ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-11

March 19, 2024

ST. ALBERT SCHOOL DIVISION

Case File Number 015838

Office URL: www.oipc.ab.ca

Summary: An individual (the Applicant) made a request for access to certain information under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act or the Act) to the St. Albert School Division (the Public Body).

The Public Body responded to the Applicant's access request, withholding some information under section 17(1) of the FOIP Act (disclosure harmful to personal privacy). In addition, some information was withheld as "non-responsive".

The Applicant then submitted nine Requests for Review asking this Office to review the Public Body's decision to withhold the information under section 17 and its determination that some of the information was non-responsive.

The Commissioner appointed a Senior Information and Privacy Manager (SIPM) to investigate and settle the matter.

The Applicant and the Public Body entered into a settlement agreement regarding the Applicant's resignation from his employment. A term of the settlement agreement was that the Applicant would withdraw his requests for information, complaints and applications under the FOIP Act.

Subsequently, the SIPM completed the investigation and issued their findings.

The Applicant was not satisfied with the outcome and requested that the Commissioner conduct an inquiry into the Public Body's response to his access request.

In his Request for Inquiry, the Applicant advised that he had entered into a settlement agreement with the Public Body; however, he took the position that the settlement agreement was null and void.

The Public Body asked the Commissioner to close the file on the basis that it was a term of the settlement agreement the Applicant signed that he would withdraw all privacy complaints and FOIP requests before this Office.

The Commissioner decided to conduct an inquiry, with the first issue being "[w]hat effect does a settlement agreement have on exercising rights under the Act?" This issue would consider whether parties can contract out of their rights and obligations under the FOIP Act.

The Adjudicator determined that as a matter of public policy, the Public Body could not contract out of its obligations under the FOIP Act, and could not require the Applicant to withdraw his Request for Review or his Request for Inquiry into the Public Body's response to his access request before this Office as a term of the settlement agreement.

The Adjudicator determined that the settlement agreement did not oust the jurisdiction of the Commissioner to review the Public Body's responses to the Applicant's access request, and advised the parties that the matter would proceed to the second stage of the inquiry.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 6, 16, 55, 69, 70, 72, and 96; *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 4(7); *Education Act*, S.A. 2012, c. E-0.3, ss. 1.

Statutes Cited: BC: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165.

Statutes Cited: ON: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56; *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c F.29

Statutes Cited: CANADA: *Canadian Charter of Rights and Freedoms*, s. 11, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Orders Cited: AB: Orders 2000-003, 2000-029, 2001-010, F2005-030, F2006-025, F2010-027 & P2010-020, F2015-41, F2017-81, and F2022-37.

Orders Cited: BC: Orders 00-47, 01-20, and 03-02.

Orders Cited: ON: Interim Order MO-3798-I, Order PO-2599.

Cases Cited: AB: *Imperial Oil v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231.

Cases Cited: CANADA: *Arcand v. Abiwin Co-Operative Inc., 2010 FC 529*.

I. BACKGROUND

[para 1] On June 21, 2019, an individual (the Applicant) made a request for access to certain information from the St. Albert School Division (the Public Body) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act or the Act).[1]

[para 2] On June 25, 2019, the Public Body acknowledged receipt of the Applicant's access request.

[para 3] On August 20, 2019, the Public Body responded to the Applicant, withholding some information under section 17(1) of the FOIP Act (disclosure harmful to personal privacy). In addition, some information was withheld as "non-responsive".

[para 4] On October 11, 2019, the Applicant submitted nine Requests for Review asking this Office to review the Public Body's decision to withhold the information under section 17 and its determination that some of the information was non-responsive to his access request.

[para 5] The Commissioner appointed a Senior Information and Privacy Manager (SIPM) to investigate and settle the matter. File number 015838 was opened to conduct the review of the Applicant's nine requests.

[para 6] On June 26, 2020, the Applicant and the Public Body entered into a settlement agreement (the Settlement Agreement) regarding the Applicant's resignation from his employment.

[para 7] The Settlement Agreement contained the following provisions:[2]

> 5. Settlement and Withdrawal of Complaints, Applications and Requests
>
> 5.1 The Teacher agrees that this Agreement fully and finally resolves all actions, complaints, applications, and requests which he has made against the Board before the courts and before any and every statutory body, including, but not limited to:

[1] At the time the Applicant made his access request, the Public Body was known as the St. Albert Public Schools District No. 5565. By way of Ministerial Order #034/2019, signed by the Minister of Education on August 15, 2019, the name of the Public Body and its corresponding board of trustees was changed to "the St. Albert School Division and The Board of Trustees of St. Albert School Division" (section 1(xx)).

[2] The Public Body provided me and the Applicant with a copy of the Settlement Agreement with its initial submission. The Applicant did not dispute that this was the Settlement Agreement he signed.

5.1.1 Any and all complaints and applications made by the Teacher to the Alberta Human Rights Commission and under the *Alberta Human Rights Act*, RSA 2000, c. A-25.5;

5.1.2 Any and all requests for information, complaints and applications made by the Teacher under the *Freedom of Information and Protection of Privacy Act*, RSA, c. F-25; and

5.1.3 Any and all applications, complaints and applications made by the Teacher under the *Occupational Health and Safety Act*, S.A. 2017, c. O-2.1 (including any allegations or complaints relating to an unsafe work environment,

which are hereinafter collectively referred to as the "Existing Legal Processes".

5.2 The Teacher agrees to withdraw, rescind and discontinue all Existing Legal Processes.

. . .

5.4 The Parties acknowledge that notwithstanding paragraph 5.2, a statutory body may continue an investigation or prosecution of an action, complaint, application or request that the Teacher has made against the Board irrespective of the Teacher's withdrawal, discontinuance or rescission of the action, complaint, application or request. The Parties agree that this will not constitute a breach of this Agreement provided the Teacher has complied with paragraph 5.2.

. . .

8.2 The Teacher and Board acknowledge and agree that there are no further outstanding matters at issue between the Parties as of the date of the execution of this Agreement and that this Agreement resolves all existing disputes between the Parties up to the Date of Execution of this Agreement.

[para 8] Subsequently, the SIPM completed the investigation and issued their findings. The Applicant was not satisfied with the outcome and requested that the Commissioner conduct an inquiry.

[para 9] In his Request for Inquiry dated December 2, 2020, the Applicant advised that he had entered into a settlement agreement with the Public Body; however, he took the position that the settlement agreement was null and void because he signed it under duress, and because actions he alleged the Public Body engaged in after the settlement agreement was signed violated the agreement.

[para 10] The Public Body asked the Commissioner to close the file on the basis that it was a term of the settlement agreement the Applicant signed that he would withdraw all complaints and applications before this Office.

