Decision F08-07

MINISTRY OF LABOUR AND CITIZENS' SERVICES

David Loukidelis, Information and Privacy Commissioner

July 24, 2008

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Summary: The Ministry and the third party, IBM, argued that IBM's request for review of the Ministry's decision to disclose information that IBM says is protected by s. 21 freezes the Ministry's duty under ss. 7 and 8 of FIPPA to respond to the applicant's access request respecting other access exceptions. This position, which relies on interpretation of s. 7(6), is not tenable. Nor is the assertion of the Ministry and IBM, respecting s. 54(b), that the access applicant is not an "appropriate person" to participate in the inquiry regarding the s. 21 issue. The applicant is an appropriate person and can participate in the inquiry into the Ministry's s. 21 decision. There is no prejudice to IBM in the applicant's participation in the inquiry. The Ministry is directed to provide the applicant with its response to the applicant's request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6, 7, 8, 10, 23, 24, 52, 54(b), 56(3), 57, 58(2).

Authorities Considered: B.C.: Order 02-38, [2002] O.I.P.C.D. No. 38; Order F07-10, [2007] B.C.I.P.C.D. No. 15; Order 01-52, [2001] B.C.I.P.C.D. No. 55; Decision F06-10, [2006] B.C.I.P.C.D. No. 34. **Ont.:** Order PO-2221-I, [2003] O.I.P.C. No. 281.

Cases Considered: *Zellers Inc. v. Naser,* [2007] B.C.J. No. 353 (S.C.); *Ontario Human Rights Commission v. Ontario Teachers' Federation Canadian,* [1994] O.J. No. 1585 (Ont. Div. Ct.); *Hinson v. Canada*, [1994] F.C.J. No. 1372; *El Hayak v. Canada*, [2005] F.C.J. 1045; *Comeau's Sea Food Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12; *Re Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 37; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner),* [2002] B.C.J. No. 848, 2002 BCSC 603; *Jill Schmidt Health Services Inc. v. British Columbia (Ministry of Attorney General) and British Columbia Nurses' Union*, [2001] B.C.J. No. 79, 2001 BCSC 101; *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, [2004] B.C.J. No. 735, 2004 BCCA 210.

1.0 INTRODUCTION

[1] The chain of events leading to this preliminary decision began over three years ago, when the BC Freedom of Information and Privacy Association ("applicant") made a request for access, under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), to the records that constitute the "Workplace Support Services" contract between IBM Canada Ltd. ("IBM") and the Ministry of Labour and Citizens' Services ("Ministry"). Those records consist of the Master Services Agreement, the Master Transfer Agreement and the License Agreement (collectively, "requested records"). The requested records are voluminous—they fill a 10 cm binder and, to date, the Ministry has released none of the information in those records to the applicant.

[2] The catalyst for this decision was the third-party notice that the Ministry gave to IBM under s. 23 of FIPPA.[1] IBM's response was to identify for the Ministry information in the requested records protected by s. 21. The Ministry considered IBM's representations and its recommended severing, but decided to provide the applicant with partial access to the requested records. The Ministry notified IBM of its decision, as required by s. 24, provided IBM with a copy of the proposed disclosure and, in accordance with s. 24(3), informed IBM of its right to request a review of its decision. It is useful to observe here that the material that the Ministry provided to this office[2] referred to severing under ss. 15, 17, 21 and 22 of FIPPA.

[3] IBM then requested a review under s. 52(2) of FIPPA. Because the matter was not resolved by mediation by this office, it moved to an inquiry under Part 5 of FIPPA and this office issued a notice of written inquiry identifying the issues as follows:

1. The Ministry's application of s. 21 to parts of the requested records;
2. IBM's claim that s. 21 applies to parts of the requested records;
3. Whether the Ministry is required to respond to the Applicant respecting the application of any and all disclosure exceptions to the requested records; and
4. Whether the Ministry is required to disclose to the Applicant the parts of the requested records that are not withheld by the Ministry under

[1] Section 23 requires a public body to give notice to an affected third party if it intends to give access to a record the public body believes contains information that might be excepted from disclosure under s. 21 of FIPPA (disclosure harmful to the business interests of a third party).

[2] I refer here to the copy of the records provided to this office by the Ministry under cover of its April 13, 2005 letter to me. Information had been blanked out from the records with marginal notations of "s. 15" or "s. 17" or both. The letter refers to the "severed copy" as "indicating information withheld under Section 17 and Section 21" (again, s. 15 is also noted in the copy provided to this office).

a disclosure exception or not disputed by IBM with respect to the Ministry's application of s. 21.

[4] The notice of inquiry was also provided to the applicant under s. 54(b) of FIPPA, which requires notice to be given to "any other person that the commissioner considers appropriate".

[5] The Ministry and IBM both made a number of objections to the inquiry notice. In my November 22, 2007 letter to the parties, I summarized those objections as follows:

> 1. The Ministry maintains that it has not and will not make a partial release of the requested records to the Applicant on the ground that FIPPA permits a public body to make no record release of any kind so long as there is a third-party review pending in respect of any part of the requested records;
>
> 2. The Ministry and IBM maintain that this inquiry must be limited to s. 21 severing that is in dispute between the Ministry and IBM, and the Commissioner has no authority under FIPPA to consider and decide the applicability to the requested records of s. 21 at large or other disclosure exceptions at all;
>
> 3. IBM also maintains that the Applicant is not a proper party to this inquiry;
>
> 4. IBM also maintains that inquiry into any issue in the Notice of Written Inquiry issued by the Portfolio Officer beyond s. 21 severing that is in dispute between it and the Ministry would somehow prejudicially affect IBM's business interests.

[6] I invited written submissions by the applicant, the Ministry and IBM on the preliminary issues raised by these objections. The Ministry and IBM made submissions, but the applicant chose not to do so, leaving me to make my decision on the preliminary issues without the benefit of the applicant's input.

