IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Information and Privacy Commissioner) v. British Columbia (Police Complaint Commissioner)*, 2015 BCSC 1538

Date: 20150828
Docket: 15-0566
Registry: Victoria

Between:

The Information and Privacy Commissioner of British Columbia

Petitioner

And

The Police Complaint Commissioner of British Columbia

Respondent

Before: The Honourable Associate Chief Justice Cullen

Reasons for Judgment

Counsel for the Petitioner:	John D. Waddell, Q.C.
Counsel for the Respondent:	Mark G. Underhill
Place and Date of Hearing:	Victoria, B.C. June 29, 2015
Place and Date of Judgment:	Victoria, B.C. August 28, 2015

INTRODUCTION

[1] Both the Information and Privacy Commissioner of British Columbia (the "Commissioner") and the Police Complaint Commissioner of British Columbia ("PCC") are officers of the Legislature. Each office fulfills a significant role in ensuring that the public's confidence in the public institutions and bodies over which they exercise their authority and

responsibility is rewarded. In the case of the Commissioner, her role is to make public bodies more accountable to the public and to protect personal privacy. In the case of the PCC, his role is to provide important civilian oversight of complaints made by members of the public against municipal police.

[2] The enabling statute for the Commissioner is the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA*"). The enabling statute for the PCC is the *Police Act*, R.S.B.C. 1996, c. 367 (the "*Police Act*").

[3] This case raises the question whether the PCC or the Commissioner has the ultimate authority, subject only to judicial review, to determine whether certain records in the possession and control of the PCC fall within the jurisdiction of the Commissioner under her enabling legislation.

[4] The impasse between the two officers of the Legislature arises out of several provisions of their respective enabling statutes, sections 3(1)(c) and 44 of *FIPPA* and s. 182 of the *Police Act*. The PCC accepts that the Commissioner has jurisdiction over some records in the possession and control of the PCC, but in relation to other records in its control (the "Substantive Records") the PCC asserts that the Commissioner lacks the authority to even screen the records to determine whether they fall within the Commissioner's jurisdiction. The PCC says the Commissioner must rely on the PCC's characterization of the Substantive Records to make a screening determination.

[5] The relevant sections of *FIPPA* read as follows:

> 3 (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:
>
> ...
>
> (c) subject to subsection (3), a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;
>
> ...
>
> 44(1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:
>
> ...
>
> (b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.
>
> (2)The commissioner may apply to the Supreme Court for an order
>
> (a) directing a person to comply with an order made under subsection (1), or
>
> (b) directing any directors and officers of a person to cause the person to comply with an order made under subsection (1).

...

(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).

...

[6] The relevant section of the *Police Act* reads as follows:

182 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

(a) any record of a complaint concerning the conduct of a member that is made, submitted, registered or processed under this Part,

(b) any record related to a record described in paragraph (a), including, without limitation, any record related to a public hearing or review on the record in respect of the matter,

(c) any information or report in respect of which an investigation is initiated under this Part, or

(d) any record related to information or a report described in paragraph (c), including, without limitation, any record related to a public hearing or review on the record in respect of the matter,

whether that record, information or report is created on or after a complaint is made, submitted or registered or the investigation is initiated, as the case may be.

[7] The relief sought by the petitioner is set out in paragraphs 1 and 2 of Part 1 of the petition, which read as follows:

1. That the Respondent produce to the Information and Privacy Commissioner ("Petitioner/Commissioner") in an inquiry between an Applicant and the Office of the Police Complaint Commissioner ("OPCC") - Office of the Information and Privacy Commissioner ("OPIC") File No. F12-51784, copies of the following records:
   a. An expert opinion on use of force written by Dr. Lewinski and commissioned by the Vancouver Police Department ("VPD") and provided to the Respondent in the context of OPCC Complaint 2007-3854T;
   b. A supplemental expert opinion written by Dr. Lewinski and commissioned by the Respondent in the course of OPCC Complaint 2007-3854T; and
   c. Written correspondence between the Police Complaint Commissioner ("PCC"), his delegates and Dr. Lewinski which were created in the course of reviewing and commissioning Dr. Lewinski's expert opinions pursuant to section 44(3) of the *Freedom of Information and Privacy Act*, RSBC 1996, c. 165.
2. Such further and other relief as this Honourable Court may deem just.

FACTUAL BACKGROUND

[8] The factual background of this application is set out in the respondent's written argument, paragraphs 6 to 29, which reads as follows:

1. The OPCC Complaint

6. On the evening of August 13, 2007, Mr. Paul Boyd was shot and killed by Constable Chipperfield, a member of the Vancouver Police Department ("VPD"), following an altercation involving Mr. Boyd and several members of the VPD.

7. The VPD notified the OPCC of the shooting and on August 14, 2007, OPCC file 2007- 3854 was opened for the purpose of monitoring the VPD investigation into the shooting of Mr. Boyd.

8. On September 28, 2007, the OPCC received a Form 1 complaint from British Columbia Civil Liberties Association ("BCCLA") Executive Director Murray Mollard, which alleged that the VPD officer(s) failed to meet appropriate professional standards in discharging their duty of care to Mr. Boyd (the "Complaint"). At that time, OPCC Monitor file 2007-3854 was transitioned into the OPCC 2007-3854T *Police Act* file. The "T" connotes a transitional file as it occurred under the previous legislation which was in place prior to March 31, 2010.

9. The OPCC forwarded the Complaint to the VPD and a Professional Standards investigator was appointed by the VPD, pursuant to the provisions of the *Police Act*.

10. The VPD's Major Crime Section conducted a parallel criminal investigation.

11. The OPCC has in its custody and control:

a. an expert opinion on use of force written by Dr. Lewinski and commissioned by the VPD and which the VPD provided to the OPCC and which influenced decisions made by the Police Complaint Commissioner ("PCC") in the course of the OPCC exercising its police discipline oversight powers and gatekeeping duties under the *Police Act* in OPCC Complaint 2007-3854T ("the Lewinski Report");

b. a supplemental expert opinion on use of force written by Dr. Lewinski and commissioned by the OPCC in the course of the OPCC exercising its police discipline oversight powers and gatekeeping duties under the *Police Act* in OPCC Complaint 2007-3854T (the "Supplemental Report"); and

c. written correspondence between Dr. Lewinski and Crown Counsel, which was created in the course of the criminal investigation into the August 13, 2007 shooting, and which reveals the substance of the Lewinski Report (the "Lewinski Emails").

12. On November 9, 2009, the Criminal Justice Branch announced that no charges would be laid against Constable Chipperfield.

13. On February 26, 2010, a Final Investigation Report was filed with the Discipline Authority, Inspector Mario Giardini, Professional Standards Section and the OPCC, concluding that there was insufficient evidence to support the substantiation of any disciplinary default under the *Police Act*. The Discipline Authority agreed with the conclusion of the Final Investigation Report, and his decision was submitted to the OPCC and to the BCCLA on March 10, 2010.

14. The OPCC reserved its final review and decision on the Complaint until the completion of the Coroner's inquest into this matter, scheduled for December 10, 2010 (the "Coroner's Inquest").

15. On March 16, 2012, the OPCC issued his final report and conclusions, concluding that there was no reasonable basis to believe that the decision of the Discipline Authority was incorrect, and concluded the Complaint. The OPCC's final

decision was published and posted on the OPCC's website immediately following its March 16, 2012 release.

2. The FOI Request and OIPC Inquiry

16. On October 1, 2012 a journalist with the CBC, Mr. Kurt Petrovich ("Petrovich") requested from the OPCC: "all records related to police psychologist Bill Lewinski held by the Office of the Police Complaint Commissioner, between September 1, 2011 and October 1, 2012."

17. On November 9, 2012, the OPCC responded to Petrovich's request and informed Petrovich that it was withholding all responsive records under section 182 of the *Police Act*. However, in response to Petrovich's access request, the OPCC created a record that included the total amount of money paid to Dr. Lewinski and provided Petrovich with a copy of that record.

18. On December 21, 2012, the OIPC received a request by Petrovich for a review of the OPCC's decision to withhold the records.

19. In or about July, 2013, the parties attended mediation, and as a result of that mediation, on July 12, 2013, the OPCC provided Petrovich with an amended response. In particular, the OPCC released 44 pages of records to Petrovich, redacted in accordance with ss. 17(l)(f), 21(1) and 22(1) of the *FIPPA*. The OPCC continued to maintain that some responsive records could not be disclosed pursuant to section 182 of the *Police Act* and s. 3(1)(c) of the *FIPPA*, and withheld those records accordingly.

20. Despite the further disclosure by the OPCC, Petrovich decided to proceed with requesting an inquiry, and on October 8, 2013, the OPCC was served with a Notice of Written Inquiry by the OIPC.

