

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ADJUDICATION ORDER #10

June 28, 2016

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

Date: June 28, 2016
File Numbers: 0980M-B1/13-01
0890-B1/12-01

**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 192/2015**

Between:

NCB

Applicant

- and -

Office of the Information and Privacy Commissioner

Respondent

**Reasons for Decision
of the
Honourable Madam Justice S.J. Greckol, Adjudicator**

APPEARANCES:

NCB
Self-represented
Applicant

Glenn Solomon
JSS Barristers
for the Office of the Information and Privacy Commissioner

I. Introduction

[1] I have been appointed as External Adjudicator for the purpose of section 75 (1) (e) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 [FOIPPA] by virtue of Order in Council 192/2015, in respect of NCB's request for review of the Information and Privacy Commissioner's response to his FOIP request.

[2] NCB requests all records relating to complaints filed by him with the Office of the Information and Privacy Commissioner (OIPC); as well as all correspondence between OIPC and the University of Alberta related to the University's general practice of access to personal medical information

[3] For the reasons that follow, I conclude that NCB's application cannot succeed. In brief, the Alberta Court of Appeal held in *Alberta (Information and Privacy Commissioner) v Alberta (Freedom of Information and Protection of Privacy Act Adjudicator)*, 2011 ABCA 36, 502 AR 339 [Buteau] that s 4(1)(d) must be applied according to its plain and ordinary meaning and that, as a result, s 4(1)(d) excludes OIPC files from the application of FOIPPA. Subsequent External Adjudicators have followed this decision and also held that s 4(1)(d) excludes OIPC files from FOIPPA. Therefore NCB's request for review of the Information and Privacy Commissioner's response to his FOIP request cannot succeed.

II. Facts

[4] Since 2010, NCB and the University of Alberta have been involved in a number of disputes about NCB's employment with the University as a tenured professor and Research Chair. In 2012, NCB successfully applied for a modification of his work duties based on a medical condition.

[5] In September, 2012, NCB refused the Provost's direction to sign a consent form allowing the Provost access to all medical documentation supporting NCB's medical condition. On September 6, 2012, NCB wrote the Office of the Information and Privacy Commissioner [OIPC] expressing a concern that the mandatory consent form was contrary to his privacy rights.

[6] On October 4, 2012, the OIPC wrote NCB, informing him that the Commission could not respond to a complaint unless a collection, use or disclosure of personal information had actually occurred. However, under s 53(1)(a) of FOIPPA the Commissioner initiated an investigation of her own motion into the University's general policy and practice of collecting personal medical information.

[7] On November 25, 2012 and again on June 17, 2013, NCB wrote the OIPC restating his original concern about the consent form. In his second letter, he also requested a copy of:

...all correspondence (letters, email, forms or notes of verbal conversations) between your office and the University of Alberta with regard to my complaints as well as a copy of all correspondence between your office and the University of Alberta related to the University's general practice of access to personal medical information.

[8] On July 2, 2013, the OIPC denied NCB's request, because the records he sought were excluded from the application of *FOIPPA* under s 4(1)(d) as records "[relating] to the Commissioner's function of conducting reviews and investigations under the *FOIP Act*".

[9] On August 1, 2013 the OIPC informed NCB that the OIPC investigation had found the University's policies and practices relating to the collection of personal medical information to be within the authority granted by *FOIPPA*, and further informed him he did not have a statutory right to request the investigation proceed to an inquiry. Consequently, the investigation file was closed.

[10] NCB now requests a review of the OIPC's decision to deny him access to the records relating to his complaint and to the University's general practices of collecting personal medical information under 77(2) of *FOIPPA*.

III. Issues

[11] The parties raise the following issue for review:

1. Are the records sought by NCB excluded from the operation of *FOIPPA* by s 4(1)(d)?

IV. Positions of the Parties

A. NCB's position

[12] NCB submits that excluding the requested records under s 4(1)(d) means he is unable to view and, accordingly, address the information the University provided to the OIPC in the s 53(1)(a) investigation, and based on the result of the s 53(1)(a) investigation, it is clear that the University provided the OIPC with inaccurate or incomplete information. He argues he needs to be able to access the records to address these factual discrepancies. He further submits that s 4(1)(d) shields the University from his allegations of a breach of privacy, contrary to *FOIPPA*'s purpose of protecting personal information.

B. The OIPC's position

[13] The OIPC submits that the only question for this review is whether the records requested by NCB meet the requirements of s 4(1)(d), such that they are excluded from *FOIPPA*.

