Order F24-98

MINISTRY OF CITIZENS' SERVICES

Elizabeth Vranjkovic
Adjudicator

November 28, 2024

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Summary: The Ministry of Citizens' Services (Ministry) requested that the Commissioner exercise his discretion under s. 56(1) to refuse to conduct an inquiry on the basis of abuse of process. 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, s. 56(1).

INTRODUCTION

[1] The applicant asked the Ministry of Citizens' Services (Ministry) for access to records related to birth alerts under the *Freedom of Information and Protection of Privacy Act* (FIPPA).[1] The Ministry provided some information to the applicant but withheld other information under ss. 13 (advice or recommendations), 14 (solicitor-client privilege), 15 (harm to law enforcement) and 22 (unreasonable invasion of a third party's personal privacy) of FIPPA.[2] The Ministry also said that some information was outside the scope of FIPPA under s. 3(3)(f).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. The applicant also argued that the withheld information should be disclosed under s. 25(1)(b) (disclosure clearly in the public interest). The Ministry declined to release the withheld information under s. 25(1)(b). The OIPC's mediation process did not resolve the issues between the parties and the applicant requested the matter proceed to inquiry.

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[1] Birth alerts were a practice used by the Ministry of Child and Family Development (MCFD) to flag certain expectant parents in the healthcare system.
[2] For the remainder of this Order, when I refer to sections of an enactment I am referring to sections of FIPPA.

[3] Under s. 56(1), the Ministry requested the Commissioner decline to hold an inquiry into this matter. Section 56(1) gives the Commissioner the discretion to choose whether to hold an inquiry. The basis of the Ministry's s. 56(1) application is that it would be an abuse of process to conduct an inquiry.

Preliminary issue – who is the applicant?

[4] There was some confusion about the identity of the access applicant.[3] The OIPC's contact list identifies a lawyer (the lawyer) as the applicant and the Ministry refers to the lawyer as the applicant in its initial submission. However, the lawyer says that an individual she represents (the individual) is the applicant.[4]

[5] The individual affirms that she initiated the access request and it was submitted on her behalf by the lawyer. I accept the individual's evidence that she initiated the access request. As a result, I find that the individual is the applicant.

ISSUE

[6] 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.

[7] In accordance with past orders, the burden is on the Ministry to show why an inquiry should not be held.[5]

DISCUSSION

Background[6]

[8] Birth alerts were a practice used by the Ministry of Child and Family Development (MCFD) to flag certain expectant parents in the healthcare system. The alerts directed hospital staff to notify MCFD when those expectant parents were admitted to hospital for the birth of their child. The expectant parents were not notified about this practice or told that they were the subject of a birth alert. Birth alerts were primarily issued for marginalized women and disproportionately for Indigenous women. This practice was discontinued in September 2019.

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[3] I find it necessary to address this confusion because the identity of the access applicant is relevant to the abuse of process analysis below.
[4] Applicant's response submission at para 12.
[5] For example, Order F24-24, 2024 BCIPC 31 at para 48.
[6] The information in this section is from the public body's initial submission at paras 5-6 and 60, the applicant's response submission at paras 5-7, 13 and 16, the applicant's affidavit and Order F23-62, 2023 BCIPC 72.

[9] In 2022, the applicant requested her hospital records and discovered that she was the subject of a birth alert in 2013. The applicant is the representative plaintiff in a proposed class proceeding against the Province relating to the practice of birth alerts (the Class Action). The lawyer represents the applicant in the Class Action, which has not yet been certified as a class proceeding.

[10] The responsive records in this matter were the subject of a previous inquiry involving the Ministry and a digital news platform applicant, which resulted in Order F23-62 (the Previous Inquiry).

[11] From Order F23-62, I can see that in the Previous Inquiry, the Ministry initially withheld information under ss. 3, 12, 13, 14, 15, 17 and 22. After the OIPC issued its Notice of Inquiry in that case, the applicant withdrew its request for review of the application of ss. 3, 14, 15 and 22 to the records and the Ministry reconsidered its decision to refuse access under ss. 12 and 17. The applicant raised s. 25(1)(b) for the first time in its response submission, but the OIPC did not allow the late addition of s. 25(1)(b) into the inquiry. Consequently, in Order F23-62, the adjudicator only decided the application of s. 13(1).

Section 56(1) – discretion to hold an inquiry

[12] Section 56(1) gives the Commissioner or their delegate a broad discretionary power to decide whether to hold an inquiry.[7] 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.

[13] As set out in earlier decisions, the Commissioner or their delegate may decline to conduct an inquiry on a number of grounds, including on the basis of abuse of process.[8]

[14] The Ministry makes extensive submissions about the interpretation of s. 56(1).[9] The Ministry argues that the Commissioner should always keep reasonableness at the forefront of his mind when deciding whether to conduct an inquiry.[10] The Ministry also argues that the Commissioner must exercise his discretion to decide whether to conduct an inquiry in accordance with the principles of natural justice, fairness and FIPPA's scheme and purposes.[11]

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[7] *Gichuru v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 at para 47.
[8] Decision F08-11, 2008 CanLII 65714 (BC IPC) at para 8.
[9] Public body's initial submission at paras 22-41.
[10] Public body's initial submission at para 30.
[11] Public body's initial submission at para 40.