21. In its initial written submissions dated November 5, 2013, counsel for the OPCC advised the OIPC that in addition to the records withheld under sections 17, 21, and 22, the OPCC had records that were responsive to Petrovich's request that were "records created by or for, or that are in the custody or control of the OPCC and that relate to the exercise of the OPCC's functions under the *Police Act*." The initial submissions then went on to describe the Lewinski Report, the Supplemental Report, and the Lewinski Emails (together, the "Substantive Records").

22. The OPCC's initial submissions made explicit reference to OPCC Complaint 2007- 3845T in relation to the Substantive Records.

23. The November 5, 2013 initial submissions stated that the Substantive Records were working papers and case-specific records received or created in the course of the OPCC processing a Police Act complaint or considering taking action in the case. The submissions further stated that the Substantive Records were created by the OPCC, his delegates, or a retained consultant.

24. In addition, the OPCC filed an affidavit of the Deputy Police Complaint Commissioner, Mr. Rollie Woods, in which Mr. Woods described the Substantive Records, again with specific reference to OPCC Complaint 2007-3845T.

25. In its reply submissions, dated November 19, 2013, counsel for the OPCC advised the OIPC adjudicator, *inter alia*:

> The PCC reiterates that the Act does not apply to the Complaint 2007-3854T Substantive Records as they are working papers and case-specific records received or created in the course of the PCC processing a P*olice Act* complaint or considering taking action in the case. The records were created by the PCC, his delegates or a retained consultant. Further, none of the

Complaint 2007-3854T Substantive Records relate to the exceptions to this class exclusion from the Act in section 3(3).

26. On or about August 14, 2014, OIPC Registrar Cindy Hamilton contacted counsel for the OPCC, and requested unredacted copies of the 44 pages of documents redacted by the OPCC in accordance with ss. 17(1)(f), 21(1) and 22(1) of the *FIPPA*. The unredacted documents were provided to Registrar Hamilton by email dated August 15, 2014. On or about August 22, 2014, Registrar Hamilton again contacted counsel for the OPCC, and requested the Substantive Records.

27. By letter dated September 2, 2014, counsel for the OPCC advised Registrar Hamilton that the Substantive Records fall outside the scope of the *FIPPA*, and accordingly did not need to be produced to the OIPC (and noted that an adequate description of the documents had been provided).

28. By letter dated September 16, 2014, OIPC Adjudicator Ross Alexander ordered production of the Substantive Records pursuant to subsection 44(3) of the *FIPPA*.

29. By letter dated September 25, 2014, counsel for the OPCC advised Registrar Hamilton that the OPCC continued to take the position that the documents would not be produced, and that sufficient detail as to the nature of the Substantive Records had been provided.

[Exhibit references omitted.]

[9] The adjudicator's letter dated September 16, 2014, reads as follows:

Dear Mr. Underhill:

Inquiry between an Applicant and the Office of the police Complaint Commissioner ("OPCC")—OIPC File No.: F12-51784 — Your File No.: 10546

I write in response to your letter dated September 2, 2014 stating that the OPCC will not provide the records at issue in this inquiry.

The OIPC's function in this inquiry is to provide an independent review of the OPCC's decision to withhold responsive records from the applicant arising from his request for records under the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

An integral part of the OIPC's independent review is to review the records in dispute at inquiry. This step assures the applicant that the Commissioner or adjudicator (as the case may be) makes an independent decision rather than relying on the public body's characterization of the records. This is particularly important for many applicants since many applicants view themselves as adverse in interest to the public body.[1]

Given this and an absence of evidence suggesting that producing the records in dispute to the 01 PC will prejudice the OPCC, under the authority delegated to me by the Information and Privacy Commissioner, I order that the OPCC produce to the Commissioner unsevered copies of the records at issue in this inquiry pursuant to s. 44(1) of FIPPA. Pursuant to s. 44(3) of FIPPA, the OPCC must produce copies of the records within 10 days, despite any other enactment or any privilege of the law of evidence.

Please send the records to the attention of OIPC Registrar Cindy Hamilton.

Yours sincerely,

Ross Alexander Adjudicator

[1] I observe that the Ontario Court of Appeal determined in *Ontario (Minister of Health) v. Big Canoe*, 1995 CarswellOnt 3311 that records can be compelled under Ontario's equivalent of s. 44 of FIPPA for inquiries relating to whether those records are within the jurisdiction of FIPPA.

[10] The September 25, 2014, letter sent by counsel for the PCC reads as follows:

Dear Registrar Hamilton:

Re: Notice of Inquiry - OIPC File F12-51784

We are in receipt of Adjudicator Alexander's Order dated September 16, 2014 in the above- noted Inquiry (the "Order").

The Order purports to require production of copies of the responsive records that were withheld on the basis of s. 182 of the *Police Act*, RSBC 1996, c. 367 and s. 3(1)f) of the Freedom of Information and Protection of Privacy Act ("FIPPA").

As previously set out in our letter of September 2, 2014, the OPCC takes the position that it is not required to produce the records in question, but rather must simply provide sufficient detail of the records in order for the adjudicator to make the determination that the records fall outside the scope of the FIPPA.

It is our view that the OPCC's initial submissions in this matter, supported by the Affidavit of Rollie Woods, sworn November 5, 2013, provide more than sufficient detail of the nature of the impugned records, such that Adjudicator Alexander is able to determine whether they fall within or outside the jurisdiction of the FIPPA. In that regard, we note that the Adjudicator has not provided any basis for concluding that the description provided by the OPCC is inadequate, such that he cannot make a proper determination under the legislation.

In our opinion, section 182 of the *Police Act*, when read together with section 3(1)(c) of the FIPPA, provide that the FIPPA, including section 44, does not apply to the OPCC's operational records. As Commissioner Loukidelis held in Order 03-06; Vancouver (City) Police Department, [2003] BCIPCD No. 6, in relation to the precursor of section 182:

> [25] Section 66.1 of the *Police Act*, by excluding certain records from the Act's application, complements s.3(1)(c) of the Act by ousting the Act's operation respecting certain complaint-related records in the custody or under the control of another public body...

While section 44(3) of the FIPPA does provide that section 44(1) applies despite any enactment, by use of the broad exclusory language in section 182 of the *Police Act*, the legislature has expressly indicated that the OPCC's operational records fall completely outside the purview of the FIPPA. This type of production order would frustrate the legislative intent expressed in section 182. For this reason, the decision of the Ontario Court of Appeal in Ontario *(Minister of Health) v. Holly Big Canoe*, [1994] OJ. No. 4609, affd 1995 CanLII 512 (ON CA) is distinguishable.

Notably, the language of section 182 stands in contrast with the Legislature's choice of language in many other legislative schemes in British Columbia, which provide that the FIPPA does not apply to various records, except for section 44 of the FIPPA (see, for example, the *Coroners Act*, SBC 2007, c. 15, s. 64(2), the *Securities Act*, RSBC 1996, c. 418, s.148; the *Public Inquiry Act*, S.B.C. 2007, c. 9, s. 26; *Family Law Act*, S.B.C. 2011, c. 25, s. 243; *Statistics Act*, R.S.B.C. 1996, c. 439, s. 9(2); *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 75(2). See also the *Health Professions Act*, RSBC 1996, c. 182, s. 50.64; the *Human Rights Code*, RSBC 1996, c. 210, s. 32; and

> the *Labour Relations* Code, RSBC 1996, c. 244, s. 115.1, which incorporate by reference section 61 of the *Administrative Tribunals Act*, SBC 2004 c. 45). Simply put, had the legislature wanted Section 44(3) to apply to the operational records of the OPCC, it could have said so in the *Police Act* as it has done in many other enactments.
>
> Further, we also note that the *Police Act* has express confidentiality provisions prohibiting the Commissioner and his staff from divulging or disclosing any information or records that are received in the course of exercising their duties under the *Police Act* (see, for example, sections 49.1, 51.01 and 95). This is consistent with the doctrine of deliberative secrecy, the compromise of which could cause substantial prejudice.
>
> Finally, the exclusion of the OPCC's operational records from the jurisdiction of the OIPC, including any orders made pursuant to section 44 of FIPPA, is consistent with the purposes of Parts IX and XI of the *Police Act*, namely, the establishment of an independent Officer of the Legislature to ensure that misconduct on the part of the police is appropriately dealt with in the public interest and in accordance with the *Police Act*.
>
> In sum, we are of the view that the Adjudicator has no jurisdiction to issue the Order, and a copy of the requested records will not be provided.
>
> Underhill, Boies Parker Law Corporation Inc.
>
> Mark G. Underhill

[11] The Substantive Records at issue were described in a letter written by the then counsel for the PCC, dated November 5, 2013, at page 5 as follows:

> a) an expert opinion on use of force written by Dr. Lewinski and commissioned by the Vancouver Police Department ("VPD") and which the VPD provided to the PCC and which influenced decisions made by the PCC in the course of the PCC exercising his police discipline oversight powers and gatekeeping duties under the *Police Act* in OPCC Complaint 2007-3854T [see, for example the *Police Act* - particularly in this type of case - sections 96, 97 98, and 117, but also sections 82, 92,93, 108, 109, 111, and 120];
>
> b) a supplemental expert opinion written by Dr. Lewinski and commissioned by the PCC in the course of the PCC exercising his police discipline oversight powers and gatekeeping duties under the *Police Act* in OPCC Complaint 20G7-3854T [see, for example- the *Police Act* - particularly in this type of case - sections 51(3), 96, 97, and 117]; and
>
> c) written correspondence between the PCC, his delegates and Dr. Lewinski which were created in the course of reviewing Dr. Lewinski's first expert opinion and in commissioning Dr. Lewinski's supplemental expert opinion, all of which would reveal the substance of the written expert opinions and the facts from a coroner's inquest that Dr. Lewinski was asked to consider in his supplemental expert opinion.

