



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F10-13

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

Michael McEvoy, Adjudicator

April 30, 2010

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Summary: The applicant requested audit records used in the preparation of a report by Josiah Wood QC concerning a review of the police complaints process. The Ministry refused the request on the basis that the records arose or were related to conduct complaints. The Ministry said s. 66.1 of the *Police Act* applied to exclude the application of FIPPA to the records. Section 66.1 of the *Police Act* applies to the majority of the records and as such they are not subject to FIPPA. A small number of records were ordered disclosed because they did not relate to conduct complaints.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 3(1)(c); *Police Act*, s. 66.1.

Cases Considered: *File 10766 Police Complaint Commissioner*, [2000] B.C.I.P.C.D. No. 45; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 S.C.C. 53; [2002] S.C.J. No. 55.

1.0 INTRODUCTION

[1] This inquiry arises from a request for review by the British Columbia Civil Liberties Association (the “applicant”) of a decision of the Police Services Division, Ministry of Public Safety and Solicitor General (“Ministry”). The Ministry refused access to certain background materials for a report Josiah Wood Q.C. wrote as part of a review of the police complaints process under the *Police Act*.

[2] The applicant requested access to “all notes generated in the preparation of the audit report for the complaint file review” undertaken as part of Mr. Wood’s

review. The applicant also requested, “copies of any notes prepared as part of the interview of complainants by Mr. Wood or his Review Team.”¹

[3] The Ministry responded by stating that the first set of requested records consisted of 800 pages of documents under the custody and control of the Police Complaint Commissioner (the “Audit Records”). The Ministry said that the Police Complaint Commissioner is an Officer of Legislature and therefore records in his custody and control are outside the scope of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) under s. 3(1)(c) of FIPPA. The Ministry also said it was withholding the second set of records, involving complainant interviews, in their entirety under s. 22 of the FIPPA.²

[4] The applicant requested a review of this decision. The applicant took the position that the Ministry must have custody or control of the Audit Records. It stated that, “[t]o the extent that they do not, then we fear that they have relinquished such control inappropriately either to avoid disclosure in law or for other reasons.” The applicant also asserted that the Ministry failed to sever the records relating to the complainant interviews, as required by FIPPA, and did not seek the consent of third parties to disclose those records.³

[5] The Ministry later told the applicant that the Police Complaint Commissioner had raised a concern that the Audit Records fell within s. 66.1 of the *Police Act*, which excludes records from the scope of FIPPA that arise out of or otherwise relate to the processing of a “conduct complaint”. Section 66.1 does not exclude policy or service complaints. The Ministry representative stated:

It isn’t clear on their face which category of complaints the Audit Records fall into. Therefore, my office is working with the Police Services Division of the Ministry to help categorize these complaints. As a result, we will not be providing you with severed copies of the Audit Records this week.⁴

[6] The Ministry also said it changed its decision with respect to the complainant interview records and was in the process of severing the personal information in those records so that the remainder could be provided. The Ministry said it would be releasing the notes of interviews where the interviewee had consented to the release.⁵

[7] The Ministry also subsequently released those portions of the Audit Records that involved complaints other than conduct complaints.⁶ Some of the

¹ Applicant’s initial submission, para. 14.

² Letter from Vicki Hudson to Murray Mollard, February 19, 2007.

³ Affidavit of Murray Mollard, Exhibit “G”.

⁴ Letter from Vicki Hudson to Murray Mollard, November 9, 2007.

⁵ Affidavit of Murray Mollard, Exhibit “H”.

⁶ Affidavit of Murray Mollard, Exhibit “J”.

information in these records was severed under s. 22 of FIPPA. It also released severed copies of the complainant interview notes.⁷

[8] The Ministry later told this Office that it would no longer be relying on s. 3(1)(c) with respect to the Audit Records.⁸ The applicant also said it no longer wished to proceed with an inquiry with respect to the interview notes.⁹ The Office of the Police Complaint Commissioner (the “OPCC”) was given notice of the inquiry as an appropriate person and provided submissions.

2.0 ISSUES

[9] The amended notice of written inquiry sets out as the only issue in this inquiry whether the Audit Records are excluded from FIPPA under s. 66.1 of the *Police Act*.

