC) at paras 22-24.
[24] Ministry's initial submission at paras 33-36.
[25] SPD's initial submission at 9-10.
[26] Applicant's response submission at para 1.
[27] At para 1.

[40] In reply, the Ministry says that the issue in relation to s. 3(3)(a) is not whether the open court principle requires giving the public access to court records, but whether such access is governed by FIPPA or by the court.[28] The SPD says much the same in its reply.[29]

[41] Order F23-70 was a reconsideration of an earlier decision in which the adjudicator had held that "court record" had the same meaning as "records in a court file" in the former s. 3(1)(a).[30] In that order, the adjudicator said:

> Having considered the natural meaning that appears when the provision is simply read through, in my view, the grammatical and ordinary meaning of the term "a court record" is a record relating to court proceedings. I am satisfied that the grammatical and ordinary meaning of the term "a court record" shows that this exemption applies to the records that have been created for a trial or hearing relating to the court proceedings, for instance records filed [with] or sent to the court, orders made or granted by the court and supporting or related documents, transcripts or audio recordings of proceedings, and clerks' notes of proceedings.
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> …
>
> In summary, I find the term "a court record" in s. 3(3)(a) means a record relating to a court proceeding. Further, the term "a court record" is not limited to records in the custody or under the control of a court because there is no wording or context of s. 3 that indicates s. 3(3)(a) is limited to a court record physically located in the court. I am satisfied that a court record can mean a court record in the custody or under the control of a public body.[31]

[42] I agree with and adopt this approach. Applying this reasoning to the Reasons for Judgment, in my view, they are plainly a court record. They record a decision of the Provincial Court and were issued by that Court. The Provincial Court of BC's "Access to Court Records Policy", which the Ministry included with its submission, sets out a number of categories of court records. Reasons for Judgment are expressly included in those categories.

[43] While I agree with the applicant's comments on the importance of the open court principle to a democratic society, I do not think his assertions are relevant to the narrow question of whether the Reasons for Judgment are a court record within the meaning of s. 3(3)(a). I am satisfied that they are, so that FIPPA does not apply to them.

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[28] Ministry's reply submission at paras 9-11.
[29] SPD's reply submission at 1.
[30] Order F23-07, 2023 BCIPC 8 (CanLII) at paras 22-23.
[31] Order F23-70, 2023 BCIPC 83 (CanLII) at paras 23 and 32.

[44] As for the Letter, no party argued that it is a court record. It was not generated by the Provincial Court, was never filed in that Court, and does not seem to me to fit into any of the categories in the Court's Court Records Policy. Nor does it fit into any common-sense definition of "court record". I therefore find that s. 3(3)(a) does not apply to the Letter.

Records that relate to the exercise of functions of an officer of the Legislature under an Act – s. 3(3)(f)

[45] Section 3(3)(f) says that FIPPA does not apply to "a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of functions under an Act". This section replaced the former s. 3(1)(c), which was worded very similarly.

[46] The Ministry does not take a position on the application of s. 3(3)(f).[32]

[47] The OPCC submits that previous orders considering the former s. 3(1)(c) remain persuasive. However, the OPCC does not ultimately take a position on whether s. 3(3)(f) applies to the Letter.[33]

[48] The SPD submits that since the Letter and Reasons for Judgment initiated the Part 11 investigation, s. 3(3)(f) applies to them in their entirety. It says that the author of the Letter reasonably expected that the sending of the Letter would result in a Part 11 investigation.[34] I understand the SPD to be arguing that what it infers was the author's expectation is sufficient to establish that the Letter relates to the OPCC's functions under the *Police Act*.

[49] The applicant submits that the open court principle precludes the application of s. 3(3)(f), but he focuses his arguments on the Reasons for Judgment rather than the Letter.[35] He also says that the OIPC should not adopt a reading of FIPPA that would violate s. 2 of the *Charter of Rights and Freedoms* (*Charter*).[36]

[50] I agree with the OPCC that orders considering the former s. 3(1)(c) remain persuasive for the interpretation of s. 3(3)(f), given the similarity of the wording of the sections. In Order F16-28, the adjudicator laid out the following set of criteria that must be met:

1. An "officer of the Legislature" is involved.

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[32] Ministry's initial submission at paras 37-39.
[33] OPCC's initial submission at paras 27-37.
[34] SPD's initial submission at 8-9.
[35] Applicant's response submission at para 2.
[36] Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK) 1982, c 11.