THE ISSUE

[12] The PCC concedes the Commissioner has the jurisdiction to consider whether the Substantive Records are included in or excluded from the scope of *FIPPA*. However, the

PCC denies it is within her jurisdiction to order production of the Substantive Records for inspection to enable that determination to take place.

[13] The PCC submits that the seeming incongruity of his position is justified by the statutory language of the relevant provisions of *FIPPA* and the *Police Act*, the principles of statutory interpretation, and case law interpreting analogous statutory provisions. The PCC points out that the language of both s. 3(1)(c) of *FIPPA* and s. 182 of the *Police Act* is sweeping. In particular, s. 182 of the *Police Act* excludes categories of records from the scope of *FIPPA* without creating an exception for the provision of s. 44(1)(b). Other Acts which exclude categories of records from the scope of *FIPPA* expressly exempt s. 44(1)(b) from those exclusions. The PCC takes the position that the absence of an exemption, either in s. 3(1)(c) of *FIPPA* or s. 182 of the *Police Act* for s. 44(1)(b) means that excluded records in the possession or control of the PCC are excluded for all purposes, including their inspection to enable a determination of their character.

[14] As such, the PCC submits they are not akin to records which fall within the scope of *FIPPA* but are exempted from the operation of the *Act* due to their status (such as being subject to solicitor/client privilege). Those latter records are subject to the processes in *FIPPA* which determine whether they are disclosable and accordingly can be ordered to be produced for inspection under s. 44(1)(b). On the other hand, the PCC submits records not within the scope of *FIPPA* are untouchable in their entirety.

THE POSITIONS OF THE PARTIES

The Position of the Petitioner

[15] The petitioner challenges the position put forth by the PCC. The challenge rests on the purposes of *FIPPA* as set out in s. 2(1) which include:

> **2** (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> ...
>
> (e) providing for an independent review of decisions made under this Act.

[16] The Commissioner contends that this statutory goal creates a duty for the Commissioner to ensure public bodies are only withholding documents as outlined in the legislation.

[17] With respect to documents excluded by s. 3(1)(c) of *FIPPA*, the Commissioner notes that a distinction has been drawn consistently between "operational needs" which relate to

the exercise of "an officer's function under the *Act*" and administrative records which do not: *Order F07-07: Elections British Columbia (Re)*, 2007 CanLII 10862 (B.C.I.P.C.). In his legal argument, counsel for the Commissioner referred to operational records as being "exempted from *FIPPA* under s. 3(1)(c)".

[18] The Commissioner says that if the PCC's position is sustained it will diminish the role of the Commissioner and hinder her from fulfilling the objects of *FIPPA*. The petitioner notes that she can review decisions by public bodies and can conduct an inquiry under s. 56 of *FIPPA* to decide all questions of fact and law arising in the course of an inquiry. She also notes that s. 57(1) of *FIPPA* provides:

> **57** (1) At an inquiry into a decision to refuse an applicant access to all or part of the record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part.

[19] The Commissioner submits it is untenable with *FIPPA* to effectively leave the decision over disclosure of documents in the hands of the public body where the applicants for the record are often adverse in interest to the body declining their application. The petitioner submits as a matter of policy there should be the opportunity for a confidential review of the documents which the public body says are outside the scope of *FIPPA*. This, she submits, creates no prejudice to the respondent, who retains the ability to seek a judicial review of any decision which runs counter to its position, or to submit that the documents are otherwise subject to exceptions created by the *Act*.

[20] The petitioner relies on several decisions as supporting the "general oversight ability" of the Commissioner as cogent authorities with respect to the issue in the present case.

[21] In *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427, at paras. 42 and 48 the court followed a decision of the Newfoundland Court of Appeal in *Newfoundland and Labrador (Attorney General) v. Newfoundland (Information and Privacy Commissioner)*, 2011 NLCA 69 [*Newfoundland 2011*], which held that s. 52 of the *Access to Information and Protection of Privacy Act*, S.N.L. 2002 c. A-1.1 ("*ATIPPA*"), authorized the Commissioner under that *Act* to compel the production of responsive records subject to a claim of solicitor/client privilege and to adjudicate questions arising from the claim of privilege to determine what records should be withheld: at para. 84. The petitioner submits that claims of solicitor/client privilege are "more sensitive" than the basis of the PCC's withholding of the records (that they are operational rather than administrative) and accordingly those decisions provide an authoritative basis for finding the requisite authority to compel production of the responsive documents in the

present case. The petitioner relied in particular on the reasoning of the Newfoundland Court of Appeal at para. 78 of *Newfoundland 2011*, where it stated in part:

> The purpose of at ATIPPA is to create an alternative to the courts. This goal would be defeated if the Commissioner cannot review denials of access to requested records where solicitor/client privilege is claimed and was forced to resort to applications to court to compel production.

[22] Based on this Court's adoption of that reasoning in *School District No. 49*, the petitioner urges its application to the case at bar.

[23] The Commissioner also relied on *Ontario (Ministry of Health) v. Holly Big Canoe*, [1994] O.J. No. 4609 (Div. Ct.) [*Big Canoe 1994*], aff'd [1995] O.J. No. 1277 (C.A.) [*Big Canoe 1995*], where it was held that the Ontario Commissioner had authority in an inquiry to order the production of records even if they were potentially outside the scope of the privacy legislation to determine if the Commissioner had the jurisdiction to continue the inquiry: at paras. 8-9.

[24] The Commissioner pointed to several decisions of the Commissioner as establishing the normal course of an OIPC inquiry is for the public body to disclose the record in dispute to the Commissioner or her appointed adjudicator to determine whether it is outside the scope of *FIPPA* or not: *Decision F13-07: Vancouver Coastal Health Authority*, [2013] B.C.I.P.C.D. No. 13 at para. 13; *Order No. 170-1997: Insurance Corporation of British Columbia*, [1997] B.C.I.P.C.D. No. 31; *Order F10-13: British Columbia (Ministry of Public Safety and Solicitor General)*, [2010] B.C.I.P.C.D. No. 22.

[25] The petitioner submits it is not consistent for the PCC to take the position, on the one hand, that the Commissioner has authority to determine whether the documents at issue fall within its jurisdiction but has no authority to look at the documents to make that determination. The petitioner says in the absence of clear and unequivocal language in the statutory scheme barring the Commissioner from oversight the records should be reviewable to permit the Commissioner to fulfill her mandate. The petitioner contends that to hold otherwise would potentially allow public bodies to avoid independent review completely.

[26] The Commissioner notes that the PCC has already changed its position with respect to earlier claims that the records engaged exceptions set out in *FIPPA*, specifically, under ss. 17, 21 and 22, and the Commissioner argues that that is a demonstration of the need for an independent review of any claimed exclusion from the scope of *FIPPA*.

The Position of the Respondent

[27] The respondent argues the Commissioner does not have the jurisdiction to order production of PCC records for her review under s. 44 of *FIPPA*, when those records are expressly excluded from the scope of the Commissioner's enabling statute by virtue of both s. 3(1)(c) of *FIPPA* and s. 182 of the *Police Act*.

[28] The respondent submits the Substantive Records fall within the exclusions created by s. 3(1)(c) of *FIPPA* and s. 182 of the *Police Act*. The PCC argues the proper interpretation of both s. 3(1)(c) and s. 182 leads to the conclusion that the Substantive Records are completely excluded from the scope of *FIPPA*, including s. 44.

