

JUN 29 2011

S=114429

NO. _____
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE: In the matter of the *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C., 1996, c. 241
and the *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*, R.S.B.C.,
1996, c. 165 and in the matter of Order No. F11-16 of the Delegate of the Information and
Privacy Commissioner for British Columbia

BETWEEN:

PROVINCIAL HEALTH SERVICES AUTHORITY

PETITIONER

AND

THE INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH
COLUMBIA, DR. NEVIO CIMOLAI, DR. EVA THOMAS AND
HANNE JENSEN

RESPONDENTS

PETITION TO THE COURT

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

This proceeding has been started by the petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

TIME FOR RESPONSE TO PETITION

A response to petition must be filed and served on the petitioner(s),

- (a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,

- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is:
(2)	The ADDRESS FOR SERVICE of the petitioner(s) is: 2700-700 West Georgia Street, Vancouver, BC, V7Y 1B8 Fax number address for service (if any) of the petitioner(s): 604-484-9732. E-mail address for service (if any) of the petitioner(s): n/a
(3)	The name and office address of the petitioner's(s)' lawyer is: Alexander Holburn Beaudin & Lang LLP, 2700-700 West Georgia Street, Vancouver, BC, V7Y 1B8, Attention: Eileen E. Vanderburgh

CLAIM OF THE PETITIONER

Part 1: ORDER(S) SOUGHT

1. The Petitioner seeks the following orders against the Respondents the Information and Privacy Commissioner for British Columbia and Dr. Nevio Cimolai:
 - (a) That the orders set out in paragraphs 92(1) and (2) of Order F11-16 issued by a Delegate of the Information and Privacy Commissioner for British Columbia and dated May 27, 2011, be set aside; and.
 - (b) That this Court direct the Delegate of the Information and Privacy Commissioner for British Columbia to reconsider and determine the application of section 3(1)(b) of the *Freedom of Information and Protection of Privacy Act* to the records at issue.
2. The Petitioner seeks an order granting it costs of this Petition as against the Respondent Dr. Nevio Cimolai.

Part 2: FACTUAL BASIS

Procedural history

3. This is an application for judicial review of the orders set out in paragraphs 92(1) and (2) of Order F11-16¹ of the Delegate of the Information and Privacy Commissioner for British Columbia (the "Delegate"), which arises out of an inquiry (the "Inquiry")

¹ Ex. B, Affidavit of T. Fabbro #2: Order F11-16, [2011] B.C.I.P.C.D. No. 22

held under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA")². In particular, the Petitioner is seeking judicial review of Order F11-16 as it relates to the following records identified in the Schedule attached to Order F11-16 under the Column titled "s.3(1)(b) does not apply":

- (a) Records described as "Complainants Legal Counsel", pages 1311-1332, 1351-1356, and 1400-1402;
 - (b) Records described as "Applicant Evidence #1 and Applicant Evidence #2 – Tab 3: Interviews conducted on March 3 & 11, 2004. My handwritten notes, transcribed along with Interrogatory," all pages;
 - (c) Records described as "Applicant Evidence #1 and Applicant Evidence #2 – Tab 4: Interviews conducted on July 13, 15 & 21, 2004. My handwritten notes, transcribed along with interrogatory," all pages;
 - (d) Records described as "Applicant Evidence #1 and Applicant Evidence #2 – Tab 5: Interviews conducted on October 28...", all pages;
 - (e) Records described as "Applicant Evidence #1 and Applicant Evidence #2 – Tab 6: Interviews conducted on January 12, 13, 19, 10, 26 & on February 3, 2005. My handwritten notes, transcribed along with interrogatory," all pages;
 - (f) Records described as "Complainant Interviews – Tab 2: Interview of August 28, 2003. My handwritten notes, transcribed along with interrogatory," all pages;
 - (g) Records described as "Complainant Interviews – Tab 3: Interview of May 19, 2004. My prepared introduction; my handwritten notes & transcription of the notes along with interrogatory," all pages;
 - (h) Records described as "Complainant Interviews – Tab 5: Interviews of October 4, 5, 7 & 19. My handwritten notes & transcription thereof along with interrogatory," all pages;
 - (i) Records described as "Complainant Interviews – Tab 7: Outline of document review, & Interview held January 7, 2005. My Handwritten notes, transcribed along with interrogatory," all pages;
 - (j) Records described as "Complainant Interviews – Tab 9: Interview of March 15, 2005, transcribed along with interrogatory," all pages; and
 - (k) Records described as "Witness Tapes", all pages (witness interview notes) (collectively the "Records at Issue").
4. The Inquiry arose out of a request made by the Respondent Dr. Nevio Cimolai to the Petitioner the Provincial Health Services Authority (the "PHSA") for records related to a harassment investigation conducted by the Respondent Hanne Jensen for the Children's and Women's Health Centre of British Columbia (the "Health

