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Order F11-16

PROVINCIAL HEALTH SERVICES AUTHORITY

Celia Francis, Senior Adjudicator

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Summary: In the judicial review of Order F09-07, the court set aside the decision that a human rights investigator was acting in a quasi judicial capacity for the purposes of s. 3(1)(b) of FIPPA in carrying out her investigation of a complaint against a doctor. The judge remitted back to the senior adjudicator the question of whether the investigator's records were her "personal notes" or her "communications" for the purposes of s. 3(1)(b). The senior adjudicator found that the investigator's introductory notes, notes on agendas and telephone conversations and her outgoing correspondence are her "personal notes" and "communications" for the purposes of s. 3(1)(b). The senior adjudicator found that the other correspondence, including incoming letters and emails to the investigator, and her typed and handwritten interview notes are not her "personal notes" and "communications" and that they are not excluded from the scope of FIPPA under s. 3(1)(b). The PHSA is ordered to decide whether the doctor is entitled to access to the information that s. 3(1)(b) does not exclude.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 3(1)(b).

Authorities Considered: **B.C.:** Order F09-07, [2009] B.C.I.P.C.D. No. 10; Order No. 321-1999, [1999] No. 34; Order 00-16, [2000] B.C.I.P.C.D. No. 19; Order 02-12, [2002] B.C.I.P.C.D. No. 12; Order F10-09, [2010] B.C.I.P.C.D. No. 14; Order 01-43, [2001] B.C.I.P.C.D. No. 45; Order F10-35, [2010] B.C.I.P.C.D. No. 53; Order F05-34, [2005] B.C.I.P.C.D. No. 46; Order F09-10, [2009] B.C.I.P.C.D. No. 13.
Alta.: Order 99-025, [1999] A.I.P.C.D. No. 31.

Cases Considered: *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 931; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597.

1.0 INTRODUCTION

[1] On April 30, 2009, I issued Order F09-07,¹ in which I found that an investigator was not acting in a quasi judicial capacity for the purposes of s. 3(1)(b) in creating some of the complaint investigation records the applicant requested. I ordered the PHSA to process the records under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) and give the applicant a decision on whether he was entitled to have access to them.

[2] The Provincial Health Services Authority (“PHSA”) applied for judicial review of Order F09-07. Pitfield J. disagreed with my finding that the investigator was not acting in a quasi judicial capacity in her investigation. He set aside my decision on that issue and remitted to me for determination the question of whether the investigator’s records “are exempt from production as a personal note, communication or draft decision” within the meaning of s. 3(1)(b) of FIPPA.² This order deals with that question.

2.0 ISSUE

[3] The issue before me is whether the requested records are excluded from the scope of FIPPA under s. 3(1)(b). Section 57 of FIPPA, which sets out the burden of proof in an inquiry, is silent respecting exclusions under s. 3(1). It is thus incumbent on the parties to provide argument and evidence in support of their positions.

3.0 DISCUSSION

[4] **3.1 Background**—Order F09-07 provides extensive background information on the human rights complaint that led to the investigation, the framework for that investigation and the various associated legal proceedings in which the applicant has been involved. For the purposes of this decision, I summarize the relevant points below.

[5] The applicant is a physician on unpaid leave from the Children’s & Women’s Health Centre (“CWHC”). He was the subject of complaints of personal harassment in the workplace by a third party (“complainant”). Hanne Jensen was appointed to investigate these complaints under the CWHC’s human rights policy and found that the applicant had contravened the policy. The applicant requested records concerning the investigator’s “interactions” with him and with other individuals and bodies during her investigation. The PHSA denied access to many of the records on the grounds that they were excluded from the scope of FIPPA under s. 3(1)(b). The applicant requested a review by

¹ [2009] B.C.I.P.C.D. No. 10.

² *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 931.

this Office (“OIPC”). Mediation was not successful in resolving the issues and an inquiry took place, with the result I described above.

[6] **3.2 Records in Dispute**—There are over 1,400 pages of responsive records:

- the investigator’s running and log file notes;
- correspondence between the investigator and others on a variety of matters;
- records the applicant, the third party and the CWHC provided to the investigator;
- the investigator’s handwritten and typed notes of her interviews with the applicant, complainant and witnesses;
- her notes of a tape recording of a meeting;
- relevant court decisions; and
- the investigator’s report.

[7] The PHSA disclosed a number of records and withheld or severed others. The “records in dispute” here are the records that the PHSA claims are excluded from the scope of FIPPA under s. 3(1)(b), principally correspondence to and from Hanne Jensen and her “interview notes”. I discuss them individually below.

[8] **3.3 What is not in Dispute**—In addition to the s. 3(1)(b) issue, Order F09-07 dealt with other issues and records which are not in dispute here:

- the application of s. 51 of the *Evidence Act*—I found it applied to certain information and the applicant did not take issue with this decision
- the application of s. 22 of FIPPA—I found it applied to some information, but not to other information; neither party took issue with this decision
- I found that an excerpt from a court transcript was in the PHSA’s custody and control and I ordered it to process this record under FIPPA—the PHSA included this issue in its petition for judicial review and Pitfield J. upheld my finding on this point

[9] **3.4 Personal Note or Communication**—Section 3(1)(b) reads as follows:

Scope of this Act

- 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following: ...
- (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity.

[10] As noted above, Pitfield J. concluded that the investigator, Hanne Jensen, was acting in a quasi judicial capacity in conducting her investigation. The PHSa said that the records do not include a “draft decision”.³ Thus, the issue I have to decide is whether the records in dispute are her “personal notes” or her “communications” for the purposes of s. 3(1)(b).

