

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4235

Appeal PA21-00390

Ministry of the Solicitor General

February 15, 2022

Summary: The requester submitted an access request, pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*), to the Ministry of the Solicitor General for a copy of a 1998 police report related to the death of her brother. She had previously sought access to the same record from the ministry and, on appeal of the ministry's access decision in response to that request, an adjudicator with the Information and Privacy Commissioner (the IPC) upheld the ministry's decision to deny access to portions of this record pursuant to the mandatory personal privacy exemption in section 21(1). In response to her second request, the ministry issued a decision claiming that it was frivolous or vexatious according to section 10(1)(b) of the *Act*.

In this order, the adjudicator finds that the doctrine of issue estoppel applies and she dismisses the appellant's appeal of the ministry's decision because it arises from a request for the same record requested by her previously. This previous request involved the same parties and resulted in a final decision issued by the IPC, Order PO-3900. The adjudicator dismisses the appeal without conducting an inquiry. As such, the adjudicator did not need to determine whether the appellant's second request for the same record was frivolous or vexatious.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 52(1).

Orders Considered: Orders PO-3900 and PO-3946.

Cases Considered: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.*, 1998 CanLII 6467 (BC CA); *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19.

OVERVIEW:

[1] This order addresses the application of the doctrine of issue estoppel in circumstances where the appellant seeks access to a copy of a 1998 police report concerning the death of her brother.

[2] The appellant had previously requested a copy of this 1998 report from the Ministry of Community Safety and Correctional Services (now the Ministry of the Solicitor General)¹ (the ministry) pursuant to the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)*. She received a copy of this report, with portions redacted that contained the personal information of individuals other than her brother. She appealed this decision to the Information and Privacy Commissioner of Ontario (the IPC), which upheld the ministry's decision in Order PO-3900.

[3] At issue in the present appeal is the appellant's request to the ministry for:

...access to an unredacted copy of the police report connected to my brother [name's] murder. He was murdered in [place] on [date in 1998].

[Ontario Provincial Police (the OPP)]² Occurrence [#]

[4] The ministry responded to the request by issuing a decision claiming that it was frivolous or vexatious according to section 10(1)(b) of the *Act* and section 5.1(a) and (b) of the Regulation 460. The ministry described in its letter the following rationale for this position.

Please be advised that in the above noted request received by the ministry, you seek access to the same records that have previously been released under request [#]. You appealed that decision to [the Information and Privacy Commissioner (the IPC)] and the appeal number was PA16-528. The appeal proceeded to adjudication where Order PO-3900 was issued. The ministry complied with the Order and issued a supplementary decision in which we attached a copy of the information ordered disclosed to you by [the IPC].³

[5] The appellant appealed the ministry's decision to the IPC and a mediator was appointed to try to resolve the issues in this appeal.

¹ On April 4, 2019 the Ministry of Community Safety and Correctional Services became the Ministry of the Solicitor General. See <https://www.ontario.ca/page/published-plans-and-annual-reports-2019-2020-ministry-solicitor-general#:~:text=Ministry%20overview,Ministry%20of%20the%20Solicitor%20General.&text=The%20ministry%20is%20also%20accountable,private%20security%20and%20investigative%20services>

² The Ontario Provincial Police is part of the ministry.

³ Besides the record that is at issue in this appeal, in Appeal PA16-528 there were two other records at issue, a witness statement and police officer's notes. The information that was ordered disclosed in Order PO-3900 was not from the record at issue in this appeal.

[6] During mediation, the ministry confirmed its position that the request was frivolous or vexatious. The appellant took issue with that position and confirmed that she was seeking access to an unredacted copy of the report she requested.

[7] No further mediation could be conducted and the appeal moved to the adjudication stage. I sought the ministry's representations on whether the appellant's request was frivolous or vexatious. I also sought representations on the preliminary issue of whether the doctrine of issue estoppel may apply in this situation in light of the decision in Order PO-3900,⁴ given my preliminary view that it may.

[8] I received representations from the ministry, which were shared with the appellant. The appellant provided representations in response.

[9] In this order, I find that the doctrine of issue estoppel applies because the appellant's request is for the same record previously requested by her under the *Act* and involves the same parties subject to the final decision issued by the IPC in Order PO-3900. Therefore, I dismiss the appeal without conducting an inquiry.