2.0 ISSUES

[7] The objections of the Ministry and IBM give rise to these two main issues:

1. Is the Ministry required to release part of the requested records to the applicant regardless of IBM's request for third-party review? This requires consideration of objections 1, 2 and 4 identified in my November 22, 2007 letter; and

2. Is the applicant an appropriate person to participate in the third-party review for the purposes of s. 54(b) of FIPPA (objection 3 identified in my November 22, 2007 letter)?

[8] As the following discussion shows, these issues, although they are separately stated, are interconnected.

3.0 DISCUSSION

[9] **3.1 FIPPA'S Statutory Scheme**—The Ministry and IBM raise significant issues of first impression under FIPPA, almost 15 years after it came into force, that make it useful to offer a brief overview of the statutory scheme before addressing the issues. FIPPA's purposes are expressly said, in s. 2(1), to be to "make public bodies more accountable to the public and to protect personal privacy by", among other things, giving the "public a right of access to records", "specifying limited exceptions to the rights of access" and "providing for an independent review of decisions" made under FIPPA.

[10] Part 2 of FIPPA deals with freedom of information and Part 3—which is not engaged here—deals with the protection of privacy. Division 1 of Part 2 sets out the process for making access requests and a public body's duties and responsibilities in responding to requests. Those duties include a public body's s. 6 duty to "make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely". Section 7 establishes the time limits for a public body's response to an access request. Here are the relevant portions of s. 7:

> **Time limit for responding**
>
> 7(1) Subject to this section and sections 23 and 24 (1), the head of a public body must respond not later than 30 days after receiving a request described in section 5 (1).
>
> ...
>
> (6) If a third party asks under section 52 (2) that the commissioner review a decision of the head of a public body, the 30 days referred to in subsection (1) do not include the period from the start of the day the written request for review is delivered to the commissioner to the end of the day the commissioner makes a decision with respect to the review requested.

[11] A public body's response must, according to s. 8, inform the applicant whether or not access will be granted and, if access is refused, must state the reasons for the refusal and the provisions of FIPPA on which the refusal is based.

[12] Sections 23 and 24 of FIPPA provide for notice to third parties. Schedule 1 of FIPPA defines "third party" as follows:

> **"third party"**, in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than
>
> (a) the person who made the request, or
>
> (b) a public body;

[13] Section 23(1) requires a public body to provide third parties with written notice under s. 23(3) if the public body "intends to give access to a record that the head has reason to believe contains information that might be excepted under section 21 or 22". Section 21 excepts certain third-party business information from disclosure, while s. 22 does the same for certain third-party personal information. If a public body intends to withhold information under either or both of ss. 21 or 22, it may provide third-party notice under s. 23(3), although it is not required to do that. This is s. 23(3):

> 22(3) The notice must
>
> (a) state that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the third party,
>
> (b) describe the contents of the record, and
>
> (c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.

[14] If a public body gives notice under s. 23(3), it must also give the applicant a notice under s. 23(4):

> (4) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that
>
> (a) the record requested by the applicant contains information the disclosure of which may affect the interests or invade the personal privacy of a third party,
>
> (b) the third party is being given an opportunity to make representations concerning disclosure, and
>
> (c) a decision will be made within 30 days about whether or not to give the applicant access to the record.

[15] After these notices have been given, s. 24 gives the public body 30 days[3] to decide whether or not to give access to the record or part of it:

[3] Schedule 1 to FIPPA defines "day" as excluding a "holiday or a Saturday".

Time limit and notice of decision

24(1) Within 30 days after notice is given under section 23 (1) or (2), the head of the public body must decide whether or not to give access to the record or to part of the record, but no decision may be made before the earlier of

(a) 21 days after the day notice is given, or

(b) the day a response is received from the third party.

(2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision to

(a) the applicant, and

(b) the third party.

(3) If the head of the public body decides to give access to the record or to part of the record, the notice must state that the applicant will be given access unless the third party asks for a review under section 53 or 63 within 20 days after the day notice is given under subsection (2).

[16] Part 5 of FIPPA governs "reviews" and "complaints". Section 52 deals with the right to ask for a review:

Right to ask for a review

52(1) A person who makes a request to the head of a public body, other than the commissioner or the registrar under the *Lobbyists Registration Act*, for access to a record or for correction of personal information may ask the commissioner to review any decision, act or failure to act of the head that relates to that request, including any matter that could be the subject of a complaint under section 42 (2).

(2) A third party notified under section 24 of a decision to give access may ask the commissioner to review any decision made about the request by the head of a public body, other than the commissioner or the registrar under the *Lobbyists Registration Act*.

[17] The process for asking for a review is set out in s. 53, which simply says that, to ask for a review, "a written request must be delivered to the commissioner". Section 53(3) provides that the failure of the head of a public body to respond in time to an access request is to be treated as a decision to refuse access, but the 30-day time limit in s. 53(2)(a) for delivering requests for review does not apply.

[18] Section 54 requires the commissioner to give notice of the review, as follows:

Notifying others of review

54 On receiving a request for a review, the commissioner must give a copy to

(a) the head of the public body concerned, and

(b) any other person that the commissioner considers appropriate.

[19] Section 56, which deals with inquiries, reads as follows, in relevant part:

Inquiry by commissioner

56(1) If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

(2) An inquiry under subsection (1) may be conducted in private.

(3) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review must be given an opportunity to make representations to the commissioner during the inquiry.

(4) The commissioner may decide

(a) whether representations are to be made orally or in writing, and

(b) whether a person is entitled to be present during or to have access to or to comment on representations made to the commissioner by another person.

(5) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review may be represented at the inquiry by counsel or an agent.

(6) Subject to subsection (8), an inquiry into a matter under review must be completed within 90 days after receiving the request for the review.