The purpose of s. 3(1)(b)

[11] Previous orders have said that the purpose of s. 3(1)(b) is to protect “deliberative secrecy”.⁴ Black’s Law Dictionary defines “deliberate” to mean

(of a court, jury, etc) to weigh and analyze all the evidence after closing arguments.⁵

[12] It defines “deliberation” as

The act of carefully considering issues and options before making a decision or taking some action; esp., the process by which a jury reaches a verdict, as by analyzing, discussing, and weighing the evidence.⁶

[13] The BC Supreme Court commented on the purpose of s. 3(1)(b) in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*:⁷

All are agreed that the purpose of s. 3(1)(b) is the protection of deliberative secrecy. One aspect of that is the need to protect the ability of those exercising judicial or quasi-judicial functions to express preliminary and tentative remarks and conclusions that might later have to be changed. The risk of their being published could have a constraining effect on the creative process. That consideration would apply to commissions of inquiry reviewing the propriety of conduct of individuals.

[14] Pitfield J. also commented on the purpose of this provision:

[31] The purpose of s. 3(1)(b) of *FIPPA* is to protect deliberative secrecy. Deliberation encompasses the gathering of information, its assessment, and the formulation of an opinion or conclusion in respect of it.

...

³ PHSa’s letter of November 10, 2005.

⁴ See Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34, for example.

⁵ 8th ed. St. Paul, Minn.: Thomson/West, 2004, “*deliberate*”.

⁶ 8th ed. St. Paul, Minn.: Thomson/West, 2004, “*deliberation*”.

⁷ 2004 BCSC 1597, at para. 70.

[33] ... Because of the process which has been created for the purpose of addressing human rights and privilege issues, all deliberative steps must be protected. In that way, those charged with the responsibility of formulating opinions which are essential to the eventual disposition of a complaint will be able to formulate their opinions free from concerns about inquiries into their thought-making processes.⁸

What types of records does s. 3(1)(b) cover?

[15] Previous orders have recognized that s. 3(1)(b) does not capture every record that a person acting in a quasi judicial capacity creates. Commissioner Loukidelis discussed this in Order 00-16:

I stress that s. 3(1)(b) is only triggered when a person is actually “acting” in a judicial or quasi judicial capacity in respect of the record in issue. The section recognizes that employees of public bodies - including members of administrative tribunals - may discharge multiple functions, only some of which could be termed functions of a judicial or quasi judicial nature. ...⁹

[16] The Commissioner went on to find that s. 3(1)(b) applied to certain records, such as panel members’ comments and thoughts about issues raised in the application, as well as their comments on the evidence before them. He found that certain other communications, such as those concerning the scheduling of meetings and the constitution of the panel—records relating to the exercise administrative functions—did not fall under s. 3(1)(b) because they “did not engage the deliberative processes that are protected by s. 3(1)(b)”.¹⁰

[17] Commissioner Loukidelis also distinguished between a communication on the merits of an issue *from* a panel member while acting in a quasi judicial capacity and the response *to* the panel member, for the purposes of s. 3(1)(b). He said the former would be excluded under s. 3(1)(b) while the latter would not:

... a memorandum or other communication from a panel member to a Board lawyer or other staff member – *i.e.*, to someone who is not a Board member – about the merits of an issue in a particular application before the Board, would also be a “personal note” or “communication” of a person acting in a quasi judicial capacity. The response to such a communication would not be excluded under s. 3(1)(b), although any notes to file written by a panel member who received the response would be excluded. (The staff member’s response might, depending on the circumstances, be protected under s. 13(1) or another of the Act’s exceptions.)¹¹

⁸ *Provincial Health Services Authority*, at para. 33.

⁹ At p. 7.

¹⁰ At pp. 7-10.

¹¹ At pp. 8-9.

[18] I take here the approach to the interpretation and application of s. 3(1)(b) to the records in dispute as set out above and in relevant orders and caselaw.¹²

[19] **3.5 Parties' Arguments on "personal note" and "communication"**—The PHSA argued that "deliberative secrecy" protects records of an administrative decision-maker that are not part of the "record". Conversely, the PHSA argued, administrative records "related to a quasi judicial proceeding" are not excluded by s. 3(1)(b). It likened such records to those the registrar of an administrative tribunal creates, such as records related to scheduling hearings, receiving submissions and other documents and delivering reasons. It noted that Commissioner Loukidelis found in Order 00-16 that s. 3(1)(b) did not apply to administrative records, such as letters scheduling meetings and on the constitution of the panel. In this regard, it suggested that the definition of a "record of proceeding" in the *Judicial Review Procedure Act* ("JRPA") is helpful:

"record of the proceeding" includes the following:

- (a) a document by which the proceeding is commenced;
- (b) a notice of a hearing in the proceeding;
- (c) an intermediate order made by the tribunal;
- (d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;
- (e) a transcript, if any, of the oral evidence given at a hearing;
- (f) the decision of the tribunal and any reasons given by it;

[20] The PHSA argued that Ms Jensen's "quasi judicial administration" records are limited to similar kinds of records. It said it has disclosed communications related to those activities, such as scheduling meetings, scheduling submissions and receiving documents and submissions.¹³

[21] The PHSA argued that s. 3(1)(b) applies to records that Ms Jensen created, as follows:

- (a) Her running file notes;
- (b) Her notes of interviews with the parties and the witnesses;
- (c) Her notes in preparation of interviews with the parties and witnesses;
- (d) Her notes made while listening to the tape of the meeting of the Infection Control Committee;

¹² See also, for example, Order 02-12, [2002] B.C.I.P.C.D. No. 12, at paras. 21-24, Order F10-09, [2010] B.C.I.P.C.D. No. 14, at paras. 63-77, and Order F10-35, [2010] B.C.I.P.C.D. No. 53, at para. 30.

¹³ Paras. 63-66 & 71, PHSA's initial submission.