[14] The OIPC submits that these records meet the requirements for exclusion as records created by or for, or in the custody or control of, an Officer of the Legislature. The Privacy Commissioner is an Officer of the Legislature and the requested records relate to her functions of overseeing and administering her home statute.

[15] The OIPC submits that the s 53(1)(a) investigation is not subject to this review, because the investigation does not produce a binding decision. The OIPC further submits that there is no complainant to a s 53(1)(a) investigation, and no party has a statutory right to participate.

V. Analysis

A. Are the records sought by NCB excluded from *FOIPPA* under s 4(1)(d)?

[16] Section 4(1) reads:

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 created by or for or 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.

[17] Section 1(m) reads:

“officer of the Legislature” means the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner, the Information and Privacy Commissioner, the Child and Youth Advocate or the Public Interest Commissioner.

[18] Section 4(1)(d) was interpreted by the Court of Appeal in *Alberta (Information and Privacy Commissioner) v Alberta (Freedom of Information and Protection of Privacy Act Adjudicator)*, 2011 ABCA 36, 502 AR 339 [*Buteau*]. The Court held that s 4(1)(d) must be interpreted and applied according to its plain and ordinary meaning (at para 66): the section excludes a record created for, created by, or held by an officer of the Legislature and which relates to the officer's statutory functions under an Act of Alberta.

[19] In that case, the Court applied s 4(1)(d) to a letter written by the OIPC to a third party to a privacy complaint indicating that the complaint was being dismissed as an abuse of process (at para 5). The Court held that the letter was excluded under s 4(1)(d), because it was created by the Commissioner in the exercise of his functions under the *Personal Information Protection Act*, SA 2003, c P-6.5 [*PIPA*] (*Buteau* at para 76).

[20] Two External Adjudications have also considered the application of s 4(1)(d) to records from OIPC files. In both cases, the Adjudicator found that the record was excluded under s 4(1)(d) as relating to a statutory function of the Information and Privacy Commissioner.

[21] In *Bonsma v Alberta (Information and Privacy Commissioner)* (August 12, 2009), Adjudication Order #7, online:

OIPC < https://www.oipc.ab.ca/media/470420/Adjudication_Order_7_Aug2009.pdf >, Veit J considered the application of s 4(1)(d) to a request for all OIPC records relating to an access request filed by the applicant for records held by his former employer. Veit J held that the records sought related to the exercise of the Commissioner's functions under PIPA and, as a result, were excluded by s 4(1)(d) (at para 24).

[22] In *GC v Alberta (Information and Privacy Commissioner) (September 10, 2015)*, Adjudication Order #9, online:

OIPC < https://www.oipc.ab.ca/media/637734/Adjudication_Order_9_Sep2015.pdf >, Schutz J considered the application of s 4(1)(d) to records provided by a third party to the Commissioner in response to a complaint that the OIPC was investigating. Schutz J found that the records related to the Commissioner's function in his capacity as head of a public body, and, consequently, they were excluded under s 4(1)(d) (*ibid* at para 17).

[23] I therefore conclude that the records requested by NCB also fall under the exclusion in s 4(1)(d), as the requested records relate to the Commissioner's functions under *FOIPPA*. In particular, the correspondence regarding NCB's complaint relates to the Commissioner's

function of investigating a complaint under *FOIPPA*, and the correspondence regarding the general practices of the University relates to the s 53(1)(a) inquiry and, hence, the Commissioner's function of conducting an inquiry pursuant to s 53(1)(a).

[24] In his submissions, NCB argued that the records should not be excluded under s 4(1)(d), because that prevents him from participating in the s 53(1)(a) investigation, to ensure that the factual record is complete. Consequently, this prevents him from protecting his privacy rights according to the purposes of *FOIPPA*. However, according to the Court of Appeal, s 4(1)(d):

Section 4 of the *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 rewrite 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 (*IPC* at para 66).

In other words, the Legislature has chosen to exclude certain records under *FOIPPA* and, as a result, those records must be excluded.

[25] I note that in his submissions NCB also argued he needed to correct the factual record in the s 53(1)(a) investigation. However, under *FOIPPA* he has no role in that investigation and no right to challenge the result.

VI. Conclusion

[26] I conclude that s 4(1)(d) excludes the records requested by NCB from the operation of *FOIPPA* as records relating to the statutory functions of an officer of the Legislature under an Act of Alberta.

Dated at the City of Edmonton, Alberta this 28th day of June, 2016.

S.J. Greckol
Adjudicator