[20] Section 57 specifies the burden of proof in inquiries. That provision is directed at public body decisions to give or refuse access to information, including information that relates to a third party. As regards a decision to give access to third-party business information, it is up to the third party to prove the applicant has no right of access to all or part of the record. With respect to third-party personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

[21] Last, s. 58 sets out what orders may be made on completion of an inquiry. Section 58(2) provides that, where the inquiry is into a decision to give or refuse to give access to all or part of a record, one of three orders must be made:

1. If the public body is not authorized or required to refuse access, it must be required to give the applicant access to all or part of the requested record;

2. If the public body is authorized to refuse access, its decision may be confirmed or the public body may be required to reconsider its decision; or

3. If the public body is required to refuse access, the order must require the public body to refuse access.

[22] Orders made under s. 58 must, among others, be given to the person who asked for the review, the public body concerned and any person given notice under s. 54.

[23] I will now address the issues raised by IBM and the Ministry.

[24] **3.2 Scope of Third-Party Reviews**—The Ministry and IBM argue that the effect of s. 7(6) of FIPPA is to suspend, until completion of a review that a third party has requested, a public body's duty to respond to an applicant. Again, s. 8 requires a public body to tell an applicant whether or not access will be granted. Where access is refused, s. 8 also requires the public body to give the reasons for the refusal and the provisions of FIPPA on which the refusal is based. IBM says its request for review "is solely concerned with a portion of issue b) above, namely [IBM's] claim that s. 21 applies to parts of the requested records" (original emphasis).[4] The Ministry agrees with this contention.

[25] Supported by IBM, the Ministry characterizes its s. 24(1) decision to release some information over IBM's objections as a "preliminary" decision concerning access. It says that "[t]he decision with respect to third party severing is separate and distinct from the ultimate decision of the head" and that, at this juncture, "the applicant cannot make a complaint about the propriety of the s. 21 severing, as there has been no final decision made".[5] The Ministry says that it is only once IBM's requested review has been completed and an order has been made about the application of s. 21 to the severing in dispute between it and IBM that the Ministry will make a "final decision regarding the proposed severing of s. 21 (and ss. 15 and 17)".[6]

[26] The Ministry says it is this final decision that can, in turn, form the basis for an applicant-requested review. In the absence of any Ministry "final decision" and a request for review of that decision by the applicant, the commissioner has no jurisdiction—excluding consideration of the s. 21 severing in dispute between IBM and the Ministry in IBM's requested review—to make any decision or order respecting the Ministry's application of any of FIPPA's exceptions to the requested records. In the meantime, the Ministry need not release any of the requested records to the applicant, even if the Ministry does not believe any FIPPA exceptions apply to any or all of them. In principle, this means that

[4] IBM's October 25, 2007 letter to the Registrar, at p. 2.
[5] Ministry's October 19, 2007 letter to the Registrar, at para. 3.
[6] Ministry's October 17, 2007 letter to the Registrar, at para. 17.

records must in such cases stay where they are even if there is no basis in FIPPA to withhold them.

[27] In support of its position, the Ministry invokes the administrative law doctrine of prematurity considered in such cases as *Zellers Inc. v. Naser*[7] and *Ontario Human Rights Commission v. Ontario Teachers' Federation*.[8] The Ministry says this doctrine should be applied in this context so as to ensure that I "not engage in a review of the decision until it is final".[9] The Ministry elsewhere effectively characterizes its s. 21 decision as 'interlocutory' and its authority to respond to an access request as involving a continuing power. It refers in this regard to some federal immigration cases which explain how one goes about determining whether or not a decision is a 'final' one,[10] as well as to s. 27(3) of the *Interpretation Act*[11] and the interpretation placed on such a statutory provision in *Comeau's Sea Food Ltd. v. Canada (Minister of Fisheries and Oceans)*.[12]

[28] *Comeau's Sea Food* distinguished between a ministerial power to authorize the granting of a licence and the actual issuance of the licence. Relying on the federal equivalent of s. 27(3) of the *Interpretation Act*, the Supreme Court of Canada found that:

> 43 The power to issue the licence, once exercised in any single instance, is expended and may only be revised or revoked under the specific statutory conditions in s. 9. However, the power to authorize is a continuing power within the meaning of s. 31(3) of the *Interpretation Act*. I do not think that the authorization to issue the licence conferred upon the appellant an irrevocable legal right to a licence. Until the licence is issued, there is no licence and therefore no permission to do what is otherwise prohibited, namely fish for lobster in the offshore. Unless and until the licence is actually issued, the Minister in furtherance of government policy may re-evaluate or reconsider his initial decision to authorize the licence. Until the Minister actually issued the licence, he possessed a continuing power to reconsider his earlier decision to authorize and or issue the licence: *Reference Maritime Freight Rates Act*, [1933] S.C.R. 423.

[29] The Ministry also says courts have acknowledged that statutory requirements to report or finalize decisions, such as s. 8 of FIPPA, are strong indications of when a decision becomes finalized. The Ministry continues:

> 15. … In *Bowen v. Council of City of Edmonton* (1977), 2 Alta. L.R. (2d) 112, the Alberta Court of Appeal interpreted a thirty-day limitation on

[7] [2007] B.C.J. No. 353 (S.C.).
[8] [1994] O.J. No. 1585 (Ont. Div. Ct.).
[9] Ministry's October 19, 2007 letter to the Registrar, at para. 6.
[10] *Hinson v. Canada*, [1994] F.C.J. No. 1372, and *El Hayak v. Canada*, [2005] F.C.J. 1045.
[11] Section 27(3) provides: "If in an enactment a power is conferred or a duty imposed, the power may be exercised and the duty must be performed from time to time as occasion requires".
[12] [1997] 1 S.C.R. 12.

> a right to apply for leave to appeal a decision of the Development Appeal Board as not beginning to run until a decision in writing was communicated to the affected party. The Court did so on the basis that the *Planning Act* requires the Development Appeal Board to render its decision in writing within a certain time. Clement J. found that a decision is not "rendered" until the writing is communicated….