- (e) Her notes made on documents and submissions of the parties;
- (f) Her correspondence with the parties on procedural or substantive issues in the investigation; and
- (g) Her correspondence with legal counsel on procedural issues.¹⁴

[22] The PHSA referred to Alberta Order 99-025¹⁵ on the equivalent section in Alberta's *Freedom of Information and Protection of Privacy Act* where the Alberta Commissioner said that "personal notes" were "notes taken by an individual that were intended only for that individual's use". The PHSA also referred to Order 02-12,¹⁶ in which Commissioner Loukidelis found that notes of panel members on evidentiary issues and other such notes fell under s. 3(1)(b).¹⁷

[23] Hanne Jensen deposed about the purpose of her notes as follows:

- her running file notes were made to record the ongoing process of the investigation and to record her observations, opinions and queries with respect to further investigation or issues to be identified and resolved
- these notes were for her own use in conducting the investigation and preparing the report
- the notes she took in preparation for, and during, her interviews of the parties and witnesses were for her own use in identifying the issues in the investigation, gathering evidence and information related to the complaint, assessing the evidence and the credibility of the parties and the witnesses, and preparing the final report
- she made other notes, including on documents and submissions the parties provided, to assist her in assessing the parties' submissions, conducting the investigation, assessing the evidence, preparing her final report and deciding the applicant's request to dismiss the complaint
- her interview notes "are a combination of a record of relevant statements from the witness, my impressions of the witness, and my identification of further issues for investigation or clarification"
- some of her communications were to obtain evidence on issues in her investigation and to raise or address specific procedural, evidentiary and substantive issues

¹⁴ Para. 8, PHSA's initial submission. The PHSA's submission argued that Hanne Jensen's "log file notes" fall under s. 3(1)(b). Its decision letters of November 10 and 15, 2005 indicate that it originally categorized these items as falling under s. 3(1)(b). However, it later disclosed these items as pp. 1270-1271, with minor severing under s. 22, with its decision letter of February 21, 2006. I dealt with the s. 22 severing of these pages in Order F09-07 and thus do not need to consider them here.

¹⁵ [1999] A.I.P.C.D. No. 31.

¹⁶ [2002] B.C.I.P.C.D. No. 12.

¹⁷ At paras. 23-24.

- her communications with legal counsel were to obtain advice on jurisdictional and procedural issues arising in the investigation.¹⁸

[24] The applicant's submission on s. 3(1)(b) mainly concerned the issue of whether the investigator was acting in a quasi judicial capacity. However, he did refer to Order F05-34,¹⁹ which concerned investigation records similar to those in issue here, some of which I ordered disclosed.²⁰ Section 3(1)(b) was not an issue in that case.

[25] **3.6 Application of s. 3(1)(b) to the records in dispute**—Having regard for the discussion and caselaw outlined above, I will now consider whether s. 3(1)(b) applies to the individual disputed records. The PHSA provided the entire set of responsive records to me in a series of binders, cerlox books and sheaves of loose papers. I discuss below only those records that are in issue respecting s. 3(1)(b).

Binder called "Admin Other Evidence"

[26] The index of this binder is entitled "administrative matters". Tabs 2, 7 and 9 of this binder contain material that the PHSA says falls under s. 3(1)(b).

[27] **Tab 2: "Running File"** — This 37-page item records Hanne Jensen's activities and comments on her investigation from August 26, 2003 to October 29, 2004. The entries include the following: Ms Jensen's thoughts on the issues; matters she noted for further consideration; attempts to contact and meet with the parties; issues she intended to cover; steps she was considering taking or had decided to take; which witnesses she was considering interviewing; questions for herself and those she planned to ask the parties and witnesses; notes of her telephone communications with the parties, witnesses and counsel for the parties on the investigation; an email she sent a witness. While there is some information of an administrative character, such as telephone messages, it is intertwined with the other information in this record. I am satisfied that the 37-page record comprising the running file notes arises out of Ms Jensen's quasi judicial functions. I therefore find that s. 3(1)(b) applies to it in its entirety.

[28] **Tab 7: "Correspondence with Fasken"** — The records in this tab consist of the following:

- letters from Hanne Jensen to Fasken Martineau LLP, a law firm ("Fasken")
- letters from Fasken to Hanne Jensen
- letters from Fasken to legal counsel for the complainant
- a letter from Fasken to the applicant

¹⁸ Jensen affidavit.

¹⁹ [2005] B.C.I.P.C.D. No. 46.

²⁰ Para. 10, p. 6, applicant's reply submission.

[29] The letters from Hanne Jensen concern her attempts to meet with the parties and other issues. They are Ms Jensen's "communications" arising out of her quasi judicial functions. I find that s. 3(1)(b) applies to Hanne Jensen's outgoing letters in this tab.

[30] Applying Commissioner Loukidelis's reasoning in Order 00-16, as set out above at para. 17, I find that the letters from Fasken are not Hanne Jensen's "communications" for the purposes of s. 3(1)(b), as they are not from her. I therefore find that s. 3(1)(b) does not apply to the other letters.

[31] **Tab 9: "Evidence from C&W²¹ via Faskens"** — The table accompanying the PHSA's submission indicates that, in this tab, the PHSA applied s. 3(1)(b) to "correspondence from Faskens to HJ".

[32] The correspondence in question is a letter, with accompanying fax cover sheet, from Fasken to Hanne Jensen. As a letter to Hanne Jensen, it is not her "communication" for the purposes of s. 3(1)(b). I find that s. 3(1)(b) does not apply to it.

Binder called "[applicant's legal counsel]"

[33] This binder contains correspondence between Hanne Jensen and the applicant or his legal counsel. The PHSA's table of records indicates that pages 1272-1310 and 1404-1405, called "other correspondence", are in issue regarding s. 3(1)(b).

[34] Pages 1272-1306 and 1310 are all letters from the applicant or his counsel to Hanne Jensen. As such, they are not her "communications" for the purposes of s. 3(1)(b) and I find that this section does not apply to them.

[35] Pages 1307-1309 and 1404-1405 are letters from Hanne Jensen to the applicant's counsel. They concern matters arising out of Ms Jensen's quasi judicial functions and I find that s. 3(1)(b) applies to them.

Binder called "[complainant's legal counsel]"

[36] This binder contains correspondence between Hanne Jensen and counsel for the complainant in the human rights matter. The PHSA's table indicates that pages 1311-1403, called "other correspondence", are in issue respecting s. 3(1)(b).

²¹ Children's and Women's Health Centre.

