



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F09-20

VANCOUVER POLICE DEPARTMENT

Celia Francis, Senior Adjudicator

November 6, 2009

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Summary: The applicant requested access to records related to the “police involved shooting” in 2004 of a named individual. The VPD initially refused access to all of the records under s. 22(3)(b). It later added other exceptions and argued that additional records were excluded under s. 66.1 of the *Police Act*. It also released some records. The VPD are required to withhold the remaining third-party personal information under s. 22(1). Certain other pages are excluded from the scope of FIPPA under s. 66.1 of the *Police Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 22(1), 22(2)(a), 22(3)(a), (b) and (d), 25(1)(b); *Police Act*, s. 66.1.

Authorities Considered: B.C.: Order F09-18, [2009] B.C.I.P.C.D. No. 24; Order F09-19, [2009] B.C.I.P.C.D. No. 25; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order F08-16, [2008] B.C.I.P.C.D. No. 28; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order 02-19, [2002] B.C.I.P.C.D. No. 19; Order 03-06, [2003] B.C.I.P.C.D. No. 6.

1.0 INTRODUCTION

[1] This order arises out of the applicant’s request for records to the Vancouver Police Department (“VPD”) about its investigation into the 2004 death of a named individual (“third party”). It is the third in a series of related decisions I am issuing concurrently, the other two of which are Order F09-18¹ and Order F09-19.² As with the other two cases, the applicant said he was requesting the records, as a matter of public interest, for use in a documentary to

¹ [2009] B.C.I.P.C.D. No. 24.

² [2009] B.C.I.P.C.D. No. 25.

be aired on the CBC, and the VPD responded by denying access to the records in their entirety under s. 22(3)(b) of FIPPA.

[2] The applicant requested a review of the VPD's decision by this Office ("OIPC"), saying the subject of his investigation was the police, not the deceased individual, and that s. 25 was applicable. During mediation of the request for review, the VPD said it would also rely on ss. 13(1), 15(1)(a), 15(1)(g), 16(1)(b), 22(1), 22(3)(a) and 22(3)(d) of FIPPA and s. 66.1 of the *Police Act*. The request for review did not settle and the matter proceeded to inquiry. The OIPC invited representations from the applicant, the VPD, the Office of the Police Complaint Commissioner ("OPCC") and, as intervenor, the United Native Nations.

[3] Around the due date for initial submissions in this inquiry, the VPD disclosed a number of pages: newspaper clippings and other related records,³ and extracts from a 2004 "Use of Force" report regarding the "Police Involved Shooting Sudden Death" of the third party. The VPD also referred the applicant to its website for its regulations and procedures manual.⁴ The media-related records show that the third party died of gunshot wounds, during an altercation with two VPD officers.

2.0 ISSUES

[4] The issues before me are these:

1. Whether the public body is authorized by ss. 13(1), 15(1)(a), 15(1)(g) and 16(1)(b) of FIPPA to withhold the records.
2. Whether the public body is required by ss. 22(1), 22(3)(a), 22(3)(b) and 22(3)(d) of FIPPA to withhold the records.
3. Whether the public body is required by s. 25 of FIPPA to disclose information to the public.
4. Whether certain records are excluded from the scope of FIPPA by s. 66.1 of the *Police Act*.

[5] Under s. 57(1) of FIPPA, the burden of proof is on the VPD regarding ss. 13(1), 15(1)(a), 15(1)(g) and 16(1)(b) of FIPPA, while under s. 57(2) the applicant has the burden of proving that disclosure of personal information of a third party would not be an unreasonable invasion of third-party personal privacy.

³ One of these was a fact sheet the VPD handed out to the media outlining the VPD's actions in the incident.

⁴ Para. 14, VPD's initial submission.

[6] Previous decisions of the Commissioner have held that, while s. 57 of FIPPA is silent respecting the burden of proof in determining whether s. 25 of FIPPA applies, as a practical matter it is in the interests of each party to present evidence as to whether this section applies. Similarly, s. 57 is silent respecting the burden of proof regarding s. 66.1 of the *Police Act* and it is in the interests of each party to present evidence as to whether this section applies and excludes certain records from the scope of FIPPA.