[10] Section 57 is silent regarding the issue of whether records are excluded from the scope of FIPPA under s. 66.1 of the *Police Act*. Past orders have stated that in such cases it is in the interests of the parties to provide argument and evidence to support their positions.

3.0 DISCUSSION

[11] **3.1 Background**—On June 14, 2005, the Ministry issued a press release stating that, in response to recent recommendations by the Police Complaint Commissioner, the Solicitor General had directed the Director of Police Services to conduct a review into matters concerning policing in British Columbia, under s. 42 of the *Police Act*. The Solicitor General referred to the review as “comprehensive” and “impartial”.¹⁰ The terms of reference for the review provided that it was to address, among other things, “[t]he adequacy and effectiveness of the current complaint process set out Part 9 of the *Police Act* including how it is currently implemented and any recommendations for change.”¹¹ The review resulted in a report that Josiah Wood Q.C. issued in February 2007 titled “Report on the Review of the Police Complaints Process in British Columbia” (the “Wood Report”).

[12] The Wood Report sets out the methodology of the review.¹² The Police Services Division members of the review team conducted an administrative audit focused on a randomly selected sample of 294 lodged police complaint files that were closed between June 2003 and June 2004. The administrative audit

⁷ Affidavit of Murray Mollard, Exhibit “I”.

⁸ Affidavit of Murray Mollard, Exhibit “H”.

⁹ Applicant’s initial submissions, para. 21.

¹⁰ Affidavit of Murray Mollard, Exhibit “B”.

¹¹ Report on the Review of the Police Complaints Process in British Columbia (the “Wood Report”), p.11.

¹² The Wood Report, pp. 3-4.

examined compliance with the administrative or technical aspects of the police complaint process, such as notification and reporting requirements, information resolution and discipline procedures and timelines.¹³

[13] In addition, Staff Sergeant Deborah Chisholm of the RCMP and Peter Juk of the Ministry of the Attorney General (the “Investigative Audit Team”) conducted an investigative audit of the same 294 files.¹⁴ The investigative audit examined the quality of the investigations undertaken and the appropriateness of the conclusions in light of the evidence obtained. The Investigative Audit Team created a template audit form comprising several questions to be answered for each file. That form was attached as Annex 1 to the Report on the Investigative Audit, which is attached as Appendix C to the Wood Report. The Investigative Audit Team also reviewed records relating to 100 non-lodged complaints. For each of the non-lodged complaints, they completed a second template audit form that is attached as Annex II to their report.

[14] The Audit Records at issue in this inquiry consist of the template audit forms the Investigative Audit Team completed for each of the randomly selected files referred to in paragraph 13.

[15] **3.2 Does section 66.1 of the *Police Act* apply?**—Section 66.1 of the *Police Act* states:

- 66.1 Except as provided by this Act, the *Freedom of Information and Protection of Privacy Act* does not apply to any record that
- (a) arises out of or is otherwise related to the making, submitting, lodging or processing of a conduct complaint under this Part, and
 - (b) is created on or after the conduct complaint is made, submitted or lodged.

[16] The effect of s. 66.1 is to exclude certain records from the operation of FIPPA.

[17] In *File 10766 Police Complaint Commissioner*,¹⁵ Commissioner Loukidelis held that s. 66.1 applies to a record which:

- (a) arose out of or is otherwise related to a “conduct complaint” under Part IX of the *Police Act*

¹³ The Wood Report, B-4.

¹⁴ The Wood Report, page B-4. I note that the applicant refers throughout its submissions to the “administrative audit” when it appears to be discussing the investigative audit. This may arise from an error in para. 11 of the applicant’s initial submissions where the two are not clearly identified as distinct. However, it is clear that the disputed records are connected with the investigative audit.

¹⁵ [2000] B.C.I.P.C.D. No. 45, at para. 7.

- (b) arises out of or is otherwise related to the making, submitting, lodging or processing of the conduct complaint and
- (c) was created on or before the conduct complaint is made, submitted or lodged.

