

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ADJUDICATION ORDER #9

September 10, 2015

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

**In the Matter of an Inquiry Pursuant to the
Freedom of Information and Protection of Privacy Act,
RSA 2000, c F-25
Respecting Order-in-Council 093/2015**

Date: September 10, 2015

Between:

G.C.

Applicant

- and -

Office of the Information and Privacy Commissioner .

Respondent

**Reasons for Decision
Hon. F.L. Schutz, Adjudicator**

Introduction

[1] On April 17, 2014, Mr. C. wrote to the Information and Privacy Commissioner seeking certain personal information in three categories. The Assistant Commissioner responded on July 21, 2014, denying the request.

[2] On August 16, 2014 Mr. C. requested a review of the decision to refuse access to the information he had requested.

[3] On March 19, 2015, I was appointed as an adjudicator for the purposes of s. 75(1)(e) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25; that is, "to review, if requested under section 77, any decision, act or failure to act of the Commissioner as the head

of the Office of the Information and Privacy Commissioner". I received notice of this appointment on April 27, 2015.

Background

[4] In his April 17, 2014 request, Mr. C. sought certain personal information in three categories. The Assistant Commissioner's response dated July 21, 2014 incorporated Mr. C.'s requests:

... You write:

1. I seek to access personal information connected with any personal information which may have been provided to you in your capacity of Information and Privacy Commissioner and in relation to any relevant function of OIPC designed to protect the public against 'dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity'.

Section 7(2) of the FOIP Act requires an applicant to provide enough detail to enable the public body to identify the records that the applicant is seeking ... We are unclear as to the Information you are seeking. ... [W]ithout further clarification from you, we are unable to proceed with this item.

However, as you have been told previously, records that relate to the Commissioner's legislative functions would be excluded from the scope of the FOIP Act under section 4(1)(d).

...You state:

I am under the Impression that by virtue of the aforementioned function that the Registrar of Inquiries, Ms. Karen Hesson, was contacted on, or about, 1 August 2013, by a third party (either the Attorney General and Minister of Justice for Alberta, FBI, GCHQ, MI5, NSA, Calgary Police Service or London Metropolitan Police) and that a request was made by this party for her to send me a letter, dated August 1, 2013, for Case File No.: 5895.

2. I seek access to other instances whereby a set of instructions were possibly secretly provided to OPIC [sic] by this very same third party during the course of this public body examining privacy complaints of mine. The period for which I would ask that a search be conducted for responsive records/information is 2001 to 2013.

It appears that you believe a third party ... instructed Ms. Hesson, Registrar of Inquiries, with our Office to send you a letter dated August 1, 2013 for File F5895.

The August 1, 2013 letter was sent to you and the City of Calgary in relation to File F5895. The letter is a standard letter that our Office sends to parties in an inquiry acknowledging receipt of their rebuttal submissions...

... [T]here was no third party giving instructions in relation to our issuance of the August 1, 2013 letter to you. Therefore, there are no records of "other instances" in which this "same third party" provided instructions to our Office.

... Records relating to your requests for review and complaints are excluded under section 4(1)(d) of the FOIP Act since they relate to the Commissioner's functions of conducting reviews and investigations.

... You asked for:

3. Access to the use put to all personal information that was possibly shared with OIPC relating to me.

... Our Office has no information about you other than the information that relates to matters that you have brought before our Office... [R]ecords relating to matters that you have brought before our Office are excluded from the scope of the FOIP Act under section 4(1)(d)...

[5] In correspondence to the Commissioner dated June 8, 2015, I requested all records in the Commissioner's custody or control relating to files 2014/15-P-001, 5895, 27060, 27825, and all other records relevant to the adjudication. The Commissioner responded that the two letters referenced above are the only responsive records in this adjudication.

Issues

[6] Two issues arise in this adjudication:

- 1) Has the Commissioner provided the records relevant or responsive to this adjudication?
- 2) Did the Commissioner properly apply s. 4(1)(d) in determining that the records sought were exempt from disclosure?

Positions of the Parties

[7] Counsel for the Commissioner provided written submissions in a letter dated June 23, 2015. Mr. C. provided written submissions in a letter dated July 11, 2015.

[8] Counsel for the Commissioner submits that s. 4(1)(d) exempts from the scope of access requests those records relating to the Commissioner's handling of matters involving Mr. C., as all of the Commissioner's actions relating to him involve the Commissioner overseeing and administering her home statutes. Mr. C's request specifically relates to the Commissioner's actions in the exercise of her functions in relation to examination of privacy and access complaints.