[29] The respondent submits the appropriate standard of review is one of correctness, as the issue on this petition is a true question of jurisdiction and concerns the jurisdictional lines between two competing specialized tribunals. In support he cites *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 18 [*Canada (CHRC)*], and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 30. In addition, the respondent points to case law which has established that when reviewing a decision in relations to the interpretation of s. 3(1) of *FIPPA*, the correctness standard applies: see *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 931 at para. 19; *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1481 at paras. 69-70; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner) et al.*, 2004 BCSC 1597 at paras. 30, 47. Further, the respondent distinguishes the authorities cited by the petitioner with respect to standard of review as involving the interpretations of the *exceptions* under Division 2 of Part 2 of *FIPPA*, rather than the *exclusions* under s. 3(1)(c) at issue here.

[30] The respondent argues the interpretations of s. 3(1)(c) of *FIPPA* and s. 182 of the *Police Act* that he advances are supported by the ordinary meaning of the language of the sections. The respondent again distinguishes Part 2, Division 2 of *FIPPA*, arguing the inclusion of these separate exceptions sections supports the interpretation that the exclusion provisions in both Acts are different in kind. He submits the exceptions set out in Part 2, Division 2 are wholly unrelated, and not at all analogous, to the exclusions set out in s. 3(1), citing *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 at paras. 29-31 [*Toronto Star*].

[31] With respect to s. 182 of the *Police Act*, the respondent notes that this section does precisely what is contemplated by s. 79 of *FIPPA*: it expressly provides that the exclusion created by s. 182 prevails over the provisions of *FIPPA* such that the Substantive Records are outside of *FIPPA*'s jurisdiction. The respondent submits this exclusion includes s. 44 of

FIPPA and, accordingly, s. 182 of the *Police Act* precludes the Commissioner from ordering production of the Substantive Records.

[32] The respondent argues that had the legislature intended s. 44 of *FIPPA* to apply to the PCC notwithstanding the exclusion created by s. 182 of the *Police Act*, the legislature would have done so explicitly, as it has done in several other statutes: see e.g. *Securities Act*, R.S.B.C. 1996, c. 418, s. 148; *Public Inquiry Act*, S.B.C. 2007, c. 9, s. 26; *Family Law Act*, S.B.C. 2011, c. 25, s. 243; *Statistics Act*, R.S.B.C. 1996, c. 439, s. 9(2); *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 75.

[33] The respondent submits that s. 182 must be interpreted as ousting the jurisdiction of *FIPPA*, when read in the context of Part 11 of the *Police Act*, which includes the confidentiality provision of s. 95 and gives the PCC oversight, complaints monitoring, investigative and disciplinary responsibilities under s. 177. This, he submits, is consistent with the doctrine of deliberative secrecy.

[34] The respondent addresses the petitioner's argument that the exclusions to *FIPPA* must be nevertheless interpreted as allowing the Commissioner to retain the ability under s. 44 to examine documents claimed to fall with the exclusions, in order to determine the veracity of those claims by noting that the decision in *Big Canoe 1994*, cited by the petitioner, has been overtaken by a number of cases including *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2010 NLTD 19 [*Newfoundland 2010*]. In *Newfoundland 2010*, Fowler J. was asked to determine a similar issue arising under ss. 5 and 52 of *ATIPPA*. Section 5 of *ATIPPA* lists classes of records to which the act "does not apply", while s. 52 contains similar language to s. 44 of *FIPPA,* and allows the Commissioner under *ATIPPA* to order production of records for review. Fowler J. explained the issue as follows at paras. 44-45:

> [44] ... If the Commissioner, as the Applicant argues, has no jurisdiction to inquire into the section 5(1) records then how is this determined? How can the Commissioner determine his own jurisdictional boundaries without having the power to examine a section 5(1) record to determine for himself whether or not the record properly falls under section 5(1) over which the *Act* and jurisdiction don't apply.
>
> [45] This is indeed a conundrum and raises the question, does the commissioner simply accept the opinion of the head of a public body that the information being requested does not fall under the authority of the *Act.* If that were the case, the argument could be made that it could be seen to erode the confidence of the public in the *Act* by an appearance or perception that the process is not independent, transparent or accountable.

[35] Although recognizing these concerns, Fowler J. concluded that under *ATIPPA* the Commissioner was required to accept the opinion of a head of a public body and he did not

have the power to conduct an examination of the records claimed to be excluded (at para. 48). Fowler J. acknowledged that this necessarily "weakens the power of the *Act*" but noted that the Commissioner's powers are clearly not unlimited and any change to them must come from the legislature (at para. 49). The respondent argues the same reasoning applies in the present case.

[36] Finally, the respondent submits that the PCC has provided the Commissioner with sufficient information for the adjudicator to determine that the Substantive Records fall within the s. 3(1)(c) and s. 182 exceptions and outside the scope of *FIPPA*. The respondent suggests that providing this information allows *FIPPA* and the *Police Act* to co-exist harmoniously through dialogue when the character of records is disputed. The respondent argues this is the appropriate means of reconciling the two Acts, rather than interpreting the Acts as preserving the Commissioner's ability to compel production of records under s. 44 of *FIPPA*. The respondent submits that in the event dialogue is unsuccessful, the Court's inherent supervisory jurisdiction could be invoked and the Court could (on an *in camera* basis) review the records and provide directions.

[37] As a result, the respondent submits the petition should be dismissed, with costs.

DISCUSSION AND CONCLUSION

The Standard of Review

[38] The petitioner contends the applicable standard of review is reasonableness when the Commissioner is interpreting her enabling statute, relying on *Langley (Township) v. De Raadt*, 2014 BCSC 650 at paras. 41-42, and *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2006 BCSC 131 at para. 77.

[39] The petitioner cites *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 54, where the Court held as follows:

> Deference will usually result when a tribunal is interpreting its own statute, or statutes closely connected to its function, with which it will have particular familiarity .... Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context ....

[40] The petitioner submits that at issue in the present case are questions of "the interpretation of the Commissioner's home statute and raise issues of fact, discretion or policy."

[41] The respondent submits the appropriate standard of review is correctness. This submission rests on the precept that the question of *vires* or the definition of jurisdictional lines separating one tribunal's area of speciality from another's attract the correctness standard of review because the question is one of pure law over which no tribunal has acquired superiority over the Court.

[42] In *Canada (CHRC)*, the Court summarized the analysis in *Dunsmuir* when a correctness standard is engaged at para. 18 as follows:

> [18] *Dunsmuir* recognized that the standard of correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, as well as to "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58, 60-61; see also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, *per* Fish J.). The standard of correctness will also apply to true questions of jurisdiction or *vires*. In this respect, *Dunsmuir* expressly distanced itself from the extended definition of jurisdiction and restricted jurisdictional questions to those that require a tribunal to "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (para. 59; see also *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5).

[43] Although in that case, the Court held that the proper standard of review of a decision concerning whether the Human Rights Tribunal had the authority to award legal costs under s. 52(2)(c) and (d) of its enabling statute was reasonableness, it did so on the basis that "[t]he question of costs is one of law located within the core function and expertise of the tribunal relating to the interpretation and the application of its enabling statute (*Dunsmuir* at para. 54)": at para. 25.

[44] The Court held that although a Human Rights Tribunal has no particular expertise in costs if it is "a function assigned and property exercised under the enabling legislation" by a tribunal then the tribunal's mandate and expertise is engaged and deference is owed to the tribunal: at para. 25.

[45] The Court held at para. 27:

> [27] In summary, the issue of whether legal costs may be included in the Tribunal's compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside the Tribunal's area of expertise within the meaning of *Dunsmuir*. As such, the Tribunal's decision to award legal costs to the successful complainant is reviewable on the standard of reasonableness.

[46] In the present case, however, what is specifically at issue is whether s. 44(1) empowers the Commissioner or her appointed adjudicator to make production orders in

relation to requested material whether or not the material falls outside the Commissioner's jurisdiction by virtue of s. 3(1)(c) *FIPPA* and s. 182 of the *Police Act*, or whether it is within the authority of the head of a public body to refuse to disclose this requested material on these grounds. As I see it, that is a question "regarding the jurisdictional lines between two or more competing specialized tribunals" and it is therefore a question subject to a correctness standard of review. It is in essence a pure question of law and jurisdiction which does not implicate the Commissioner's area of expertise.

[47] Support for that conclusion can be found in existing authorities interpreting s. 3(1) of *FIPPA*, including those cited by the respondent, listed at para. 29 of these Reasons. In my view, the existing jurisprudence establishes correctness as the applicable standard of review in connection with the issue whether s. 44(1)(b) applies to requested material whether or not it falls within the jurisdiction of *FIPPA*.

[48] Further support for that conclusion can be found in *Toronto Star*, a decision of the Ontario Superior Court of Justice Divisional Court which concluded that s. 52(4) of the Ontario equivalent to *FIPPA*, which is analogous to s. 44(1) of *FIPPA*, did not authorize the Ontario Commissioner to order production of documents in the face of s. 65(5.2) of the Ontario *Act*, which limits the scope of that *Act* as follows:

> (5.2) This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[49] The Court determined in that case that the proper standard of review of a decision by the Ontario Commissioner interpreting s. 65(5.2) so as to apply to documents in a live prosecution was correctness. The Court held such an interpretation "is a matter of general law and is a matter of significant importance to the administration of criminal justice in the Province of Ontario": at para. 33.