[10] Given my finding that the doctrine of issue estoppel applies, there is no need for me to also consider whether the appellant's request is frivolous or vexatious. I dismiss the appeal.

RECORD:

[11] The appellant is seeking access to an unredacted copy of a 19-page 1998 OPP report. The report was prepared by the OPP in connection with the appellant's brother's death and consists of an Occurrence Summary Report (page 1), a Homicide/Sudden Death Report (pages 2-9), and Supplementary Occurrence Reports (pages 10-19). This same record was adjudicated upon in Order PO-3900.

DISCUSSION:

Does the doctrine of issue estoppel apply to the adjudication of the record in light of the decision in Order PO-3900?

[12] Previous orders of the IPC⁵ have determined that the IPC may dismiss an appeal pursuant to section 52(1) of the *Act*⁶ without conducting an inquiry where the appeal

⁴ Order PO-3900 see <https://decisions.ipc.on.ca/ipc-cipvp/orders/en/363011/1/document.do>

⁵ See for example Orders P-1392, MO-1907 and PO-3946.

⁶ Section 52(1) of the *Act* states,

The Commissioner may conduct an inquiry to review the head's decision if,
(a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or

involves the same parties, issues and records previously considered, based on the application of the doctrine of issue estoppel.

[13] As set out above, my preliminary view was that the doctrine of issue estoppel applies, therefore, I sought the parties' representations on the following principles regarding this doctrine.

[14] The leading case that considers the doctrine of issue estoppel in the context of prior tribunal decisions is the Supreme Court of Canada's decision, *Danyluk v. Ainsworth Technologies Inc. (Danyluk)*.⁷ In that decision, the Supreme Court of Canada stated:

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry.... An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal...

[15] The Supreme Court in *Danyluk* also confirmed that the doctrine of issue estoppel applies to administrative tribunals:

These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

[16] The test set out in *Danyluk* for establishing the operation of issue estoppel has been adopted by the IPC. In Order PO-3946, the adjudicator stated:

Danyluk sets out a two-step analysis for the application of issue estoppel. First, the decision maker must determine whether the moving party ... has

(b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected.

⁷ *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

established the three conditions to the operation of issue estoppel. These conditions are:

1. that the same question has been decided,
2. that the judicial decision which is said to create the estoppel was final; and,
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[17] Even if these three conditions are met, the IPC must still determine “whether, as a matter of discretion, issue estoppel ought to be applied.”⁸

[18] As the appellant is seeking access to an unredacted copy of the same police report that was adjudicated upon in Order PO-3900, the parties were asked to provide representations on the three conditions in *Danyluk* and whether, as a matter of discretion, the IPC should apply the doctrine of issue estoppel if these three conditions have been met in this appeal.

[19] The parties were advised that I could dismiss the appeal on the basis of issue estoppel, without considering whether the request was frivolous or vexatious.

Representations

[20] The ministry states that the appellant had previously filed a request for the same record in connection with Appeal PA16-528 and that it severed pages 1, 11 and 16 of the record on the grounds that it contained another individual’s personal information and in accordance with the mandatory personal privacy exemption in section 21(1).

[21] The ministry states that the IPC upheld its decision in Order PO-3900. It quotes from paragraph 97 of that order, where the adjudicator stated:

The ministry disclosed a great deal of information to the appellant which is supplemented by the information that I have ordered to be disclosed. The information that remains at issue is not the personal information of the deceased alone, but also qualifies as the personal information of other identifiable individuals.

[22] In the appeal that led to Order PO-3900, additional records were at issue beyond the one before me. The ministry notes that in Order PO-3900, the adjudicator did order some additional information in other records to be disclosed, but none of it was contained in the record that is now at issue. It states that in Order PO-3900, the

⁸ See for example Order PO-3946, and *Danyluk* (cited above).

adjudicator upheld the ministry's decision to withhold the personal information in the police reports on the basis that to disclose it would constitute an unjustified invasion of personal privacy of individuals other than the appellant.

[23] The ministry states that, now, just three years after the issuance of Order PO-3900, the appellant has filed an access request for the same record, and has sought disclosure of the same personal information that was previously withheld by it and that was ordered in Order PO-3900 to be withheld. The ministry's view is that this personal information is as worthy of protection now as it was three years ago, and that its protection continues to be assured under *FIPPA*.

