

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ADJUDICATION ORDER #11**

*April 27, 2017*

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**Note:** The Office of the Information and Privacy Commissioner has removed the Applicant's name and the Adjudicator's signature from this unofficial version of the Order.

**IN THE MATTER OF A Review Under Section 75(1) of the  
*Freedom of Information and Protection of Privacy Act* (the FOIP Act)  
Respecting Order-in-Council 298/2016**

Between:

N            G

- and -

Applicant

**Office of the Information and Privacy Commissioner**

Respondent

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**Decision of the Adjudicator  
Under Section 75(1) of the  
Freedom of Information and Protection of Privacy Act  
of the  
Honourable Mr. Justice R. Paul Belzil**

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### **Introduction**

[1] I have been appointed as an Adjudicator pursuant to Order-in-Council 298/2016 and s 75(1)(e) of the *Freedom of Information and Protection of Privacy Act* (FOIP Act).

[2] The decision under review is the decision of the Office of the Information and Privacy Commissioner (OPIC) by way of a letter dated October 14, 2015 in which Mr. N G 's request to access certain documents in the possession of OPIC was denied.

### **Background History**

[3] In 2005 the Applicant was employed by Westfair Food Company (Westfair) but his employment was terminated.

[4] On September 17, 2015 OPIC received a request pursuant to the FOIP Act for access to "it is an investigation conducted by the OPIC from August 2006 to December 2006. I need all correspondence from Westfair Food Company where I was working." On September 21, 2015 Mr. G sent further correspondence to OPIC which contained the following statement:

I received an answer from the employer Westfair Food about why they terminated the contract with and the file to them in June and August 2005.

[5] The Applicant clarified that the time period for which records were being requested was from June 2005 to August 2005.

[6] In the OPIC letter of October 14, 2015 the following paragraphs appear:

Response to Your Access Request

On September 24, 2015, our office initiated a search for records responsive to your request. I directed that all records related to yourself and Westfair Foods in the custody or control of our office be included in the search to ensure all possible responsive records were located.

On October 5, 2015, I reviewed all of the records located in our search, and found that they relate exclusively to matters concerning the Commissioner's functions of conducting investigations and reviews.

Section 4 of the FOIP Act excludes certain types of records from the application of the FOIP Act. If a record falls under one of the subsections of section 4, the FOIP Act does not apply to the record and there is no obligation to disclose the record under the FOIP Act.

In particular, section 4(1)(d) reads:

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 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;

Under section 1(m) of the FOIP Act, an "officer of the Legislature" is defined as 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.

In Adjudication Order #7 (which can be accessed on our website [www.opic.ab.ca](http://www.opic.ab.ca)), Adjudicator Veit ruled that applicants could not obtain access under the FOIP Act to records that fall under section 4(1)(d) of the FOIP Act.

This interpretation of section 4(1)(d) of the FOIP Act was upheld in a decision by the Court of Appeal of Alberta (2011 ABCA 36). That decision confirmed that a record created by or for or in the custody or under the control of the Commissioner in the exercise of her duties is exempt from the application of the FOIP Act. A copy of this decision is available on the following public website: [www.canlii.org](http://www.canlii.org).

The interpretation that a record created by or for or in the custody or under the control of the Commissioner in the exercise of her duties is exempt from the

application of the FOIP Act was further upheld by the Adjudicator Schutz (copy attached) pursuant to Order-in-Council 093/2015.

Since the records responsive to your access request relate to the Commissioner's functions of conducting investigations and reviews under the FOIP Act, these records are excluded from the application of the FOIP Act and our office will not be providing you with access to these records.

[7] In the result OPIC refused Mr. G's request relying on its interpretation of s 4(1)(d) of the FOIP Act.

### Discussion

[8] Section 4(1)(d) of the FOIP Act reads as follows:

Records to which this Act applies

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 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;

[9] In his letter to me of February 22, 2017 Mr. Solomon, counsel for OPIC, submits that s 4(1)(d) applies to Mr. G's request and that the section must be interpreted to mean that records falling under this provision cannot be disclosed pursuant to a FOIP request.

[10] In other words, records falling under this section are exempted from production under the FOIP Act as the Information and Privacy Commissioner is an officer of the Legislature.

[11] The Alberta Court of Appeal interpreted this provision in its decision in *Alberta (Information and Privacy Commissioner) v Alberta (Freedom of Information and Protection of Privacy Act Adjudicator)*, 2011 ABCA 36.

[12] In overturning a decision by an Adjudicator the Court of Appeal gave a broad interpretation to the wording of s 4(1)(d) and the following passage appears at paragraph 66:

[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.

[13] In other words, the Court of Appeal refused to narrow the scope of the exemption clearly stated in s 4(1)(d).

[14] Mr. G's request to OPIC for production of records was made in the context of a previous request to Westfair for production of records which OPIC assisted in.

[15] In my view, s 4(1)(d) clearly covers this situation such that OPIC is prohibited from disclosing these records to Mr. G.

[16] As such it is my decision as Adjudicator that OPIC's letter of October 14, 2015 correctly interpreted s 4(1)(d) of the FOIP Act such that the review under s 75(1)(e) of the FOIP Act must be dismissed.

Dated at the City of Edmonton, Alberta this 27<sup>th</sup> day of April, 2017.

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**R. Paul Belzil**  
**Adjudicator**

N G  
self represented Applicant

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