



September 3, 2015

Vincent Gogolek
Executive Director
BC FIPA
103 – 1093 West Broadway
Vancouver, BC V6H 1E2

Dear Vincent Gogolek:

**Re: Request concerning Order F14-45 inquiry process—OIPC File
No. F15-61767**

I write in response to your letter of June 9, 2015 concerning government's conduct in the hearing concerning the above captioned file. The essence of your letter is that a change of circumstances after the close of the hearing, but before the issuance of Order F14-45, was not, and should have been, disclosed to the adjudicator conducting the inquiry.

In Order F14-45 you requested access to records related to data sharing and research agreements between the Ministry of Health and four individuals, including information about delays or impediments to accessing data for research purposes. The Ministry refused to disclose some information in the responsive records pursuant to, among others, s. 15(1)(a) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), which applies where disclosure may harm a law enforcing matter.

Specifically, the Ministry argued at inquiry that certain information requested by you should be withheld because its disclosure could reasonably be expected to harm an ongoing law enforcement investigation related to the termination and suspension of employees and contractors by the Ministry of Health in 2012.

The Ministry provided an *in camera* affidavit (now public) to the adjudicator which referred to an email authored by RCMP Sergeant Andrew Cowan. The email (Email #1), dated October 22, 2013, stated the following

To confirm, the RCMP investigation, although suspended pending the final report/investigation by the [Office of the Comptroller General] office, is not concluded. Our file remains open with exhibits seized from the BC government and Statistics Canada in our possession.

On November 4, 2014, the adjudicator issued Order F14-45 in which she stated, based on Email #1, that she was satisfied that an "RCMP investigation into matters related in some way to the Office of the Comptroller General's ("OCG") investigation was commenced and had not concluded at the time of inquiry submissions." Despite this finding she determined that the Ministry had not provided sufficient evidence to prove that the disclosure of the requested records would harm the investigation, and was not permitted to withhold the information on that ground.

On June 11, 2015, the *Vancouver Sun* published a story about the Ministry of Health firings, based on documents received under a federal access to information request. One document was an RCMP email dated November 6, 2014 (Email #2) that set out a chronology of events concerning the "Ministry of Health File."

The entry for July 16, 2014, states as follows:

RCMP File concluded citing no action in over a year. Government investigators notified.

If the entry in RCMP Email #2 is correct it raises a legitimate question about whether the Ministry should have told the adjudicator that the RCMP "concluded" their file regarding the investigation, given that the Ministry was relying on the fact of an ongoing RCMP investigation and the adjudicator had not yet issued her decision.

As part of our investigative process, I requested the Ministry provide me with information and explanation regarding the circumstances surrounding the emails and investigations in order to properly decide what steps, if any to take in relation to your request.

The Ministry advised me that the entry contained in Email #2 related to an earlier email between Constable Dean Miller of the RCMP and Wendy Taylor dated July 16, 2014 (Email #3). Wendy Taylor was the Ministry's investigator into alleged wrongdoing of Ministry employees and contractors. Email #3 reads as follows:

Wendy,

I hope your summer is going well. Just to keep you in the loop, we are concluding our file as we have not done anything on it on over a year. If and when you and your counterparts complete your investigation, let us know and we will reopen it and evaluate it at that time.

Dean

The Ministry says the OCG investigation into alleged wrongdoings within the Ministry of Health was still underway when Email #3 was written. It states that Wendy Taylor forwarded Email #3 to Dan Peck with the OCG.

The Ministry submits that, in the view of OCG investigators, there was no material difference between Email #1, relied upon by the adjudicator and Email #3. Both emails, the Ministry says, made clear that the RCMP investigation was not over and that that the RCMP investigation was linked to the ongoing OCG investigation. The OCG believed that the RCMP would review the OCG's report when completed and make its own determination about how it would proceed. The Ministry submits that until the RCMP made that determination, the government considered the RCMP's concerns in Email #1 regarding the potential harm that could come to their law enforcement investigation by the release of documents to be very much alive.

FIPA's view is that the RCMP's statement that the file was "concluded", as they put it, constituted a "radical" change of circumstances about the case about which I was not advised either deliberately or through a lack of internal communication. Either scenario is premised on the assumption that the OCG and Wendy Taylor knew, or ought to have known, that there was indeed a change of circumstances regarding the status of the RCMP file that should have been communicated to the adjudicator.

However, the evidence before me is that the OCG and Wendy Taylor did not believe this was the case. Was this a reasonably held view?

Both OCG officials and Wendy Taylor were of the view that "concluding" the file with the potential for its reopening, pending the OCG report, was not materially different from its suspension pending the reopening of the file when the OCG was received. It is important to recall that the adjudicator accepted as a fact that the suspension of the RCMP file with the potential to reopen it when the OCG report was filed constituted a law enforcement investigation for the purpose of s. 15. Wendy Taylor provided me with an affidavit stating that, in essence, she was advised by the RCMP that it was "concluding" the file with the proviso that it be reopened and re-evaluated when the OCG report was received. The RCMP confirmed to me that though it did not have detailed notes of meetings with Wendy Taylor, the key elements of the understanding between the RCMP and Wendy Taylor as outlined by Ms. Taylor are consistent with that of the RCMP investigators and managers overseeing the file.

Wendy Taylor's statements to me, buttressed by representations from the RCMP lead me to conclude that Wendy Taylor and the OCG reasonably believed that the "conclusion" of the file was not materially different from its suspension—in either case the potential for harm to a law enforcement matter remained because the file would be reopened when the OCG presented their report. In short, it was

not unreasonable for Wendy Taylor and the OCG to conclude that, whatever words were used to describe status of the RCMP file, for practical purposes it was never finally closed at the time Order F14-45 was issued. Indeed, we have confirmed that the RCMP reviewed the OCG report in order to determine whether or not to undertake a criminal investigation.

As the Ministry was of the reasonably held view that there was no “radical change in circumstances” concerning the RCMP file, I cannot accept FIPA’s assertion that the Ministry either deliberately or through a miscommunication undermined my Office by not reporting to the adjudicator matters related to Email’s #2 and #3.

Yours sincerely,



Elizabeth Denham
Information and Privacy Commissioner
for British Columbia

pc. John Tuck
Legal Services Branch, Ministry of Justice