Order F24-32

MINISTRY OF FORESTS

Alexander Corley
Adjudicator

April 25, 2024

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Summary: The Ministry of Forests (Ministry) requested the Commissioner exercise their discretion, under s. 56(1) of the *Freedom of Information and Protection of Privacy Act*, to decline to hold an inquiry into the Ministry's decision to refuse an applicant access to a requested record. The Ministry argued that an inquiry should not be held because it is plain and obvious that it does not have custody or control of the requested record. The adjudicator found that it was not plain and obvious that the Ministry did not have custody or control of the requested record. Therefore, the adjudicator dismissed the Ministry's s. 56(1) application and directed the matter to an inquiry.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* [RSBC 1996], c. 165, ss. 3(1), 4(1), and 56(1).

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA),[1] a journalist (applicant) requested the Ministry of Forests (Ministry) provide access to a copy of a draft report regarding the origin and cause of a wildfire (Report).

[2] The Ministry denied the applicant access to the Report. The Ministry informed the applicant that the Report is not in its custody or under its control, and therefore falls outside the scope of FIPPA pursuant to s. 3(1) (application). In the alternative, the Ministry further advised the applicant that if the Report does fall within FIPPA's scope, the Ministry would withhold it in full pursuant to ss. 15 (disclosure harmful to law enforcement) and 16 (disclosure harmful to intergovernmental relations or negotiations).

[3] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. The OIPC's investigation

[1] For the remainder of this Order, when I refer to sections of an enactment, I am referring to sections of FIPPA unless otherwise specified.

and mediation process did not resolve the issues between the parties and the applicant requested the matter proceed to an inquiry.

[4] After the notice of inquiry was issued, the Ministry requested the Commissioner decline to hold an inquiry into this matter. Under s. 56(1), the Commissioner has the discretion to decide whether to hold an inquiry if the matter is not settled during the OIPC's investigation and mediation process. I am the Commissioner's delegate assigned to decide the Ministry's s. 56(1) application.

ISSUE AND BURDEN OF PROOF

[5] The issue I need to decide is whether I should grant the Ministry's request that the Commissioner decline to hold an inquiry into the Ministry's decision to refuse the applicant access to the Report. The Ministry bears the burden of proving that its application under s. 56(1) should be granted.[2]

DISCUSSION

Background

[6] Over the past several years there have been a series of serious wildfires across British Columbia. The causes and origins of some of these wildfires have been or are being investigated by various law enforcement agencies, including the Royal Canadian Mounted Police (RCMP). The BC Wildfire Service, which is a branch of the Ministry, has also opened its own investigations into the causes and origins of many of these wildfires.

[7] In the summer of 2022, the applicant made an access to information request to the Ministry for several classes of records related to the cause and origin of a specific wildfire which is under investigation by both the RCMP and the Ministry. After further discussion with the Ministry, the applicant narrowed their request to focus solely on the Report.

[8] In response to the access request, the Ministry identified a draft of the Report, written by a BC Wildfire Service investigator, as the only responsive record.[3]

Discretion to conduct an inquiry – s. 56(1)

[9] Section 56(1) provides that if the matter in dispute between the parties is not referred to a mediator or settled under s. 55, the Commissioner may conduct

[2] Order F16-37, 2016 BCIPC 41 at para. 10.
[3] Public Body's Initial Submission at para. 3, citing Affidavit #1 of the Ministry's Wildfire Enforcement Superintendent (Superintendent) at para. 4.

an inquiry and decide all questions of fact and law arising in the course of the inquiry. It is well-established that s. 56(1) gives the Commissioner a "broad discretionary power to determine whether or not to hold an inquiry."[4]

[10] As set out in earlier OIPC decisions and orders, the Commissioner may decline to conduct an inquiry on a number of grounds, including that it is plain and obvious that the disputed records fall outside the scope of FIPPA.[5] Regardless of the basis for the s. 56(1) application, in each case, it must be clear that there is no issue which merits adjudication in an inquiry.[6] Put another way, the party asking that an inquiry not be held must establish that there is "no arguable case that merits an inquiry."[7]

[11] The Ministry submits that an inquiry should not be held because it is plain and obvious that it does not have custody or control of the Report for purposes of ss. 3(1) and 4(1) and therefore the Report falls outside of FIPPA's scope.

