



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Decision F10-09

PROVINCIAL HEALTH SERVICES AUTHORITY

AND

CHILDREN'S & WOMEN'S HEALTH CENTRE OF BRITISH COLUMBIA

Jay Fedorak, Adjudicator

September 29, 2010

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Summary: The respondent's request of March 2009 for records regarding his ongoing dispute with the PHSA, except with respect to solicitor-client communications, is not frivolous or vexatious or systematic or repetitious. There are options available to the PHSA under FIPPA for reducing the administrative burden of responding to this portion of the request. The PHSA is authorized to disregard the portion of the request regarding solicitor-client communications and any future requests for such records for two years.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 43.

Authorities Considered: B.C.: Auth. (s. 43) 99-01; Order 00-26, [2000] B.C.I.P.C.D. No. 29; Order 01-34, [2001] B.C.I.P.C.D. No. 35; Order 02-18, [2002] B.C.I.P.C.D. No. 18; Auth. (s. 43) 02-01, [2002] B.C.I.P.C.D. No. 47; Auth. (s. 43) 02-02, [2002] B.C.I.P.C.D. No. 57; Order 04-25, [2004] B.C.I.P.C.D. No. 25; Order 04-36, [2004] B.C.I.P.C.D. No. 37; Decision F05-01, [2005] B.C.I.P.C.D. No. 4; F05-10, [2005] B.C.I.P.C.D. No. 11; Decision F05-03, [2005] B.C.I.P.C.D. No.21; Decision F06-02 [2006] B.C.I.P.C.D. No. 3; Decision F06-03, [2006] B.C.I.P.C.D. No. 6; F06-05 [2006] B.C.I.P.C.D. No. 10; F06-07, [2006] B.C.I.P.C.D. No. 12; F06-08, [2006] B.C.I.P.C.D. No. 13; F06-09, [2006] B.C.I.P.C.D. No.14; Decision F07-08, [2007] B.C.I.P.C.D. No 28; F09-07, [2009] B.C.I.P.C.D. No. 10; F09-25 [2009] B.C.I.P.C.D. No.31.

1.0 INTRODUCTION

[1] The Provincial Health Services Authority (“PHSA”) and the Children’s and Women’s Health Centre of BC (“CWHC”) have asked the Office of the Information and Privacy Commissioner (“OIPC”) for authorization to disregard a March 2, 2009 request for records that the respondent made under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), on the grounds that it is frivolous, vexatious, systematic and/or repetitious for the purposes of s. 43(b) of FIPPA. They have also asked for authorization to disregard certain types of future FIPPA requests from the respondent.

2.0 ISSUE

[2] The issue in this matter and the relief the PHSA seeks are set out in para. 4 of the PHSA’s application of May 5, 2010, as follows:

The PHSA submits that the [respondent]’s request of March 2, 2009 is part of a pattern of repetitious or systematic requests and would unreasonably interfere with the operations of the PHSA and the Health Centre and is “frivolous or vexatious” and asks that the Commissioner make the following orders:

- (a) to authorize the PHSA and the Health Centre to disregard the March 2, 2009 request;
- (b) to authorize the PHSA and the Health Centre to disregard any further broadly based requests for records related to this [respondent], that is, requests for all records relating to the [respondent] held by all individuals, committees, departments and service providers of the PHSA or the Health Centre, from this [respondent] or anyone acting on his behalf;
- (c) to require the [respondent] in any future requests for records that relate to him to identify in the request a specific department or individual or committee within the PHSA or the Health Centre and to provide a reasonable basis for his belief that the specified individual or department or committee has records that relate to him that have not been the subject of previous requests;
- (d) to authorize the PHSA and the Health Centre to disregard any future requests from this [respondent] or anyone acting on his behalf for records in the files of lawyers or law firms acting for the PHSA or the Health Centre or any individuals or committees of the PHSA or the Health Centre; and
- (e) to authorize the PHSA and the Health Centre to disregard any further requests from this [respondent] or anyone acting on his behalf for records relating to him that are:

- (i) communications between lawyers and law firms acting for the PHSA or the Health Centre and individuals at the PHSA or the Health Centre;
- (ii) communications between lawyers and law firms acting for the PHSA and the Health Centre.