2. The record must either:
   a. have been created *by* or *for* the officer of the Legislature; or
   b. be in the *custody* or *control* of the officer of the Legislature.

3. The record must relate to the exercise of the officer's functions under an Act.[37]

An officer of the Legislature

[51] The OPCC is clearly an officer of the Legislature. Schedule 1 of FIPPA expressly defines "officer of the Legislature" to include "the police complaint commissioner appointed under Part 9 of the *Police Act*".

Created by or for the officer of the Legislature, or in the officer's custody or control

[52] No party argued that the Letter was created by or for the OPCC, and I do not find that it was. The next question, therefore, is whether it is in the OPCC's custody or control.

[53] The SPD does not make a submission about custody or control. The OPCC says that its possession of a copy of the Letter is "ordinarily…sufficient to establish" custody of it.[38] The OPCC referred me to Order 02-30, in which former Commissioner Loukidelis said:

> In Order No. 308-1999, [1999] B.C.I.P.D. No. 21, my predecessor accepted that physical possession of a record is not enough to establish custody for the purposes of the Act. He agreed, at p. 9, that a public body must have "charge and control" of such records, "including some legal responsibility for their safekeeping, care, protection, or preservation".[39]

[54] No party argued that the OPCC has any such responsibilities with respect to the Letter. Moreover, the applicant is not requesting the records from the OPCC; he is requesting them from the Ministry. I am not persuaded that the Ministry's copy of the Letter, which is at issue in this inquiry, is in the OPCC's custody or control.

Related to the exercise of the officer's functions under an Act

[55] The OPCC referred me to Order 01-43, in which former Commissioner Loukidelis said:

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[37] Order F16-28, 2016 BCIPC 30 (CanLII) at para 16, citing Order 01-43, 2001 CanLII 21597 (BCIPC) at para 14, and Order F14-12, 2014 BCIPC 15 (CanLII) at para 8.
[38] OPCC's initial submission at para 37.
[39] Order 02-30, 2002 CanLII 42463 (BC IPC) at para 23.

> It should also be said, at this point, that I share [former Commissioner Flaherty's] doubt that s. 3(1)(c) was intended to catch public body records in the ordinary course of business, before an Ombudsman investigation began, simply because they have been copied to the Ombudsman in connection with an investigation. Any copies of such records that have been sent to the Ombudsman will be excluded under s. 3(1)(c) if they are in the Ombudsman's custody or control and relate to the exercise of the Ombudsman's statutory functions, even where those copies are in a file kept by the public body for the Ombudsman's investigation. To be clear, the reach of s. 3(1)(c) almost certainly does not extend to records that came into existence in the ordinary course of a public body's activities simply because copies of those records are at some stage sent to the Ombudsman's office in connection with a complaint. Copies of those routine records kept in a separate public body file for the Ombudsman matter may well be excluded under s. 3(1)(c), but I very much doubt the originals or other copies located in regular public body files are protected.[40]

[56] No party expressly argued that the Letter is related to the exercise of the OPCC's functions, and I am not persuaded that it is. The Letter came into existence pursuant to the Crown Counsel Policy Manual – that is, in the ordinary course of the Ministry's business. While some eventual OPCC involvement might have been contemplated by the author, nothing about the Letter's content or context indicates that it relates to the OPCC's functions. It does not mention the OPCC, nor was it copied to the OPCC. Its substance deals with a judge's assessment of a witness's evidence given in court, not with any of the OPCC's functions. The fact that the OPCC later obtained a copy of the Letter is not enough to persuade me that it relates to the OPCC's functions in the context in which I am considering it – that is, in the Ministry's files.

[57] For the reasons given above, I find that s. 3(3)(f) does not apply to the Letter.

Conclusion on s. 3 of FIPPA

[58] To summarize, I have found that s. 3(3)(a) of FIPPA applies to oust the application of FIPPA with respect to the Reasons for Judgment, because they are court records, so that the applicant has no right of access to them under FIPPA. I have found that s. 3(3)(f) does not apply to the Letter. FIPPA therefore applies to it, and so it is necessary to consider the application of s. 22(1) to its contents.

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[40] Order 01-43, 2001 CanLII 21597 (BC IPC) at para 34, citing Order No. 297-1999, 1999 CanLII 1075 (BC IPC).

Unreasonable invasion of third-party personal privacy – s. 22

[59] Section 22 of FIPPA provides that the head of a public body must refuse to disclose information whose disclosure would be an unreasonable invasion of a third party's personal privacy.