3.0 DISCUSSION

[7] 3.1 Procedural Matters

Applicant's initial submission

[8] The OIPC extended the due dates for initial submissions to this inquiry at the applicant's request. The applicant then requested a further extension. Correspondence ensued between the applicant and the OIPC regarding his delays in making submissions in this and the related inquiries. The OIPC then granted the applicant an extension to the due date for his initial submission in this inquiry. When the applicant's submission arrived, however, it was not in the form and number the OIPC required, despite the fact that, on numerous occasions throughout this and the related inquiries, the OIPC had reminded the applicant what he was expected to do. The OIPC therefore declined to accept the applicant's initial submission. The applicant accepted this decision and asked that the inquiry proceed.

Police Act records

[9] The VPD did not provide any argument on s. 66.1 of the *Police Act* in its initial submission, even though the notice for this inquiry stated that s. 66.1 of the *Police Act* would be an issue regarding some records. The VPD did however say that it believed additional records existed in its Professional Standards Section and it would update the OIPC after it had searched for these records. It also said it anticipated that it would argue that any such records were excluded from the scope of FIPPA under s. 66.1 of the *Police Act*.

[10] The VPD did not provide any updates and so the OIPC wrote to ask whether it had located any further records. The VPD provided copies of records it had located in its Professional Standards section, together with a supplementary submission on s. 66.1 of the *Police Act*. The OIPC provided the other participants with an opportunity to comment on this supplementary submission and only the applicant did so.

[11] **3.2 Records in Dispute**—The VPD said the 647 pages of responsive records include the following: investigator's reports pertaining to the shooting death of the third party, as well as other law enforcement investigations reviewed

as part of the investigation into the shooting of the third party; autopsy photographs and reports; witness and police statements; crime scene photographs; computer printouts from police information databases; police interoffice correspondence; investigation logs; follow-up and analysts' reports; police forensic lab reports; third-party criminal history and images; and the third party's medical records.⁵

[12] **3.3 Public Interest Override**—The applicant's request for review argued that s. 25 required disclosure of the records in this case and so it was listed as an issue in the notice for this inquiry. The relevant parts of s. 25 read as follows:

Information must be disclosed if in the public interest

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

...

(b) the disclosure of which is, for any other reason, clearly in the public interest.

[13] A number of orders have dealt with s. 25 and I have applied the same principles here.⁶

[14] The applicant's initial submission would normally be expected to contain argument on s. 25, but for reasons given above, the OIPC did not accept the applicant's initial submission in this case. I have therefore decided that I need not consider it here. Even if I were to do so, however, and on a preliminary basis only, I would be inclined to find that s. 25(1)(b) does not apply.

[15] The records show that there was an extensive investigation at the time, as well as a review by the OPCC. I see no urgent or compelling interests at stake here requiring disclosure "without delay". While the public may be interested in disclosure of the records, this is not the test, as many orders have confirmed. Similarly, the applicant's proposed use of the records in a television documentary does not mean that there is an urgent and compelling public interest in disclosure of the records.

⁵ Para. 9, VPD's initial submission; para. 9, Porteous affidavit. The VPD argued that all of the records also fall under s. 22(3)(b), that pp. 321-322 of Binder #1 and pp. 14-28 and 80-87 of Binder #2 fall under s. 22(3)(a) and that pp. 118, 129-144, 169, 180-187, 244-245 of binder #2 also fall under s. 22(3)(d).

⁶ See Order 02-38, [2002] B.C.I.P.C.D. No. 38, for example.

[16] **3.4 Sections 13(1) and 15(1)(a) and (g)**—The VPD did not provide any argument on these sections although its second decision letter relied on them and the notice for this inquiry listed them as issues.⁷ This would normally mean that the VPD had not met its burden regarding these exceptions and I would find that s. 13(1) and ss. 15(1)(a) and (g) do not apply. Given my findings below on s. 22(1), however, I need not consider these exceptions.

[17] **3.5 Harm to Third-Party Privacy**—Many previous orders have considered the application of s. 22⁸ and I take the same approach here. The relevant provisions are these:

Disclosure harmful to personal privacy

- 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny, ...
- (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people, ...
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
- (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
- ...
- (d) the personal information relates to employment, occupational or educational history, ...

⁷ The VPD did not explain why it failed to address these exceptions.

⁸ See Order 01-53, [2001] B.C.I.P.C.D. No. 56, and Order 02-56, [2002] B.C.I.P.C.D. No. 58, for example.