[para 11] The Commissioner decided to conduct an inquiry, with the first issue being "[w]hat effect does a settlement agreement have on exercising rights under the Act?" This issue would consider whether parties can contract out of their rights and obligations under the Act.

[para 12] The Commissioner delegated her authority to conduct the inquiry to me.

II. ISSUE

[para 13] The Notice of Inquiry dated September 24, 2021 set out the issue for this inquiry as follows:

> **1. What effect does a settlement agreement have on exercising rights under the Act?**
>
> **This issue will consider whether parties can contract out of their rights and obligations under the Act.**

III. DISCUSSION OF ISSUE

Preliminary Matter – Applicable Law and Scope of Inquiry

[para 14] Throughout his initial and rebuttal submissions, the Applicant refers to the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (PIPA), as the law which governs his access request and the Public Body's response.

[para 15] Specifically, the Applicant argues that section 4(7) of PIPA applies in this case. Section 4(7) of PIPA states:

> *4(7) This Act applies notwithstanding any agreement to the contrary, and any waiver or release of the rights, benefits, or protections provided under this Act is against public policy and void.*

[para 16] The Applicant is incorrect. The St. Albert School Division is a public body as defined in the FOIP Act, and therefore it is the FOIP Act, and not PIPA, that governs the Applicant's access request and the Public Body's response, and the determination of the issue in this inquiry.[3]

[para 17] Most of the arguments the Applicant makes in his initial and rebuttal submissions are about his disagreement with and objections to actions taken by the Public Body regarding his employment. I have no jurisdiction over the actions taken by the Public Body with respect to the Applicant's employment and will not be considering these arguments.

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[3] Section 1(p)(vii) of the FOIP Act defines a "public body" to include a "local public body". Section 1(j)(i) defines a "local public body" to include "an educational body". Section 1(d)(v) defines an "educational body" to include "a board as defined in the *Education Act*". Section 1(1)(c) of the *Education Act*, S.A. 2012, c. E-0.3 defines a "board" as "a board of trustees of a school division". Accordingly, the board of trustees of the St. Albert School Division is a public body under the FOIP Act.

[para 18] Additionally, the Applicant makes numerous arguments as to why the settlement agreement he signed is void. These arguments are not relevant to the issue being determined in this inquiry. If I conclude in this inquiry that a public body can require an applicant to restrict, or give up their rights under the FOIP Act, I would then need to consider, as the first issue in the next part of the inquiry, whether the Commissioner has the jurisdiction to determine the validity of a settlement agreement under the FOIP Act. It is only if the answer to this question is "Yes", that the Applicant's arguments regarding the validity of the settlement agreement would become relevant.

[para 19] As well, the Applicant argues that section 11.a of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter) gives him the "right to fully know and understand the specific case/offense against him without unreasonable delay".

[para 20] Again, this argument is outside the scope of this inquiry, and in any event, in Order F2015-41, former Commissioner Clayton stated at paragraph 12 that this Office does not have jurisdiction to determine questions of constitutional law. Accordingly, I will not consider further this issue.

[para 21] The Applicant also took issue in his Request for Inquiry with the Public Body's request to the Commissioner under section 55 of the FOIP Act, to disregard *other* access requests he had submitted to the Public Body (the "Request to Disregard"). Section 55 states:

> *55 If the head of a public body asks, the Commissioner may authorize the public body to disregard one or more requests under section 7(1) or 36(1) if*
>
> *(a) because of their repetitious or systemic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests, or*
>
> *(b) one or more of the requests are frivolous or vexatious.*

[para 22] File number 013603 was opened to address the Public Body's Request to Disregard. File number 013603 is a separate file and is not part of this inquiry. I have no authority to review the Public Body's request to the Commissioner to disregard other access requests made by the Applicant.

[para 23] Finally, I note that the Applicant frequently refers to the findings of the SIPM in his Request for Inquiry. Those findings are not relevant to the sole issue in this inquiry and I will not be considering them.[4]

[para 24] This inquiry only relates to the Applicant's Request for Inquiry into the Public Body's response to his access request made under the FOIP Act dated June 21, 2019, which is the subject of this Office's file number 015838. All other access requests made by the Applicant

[4] Furthermore, an inquiry is a *de novo* process, meaning it is not a review of the investigation conducted by the SIPM, and the conclusions of the SIPM are not reviewed or considered in the inquiry process.

to the Public Body, and files opened by this Office referred to by the Applicant and the Public Body in their submissions, are outside the scope of this inquiry, and are not relevant to this inquiry.

[para 25] The only issue in the first part of this inquiry is what effect does a settlement agreement have on exercising rights under the FOIP Act?

1. What effect does a settlement agreement have on exercising rights under the Act?

This issue will consider whether parties can contract out of their rights and obligations under the Act.

[para 26] The purposes of the FOIP Act are set out in section 2. With respect to access to information, sections 2(a) and (c) state:

> *2 The purposes of this Act are*
>
> *(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in the Act,*
>
> . . .
>
> *(c) to allow individuals, subject to limited and specific exceptions set out in this Act, a right of access to personal information about themselves that is held by a public body,*
>
> . . .

[para 27] Section 2(e) provides the following additional purpose of the FOIP Act:

> *(e) to provide independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

[para 28] Section 6(1) of the FOIP Act sets out the rights of individuals to request access to information from public bodies. Section 6(2) informs individuals that this right is subject to the exceptions to disclosure set out in Division 2 of Part 1 of the FOIP Act. Section 6 states:

> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can be reasonably severed from a record, an applicant has a right of access to the remainder of the record.*

The Applicant's Submissions

Applicant's Initial Submission

[para 29] As mentioned above, the Applicant's initial submissions were either irrelevant to the issue to be decided in this inquiry or outside of my jurisdiction, and accordingly will not be considered or addressed herein.

Applicant's Rebuttal Submission

[para 30] The only relevant information to the issue at hand in the Applicant's rebuttal submission was his recital of the purposes of the FOIP Act, set out in section 2 of the FOIP Act.