[60] The analytical framework for s. 22 of FIPPA, which I will apply, is well-established:

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section [applies only] to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[41]

[61] The Ministry is withholding information in the Letter under s. 22(1), specifically the defendant's name, the court file number, and the SPD file number.

[62] The SPD says that the Ministry should also withhold the police officer's name.[42] The Ministry takes no position on this additional proposed severing.[43] The applicant takes the position that all the information the Ministry and the SPD seek to withhold should be disclosed.[44] The OPCC does not take a position on the application of s. 22.[45]

Is the information personal information? – s. 22(1)

[63] The first step in the s. 22 analysis is to determine whether the withheld information is personal information. Both "personal information" and "contact information" are defined in Schedule 1 of FIPPA:

> "personal information" means recorded information about an identifiable individual other than contact information;

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[41] Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.
[42] SPD's initial submission at 1 and 13.
[43] Ministry's initial submission at para 59.
[44] Applicant's response submission at para 3.
[45] OPCC's initial submission at paras 24-25.

> "contact information" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;

[64] The SPD says that the police officer's name is personal information.[46] The applicant does not make a submission about whether any of the information in the Letter is personal information.

[65] I find that all the information the Ministry withheld, as well as the police officer's name, is personal information, because it is reasonably capable of identifying individuals. All of the disputed information consists of individuals' names and file numbers associated with those names. None of the information, viewed in context, is included to allow the third parties to be contacted at a place of business, so I find that none of it is contact information.

Not an unreasonable invasion of third-party personal privacy – s. 22(4)

[66] The next step in the s. 22 analysis is to determine whether any of the disputed information falls into any of the categories set out in s. 22(4). If it does, disclosure of that information will not be an unreasonable invasion of third-party personal privacy.

[67] The Ministry and SPD both say that none of the s. 22(4) categories apply to any of the disputed personal information.[47] The applicant does not make a submission on any s. 22(4) category.

[68] Reviewing the s. 22(4) categories in light of the information both the Ministry and SPD seek to withhold, I find that none of them apply.

Presumed unreasonable invasion of third-party personal privacy – s. 22(3)

[69] The next step in the s. 22 analysis is to determine whether any of the presumptions set out in s. 22(3) apply. The Ministry submits that s. 22(3)(b) applies to the information it withheld, and the SPD submits that ss. 22(3)(d) and (g) apply to the information it seeks to have the Ministry withhold.

[70] Section 22(3) provides, in part:

> A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …

[46] SPD's initial submission at 11.
[47] Ministry's initial submission at para 50; SPD's initial submission at 11.

> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party

Investigation into a possible violation of law – s. 22(3)(b)

[71] Section 22(3)(b) provides that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[72] The Ministry submits that s. 22(3)(b) applies to the information it withheld, but does not explain its reasoning.[48] The other parties do not say anything about the application of s. 22(3)(b).

[73] Section 22(3)(b) sets out two requirements: there must have been an "investigation into a possible violation of law", and the disputed information must have been compiled and be identifiable as part of that investigation.

[74] With respect to the first requirement, previous orders have defined "law" to include a legislative provision whose violation could result in a penalty or sanction.[49] With respect to the second requirement, previous orders have said that compiling information involves some exercise of judgment, knowledge, or skill by or on behalf of the public body.[50]

[75] The Ministry does not explain how the withheld file numbers and defendant's name were compiled and are identifiable as part of an investigation into a possible violation of law. The subject of the Letter is the police officer's evidence at the criminal defendant's trial. The process that generated the Letter

[48] Ministry's initial submission at para 52.
[49] Order F23-78, 2023 CanLII 90556 (BC IPC) at para 94.
[50] *Ibid*, citing Order F19-02, 2019 BCIPC 2 at para 39.

is not an investigation into a possible violation of law, but a notification to the police officer's employer of an adverse judicial comment about one of its members, pursuant to the Policy Manual.

[76] As for the second requirement, without more, I cannot see that the defendant's name and the two file numbers were *compiled* as part of an investigation into a violation of law in the context in which they appear in the Letter. It does not appear to me that the author of the Letter exercised skill or judgment in including the information the Ministry seeks to withhold, nor does any party say the author did so.

[77] I therefore find that neither of the two requirements is met with respect to the information the Ministry withheld, so s. 22(3)(b) does not apply to any of it.