Unreasonable invasion of third-party privacy

[18] The VPD made the following arguments on this issue:

- the records consist entirely of third-party personal information related to the investigation of the “police-involved shooting” of the third party
- “personal information” applies to both living and deceased individuals and the third-party personal information in this case includes names, addresses, dates of birth of adult individuals whom the VPD interviewed or who were mentioned in interviews as part of that investigation; and witness statements and documents the police generated, such as various reports and notes
- the information in all the records was compiled and is identifiable as part of an investigation into a possible violation of law, the *Criminal Code*, and thus falls under s. 22(3)(b)⁹
- some of the records (autopsy and post-mortem examination report of the third party, medical charts, related photographs and laboratory analysis records) contain the third party’s medical information which falls under s. 22(3)(a)
- some records contain the employment, occupational or educational history information of third parties which falls under s. 22(3)(d)¹⁰

[19] The VPD also argued, in the alternative, that it is not reasonable to sever the records under s. 4(2).¹¹ This last argument has no bearing on whether or not s. 22 applies to withheld information. Rather it relates to whether or not it is reasonable to sever excepted information (personal or non-personal) from a record and disclose the remainder.¹²

[20] The notice for this inquiry stated that the applicant had the burden of proof regarding third-party personal information. In such cases, an applicant’s initial submission would normally be expected to provide argument and evidence to support his or her case that s. 22 does not apply. For reasons noted above, the OIPC declined to accept the applicant’s initial submission. It is however clear from the applicant’s other material¹³ and his stated purpose for making the request that he is aware that the records relate to a police investigation.

[21] The records in dispute arose out of a criminal investigation into the third party’s death. The VPD accurately described the records (see para. 11 above) and I agree they all consist of third-party personal information that falls under

⁹ The VPD’s second decision letter states that it was withholding over 500 pages of records.

¹⁰ Paras. 8-23 & 27-43, initial submission.

¹¹ Paras. 24-26, VPD’s initial submission.

¹² See Order F08-16, [2008] B.C.I.P.C.D. No. 28, at paras. 36-37.

¹³ His request and request for review.

s. 22(3)(b). I also agree that s. 22(3)(a) applies to the third party's medical information and that s. 22(3)(d) also applies to certain information, as the VPD argued above. Disclosure of this personal information is therefore presumed to be an unreasonable invasion of third-party privacy.

[22] I exclude from this finding pp. 252-255, binder #2, which I deal with below in the discussion of s. 66.1 of the *Police Act*.

Relevant circumstances

[23] I take the applicant's purpose for requesting the records, including his statement that the VPD are the subject of his investigation, to mean he believes that s. 22(2)(a) is a factor here. The VPD does not believe any relevant circumstances favour disclosure in this case.¹⁴

[24] The VPD provided affidavit evidence that the incident was the subject of an investigation by its Professional Standards Section.¹⁵ As noted above, the OPCC also conducted a review of the incident. There was also media coverage of the incident. Disclosure of the requested records would not in my view add meaningfully to the public's understanding of the VPD's actions in this case. I therefore find that s. 22(2)(a) does not apply.

Conclusion on section 22(1)

[25] I found above that ss. 22(3)(a), (b) and (d) apply to the records in dispute and that there are no relevant circumstances favouring disclosure. I therefore find that s. 22(1) requires the VPD to withhold the information in its entirety.

[26] **3.6 Information Received in Confidence**—The VPD argued that s. 16(1)(b) applies to CPIC¹⁶ correspondence received in confidence from other agencies, pertaining to third-party victims and suspects.¹⁷ It also noted that previous orders have found that information in the CPIC system is not to be disclosed by any other police organization or agency unless that body was the one that entered the information in the CPIC system.¹⁸ The VPD said that the CPIC records in this case contain information that agencies other than the VPD inputted into the system. In support of its position, the VPD provided, on an *in camera* basis, two extracts from the CPIC Reference Manual.¹⁹

¹⁴ Para. 29, VPD's initial submission.

¹⁵ Para. 7, Porteous affidavit.

¹⁶ Canadian Police Information Centre.

¹⁷ The VPD argued that pp. 208-214 fall under s. 16(1)(b).

¹⁸ In this regard, the VPD referred to relevant British Columbia and Ontario orders.

¹⁹ Paras. 44-52, Exhibit "C", VPD analyst's affidavit. The VPD said that some of the CPIC information is data the VPD entered and that these data fall under s. 22(3)(b); para. 50, VPD's initial submission.

[27] Section 16(1)(b) reads as follows:

Disclosure harmful to intergovernmental relations or negotiations

16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

- (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

[28] The VPD's argument and evidence on this issue are not compelling and not up to the standard that previous orders have required for establishing that this exception applies.²⁰ The manual extracts above provide some support for its position but more detailed evidence would have been helpful, for example, any relevant memoranda of understanding. Relevant affidavit evidence from VPD officers or others with direct knowledge and experience in the confidential receipt of information through the CPIC system would also have been helpful. I have however decided I do not need to consider whether s. 16(1)(b) applies in this case, as I have already found that s. 22(1) applies.

