

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ADJUDICATION ORDER #13

November 9, 2021

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

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

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 OC 126/2021 – *Re* OIPC File Reference 1455-20-2019/20-G-007

Between:

Mr. L

Applicant

- and -

THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

Respondent

REASONS FOR DECISION
HONOURABLE MADAM JUSTICE JUNE M ROSS, ADJUDICATOR

Introduction

[1] On February 11, 2020, Mr. L submitted a formal request for access to information to the Office of the Information and Privacy Commissioner [OIPC] for the following records:

All records pertaining to the complaint I filed against Google Canada Corporation including emails and telephone conversations. Exclude documents I provided.

[2] On February 25, 2020 the OIPC refused to disclose the information to Mr. L on the ground that the requested records are excluded from the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 [FOIPPA] under s 4 [the Access to Information Decision].

[3] On March 10, 2020, Mr. L submitted a written request to the Minister of Service Alberta for a review of the Access to Information Decision.

[4] I was appointed as Adjudicator in this matter – referenced as: OIPC File Reference 1455-20-2019/20-G-007 – by Order in Council O.C. 126/2021, dated May 12, 2021.

[5] The Order in Council states that I have been designated “to act as an adjudicator for the purposes of section 75(1)(e)” of FOIPPA.

[6] I was formally notified of this appointment by email correspondence dated June 24, 2021.

[7] On June 26, 2021, I advised the parties that I was extending the time period to complete the inquiry under section 69(6) of *FOIPPA* until September 22, 2021.

[8] I received written submissions and copies of documents from the OIPC and Mr. L in August 2021.

[9] On September 1, 2021 I advised the parties that I would be further extending the period for completion of review and delivery of written decision on this matter to November 22, 2021, pursuant to *FOIPPA* s 69(6).

Background

The PIPA Complaint and the QB Action

[10] On June 13, 2019, Mr. L submitted a complaint to the OIPC under the *Personal Information Protection Act*, SA 2003, c. P-6.5 [*PIPA*] alleging that since 2017 Google Canada Corporation had been violating his privacy by accessing and collecting information about him [the *PIPA* Complaint]. Given the content of the complaint, it was made under sections 36(2)(e) and 46(2) of *PIPA*.

[11] Under section 46(3) of *PIPA* a written complaint must be delivered “within a reasonable time,” unless “a longer period” is allowed under section 46(2)(b).

[12] The OIPC requested additional information from Mr. L and advised him that his complaint was approximately 18 months past the allowable time under *PIPA*.

[13] On January 20, 2020 the OIPC received additional information from Mr. L, as well as submissions from him regarding the reason for delay in the commencement of the *PIPA* Complaint.

[14] On February 21, 2020, the OIPC responded to Mr. L advising that it would not extend the allowable time for delivering a complaint because of the time that had elapsed [the *PIPA* Decision].

[15] Mr. L takes the position that the *PIPA* Decision was unreasonable, as the alleged privacy violations by Google Canada Corporation were continuing.

[16] When he sought the appointment of an adjudicator from the Minister of Service Alberta, Mr. L referred not only to the Access to Information Decision, but also to the *PIPA* Decision. In his submissions to me, Mr. L seeks to have me review both the Access to Information Decision and the *PIPA* Decision.

[17] As noted above, Mr. L’s request to the Minister of Service Alberta was dated March 10, 2020. On July 16, 2020, the Minister advised the Information and Privacy Commissioner [the IPC] that steps were being taken to designate an adjudicator under section 80 of *FOIPPA*.

[18] On August 4, 2020, the IPC wrote to the Minister, as follows:

The Applicant appears to be requesting a review of two decisions. The first decision is the one made by my delegate Ms. Cheryl MacDonald under section 47(2)(b) of sections 47(3) of [*PIPA*]...

The second decision is the one made by my delegate Mr. LeRoy Rower, in responding to the Applicant's access request to my office... That decision is my office's file 2019/20-G-007, to which your letter refers.

An adjudicator has the authority to review a decision that I make while acting as the head of a public body, namely, the [OIPC]. When I (or my delegate) make a decision on an access request to my office, I am acting as the head of the OIPC. Consequently, the access decision made by Mr. Brower as my delegate is reviewable by an adjudicator under [FOIPPA].