[37] Pages 1311-1336, 1338-1343, 1347-1349, 1351-1363, 1369-1383, 1387-1392 and 1396-1403 are letters from the complainant's counsel, either to Hanne Jensen or to counsel for the PHSA. As such, they are not Ms Jensen's "communications" for the purposes of s. 3(1)(b) and I find that this section does not apply to them.

[38] Pages 1337, 1344-1346, 1350, 1364-1368, 1384-1386 and 1393-1395 are all letters from Hanne Jensen to the complainant's counsel. They all flow from Ms Jensen's quasi judicial functions and I find that s. 3(1)(b) applies to these items.

Two binders called "[applicant] evidence #1" and "[applicant] evidence #2"

[39] The index for these two binders is headed "binder containing (mostly) oral evidence of [the applicant]". The two binders contain six tabbed sets of documents which the PHSA's table describes as "H. Jensen's personal notes of interviews with [the applicant]", all of which the PHSA says are excluded under s. 3(1)(b). Although the index refers to a seventh tab said to contain a letter from the applicant's counsel, there was no tab 7 in the binder the PHSA provided to me.

[40] **Tab 1: "Correspondence etc with [the applicant], prior to December 10, 2003"** — The first two pages in this tab are Hanne Jensen's notes of a telephone conversation she had on December 8, 2003 with the applicant. The last page in this tab contains what appear to be notes of a conversation of February 3, 2004 between Hanne Jensen and the applicant's counsel. The contents of all three pages are Hanne Jensen's "personal notes" concerning matters arising out of her quasi judicial functions. I find that s. 3(1)(b) applies to them.

[41] The remaining documents in this tab consist of the following:

- letters from the applicant to Hanne Jensen
- letters from Hanne Jensen to the applicant
- a letter from Fasken Martineau to Hanne Jensen
- letters from Hanne Jensen to Fasken
- courier and postal tracking slips

[42] The incoming letters (from the applicant and Fasken to Hanne Jensen) are, for reasons I gave above, not Hanne Jensen's "communications" for the purposes of s. 3(1)(b). Nor are the courier and tracking slips. I find that s. 3(1)(b) does not apply to these records.

[43] As for the outgoing letters (from Hanne Jensen to the applicant and to Fasken), they are Hanne Jensen's "communications" concerning her mandate as an investigator and other matters arising out of her quasi judicial functions. I find that s. 3(1)(b) applies to them.

[44] **Tab 2: "[The applicant's] written response to the complaint, dated January 27, 2004"** — This tab contains a covering letter from the applicant's counsel to Hanne Jensen, together with two copies of the applicant's response to the complaint. As correspondence to Hanne Jensen, this record is not her "communication" for the purposes of s. 3(1)(b). I find that s. 3(1)(b) does not apply to it.

[45] **Tab 3: "Interviews conducted on March 3 and 11, 2004. My handwritten notes, transcribed along with interrogatory"** — This tab begins with a duplicate of the notes of the conversation of February 3, 2004 between Hanne Jensen and the applicant's counsel. I dealt with this page above at para. 40.

[46] The next record is a three-page "introduction". It appears to be Hanne Jensen's notes of points she planned to cover at the beginning of her meeting of March 3, 2004 with the applicant and his lawyer. It includes comments on her mandate and role and how she would conduct the investigation. These are Ms Jensen's "personal notes" concerning matters arising out of her quasi judicial functions. I find that s. 3(1)(b) applies to them.

[47] The rest of Tab 3 consists of Hanne Jensen's handwritten notes of the applicant's responses to her questions during her interviews with him on March 3 and 11, 2004 and her typed notes of these interviews, containing both her questions and his responses.

[48] Hanne Jensen deposed that she did not tape record her interviews and did not prepare transcripts. She also deposed that her interview notes were a combination of a witness's relevant statements, her impressions of the witness and identification of further issues for investigation or clarification.²²

[49] If Hanne Jensen had taped her interviews, the tape recordings would not be considered her "personal notes" but rather would be the record of evidence before her. Ms Jensen's interview notes are almost verbatim accounts of her interviews with the applicant, complainant and witnesses. While Hanne Jensen may have used her interview notes in her investigation, I find that these records are not her "personal notes" for the purposes of s. 3(1)(b). With minor exceptions, they are essentially transcripts of the evidence before her—the only record of evidence or testimony I am aware of.

²² Para. 13, Jensen affidavit.

[50] As noted above, the PHSA argued that the materials which would be included in the “record of proceedings” as defined in the JRPA would not be excluded from FIPPA as a result of s. 3(1)(b). Evidence provided to a decision maker and the transcripts of oral evidence received would fall within the definition of record of proceedings in the JRPA. I make no finding on whether or not it is useful to have regard to the definition of record of proceedings in determining the scope of s 3(1)(b) generally. However, in this case I am satisfied that s. 3(1)(b) does not exclude from the scope of FIPPA the record of evidence the investigator received.

[51] I draw a distinction between the interview notes I am considering here and the “coroners notes” I dealt with in Order F09-10.²³ In that case, I found that s. 3(1)(b) applied to notes the coroners had made of their conversations with police, witnesses, pathologists and others. The notes there distilled what the coroners had learned from those conversations.

[52] The handwritten and typed interview notes in this case have not undergone any such filtering or summarizing. Rather they capture virtually everything the parties and witnesses said in their interviews.

[53] As exceptions to this finding, the notes of the interview of March 11, 2004 contain a few “personal notes” in the form of occasional parenthetical comments about the applicant’s demeanour and a reminder from Hanne Jensen to herself. I find that these items fall under s. 3(1)(b), as set out in the attached schedule.

[54] **Tab 4: “Interviews conducted on July 13, 15 and 21, 2004. My handwritten notes, transcribed along with interrogatory”** — The first record in this tab is an “agenda” for the interview of July 13, 2004. It consists of two pages of typed notes of points that Hanne Jensen prepared to cover in her meeting of July 13, 2004 with the applicant and his lawyer. The first paragraph on page 1 of 39 of the typed notes of the interview of July 13, 2004 (beginning “Say: ... ”) also contains introductory remarks of a similar character. For the same reasons as those I gave above at para. 45 about Ms Jensen’s “introduction” notes, I find that s. 3(1)(b) applies to these two sets of “personal notes”.

