Order F24-89

MINISTRY OF ATTORNEY GENERAL

Emily Kraft
Adjudicator

October 18, 2024

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Summary: The Ministry of Attorney General (Ministry) requested that the Commissioner exercise his discretion under s. 56(1) to refuse to conduct an inquiry on the basis that the applicant is abusing FIPPA's processes. The adjudicator found that the applicant's conduct did not amount to an abuse of process and dismissed the Ministry's s. 56 application.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 56(1).

INTRODUCTION

[1] An individual (applicant) requested the Ministry of Attorney General (Ministry) provide him with access to a memo about Crown counsel's decision to direct a stay of proceedings in a criminal matter against him. The Ministry responded to the applicant and told him it was withholding the record in its entirety under ss. 14 (solicitor-client privilege), 15(1)(g) (exercise of prosecutorial discretion), 16 (harm to intergovernmental relations), and 22 (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).[1]

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision to refuse access. Mediation by the OIPC did not resolve the matter and the applicant asked that it proceed to an inquiry.

[3] Under s. 56(1) of FIPPA, the Ministry requested that the Commissioner decline to hold an inquiry into this matter. Section 56(1) gives the Commissioner the discretion to decide whether to hold an inquiry when a matter is not settled during

[1] Investigator's fact report at para 10 (see affidavit of Information Access and Privacy Coordinator, Exhibit B).

the OIPC's mediation process. The basis of the Ministry's s. 56(1) application is that the applicant is abusing FIPPA's processes.

ISSUE

[4] The issue I must decide is whether to grant the Ministry's request not to conduct an inquiry on the basis of abuse of process. The burden is on the Ministry to show why an inquiry should not be held.[2]

DISCUSSION

Background

Criminal proceedings

[5] In 2007, the applicant was charged in BC with a number of sexually based offences contrary to the *Criminal Code of Canada*. In 2008, all charges were stayed by Crown counsel, meaning there was no longer a criminal prosecution against the applicant for those offences.

[6] Also in 2008, the applicant was charged in the United States with similar criminal offences involving the same victim. He was arrested on an extradition warrant in 2015 and was formally surrendered to the United States in 2018. In 2019, he was convicted of the charges and sentenced to four life sentences in the United States.[3]

[7] In 2023, counsel for the applicant filed a post-conviction petition challenging the applicant's convictions. Counsel for the applicant says that new evidence can be raised in the petition.[4] The applicant believes that the record sought will assist him in his attempt to overturn his convictions in the United States.[5]

2015-2017 access requests

[8] On June 18, 2015, the applicant requested the Ministry provide him with a full copy of the Crown and RCMP records related to the 2007 criminal matter, including all correspondence, notes, memoranda, and video and audio interviews.

[9] On July 13, 2015, the Ministry responded to the applicant and told him that Crown counsel is obligated to provide a copy of the "RCMP records" to an accused at the time of their trial, so it would not provide an additional copy of those records

[2] Order F24-24, 2024 BCIPC 31 at para 48; Order F20-11, 2020 BCIPC 13 at para 4.
[3] Affidavit of NF at paras 2-3.
[4] Affidavit of NF at para 8.
[5] Applicant's response submission at para 8.

under FIPPA.[6] It also said that it was withholding its copy of other Criminal Justice Branch records such as Crown notes to file and inter office memorandum in their entirety under ss. 15(1)(g), 16, and 22 of FIPPA. It informed the applicant of his right to request a review by the OIPC within 30 days.[7]

[10] On July 31, 2015, the applicant requested that the Ministry provide him with "Crown's decision to direct a stay of proceedings in this matter."

[11] The Ministry responded on August 18, 2015, and told the applicant that it had already withheld a Crown memo (Crown Memo) that was responsive to his request.[8] It informed the applicant of his right to request a review by the OIPC within 30 days.[9]

[12] The Ministry also says that on two occasions in 2016 and 2017, the applicant asked several questions about the stay of proceedings and requested additional records. The Ministry did not specify what records the applicant requested or provide me with a copy of his correspondence. The Ministry says that it responded to the applicant by telling him that it had already responded to his questions and requests in its previous letters.

2022 request for review and repeated access request

[13] On December 14, 2022, the applicant requested that the OIPC review the Ministry's August 18, 2015 decision to withhold the Crown Memo.

[14] On December 16, 2022, the OIPC informed the applicant that it could not review a request made and responded to in 2015. Section 53(2) of FIPPA states that a request for a review of a decision of the head of a public body must be delivered within (a) 30 days after the person asking for the review is notified of the decision, or (b) a longer period allowed by the commissioner.