[15] The applicant submits that the Commissioner should only exercise his discretion not to conduct an inquiry under s. 56(1) in the clearest of circumstances.[12]

Abuse of Process

[16] The doctrine of abuse of process is rooted in a judge's inherent and residual discretion to prevent abuse of the court's process.[13] The administration of justice and fairness lie at the heart of the doctrine and it is flexible and unencumbered by specific requirements.[14]

[17] The Supreme Court of Canada has said the following about abuse of process:

> In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays…, or whether it prevents a civil party from using the courts for an improper purpose…, the focus is less on the interests of parties and more on the integrity of judicial decision making as a branch of the administration of justice.[15]

[18] The BC Supreme Court said the following about the types of circumstances that may be an abuse of process:

> The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression…[16]

[19] The Ministry submits that it would be an abuse of process to conduct an inquiry in this matter for two reasons:

1. The applicant is using the inquiry process for the collateral purpose of seeking access to information for potential use in the Class Action; and

2. Conducting an inquiry would be unreasonable because the records have already been through an inquiry process.

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[12] Applicant's response submission at para 18.
[13] *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 35 [*Toronto (City)*].
[14] *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 40-41.
[15] *Toronto (City)*, *supra* note 13 at para 43.
[16] *The Owners, Strata Plan BCS3702 v Hui*, 2023 BCSC 1420 at para 24 citing *Babavic v Babowech*, [1993] BCJ No 1802 (SC) at para 38.

[20] I will consider each of these issues in turn below.

Is the applicant using the inquiry process for a collateral purpose?

[21] The Ministry says that it is an abuse of process for a litigation to use FIPPA to access records and information for the purposes of litigation.[17] The Ministry says that the applicant's interest in the withheld information is inextricably linked to the Class Action.[18]

[22] The Ministry submits that the court is the appropriate forum for this matter because access to documents through the court discovery process is broader than what is provided for under FIPPA.[19] The Ministry submits that the only potential benefit to the applicant making a FIPPA access request arises in the event that the Ministry inadvertently discloses information that is subject to solicitor-client privilege.[20]

[23] More generally, the Ministry submits that a public body should not have to participate in an inquiry about an access request made by a party to litigation for documents that are accessible through the discovery process in that litigation.[21] In support of this position, the Ministry relies on Order F24-39, in which the adjudicator authorized a public body under s. 43(b) to disregard part of an access request for records that had been disclosed to the applicant during human rights proceedings and were also available to the applicant through civil litigation document discovery.[22] The Ministry submits that the adjudicator's interpretation of s. 43 in that order forms a "vital part of the context in which the Commissioner's discretion under s. 56(1) must be interpreted and applied."[23]

[24] The applicant submits her participation in the Class Action, which relates to the same subject matter as her access request, does not amount to an abuse of process. The applicant says she is not trying to subvert court processes or waste resources. Instead, she says that because she was the subject of a birth alert, she has a personal interest in understanding why the Province did not tell individuals that they had been the subject of a birth alert.[24]

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[17] Public body's initial submission at para 50.
[18] Public body's initial submission at para 49.
[19] Public body's initial submission at para 46.
[20] Public body's initial submission at para 50.
[21] Public body's initial submission at paras 32-35.
[22] Section 43(b) provides that if the head of a public body asks, the commissioner may authorize the public body to disregard a request because it is for a record that has been disclosed to the applicant or that is accessible by the applicant from another source. Order F24-39, 2024 BCIPC 47.
[23] Public body's initial submission at para 35.
[24] Applicant's response submission at paras 20-21, applicant's affidavit at para 5.

[25] The applicant also submits that the ability to obtain records by other means, including through the court discovery process, does not oust her right of access under FIPPA.[25] The applicant says that her ability to obtain the requested information through the court discovery process is years away, if the Class Action even moves forward at all. She says that she wants access to the withheld information whether or not the Class Action proceeds.[26] Finally, the applicant notes that any information obtained through discovery will be subject to an implied undertaking and will not be able to be used or disclosed outside the Class Action.[27]

[26] In reply, the Ministry says that it is only because the applicant is acting on behalf of a proposed class, instead of as an individual, that she has not already obtained full document discovery in court.[28] The Ministry also says that the applicant's interest in understanding why individuals other than herself were not notified shows that the applicant's interest in this information is "directly tied" to the Class Action.[29]

Analysis and conclusion

[27] For the reasons that follow, I am not persuaded that the applicant is using the inquiry process for the collateral purpose of seeking access to information for potential use in the Class Action.

[28] First, I accept the applicant's evidence that she seeks access to the withheld information regardless of whether the Class Action proceeds. I do not accept that the applicant's interest in the information is inextricably linked to her role in the Class Action, as the Ministry suggests.

[29] Second, I am not persuaded by the Ministry's position that the "only potential benefit" for a litigant making a FIPPA request is to create an opportunity for error in the production of privileged records. One benefit of a FIPPA request is that, unlike the court discovery process, FIPPA places no restrictions on what the applicant may do with the records.