Custody and control – ss. 3(1) and 4(1)

[12] Section 3(1) states that FIPPA applies to all records "in the custody or under the control" of a public body. Section 4(1) gives an applicant "a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant," subject to any applicable exceptions or exclusions. Therefore, a record must either be in the custody or under the control of a public body for an applicant to access it under FIPPA. Both are not required since "either custody or control over a particular record will suffice to bring it within the scope of s. 3(1)."[8]

[13] Although FIPPA does not define the term "custody," it is well-established that the process for determining whether a public body has custody of a record involves the following steps:

- The first step is to establish whether the public body has physical possession of the requested record.

- If the public body has physical possession of the requested record, then the second step is to determine whether the public body has any rights or responsibilities for the record.[9]

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[4] *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 at para. 47.
[5] Order F23-23, 2023 BCIPC 27 at para. 32.
[6] Decision F07-04, 2007 CanLII 67284 (BC IPC) at para. 16.
[7] Decision F08-11, 2008 CanLII 65714 (BC IPC) at para. 8.
[8] Order F18-45, 2018 BCIPC 48 at para. 15.
[9] Order F18-45, *ibid* at para. 17.

[14] Therefore, to establish "custody," it is not enough that a public body has physical possession of the requested records. Prior jurisprudence has confirmed that the public body must also have "immediate charge and control of the records, including some legal responsibility for their safe keeping, care, protection or preservation."[10]

[15] Turning to "control," FIPPA also does not define the term. However, previous OIPC orders have accepted that a public body has control of a record if it has "some power of direction or comment" over the record, even if only on a "partial," "transient," or "de facto" basis.[11] The contents of the record and the circumstances in which it came into being are also relevant in determining whether it is under the control of a public body.[12] Prior OIPC orders have established certain indicia of control, including:

- Whether the record was created by an officer or employee of the public body in carrying out their duties;
- Whether the public body has statutory or contractual control over the record;
- Whether the public body has physical possession of the record;
- Whether the public body has relied on the record;
- Whether the record is integrated with the public body's other records;
- Whether the public body has authority to regulate the use and disposition of the record; and,
- Whether the contents of the record relate to the public body's mandate and functions.[13]

[16] This list is non-exhaustive and not all factors will apply in each case.[14]

[17] The question then is whether, based on the tests set out above,[15] the Report is plainly and obviously not in the Ministry's custody or under its control. If

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[10] *Minister of Small Business, Tourism and Culture et al. v. The Information and Privacy Commissioner of the Province of British Columbia et al.*, 2000 BCSC 929 at paras. 14 and 25. See also Order F15-65, 2015 BCIPC 71 at para. 12.
[11] Order F15-65, *ibid* at para. 17, citing *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 [*Canada (MND)*] at para. 48.
[12] *Canada (MND)*, *ibid*.
[13] Order F17-20, 2017 BCIPC 21 at para. 26. See also Order F23-68, 2023 BCIPC 79 at para. 18.
[14] Order F17-20, *ibid*.
[15] I note that the Ministry's submissions on "control" appear to rely on the incorrect legal test. The Ministry applies the two-part test set out in *Canada (MND)*, *supra* note 11. However, while that case is leading on the interpretation of "control" in access to information statutes, the test the court refers to at para. 50 and which the Ministry adopts only applies where a public body does not have physical possession of the record(s) in issue, which, as is explained below, the Ministry accepts is not the case here. I find that the more context-driven assessment set out in prior OIPC orders, such as Orders F17-20 and F23-68, both *ibid*, incorporates the interpretation of "control" from *Canada (MND)* and is more appropriate where a public body does not dispute that it has physical possession of a record.

so, then the Ministry's application to cancel the inquiry should be granted. If not, then this matter should proceed to an inquiry wherein the Commissioner may decide all relevant questions of fact and law based on full and final submissions from the parties.

Is it "plain and obvious" that the Ministry does not have custody or control of the Report?

Positions of the parties

[18] The Ministry accepts that it has physical possession of the Report, that the Report was drafted by one of its employees, and that the contents of the Report relate to its mandate and functions, specifically those functions concerning wildfire investigations. However, the Ministry submits that it nonetheless plainly and obviously does not have custody or control of the Report for the following reasons.