[50] The Court held however that an adjudicator's exercise of discretion under s. 52(4) was subject to a reasonableness standard of review.

[51] The Court reviewed the adjudicator's reasons for interpreting the scope of s. 65(5.2) and found it wanting, holding as follows as para. 57:

> [57] In summary, we conclude that the Adjudicator erred and seriously misconstrued the scope and intention of the s. 65(5.2) exclusion. First, he incorrectly interpreted the meaning of the phrase "relating to"; second, he incorrectly interpreted the purpose of s. 65(5.2); and finally, he incorrectly differentiated among types of documents to differentiate the Crown Brief from a record outside of the Crown Brief. Each of these errors incorrectly limited the scope and application of the s. 65(5.2) exclusion.

[52] In the present case, the only issue to be determined attracts a correctness standard of review as the adjudicator did not, in his letter ordering production of the Substantive Records, purport to apply s. 44(1) in light of his interpretation or assessment of those documents. He did not thus engage in an exercise of discretion under s. 44(1). He simply ruled that s. 44(1) applied whether or not the documents fell within the scope of *FIPPA*.

The Interpretation of the Statutory Provisions

[53] The prevailing rule of statutory interpretation is that statutes are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para. 21.

(a) FIPPA

[54] It is important to consider that *FIPPA* has dual objectives: one is to make public bodies more accountable to the public, while the other is to protect privacy rights. It is also important to acknowledge that *FIPPA* treats records in the custody or control of a public body headed by officers of the Legislature differently than other records.

[55] In particular, in Schedule 1 of *FIPPA*, a "public body" is defined as:

> **"public body"** means
>
> (a) a Ministry of the Government of British Columbia,
>
> (b) an agency board commission, corporation, office or other body designed in or added by regulation to Schedule 2, or
>
> (c) a local public body
>
> but does not include
>
> (d) the office of a person who is a member or officer of the Legislative Assembly, or
>
> (e) the Court of Appeal, Supreme Court or Provincial Court;

[56] Under Schedule 2, the "Office of the police complaint commissioner appointed under the *Police Act*" is designated as a public body and the "Police complaint commissioner" as its head.

[57] Section 3(1)(c) of the *FIPPA* provides that it applies to "all records in the custody or under the control of a public body … but does not apply to … a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act".

[58] The exclusion in s. 3(1)(c) is subject to s. 3(3) which makes various sections of *FIPPA* applicable to officers of the Legislature "as if the officers and their offices were public bodies". The applicable sections under s. 3(3) all relate to the Commissioner's function in protecting privacy, not in making public bodies more accountable to the public.

[59] Thus, insofar as records in the custody or control of a public body whose head is an officer of the Legislature are concerned, they are not subject to *FIPPA* unless they do not relate to the legislative officer's functions under an Act unless they engage protection of personal information issues.

[60] In other words, s. 3(1)(c) carves out significant records in the custody or control of the PCC from the ambit of *FIPPA* insofar as it provide access to information.

(b) The Police Act

[61] Section 79 of *FIPPA* reads as follows:

> **79** If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

[62] The *Police Act*, Part 2, provides for an investigative and disciplinary regime in relation to complaints brought against municipal police officers. Section 95 of that Part reads as follows:

> **95** (1) Except as otherwise provided under this Part, the police complaint commissioner may not disclose
>
> (a) that an investigation has been or may be initiated under this Part, or
>
> (b) any information relating to an investigation under this Part.
>
> (2) Despite subsection (1), the police complaint commissioner may make a disclosure described in subsection (1) if she or he considers it in the public interest.

[63] Sections 49.1 and 51.01(1) bear on the issue of the requirement of confidentiality in relation to information received through the regime under the *Act*. Those sections read as follows:

> **49.1** Before beginning to exercise powers and perform duties under this Act, the police complaint commissioner and any acting police complaint commissioner must take an oath before the Clerk of the Legislative Assembly
>
> (a) to faithfully and impartially exercise those powers and perform those duties, and
>
> (b) not to divulge any information received under this Act, except as permitted under this Act.
>
> ...

> **51.01** (1) Before beginning to exercise powers and perform duties under this Act, a deputy police complaint commissioner and an employee appointed under section 51 (1) must take an oath before the police complaint commissioner
>
> > (a) to faithfully and impartially exercise the powers and perform the duties delegated by the police complaint commissioner to the deputy police complaint commissioner or the other employee, and
> >
> > (b) not to divulge any information received in the exercise of those powers or performance of those duties, except as permitted under this Act.
>
> ...

[64] It is in the context of the provisions of *FIPPA* and the provisions of the *Police Act* that the issue of the applicability of s. 44 to the Substantive Records is to be assessed.

(c) Other Legislation

[65] Further context is created by other enactments which limit the ambit of *FIPPA* to records in the custody or control of other public bodies. In particular, s. 26(1) of the *Public Inquiry Act*, S.B.C. 2007, c. 9, reads as follows:

> **26** (1) The *Freedom of Information and Protection of Privacy Act*, other than section 44 (1) (b), (2), (2.1) and (3) *[powers of commissioner in conducting investigations, audits or inquiries]*, does not apply to any of the following in respect of a hearing commission:
>
> > (a) a personal note, communication or draft report of a commissioner or of a person acting on behalf of or under the direction of a commissioner;
> >
> > (b) any information received by the commission to which section 15 *[power to prohibit or limit attendance or access]* or 29 *[disclosure by Crown]* of this Act applies;
> >
> > (c) a transcription or recording of a hearing;
> >
> > (d) information to which public access is provided by the commission.
>
> [Underlining added.]

[66] Section 148 of the *Securities Act*, R.S.B.C. 1996, c. 418, reads as follows:

> **148** (1) For the purpose of protecting the integrity of an investigation authorized under section 142, the commission may make an order, that applies for the duration of the investigation, prohibiting a person from disclosing to any person the existence of the investigation, the inquiries made by persons appointed under section 142, or the name of any witness examined or sought to be examined in the course of the investigation.
>
> (1.1) An order made under subsection (1) does not apply to the disclosure of information between a person and the person's lawyer.
>
> (2) An order made under subsection (1) applies despite any provision of the *Freedom of Information and Protection of Privacy Act* other than section 44 (1) (b), (2), (2.1) and (3) of that Act.
>
> (3) [Repealed 2010-4-61.]

[Underlining added.]

[67] Sections 9(1) and (2) of the *Statistics Act*, R.S.B.C. 1996, c. 439, reads as follows:

> **9** (1) Except as otherwise permitted by this section and except for the purposes of a prosecution under this Act,
>
> (a) a person who is not employed or engaged under this Act and sworn under section 4 must not be permitted to examine an identifiable individual return, and
>
> (b) a person sworn under section 4 must not disclose or knowingly cause to be disclosed, by any means, information obtained under this Act in a manner that it is possible from the disclosure to relate the particulars obtained from an individual return to an identifiable individual person, business or organization.
>
> (2) Subsection (1) applies despite any provision of the *Freedom of Information and Protection of Privacy Act* other than section 44 (1) (b), (2), (2.1) and (3) of that Act.

[Underlining added.]

[68] Section 64(2) of the *Coroners Act,* S.B.C. 2007, c. 15, reads in part:

> (2) The *Freedom of Information and Protection of Privacy Act*, other than section 44 (1) (b), (2), (2.1) and (3) *[powers of commissioner in conducting investigations, audits or inquiries]*, does not apply to any of the following:
>
> (a) a draft report of a coroner, made under Division 3 of Part 3 *[Report to Chief Coroner]*, including any personal note or communication made in relation to the draft report;
>
> …
>
> (c) a personal note, communication or draft report of a coroner, made in the exercise of any power under Part 4 *[Inquests]*;
>
> …
>
> (f) a record
>
> (i) submitted in an inquest for which public access is provided by the chief coroner, or
>
> (ii) that, if disclosed, would reveal the subject matter of a review conducted by a death review panel;
>
> …

[Underlining added.]

[69] Similar provisions govern the *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 75, the *Family Law Act*, R.S.B.C. 2011, c. 25, s. 243, and the *Health Professions Act*, R.S.B.C. 1996, c. 183, s. 26.2.

[70] In addition, other Acts are governed by a similar provision in the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, namely s. 61. These include the *Human Rights Code*,

R.S.B.C. 1996, c. 210, s. 32, and the *Labour Relations Code,* R.S.B.C. 1996, c. 244, s. 115.1.