[30] The Ministry says the cases on which it relies support its contention that it has not made a final decision about access to the records the applicant has requested. The Ministry says these principles can be drawn from its cases:

- The decision regarding the proposed disclosure of some information in the records made following third-party consultations does not—and cannot in the face of a third party review—constitute a final written decision concerning access by an applicant which is reviewable under the Act. The decision with respect to third party severing is separate and distinct from the ultimate decision of the head. The proposed severing as it currently stands could be changed via the third party review process, and therefore cannot be a final decision as described in *Hinson*.

- A decision of the head is not finalized until the head communicates it to the applicant via the response procedure described in s. 8 of the Act, a procedure similar to the one described in *Bowen*, and necessary to protect an applicant's right of appeal where there is a statutory time deadline.

- A letter informing the applicant of a preliminary decision cannot be taken as final. The powers granted to the head under the Act are similar to that of the Minister in *Comeau's Sea Foods*. Until the decision of the head was finalized and communicated to the applicant head [sic] has the ability to modify that decision, especially in light of s. 27(3) of the *Interpretation Act*.[13]

[31] The outcome of this issue rests largely on interpretation of s. 7(6). There is some scope for interpreting that section, standing alone, so as to relieve a public body of its duty to respond to an access request pending the result of a third-party requested review. For the reasons given below, however, I have decided that, when ss. 7, 23 and 24 of FIPPA are read together harmoniously, and when s. 58 is also taken into account, the most sensible, reasonable and just interpretation of s. 7(6) is one that suspends the time to respond to an access request only to the extent that a response would nullify the ss. 23 and 24 notification and decision provisions and a third party's right of review under s. 52(2).

[32] Put another way, while IBM's review is pending, the Ministry could not release the parts of the requested records to which IBM has claimed s. 21 applies. On this interpretation, a public body would still be required to make

[13] Public Body's October 19, 2007 letter to the Registrar at para. 16.

a decision and provide a response to the applicant about application of other disclosure exceptions, such as ss. 15, 17 and 22. Even where a third party and public body disagree on s. 21 in part, such a response to the applicant would cover the application of s. 21 where both the public body and third party agree. In such a case, the public body would not release portions of the requested records that are the subject of a third-party notice and any third-party requested review. These decisions by the public body would trigger both the applicant's right to request a review under s. 52(1) and the third party's right to request a review under s. 52(2) so that, in the event reviews are sought by both, all of the issues relating to proposed severing or release could be dealt with in one inquiry.

[33] Analysis of this issue must begin by once more acknowledging a fundamental yet simple principle of statutory interpretation. It is well established that a statutory provision such as s. 7(6) should not be interpreted in isolation. Its words are to be read in their grammatical and ordinary sense, but they must also be considered and interpreted in their entire context, harmoniously with the statute's scheme and object, and the Legislature's intention.[14] Section 7(6) should therefore be considered, not just on its own, but within its context in s. 7 and having particular regard to ss. 23, 24, 57 and 58 of FIPPA. It should also in my view be considered in connection with s. 6, which places a positive duty on public bodies like the Ministry to "make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely". All of these provisions must be considered together, harmoniously if possible, in a sensible manner.

[34] If one accepts the interpretation of s. 7(6) advanced by the Ministry and IBM, a public body's obligation to respond to an access request is suspended pending any third-party review. Such a suspension of the public body's duty to respond regarding all disclosure exceptions does not protect any third-party interest served by the third-party notice or request for review processes. By contrast, it has possibly Draconian effects for the applicant and the right of access under FIPPA. For one thing, the applicant's right of access to information in the records that FIPPA does not except from disclosure is denied for a potentially extended period of time. For another, the applicant's right to request a review of the public body's application of other disclosure exceptions to the records cannot begin until the public body issues an access decision following the completion of the review process relating to the third party's request for such a review.

[35] Under this interpretation, a third party could make a request for review that is very broad, but which is later narrowed in mediation by this office, or because of submissions in an inquiry, to just a small amount of information, perhaps even a line or two. Yet even then, as the Ministry and IBM would have it, the public

[14] See, for example, *Re Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 37. Such an approach is also reflected in s. 8 of the *Interpretation Act*. Also see Order 02-38, [2002] O.I.P.C.D. No. 38, and Order F07-10, [2007] B.C.I.P.C.D. No. 15, among others, where this principle has been applied.

body could continue to deny the applicant a decision on other disclosure exceptions until the completion of the third-party review process. Such an interpretation is one that, in my view, runs contrary to the duties placed on public bodies under FIPPA to respond without delay, the specific timelines for responding to access requests and one of the paramount purposes of FIPPA, which is to give "the public" a right of access to records in order to make public bodies "more accountable to the public".

[36] In addition, s. 58 of FIPPA, which sets out the types of orders that must be made upon completion of an inquiry, contemplates that an inquiry into a public body's decision to give or refuse access to all or part of a record will conclude with an order under s. 58(2). But the orders listed in s. 58(2) are not in the least compatible with the bifurcated decision-making process advocated by the Ministry and IBM or with the notion that the Ministry's decision here is in some sense merely a "preliminary", not "final", decision.

[37] The Ministry has to some extent relied on the government's own policy and procedures manual[15] in support of its interpretation. As has been remarked many times before, that manual is not binding on this office, though it does cast some light on the government's views of its statutory duties under FIPPA.[16] The manual's commentary on s. 7 indicates that it allows public bodies to stop working on FIPPA requests when waiting for a ruling under s. 43 (whether it can ignore a high volume requester), s. 52(1) (review of a fee estimate or fee waiver decision), or s. 52(2) (third-party request for a review). The commentary on s. 24 suggests otherwise, however, in relation to third-party reviews. The manual suggests that the government sees s. 24 as calling for a decision on the release of records, but also for the actual release of records or parts of records that are unaffected by the third-party disclosure exception involved (*i.e.*, s. 21 or s. 22).[17] Policy 8(2) says this about s. 24:

> The applicant is not given access to any record or part of a record that is the subject of third party representations until the end of the 20 day period.