² *Freedom of Information and Protection of Privacy Act*, R.S.B.C.1996, C. 165, as amended

- Centre"). The harassment investigation related to a complaint made by the Respondent Dr. Eva Thomas against Dr. Cimolai under the Health Centre's Human Rights policy. The Health Centre is a member agency of the PHSA.³
5. On June 1, 2005 Dr. Cimolai, made a written request to the PHSA for "all materials relating to him and which relate to the recent harassment investigation so conducted by Ms. Hanne Jensen." On November 16, 2005 the PHSA responded to Dr. Cimolai's request granting access to some of the records requested and withholding some records under section 3(1)(b) of *FIPPA* as being outside of the scope of *FIPPA*.⁴
 6. On November 18, 2005 Dr. Cimolai requested that the Office of the Information and Privacy Commissioner for British Columbia ("OIPC") review the decision of the PHSA to withhold records from him pursuant to, *inter alia*, section 3(1)(b) of *FIPPA*.⁵
 7. Dr. Cimolai's request for review did not settle in mediation proceedings conducted by the OIPC.⁶ The OIPC issued a Notice of Written Inquiry on March 2, 2006⁷ and a written inquiry took place before a delegate for the Information and Privacy Commissioner for British Columbia (the "Delegate") under Part 5 of *FIPPA*.
 8. On April 30, 2009, the Delegate issued Order F09-07⁸ which ordered, *inter alia*, the PHSA to comply with the provisions of *FIPPA* by processing Dr. Cimolai's request for access to Ms. Jensen's records that it had withheld under section 3(1)(b) of *FIPPA*.
 9. On July 11, 2009 the PHSA filed a Petition⁹ for judicial review of the Delegate's Order F09-07, including the order that the PHSA process Dr. Cimolai's request for access to Ms. Jensen's records.
 10. On July 2, 2010 Mr. Justice Pitfield issued his decision in *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 931. Mr. Justice Pitfield set aside the Delegate's decision that Ms. Jensen was not acting in a quasi-judicial capacity for the purposes of 3(1)(b) of *FIPPA* in carrying out her investigation of the Human Rights complaint against Dr. Cimolai. Mr. Justice Pitfield remitted back to the Delegate the question of whether Ms. Jensen's records that had been withheld by the PHSA were her personal notes or her communications for the purpose of section 3(1)(b) of *FIPPA*.

³ Ex. D, Affidavit of T. Fabbro #1: Order F09-07, [2009] B.C.I.P.C.D. No. 10 @ para. 1

⁴ Ex. B, Affidavit of T. Fabbro #1: Portfolio Officer's Fact Report

⁵ Ex. B, Affidavit of T. Fabbro #1: Portfolio Officer's Fact Report

⁶ Ex. B, Affidavit of T. Fabbro #1: Portfolio Officer's Fact Report

⁷ Ex. A, Affidavit of T. Fabbro #1: Notice of Written Inquiry

⁸ Ex. D, Affidavit of T. Fabbro #1: Order F09-07, [2009] B.C.I.P.C.D. No. 10 @ para. 106

⁹ Ex. A, Affidavit of T. Fabbro #2: Petition filed June 11, 2009

11. On May 27, 2011 the Delegate issued Order F11-16. In Order F11-16 the Delegate found that some of the records from Ms. Jensen's files that had been withheld by the PHSA were not her "personal notes and communications" for the purposes of section 3(1)(b) of *FIPPA* and were therefore within the scope of *FIPPA*. The Delegate ordered the PHSA to provide Dr. Cimolai with its decision under *FIPPA* on whether or not he was entitled to have access to the records found to be within the scope of *FIPPA*.

Facts and evidence

12. In August 2003, the PHSA and the Health Centre retained Ms. Jensen to conduct a second investigation into the complaint made by Dr. Thomas against Dr. Cimolai under the Health Centre's Human Rights Policy (the "Investigation").¹⁰
13. Section 3.3.3 of the Health Centre's Human Rights Policy¹¹ sets out the process where a formal investigation is required to resolve a complaint. Section 3.3.3.9 provides:

The Investigator will apply appropriate procedures and practices to investigate and conduct interviews properly and confidentially, within the framework of natural justice. This will include each party's right to know and respond to all allegations. Without limiting the generality of the foregoing, the following guidelines are provided:

- a. The Investigator shall provide an opportunity to both the complainant and the respondent to provide verbal and/or written information related to the allegations. All potential witnesses may be interviewed by the Investigator. The complainant and respondent will be provided an opportunity to respond to all relevant information provided by witnesses.
- b. If more than one complaint has been lodged against the respondent, the complaints may be investigated together.
- c. Typically within 30 days, the Investigator shall review all relevant information and make a determination whether or not there has been a violation of the Policy.
- d. In complaints of sexual harassment that involve an allegedly coerced sexual relationship where the respondent had any control over the employment status of the complainant, the burden of proof that the relationship was consensual rests with

¹⁰ Ex. D, Affidavit of T. Fabbro #1: Order F09-07, [2009] B.C.I.P.C.D. No. 10 @ para. 12

¹¹ Ex. C, Affidavit of T. Fabbro #1: Affidavit of Hanne Jensen dated May 23, 2006, Ex. B – Health Centre Human Rights Policy @ pp 11-12

the respondent. The burden of proof in all other allegations rests with the complainant.