The Public Body's Submissions

Public Body's Initial Submission

[para 31] In its initial submission, the Public Body stated:

> . . .
>
> 5. Indeed, it is telling that FOIP does not contain section 4(7) of PIPA, or any such similar section, which specifically confirms that FOIP prevails over settlement agreements. In accordance with general principles of statutory interpretation, the absence of similar language in FOIP suggest a legislative intent that PIPA and FOIP must be treated differently with respect to settlement agreements.
>
> 6. The legislature made a clear intention in PIPA that settlement agreements were not to extinguish an applicant's rights under PIPA. The lack of any such language in FOIP supports the premises that if the legislature intended to restrict the impact of rights arising out of a settlement agreement in relation to FOIP, they would have drafted a provision related to same.
>
> 7. It is SPS's position that the settlement agreement entered into between the parties is prima facie valid. By entering into the settlement agreement, the Applicant has already withdrawn his complaints. The only reason this remains an issue is that the Applicant failed to notify OIPC that his complaints were withdrawn.
>
> . . .
>
> 34. As already stated, section 4(7) does not exist in FOIP and there is no equivalent section. In FOIP, there is no evidence whatsoever that the Legislature intended an applicant to have the ability to bypass a settlement agreement or to find a settlement agreement void under FOIP. In fact, the absence of this provision indicates the opposite intention, that the parties are free to resolve disputes themselves.
>
> 35. Parties' abilities to resolve privacy disputes themselves is not controversial. For example, in *Arcand v Abiwin Co-Operative Inc.*, 2010 FC 529, the parties entered into a settlement agreement and release whereby the applicant claimed the release did not

preclude her from bringing a privacy complaint under the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). One of the questions before the court was whether the applicant was estopped from bringing the application by virtue of a settlement agreement. The Court determined that the release was enforceable and:

> with the release, the respondent attempted to, and in my view, did purchase contractual immunity from the present claim made against it.[5]

Arcand v Abiwin Co-Operative Inc., 2010 FC 529 ("*Arcand*") at para 39 **[TAB 14]**

36. PIPEDA, similar to FOIP, does not have the same express provision under 4(7) that would limit the impact of a settlement agreement. The [rationale] from the Federal Court is directly applicable to our case.

37. Moreover, our legislation also anticipates that parties may be able to resolve disputes themselves. Section 70 of FOIP allows the Commissioner to refuse to conduct an inquiry in certain circumstances:

> Refusal to conduct inquiry
>
> 70 The Commissioner may refuse to conduct an inquiry pursuant to section 69 if in the opinion of the Commissioner
>
> (a) the subject-matter of a request for a review under section 65 has been dealt with in an order or investigation report of the Commissioner, or
>
> (b) the circumstances warrant refusing to conduct an inquiry.

FOIP at section 70 **[TAB 15]**

38. As is clear, the legislature fully anticipated that the OIPC need not pursue any and every complaint. The legislature anticipated that the OIPC would need to exercise its judgement and refuse to conduct an inquiry where circumstances justify such a refusal.

39. The circumstances before you now clearly warrant such a refusal. In this case, the Applicant entered into a settlement agreement which clearly identified the pre-existing complaints and expressly referred to FOIP. The Agreement resolved all outstanding issues and addressed all matters which could give rise to a complaint at the time. The Applicant agreed to withdraw his complaints under FOIP. The Applicant was represented by legal counsel and negotiated these terms as part of his resignation.

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[5] Based on the comments of the Federal Court in *Arcand*, the Office of the Privacy Commissioner of Canada continued to investigate the complainant's privacy complaint *after* the parties entered into the settlement agreement, and subsequently issued its decision regarding the complainant's complaint.

40. At page 7 of his submissions, the Applicant contends that the Agreement was considered null and void given it was coerced and imposed on the Applicant while he was on medical/stress leave. Respectfully, SPS disagrees.

41. First, there are no provisions in FOIP that grants the OIPC the authority to determine whether or not a settlement is valid. There are no provisions in FOIP similar to section 4(7) of PIPA that would restrict the application of the settlement agreement or an individual's ability to contract out of their rights as under FOIP.

. . .

44. Moreover, while the Applicant claims the Agreement is null and void, this inquiry does not in fact address the validity of the Agreement. This inquiry is limited to the impact of exercising rights under FOIP.

45. It is not the place of the Commissioner to determine the validity of the Agreement. A fully executed Agreement has been presented, SPS has paid the consideration to the Applicant, and the Agreement clearly required the Applicant to withdraw all complaints under FOIP.

46. However, should the OIPC wish to determine validity, the issue is moot in any event. The court in *Arcand* has confirmed that an applicant who is represented by counsel at the time the release was signed cannot make claims of *non est factum* or unequal bargaining power.

Arcand at para 52 **[TAB 14]**

47. In closing, we also note the purpose and intent of FOIP is not served by a continued inquiry. The Applicant is entitled to rely on FOIP for future, unrelated matters. The Agreement provided that the Applicant was to withdraw his existing complaints and requests for [review] under FOIP and to resolve all disputes as existed at that time. This does not impact the Applicant's future rights under FOIP nor the purposes behind the legislation. Respecting the agreement reached by the parties promotes resolution and fosters respect for FOIP by requiring parties to consider and resolve FOIP obligations where part of larger disputes. In this case, the parties did reach such a resolution and the Applicant received a substantial payment in return.

48. SPS submits that the Commissioner, under section 70 of FOIP, is in a position where the circumstances warrant refusing to conduct an inquiry.

PART 4 CONCLUSION

49. It is the position of SPS that a settlement agreement under *FOIP* operates to remove existing complaints under the legislation, but does not act as a bar for future unrelated complaints.

Public Body's Rebuttal Submission

[para 32] In its rebuttal submission, the Public Body correctly noted that with little exception, the arguments in the Applicant's rebuttal submission were not about the issue in this inquiry. The Public Body reiterated the arguments it made in its initial submission.

Analysis

[para 33] I will first address the Public Body's request that I refuse to conduct an inquiry under section 70(b) of the FOIP Act on the basis that the Applicant agreed in the settlement agreement to withdraw his Request for Inquiry into the Public Body's response to his access request, and therefore, even though he has not withdrawn his Request for Inquiry, the circumstances warrant refusing to conduct an inquiry.

[para 34] Decisions under section 70 are made by the Commissioner upon receipt of an applicant's or complainant's request for an inquiry. I have no authority to make decisions under section 70. In this case, former Commissioner Clayton decided that the circumstances *did* warrant conducting an inquiry. That decision has already been made by the Commissioner and cannot be reversed. The Commissioner set out the first issue to be decided in the inquiry, and delegated her authority to conduct the inquiry to me. Depending on the answer to the first issue, the inquiry will either end or continue on to review the Public Body's response to the Applicant's access request.

[para 35] The FOIP Act came into force in 1995 and gave individuals the right to request any information, including their own personal information, in the custody or under the control of a public body, subject to the exclusions and exceptions set out in the FOIP Act. PIPA came into force in 2004 and gave individuals the right to request only their own personal information from organizations, subject to the exclusions and exceptions set out in PIPA.

[para 36] I understand the Public Body to be arguing that because the Legislature included a clause in PIPA in 2004 stating that PIPA applies notwithstanding any agreement to the contrary, and any waiver or release of the rights, benefits, or protections provided under PIPA is against public policy and void, but did not include such a clause in the FOIP Act in 1995, I should infer that the Legislature intended in 1995 to permit public bodies to require individuals to enter into agreements in which individuals waived or released their rights, benefits or protections under the FOIP Act.