The positions of the parties

[18] The applicant states that the Audit Records do not fall within the definition of a “conduct complaint” nor do they relate to the making, submitting, lodging or processing of a conduct complaint.¹⁶ The applicant points out that a number of relevant terms relating to the Part 9 complaints process are set out in s. 46 of the *Police Act*.

- A “conduct complaint” is defined as either a public trust or internal discipline complaint.
- A public trust complaint is defined as “a complaint to the effect that the respondent has committed a public trust default.”
- A public trust default is defined as conduct that would, if proved, constitute a disciplinary default and that causes or has the potential to cause physical or emotional harm or financial loss to any person, violates any person’s dignity, privacy or other rights, or is likely to undermine public confidence in the police.
- An “internal discipline complaint” is defined as a complaint which “relates to acts, omissions or departments of a respondent and is not a public trust complaint or is a public trust complaint that is not processed as such.”

[19] The applicant argues that these are exhaustive definitions and that, since the Audit Records do not consist of a conduct complaint, they are not caught within s. 66.1.¹⁷ The applicant argues that the Audit Records are not complaints at all, but if they were, they would be more correctly categorized as “service or policy complaints.”¹⁸ This type of complaint is defined as a complaint to the effect that one or more of the following are inadequate or inappropriate for or in relation to the conduct of a municipal police department:

- (a) its policies;
- (b) its procedures;
- (c) its standing orders;
- (d) its supervision and management controls;

¹⁶ Applicant’s initial submission, para. 25.

¹⁷ Applicant’s initial submission, para. 29.

¹⁸ Applicant’s initial submission, para. 31.

- (e) its training programs and resources;
- (f) its staffing;
- (g) its resource allocation;
- (h) its procedures or resources that are available to permit it to respond to requests for assistance;
- (i) any other internal operational or procedural matter.¹⁹

[20] The applicant submits that the information in the Audit Records was collected in order to investigate the police complaint regime in its entirety, not in relation to the making, submitting, lodging or processing of any individual conduct complaint.²⁰ The applicant says that it is evident from the following questions that the Investigative Audit Team posed that the Audit Records contain information used to evaluate the police complaints system as a whole:

- (1) Are the allegations clearly articulated in the complaint? If not, were efforts made to clarify or expand upon the allegations in the complaint?
- (2) If the complaint was withdrawn prior to or during investigation were there reasons to continue investigating the complaint?
- (3) If the complaint was summarily dismissed was that done in accordance with s. 54(1)?
- (4) If the complaint was informally resolved: was it done in accordance with the OPCC's guidelines for informal resolution? Was that appropriate in the circumstances? If so, why was it?²¹

[21] The applicant argues that, while Part 9 of the *Police Act* provides the framework for filing and resolving complaints, the Audit Records arise, not from the complaint processing regime, but from the review ordered under s. 42 of the *Police Act*, which is outside Part 9.²² The applicant states that, if the Audit Records contain information derived from the complaints submitted under Part 9, that information has been "altered by the notations of the [Investigative Audit Team] to such an extent as to distinguish the Audit Records from conduct complaints."²³ The applicant asserts that:

To allow the application of s. 66.1 to records which were created outside the scope of Part IX of the *Police Act* effectively broadens the application of the s. 66.1 exception to any records under the *Police Act* and may erode the fundamental goal of FIPPA. Accordingly, the Privacy Commissioner should find that the s. 66.1

¹⁹ *Police Act*, s. 46.

²⁰ Applicant's initial submission, para. 29.

²¹ Applicant's initial submission, para. 37.

²² Applicant's initial submission, paras. 33, 39-44.

²³ Applicant's initial submission, para. 30.

exception only applies to those records created under Part IX of the *Police Act*.²⁴

[22] The applicant notes that in ordering the review the Solicitor General stated that Josiah Wood Q.C was to report his findings and opinions with respect to the “integrity of the conduct of the police complaint investigations by independent municipal police departments.” The applicant argues that the “independence of the Wood Review along with the objective of determining ‘integrity’ reveals a desire for upholding the principles of transparency and accountability.”²⁵

[23] The OPCC says that its only interest in this inquiry is in ensuring that s. 66.1, which it describes as a core feature of the regulatory regime set out in the *Police Act*, is respected.²⁶ The OPCC says that the s. 42 review was a direct consequence of Police Complaint Commissioner Dirk Ryneveld’s decision recommending such an audit one month earlier.²⁷ It states:

The statutory authority under which Mr. Wood’s review was undertaken and the circumstances in which it was initiated demonstrate the inextricable link between the audit records, the *Police Act* complaint process and the larger purposes of the *Police Act* relative to the police complaint process. The very title of the report – Report on the Review of the Police Complaint Process in British Columbia – makes this clear. An audit record whose very purpose is to review and critically analyze a *Police Act* complaint file and its processing “arises from or is otherwise related to the making, submitting, lodging or processing of a complaint” under Part 9.

Analysis of the *Police Act* complaint files and their processing was the *raison d’être* of the statutory audit; the Part 9 complaint files were the very *locus* of the information recorded in the audit notes. If the audit records are not “related to” the making and lodging of the *Police Act* complaints, it is difficult to imagine what alternative thing to which they could reasonably be said to relate.²⁸

[24] The OPCC states that s. 66.1 is the result of a legislative policy decision not to make conduct complaint information accessible under “ordinary FOI rules.” It argues that:

... conduct complaints contain a mix of sensitive and privileged information, and they arose in a unique and singular policy area which customarily operates by way of ‘comprehensive code’; which

²⁴ Applicant’s initial submission, para. 43.

²⁵ Applicant’s initial submission, paras. 45-46.

²⁶ OPCC initial submission, para. 3.

²⁷ OPCC’s initial submission, para 18.

²⁸ OPCC’s initial submission, paras. 19 and 20.

code itself delineates a sliding scale of information and process rights for participants at various stages of the complaints process ...²⁹

[25] The OPCC says that it would undermine the legislature's intention in enacting s. 66.1 and the integrity of the statutory scheme if an applicant were able to obtain information about *Police Act* complaint files "through the back door via disclosure of audit records based on the very *Police Act* complaint files the legislature has said are outside FIPPA." The OPCC says that, in order to avoid this, s. 66.1 "has been drafted as a subject matter exclusion."³⁰

[26] The Ministry says that s. 66.1(c) is clearly met because, since the "records all originate from an audit process, it is clear that the records were created after the conduct complaint was made, submitted or lodged."³¹

[27] The Ministry submits that the Legislature could have chosen to frame the exclusion in s. 66.1 more narrowly. For example, it could have excluded only the complaint form. The Ministry states:

However, the Legislature instead chose to use very broad language which touches, in the Ministry's submission, any record which has as its origin a complaint or is directly related to a conduct complaint from the time it was made or submitted to its final resolution.

Further, the Ministry says that its interpretation of s. 66.1 respects the purpose of the legislation. In passing s. 66.1 and thereby specifically limiting an individual's access to conduct complaint records through *FOIPPA* there was a public interest served by this limited access.

Each audit record is directly related to the making of a specific complaint—and contains details of that complaint. The audit records are not a summary of complaints generally, but a direct reflection on the contents and conduct of an individual complaint file.

It is difficult to understand how the complaint records themselves would be covered by s. 66.1 of the *Police Act*, but the audit records would not be, when they mirror each other. The Ministry submits that it would undermine the language and intent of s. 66.1 (which appears to be to create a class or category based exemption) if the original complaint documents were excluded from *FOIPPA*, but documents based on them as part of a statutory review were not protected.³²

²⁹ OPCC's initial submission, para 22.

³⁰ OPCC's initial submission, para 24.

³¹ Ministry's initial submissions, para. 16.

³² Ministry's initial submission, paras. 28-31.