An adjudicator does not have the authority to review a decision that I make when performing my functions under an Act of Alberta. I am performing my functions under an Act of Alberta when I make a decision that the legislation authorizes or empowers me to make: see *Alberta (Information and Privacy Commissioner) v Alberta (Freedom of Information and Protection of Privacy Act Adjudicator)*, 2011 ABCA 36 [*IPC v FOIPPA*], in which the Court of Appeal of Alberta said, at para. 81:

[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.

Consequently, the decision made by Ms. MacDonald as my delegate is made in performing my functions under section 47(2)(b) and section 47(3) of [PIPA] and is not reviewable by an adjudicator under [FOIPPA]. That decision may be reviewed only by a judge of the Court of Queen's Bench of Alberta on an application for judicial review under the Rules of Court.

[19] The position of the IPC in her correspondence, which is supported by the OIPC in this adjudication, is clearly correct. The Order in Council that designated me as an adjudicator is expressly stated to be for the purposes of section 75(1)(e) of FOIPPA. That section permits the designation of an adjudicator "to review, if requested under s 77, any decision, act or failure to act" of the IPC acting as the head of the OIPC. The IPC (or her delegate) was acting in that role in making the Access to Information Decision.

[20] As confirmed by the Court of Appeal in *IPC v FOIPPA*, the role of the IPC as head of the OIPC is distinct from the role of the IPC in overseeing and administering PIPA. The latter role includes the IPC's authority to determine whether a complaint has been delivered within a reasonable time, and the discretion to allow a longer period for delivery: PIPA sections 47(3) and 47(2)(b).

[21] Decisions made by the IPC under *PIPA* are final: *PIPA* section 53. They are subject only to judicial review by the Court of Queen’s Bench, on application made within 45 days of delivery of the decision: *PIPA* section 54.1.

[22] Mr. L did not commence an application for judicial review within 45 days of the *PIPA* Decision. He commenced an action in the Court of Queen’s Bench against Google Canada Corporation, the Royal Canadian Mounted Police and OIPC by Statement of Claim, filed on November 26, 2020 (Action No. 2001-13348), in which he sought relief pertaining to both the *PIPA* Decision and the Access to Information Decision [the QB Action]. The OIPC brought an application to strike or dismiss the QB Action as against the OIPC on the grounds, among others, that the *PIPA* Decision could only be reviewed by judicial review and the Access to Information Decision could only be reviewed by an adjudicator appointed under *FOIPPA*. The QB Action was dismissed against the OIPC by Order of Master Farrington on April 15, 2021.

[23] I have no jurisdiction to review either the *PIPA* Decision or the dismissal of the QB Action. My jurisdiction to review the Access to Information Decision is not challenged. I now turn to that review.

The Access to Information Decision

[24] 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 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.

[25] In *IPC v FOIPPAA* at para 66, the Court of Appeal held that section 4 of *FOIPPA* “lists records to which *FOIPPA* does not apply,” and noted that the exceptions in section 4 should not be given an “overly restrictive meaning.”

[26] The exception in section 4(1)(d) does not apply to all records of the IPC. As noted by the Court of Appeal at para 74, the “[r]ecords must relate to the exercise of that officer’s function under an act of Alberta to be exempt.”

[27] Mr. L sought “records pertaining to the complaint [he] filed against Google Canada Corporation”. These records relate directly to the *PIPA* Complaint and the *PIPA* Decision, specifically the determination that Mr. L’s written complaint was not delivered within a reasonable time as required by section 47(3) of *PIPA* and that the IPC was declining to allow a longer period under section 47(2)(b). These records are directly related to the exercise of functions of the IPC under *PIPA*.

[28] The application of section 4(1)(d) to the requested records is clear. A request for access to similar records was denied by Veit J in *Bonsma v Alberta (Information and Privacy Commissioner)*, File Reference: 2008-P-002 (August 12, 2009), in the decision that was cited with approval by the Court of Appeal in *IPC v FOIPPAA*.

Disposition

[29] The decision of the IPC in respect of the Access to Information Request is upheld.

Heard on the 15th day of July, 2021.

Written Submissions provided on August 11, 2021, August 17, 2021, and August 25, 2021.

Dated at Alberta this 9th day of November, 2021.

[Original signed]

**Honourable Madam Justice June M Ross
Adjudicator**

Appearances:

Mr. L

Self-Represented Applicant

Glenn Solomon, QC

Jensen Shawa Solomon Duguid Hawkes LLP
for the Respondent