[9] Mr. C. argues that the adjudicator is not a third party for the purposes of s. 4(1)(d), and the Commissioner should have provided all the materials relating to four files (among his 89 requests and complaints received by the Office between 2001 and 2013) so that the adjudicator could review them to determine whether they are exempt under s. 4(1)(d). Mr. C. relies on the "open court" principle.

[10] Regarding his specific requests for access to information held by the Commission, he submits (page 5):

... Counsel argues that the Applicant "asserts" that the Commissioner was acting on someone else's instruction when deciding to send him a letter, dated August 1, 2013, for Case File No.: 5895. The Applicant submits that he has made no such "assertion" but is merely operating under an unconfirmed suspicion that the Commissioner may have conducted himself in this fashion.

[11] Mr. C. also complains that the Commissioner has failed to provide him with search results in relation to Mr. C.'s request which would show whether the Commissioner conducted an adequate search for responsive records.

Adjudication

[12] Having had the opportunity to review Mr. C's correspondence of April 17, 2014 and August 16, 2014 and the submissions of Mr. C. and Counsel for the Commissioner, I find that the Commissioner has provided the records which are responsive to this adjudication, being Mr. C.'s request for access, and the Assistant Commissioner's denial.

[13] Section 4(1)(d) of *FOIPPA* provides:

4(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:

... (d) a record that is ... in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer's functions under an Act of Alberta.

[14] In *Alberta (Information and Privacy Commissioner) v Alberta (Freedom of Information and Protection of Privacy Act Adjudicator)*, 2011 ABCA 36, 502 AR 339, Ritter J.A. for the Court of Appeal discussed the interpretation of ss. 4(1)(d) and the roles of the Commissioner:

66 Section 4 of *FOIPPA* lists records to which *FOIPPA* does not apply. There is nothing in s. 4 or elsewhere in *FOIPPA* to suggest that the exceptions contained in s. 4 should receive an artificial or overly restrictive meaning. In fact, most of the exceptions use broad, general language. This suggests that the legislature intended, at a minimum, interpretation using ordinary usage and meaning, and not restricted meaning in so far as the exceptions in s 4. are concerned. The judiciary should not re-write statutes based on its view of what the legislation should be. Privacy rights, in the context in which *FOIPPA* applies, are largely creations of the legislature. There is nothing to prevent the legislature from exempting certain records from the reach of *FOIPPA* and that is what the legislature has done. Judges must avoid "interpretive creativity" when there is no ambiguity in the statutory provision that is being interpreted: see *R. v. Gomboc*, 2010 SCC 55 at para. 89; *Purba v. Ryan*, 2006 ABCA 229, 397 A.R. 251 at para 56.

...

81 Like Veit J. in *Bonsma*, I prefer the analysis of Smith J. of the British Columbia Superior Court acting as adjudicator in *Mr. M.* in which she held at para. 9:

The Commissioner has two distinct roles under the Act: (1) overseeing and administering the Act, and (2) acting as head of a public body. It is only the acts or omissions by the Commissioner in the latter capacity that are subject to review by an adjudicator. This is an important distinction because the bulk of the Commissioner's work, which includes monitoring compliance by other public bodies, investigating complaints and promoting public awareness of the Act, is subject only to judicial review and is not reviewable by an adjudicator.

[15] Mr. C. complains that the Commissioner did not properly respond to a request for information about him received from third parties and in the Commissioner's custody and control.

[16] The Assistant Commissioner's letter denying the request was responsive to Mr. C.'s request. She explained that the August 1, 2013 letter sent to Mr. C. was a standard letter acknowledging receipt. She denied that there were instructions by a third party to send that letter, nor were there other instances of a third party giving instructions. She also stated that the Office had no information about Mr. C other than the information relating to matters he had brought before the Office.

[17] I further find that the Assistant Commissioner appropriately applied s. 4(1)(d). The subject of this adjudication is an act or omission of the Commissioner in the capacity as head of a public body. The documents in question, if they exist, are held by the Office. If, indeed, the documents sought by Mr. C. existed and were held by the Commissioner, they would be covered by the s. 4(1)(d) exemption.

Dated at the City of Edmonton, Alberta the 10th day of September, 2015.

Hon F.L. Schutz
Adjudicator

Written Submissions:

G.C.

Written submissions from the Applicant dated July 11, 2015 and received on July 21, 2015
for the Applicant (Self-Represented)

Glenn Solomon, Q.C., Jensen Shawa Solomon Hawkes LLP

Written submissions from counsel for the Commissioner received June 23, 2015
for the Office of the Information and Privacy Commissioner