



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F17-57

DELTA POLICE DEPARTMENT

Drew McArthur
Acting Information and Privacy Commissioner

December 14, 2017

CanLII Cite: 2017 BCIPC 62
Quicklaw Cite: [2017] B.C.I.P.C.D. No. 62

Summary: This order is issued concurrently with Order F17-56, which addresses the applicants' request to the Delta Police Department (DPD) for any records about the applicants. DPD gave the applicants access to the responsive records but refused to disclose some information under several exceptions to disclosure under Part 2 of the *Freedom of Information and Protection of Privacy Act*. During the Order F17-56 inquiry, DPD requested that the Commissioner not delegate the power to examine a subset of the records being withheld under s. 15(1)(a) (harm to law enforcement). The Acting Commissioner determined that s. 49(1.1) (delegation by the Commissioner) applied so he did not delegate the power to examine the subset of records. In this order, the Acting Commissioner confirms DPD's decision to withhold the subset of records under s. 15(1)(a).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(a) and 49(1.1)

Authorities Considered: BC: Order F08-03, Ministry of Public Safety and Solicitor General, 2008 CanLII 13321 (BC IPC).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31

INTRODUCTION

[1] The applicants requested that the Delta Police Department (DPD) provide any records about themselves and consented to disclosing their own information to each other. The procedural history and circumstances relevant to this inquiry

are set out in Order F17-56, issued concurrently with this order. This order concerns a subset of records from the other inquiry. The head of DPD requested that I not delegate the power to examine that subset of the records, which was being withheld under s. 15(1)(a).

[2] Section 49 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) states as follows:

Delegation by commissioner

49 (1) Subject to this section, the commissioner may delegate to any person any duty, power or function of the commissioner under this Act, other than the power to delegate under this section.

(1.1) The commissioner may not delegate the power to examine information referred to in section 15 if the head of a police force or the Attorney General

(a) has refused to disclose that information under section 15, and

(b) has requested the commissioner not to delegate the power to examine that information.

[3] I determined that s. 49(1.1) applied. Therefore, this order concerns the subset of records, which I alone have examined as required by s. 49(1.1).

ISSUE

[4] The issue to be determined in this inquiry is as follows:

1. Is DPD authorized under s. 15(1)(a) of FIPPA to refuse access to the information in the subset of records?

[5] Section 57 of FIPPA sets out the burden of proof regarding exceptions to disclosure. DPD has the burden to establish that s.15 authorizes it to refuse to disclose information.

DISCUSSION

[6] The information in dispute is within records related to DPD's investigation of the applicants. DPD submits that the information may be withheld under s. 15(1)(a) of FIPPA because it could reasonably be expected to harm a law enforcement matter.

[7] Section 15 states:

Disclosure harmful to law enforcement

15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

...

Also relevant is the definition of “law enforcement” in Schedule 1 of FIPPA:

“law enforcement” means

- (a) policing, including criminal intelligence operations,
- (b) investigations that lead or could lead to a penalty or sanction being imposed, or
- (c) proceedings that lead or could lead to a penalty or sanction being imposed;

[8] As stated in Order F08-03, s. 15(1)(a) requires that the alleged harm to law enforcement “could reasonably be expected to” occur. The standard of proof for provisions containing this language was set out by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences.”¹

[9] DPD has provided in-camera submissions and affidavit evidence about the harm that could reasonably be expected to result from the disclosure of the subset of records. I have also considered the applicants’ December 3, 2016 submission regarding s. 15(1)(a) from the Order F17-56 inquiry.

[10] The information in question consists of entries in a police officer’s notebook concerning matters unrelated to the applicants. I have examined the records and determined that this information concerns an ongoing policing matter and is therefore “law enforcement” as defined by FIPPA. Further, I agree with the DPD submission that it would be harmful to law enforcement if this subset of records is disclosed.

[11] In conclusion, I find that disclosing the subset of records could reasonably be expected to harm a law enforcement matter. The evidence satisfies me that

¹ 2014 SCC 31 (CanLII) at para. 54.

the alleged harm from disclosure is more than a mere possibility. Therefore, the DPD has established that it is authorized to refuse to disclose the information in the subset of records under s. 15(1)(a).

CONCLUSION

[12] I confirm DPD's decision under s.15(1)(a) of FIPPA to refuse to give the applicants access to the subset of the records.

December 14, 2017

ORIGINAL SIGNED BY

Drew McArthur
Acting Information and Privacy Commissioner

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