[para 37] Put another way, in the context of this case, the Public Body is arguing that organizations under PIPA cannot require employees to waive or release their rights, benefits and protections under PIPA in a settlement agreement, but public bodies under the FOIP Act, *can* require employees to waive or release their rights, benefits or protections under the FOIP Act in a settlement agreement.

[para 38] The Public Body does not provide an explanation as to why the Legislature would have decided that the rights, benefits or protections of employees of organizations under PIPA would be protected in this way, but the rights, benefits or protections of employees of public bodies under the FOIP Act would not.

[para 39] By requiring an individual to contract out of their right to make access requests to the public body with respect to a certain subject matter, and/or to withdraw their request for a review or inquiry by this Office of a public body's response to an access request under the FOIP Act, a public body is also attempting to contract out of its obligations to respond to access requests under the FOIP Act, or to remove from the purview of the Commissioner's review its response to an applicant's access request under the FOIP Act.

[para 40] Since the FOIP Act came into force, this Office has consistently stated that public bodies cannot contract out of their obligations under the FOIP Act, and cannot require individuals to agree to waive or release their rights, benefits, or protections provided under the FOIP Act.

[para 41] For example, in Order 2000-003, former Commissioner Clark found that a settlement agreement whereby a public body agreed to "seal" a record in its custody or control could not override an applicant's right to request access to that record. The Commissioner stated at paragraphs 26 – 28 (my emphasis):[6]

> [para 26] I agree that the Act supersedes an agreement regarding how or when information will be disclosed: see Order 97-002. Of necessity, the Act must also supersede an agreement regarding the withholding of information, except where the Act itself permits that withholding.
>
> [para 27] Section 90 of the Act reinforces my view. Section 90 provides:
>
> > *90 This Act applies to any record in the custody or under the control of a public body regardless of whether it comes into existence before or after this Act comes into force.*
>
> [para 28] I also agree that a public body cannot enter into an agreement that limits my review: see Order 98-006. Again, section 90 reinforces my view. I have authority to decide whether a record is in the custody or under the control of a public body.

[para 42] Furthermore, as the Commissioner is not a party to such an agreement the Commissioner is not bound by the agreement.

[para 43] Similarly, in Order 2000-029, former Commissioner Clark considered an argument that a public body's policy that reference letters be kept confidential overrides the right of access to those letters under the FOIP Act. The Commissioner concluded that the policy cannot override the FOIP Act stating (my emphasis):

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[6] Section 90 is now section 96 of the FOIP Act.

[para 54] I have stated that the Act supersedes an agreement regarding the withholding of information, except where the Act itself permits that withholding. See Order 2000-003. Public policy mandates that parties cannot contract out of the *Freedom of Information and Protection of Privacy Act*.

[para 55] Therefore, I find that the U of A must comply with the Act, irrespective of its policy. The policy itself is subject to the Act and must conform to the Act.

[para 56] One of the purposes of the Act is to allow individuals, such as the Applicant, a right of access to personal information about themselves that is held by a public body, subject to limited and specific exceptions set out in the Act.

[para 57] The Supreme Court of Canada has recognized the importance of access rights in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 where Justice La Forest discussed the purpose of access-to-information laws. Justice Cory, who was writing for the majority, agreed with Justice La Forest's approach to the interpretation of the federal Access to Information Act and Privacy Act. Paragraphs 59-61 read:

> As earlier set out, s. 2(1) of the Access to Information Act describes its purpose, inter alia, as providing a right of access to information under the control of a government institution in accordance with the principles that government information should be available to the public. The idea that members of the public should have an enforceable right to gain access to government-held information, however, is relatively novel. The practice of government secrecy has deep historical roots in the British Parliamentary tradition: see Patrick Birkinshaw, Freedom of Information: The Law, the Practice and the Ideal (1988), at pp. 61-85.
>
> As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principles of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them: see David J. Mullan, 'Access to Information and Rule-Making', in John D. McCamus, Ed. Freedom of Information: Canadian Perspectives (1981), at p. 54.
>
> The overarching purpose of access to information legislation, then is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry . . .

[para 58] The B.C. Commissioner also followed this approach in B.C. *Order 00-47*, [2000] B.C.I.P.D. No. 51, which dealt with Malaspina University-College's contract with an applicant. The B.C. Commissioner held that an applicant's signing of a contractual release and waiver in favour of the university did not preclude the applicant from making a subsequent access request for records related to him or excuse the university from responding. The Commissioner held that public policy dictates that rights and obligations under the Act cannot be waived by contract . . .

. . .

Conclusion

[para 61] I find that parties cannot contract out of the Act. The Applicant has a right of access to her personal information, and a policy or contractual agreement does not allow a public body to withhold Third Parties' personal information under section 16.

[para 44] I also note the comments of former Commissioner Clark at paragraph 64 of Order 2001-010 (my emphasis):[7]

> [para 64] The Applicants submitted documentation showing that the Board attempted to draw the Applicants into a private arbitration process "to solve FOIP questions . . . on a full and final basis" one month prior to the inquiry. Ironically, the Board relied upon Order 2000-003, where I discuss the fact that parties cannot contract out of the Act, or do an "end run" around the Act. See also Order 2000-029. An offer to privately arbitrate a dispute or circumvent an inquiry under the Act is contrary to the Act. It has no legal effect. In other circumstances I would have consulted with the Minister of Justice about whether such conduct amounted to obstruction under section 86(1)(c) of the Act.

[para 45] In Order F2006-025, the adjudicator confirmed the position of this Office with respect to contracting out of the FOIP Act, stating at paragraph 36 (my emphasis):

> [para 36] The Public Body argues that the process by which external references are generally kept confidential is a standardized process "that has been negotiated between the University and the Applicant's arguing agent". The Public Body provides no additional details about this "negotiation" or which "agent" is being referred to. Regardless, the Act supersedes an agreement regarding the withholding of information, except where the Act itself permits that withholding; public policy mandates that parties cannot contract out of the *Freedom of Information and Protection of Privacy Act* (Order 2000-003 at para. 26; Order 2000-029 at para. 54).

[para 46] The ability of a public body to rely on a confidentiality clause in a contract with a third party to in effect "contract out" of its obligation to provide information in the contract in response to an applicant's access request has also been considered in Orders issued by this Office.

[para 47] A confidentiality clause in a contract does not automatically mean that the information in the contract can be withheld in response to an access request. Only information which fits within one of the exceptions to disclosure under the FOIP Act may, or in some cases must, be withheld. One of the circumstances in which information must be withheld is where the information meets the requirements set out in section 16 of the FOIP Act (disclosure harmful to business interests of a third party).