Findings

[28] The *Police Act* is a comprehensive legislative scheme dealing with policing matters under the authority of the Province of British Columbia. Part 9 of the legislation provides a mechanism for receiving and dealing with complaints about police. The *Police Act* defines various types of complaints and sets out provisions for the resolution of each type. Records related to all matters arising under the *Police Act* are subject to FIPPA with one exception, that is, certain matters related to conduct complaints under Part 9. Commissioner Loukidelis observed in *File 10766; Police Complaint Commissioner*³³ that s. 66.1 of the *Police Act* is a clear expression of the Legislature's decision that records arising out of, or related to, that specific form of complaint are not to be subject to the access rights otherwise afforded under FIPPA.³⁴

[29] The OPCC and Ministry take a very broad view of the scope of the language of s. 66.1 of the *Police Act* while the applicant wishes to place them in a narrower context. I am compelled by Section 8 of the *Interpretation Act* to interpret the *Police Act* as being “remedial” and to give it “such fair, large and liberal construction and interpretation as best insures the attainment of its objects.” In addition, the Supreme Court of Canada has said that the words of a statute must be interpreted in their entire context and in their grammatical and ordinary sense, in harmony with the scheme of the legislation, the purposes of the legislation and the intention of the Legislature. See, for example, *Lavigne v. Canada (Office of the Commissioner of Official Languages)*.³⁵

[30] I have carefully considered the parties' submissions and the evidence. I begin by noting the stated purpose of the Wood Report:

The purpose of the review was to address the shortcomings in Part IX of the *Act*, with the ultimate object being recommendations for improvement. Everyone associated with the complaint process, virtually since its inception in 1998, has realized there were problems with Part IX, problems which made it difficult for the police to discharge their responsibility to thoroughly investigate and properly process complaints and problems that made it difficult for the police complaint commissioner to discharge the oversight functions of that office in an effective manner. Thus, wherever possible, the facts accumulated during this review have been reported and will remain anonymous. That is particularly so with respect to the audit results, both administrative and investigative. The purpose in looking back, and examining complaint files closed between June 2003 and June

³³ [2000] B.C.I.P.C.D. No. 45.

³⁴ http://www.oipcbc.org/orders/other_decisions/otherdec_5.html

³⁵ 2002 S.C.C. 53; [2002] S.C.J. No. 55.

of 2005, was solely to enable me to see what improvements could be made in the process of going forward.³⁶

[31] The Audit Records were created in order to assess the quality of the processing of individual complaints, as part of an examination into the effectiveness of the complaint system as a whole. The Audit Records were not part of the processing of the individual complaints and were not created or utilized in order to further the processing of those individual complaints in any way. For this reason, I agree with the applicant that the Audit Records are not themselves complaints under Part 9 of the *Police Act*. Therefore, the records do not “arise out of” a conduct complaint as the Ministry defined those terms. Rather they originate or stem from the review process Josiah Wood QC conducted to assess the complaint system as a whole under Part 8, s. 42 of the *Police Act*.

[32] The next question is whether the Audit Records *relate* to the making, submitting, lodging or processing of a conduct complaint under Part 9. In my view, this provision is not so broad as to create the kind of “subject matter based exclusion” suggested by the OPCC. The logic of this position would exclude from the scope of FIPPA any documents in the custody or control of a Ministry that are about the police complaints system and how it operates.

[33] Rather, an assessment is required of the specific nexus between the requested records and the making, submitting, lodging or processing of a particular conduct complaint. Having reviewed the disputed Audit Records, I find that almost all of them³⁷ consist of answers to the template questionnaire that specifically refer to individual conduct complaint files. The Audit Records, as noted above, are not the conduct complaint records themselves. Certainly, if the Investigative Audit Team had appended any correspondence between a complainant and police department to the audit template, for example, there is no question such a record would be excluded from FIPPA by virtue of s. 66.1. Further, if the Audit Records recorded verbatim passages from the conduct complaint files, these too would be excluded. Neither is before me here.

[34] What are before me are records that follow closely on this continuum. The Investigative Audit Team had direct access to the conduct complaint records. It is therefore not surprising that the Audit Records reflect the contents of individual conduct complaints, given the specific questions posed in the template questionnaire document. The applicant is correct to say that the information in the Audit Records was collected in order to investigate the police complaint regime in its entirety. However, taken individually, the contents of the Audit Records, though created by and for the Wood Report, are sufficiently detailed about each complaint such that it can be said that each record relates to

³⁶ The Wood Report, p. 5.

³⁷ There are two records that do not and I will address those at para. 39.

the “making, submitting, lodging or processing of a conduct complaint” under Part 9 of the *Police Act*. Contrary to the applicant’s contention, the information in the Audit Records is not altered by the Investigative Audit Team to such an extent as to distinguish the Audit Records from conduct complaints.