[24] The ministry states that it specifically considered the test set out in *Danyluk* and that issue estoppel applies, as all three conditions set out in that case have been met.

[25] In support of the first condition, the ministry states that the same question was decided in Order PO-3900, in that the same appellant was requesting the same record relating to her brother's death. The ministry states that it denied portions of the record then and now because it contains the personal information of other individuals.

[26] In support of the second condition, that the decision which is said to create the estoppel was final, the ministry notes that Order PO-3900 is a final order.

[27] In support of the third condition, that the parties to the decision were the same persons as the parties to these proceedings, the ministry notes that the appellant and the institution are the same in the proceedings that led to Order PO-3900 and the current appeal.

[28] The ministry submits that the IPC should exercise its discretion by applying the doctrine of issue estoppel, thereby dismissing the appeal. It is the ministry's view that there is no public policy interest in re-adjudicating the same type of request for the same records by the same appellant. Having been denied access to the personal information of affected third party individuals in Order PO-3900, the ministry submits that the appellant should not now be able to circumvent that order.

[29] The appellant did not address the issue of issue estoppel in her representations. Under the heading "Issue Estoppel" in her representations, she objects to the same ministry legal counsel being involved in this appeal and in the appeal that resulted in Order PO-3900.

[30] The appellant's representations instead focus on her belief as to why her brother's death in 1998 was not properly investigated.

Analysis/Findings

[31] The appellant has requested a copy of an unredacted copy of the 19-page police report connected to her brother's death in 1998. This same record was adjudicated

upon in the appeal that resulted in Order PO-3900.

[32] For the reasons that follow, I find that the doctrine of issue estoppel applies in this appeal as all three conditions set out in *Danyluk* for its operation have been met. In particular, I find that:

1. The same question has been decided

In both this appeal and the appeal that gave rise to Order PO-3900, the appellant sought access to the same record from the ministry, which has custody of the record.

2. The judicial decision was final

Order PO-3900, the order that the ministry submits creates the estoppel, determined the issues around access to the same record at issue in this appeal. Order PO-3900 is a final decision.

3. The parties are the same

This appeal is the proceeding in which the question of issue estoppel is raised. The parties to the appeal leading to the adjudicator's decision in Order PO-3900, the ministry and the appellant, are the same as the parties in this appeal.

[33] Therefore, I find that all three conditions in *Danyluk* have been met for the operation of issue estoppel.

[34] Even though I have found that issue estoppel applies, I may exercise my discretion to hear the appeal. In *Danyluk*, the Supreme Court referred to *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.*,⁹ in which the Court of Appeal of British Columbia stated,

Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

[35] Of particular relevance to the context of IPC decision-making is the statement made by the Supreme Court in *Danyluk* that "the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision

⁹ *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.*, 1998 CanLII 6467 (BC CA) at para 32.

makers.”¹⁰

[36] In *Penner v. Niagara (Regional Police Services Board)*,¹¹ the Supreme Court considered the discretionary application of issue estoppel. In its decision, the majority specifically referred the application of this doctrine to the decisions of administrative tribunals and stated as follows:

Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature’s intent in setting up the administrative scheme.¹²

[37] However, the Supreme Court in *Penner* stated that even if issue estoppel applies, “a court retains discretion to not apply issue estoppel when its application would work an injustice.”¹³

[38] Regarding the factors to consider in the discretionary application of issue estoppel, the Supreme Court in *Penner* stated,

Broadly speaking, the factors identified in the jurisprudence [such as *Danyluk*] illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.¹⁴

[39] Upon consideration of these factors, the circumstances of the appeal, the parties’ representations and the record at issue, I find that it would be just to apply the doctrine of issue estoppel in this case.

[40] I find no evidence to demonstrate that the prior proceeding (i.e. the inquiry under the *Act*) that resulted in Order PO-3900 was unfair to the appellant. In *Penner*, the Supreme Court directs the decision-maker to consider factors including “procedural safeguards, the availability of an appeal, and the expertise of the decision maker”¹⁵ in considering the opportunity the parties had to participate in, and the fairness of, the administrative proceeding. The Supreme Court stated these considerations “address the

¹⁰ *Danyluk*, supra note 2 at para 62.

¹¹ *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, (*Penner*).