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[7] Section 86(1)(c) of the FOIP Act is now section 92(1)(d).

[para 48] One of the requirements for section 16 to apply is that the information that is being withheld is "supplied, explicitly or implicitly, in confidence". The inclusion of a confidentiality clause in an agreement is one of the factors that is taken into consideration in determining whether the withheld information was supplied in confidence.

[para 49] In Order F2005-030, former Commissioner Work considered whether Alberta Environment was required to disclose a remediation agreement (the Agreement) to the applicant. Alberta Environment had cited section 16 to withhold some of the information in the Agreement.

[para 50] At paragraphs 92 and 93, former Commissioner Work stated (my emphasis):

> [para 92] In Order 96-016, the former Commissioner rejected the argument that where the Public Body has contracted with another entity to keep the information at issue confidential, disclosure of the information can cause it harm by interfering with its contractual relations. The Public Body acknowledges this decision, but says that the present circumstances are different because specific harmful consequences would, by the terms of the Agreement, be triggered by its disclosure.
>
> [para 93] This assertion overlooks the referenced Article is capable of being read as providing quite the opposite, making it impossible to conclude that confidentiality of the Agreement is a term of the contract. Further, even had the Public Body entered into such a contract, if the Act requires the Public Body to disclose the Agreement or parts of it, the Public Body is not permitted to contract out of these obligations (see Order 2000-029 at para. 54.) A Public Body cannot enter into a contract that will not meet any obligations it has under the FOIP legislation, and then argue, on the basis of this contract, that section 25 is met because violating the contract will cause it economic harm.

[para 51] Order F2005-030 was judicially reviewed by the Court of Queen's Bench (now the Court of King's Bench) and that decision was appealed to the Alberta Court of Appeal. In *Imperial Oil v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, the Alberta Court of Appeal confirmed that public bodies cannot contract out of the FOIP Act. At paragraphs 74 – 75, the Court stated (my emphasis):

> [74] The concept of "confidentiality" comes into play because the exception to disclosure found in s. 16(1) of the *FOIPP Act*. That section creates a three part test that justifies non-disclosure of certain commercial, financial or scientific information of a third party. The second part of the test is:
>
> > 16(1) The head of a public body must refuse to disclose to an applicant information . . .
> >
> > (b) that is supplied, explicitly or implicitly, in confidence, and . . .
>
> Thus in order to take advantage of this exception to disclosure, Imperial Oil or Alberta had to establish that the information leading to the Remediation Agreement was supplied by Imperial Oil "explicitly or implicitly, in confidence".

> [75] The Commissioner made the obvious point that no public body can "contract out" of the FOIPP Act. No party disputes that, but that is not the issue. The exception in s. 16(1)(b) is that the information was "supplied, explicitly or implicitly, in confidence". That is substantially a subjective test; if a party intends to supply information in confidence, then the second part of the test in s. 16(1) is met. It follows that while no one can "contract out" of the *FOIPP Act*, parties can effectively "contract in" to the part of the exception in s. 16(1)(b). It also follows that the perceptions of the parties on whether they intended to supply the information in confidence is of overriding importance. No one can know the intention of the parties better than the parties themselves. It is therefore questionable whether the Commissioner can essentially say: "You did not intend to implicitly provide this information in confidence, even if you thought you did".

[para 52] It has been the clear position of this Office since the FOIP Act came into force that in all instances public bodies cannot contract out of their obligations under the FOIP Act, and cannot require individuals to contract out of their rights, benefits or protections under the FOIP Act, as it is against public policy.[8] Accordingly, provisions in agreements, including settlement agreements, or waivers and releases, which purport to do this are void.

[para 53] In my view, when the Legislature included section 4(7) in PIPA in 2005, which specifically says that PIPA applies notwithstanding any agreement to the contrary, and any waiver or release given of the rights, benefits or protections provided under PIPA is against public policy and void, its intent was to codify the premise that already applied to the FOIP Act.

[para 54] In the context of this case, it makes sense that public bodies cannot require their employees to waive or release their right to access information under the FOIP Act, just as organizations cannot require their employees agree to waive or release their right to information under PIPA. This interpretation creates coherence and consistency between the FOIP Act and PIPA.

[para 55] I would note that whether an agreement in which an individual waives or releases their rights, benefits or protections under the FOIP Act is signed after a Request for Review has been submitted to the Commissioner, or after a Request for Inquiry has been submitted to the Commissioner, is not relevant to the question of whether the FOIP Act permits a public body to require an individual contract out of the rights, benefits or protections they have under the FOIP Act.

[para 56] It is also irrelevant whether the agreement purports to limit the extent that an individual is required to contract out of their rights, benefits or protections under the FOIP Act.

[para 57] In other words, it is not relevant if an agreement purports to limit an individual from making access requests or bringing or continuing a Request for Review or Request for Inquiry only with respect to the matter that has been settled between the parties, but does not restrict an individual from making access requests to a public body, or bringing Requests for Review or

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[8] In addition to the cases discussed herein, see Orders F2010-027 & P2010-020 at para. 61, F2017-81 at paras. 70 – 74, and F2022-37 at para. 56.

Requests for Inquiry with respect to information that is unrelated to the matter that was settled between the parties.[9]

[para 58] Either a public body is permitted to require an individual to waive or release their rights, benefits or protections under the FOIP Act by way of agreement, or it is not. It is not.

[para 59] Further, the determination that any waiver or release by an individual of their rights under the FOIP Act is against public policy and void, is consistent with the position that has been taken in other jurisdictions across Canada that have freedom of information and protection of privacy legislation. Below are examples from British Columbia and Ontario, both of which involved settlement agreements or releases.

British Columbia

[para 60] As former Commissioner Clark noted in Order 2000-029, in Order 00-47 former British Columbia Information and Privacy Commissioner Loukidelis determined that parties could not contract out of the British Columbia *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (the BC FOIP Act).[10]

[para 61] The summary of Order 00-47 states (my emphasis):

> **Summary:** Applicant's signing of a contractual release and waiver in favour of public body did not preclude applicant from making subsequent access request for records related to him or excuse public body from responding. Public Policy dictates that rights and obligations under the *Freedom of Information and Protection of Privacy Act* cannot be waived by contract. Public body was required to respond to applicant's access request, which it had done, but applicant was not entitled to have access to records covered by s. 14. It was not necessary to consider s. 22 issues relating to records protected by s. 14.

[para 62] Given the similarity between the facts and arguments before former Commissioner Loukidelis and the facts and arguments before me, and former Commissioner Louikidelis' thorough analysis of why public policy dictates that rights and obligations under the BC FOIP Act cannot be waived by contract, I have reproduced a significant portion of his Order below.