[19] The Ministry says that while investigating the wildfire, the RCMP seized or otherwise "compelled" certain evidence from third parties, pursuant to a search warrant (evidence).[16] Furthermore, that the evidence is reproduced in the Report and the evidence only initially came into the Ministry's physical possession due to an RCMP request that a Ministry employee draft the Report to assist with the RCMP's investigation of the wildfire.[17] The Ministry says that because the evidence was collected pursuant to a search warrant, it is subject to an "implied undertaking" between the RCMP and the third parties that, absent a court order, the RCMP will not use the evidence for any purpose other than investigating the wildfire.[18]

[20] However, the Ministry acknowledges that it subsequently obtained a copy of the evidence for use in the Ministry's own investigation of the wildfire pursuant to a further search warrant which the Ministry executed on the RCMP.[19] Therefore, the Ministry says that while it now possesses the evidence for the purposes of its own investigation, the evidence is still subject to an "implied undertaking." Specifically, an undertaking from the Ministry to the RCMP that the evidence will not be used for any purpose other than the Ministry's own wildfire investigation.[20]

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[16] Superintendent's Affidavit at para. 7.
[17] Superintendent's Affidavit at paras. 10 and 12.
[18] Superintendent's Affidavit at para. 8. Much of the Ministry's submissions explain the purpose and scope of the "implied undertaking". I do not find it necessary to reproduce those submissions here. Suffice it to say that I accept that evidence collected under a search warrant may be subject to an implied undertaking that it will not be used for purposes beyond furthering the investigation that evidence was collected in relation to and any related criminal or administrative proceedings.
[19] Affidavit #1 of the Ministry's Natural Resource Officer and Investigator (Investigator) at paras. 10 and 12.
[20] Investigator's Affidavit #1 at paras. 14-16.

[21] Based on this state of affairs, the Ministry says that as the Report reproduces information which is subject to an "implied undertaking" (that being the evidence), it is plain and obvious that the Ministry's legal rights and responsibilities related to the Report are too restricted to support a finding that the Report is in its custody or under its control for purposes of FIPPA.

[22] In making this argument, the Ministry primarily cites two cases, one from the Federal Court (*Andersen*)[21] and one from the Ontario Court of Appeal (*Fontaine*).[22] The Ministry says these cases stand for the proposition that information which is subject to an implied undertaking is not in the custody or under the control of a public body that physically possesses that information.

[23] The Ministry also provides some limited evidence that the Report has been dealt with by the Ministry as an RCMP record as opposed to a Ministry record and briefly explains the ways in which the Report has been secured and kept separate from other records in the Ministry's possession.[23]

[24] The applicant questions the Ministry's submission that it is plain and obvious that the entire Report falls outside FIPPA's scope of application simply because some information in the Report may be subject to an implied undertaking. The applicant says that there are ways for the Ministry to safeguard any information in the Report which is based on the evidence without having to assert that the entire Report falls outside of FIPPA's scope. The applicant submits that the matter should proceed to a full inquiry on this basis.

Analysis and conclusion

[25] I find that the Report bears many of the usual indicia of a record that is within a public body's custody or control. For instance, I find that the Ministry clearly has at least some legal responsibility to keep safe and preserve the Report; the Report is in the Ministry's physical possession; the Report relates to the Ministry's mandate and functions; and, the Report was drafted by a Ministry employee.

[26] Therefore, under the usual custody and control analysis I find it is not plain and obvious that the Report falls outside of FIPPA's scope pursuant to s. 3(1). However, I take the Ministry's core argument to be that *Andersen* and *Fontaine* demonstrate that the Report is plainly and obviously not in its custody or under its control in any event due to the presence of the implied undertakings the Ministry references.[24] Given this, I find that to fairly decide the Ministry's s. 56(1)

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[21] *Andersen Consulting v. Canada (T.D.)*, 2001 CanLII 22032 (FC) [*Andersen*].
[22] *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241 [*Fontaine*].
[23] Superintendent's Affidavit #1 at paras. 11 and 13-14; Superintendent's Affidavit #2 at para. 5.
[24] See Public Body's Initial Submission at paras. 58-59.

application I need to briefly consider those cases and their applicability to the facts before me.

[27] In my view, for the following reasons, *Fontaine* and *Andersen* do not plainly and obviously demonstrate that the Report is outside the Ministry's custody and control. To make this point clear, I will set out the relevant portions of each decision and then explain some of the reasons I find the decisions are arguably distinguishable from this case.