14. In her Affidavit filed in the Inquiry, Ms. Jensen provided evidence regarding the process she followed in the investigation of Dr. Thomas' complaint against Dr. Cimolai, in particular regarding her preparation for and interviews of the parties and the witnesses:
- (a) Based on the allegations in the written complaint of Dr. Thomas, Ms Jensen prepared notes of questions and issues to discuss with Dr. Thomas;
 - (b) She interviewed Dr. Thomas in the presence of her counsel and made notes of the interview for her use in identifying the issues in the investigation, gathering evidence and information related to the complaint, assessing the evidence and credibility of the parties, preparing for her interview of Dr. Cimolai, identifying relevant documentary evidence and witnesses required, and preparation of the final report.
 - (c) She prepared notes of questions and issues to discuss with Dr. Cimolai based on the complaint, his written response to the complaint, and the interview with Dr. Thomas;
 - (d) She interviewed Dr. Cimolai in the presence of his counsel and made notes of the interview for her use in identifying the issues in the investigation, gathering evidence and information related to the complaint, assessing the evidence and credibility of the parties, preparing for further interviews of the parties, identifying relevant documentary evidence and witnesses required, preparing for interviews of the witnesses, and preparation of the final report.
 - (e) She interviewed Dr. Thomas again in the presence of her counsel and made notes of the interview for her use in identifying the issues in the investigation, gathering evidence and information related to the complaint, assessing the evidence and credibility of the parties, preparing for further interviews of the parties, identifying relevant documentary evidence and witnesses required, preparing for interviews of the witnesses, and preparation of the final report.
 - (f) Based on a review of her notes and the documents and after receiving names of proposed witnesses from the parties, Ms. Jensen identified witnesses who had relevant information to provide on matters at issue in the investigation and prepared notes of questions and issues to raise with the witnesses.
 - (g) She interviewed the witnesses and made notes of the interviews for her use in identifying issues for further investigation, gathering evidence and information related to the complaint, assessing the evidence and credibility of the parties, and preparation of the final report.
 - (h) Based on the witness evidence and the documentary evidence, she prepared notes of further questions and issues to raise with Dr. Thomas and Dr. Cimolai in follow-up interviews.
 - (i) She conducted several follow-up interviews of Dr. Thomas and Dr. Cimolai to review the evidence of the witnesses and gather additional evidence from the parties. She made notes of the interviews for her use in identifying issues for

further investigation, gathering evidence and information related to the complaint, assessing the evidence and credibility of the parties and the witnesses, and preparation of the final report.¹²

15. Ms. Jensen did not record the interviews of the parties and the witnesses and did not prepare a transcript of their evidence. Her interview notes record the relevant statements from the witness being interviewed, her impressions of the witness and her identification of further issues for investigation or clarification.¹³
16. Ms Jensen provided evidence regarding the records described in paragraph 3(a) of this Petition, that is, pages 1311-1332, 1351-1356 and 1400-1402 under the heading "Complainants Legal Counsel" in the schedule to Order F11-16. Ms Jensen deposed that those pages contained her hand-written notes made to assist her in assessing the parties' submissions on an application and on the final report, and to assist her in conducting the investigation, assessing the evidence and preparing the final report.¹⁴
17. Under section 3.3.3.10 of the Human Rights Policy¹⁵ the Investigator is required to produce a final report containing the following:
 - a. a summary description of the allegations;
 - b. a summary of the testimony provided by the witnesses and the respondent;
 - c. a determination as to whether or not the allegations have been proven on a balance of probabilities;
 - d. a determination as to whether or not the Human Rights Policy has been violated;
 - e. if the allegations are supported, a determination as to whether the discrimination or harassment was intentional or unintentional;
 - f. if the complaint is not substantiated, a determination as to whether the complaint was vexatious and made in bad faith; and
 - g. mitigating or aggravating circumstances affecting either party.
18. The second investigation was completed and the Investigator's final report was issued on May 31, 2005. The 250 page final report contains accounts of Ms. Jensen's interviews of the parties and the witnesses.¹⁶

¹² Ex. C, Affidavit of T. Fabbro #1: Affidavit of Hanne Jensen dated May 23, 2006, @ para 12

¹³ Ex. C, Affidavit of T. Fabbro #1: Affidavit of Hanne Jensen dated May 23, 2006, @ para 13

¹⁴ Ex. C, Affidavit of T. Fabbro #1: Affidavit of Hanne Jensen dated May 23, 2006, @ para 19

¹⁵ Ex. C, Affidavit of T. Fabbro #1: Affidavit of Hanne Jensen dated May 23, 2006, Ex. B – Health Centre Human Rights Policy @ p 12

Delegate's Order

19. The Delegate made the following findings¹⁷ in relation to the records described in paragraph 3(a) of this Petition, that is, pages 1351-1356, 1311-1332 and 1400-1402 under the heading "Complainants Legal Counsel" in the schedule to Order F11-16:

[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).