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[15] *Policy and Procedures Manual*, http://www.mser.gov.bc.ca/privacyaccess/manual/toc.htm.

[16] The Ministry is the ministry designated as being responsible for FIPPA and it publishes the policy and procedures manual.

[17] The manual is not up to date. While the manual's version of s. 7 has been revised to reflect 2002 amendments to that section, the accompanying policy statement does not reflect changes to ss. 7(5) and (6). (Nor does the manual reflect post-2002 changes to s. 10.) Before 2002, s. 7 was a short section that required a public body to respond to a request within 30 days unless there was a time extension under s. 10 or the access request was transferred under s. 11. The 2002 amendments added the phrase in s. 7(1) that makes the duty to respond in 30 days "[s]ubject to this section and to sections 23 and 24(1)". The amendments also added the s. 7 subsections that suspend the 30-day response time when the review processes are underway, including as set out in s. 7(6). They also repealed s. 10(1)(d), which read: "The head of a public body may extend the time for responding to a request for up to 30 days, or with the commissioner's permission, for a longer period if ... (d) a third party asks for a review under section 52(2) or 62(2)". The 2002 amendments made no changes to the third-party notice provisions.

> If the third party representations affect only some of the requested records, the public body releases the remainder of the records to the applicant.

[38] Further, policy 9 says this about s. 24:

> If the head has decided to give access to the record or part of the record, and the third party does request a review by the Commissioner, then the time limit for responding to the request is extended under paragraph 10(1)(d). The applicant is not given access to any record or part of a record that is the subject of the review until the review is completed. If the review affects only some of the requested records, the public body releases the remainder of the records to the applicant. The outcome of the review determines whether or not access is given to any records that are the subject of the review.

[39] The legislative history around the 2002 amendments to FIPPA, when viewed collectively, also suggests that the amendment to s. 7(6) was aimed at automatically suspending the response period under s. 7(6) in relation only to the release of the records or parts of records that are affected by the s. 21 or s. 22 third-party review.

[40] Returning to the statutory provisions, s. 7(6) applies to third-party reviews relating to either s. 21 (third-party business interests) or s. 22 (third-party personal privacy interests). Sections 23 and 24 are only triggered in respect of these two types of third-party interests. Section 24(1) requires a public body to "decide whether or not to give access to the record or part of the record". The implication of a decision about giving access or not is that it is about *all* disclosure exceptions which the public body intends to apply in order to deny access to all or part of the records, not just s. 21 or s. 22. That is, the public body will have decided that FIPPA disclosure exceptions do not apply to the identified records, such that access should be given to them. Section 24(3) reinforces this by saying that, if the public body has "decided to give access to the record or part of the record, the notice [under s. 24(2)] must state that the applicant will be given access unless the third party asks for a review."

[41] Section 7(6) is, as noted, triggered only when a third party requests a review. The decision to which s. 7(6) refers is the public body's decision under s. 24 to disclose information that the third party asserts should be withheld under s. 22 or s. 21. Setting aside applicant-initiated fee-related reviews under s. 7(5), the public body's s. 7(1) obligation to respond to an applicant is only limited by ss. 23 and 24 of FIPPA. The public body must, in other words, respond to an applicant by providing access to those parts of the requested records that are neither excepted from disclosure nor the subject of a third-party request for review flowing from the ss. 23 and 24 process. Put another way, the portion of the requested records to which the ss. 23 and 24 process applies is effectively carved out from the other responsive information until the third-party notice obligations are spent and, where a third-party review is requested, until mediation

resolves the issue or an order is made under s. 58 in respect of that review. In such a case, the public body is telling the third party that it has decided to release that information, but it cannot do so until these processes are spent without rendering ss. 23 and 24 meaningless.

[42] If a third party has received notice under s. 23 of the public body's decision to release information and does not request a review of that decision, that information is to be released after the period referred to in s. 24(1). This flows from s. 24(3).[18] If, however, the third party requests a review of the decision about that information, the public body cannot release it. Rather, it is the outcome of the third-party review that will determine whether some or all of that information must be withheld under either s. 21 or s. 22. This also flows from s. 24(3).

[43] Last, as a matter of statutory interpretation, I find that the Ministry's decision under s. 24 is not properly characterized, as the Ministry would have it, as "preliminary" or "interlocutory". The cases referred to by the Ministry to support its position are neither helpful nor on point. The third-party review in this case was triggered by the Ministry's s. 24 decision and notice of that decision to IBM and to the applicant. The language used in ss. 23 and 24 of FIPPA very clearly speaks to public body decisions, not preliminary decisions. The Ministry's decision on s. 21 will be reviewed in the inquiry that IBM, as a third party, has requested. Any order made in that review will be determinative[19] of whether the information that is in dispute as between the Ministry and IBM—which is only at issue because it is responsive to the applicant's access request—is properly released or withheld under s. 21. On this score, I note that decisions flowing from third-party reviews have been the subject of judicial review before. Examples include *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*,[20] and *Jill Schmidt Health Services Inc. v. British Columbia (Ministry of Attorney General) and British Columbia Nurses' Union*.[21] Depending on the outcome, the information will either be ordered released or withheld. It is not open to the Ministry at that stage to revisit its decision and "finalize" it, only then triggering an applicant's right to seek a review of that final decision.