[3] As previous decisions under this section have noted, the public body is responsible for demonstrating that it is entitled to relief under s. 43.

3.0 DISCUSSION

[4] **3.1 Background**—The respondent is a physician whose employment and hospital privileges at the CWHC are presently suspended. The events giving rise to this suspension and the multiplicity of legal proceedings that followed are a matter of public record and are also summarized in Order F09-07¹ and Decision F07-08.²

[5] **3.2 Applicable Principles**—Commissioner Loukidelis discussed the interpretation and application of s. 43(a) in Auth. (s. 43) 02-01 and s. 43(b) in Auth. (s. 43) 02-02.³ I have applied the approach taken in those and other decisions dealing with ss. 43(a) and (b), as well as the cases to which they refer.

[6] Section 43 reads as follows:

Power to authorize a public body to disregard requests

- 43 If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 or 29 that
- (a) would unreasonably interfere with the operations of the public body because of the repetitious or systematic nature of the requests, or
 - (b) are frivolous or vexatious.

[7] **3.3 The Request in Issue**—The request of March 2, 2009 for which the PHSA seeks relief is the most recent in a series more than 40 access requests that the respondent has submitted to the PHSA since April 2002, some of them comprising multiple categories of documents.

[8] The March 2009 request reads as follows:

all materials relating to me and my interactions with the Centre, PHSA, and its affiliates. This would include all materials, e-mails, notes to file,

¹ [2009] B.C.I.P.C.D. No. 10, paras. 10-14.

² [2007] B.C.I.P.C.D. No. 28.

³ [2002] B.C.I.P.C.D. No. 47; [2002] B.C.I.P.C.D. No. 57.

correspondence, and any other relevant materials. This would include material from the time of my last request (May 17, 2006) to the final reply from you relating to this request or up to the time of an Inquiry relating to these new matters if that should occur.

Such materials could be acquired from for example, but not limited to, the MAC, Peer Review Committee, my department, the Human Resources department, the Board of the PHSA, your office, legal firms representing the aforementioned and other, [five named physicians] among others.

[9] **3.4 Description of Previous Requests**—The PHSA provided me with copies of the respondent's 43 PHSA requests to set this matter in context, together with a table listing the requests, their dates, the PHSA's file numbers and, where applicable, the OIPC's file, decision and order numbers. According to the table, 38 of these 43 requests have led to files with this Office and a little over half have resulted in orders or decisions.

[10] The requests span the period from April 2002 to March 2009 and include requests for the following types of records:

- the respondent's personnel files;
- the respondent's personal information in the hands of various named CWHC employees, departments or investigators;
- emails, notes and other correspondence related to "interactions" between the respondent and various named CWHC physicians, other employees, investigators or external legal counsel, including records which have a bearing on the respondent's employment;
- details of contracts, "payment relationships", costs and invoices of various named bodies or individuals, including investigators and external legal counsel;
- "definition of legal counsel" for individuals involved in the respondent's legal actions;
- results of various microbiology tests from 1988 to 2003;
- the respondent's billings to the Medical Services Plan from 1987 to 2003;
- minutes, tapes and transcripts of certain meetings of specified committees; and
- records related to a particular grievance.

[11] **3.5 Is Relief Warranted Under Section 43?**—The issue to be decided under s. 43 is whether the respondent's request of March 2, 2009 is frivolous or vexatious and/or whether it is part of a series of requests that owing to their systematic or repetitious nature would unreasonably interfere in the operations of the PHSA.