[55] The remaining records in Tab 4 are typed and handwritten notes of the investigator’s questions and the applicant’s responses, from the three meetings in July 2004. As with the other interview notes, these records are almost verbatim accounts of the interviews. For reasons I gave above, they do not fall under s. 3(1)(b). As exceptions to this findings, I find that a few “personal notes” of Ms Jensen (occasional parenthetical comments and a reminder) do fall under s. 3(1)(b), as set out in the attached schedule.

²³ [2009] B.C.I.P.C.D. No. 13.

[56] **Tab 5: “Interviews conducted on October 28 ... ”** — This tab contains handwritten and typed notes of another interview between the investigator and the applicant. The first three pages of typed notes, down to the word “first” on page 3, contain the “outline of agenda” for that interview, together with preparatory notes of points Hanne Jensen wanted to cover and things she planned to say at the beginning of the interview. These notes arise out of Ms Jensen’s quasi judicial functions. I find that s. 3(1)(b) applies to them.

[57] The rest of the notes consist of Ms Jensen’s typed and handwritten interview notes of that interview. For reasons given above, I find that s. 3(1)(b) does not apply to these interview notes.

[58] **Tab 6: “Interviews conducted on January 12, 13, 19, 10, 26 and on February 3, 2005. My handwritten notes, transcribed along with interrogatory”** — This tab contains typed and handwritten notes from a series of interviews in January and February 2005. In two cases, the first part of the typed notes for the particular day’s interview contains Ms Jensen’s notes to herself about how the interview would proceed and points she wanted to cover, similar to the “introduction” and “agenda” notes I discuss above. These introductory notes arise out of Ms Jensen’s quasi judicial functions and I find that s. 3(1)(b) applies to them, as set out in the attached schedule.

[59] The remaining notes in this tab, both handwritten and typed, are detailed, almost verbatim, accounts of Hanne Jensen’s interviews with the applicant. With some minor exceptions I discuss in the next paragraph, I find, for reasons I discuss above, that these interview notes are not “personal notes” for the purposes of s. 3(1)(b).

[60] The exceptions are occasional reminders and parenthetical comments on the applicant’s demeanour and a few marginal annotations and marks. These items reflect the investigator’s thoughts on the evidence. I find that they are her “personal notes” for the purposes of s. 3(1)(b), as set out in the attached schedule.

Binder called “[complainant] interviews”

[61] The index for this binder is entitled “binder containing complaint and oral evidence of [the complainant]”. It contains nine sets of tabbed documents which the PHSA’s table describes as “H. Jensen’s personal notes of interviews with [the complainant]”, all of which the PHSA says are excluded by virtue of s. 3(1)(b).

[62] **Tab 1: “Complaint document marked ‘working copy’ with my own notations, etc. [The applicant] has received it”** — This item is a copy of the complainant’s complaint letter of December 21, 2000 to the first human

rights investigator. (Hanne Jensen is the second, for reasons I explain in Order F09-07.²⁴)

[63] As above, the complaint itself is not Ms Jensen's "personal note" or "communication" because it was not from Ms Jensen. I find that s. 3(1)(b) does not apply to the letter itself.

[64] However, the margins of this letter contain a few handwritten "personal notes" by Ms Jensen. I find that s. 3(1)(b) applies to them.²⁵

[65] **Tab 2: "Interview of August 28, 2003. My handwritten notes; transcribed along with interrogatory"** — The first two full paragraphs on page 1 of the typed interview notes contain Hanne Jensen's notes of things she planned to say in the interview, similar in character to the introductory notes I discuss above. For reasons I give above, I find that s. 3(1)(b) applies to them.

[66] The rest of the notes, both typed and handwritten, are like the other interview notes. For reasons I discuss above, I find that s. 3(1)(b) does not apply to them, with the exceptions noted in the next paragraph.

[67] The exceptions are a few comments in the typed notes of this interview which I find are "personal notes" for the purposes of s. 3(1)(b), as set out in the attached schedule.

[68] **Tab 3: "Interview of May 19, 2004. My prepared introduction; my hand-written notes and transcription of the notes along with interrogatory"** — This tab contains Hanne Jensen's prepared introductory remarks for this interview and notes for a document review she proposed to do during the interview. For reasons given above, I find that the typed introductory and document review notes are "personal notes" that fall under s. 3(1)(b), as set out in the attached schedule.

[69] The rest of the documents in this tab contain the typed and handwritten questions and responses from the interview. These notes are similar in character to the interview notes I discuss above and, for the same reasons, I find that they do not fall under s. 3(1)(b).

[70] **Tab 4: "My prepared introduction to October 4, 2004 interview"** — The record in this tab is three pages of typed notes (numbered page 1 of 30 to page 3 of 30) on how Hanne Jensen proposed to conduct this interview,

²⁴ At paras. 10-12.

²⁵ See paras. 40-41 of Order 01-43, [2001] B.C.I.P.C.D. No. 45, where Commissioner Loukidelis found that s. 3(1)(c) excluded handwritten notes on a record that was itself not excluded. Similarly, in Order F10-35, [2001] B.C.I.P.C.D. No. 36, at para. 30, Adjudicator McEvoy found that "markings" that Peer Review Committee members had made on documents in their binders were excluded from FIPPA under s. 3(1)(b), along with their "personal notes".

including comments on her role and mandate as investigator, the process she usually follows and the steps she intended to take. It is identical in character to other introductory remarks I found above to fall under s. 3(1)(b). For the same reasons, I find that this record does as well.

[71] **Tab 5: “Interviews of October 4, 5, 7 and 19. My hand-written notes and transcription thereof along with interrogatory”** — This tab contains a duplicate of the three-page introduction in Tab 4 of this binder (here, numbered page 1 of 52 to page 3 of 52 and the first eight lines on page 4 of 52). It is similar in character to the other introductory notes I discuss above and for the same reasons I find that s. 3(1)(b) applies to it.