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[6] I note here that this was not a proper response under s. 8(1)(c) of FIPPA, which requires public bodies to tell applicants what provisions of FIPPA they relied on to withhold information in responsive records.

[7] The Ministry provided me with a copy of this response letter.

[8] Again, as noted at *supra* note 6, this was not a proper response under s. 8(1)(c) of FIPPA. I presume the Crown Memo was captured by the applicant's previous, broader request for records, and the Ministry determined that the same exceptions to disclosure it cited in its previous response applied. However, it was not sufficient for the Ministry to tell the applicant that the responsive record had already been withheld. It should have specified what provisions of FIPPA it relied on to withhold the record.

[9] The Ministry provided me with a copy of this response letter. In this letter, the Ministry also summarized the reasons for the stay of proceedings, citing s. 15(4) of FIPPA, which says that the head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or (b) to any other member of the public, if the fact of the investigation was made public.

[15] After denying his request for review, the OIPC told the applicant the process for making an access request.[10]

[16] On December 29, 2022, the applicant made a new access request to the Ministry for the Crown Memo.

[17] On January 31, 2023, the Ministry responded to the applicant and told him that it had "already responded in the fullest way possible and [has] nothing further to add." It attached copies of its previous response letters.

[18] On February 10, 2023, the applicant requested the OIPC review the Ministry's January 31, 2023 decision.

[19] On June 12, 2023, the Ministry clarified that it was refusing to disclose the Crown Memo under ss. 14, 15(1)(g), 16, and 22 of FIPPA.[11]

[20] The matter was not resolved during mediation by the OIPC and the applicant requested that it proceed to inquiry. The Ministry is asking the OIPC not to conduct an inquiry into this matter.

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

[21] Section 56(1) gives the Commissioner or his delegate discretion to decide whether to hold an inquiry. It reads:

> 56(1) If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[22] Past orders have used the authority under s. 56(1) not to hold an inquiry because the outcome is plain and obvious, or on the basis of mootness, *res judicata*, or abuse of process.[12]

[23] The Ministry is making this s. 56(1) application on the basis of abuse of process.

[24] While the applicant makes some submissions about abuse of process, which I will outline below, he also says that "the test for refusing an inquiry under section 56(1) is that there must be no arguable case at issue."[13] That is true when the basis of the s. 56(1) application is that the outcome of the inquiry is plain and

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[10] Investigator's fact report at para 2 (see affidavit of Information Access and Privacy Coordinator, Exhibit B).
[11] I note that s. 14 was not cited in the Ministry's July 13, 2015, or August 18, 2015 response letters.
[12] Order F24-24, 2024 BCIPC 31 at para 56 citing Decision F08-11, 2008 CanLII 65714 (BC IPC) at para 8; Order F23-23, 2023 BCIPC 27 at para 32 and the cases cited therein. Order F23-23 was upheld on judicial review in *Cimolai v British Columbia (Information and Privacy Commissioner)* 2024 BCSC 948.
[13] Applicant's response submission at para 63.

obvious; however, as established in Order F24-24, there is no requirement for a public body to prove that there is no arguable case that merits an inquiry when abuse of process is the basis of the s. 56(1) application.[14]

Abuse of process

[25] The concept of abuse of process has been described as proceedings "unfair to the point that they are contrary to the interests of justice."[15] Abuse of process is a flexible doctrine that can apply in a variety of legal contexts.[16] It "…engages the inherent jurisdiction of a court to prevent the misuse of its procedure in a way that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute."[17] The primary focus of abuse of process is the integrity of the adjudicative functions of courts and tribunals.[18]

[26] Abuse of process has been applied by Canadian courts to preclude re-litigation of claims which the court has already determined in cases where the strict requirements of issue estoppel are not met, but where allowing the litigation to proceed would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.[19]

[27] Abuse of process may also apply where proceedings are oppressive or vexatious and violate the fundamental principles of justice underlying the community's sense of fair play and decency.[20]

[28] The OIPC has found that it is an abuse of process when applicants:

- use FIPPA processes excessively for reasons other than for obtaining information, including to air their grievances about matters outside the OIPC's jurisdiction;[21]
- repeatedly attempt to obtain the same information by making access requests and requests for review after already receiving a fair settlement of the issues;[22] and
- refuse to comply with OIPC policies and procedures.[23]