[71] Those enactments providing for the application of s. 44 to records which otherwise fall outside the ambit of *FIPPA*, there is thus no jurisdictional threshold to be determined in those cases. The Commissioner or an adjudicator appointed by her acting under s. 42 or under s. 56 of *FIPPA* may order a record to be produced even if it is manifestly one to which *FIPPA* does not apply.

[72] The issue in the present case, as I see it, is whether given the general context and purposes of *FIPPA*, the general context and purposes of Part 11 of the *Police Act*, the specific provisions of s. 3(1)(c) of *FIPPA* and s. 182 of the *Police Act*, and the absence of any provision in the *Police Act* or *FIPPA* preserving the applicability of s. 44 to otherwise excluded records, the Commissioner has a similar authority to order the production of records assertedly excluded from *FIPPA*'s ambit either for the purposes of s. 42 or for the purpose of s. 56.

(d) Case Law

[73] The case law relied on the by the petitioner in support of such an authority, including *School District No. 49, Newfoundland 2011*, *Big Canoe 1994*, and *Big Canoe 1995*, requires some analysis.

[74] In *Big Canoe 1994*, the issue was whether the Ontario *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31 [*OFIPPA*], applied to records contained in the clinical file of a psychiatric patient. The records had been denied to an applicant by the Ministry of Health under s. 65(2)(a) and (b) of *OFIPPA*, which have since been repealed. Section 65(2)(a) and (b) read as follows:

> (2) This Act does not apply to a record in respect of a patient in a psychiatric facility as defined by section 1 of the *Mental Health Act*, where the record:
>
> > (a) is a clinical record as defined by subsection 35(1) of the *Mental Health Act*; or
> >
> > (b) contains information in respect of the history, assessment, diagnosis, observation, examination, care or treatment of the patient.

[75] Sections 52(4) of Ontario *FIPPA*, which remains unchanged, reads as follows:

> (4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation. R.S.O. 1990, c. F.31, s. 52 (4).

[76] In *Big Canoe 1994*, the inquiry officer conducting the appeal had ordered production of the records under s. 52(4) holding in part as follows (reproduced at para. 7):

> In my view, s. 65(2) can apply only to the records that fall within the scope of that section. While the Legislature clearly intended that these records should fall outside the purview of this Act, I do not believe that the Legislature intended to have the threshold issue of whether or not the record fell within the scope of this provision determined by a non-independent body such as the Ministry, whose decision would not be reviewable.

[77] The Divisional Court upheld the inquiry officer, holding as follows at paras. 8-9:

> 8 We are in agreement with the assessment by the Inquiry Officer that s. 65(2) does not prohibit the Inquiry Officer from determining whether she had jurisdiction to entertain the appeal and also with her approach to that issue. We would only add that an preliminary determination that the Inquiry Officer either did or did not have jurisdiction to entertain the appeal based on whether the record was a "clinical record" within s. 65(2) of the Act would be subject to judicial review on a standard of correctness.
>
> 9 Further, we are of the view that s. 52(4) explicitly authorizes the Commissioner in an inquiry to have produced any document and more specifically the pertinent records in this case. We do not accept the submission of counsel for the Ministry of Health that the phrase, "despite Parts II and III of this Act" in s. 52(4) confines the application of s. 52(4) to those parts of the Act. If that result had been intended the Legislature could have readily conveyed that intention in clear and unambiguous terms. We are all of the view that s. 52(4) applies to all parts of the Act. In our view, the Commissioner must have the procedural mechanism necessary to decide matters of substance.

[78] On appeal to the Ontario Court of Appeal, the Court upheld the Divisional Court in *Big Canoe 1995* as follows at paras. 2-3:

> **2** The narrow issue in this appeal is whether the Commissioner may invoke the provisions of s.52(4) of the Act and require the production and examination of the records in question for the purpose of determining whether the Commissioner has jurisdiction to continue the inquiry. The appellants contend that s.52(4), properly interpreted, is confined to issues which arise in inquiries relating to records referred to under Parts II and III of the Act and that s.52(4) is not applicable to records referred to under Part V of the Act or, more specifically, to records which may be excluded from the purview of the Act by s.65(2).
>
> **3** Notwithstanding the very able argument presented by counsel for the appellants, we agree with the conclusion reached by the Divisional Court. It is our opinion also that s.52(4) must be construed as being applicable to all inquiries conducted pursuant to the Act. Having regard to the purposes of the Act and the manner in which the section is framed, the procedures available to the Commissioner under s.52 in conducting an inquiry to review a head's decision are applicable to inquiries relating to a head's decision that records sought by a requester are excluded by s.65(2). We agree also with the Divisional Court that the Commissioner is not precluded by ss. 8 and 35 of the *Mental Health Act* from determining the jurisdictional issue as to whether s. 65(2) is applicable by requiring production of the relevant records pursuant to s. 52(4).

[79] In *Newfoundland 2011*, the Court was dealing with an appeal from a declaration by an application's judge that s. 52 of *ATIPPA* did not oblige the Department of Justice to produce for review certain records requested by the Commissioner to verify a claim by the Department of Justice that the records were subject to solicitor/client privilege. The Court of Appeal reversed the application's judge and ordered the records produced (at para. 84).

[80] As to the standard of review, the Court held at para. 13:

> **13** The parties have agreed that the standard of review applicable to this appeal is one of correctness and I concur with that position. The sole issue here is a matter of the correct interpretation of statutory language where that language could potentially infringe a fundamental right, namely solicitor/client privilege. Thus a question of law is clearly engaged.

[81] Section 52 of *ATIPPA* reads as follows:

> **52.** (1) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the Public Inquiries Act, 2006.
>
> (2) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner except any record which contains information that is solicitor and client privileged or which is an official cabinet record under section 18.
>
> (3) The commissioner may examine information in a record that he or she may require under subsection (2), including personal information.
>
> (4) The head of a public body shall produce to the commissioner a record or a copy of a record required under this section within 14 days notwithstanding
>
> (a) another Act or regulation; or
>
> (b) a privilege under the law of evidence, except a privilege referred to in subsection (5).
>
> (5) Subsection (4) does not apply to records which are solicitor and client privileged.

[82] The Court found that s. 52 "authorizes the Commissioner to compel the production of responsive records subject to solicitor/client privilege": at para. 78. It went on to find that "the routine production of such records is absolutely necessary" and continued in para. 78 (in part) as follows:

> The purpose of the legislation, described above, is to provide for an independent review officer which can undertake a timely and affordable first level review of all information request denials. This access to justice rationale mandates that the Commissioner's routine exercise of his authority to review solicitor-client privileged materials is absolutely necessary. The purpose of ATIPPA is to create an alternative to the courts. This goal would be defeated if the Commissioner cannot review denials of access to requested records where solicitor-client privilege is claimed and was forced to resort to applications to court to compel production.

[83] The Court concluded at para. 84 as follows:

> **84** For the foregoing reasons, I conclude that the learned applications judge erred in law in declaring that the Commissioner was not entitled to access to the requested records for review and verification of the claim to solicitor-client privilege by the Attorney-General. Section 52 of ATTIPA is unambiguous and explicitly permits the Commissioner to abrogate a claim to solicitor-client privilege in order to verify the legitimacy of such a claim in the discharge of his statutory mandate.

[84] In the course of its Reasons, the Court addressed "the possibility of misuse of authority conferred by the legislation": at para. 80. The Court described one potential abuse as the Department of Justice using blanket claims of privilege for files which may contain privileged documents but also documents not impressed by any privilege. The other form of misuse identified by the Court would be if the Commissioner "demanded to have documents produced he could reasonably conclude, without inspecting them, were covered by solicitor-client privilege": at para. 80.

[85] In *obiter dicta*, the Court addressed the prospect of those misuses of authority thus at para. 81 and 82:

> **81** If the Commissioner were to receive a letter (or possibly an affidavit) from a senior Justice official indicating that all materials were provided as per an access to information request save for documents containing legal advice (identified by subject matter, date and solicitor) could not the Commissioner reasonably rely on that to conclude that the documents in question are in fact privileged? Such an arrangement, it seems to me, should operate to deal with the vast majority of cases. And, in the few where the Commissioner felt compelled to pursue matters further, the discussion would be focused in a way that should assist reasoned consideration.
>
> **82** The key to all this is good faith in the exercise of authority. With that comes mutual trust, by the Commissioner that senior Justice officials are being truthful and by Justice officials that the Commissioner will not unreasonably call for the production of legal opinions and advice. Cooperation should be the rule and litigation very much the exception.