[44] To summarize, I do not accept that the Legislature intended by its 2002 amendments to s. 7 to create a cumbersome staggered review process with, from the perspective of an applicant and the s. 2(1) purposes of FIPPA, denial of timely access to information that is not in issue in the third-party review and is not

[18] Section 23(3) provides that, if "the public body decides to give access to the record or to part of the record, the notice must state that the applicant will be given access unless the third party asks for a review under section 53 or 63 within 20 days after the day notice is given under subsection (2)".
[19] Subject, of course, to judicial review.
[20] [2002] B.C.J. No. 848, 2002 BCSC 603.
[21] [2001] B.C.J. No. 79, 2001 BCSC 101.

properly withheld under FIPPA exceptions. Nor did the Legislature intend by those amendments to create a review process that, from the perspective of FIPPA's administration, entails inefficiencies in the use of my office's limited resources. Nor can I think of any plausible policy reason for such an approach.

[45] Taking all of this into account, I am of the view that the best interpretation of s. 7(6) is that which limits that section's suspension of the response period for the access request to a stay of the subject-matter of the third-party review, without which the third party's right to request a review under s. 52(2) would be defeated before the review could be completed. This interpretation makes the most sense, is most compatible with the ss. 23 and 24 third-party notice provisions, best fits with FIPPA's emphasis on timely responses to access requests, and best fits with the various aspects of s. 58. For these reasons, I reject the interpretation of s. 7(6) that has been advanced by the Ministry and IBM. It follows that the Ministry's obligation to respond completely to the applicant's request must now be fulfilled.

[46] **3.3 Is the Applicant An Appropriate Person?**—As far as I am aware, this is the first time a public body—certainly, a ministry of the provincial government—has challenged the appropriateness of an access applicant's participation in a third-party review of a public body's decision respecting s. 21 to disclose information to that applicant.

[47] The implications of the Ministry's challenge are significant. Clearly, if an applicant is not allowed to participate in an inquiry flowing from a third-party review of a public body decision to disclose information, there will be no opportunity for the applicant to respond to the third party's submissions that responsive information must be withheld under s. 21. An access applicant would only have the opportunity to respond where the public body has withheld requested information under s. 21 and the applicant has requested a review of the Ministry's decision. In such a case, the third party is typically joined as an appropriate person under s. 54(b) and can if it wishes participate to oppose disclosure of information.

[48] The Ministry and IBM, citing the discretionary nature of s. 54(b), say the commissioner must, in relation to every inquiry, satisfy herself or himself that a particular applicant's rights are sufficiently affected to merit the giving of notice and the participatory rights that flow from it. They say applicants should not be automatically notified under s. 54(b) or even accorded participatory status simply because they wish to participate. They say this despite the fact that it is the applicant's access request that is the very subject of the third-party review that triggers the inquiry. The Ministry and IBM rely on the Court of Appeal's decision in *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*,[22] as well as s. 54 of FIPPA (which only requires notice of all

[22] [2004] B.C.J. No. 735, 2004 BCCA 210.

review requests to be given to the public body in question), and s. 56(3) (which lists those persons who must be given the opportunity to make representations at an inquiry (such as the public body), but does not specifically refer to an applicant.

[49] The Ministry argues that the absence of specific reference in ss. 54 and 56(3) signals a legislative intent to "avoid the unnecessary complication of the commissioner's administrative function in deciding on an issue not directly impacting on the applicant" and "divest the applicant of status as an interested party". The Ministry puts it this way:

> … – in other words, the participation of the complainant (i.e. in this case the Third Party) and of the public body concerned is sufficient. This is a similar interpretation to that taken by the Supreme Court of *Bibeault v. McCaffrey*, [1984] 1 SCR 176 … where the court was asked to determine whether the Quebec *Labour Code* recognized employees as "interested parties" at an investigation of the Labour Commissioner.[23]

[50] From this, the Ministry argues that ss. 54 and 56 should be interpreted in a way similar to that in *Bibeault*, with the result that these sections divest access applicants of the status of an interested party in third-party reviews. The Ministry also submits that the threshold for establishing whether notification to a person or organization is "appropriate" under s. 54(b) is whether "the interests of the person or organization are affected by the inquiry."[24] The Ministry suggests that an applicant must have personal privacy or personal financial interests that are affected before it s. 54(b) notice is appropriate.[25] The Ministry relies here on Order 01-52,[26] Decision F06-10 [27]and Ontario Order PO-2221-I.[28]

[51] I will say at once that the orders on which the Ministry relies do not support its position that only applicants whose personal privacy or personal financial interests are affected should receive notice under s. 54(b). Nor do they support the proposition that an applicant does not have a sufficient interest to attract a right to participate. Further, in Ontario Order PO-2221-I, the applicant was in fact a participant. Assistant Commissioner Mitchinson simply agreed with the applicant, who was seeking access to some videotapes, that it was not necessary for the public body involved to provide notice to media representatives depicted in the videos on the basis that what was depicted was not their personal information.[29]

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[23] Page 3, Ministry's submission.
[24] Page 7, Ministry's submission.
[25] Page 7, Ministry's submission.
[26] [2001] B.C.I.P.C.D. No. 55.
[27] [2006] B.C.I.P.C.D. No. 34.
[28] [2003] O.I.P.C. No. 281.
[29] I also note, in passing, that Ontario's equivalent of s. 54(b), s. 50(3) of the Ontario *Freedom of Information and Protection of Privacy Act*, explicitly provides that, where a notice of appeal is filed with the commissioner, the commissioner must give notice to the head of the institution

[52] The Ministry goes on to argue that,

> …[w]hile the Commissioner's decision on the contested s. 21 severing will be eventually reflected in the record released to the applicant, it is the third party's right to have information withheld under s. 21 which formed the request for review. Put another way, the Ministry submits that the parties should reflect the scope of issues.

[53] The Ministry says that its interpretation of s. 54(b) does not prejudice the applicant's interests in this inquiry because the applicant can request a review of "the s. 21 severing" after the Ministry has made its "final decision" under s. 8 of FIPPA. At that juncture, the Ministry says, the applicant "would have at least seen portions of the contract, leaving [the applicant] in a far better position to evaluate the severing and make argument" (unless of course the information in issue has been found to have been properly withheld). The Ministry also says that, at this stage, the applicant can bring any evidence it might have "that s. 21 was not properly applied to the attention of the Commissioner at that time".