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[14] Order F24-24, 2024 BCIPC 31 at para 58. The adjudicator noted at para 58 that the abuse of process doctrine is "rooted in policy objectives such as judicial efficiency and coherence."
[15] *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 (CanLII) at para 35.
[16] *Ibid* at para 35.
[17] *Ibid* at para 37 citing *Canam Enterprises Inc. v Coles* (2000), 2000 CanLII 8514 (ON CA) at paras 55-56.
[18] *Ibid* at paras 42-44.
[19] *Ibid* at para 37.
[20] *Ibid* at para 35 quoting McLachlin J. (as she then was) in *R v Scott,* 1990 CanLII 27 (SCC) at p 1007.
[21] Order F23-23, 2023 BCIPC 27 (upheld on judicial review in *Cimolai v British Columbia (Information and Privacy Commissioner)* 2024 BCSC 948).
[22] Order 01-16, 2001 CanLII 21570 (BC IPC).
[23] Order No. 291-1999, 1999 CanLII 2725 (BC IPC).

Overview of the parties' positions

[29] The Ministry says that the applicant failed to request a review of the Ministry's 2015 decision to withhold the Crown Memo within the deadline set out in FIPPA and was therefore denied a review of that decision by the OIPC in 2022. It says that, by repeating the same access request to the Ministry in 2022, the applicant created a second opportunity to proceed with a review by the OIPC, which is an abuse of process.[24] I presume that the Ministry is saying that both the 2022 access request to the Ministry and the 2023 request for review to the OIPC constitute an abuse of process.

[30] The Ministry also says that the applicant's access request and request for review is an abuse of process because the applicant has conceded that the requested record is excepted from disclosure under s. 14.

[31] Finally, the Ministry says that, beyond the abuse of process, it would be unreasonable to conduct an inquiry into this matter.

[32] The applicant says that he has not abused the OIPC's processes.

[33] I will discuss the parties' submissions in more detail below.

[34] I note that most of the applicant's submissions and some of the Ministry's submissions are about the applicability of ss. 15(1)(g) and 15(4) to the requested record. I find those submissions irrelevant to the basis of this s. 56 application, so I will not address them any further.[25]

Is the applicant's 2022 access request and subsequent request for review an abuse of process because the OIPC denied his first request for review?

[35] The Ministry says that the applicant made several access requests to the Ministry for the same information between 2015 and 2017. It says that the applicant was provided with clear instructions on how to ask for a review under FIPPA but chose not to pursue that right until 2022, at which point the OIPC informed him that a review was no longer available. The Ministry says that if the OIPC has already decided not to review the Ministry's decision because the applicant did not comply with the timelines in FIPPA, it would be inconsistent with both the decision of the OIPC and the timelines in FIPPA to then allow the applicant a review and inquiry into the Ministry's decision about a "new" request for the same information. It says that if the inquiry proceeds, it sets a precedent for any other applicant to also disregard FIPPA's timelines and review processes by simply resubmitting a new request.

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[24] Ministry's reply submission at para 20.

[25] The Ministry acknowledges that the application of s. 15 to the requested record is irrelevant to its s. 56 application in its reply submission at para 8.

[36] The Ministry says that the applicant's conduct falls squarely within the abuse of process doctrine of using a process more than once for the purpose of revisiting an issue which has been previously addressed[26] and tying up an administrative system years after the legislated review period.[27] It says that while there may be justifiable reasons for exceeding the time limit in some circumstances, a delay that is more than seven years is unjustifiable, undermines a sense of fair play, is inconsistent with the treatment of other applicants seeking information under FIPPA, and constitutes an abuse of process.[28]

[37] The Ministry points me to Order 01-16,[29] where former Commissioner Loukidelis found that an applicant's pursuit of the review and inquiry process was an abuse of process. In that case, the applicant had requested access to her own personal information and requested a review of the public body's decision to withhold some information. The request for review was settled during mediation. Several months later, the applicant changed her mind and made another access request to the public body for the same record. Former Commissioner Loukidelis said that the applicant was seeking to avoid her acceptance of the previous mediation's outcome by making a second, identical request for the same record she requested before. He concluded that her pursuit of the review and inquiry process was an abuse of process. He added that, in all cases, fairness will be the touchstone in deciding whether a public body should be excused from responding to the same, previously mediated access request.[30]

[38] The applicant says that he is not using FIPPA for an improper purpose and there is no evidence of bad faith on his part. He says that he has not abused any process by failing to request a review of the Ministry's decision within 30 days. He says that he is not a lawyer and was not assisted by counsel during his original correspondence with the Ministry. He provided affidavit evidence from his wife who says she helped him with his access requests to the Ministry between 2015 and 2017. She says that she did not appreciate that there was a legitimate avenue to have the decision reviewed by the OIPC.[31] The applicant adds that since his initial efforts to obtain the records to the present day, he has been dealing with extradition proceedings, incarcerated and waiting proceedings, or serving a prison sentence. He says the delay is not due to him "sitting around."[32]