[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.

20. The Delegate does not refer to Ms. Jensen's evidence regarding her hand-written notes on pages 1311-1332, 1351-1356 and 1400-1402 in her findings on this group of records.
21. The Delegate made the following findings¹⁸ in relation to Ms. Jensen's interview notes:

[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 the 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.

[50] As noted above, the PHSA argued that the materials which would not 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

¹⁶ Ex. C, Affidavit of T. Fabbro #1: Affidavit of Hanne Jensen dated May 23, 2006 @ para. 12(q); Ex. D, Affidavit of T. Fabbro #1: Order F09-07, [2009] B.C.I.P.C.D. No. 10 @ para. 38

¹⁷ Ex. B, Affidavit of T. Fabbro #2: Order F11-16, [2011] B.C.I.P.C.D. No. 22 @ paras. 36-37

¹⁸ Ex. B, Affidavit of T. Fabbro #2: Order F11-16, [2011] B.C.I.P.C.D. No. 22 @ paras. 49-52

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. 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.

22. The Delegate noted exceptions in the interview notes, in particular parenthetical comments about the demeanour of the person being interviewed, reminders from Ms. Jensen to herself, marginal annotations and marks which reflected Ms. Jensen's thoughts on the evidence.¹⁹ The Delegate identified each of the parenthetical comments, reminders, annotations and markings on the schedule attached to Order F11-16 as Ms. Jensen's personal notes that were excluded from the scope of FIPPA under s. 3(1)(b).
23. The Delegate made the following order²⁰:

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

1. I find that s. 3(1)(b) does not apply to the [sic] 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.

¹⁹ Ex. B, Affidavit of T. Fabbro #2: Order F11-16, [2011] B.C.I.P.C.D. No. 22 @ paras. 53, 55, 60, and 67

²⁰ Ex. B, Affidavit of T. Fabbro #2: Order F11-16, [2011] B.C.I.P.C.D. No. 22 @ para. 93

Part 3: LEGAL BASIS

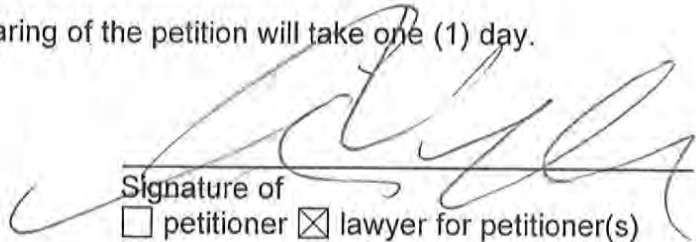
1. The Petitioner relies on the following rules and enactments:
 - (a) Rule 16-1. *Supreme Court Civil Rules*;
 - (b) *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, as amended; and
 - (c) *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, as amended.
2. The Petitioner says that the Delegate erred in law and jurisdiction in finding that the Records at Issue described in paragraph 3 of this Petition were not the personal notes of the investigator Ms Jensen and were therefore not excluded from the scope of *FIPPA* under section 3(1)(b).

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit of Toni Fabbro #1 sworn June 11, 2009 and filed in *Provincial Health Services Authority v The Information and Privacy Commissioner for British Columbia, Dr. Nevio Cimolai, Dr. Eva Thomas and Hanne Jensen*, No. S-094064, SCBC, Vancouver Registry.
2. Affidavit of Toni Fabbro #2 sworn June 29, 2011 and filed herein.

The petitioner(s) estimate(s) that the hearing of the petition will take one (1) day.

Dated: June 29, 2011.



 Signature of
 petitioner lawyer for petitioner(s)

EILEEN E. VANDERBURGH

To be completed by the court only:

Order made

- in the terms requested in paragraphs ___ of Part 1 of this application
- with the following variations and additional terms:
[specify]

Dated:

Signature of Judge Master

NO. VANCOUVER REGISTRY

IN THE SUPREME COURT OF
BRITISH COLUMBIA

BETWEEN:

PROVINCIAL HEALTH SERVICES
AUTHORITY

PETITIONER

AND:

THE INFORMATION AND PRIVACY
COMMISSIONER FOR BRITISH
COLUMBIA ET AL

RESPONDENTS

PETITION TO THE COURT

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