[54] IBM generally agrees with the Ministry's submission. It says the applicant is entitled to be notified of IBM's request for review, but the purpose of this is just "to make the Applicant aware that there will be what can be termed further 'internal delay' in the processing of its request for information." IBM maintains the applicant is otherwise "without standing" to participate.

[55] IBM also makes a technical argument that s. 56(3) is not engaged because the applicant was only notified of the review, as distinct from being provided with the actual review request itself. This argument can readily be dismissed. The October 3, 2007 notification letter that this office's Registrar of Inquiries sent to the applicant attached four documents, one of which was a severed copy of IBM's request for review. IBM's technical argument has no merit on this basis alone.

[56] IBM also characterizes the focus of the third-party review to be "a bipolar, rather than a polycentric dispute" that does not involve the applicant.[30] It says that,

> ...[e]ven if it is conceivable that in other circumstances an Applicant might be able to play some role in such an inquiry, the benefits of allowing this to happen are simply outweighed by the risks and there can be no reason to impose this uncertainty upon the Third Party [IBM] in the present case.[31]

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concerned and may also inform any other institution or person with an "interest in the appeal". This language is very different from that of s. 54(b).

[30] Page 3, IBM's submission.

[31] Page 3, IBM's submission.

[57] IBM does not particularize the "risks" that it says the applicant's participation would create. IBM maintains that an interpretation of s. 54(b) that would essentially limit applicant participation in third-party reviews and inquiries to exceptional circumstances would not leave that provision "devoid of any meaning". It explains this contention by referring to the following example:

> …For example, the records a third party seeks to have a public body withhold may contain the trade secrets of a "fourth party". Alternatively, a third party may have provided a fourth party's technical information to a public body in confidence, but may only be asking the Commissioner to order the public body to withhold its own information and not that of the fourth party.
>
> If the Commissioner were to learn of the fourth party's interest in the course of a review requested by the third party, it would likely be appropriate for the Commissioner to provide the fourth party with a copy of the third party's request and, by s. 54(b) and s. 56(3), give the fourth party standing to make representations in any inquiry. The fourth party's interests in respect of such a s. 21 review and inquiry are clearly distinguishable from those of an applicant. The fourth party's statutory rights are being directly engaged, while an applicant's essential FIPPA rights – to be given access to information except as otherwise prohibited or exempted and to appeal a public body's disclosure decisions to the Commissioner – are, it is submitted, not engaged at all.[32]

[58] IBM's example does not advance its argument. If a requested record contains information the disclosure of which may be harmful to the s. 21 interests of more than one person, and if the public body proposes to disclose that information, each of those persons is a third party. There would be no "fourth party". There would be multiple third parties. Schedule 1 to FIPPA defines "third party" as "any person, group of persons or organization other than" the public body and the person who made the request. In legislation, the singular includes the plural.[33] FIPPA's definition of "third party" accommodates the existence of more than one third party in a given case. This situation arises, for example, in relation to requests for access to third-party personal information. It is not unusual at all for a single access request to cover records containing the personal information of multiple individuals, each of whom is, for s. 22 purposes, a third party, not a fourth, fifth, sixth, or whatever, party.

[59] IBM also refers to a well-known text on Canadian access and privacy law, where the authors discuss the third-party notification process generally in Canadian information and privacy law and remark that notice to a requester "is not designed to invite representations from the requester as to why the

[32] Page 5, IBM's submission.
[33] *Interpretation Act*, s. 28(3).

information, which is subject to the request, should be disclosed".[34] The authors go on to describe the making of representations in a third-party review context to be "a one-sided affair".[35] These observations refer to the stage at which a third party is notified, under provisions such as s. 23 of FIPPA, and makes representations to the public body before the public body decides whether or not to give access to information. They do not deal with whether an applicant should be or is entitled to participate in an inquiry flowing from a third party's review request under s. 52(2).

[60] I agree that, at the s. 23 notification stage, the making of third-party representations "is a one-sided affair", in the sense that the right to be heard by the public body is, "at this stage, exclusively for the benefit of the third party". This is clearly reflected in s. 23(3)(c), which requires the third party to be notified of its right "to make representations". Section 23(4) also reflects this. That is quite a different thing, however, from excluding an applicant from a resulting inquiry, one triggered by a public body's s. 24 decision to disclose third-party information after considering the third party's representations.

[61] IBM expresses concern that the applicant's participation in the inquiry would be procedurally prejudicial to the applicant because it would have to make its submissions "blind to the facts" without the benefit of knowing—unlike IBM and the Ministry—"what the requested redaction would contain", a situation which is described as creating unspecified "risks".[36] Applicants face this in any inquiry where information has been withheld under a FIPPA exception and the inquiry stems from an applicant's request for review of the decision to withhold information.

[62] Nor do I see how, as IBM asserts, it would be "extremely prejudicial" or "unfair" for IBM "to be required to fight against both a Ministry and another party in such third party proceedings".[37] IBM does not particularize the "prejudice" it would allegedly suffer, much less how it would be "extremely" to IBM's prejudice. It is not in the least unusual for applicants to have to meet arguments in favour of non-disclosure advanced by more than one participant, including where a third party such as IBM participates in an inquiry as an "appropriate person". Certainly, litigants in civil proceedings must sometimes face off against more than one opponent and I fail to see how doing so here would "prejudice" IBM or be "unfair" to it.