[72] The rest of this tab contains the typed and handwritten notes of the interviews in question. These interview notes are identical in character to those I discuss above and, for the same reasons, I find that s. 3(1)(b) does not apply to them.

[73] **Tab 6: “Medical notes from [a physician], and what [the applicant’s lawyer] submitted; all has been made available to [the applicant]”** — This tab contains letters and notes of visits the complainant made to her family physician. The investigator did not create them and so they are not her “personal notes” or “communications” for the purposes of s. 3(1)(b). I find that s. 3(1)(b) does not apply to the records in this tab.

[74] **Tab 7: “Outline of document review, and interview held January 7, 2005. My Handwritten notes, transcribed along with interrogatory”** — This tab contains four records.

[75] The first is two typed pages (called an “agenda”, numbered page 1 and page 2 of 2) listing documents the investigator had received, apparently from witnesses she had interviewed previously. The list contains the investigator’s notes of things that she intended to discuss at her meeting with the complainant regarding the exchange of documents. I find that they are her “personal notes” for the purposes of s. 3(1)(b).

[76] The second is a three-page typed list of documents and questions, with the complainant’s responses to the questions (numbered page 1 of 3 to page 3 of 3). It is similar in character to the interview notes I discuss above and, for the same reasons, I find that s. 3(1)(b) does not apply to these three pages.

[77] The third record is Ms Jensen’s typed notes of her actual interview with the complainant, with questions and responses (numbered page 1 of 6 to page 6 of 6). The fourth record is her handwritten notes of the responses in that interview.

[78] The first page of the typed interview notes (page 1 of 6) consists of introductory comments Ms Jensen planned to make and points she intended to cover at the interview. For reasons discussed above, I find that s. 3(1)(b) applies to this page.

[79] The rest of the typed interview notes and the handwritten interview notes are identical in character to the interview notes I discuss above. For the same reasons, I find that s. 3(1)(b) does not apply to them.

[80] **Tab 8: “Typed notes taken during phone conversation with [the complainant’s lawyer] on March 10, 2005”** — This record is the investigator’s “prep” for a “chat” with the complainant’s lawyer and a record of the “chat” itself. It arises out of Hanne Jensen’s quasi judicial functions and I find that s. 3(1)(b) applies to it.

[81] **Tab 9: “Interview of March 15, 2005, transcribed along with interrogatory”** — This tab contains typed and handwritten notes of another interview and is similar in character to the other interview notes. For reasons I discuss above, with one exception, I find that these pages do not fall under s. 3(1)(b).

[82] The exception is the first paragraph beginning “When ... ” on page 1 of the typed notes. It is not a record of what the complainant said but rather is Ms Jensen’s “personal note” to herself. It arises out of her quasi judicial functions and I find that it falls under s. 3(1)(b)

Binder called “Witness Tapes”

[83] This binder, all of which the PHSA says falls under s. 3(1)(b), contains 12 sets of tabbed documents on the following:

- handwritten and typed notes of Hanne Jensen’s interviews with 15 witnesses and associated documents
- notes Ms Jensen took while listening to a tape of the Infection Control Committee meeting of September 15, 1999, together with a list of members of the Infection Control Committee as of May 1999

[84] The witness interview notes follow the same pattern as those I describe above: handwritten notes of the witnesses’ responses and typed versions of both questions and responses. For reasons given above, I find that s. 3(1)(b) does not apply to them.

[85] The notes of the taped meeting of September 15, 1999 are Hanne Jensen’s handwritten notes of what the committee members said during that meeting. These notes are not the “record of evidence” of that meeting and

are not akin to a transcript as are the interview notes I discuss above. I conclude that they are Hanne Jensen's "personal notes" for the purposes of s. 3(1)(b).

Binder called "Communications with independent counsel"

[86] The final set of records in dispute is a sheaf of faxes, emails, letters and typed notes numbered L1 to L60. The PHSA says that all of them fall under s. 3(1)(b).

[87] Pages L1, L4, L16 and L32 are faxes from Hanne Jensen to the "independent counsel", Rod Germaine. L22 is an email of the same character. They are Ms Jensen's "communications" arising out of her quasi judicial functions. I find that s. 3(1)(b) applies to these pages.

[88] Pages L2-L3, L28-L29, L34-L40 and L49-L59 are emails between Hanne Jensen and Rod Germaine. Ms Jensen's outgoing emails to Mr Germaine within these pages are her "communications" arising out of her quasi judicial functions. I find that s. 3(1)(b) applies to them. Applying Commissioner Loukidelis's reasoning from Order 00-16, as set out above at para. 17, I find that the incoming emails from Mr Germaine on these pages are not Ms Jensen's "communications" for the purposes of s. 3(1)(b) and that s. 3(1)(b) does not apply to them.

[89] Pages L5, L6, L14, L19-L21 and L30-L31 are letters from Rod Germaine to Hanne Jensen. As such they are not her "communications" for the purposes of s. 3(1)(b). I find that s. 3(1)(b) does not apply to them.

[90] However, pages L30-L31 also contain Hanne Jensen's handwritten annotations. These annotations are her "personal notes" arising out of her quasi judicial functions and I find that they fall under s. 3(1)(b).

[91] Pages L7-L13, L17, L18a, L18b and L41-L48 are notes that Hanne Jensen prepared for Rod Germaine's information and discussion. They contain her distillation of the essential facts and issues involved in the complaint she was investigating, her assessment of the parties' evidence and submissions and questions for her to consider. Pages L23 to L26 are an email from Ms Jensen to Mr Germaine containing notes of the same character. They are all Ms Jensen's "personal notes" arising directly out of her quasi judicial functions. I find that s. 3(1)(b) applies to all these pages.

[92] Pages L15 and L27 are emails from Rod Germaine to Hanne Jensen. As incoming correspondence to Hanne Jensen, they are not her "communications" for the purposes of s. 3(1)(b). I find that s. 3(1)(b) does not apply to them.