[39] The applicant also cites a number of cases dealing with state-caused unreasonable delay in administrative proceedings. This is not a case about state-

[26] The Ministry cites Decision F10-07, 2010 BCIPC 37 at para 17, where the adjudicator quotes from an Ontario OIPC order.
[27] Ministry's initial submission at paras 41-43.
[28] Ministry's initial submission at para 47.
[29] 2001 CanLII 21570.
[30] Order 01-16, 2001 CanLII 21570 at para 42.
[31] Affidavit of applicant's wife at para 13.
[32] Applicant's response submission at para 101.

caused unreasonable delay, so I do not find the cases cited by the applicant relevant and I will not outline them here.

[40] For the reasons that follow, I am not persuaded that the applicant's actions constitute an abuse of process.

[41] Previous OIPC orders have found abuse of process where an applicant made repeated attempts to obtain the same information after already receiving a fair settlement with respect to access to that information.

[42] In my view, this case is different because the applicant had never requested a review of the Ministry's decision to withhold the Crown Memo before 2022 when he was denied one due to the expired deadline. When he repeated his access request to the Ministry in 2022 (and then made a new request for review), he had not previously had the benefit of a review and mediation by the OIPC and there had been no settlement with respect to access to the requested record.

[43] Also, given the amount of time that had passed since the Ministry's 2015 decision to withhold the Crown Memo, I do not think it was unreasonable for the applicant to make another request for the same record in 2022. I note that in Order 01-16, former Commissioner Loukidelis stated that "in the case of repeat requests, with or without previous mediation, it should be noted that a second request may have very different implications on its merits, including owing to the passage of time, changes in public body circumstances relevant to harm or changes in third-party circumstances relevant to harm."[33] In this case, the circumstances relevant to the Ministry's decision to withhold the Crown Memo in its entirety might have changed over the seven year period between the applicant's first and second request.[34]

[44] Additionally, I note that after the OIPC denied the applicant's request for review of the 2015 decision due to the expired deadline, it instructed him on how to make a new access request. Therefore, it seems to me that the applicant was following the process explained to him by the OIPC when he repeated his access request to the Ministry in 2022. When the Ministry responded to the 2022 access request and refused to disclose the requested record, the applicant was entitled to make a new request for review to the OIPC.

[45] There is also no evidence that the applicant has acted in bad faith or is using his access to information rights or OIPC processes for some ulterior or improper purpose. Based on the history of the applicant's access requests and questions to the Ministry, as well as his submissions in this inquiry, it is clear that he has a

[33] Order 01-16, 2001 CanLII 21570 at para 46.
[34] For a similar finding from the Alberta OIPC, see Order F2023-46, 2023 CanLII 122872 (AB OIPC) at paras 51-52.

sincere interest in the requested record, which he believes will help him in his attempt to overturn his criminal convictions in the United States.

[46] Finally, I accept the evidence from the applicant's wife, who helped the applicant make his access requests, that she did not understand or appreciate that there was a legitimate avenue to have the Ministry's decision reviewed by the OIPC. I can see that the applicant only contacted the OIPC for a review with the assistance of counsel. I am satisfied that the applicant's repeated attempts to obtain access to the requested record and his long overdue request for review from the OIPC were due to an honest misunderstanding of the OIPC and the request for review process.

[47] I am not persuaded the applicant's repeated access request to the Ministry in December 2022 and subsequent request for review to the OIPC amounts to an abuse of process.

Did the applicant concede that s. 14 applies to the requested record?

[48] In its initial submission, the Ministry says that the record requested by the applicant is a legal opinion and that it would have no evidentiary value in the applicant's post-conviction petition.

[49] In his response submission, the applicant says:

> [The applicant] seeks the record in question to assist him in this regard: while it is a legal opinion, there is a reasonable likelihood it will identify matters of evidentiary value, that to this point have been improperly withheld.[35]

[50] The Ministry submits that by saying this, the applicant is agreeing that the record in question is a legal opinion. It says that legal opinions are subject to solicitor-client privilege, and s. 14 of FIPPA allows the Ministry to withhold records that are subject to solicitor-client privilege. The Ministry says that the applicant's continued requests for a record that he "concedes is privileged" and is therefore excepted from disclosure under s. 14 is a further abuse of process. It says that proceeding with an inquiry where the parties agree that an exception applies to the records at issue is frivolous and a waste of finite public resources. It says that such an inquiry is moot.[36]