¹² *Ibid.* at para 28.

¹³ *Ibid.* at para 29.

¹⁴ *Ibid.* at para 39.

¹⁵ *Ibid.* at para 41.

question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the issues in the prior proceedings and a means to have the decision reviewed.”¹⁶

[41] The parties to the prior appeal had an opportunity to participate in the inquiry that resulted in Order PO-3900. Therefore, I find there is no evidence to establish that the prior proceeding was unfair to the appellant.

[42] The second manner in which the application of issue estoppel may be unfair relates to the fairness of using the results of the prior proceeding to preclude the subsequent proceeding. In this regard, the Supreme Court in *Penner* stated,

...even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings.... In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court’s recognition that finality is an object that is also important in the administrative law context.¹⁷

[43] In this appeal, the appellant submits that her brother’s death was not properly investigated. It appears from her representations that she seeks access to the redacted portions of the record, which contains other individuals’ personal information, to further investigate her brother’s death.

[44] In the appeal that gave rise to Order PO-3900, the appellant also argued that the investigation by the OPP into her brother’s death was inadequate. In that appeal, as in this appeal, she disputed the OPP’s conclusion that her brother’s death was self-inflicted, rather than a murder.

[45] The appellant’s submission that the investigation was inadequate was considered by the adjudicator in Order PO-3900 in arriving at his decision to uphold the ministry’s application of the personal privacy exemption in section 21(1) to portions of the record. In doing so, the adjudicator considered whether the compassionate grounds exception under the section 21(1) personal privacy exemption in section 21(4)(d)¹⁸ applied to permit disclosure of the redacted portions of the record to the appellant. In Order PO-3900, the adjudicator determined that section 21(4)(d) did not apply. The adjudicator in

¹⁶ *Ibid.* at para 41.

¹⁷ *Ibid.* at para 42.

¹⁸ Section 21(4)(d) reads:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

Order PO-3900 stated:

The ministry disclosed a great deal of information to the appellant which is supplemented by the information that I have ordered to be disclosed. The information that remains at issue is not the personal information of the deceased alone, but also qualifies as the personal information of other identifiable individuals. The personal information of the deceased is inextricably intertwined with that of the other identifiable individuals. In my view, the information already provided to the appellant as supplemented by the information that I have ordered disclosed, provides her with an understanding of the events leading up to and surrounding the death of [her] brother and of the investigation that ensued. In light of these circumstances, I find that it has not been established that the disclosure of the specific information remaining at issue is desirable for compassionate reasons as contemplated by the third part of the section 21(4)(d) test.

...I find that the exception permitting the disclosure of personal information in compassionate circumstances at section 21(4)(d) does not apply in the circumstances of this appeal.

[46] The appellant has sought an unredacted copy of the record and has indicated that there are relevant, ongoing proceedings for the record that are unrelated to her *FIPPA* request. According to the appellant, these proceedings are "larger human rights case which is currently under review by the European Court of Human Rights, four ongoing Court cases in Newfoundland and Labrador, and a Judicial Review at the Federal Court of Appeal." She has not clearly identified to me how these proceedings are relevant to the application of *FIPPA* to the information at issue in the record, nor can I ascertain such from my review of the appellant's representations in this appeal.

[47] Based on my review of Order PO-3900, the parties' representations, and the record at issue, I find the appellant's reasons are not sufficient for me to decide to proceed with the appeal despite the fact that the three preconditions for the application of the doctrine of issue estoppel have been met.

[48] In this appeal, I find that the appellant has not demonstrated an injustice that may arise from relying on the final order from the prior appeal to justify a decision not to conduct an inquiry in the present appeal.

[49] The three conditions in *Danyluk* have been met in this appeal. I find that, as a matter of discretion, the IPC should apply the doctrine of issue estoppel.

[50] Therefore, I find that the issue estoppel applies because the appellant is seeking an adjudication by the IPC on the same record as was adjudicated upon in Order PO-3900. Accordingly, I am dismissing the appeal without conducting an inquiry.

[51] As I have dismissed the appeal on the basis of issue estoppel, there is no need for me to consider whether the appellant's request in this appeal is frivolous or vexatious, and I decline to do so.

ORDER:

The appeal is dismissed.

Original Signed by: _____
Diane Smith
Adjudicator

February 15, 2022 _____