Employment or occupational history – s. 22(3)(d)

[78] The SPD says that disclosure of the police officer's name would reveal the police officer's employment history, so that s. 22(3)(d) applies to the police officer's name and the file numbers (which would identify the police officer).[51] None of the other parties made a submission on the application of s. 22(3)(d).

[79] Many previous orders have considered the application of s. 22(3)(d). For example, in Order F15-42, the adjudicator held that information that revealed how public body employees do their jobs was presumptively an unreasonable invasion of their personal privacy.[52]

[80] I find that disclosure of the police officer's name, as well as the two file numbers, is presumed to be an unreasonable invasion of the police officer's privacy under s. 22(3)(d), because the Letter consists of the author's report of the judge's critical comment on how the police officer did their job.

Personal recommendations or evaluations – s. 22(3)(g)

[81] The SPD submits that s. 22(3)(g) applies to the names of both third parties because the Letter "includes evaluative conclusions about the [police] officer's workplace performance". It does not explain how this consideration, even if true, applies to the criminal defendant.

[82] To begin with, I reject the SPD's argument that s. 22(3)(g) applies to the information identifying the defendant. The Letter is in no sense an evaluation of the criminal defendant's actions or character. The criminal defendant is at most a peripheral figure.

[51] SPD's initial submission at 11-12.
[52] Order F15-42, 2015 BCIPC 45 (CanLII) at para 37.

[83] Previous orders have interpreted s. 22(3)(g) as referring to "formal performance reviews, to job or academic references or to comments and views of investigators about a complainant's or a respondent's workplace performance and behaviour in the context of a complaint investigation".[53] There is an element of formal performance evaluation required to engage s. 22(3)(g).[54] While, as I noted above, the Letter contains evaluative statements from the judge about how the police officer did his job, I cannot see how the withheld information in the Letter fits into any of the categories noted above. The Letter is not a formal workplace or academic evaluation of the police officer's work performance, but an external communication made pursuant to the Policy Manual. I therefore find that none of the withheld information engages s. 22(3)(g).

Relevant circumstances – s. 22(2)

[84] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information at issue in light of all the relevant circumstances, including those listed in s. 22(2). It is at this step that any s. 22(3) presumptions may be rebutted. Section 22(2) provides, in relevant part:

> In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> (g) the personal information is likely to be inaccurate or unreliable,
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant

Scrutiny of activities of public body – s. 22(2)(a)

[85] The applicant says that disclosure in this case is desirable for the purpose of subjecting the Ministry's activities to public scrutiny, under s. 22(2)(a).[55] The SPD says that disclosure of the police officer's name would not assist in

[53] Order F05-30, 2005 CanLII 32547 (BC IPC) at para 41.
[54] Order F23-13, 2023 BCIPC 15 (CanLII) at para 104; Order F22-56, 2022 BCIPC 63 (CanLII) at paras 62-63; Order F22-43, 2022 BCIPC 48 (CanLII) at para 103.
[55] Applicant's response submission at para 3.

subjecting the SPD's activities to public scrutiny, since the issue of the police officer's testimony was handled and brought to a final disposition by the OPCC.[56]

[86] Previous orders have held that while s. 22(2)(a) can apply to the identities of individual public body employees where that would "allow for a more thorough and searching review of the activities of the public body itself, and would promote transparency", s. 22(2)(a) does not favour disclosure where this is not the case.[57]

[87] I find that disclosure of the withheld information would not assist the public in scrutinizing the activities of a public body, so that s. 22(2)(a) does not apply. The information that would allow the public to scrutinize the SPD's activities – the police officer's words and deeds – are not being withheld from the Letter.

Financial or other harm – s. 22(2)(e)

[88] The SPD appears to be saying that if the police officer's name is disclosed, the police officer will suffer serious mental distress.[58] There is no evidence or argument beyond bare assertion before me on this point, so I find that s. 22(2)(e) does not apply.

Supplied in confidence – s. 22(2)(f)

[89] The applicant submits that none of the personal information was supplied in confidence.[59] None of the other parties made submissions on s. 22(2)(f). I find that s. 22(2)(f) does not apply. Neither the police officer nor the criminal defendant can be said to have supplied the information in the Letter, let alone to have done so in an expectation of confidence.

Information likely to be inaccurate or unreliable – s. 22(2)(g)

[90] The applicant also submits that there is no evidence that the personal information that the Ministry and the SPD seek to withhold is inaccurate or unreliable.[60] I agree and find that s. 22(2)(g) does not apply.