[para 63] At pages 2 – 10, former Commissioner Loukidelis stated:

> **1.0 INTRODUCTION**
>
> This case raises the important question of whether it is possible to contractually limit or waive a person's rights of access to information under the *Freedom of Information and Protection of Privacy Act* ("Act"). The public body in this case, Malaspina University-College ("College"), says it was not required to respond to the applicant's November 16,

[9] The same applies to agreements which purport to limit an individual's right to make or continue a complaint before this Office under the FOIP Act.

[10] See too Order 01-20 at para. 80 where former Commissioner Loukidelis stated "As I found in Order 00-47, [2000] B.C.I.P.C.D. No. 51, any attempt to contract out of the Act is void and against public policy". See too Order 03-02 at para. 61.

1999 request for access to information because of a contractual release and waiver signed by the applicant in the College's favour. When the College and the applicant parted ways last year, the applicant agreed – in an "Agreement and Final Release" signed October 25, 1999 (the "Release") – as follows (among other things):

> THE RELEASOR [THE APPLICANT] HEREBY REMISES, RELEASES, AND FOREVER DISCHARGES the Releasee [the College] of and from any and all manner of actions, causes of action, claims and demands of any nature or kind whatsoever, whether in law or in equity, whether known or unknown, which the Releasor now has, or can or may have related to or arising out of the employment or termination of employment of the Releasor by the Releasee . . .

In his access request, the applicant sought two records that had been written about him by College staff, a College employee's minutes of meeting attended by the applicant and College representatives, and other records about the applicant allegedly held by the College's president. The College's initial response to the applicant's request, in a letter dated November 26, 1999, took the position that the College was not required to respond to the request. Despite its initial refusal to respond to the request, the College later responded to the request under the Act. It did so in a February 16, 2000 letter from its lawyers. [The] College took the position that the information sought by the applicant is, in any case, excepted from disclosure under s. 14 of the Act.

Because the matter was not settled during mediation, I held a written inquiry under s. 56 of the Act. Because I believed further submissions on the contracting-out issue were desirable, I sought and received further submissions from both parties on that issue.

2.0 ISSUES

The first question to be addressed is whether the College is correct when it says the Release deprives me of the jurisdiction to proceed with this inquiry. Put another way, have the College and the applicant validly, by way of contract, ousted the applicant's statutory right to have access to records, and have they relieved the College of its duties under the Act in relation to that request, such that I cannot complete this inquiry or offer the applicant a remedy? Neither party contends that I have no authority to determine the jurisdictional issue. In this case, I conclude – in light of s. 56(1) of the Act – that I have the authority to determine that issue.[11]

If I have the jurisdiction to proceed, the next issue is whether s. 14 of the Act applies to the information requested by the applicant. Section 57(1) of the Act provides that the College has the burden of establishing that s. 14 applies. Another issue raised here is whether s. 22 applies to the two statements requested by the applicant. Because I have found the two statements are protected by s. 14, it is not necessary to deal with the issue of whether s. 22 applies to prevent their release to the applicant.

In his reply submission, the applicant refers to an earlier access request he made to the College. The College acknowledges the applicant made a previous request for his personal file and that it responded. It says (and I agree) that this inquiry is limited to dealing with the applicant's November 16, 1999 access request.

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[11] Section 69(1) of the FOIP Act is the substantially similar to section 56(1) of the BC FOIP Act.

3.0 DISCUSSION

. . .

3.2 Freedom of Contract and Statutory Rights – As the College sees it, the Release means the applicant has contracted out of, or contractually limited, some or all of his rights under the Act. In its initial submission, it says "the applicant has bargained away his rights under" the Act. In its further submission, it modifies this stance somewhat. It says there that the applicant has "in exchange for genuine consideration" – i.e. payment by the College – only "limited his access to a number of documents". It argues that the question to be answered here "is really whether the policy of ensuring repose" after a settlement between the applicant and the College "should permit a limited qualification of some rights under the Act". The applicant is said to have given up only his statutory right to gain access to "a narrow category of documents related to a dispute which he has settled after full legal advice". The Release is "circumscribed" and "reasonably limits access to some documents for reasonable purposes".

Public Policy and Contractual Limits on Statutory Rights

The College argues that Canadian law permits individuals to "waive statutorily conferred benefits", subject only to three exceptions: (1) where it is contrary to the provisions or general policy of the statute in issue; (2) where it is contrary to public policy; and (3) where the benefits of the statute are imposed in the public interest. It cites, in support, one of the court decisions to which I referred the parties when I invited further submissions from them – *Ontario Human Rights Commission et al. v. Borough of Etobicoke (1982)* D.L.R. (3d) (S.C.C.). In that case, McIntyre J. cited Millar Estate (Re) [1938] 1 S.C.R. 1, in which Duff C.J.C. articulated the three-part test relied on by the College.

. . .

One respected Canadian author says two kinds of cases exist – those where a contract is invalid because it is directly contrary to statute and those where it is invalid because it is contrary to what is considered to be public policy. See S. Waddams, *The Law of Contracts*, 3rd Ed., 1993 (Toronto: Butterworths), at pp. 371 and following.

In my view, the question to be answered here is whether the Legislature has explicitly prohibited contracting-out from the Act and, if it has not, whether public policy nonetheless prevents the College and the applicant from doing that.

Before proceeding, I should deal with the College's argument (at page 3 of its supplemental submission) that the validity of the Release, as a "circumscribed" contract is to be analyzed differently that a contract by which it or any other public body purports to contract out of the Act in broader or more fundamental way. To my mind, no useful distinction can be drawn between the Release and such a contract. If the College can validly contract to affect, or remove, a statutory right otherwise available to the applicant (and the College's corresponding statutory right otherwise available to the applicant (and the College's corresponding obligations), it would be difficult to advance a principled objection to a broader (or blanket) contracting-out. In light of the scheme of the Act, the issue of whether the Act or public policy permits the Release to stand must be dealt with on the same footing as the question of whether a more extensive contracting-out is effective.

Has the Legislature Prohibited Contracting-Out of the Act?

The College says, in its initial submission, that the Release is perfectly valid in the absence of an express statutory prohibition against such a contract. It argues that, "where public policy requires that persons not be able to contract-out of a statute, this is expressly provided for in the legislation". It cites s. 4 of the *Employment Standards Act* as an example. Since the Legislature has expressly prohibited contracting-out of the *Employment Standards Act*, the College argues, the "Legislature must be taken to have, through its inaction, permitted parties to bargain away their rights conferred by the Act".