[63] IBM argues, and I agree, that whether the applicant is an "appropriate" person for s. 54(b) purposes is ultimately a question of statutory interpretation. IBM reviews at some length the common law principles governing standing,

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[34] C. McNairn and C. Woodbury, *Government Information: Access and Privacy* (Carswell: Toronto, 1992 (current)), at p. 4-23.
[35]. *Government Information: Access and Privacy*, above, at p. 4-21.
[36] Page 11, IBM submission.
[37] Page 11, IBM submission.

including public interest standing, but they are of limited, if any, assistance in interpreting the language of s. 54(b). For similar reasons, it is not necessary for me to consider the Ministry's submissions about whether the applicant should participate in the third-party inquiry as an intervener. In any event, even if these common law principles do inform interpretation of s. 54(b), my view is that the kinds of factors identified at common law would lend support to an applicant's participation in a third-party inquiry. In saying this, I have in mind factors such as the desire to avoid multiplicity of proceedings and meeting the needs of the adversarial system.

[64] Many of the arguments made by the Ministry and IBM are based on an interpretation of FIPPA's provisions that I have already rejected. Moreover, in relation to the argument that the applicant will be disadvantaged in the third-party inquiry because it will not be able to see any of the requested records in order to make its submissions, my interpretation of s. 7 is that the applicant should already have in its possession some of the responsive information.

[65] Turning to the discretionary nature of s. 54(b), it is important to recognize that *Guide Outfitters* involved the application of s. 54(b) to an organization that was neither an access applicant nor a third party within the meaning of FIPPA. The organization wanted to participate in the inquiry in order to support the Ministry's decision to withhold information under s. 18 of FIPPA and it argued that to deny it that opportunity amounted to a breach of the rules of natural justice. I had held that the organization did not have a sufficient interest to warrant its participation and that it is not tenable for every person who is interested generally in the outcome of an inquiry to be permitted to participate. The Court of Appeal, in upholding my decision, found that s. 54(b) was expressed in general terms and afforded "a fair measure of discretion to the Commissioner".[38] As the Ministry points out in this case, the Court went on say that this requires the commissioner to "engage in a process of consideration and analysis to reach an informed decision on such an issue" and that use of the phrase "that the commissioner considers appropriate" in s. 54(b) is "an indication that the Commissioner is to exercise his judgment as to who might reasonably be thought to be affected by his decision".[39]

[66] The Ministry and IBM challenge routine s. 54(b) notice to applicants of third-party reviews or inquiries as an inappropriate fettering of discretion. I have carefully considered their arguments, but can think of no circumstance in which an access applicant's rights would not be affected by exclusion from the third-party review process triggered by, and relating to, information that responds to the applicant's access request. The interpretation advanced by the Ministry and IBM, excluding as it does the participation of the applicant, is one that results in procedural unfairness. Further, in light of my conclusion that the Ministry's s. 24 decision is a final one, the s. 52(1) review process would not afford another

[38] Para. 29.
[39] Para. 29.

way for the applicant to be heard later as to the application of s. 21 to the records at issue in the third-party review. The effect of any order made in that review, relating as it would to information that is only at issue because it responds to the applicant's access request, is such that there will be nothing for the applicant to be heard about later.

[67] In addition, the exclusion of applicants from third-party reviews unless the applicant's *own* financial information or personal privacy interests are at stake—the Ministry's position—flies in the face of the burden of proof in s. 57(2). Section 57(2) provides that, in cases involving third-party personal information, "it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy". In other words, if a third-party individual requests a review of a public body's decision to disclose her or his personal information, the burden of demonstrating it should be released rests squarely on the access applicant. The Ministry's interpretation of s. 54(b) would preclude the applicant from participating, even though s. 57(2) explicitly places the burden of proof on the applicant in that very same inquiry.

[68] For the reasons above, I conclude that the applicant is an appropriate person for s. 54(b) purposes, such that it may participate in the review requested by IBM.

4.0 CONCLUSION

[69] For ease of reference, my conclusions on the issues raised by the Ministry and IBM can be summarized as follows:

1. Section 7(6) of FIPPA suspends the time for the Ministry to respond to the applicant's access request only insofar as such a response would nullify the operation of ss. 23 and 24 of FIPPA. In this case, this means that the Ministry's time to respond to the applicant is only limited by IBM's third-party review under s. 52(2), such that the Ministry cannot release the parts of the requested records which IBM contends are protected under s. 21, pending an order made under s. 58;

2. The Ministry was required to respond to the applicant's access request under s. 7(1) of FIPPA within 30 days of receiving the request, subject to any extension referred to in s. 7(2) and subject to its decision under s. 24. Based on its interpretation of s. 7(6), which I have now rejected, the Ministry did not do this. To the extent the Ministry proposes to withhold information under FIPPA exceptions (including s. 21 in relation to information in the records that is not the subject of IBM's third-party request for review), it must identify those exceptions under s. 8 and give reasons for its decision, also as required by s. 8. The Ministry is, however, precluded from releasing any of the information that is the

subject of a third-party review absent a s. 58 order to do so made in that review;

3. The issue in IBM's review is whether the Ministry must refuse to disclose, under s. 21, the parts of the responsive records that IBM argues are excepted from disclosure by that section;

4. The applicant is an "appropriate person" to be notified under s. 54(b) in relation to IBM's review; and

5. IBM is not prejudiced by the applicant's participation in the review.

[69] It remains for me to consider how IBM's review should proceed in light of my second finding above. As I noted at the outset, it appears the Ministry has already identified which parts of the requested records it considers are excepted from disclosure under one or more of FIPPA's other exceptions. In this light, I see no reason why the portions of the information in the requested records that are not at issue in IBM's review and that are not severed and withheld by the Ministry cannot be provided to the applicant promptly. I therefore direct the Ministry to provide the applicant with its s. 8 response within 20 days, as defined in FIPPA, after the date of this decision.

[70] Consistent with my findings, IBM's third-party review will proceed after the Ministry provides its response as just directed and after expiry of the time set out in s. 53(2)(a) for the applicant to request a review. If the applicant decides to request a review of the Ministry's response, I will then consider whether to dispense with mediation under s. 55 so that all issues relating to the requested records can be considered at the same time.

July 24, 2008

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

OIPC File: F05-25186