[29] **3.7 Section 66.1 of the *Police Act***—The VPD told the applicant that some records were excluded from the scope of FIPPA by virtue of s. 66.1 of the *Police Act*. After the inquiry had closed, the OIPC asked the VPD to identify which of the 647 pages of responsive records it had initially retrieved were in its view excluded under this provision. The VPD replied that it could not locate the Professional Standards Section (PSS) file but was able to locate electronic back-up copies of some records from the PSS which it provided to the OIPC.²¹ The PSS records are separate from the 647 pages of responsive records the VPD initially retrieved.

[30] As noted earlier, the VPD provided no argument on s. 66.1 of the *Police Act* in its initial submission. However, my review of the original 647 pages of records in dispute revealed a record at pp. 252-255, binder #2, which is similar in character to the PSS records I consider below. I have therefore included these pages in my consideration of s. 66.1 of the *Police Act*.

[31] The OPCC stated that two *Police Act* Form 1 conduct complaints²² were lodged in January 2005, following the death of the third party in December 2004.

²⁰ See, for example, Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44 and Order 02-19, [2002] B.C.I.P.C.D. No. 19.

²¹ It appears that these PSS records are not the complete file on the conduct complaints.

²² The VPD's supplementary submission noted that s. 46 of the *Police Act* defines a "conduct complaint" as either an "internal discipline complaint" or a "public trust complaint". It said that the

It argued that all of the records the VPD holds relating to the making, investigating and disposition of the conduct complaints, including the complaint, the *Police Act* investigation report and all correspondence between the VPD and the OPCC, are covered by s. 66.1 of the *Police Act*. The OPCC argued that the records were created in relation to the *Police Act* professional standards investigation of the shooting death of the third party and are excluded from the scope of FIPPA by virtue of s. 66.1 of the *Police Act*.²³

[32] The VPD said it supported the OPCC's submission, providing argument on this issue similar to the OPCC's. It described the PSS records on an *in camera* basis and explained how the records arose out of a conduct complaint under Part 9 of the *Police Act*. The VPD also argued that s. 25 of FIPPA has no application here as s. 66.1 of the *Police Act* excludes the records from the scope of FIPPA and s. 25 only applies to records within the scope of FIPPA.²⁴

[33] Most of the applicant's reply to the VPD's supplementary submission was not relevant to the issue of whether or not s. 66.1 of the *Police Act* applies to the records. He did however argue that accepting the VPD's claim might "lend itself to abuse—by simply attaching a 'complaint' to any matter under internal investigation it is then immunized from external scrutiny."²⁵

[34] Section 66.1 of the *Police Act* reads as follows:

Freedom of Information and Protection of Privacy Act does not apply

66.1 Except as provided by this Act and by section 3(3) of the *Freedom of Information and Protection of Privacy Act*, that Act does not apply to any record that

- (a) arises out of or is otherwise related to the making, submitting, lodging or processing of a conduct complaint under this Part, and
- (b) is created on or after the conduct complaint is made, submitted or lodged

[35] I have carefully reviewed the PSS records the VPD provided with its supplementary submission, as well as pp. 252-255, binder #2. While I can say little about their contents, I am satisfied that these records post-date and arise out of or relate to conduct complaints under Part 9 of the *Police Act*. I conclude that s. 66.1 of the *Police Act* applies to them and these records are therefore excluded from the scope of FIPPA.

records in this case relate to a "public trust complaint"; paras. 15-16, VPD's supplementary submission.

²³ OPCC's initial submission. The OPCC also referred to Order 03-06, [2003] B.C.I.P.C.D. No. 6, for support of its position.

²⁴ VPD's supplementary submission. I agree with the VPD that s. 25 is not relevant here.

²⁵ Page 2, applicant's reply.

4.0 CONCLUSION

[36] For reasons given above, under s. 58 of FIPPA, I require the VPD to refuse the applicant access to the withheld information in the 647 pages of responsive records the VPD initially retrieved, in its entirety under s. 22(1), except for pp. 252-255, binder #2.

[37] Given my finding on s. 22(1), no order is necessary respecting ss. 13(1), 15(1)(a) and (g) and 16(1)(b). For reasons given above, no order is necessary respecting s. 25 or the PSS records and pp. 252-255, binder #2.

November 6, 2009

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File No. F07-32150