Granted, the Legislature has expressly prohibited contracting-out of rights conferred in certain statutes, including the *Employment Standards Act* and the *Workers' Compensation Act*. In the case of the *Employment Standards Act*, s. 4 says the requirements of that statute "are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 39, 61 and 69". In the case of the *Workers' Compensation Act*, s. 13(1) reads as follows:

> A worker may not agree with his or her employer to waive or to forego any benefit to which the worker or the workers' dependants are or may become entitled under this Part, and ever agreement to that end is void.

The Act does not in this fashion prevent public bodies and others from contracting-out of rights otherwise afforded under the Act. The College argues that, in light of the Legislature's explicit prohibition against contracting-out in other statutes, the Legislature cannot be taken to have prohibited anyone from contracting-out of the Act. Silence in the Act indicates acquiescence by the Legislature to such arrangement.

In my view, the absence of an express prohibition against contracting-out is not determinative. As is apparent from *Etobicoke*, above, a legislature sometimes will expressly prohibit contracting-out. But if there is no explicit legislative prohibition, the public policy question on which *Etobicoke* turned still remains.

Does Public Policy Prevent Contracting-Out?

The College cautions against my too readily injecting my view of what public policy is and, on that basis, deciding that contracting-out from the Act is precluded. It says public policy is the "most amorphous ground" on which to set aside a contract and that the courts have been aware that "this basis is open to completely subjective criteria". Citing the Supreme Court of Canada decision in *Millar Estate (Re)*, above, the College says two "strict criteria" must be met before a contract can be held invalid or ineffective on the ground of public policy. First, a prohibition against a contract must only be imposed in the interest of state safety or the economic or social well-being of the state and its people as a whole. Second, public policy should only be invoked in clear cases, in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judges. The College says that, unlike the situation in *Etobicoke*, fulfillment of the Act's purposes – as set out in s. 2(1) – would not be substantially affected by the Release. The College says only one of the Act's purposes is engaged by the Release, i.e., that of "granting individuals access to personal information". Nor is the Act an attempt, the College submits, to cure the mischief of individuals forfeiting existing rights.

. . .

Turning to the main issue, there is ample support for the conclusion that public policy prohibits contracting-out of the Act, which is intended to further a number of important interests. Section 2 sets out the Act's purposes:

> 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,
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
>
> (c) specifying limited exceptions to the rights of access
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (e) providing for an independent review of decisions made under this Act.
>
> (2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

As the first lines of s. 2(1) make clear, the Act's dual purposes are to protect personal privacy and promote accountability to the public of institutions covered by the Act. The Act's accountability objective is achieved, as acknowledged by s. 2(1)(a), by giving "the public" a right of access to records. That right is, necessarily, exercised by individual applicants on a case-by-case basis. But the "right" articulated in the section belongs to "the public", not to individual applicants. This provision acknowledges the sea-change effected by the Act in relations between the public, on the one hand, and governments and other public institutions, on the other. The public's right of access to information under the Act compels public bodies to share information with citizens, within prescribed limits, so as to enable them to participate more effectively in society and government.

. . .

The last authority to which I will refer is *Ontario (Criminal Review Board) v. Doe* (1999), 47 O.R. (3d) 201 (O.C.A.). That case dealt with the question of whether an institution had – for the purposes of Ontario's *Freedom of Information and Protection of Privacy Act* – control over a backup tape made by a court reporter of Ontario Criminal Review Board proceedings. An access request had been made for the tape, but the court reporter – who was an independent contractor – refused to turn the tape over to the Board so it could respond to the request. As is the case under the Act, the Ontario law only applies to records in the custody or under the control of an institution covered by the Act. Since the court reporter was not covered by the Act, and since the Board had lost control over the tape, the Board said it could not respond to the access request.

In affirming a decision that the Board had control of the tape for that purpose, the Ontario Court of Appeal rejected the Board's argument that, by contracting out of the court-reporting functions previously performed by Board employees, the Board had lost its ability to control the tape. At para. 35, O'Connor J.A. said the following for the Court:

> The Board has argued throughout this proceeding that if it is ordered to make access to the backup tapes available to the John Does [the requestors], it will be unable to comply because it is not able to compel the court reporter to deliver the backup tapes to it. I must say I find this a rather surprising proposition. We were told that at some time in the past the Board had used employees to do what independent court reporters now do. If the Board had continued to use employees there would be no issue; the backup tapes would be in the Board's custody and under its control. However, the Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfill its statutory duty to provide access to the documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the Act by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act.

Although the Court did not explicitly appeal to public policy grounds in its reasoning, it evidently took a jaundiced view of the argument that, by contracting out functions it had previously performed, the institution had effectively contracted out of Ontario's access and privacy legislation, which is similar to the Act. *Ontario (Criminal Review Board)* is useful in considering the public policy issue at hand.

Section 2(1) confirms that the Act's information access rights are intended to make public bodies accountable to "the public" as a whole, not simply to individual requesters. Access rights might be individually exercised, but they benefit the entire community. They also benefit public institutions: accountability enhances public trust in them, thus contributing to their legitimacy. As for privacy, the Act's rules for collection, use and disclosure of individuals' personal information apply in individual cases, but they benefit society as a whole. Those rules curtail state actions that otherwise might unreasonably encroach on citizens' individual autonomy. Diminished individual autonomy is not conducive to the development, or continued existence, of a free and democratic society.

The authorities quoted above also attest to the fundamental importance of access and privacy laws. The Attorney General observed in debate in the Legislature that the Act creates "fundamental" access to information rights. As La Forest J. observed in *Dagg*, at para. 59, access to information rights are enacted on the premise "that members of the public should have an enforceable right to gain access to government-held information". He also emphasized, at para. 61, that the "overarching purpose of access to information legislation . . . is to facilitate democracy". As La Forest, J. noted in *Dagg*, at para. 64, "protection of privacy is a fundamental value in modern, democratic states". *Dagg* and several other Supreme Court of Canada decisions also demonstrate that privacy has constitutional dimensions under the *Canadian Charter of Rights and Freedoms*.

> To echo the words of McIntyre J. in *Etobicoke*, the Act was enacted by the Legislature for the benefit of the community at large and of its individual members – including the applicant – and clearly falls within that category of enactment that may not be waived or varied by contract. The public policy issue does not turn here on an idiosyncratic or subjective assessment of what is or should be public policy – that is articulated in the Act (including s. 2(1)) and is confirmed by the authorities to which I have referred. I have, therefore, concluded that the Release is, as regards its purported effect on the parties' rights and obligations under the Act, contrary to public policy and is not to be given effect. Accordingly, I find that I have jurisdiction to conduct this inquiry.
>
> It is not necessary for me to consider whether the terms of the Release, properly interpreted, actually have the effect the College says they do. The next question is whether the College was authorized or required by provisions of the Act to refuse to disclose information to the applicant.