[51] I am not persuaded by the Ministry's argument. Based on the entirety of the applicant's submissions, it is clear that he believes the exceptions relied on by the Ministry do not apply and that the record should be disclosed to him. I do not accept that his reference to the requested record as a "legal opinion" amounts to him conceding that the record is subject to solicitor-client privilege and is excepted from disclosure under s. 14 of FIPPA. Further, in my view, there is an arguable case about whether s. 14 applies to the requested record, so I think it is unlikely that the

[35] Applicant's response submission at para 25.
[36] Ministry's reply submission at paras 31-34.

applicant, who is represented by legal counsel in this matter, would concede that s. 14 applies.[37]

Is conducting an inquiry unreasonable?

[52] The Ministry says that, beyond the abuse of process aspect, the proposed inquiry is also unreasonable within the FIPPA framework and should not be conducted.

[53] First, it says that the purpose for which the applicant is seeking the information is not consistent with the purpose of the legislation, which is "to make public bodies more accountable to the public" and "not replace other procedures for access to information." The Ministry says that the requested record is being sought for the purposes of an appeal of a criminal conviction which "is not in line with the legislated purpose of making public bodies more accountable to the public."[38]

[54] I reject the Ministry's argument on this point. FIPPA gives applicants a right of access to any record in the custody or control of a public body, subject to the exceptions to disclosure under Part 2.[39] Unless there are grounds under s. 43 or evidence of bad faith, in which case a public body can ask for relief from the OIPC, the motivation behind an applicant's access request has no bearing on their right of access.

[55] The Ministry also says it is unreasonable to conduct an inquiry because the applicant should instead apply to the court to obtain the requested record as part of the criminal trial process.

[56] It explains that any exculpatory evidence would have to be produced by the prosecution if it was in their possession, and any third-party records would be available and could be sought through a court order to the sitting judge or justice hearing the criminal matter. However, the Ministry adds that the requested record would have no evidentiary value for an appeal because it is a legal opinion written by Crown counsel, it is not evidence.[40]

[57] In support of its argument, the Ministry relies on Order F24-39,[41] in which the adjudicator authorized the public body in that case to disregard a request under

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[37] Based on the parties' submissions, it is my understanding that the requested record is a memo written by Crown counsel about their decision not to prosecute the applicant. I note that the BC Court of Appeal has stated that solicitor-client privilege is inapplicable to the functions of Crown counsel in the charge approval process: *British Columbia (Attorney General) v Davies*, 2009 BCCA 337 (CanLII) 2009 BCCA 337 at para 103, leave to appeal dismissed *Attorney General of British Columbia v William H Davies, QC, Commissioner*, 2010 CanLII 17152 (SCC).
[38] Ministry's initial submission at para 62(b).
[39] Section 4 of FIPPA.
[40] Ministry's initial submission at para 56.
[41] 2024 BCIPC 47.

s. 43(b) of FIPPA,[42] in part because the Supreme Court Civil Rules provided the applicant with a complete mechanism to address his disclosure needs and concerns.

[58] Since the Ministry says that the requested record in the present case has no evidentiary value, it is not clear to me whether the applicant could obtain access to the record through a court order. In any event, the existence of another procedure for access to information does not oust the right of access under FIPPA.[43]

[59] I am not persuaded by the Ministry's arguments that conducting an inquiry would be unreasonable in these circumstances.

***Charter* issue**

[60] In his response submission, the applicant says that his access request "is a matter of life, liberty, and security protected by s. 7 of the *Charter*."[44] He provides no further explanation.

[61] If the applicant is saying that his s. 7 rights have been violated by the Ministry's s. 56 application or some other action, he has not provided sufficient explanation. In any event, given my findings above, I find it is unnecessary to consider this issue.

CONCLUSION

[62] The Ministry has not established that the applicant's actions constitute an abuse of process or that it would be unreasonable to conduct an inquiry. Therefore, I dismiss the Ministry's s. 56 application. The matters at issue between the parties will proceed to an inquiry.

October 18, 2024

ORIGINAL SIGNED BY

Emily Kraft, Adjudicator

OIPC File No.: F23-93986

[42] Section 43(b) says that if the head of a public body asks, the commissioner may authorize the public body to disregard a request under section 5 or 29, including because the request is for a record that has been disclosed to the applicant or that is accessible by the applicant from another source.
[43] Order F01-27, 2001 CanLII 21581 (BC IPC) at para 13.
[44] Applicant's response submission at para 84.