[35] My conclusions apply to both the non-lodged and lodged complaints. The Investigative Audit Team reviewed a sample of public trust complaints (a type of conduct complaint) found in the files of police departments that were not formally filed as lodged complaints. A “lodged” complaint is by definition one that is in writing³⁸ and thus subject to the formal processes set out in Divisions 4 and 5 of Part 9 the *Police Act*. However, Section 66.1 applies not just to lodged complaints but to the “making” or “submitting” of conduct complaints. The *Police Act* therefore contemplates that there may be non-lodged conduct complaints subject to s. 66.1 and thus outside of FIPPA’s jurisdiction.

[36] As for s. 66.1(c), it necessarily follows from the above conclusion that the Audit Records were created after the conduct complaints were made, submitted or lodged thus satisfying s. 66.1(c) of the *Police Act*.

[37] I referred above to some withheld records that in my view do not relate to conduct complaints. Section 66.1 is limited to records relating to conduct complaints and does not apply to service or policy complaints. As noted, the Ministry has released to the applicant those portions of the Audit Records that relate to policy or service complaints. The applicant argues that it would be unreasonable for me to rely on the Ministry’s characterization of the withheld Audit Records and says that “[a] decision as to whether the Audit Records relate to ‘conduct complaints’ or not should be based on the actual Audit Records themselves and not the Ministry’s characterization.” The applicant notes that the materials which the Ministry has released demonstrate that there can be problems with the characterization of complaints and that these difficulties “are made critical by the ramifications of a complaint being characterized as policy or service over conduct”, given that the scope of FIPPA is determined by that characterization.³⁹

[38] The affidavit of Dorothy Fielding, the Information and Privacy Analyst responsible for responding to the BCCLA’s request, states that she sought the assistance of the Police Services Division of the Ministry to determine which Audit Records related to conduct complaints.⁴⁰ Ms Fielding deposes that with the help of the Police Services Division, she “located the service and policy complaints” which the Ministry severed under s. 22 of FIPPA and disclosed to the

³⁸ Section 46(2) of the Police Act which reads “In this Part, “lodge” or “lodged” is a reference to the lodging of a written record of complaint, in the prescribed form, under s. 52(4)

³⁹ Applicant’s reply submissions, paras. 4-8.

⁴⁰ Affidavit of Dorothy Fielding, paras. 1-3.

applicant.⁴¹ I take it that, by “service or policy complaints”, Ms Fielding means the Audit Reports associated with underlying service or policy complaints.

[39] Further to the applicant’s submissions, I have reviewed each of the Audit Records. While it is not open to me to re-characterize a complaint which had been determined to be a “conduct complaint” under the procedure for the characterization of complaints set out in the *Police Act*,⁴² if the characterization was undertaken by one of the audit teams, it may be appropriately reviewed. My review of the records indicates each was classified correctly. In this regard, records numbered 645 and 646 are denoted as a service or policy complaint. For whatever reason however, they were not noted as such in Ms Fielding’s Exhibit “B” that lists non-conduct complaints. I take this to be an inadvertent oversight. These pages derive from the files of a police department and contain neither an explicit nor an inferential reference to OPCC files. In my view, s. 66.1 of the *Police Act* does not apply to these records because they are a service or policy complaint. The Ministry must now process these records under FIPPA.

4.0 CONCLUSION

1. For the above reasons, and subject to paragraph 2 below, I find that by virtue of s. 66.1 of the *Police Act*, FIPPA does not apply to the disputed records. No order is therefore necessary with respect to those records.
2. As an exception to paragraph 1 immediately above, I find that s. 66.1 of the *Police Act* does not apply to records 645 and 646 identified by the Ministry as the records in issue. Pursuant to s. 58(3)(a) of FIPPA I require the Ministry to process these records under FIPPA and to provide the applicant and me its decision within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before June 14, 2010.

April 30, 2010

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File No.F07-31373

⁴¹Affidavit of Dorothy Fielding, para. 4.

⁴²File 10766 *Police Complaint Commissioner*, [2000] B.C.I.P.C.D. No. 45, at para. 14.