Andersen

[28] In *Andersen*, the information at issue had been collected by Crown Counsel as a result of civil litigation document discovery.[25] The court in that case found that the records in question were provided to the Crown under the terms of an implied undertaking and therefore Crown Counsel's obligation to either return or destroy those records at the end of the litigation was not overridden by the Crown's retention obligations as set out in the *National Archives of Canada Act*.[26] The court found that the records were not under the Crown's control when the Crown's possession of the information in the records was "constrained and restricted by law," specifically by the implied undertaking.[27]

Fontaine

[29] In *Fontaine*, the information at issue related to claims made under the "Indian Residential Schools Settlement Agreement" (Settlement). The Settlement was, in part, intended to compensate Residential Schools Survivors for the harms they suffered without the need for individual litigation.[28] The Settlement also provided for an "Independent Assessment Process" (Process) for Survivors with serious claims of physical or sexual abuse.[29] The records considered by the court were submissions made by Survivors in support of claims made under the Process and adjudication decisions rendered in relation to those claims.[30] The most relevant portion of the case considers whether the records were under the control of the Ministry responsible for overseeing the Settlement and the Process, on account of the records being in the possession of that Ministry's "Settlement Agreement Operations Branch" (Branch), which was involved in the Process acting as a litigant on Canada's behalf.[31]

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[25] *Andersen*, *supra* note 21 at para. 1.
[26] RSC 1985 (3rd Supp.), c. 1 (repealed in 2004 and replaced by SC 2004, c. 11). *Andersen*, *ibid* at paras. 2, 4, 17, and 22.
[27] *Andersen*, *ibid* at paras. 17 and 22.
[28] See Settlement at Article 11 (pp. 58-62). Available here: https://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf
[29] *Fontaine*, *supra* note 22 at paras. 5-9.
[30] *Fontaine*, *ibid*.
[31] *Fontaine*, *ibid* at para. 182.

[30] Relying in part on *Andersen*, the court in *Fontaine* found that that while the records related to the Process were in the physical possession of the Branch, the Branch's possession of those records was only due to its "functions as a litigant under the [Process]".[32] Therefore, while the implied undertaking rule was "not a precise fit for the [records]," the court nonetheless found that it was appropriate to apply the rationale underlying that rule given that the records were "made and obtained through a litigation process within a court-approved settlement agreement."[33]

[31] In the result, the court found that the records were not under the control of the Branch given that the Branch's possession of the records "was always constrained by the court's inherent jurisdiction and the principle underlying the implied undertaking."[34]

Distinguishing *Fontaine* and *Andersen* from this case

[32] Turning to my concerns with how apposite *Fontaine* and *Andersen* are to the facts before me, each of those cases clearly dealt with circumstances where the public-sector entity in possession of the records had received those records in relation to civil litigation.

[33] Specifically considering *Fontaine*, which is a decision from a higher court than *Andersen* and which I find incorporates the relevant aspects of *Andersen*, a careful reading of that decision sees the court consistently return to the civil litigation context as an animating factor in reaching its conclusion that the presence of the implied undertaking precluded a finding that the records were under the Branch's control.[35] Therefore, I find it is arguable that the court's conclusion that a government agency will not have control of records which come into its possession as a result of a "court-controlled process" is narrower than the Ministry submits.[36]

[34] As I read *Fontaine* and *Andersen*, they do not stand for the proposition that the Ministry seems to ascribe to them. Put simply, I do not think these cases say that a record which is based, in part, on information subject to an implied undertaking arising from the execution of a search warrant is plainly and obviously not in the custody or under the control of a public body.

[35] I also note that *Andersen* and *Fontaine* were not specifically concerned with the interpretation and application of FIPPA. I find that this raises further

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[32] *Fontaine*, *ibid* at paras. 181-182.
[33] *Fontaine*, *ibid* at para. 183.
[34] *Fontaine*, *ibid* at paras. 181, 194, and 196
[35] *Fontaine*, *ibid* at, for example, paras. 142, 183, and 190.
[36] Public Body's Initial Submission at para. 40, citing to *Fontaine*, *ibid* at paras. 196-197 but without providing the context from the paras. cited *supra* note 35. See also Public Body's Initial Submission at paras. 58-59.

doubts as to whether their conclusions can be said to plainly and obviously demonstrate that the Report is not in the Ministry's custody or under its control for purposes of FIPPA.

[36] Based on the above, I find that the Ministry has not demonstrated that it is plain and obvious that the Report is not in the Ministry's custody or under its control. Therefore, this is not a case where there is "no issue which merits adjudication in an inquiry."[37]

CONCLUSION

[37] For the reasons given above, I dismiss the Ministry's request that the Commissioner exercise their discretion under s. 56(1) to decline to hold an inquiry regarding the Ministry's decision to refuse the applicant access to the Report. I have decided that this matter will proceed to inquiry under Part 5 of FIPPA.

April 25, 2024

ORIGINAL SIGNED BY

Alexander Corley, Adjudicator

OIPC File No.: F22-90606

[37] See Decision F07-04, *supra* note 6 at para. 16.