[86] In *School District No. 49*, Mr. Justice Butler was confronted with an application for judicial review arising from the acting Commissioner's decision that the petitioner board could not rely on s. 14 of *FIPPA* to withhold certain records from disclosure relating to the expenditure of legal fees on the basis of solicitor/client privilege. Justice Butler summarized his conclusions at para. 141 and 142 of his reasons for judgment as follows:

> [141] In summary, I find that the Commissioner has the jurisdiction to adjudicate questions of solicitor-client privilege for the purpose of determining whether records sought to be disclosed are exempted from disclosure under s. 14 of the *Act*.
>
> [142] I have reviewed the decision of the Acting Commissioner on a standard of correctness. The Acting Commissioner set out the correct legal test to be applied when considering issues of solicitor-client privilege. However, I have concluded that the Acting Commissioner's ultimate conclusion that the records in question would not disclose privileged information was incorrect. He erred in ordering the Board to disclose the information in the Vendor Inquiry Documents regarding the total amount

> of the payment and the name of the law firm, as well as in ordering disclosure of the G/L Account Summary Documents. His decision ordering that the redacted documents be produced is thus quashed.

[87] In the course of his decision, Butler J. referenced *Newfoundland 2011* and adopted its reasoning in relation to the application of the production provisions to records said to be the subject of solicitor/client privilege: at paras. 42, 48. Butler J. noted that as the Board voluntarily produced the records in question to the Commissioner he need not decide "whether the *Act* gives the Commissioner the power to compel the head of a public body to produce to the Commissioner documents which it refuses to produce because of a claim of solicitor-client privilege": at para. 69. Nevertheless, at para. 72, he found "considerable merit in the conclusion the Court arrived at in [*Newfoundland 2011*] at para. 78".

[88] The answer to *Newfoundland 2011* and Butler J.'s decision in *School District No. 49*, so far as this application is concerned, appears to lie in the fact that the focus of those cases was not on documents which fell outside the ambit of *FIPPA*, but rather on documents, which because of their nature or status were subject to an exemption or exception from the application of the *Act*. Whether they were the subject of disclosure was thus a matter of assessment and decision, not jurisdiction.

[89] That distinction between documents such as those enumerated in *FIPPA* Part 2, Division 2, (including those subject to solicitor/client privilege claims) subject to exception by the operation of *FIPPA*, and documents to which *FIPPA* does not apply and therefore which need not be "excepted", was drawn in *Newfoundland 2010*, *Information and Privacy Commissioner v. Newfoundland and Labrador (Minister of the Department of Business)*, 2012 NLTD(G) 28 [*Newfoundland Business 2012*], *Toronto Star*, and *Ring v. Memorial University of Newfoundland*, 2014 NLTD(G) 32.

[90] In *Newfoundland 2010*, Fowler J. was required to interpret s. 5(1) of *ATIPPA* which so far as relevant reads as follows:

> **5.** (1)This Act applies to all records in the custody of or under the control of a public body but does not apply to
>
> ...
>
> (k) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;
>
> ...

[91] In that case, a request had been made in July 2008 by a journalist for a police report arising from an investigation into a senior police officer. An information was sworn on October 31, 2008, charging the police officer with an offence contrary to s. 271 of the

Criminal Code. The investigating police force and the Minister of Justice refused to disclose the report relying on s. 5(1)(k), the *ATIPPA* commissioner then made a "statutory request" to the police for the information at issue under the former s. 52(2) of *ATIPPA*, which then read as follows:

> (2) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.

[92] In concluding that s. 5(1) was a bar to the Commissioner exercising his authority in relation to the records under s. 52(2), Fowler J. drew a distinction between documents accepted by the operation of the *Act* and documents exempted from the *Act*. He wrote as follows at para. 39:

> **39** Section 5 of the *Act* does not exempt, or take any position in relation to the classes of information referenced there. It simply states that the *Act* "does not apply to" them. To exempt something is to take some action to grant the exemption. Here the *Act* does nothing in that direction. It just states that it doesn't apply to the categories listed there.

[93] Fowler J. identified the conundrum that s. 5 raises at para. 44 as follows:

> **44** This brings into perspective the real issue or question to be decided. If the Commissioner, as the Applicant argues, has no jurisdiction to inquire into the section 5(1) records then how is this determined? How can the Commissioner determine his own jurisdictional boundaries without having the power to examine a section 5(1) record to determine for himself whether or not the record properly falls under section 5 (1) over which the *Act* and jurisdiction don't apply.

[94] Justice Fowler considered the effect of *Big Canoe 1995*, concluding at para. 48 that the reasoning of the Ontario Court of Appeal in that case did not apply "with the same effect to the Newfoundland and Labrador ATIPPA since the issue in *Canoe* was less sensitive or unique."

[95] He concluded the Commissioner as empowered *ATIPPA* "does not have the authority as a preliminary jurisdictional issue to determine for himself whether or not the s. 5(1)(k) information or record sought is outside the jurisdiction of the Commissioner as alleged in the matter before [the] Court": at para. 48.

[96] He concluded at para. 49 as follows:

> **49** While it is highly desirable that the Commissioner be empowered to recognize the parameters or jurisdiction of his authority, the *Act* is clear that this is not unlimited. I agree that this weakens the power of the *Act*; however, it is only the legislature that can change that.

[97] In the case before Fowler J., the Attorney General had written to the Commissioner confirming that he received affidavits verifying the existence of the prosecution and enclosing a certified copy of the information to establish that the information sought fell beyond the jurisdiction of *ATIPPA*. The Deputy Minister of Justice suggested in his letter, reproduced at para. 53, as follows:

> A similar approach can be adopted to the other records exempt from the ATIPPA. Confirmation from a judge that the notes requested are notes of that judge, or from a Minister that the notes requested are constituency records, and so forth.

[98] While Fowler J. found some merit in the Deputy Minister of Justice's proposal, he expressed reservations about its ultimate efficacy noting, for example, that he could "see no way to compel a Supreme Court judge to provide an affidavit, or indeed any court": at para. 54.

[99] He concluded at para. 54 that "a general rule of access of [sic] that basis cannot apply." Rather, he held that "[i]f the legislature determines that the *Act d*oes not apply to certain situations; that is simply the law on that matter."

[100] In the other Newfoundland decision, *Newfoundland Business 2012*, Chief Justice Orsborn drew the same distinction between specific exceptions to access and s. 5, under which *ATIPPA* does not apply to certain classes of records".

[101] He concluded at para. 84:

> **84** The *Act* does not give the Commissioner the authority to demand production of or to review records in the hands of public bodies when the public body asserts that the *Act* does not apply to the records because of s. 5.

[102] After acknowledging that undesirable consequences may flow from such a conclusion − notably that public bodies rather than the Commissioner would dictate the jurisdiction of the *Act* and would weaken its effect − Chief Justice Orsborn noted that the likelihood that the refusal of a public body to produce a record would be justiciable and subject to judicial review: at paras. 85-87.

[103] In *Toronto Star*, the Court considered for the first time s. 65(5.2) which was enacted in 2007 (after *Big Canoe 1995* had been decided).

[104] The court in the *Toronto Star* case referenced the Ontario Court of Appeal in *Big Canoe 1995* holding that s. 52(4) of the Ontario *Act* permitted the Commissioner to order the production of medical records to determine whether it had jurisdiction, but noted s. 65 (5.2) was not at issue in that decision: at paras. 28-29.

[105] The Court held that as s. 65(5.2) had not been judicially considered, it was "an extraordinary circumstance that warrants determination of the issues raised": at para. 29.

[106] The Court noted that the language "[t]his *Act* does not apply" in s. 65(5.2) was "an exclusion limiting the IPC's jurisdiction, rather than an exemption": at para. 31. The Court explained that the IPC first gains jurisdiction over a record relating to a prosecution once all proceedings relating to the prosecution have been completed: at para. 31. Only after that does the issue of whether the record become exempt apply. As earlier noted, the Court determined the standard of review in relation to a decision as to the scope of the *Act* was correctness, while the exercise of discretion under s. 52(4) was reasonableness.

[107] The Court concluded that in light of "[t]he adjudicator's jurisdictional errors, he made an unreasonable order that does not fall within a range of possible acceptable outcomes in the particular factual and legal context of this request": at para. 60.

[108] In *Ring*, the Court followed the reasoning of Fowler J. and of Orsborn C.J. in *Newfoundland 2010* and *Newfoundland Business 2012*, respectively, holding a "review for the purpose of determining whether a claim for protection under section 5 is legitimate, is for the courts": at para. 49. In *Ring*, at issue in part was whether s. 5(1)(h), which provided that *ATIPPA* does not apply to "a record containing teaching materials or research information of an employee of a post-secondary educational institution", foreclosed the Commissioner from ordering production of the records to determine if a public body's refusal to produce documents on the basis of a s. 5(1)(h) claim is legitimate.