The PHSA's arguments

[12] The PHSA states that it is not suggesting that it should not respond to any of the respondent's requests, but rather that it should be able to disregard broad requests and any requests for records copies of which the respondent already has in his possession.⁴ The PHSA points out that, while the respondent has identified certain departments and staff members who might have records concerning him, his request is for all records about him.⁵ The PHSA also submits that it has already provided the respondent with many of the records that he is requesting.⁶ The PHSA is concerned that the respondent will continue to make requests in future for records relating to his continuing involvement with the CWHC.

[13] The remedy that the PHSA seeks is this:

A reasonable limit on the access rights of the [respondent]. The remedy would require the [respondent] to focus his requests for records to categories or sources of records where he has some reasonable basis to believe that records not previously provided to him exist. The PHSA would only be required to search for records where there is some basis to believe responsive and previously undisclosed records exist.⁷

[14] The PHSA also raises a concern about the respondent's continuing requests for records in the custody of the PHSA's legal counsel. It references ten requests of the respondent that specifically identify records relating to, or in the custody of, legal counsel. It submits the following list, also identifying where the requests resulted in orders or decisions of the OIPC:

- (a) PHSA 0005-02/OIPC 16822, (Order 04-25⁸), request dated September 19, 2002 included request for records that were found to be subject to solicitor client privilege;
- (b) PHSA 0007-03/OIPC 17420, request dated December 20, 2002 for correspondence between named lawyers acting for the Health Centre and external agents;
- (c) PHSA 0019-03/OIPC 18366/F05-25534, dated March 5, 2003, requesting records held by all "external agents" that related to the [respondent];
- (d) PHSA 0025-03/OIPC 17695, request dated March 27, 2003 for billing information of named lawyers acting for the Health Centre;

⁴ PHSA's submission, para. 25.

⁵ PHSA's submission, paras. 26 and 28.

⁶ PHSA's submission, paras. 30-31.

⁷ PHSA's submission, para. 33.

⁸ [2004] B.C.I.P.C.D. No. 25.

- (e) PHSA 0030-03/OIPC 17911, (Order 04-36⁹), request dated March 29, 2003 for records related to named legal counsel who had provided specific legal advice to the Health Centre;
- (f) PHSA 0028-03/OIPC 17912, request dated March 30, 2003 for records related to named legal counsel who had provided specific legal advice to the Health Centre;
- (g) PHSA 0037-03/OIPC 18606, (Order F05-10¹⁰), request dated August 25, 2003 for records related to legal counsel retained to act for named employees of the Health Centre;
- (h) PHSA 0006-04/OIPC 21322/23764, (Order F06-05¹¹), request dated October 30, 2003 for records of legal counsel acting for the Health Centre in relation to [a particular] investigation and records of the legal counsel acting for the Complainant in relation to [that] investigation;
- (i) PHSA 0026-04/OIPC F05-24017, (Order F06-09¹²), request dated August 14, 2004 for records of named lawyer acting for employees of the HealthCentre in relation to the [respondent]'s defamation action and records of lawyer acting for the Health Centre Board; and
- (j) PHSA 0043-04/OIPC F05-23943, (Decision F05-03¹³), request dated December 23, 2004 for billing information of named lawyer acting for the PHSA and the Health Centre in relation to the [respondent]'s requests under FIPPA.¹⁴

[15] The PHSA submits that the respondent persists in requesting records subject to solicitor-client privilege, despite repeated decisions from the OIPC that consistently confirm that s. 14 of FIPPA applies to this kind of information. It says there have been seven orders involving the respondent confirming the application of s. 14 to this information (Order F05-10; Order F05-11; Order F06-05; Order F06-07¹⁵; Order F06-08¹⁶; Order F06-09; and Order F09-25¹⁷). In addition, it says the OIPC has issued two decisions denying the respondent's requests for inquiries on his access requests for solicitor-client communications because he had no arguable case (Decision F05-03 and Decision F06-02¹⁸).

⁹ [2004] B.C.I.P.C.D. No. 37.

¹⁰ [2010] B.C.I.P.C.D. No. 11.

¹¹ [2006] B.C.I.P.C.D. No. 10.