4.0 CONCLUSION

[93] For reasons given above, under s. 58 of FIPPA,

1. I find that s. 3(1)(b) does not apply to the some of the information and records which the PHSA withheld under that section, as set out in the attached schedule.
2. I require the head of the PHSA to give the applicant a decision under FIPPA on whether he is entitled to have access to the information described in para. 1 above, within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before July 11, 2011 and, concurrently, to copy me on its cover letter to the applicant.
3. I find that, under s. 3(1)(b) of FIPPA, some of the information and records in dispute is excluded from the scope of FIPPA, as set out in the attached schedule, regarding which no order is necessary.

May 27, 2011

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File No.: F05-27152

Tab	s. 3(1)(b) applies	s. 3(1)(b) does not apply
“ADMIN OTHER EVIDENCE”		
Tab 2: Running file	Entire record	N/A
Tab 7: “Correspondence with Fasken”	Letters from Hanne Jensen	Letters from Fasken
Tab 9: “Evidence from C&W via Faskens”	N/A	Fax letter from Fasken to Hanne Jensen
“[APPLICANT’S LEGAL COUNSEL]”		
	Pages 1307-1309 & 1404-1405	Pages 1272-1306 & 1310
“[COMPLAINANT’S LEGAL COUNSEL]”		
	Pages 1337, 1344-1346, 1350, 1364-1368, 1384-1386, 1393-1395	Pages 1311-1336, 1338-1343, 1347-1349, 1351-1363, 1369-1383, 1387-1392, 1396-1403
“[APPLICANT] EVIDENCE #1”, “[APPLICANT] EVIDENCE #2”		
Tab 1: “Correspondence etc with [the applicant], prior to December 10, 2003”	<ul style="list-style-type: none"> - first two pages in tab (Hanne Jensen’s notes of her telephone conversation of December 8, 2003 with the applicant) - last page of tab (what appear to be notes of a conversation of February 3, 2004 between Hanne Jensen & applicant’s counsel) - letters from Hanne Jensen 	<ul style="list-style-type: none"> - letters to Hanne Jensen - courier & tracking slips
Tab 2: “[The applicant’s] written response to the complaint, dated January 27, 2004”	N/A	<ul style="list-style-type: none"> - all documents
Tab 3: “Interviews conducted on March 3 & 11, 2004. My handwritten notes, transcribed along with interrogatory”	<ul style="list-style-type: none"> - duplicate of notes of conversation of February 3, 2004 - three-page “introduction” to meeting of March 3, 2004 - exceptions in interview of March 11, 2004: <ul style="list-style-type: none"> o item 206 on page 2, item 213 on page 3 & item 228 on page 5 (parenthetical comments on the applicant) o item 406 on page 26 (parenthetical reminder) 	<ul style="list-style-type: none"> - typed & handwritten notes of interview of March 3 & 11, 2004, with exceptions noted in column to left

Tab	s. 3(1)(b) applies	s. 3(1)(b) does not apply
<p>Tab 4: “Interviews conducted on July 13, 15 & 21, 2004 My handwritten notes, transcribed along with interrogatory”</p>	<ul style="list-style-type: none"> - two page “agenda” for the interview of July 13, 2004 - first paragraph on page 1 of 39 of the typed notes of the interview of July 13, 2004 (beginning “Say: ... ”) - exceptions in July 2004 interviews: <ul style="list-style-type: none"> o parenthetical comment on applicant’s demeanour, end of first paragraph of item 3, on page 2 of 3 of the typed interview notes of July 13, 2004 o reminder to herself of something to do at the end of item 49 on page 46 of 48 of the handwritten interview notes of the typed interview notes of July 13, 2004 o parenthetical comment on applicant’s demeanour, end of line 2 on page 17 of 32 of handwritten notes of interview of July 15, 2004 & its equivalent near beginning of fourth paragraph in item 73 on page 27 of 39 of typed notes of same interview o parenthetical comment on applicant’s demeanour in item 81, fourth line from the bottom of page 20 of 32 of handwritten notes of the interview of July 15, 2003 & its equivalent in item 81 on page 29 of 39 of typed notes of same interview o parenthetical comment on applicant’s demeanour in item 91 at bottom of page 27 of 32 of handwritten notes of interview of July 15, 2003 & its equivalent in item 91 on page 32 of 39 of typed notes of same interview o parenthetical comment on applicant’s demeanour on fourth & fifth lines of item 1 on page 1 of 9 of typed notes of interview of July 21, 2004 & its equivalent on page 10 of 28 of handwritten notes of same interview o parenthetical comment on applicant’s demeanour at end of first paragraph of item 3 on page 1 of 9 in typed notes of interview of July 21, 2004 	<ul style="list-style-type: none"> - all handwritten notes of interviews of July 13, 15 & 21, 2004 - typed notes of interviews of July 13, 15 & 21, 2004, except first paragraph (beginning “Say: ... ”) on page 1 of 39 of the typed interview notes of July 13, 2004
<p>Tab 5: “Interviews conducted on October 28 ... ”</p>	<ul style="list-style-type: none"> - first three pages of typed “agenda” notes, down to “first” on page 3 	<ul style="list-style-type: none"> - all handwritten interview notes - typed interview notes, from “first” onwards, on page 3
<p>Tab 6: “Interviews conducted on January 12, 13, 19, 10, 26 & on February 3, 2005. My handwritten notes, transcribed along with interrogatory”</p>	<ul style="list-style-type: none"> - introductory notes at or near beginning of interviews, as follows: <ul style="list-style-type: none"> o part way down page 1 of 109 of the typed interview notes—two paragraphs following the word “Introduction” o page 66 of 109, typed notes—first four paragraphs 	<ul style="list-style-type: none"> - all handwritten interview notes

(cont’d)

(cont’d)