[para 64] I agree with the analysis and conclusions of former Commissioner Loukidelis in Order 00-47 and find that the analysis applies equally with respect to contracting out of the FOIP Act.

Ontario

[para 65] This is also the position that has been taken by the Ontario Office of the Information and Privacy Commissioner with respect to contracting out of the Ontario *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56.

[para 66] For example, in Interim Order MO-3798-I, the adjudicator stated (my emphasis):[12]

> . . .
>
> [9] As no further mediation was possible, the file moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the Act . . .
>
> . . .
>
> [11] At this stage, legal counsel for the township contacted this office to inform the adjudicator of a settlement reached between the township, the appellant, and another party in the HRTO proceeding commenced by the appellant. Based on the terms of that settlement, the township ask that the appeal be discontinued. As described in more detail below, I declined the township's request on the basis that the agreement reached between the parties in that other proceeding has no effect on the appellant's rights under the *Act*, including her right of access to the records at issue.
>
> . . .

[12] See too Order PO-2599 at page 8 where the adjudicator stated "Moreover, it is a relatively well-established principle that one may not contract out of the provisions of the [*Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c F.29]".

Preliminary Matter – Effect on this appeal of settlement reached in other proceeding

[16] During the inquiry process, legal counsel for the township wrote to this office to request that this appeal be discontinued in light of a settlement reached by the parties in an HRTO proceeding brought by the appellant against the township and another individual respondent. The township provided a redacted version of Minutes of Settlement executed between the parties to show that the settlement contains a clause that it described as a "full and final legal release of all claims," including (the township claims) the appellant's appeal to this office.

[17] In light of the township's request, I sought the appellant's views on the impact of the settlement reached in that other proceeding on the appeal before this office. The appellant took the position that this appeal is unaffected by the settlement because the release bars potential claims relating to the events that gave rise to the application, and does not bar existing claims (of which this appeal is one). The appellant confirmed her interest in pursing the appeal.

[18] I found it unnecessary to address the dispute between the parties about the scope of the release contained in the agreement between them, because I concluded that, whatever its scope, the release cannot disentitle the appellant to her rights of access under the *Act*.

[19] This office has expressly rejected the notion that parties may "contract out" of access-to-information legislation, including by way of an agreement signed by parties to an appeal in order to settle other proceedings. In Order PO-2520, Adjudicator John Higgins considered, and rejected, an institutions arguments regarding the effect of such an agreement on the access regime established by the Act's provincial counterpart, the *Freedom of Information and Protection of Privacy Act* (FIPPA):

> The College's arguments in this regard may be summarized as follows: (1) it is possible to "contract out" of [*FIPPA*] in a document such as the Minutes of Settlement; (2) such "contracting out" either removes the record from the scope of [*FIPPA*] and/or from the scope of the Commissioner's authority; (3) the College did, in fact, "contract out" of [*FIPPA*] via the Minutes of Settlement in this case, and (4) in the alternative, the College appears to argue that the Commissioner should somehow enforce the Minutes of Settlement. As outlined below, I reject arguments (1), (2) and (4), and it is therefore not necessary to resolve argument (3).
>
> Section 10(1) [setting out the right of access in *FIPPA*] creates an express and unambiguous right of access to records "in the custody or under the control" of an institution such as the College, subject to exceptions that do not include the provision of a contract. In my view, therefore, [*FIPPA*] applies in the circumstances of this appeal regardless of the contents of any agreement to the contrary, and the right of access in section 10(1) must be decided within the four corners of the statute. The Commissioner's authority is unaffected. If the Minutes of Settlement ending the grievance in this case in fact include an express provision contracting out of the right of access created by [*FIPPA*] (and I expressly decline to find that they do), any violation of that provision would be a matter of contract law, employment law or labour law, and enforceable in that context. . . . There is nothing in [*FIPPA*] or in the Minutes that would

empower the Commissioner or her delegates to, in effect, enforce the Minutes of Settlement.

[20] The principle that parties may not contract out of the provisions of access-to-information legislation has been upheld by the courts,[1] and consistently applied by this office.[2] I concluded that the agreement reached between the parties in an outside proceeding has no effect on the appellant's rights under the Act, including her rights of access and to appeal the township's decision to this office. I also stated that any dispute between the parties about compliance with or enforcement of the agreement is outside the purview of this office.

Footnotes:

1 Among others, see *St. Joseph Corp v. Canada (Public Works and Government Services)*, 2002 FCT 274 (CanLII); *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, 2003 FCT 254 (CanLII); *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, 2004 CanLII 11768 (ON SCDC), affirmed CanLII 34228 (ON CA), application to Supreme Court of Canada for leave to appeal dismissed [2005] SCCA No. 563.

2 Among others, see Orders PO-2917, PO-3009-F, PO-3327 and MO-2833.

One Final Note

[para 67] In addition, I note that the Public Body included the following provision in the Settlement Agreement:

> 5.4 The Parties acknowledge that notwithstanding paragraph 5.2, a statutory body may continue an investigation or prosecution of an action, complaint, application or request that the Teacher has made against the Board irrespective of the Teacher's withdrawal, discontinuance or rescission of the action, complaint, application or request. The Parties agree that this will not constitute a breach of this Agreement provided the Teacher has complied with paragraph 5.2.

[para 68] This indicates to me that the Public Body realized that even if the Applicant *had* informed this Office that he was withdrawing his Request for Review or his subsequent Request for Inquiry with regard to the Public Body's response to his access request, this would not oust the Commissioner's jurisdiction under the FOIP Act, and the Commissioner would retain the authority to review the Public Body's response to the Applicant's access response under the FOIP Act.

CONCLUSION

[para 69] While the FOIP Act does not explicitly state that a public body cannot contract out the FOIP Act, and cannot require an individual to waive or release their rights, benefits or protections under the FOIP Act, the Orders and cases I have cited above support a finding that the FOIP Act applies notwithstanding any agreement to the contrary, and any waiver or release given of the rights, benefits or protections provided under the FOIP Act is against public policy and void.

IV. ORDER

[para 70] I make this Order under section 72 of the FOIP Act.

[para 71] I find that the provisions in the Settlement Agreement which required the Applicant to withdraw, rescind and discontinue any and all requests for information, complaints and applications made by the Applicant under the FOIP Act, to be contrary to public policy and void.

[para 72] I find that I have jurisdiction to proceed to the second part of this inquiry and determine whether the Public Body properly concluded that information was non-responsive to the Applicant's access request, and whether it properly applied section 17(1) to withhold responsive information. A Notice of Inquiry setting out the issues for the second part of this inquiry will be issued in due course.

[para 73] I make no finding on the validity of the balance of the provisions of the Settlement Agreement.

_____

Carmen Mann
Adjudicator
/kh