Unfair damage to reputation – s. 22(2)(h)

[91] The Ministry submits that disclosure of the criminal defendant's personal information in the Letter could unfairly damage the criminal defendant's reputation, so that s. 22(2)(h) weighs against disclosure.[61] In addition, while I am

[56] SPD's initial submission at 12.
[57] Order F12-12, 2012 BCIPC 17 (CanLII) at para 38; see also F23-58, 2023 BCIPC 68 (CanLII) at para 88.
[58] SPD's initial submission at 12.
[59] Applicant's response submission at para 3.
[60] *Ibid*.
[61] Ministry's initial submission at paras 54-56.

somewhat constrained by the SPD's *in camera* submission in describing the reputational harms it foresees for the police officer if their personal information in the Letter is disclosed, the SPD says that the police officer would be exposed to "additional distress and anguish as his or her reputation would be questioned both professionally and within the larger community".[62]

[92] In order for s. 22(2)(h) to weigh against disclosure, it must be established both that disclosure of the personal information may damage the reputation of a third party, and that any such damage would be unfair.[63]

[93] Neither the Ministry nor the SPD explain, and I cannot see, how any potential damage to the third parties' reputation would be unfair. The contents of the Letter are limited to a description of a finding made by a judge in open court. I find that s. 22(2)(h) does not apply to any of the withheld personal information.

Other relevant circumstances

[94] I will now turn to consider relevant circumstances not listed in s. 22(2).

[95] The applicant says that the public has a right to know what is said in open court and has a legitimate interest in the workings of the justice system generally. He says that "[g]reater scrutiny of the justice system and its inner workings is a public benefit".[64] I agree. However, the Letter itself was not something said in open court. As discussed above, it was written pursuant to the Policy Manual, and not to any rule or process of the Provincial Court. It is not obvious to me how disclosure of the police officer's and criminal defendant's names will advance the objectives the applicant mentions. I find that this factor does not favour disclosure of any of the disputed personal information.

[96] The applicant also submits that s. 2 of the *Charter*[65] applies to protect the rights of journalists to publish information on the conduct of police officers.[66] However, he does not elaborate on this point, and without more, I am not persuaded that this is a factor favouring disclosure.

[97] The Ministry submits that the fact that the criminal defendant was found not guilty is a factor that weighs against disclosure.[67] I do not agree. In general, the names of criminal defendants who are found not guilty are published in court decisions. They are only withheld in certain specified cases. The Ministry did not refer me to any OIPC orders, or any other jurisprudence, where a person's

[62] SPD's initial submission at 13.
[63] Order F21-69, 2021 BCIPC 80 (CanLII) at para 80.
[64] Applicant's response submission at para 6.
[65] *Supra* note 35.
[66] Applicant's response submission at para 9.
[67] Ministry's initial submission at para 56.

acquittal was a factor in the reasonableness of the disclosure of their personal information, and I was not able to locate any.

[98] After considering and weighing all the circumstances above, I find that the s. 22(3)(d) presumption that was raised with respect to the police officer's name and identifying file numbers has not been rebutted. As for the criminal defendant's name, I find that there are no relevant factors favouring its disclosure, and that the applicant has not met his burden of proving that its disclosure would not be an unreasonable invasion of the criminal defendant's personal privacy. The Ministry must therefore refuse to disclose all of the information in the Letter that it withheld under s. 22(1), as well as the police officer's name.

Conclusion on s. 22

[99] I have found that all of the information in dispute in the Letter is personal information, and that no s. 22(4) categories apply. I have found that s. 22(3)(d) applies to the police officer's name and to the file numbers. Finally, since I have found that no relevant circumstances favour disclosure, I am satisfied that disclosure of any of the personal information in the Letter would be an unreasonable invasion of third-party personal privacy.

CONCLUSION

[100] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. I confirm the Ministry's decision that s. 3(3)(a) applies to the Reasons for Judgment. Therefore, the applicant has no right to access this record under FIPPA.

2. I confirm the Ministry's decision that it must refuse to disclose the information it withheld in the Letter under s. 22(1);

3. The Ministry is also required under s. 22(1) to refuse to disclose the police officer's name where it appears in the Letter.

December 18, 2023

ORIGINAL SIGNED BY

David S. Adams
Adjudicator

OIPC File No.: F19-80202