[109] In the result, on that issue, Butler J. held as follows at para. 49:

> **49** Therefore, while not binding upon me, I accept Fowler, J.'s conclusion that the Commissioner has no authority to compel production of records claimed as outside the *Act* under section 5. I agree with both Fowler, J. in IPC 1 and Orsborn, C.J. in IPC 3 that, review for the purpose of determining whether a claim for protection under section 5 is legitimate, is for the courts. I specifically agree with Orsborn, C.J. that it could take the form of judicial review, distinct from the statutory appeal process that applies to Part II records. I note as well that this was the form of application brought in University of Alberta v. Alberta (Information and Privacy Commissioner), 2009 ABQB 112 and is contemplated by section 64 of the *ATIPPA*, which speaks of "a review or appeal" without reference to Parts II and III.

[110] Butler J. went on to observe that had the Commissioner accepted the Court's invitation to treat the application as one for judicial review, the Court could have reviewed the records and made a declaration as to the applicability of s. 5(1)(h) on the duty to disclose the documents to the applicant in that case: at para. 54.

[111] It is that course of action that the respondent PCC submits is appropriate in the present case.

Conclusion

[112] I accept the distinction which is made between those documents to which, pursuant to s. 3(1)(c) of *FIPPA* and s. 182 of the *Police Act*, *FIPPA* does not apply, and that those documents to which, pursuant to sections 12 to 22 of *FIPPA*, *FIPPA* creates exceptions. The distinction essentially is that in the case of the exceptions, the application of the *Act*, and hence the jurisdiction of the Commissioner, is engaged in a process to determine the status of the documents within the provisions of Division 2. In the case of s. 3(1)(c) and s. 182, which exempt or exclude the *Act* from applying to the specified documents, neither the application of the *Act* nor the jurisdiction of the Commissioner is engaged.

[113] I conclude that as much as the decisions of the Divisional Court and the Ontario Court of Appeal in *Big Canoe 1994* and *Big Canoe 1995,* respectively, provide a coherent policy rationale for the Commissioner to have access to such a category of documents to determine whether they fall within the scope of *FIPPA*, those decisions do not appear sustainable in light of current authority.

[114] More recent decisions, applying the rule of statutory interpretation in *Rizzo & Rizzo Shoes Ltd.* have moved away from the reasoning in *Big Canoe 1994 and Big Canoe 1995,* and favour the position of the respondent that the jurisdiction of *FIPPA* does not encompass documents said to be excluded by s. 3(1)(c) in connection with the regime under Part 11 of the *Police Act*, or documents excluded by s. 182 of the *Police Act* even for the limited purpose or production for an assessment pursuant to s. 44(1) of *FIPPA*.

[115] The other decisions relied on by the petitioner, in which documents potentially are subject to exception from the *Act* pursuant to Part 11, Division 2 are producible for assessment under s. 44(1), are inapplicable for the reasons I have earlier discussed.

[116] As I see it, the most potent indication of the limitations of s. 44(1) of *FIPPA* in the context of the *Police Act*, Part 11, is the absence of what is present in other statutes: an express term providing for the application of s. 44(1) to documents otherwise outside the application of *FIPPA*.

[117] That absence, when taken with those provisions of the *Police Act* limiting the authority of the Police Complaint Commissioner to disclose information relating to investigations under the *Act* (s. 95(1) and (2)) and enforcing confidentiality (s. 49.1 and s. 51.01), establishes a regime in which the authority of the Commissioner to determine her jurisdiction

under *FIPPA* is subject to the Legislature's intention to protect certain documents from disclosure even for the limited purpose of determining whether they meet the jurisdictional threshold of *FIPPA*.

[118] Similarly, with respect to the *Police Act*, s. 182 signals a clear legislative intention to exclude certain documents from the compass of *FIPPA* without creating an exception for s. 44(1). As noted, in *Order 03-06; Vancouver (City) Police Department*, [2003] BCIPCD No. 6, s. 182 complements but does not contradict s. 3(1)(c) of *FIPPA*: at para. 25.

[119] Although that finding attenuates the authority of the Commissioner and is seemingly at odds with the objectives of *FIPPA* to provide an expeditious and unimpeded opportunity to the public to have access to information in the hands of the PCC, it is clear that *FIPPA* operates within limits to its reach and scope and in deference to other statutory regimes and objectives.

[120] I conclude that such an interpretation of s. 3(1)(c) of *FIPPA* and s. 182 of the *Police Act* is reconcilable with the import of s. 57(1) of *FIPPA* which places the burden of proof that an applicant has no right of access to a requested record on the head of the public body having custody or control of the requested record.

[121] In the Notice of Written Inquiry dated October 8, 2013, after quoting s. 57 of *FIPPA*, the Notice reads as follows:

> Section 57 of FIPPA is silent with respect to the burden of proof for an inquiry relating to whether records are excluded from the scope of FIPPA under s. 3(1)(c) or under s. 182 of the *Police Act*. Previous decisions have held that, as a practical matter, it is in the interests of each party to provide argument and evidence to justify its position on the issue.

[122] In the present case, the respondent sought to provide that justification through various communications to the petitioner including a letter dated November 5, 2013, a letter dated November 19, 2013, a letter dated September 2, 2014, and a letter dated September 25, 2014, following the issuance of the adjudicator's reasons ordering production of the disputed documents. The respondent also submitted an affidavit from the Deputy Police Complaint Commissioner dated November 5, 2013. All the communications from the respondent described the disputed documents and gave reasons why the respondent took the position that those documents fell outside the reach of *FIPPA*.

[123] The dilemma which arises is in relation to documents which do not definitively or manifestly fall within those classes of documents which are excluded from the scope of the *Act* and regarding which there can be differing yet reasonable views as to its applicability.

[124] If the Commissioner or an adjudicator appointed by her does not accept the PCC's characterization of the documents as outside the jurisdiction of *FIPPA* or if the description or explanation of the documents is inadequate to make that determination, then, I agree with Orsborn C.J., that it is open to the Commissioner to bring an application for judicial review either to have the PCC produce the documents to the Court for further directions, or if appropriate, otherwise to disclose them to the applicant.

[125] Alternatively, if the Commissioner or an adjudicator appointed by her sees no merit in the PCC's characterization of the documents as beyond the reach of *FIPPA*, it would be open to her or her adjudicator to make an order pursuant to s. 44(1) which in turn would be subject to judicial review by the PCC. It would be necessary, in those circumstances, for the Commissioner to provide cogent reasons for a finding that the documents fell within the jurisdiction of *FIPPA*.

[126] In the present case, the adjudicator did not, in his reasons, attempt to determine on the basis of the information and explanation provided to him whether the documents were such as to fall outside or inside the scope of *FIPPA* or whether they should or should not be produced or disclosed. As I read his reasons, he simply addressed the policy reasons for reserving to the Commissioner the unlimited authority to order the records produced for her review, and referred to the Ontario Court of Appeal's decision in *Big Canoe 1995* as justification for ordering production under s. 44(1) of *FIPPA*.

[127] As I have concluded that the decisions of the Ontario Court of Appeal and Divisional Court in *Big Canoe 1994* and *Big Canoe 1995* had been overcome by subsequent relevant authority and are distinguishable in light of the clear legislative intent to limit the reach of s. 44(1) in British Columbia, it follows that I conclude that the adjudicator fell into error in making the production order in the present case, because he made no finding that the requested documents fell within the jurisdiction of *FIPPA*.

[128] In my view, however, in the present case the PCC should have brought an application for judicial review rather than simply refusing to comply with the production order. Section 59(1) of *FIPPA* reads as follows:

> **59** (1) Subject to subsection (1.1), not later than 30 days after being given a copy of an order of the commissioner, the head of the public body concerned or the service provider to whom the order is directed, as applicable, must comply with the order unless an application for judicial review of the order is brought before that period ends.

[129] As I see it, whatever the jurisdiction of the Commissioner or her appointed adjudicator to make the impugned order, once it is made s. 59 operates to require the PCC's

compliance with it, subject to bringing an application for judicial review. It is not open for the PCC simply to decline to comply with the order.

[130] In the final analysis, I nonetheless conclude that the petition should be dismissed. The petitioner has failed to demonstrate that the adjudicator addressed the threshold issue of whether the documents sought fell within the jurisdiction of *FIPPA* before making the production order.

[131] On a correctness standard of review, the order cannot stand and must be quashed.

[132] In oral submissions before me, counsel for the PCC offered to produce the requested documents for my review to determine the jurisdictional question in order to avoid the need for a new determination by the adjudicator which may be subject to a further judicial review.

[133] If both parties agree to that process, I will order the documents produced to me for review as though this application were a review of the merits of the adjudicator's decision on a reasonableness standard of review. If not, the matter will be remitted to the adjudicator for determination of the jurisdictional issue based on the information, descriptions, and explanations advanced by the PCC in support of his position that the Commissioner has no jurisdiction to deal with the requested records.

"A.F. Cullen ACJ."

Associate Chief Justice Cullen