[30] Third, I am not persuaded by the Ministry's arguments about Order F24-39. The OIPC consistently rejected the notion that court discovery processes displace the right of access under FIPPA.[30] In Order F24-39, the applicant said he was seeking access to records for the purpose of his civil proceeding against the public body, the records had already been disclosed to the applicant during human rights proceedings, and the records were available to the applicant in the

[25] Applicant's response submission at paras 21-22.
[26] Applicant's response submission at paras 28-29, applicant's affidavit at para 6.
[27] Applicant's response submission at para 30.
[28] Public body's reply submission at para 4.
[29] Public body's reply submission at para 7.
[30] Order P21-03, 2021 BCIPC 11 at paras 14-15; Order F17-40, 2017 BCIPC 44 at para 4.

civil proceedings where he wanted to use them.[31] In my view, the adjudicator's authorization to disregard in those specific circumstances does not mean, as the Ministry suggests, that a public body should not have to participate in an inquiry if the access request was made by a party to litigation and the requested records can be accessed through the discovery process of that litigation.

[31] Moreover, I find that the facts of the present matter are distinguishable from Order F24-39. Here, the applicant has not already obtained access to the withheld information and I have already accepted that she is not only interested for the purpose of the Class Action. In my view, Order F24-39 does not mean that the Ministry should not have to participate in an inquiry in this matter.

[32] For these reasons, I am not persuaded that conducting an inquiry would be an abuse of process on the basis that the applicant is using the inquiry process for a collateral purpose. I turn now to the Ministry's submission that conducting an inquiry would be unreasonable because the records have already been through an inquiry process.

Would conducting an inquiry be unreasonable?

[33] The Ministry says that conducting an inquiry would be unreasonable because the records were the subject of the Previous Inquiry and were redacted in accordance with Order F23-62.[32] The Ministry says that there are not sufficient issues remaining to justify an inquiry for the following reasons:

- In the Previous Inquiry, the Ministry's evidence and submissions were so compelling that the applicant withdrew their request for review in relation to ss. 3 and 14. There is no reasonable question to be considered at inquiry in relation to ss. 3 and 14 because its evidence would be equally compelling in this matter.[33]

- Section 13 was adjudicated in the previous matter, so the only matter that effectively remains at issue is whether s. 25 applies to information withheld under s. 13. This issue does not warrant proceeding to inquiry considering the applicant's ability to access the records in court.[34]

[34] The Ministry also submits that because each inquiry consumes significant public resources, deciding what is reasonable requires assessing the publicly funded nature of the FIPPA system, the resource scarcity faced by all public bodies including the OIPC, and the principle of judicial economy.[35]

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[31] Order F24-47, 2024 BCIPC 30 at paras 2 and 29.
[32] Public body's initial submission at para 60.
[33] Public body's initial submission at para 63.
[34] Public body's initial submission at para 66.
[35] Public body's initial submission at paras 67-68.

[35] The applicant submits that she is positioned differently than the applicant in the Previous Inquiry. She says that unlike the previous applicant, her personal rights were affected by the Ministry's decision not to inform individuals that they were impacted by birth alerts.[36]

[36] The applicant also notes that the OIPC did not consider the application of s. 25 in the Previous Inquiry.[37] The applicant notes that the OIPC has previously found birth alerts to be a matter that engages the public interest, so the first part of the s. 25(1)(b) test is met and the matter warrants proceeding to inquiry.[38]

Analysis and conclusion

[37] For the reasons that follow, I am not persuaded that it would be unreasonable to conduct an inquiry in this matter.

[38] First, I find that ss. 3 and 14 remain at issue and support conducting an inquiry. The Ministry provided no evidence that the applicant in the Previous Matter withdrew their request for review of ss. 3 and 14 because they found the Ministry's evidence and submissions compelling. In the absence of evidence on that point, I am not persuaded that there is "no reasonable question" to be considered at inquiry regarding ss. 3 and 14.

[39] Second, I find that the applicant's ability to potentially obtain disclosure in court does not mean that s. 25 does not warrant proceeding to inquiry. As previously noted, court discovery processes do not displace the right of access under FIPPA.

[40] Finally, I accept the applicant's position that her circumstances are different from the applicant in the Previous Inquiry because, unlike that applicant, she is an individual who was directly affected by birth alerts. I find that this position might be relevant for a s. 13 analysis.[39]

[41] For these reasons, I find that conducting an inquiry would not be unreasonable or amount to an abuse of process on the basis that the records have already been through the inquiry process.

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[36] Applicant's response submission at para 32.
[37] Applicant's response submission at para 33.
[38] Applicant's response submission at para 36.
[39] For example, s. 13(2)(n) provides that the head of a public body must not refuse to disclose under s. 13(1) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant. To be clear, I have not reviewed the records and I do not know whether s. 13(2)(n) applies.

CONCLUSION

[42] 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 withheld information. I have decided that this matter will proceed to inquiry under Part 5 of FIPPA.

November 28, 2024

ORIGINAL SIGNED BY

Elizabeth Vranjkovic, Adjudicator

OIPC File No.: F23-95033 & F23-95039