Tab	s. 3(1)(b) applies	s. 3(1)(b) does not apply
	<ul style="list-style-type: none"> - Exceptions in January and February interview notes: <ul style="list-style-type: none"> o parenthetical remark on the applicant's demeanour in item 22, at end of line 1 on page 15 of 27 of handwritten notes of interview of January 12, 2005 & its equivalent in typed notes of that interview on page 9 of 109 o two sets of parenthetical remarks on applicant's demeanour comprising last two lines of item 41, on page 21 of 27 of handwritten notes of interview of January 12, 2005 & their equivalent in typed notes of that interview on page 13 of 109 o note from Ms Jensen to herself in italics, comprising last three lines of item 67 on page 18 of 109 of typed notes of interview of January 12, 2005 o handwritten marginal note beside third paragraph of item 78 on page 21 of 109 of typed notes of interviews of January 2005 o handwritten marks in margins beside item 82 on page 22 of 109, beside item 96 on page 25 of 109 and beside several items on pages 90-97 of 109, typed notes of interviews of January 2005 o handwritten marginal notation beside item 101 on page 26 of 109 in typed notes of interviews of January 2005 o underlined remark about applicant's demeanour near end of item 114 on page 7 of 37 of handwritten notes of interview of January 19, 2005 & its equivalent in parentheses on page 30 of 109 of typed notes of that interview o parenthetical remark about applicant's demeanour half way through item 243 on page 5 of 21 of handwritten notes of interview of January 20, 2005 & its equivalent on page 53 of 109 of typed notes of that interview o parenthetical remark about applicant's demeanour, second word in item 324 on page 5 of 34 in handwritten notes of interview of January 26, 2005 & its equivalent in line 3 of item 324 on page 69 of 109 of typed notes of that interview o parenthetical note from Hanne Jensen to herself of something to do in middle of item 374 on page 20 of 34 of handwritten notes of interview of January 26, 2005 & its equivalent on page 80 of 109 of typed notes of that interview o note to herself of something to do, comprising two lines of item 391 on page 84 of 109 of typed notes of interviews of January 2005 	<p>- all typed interview notes, except as noted in column to left</p>

Tab	s. 3(1)(b) applies	s. 3(1)(b) does not apply
“[COMPLAINANT] INTERVIEWS”		
Tab 1: “Complaint document marked ‘working copy’ with my own notations, etc. [The applicant] has received it”	- marginal notes on complainant’s letter of 21 December 2000	- complainant’s letter of 21 December 2000 to first human rights investigator, except marginal notes
Tab 2: “Interview of August 28, 2003. My handwritten notes; transcribed along with interrogatory”	<ul style="list-style-type: none"> - first two full paragraphs on page 1 of typed interview notes - exceptions in typed interview notes: <ul style="list-style-type: none"> - parenthetical reminder of something to do, end of item 22, page 4 of 14 - parenthetical comment on complainant’s demeanour in third line of item 37, page 6 of 14 - reminder of something to do at end of the first paragraph of item 55, page 9 of 14 	<ul style="list-style-type: none"> - handwritten interview notes - typed interview notes following first two paragraphs on page 1 of typed notes, with exceptions as noted in column to left
Tab 3: “Interview of May 19, 2004. My prepared introduction; my handwritten notes & transcription of the notes along with interrogatory”	<ul style="list-style-type: none"> - first set of typed notes numbered page 1 of 8 to page 8 of 8: <ul style="list-style-type: none"> o all eight pages - second set of typed notes numbered page 1 of 8 to page 8 of 8: <ul style="list-style-type: none"> o all of pages one & two o first two lines of page 3 o all of pages seven & eight 	<ul style="list-style-type: none"> - handwritten interview notes - typed interview notes, with exceptions in second set of notes numbered page 1 of 8 to page 8 of 8, as noted in column to left
Tab 4: “My prepared introduction to October 4, 2004 interview”	- entire three-page record (page 1 of 30 to page 3 of 30)	N/A
Tab 5: “Interviews of October 4, 5, 7 & 19. My handwritten notes & transcription thereof along with interrogatory”	<ul style="list-style-type: none"> - page 1 of 52 to page 3 of 52 - first eight lines on page 4 of 52 	<ul style="list-style-type: none"> - typed interview notes, from line 9 onwards, on page 4 of 52 - handwritten interview notes
Tab 6: “Medical notes from [a physician], & what [the applicant’s lawyer] submitted; all has been made available to [the applicant]”	N/A	- all records
Tab 7: “Outline of document review, & interview held January 7, 2005. My Handwritten notes, transcribed along with interrogatory”	<ul style="list-style-type: none"> - “agenda”, page 1 of 2 & page 2 of 2 - “introduction”, page 1 of 6 	<ul style="list-style-type: none"> - typed interview notes on pages 1 of 3 to page 3 of 3 & from page 2 of 6 to page 6 of 6 - handwritten interview notes

Tab	s. 3(1)(b) applies	s. 3(1)(b) does not apply
Tab 8: “Typed notes taken during phone conversation with [the complainant’s lawyer] on March 10, 2005”	- entire record	N/A
Tab 9: “Interview of March 15, 2005, transcribed along with interrogatory”	- page 1 of 5 of typed interview notes, paragraph beginning “When ... ”	<ul style="list-style-type: none"> - typed interview notes except paragraph noted in left column - handwritten interview notes
“WITNESS TAPES”		
	- notes of taped meeting of September 15, 1999	- all witness interview notes
“COMMUNICATIONS WITH INDEPENDENT COUNSEL”		
	<ul style="list-style-type: none"> - L1, L4, L16, L32 - Hanne Jensen’s outgoing emails within pages L2-L3, L28-L29, L34-L40, L49-L59 - Hanne Jensen’s handwritten annotations on pages L30-L31 - pages L7-L13, L17, L18a, L18b & L41-L48 - pages L23 to L26 	<ul style="list-style-type: none"> - Rod Germaine’s incoming emails within pages L2-L3, L28-L29, L34-L40, L49-L59 - pages L5, L6, L14, L19-L21 - pages L30-L31, except Hanne Jensen’s handwritten annotations, as noted in column to left - pages L15 & L27