¹² [2006] B.C.I.P.C.D. No. 14.

¹³ [2005] B.C.I.P.C.D. No. 21.

¹⁴ PHSA's submission, para. 35.

¹⁵ [2006] B.C.I.P.C.D. No. 12.

¹⁶ [2006] B.C.I.P.C.D. No. 13.

¹⁷ [2009] B.C.I.P.C.D. No. 31.

¹⁸ [2006] B.C.I.P.C.D. No. 03.

[16] The PHSA submits:

that it is apparent from a review of the decisions and orders noted above, that the [respondent] is well aware that the records he continues to request from law firms and lawyers acting for the PHSA, the Health Centre or individuals employed by the PHSA or the Health Centre will be subject to solicitor client privilege. The PHSA says that his repeated requests for these records demonstrate that the requests are frivolous or vexatious.¹⁹

[17] The PHSA argues that it incurs costs having to request legal counsel to conduct searches to identify records, even though the records are never disclosed to the respondent.²⁰ The PHSA concludes:

that, in the context of the [respondent]'s previous requests for similar records and the number of decisions of the Commissioner or Adjudicator upholding the claims of solicitor client privilege over records in lawyers' files, the [respondent]'s further request for records from the files of lawyers and law firms providing legal advice to the PHSA, the Health Centre and committees of the PHSA and Health Centre is frivolous and vexatious. ... The PHSA says that the expenditure of public funds, in any amount, from its budget to respond to a request for records that are clearly protected by solicitor client privilege is an unreasonable interference with its operations, in particular, with its management of the public funds in its budget.²¹

[18] In summary, the PHSA requests the authority to disregard the respondent's request of March 2, 2009 and to restrict or limit the scope of any future requests from the respondent as outlined above for two years.²²

Respondent's position

[19] The respondent denies that he is requesting information that he has already received. He states that his current request is for records created since the request he filed in May 2006.²³ He emphasizes that unlike some other respondents who had "no live issue with their public bodies" he continues to have on-going disputes with the PHSA and he needs access to information to defend himself.²⁴

[20] In defence of his request for records relating to, or in the custody of, legal counsel, he submits that "not all communications of counsel are privileged".²⁵

¹⁹ PHSA's submission, para. 46.

²⁰ PHSA's submission, para. 47.

²¹ PHSA's submission, paras. 49-50.

²² PHSA's submission, para. 51.

²³ Respondent's reply submission, p. 1.

²⁴ Respondent's reply submission, p. 5.

²⁵ Respondent's reply submission, p. 4.

As to the legal costs relating to searches for the records he states, “The PHSA is not obligated to pay any lawyer any amount it does not wish.”²⁶

[21] He submits that the decision in this case could “simply mimic that of Decision F07-08 in short form”.²⁷

Is the request frivolous or vexatious?

[22] There are strong parallels between this case and Decision F07-08. The request at issue in this case is largely an updated version of the request from May 2006 that led to the previous case. Consequently, I reach many of the same conclusions Senior Adjudicator Francis reached in Decision F07-08.

[23] As with the previous case, the respondent continues to have an ongoing relationship with the PHSA involving its Peer Review committee, which the PHSA acknowledges. Therefore, the following comments of Senior Adjudicator Francis apply in this case: “given his ongoing ‘defence’ activities, I consider that the respondent had a legitimate purpose in making his May 2006 request for records he considered would be useful in his ‘defence’”.²⁸ This was one of the reasons why she determined that his request was not frivolous. The PHSA does not deny the respondent’s assertion that requested records would be relevant to that purpose. I note that I have not actually seen any of the records. Nevertheless, the submissions before me in conjunction with the conclusions of Senior Adjudicator Francis (noted above) satisfy me that the respondent has a legitimate purpose in requesting the records he is seeking, with respect to the records he has requested (except for solicitor-client communications, which I discuss below). As a result, with the exception of solicitor-client communications, I find that his request is not frivolous.

[24] The PHSA submits that the request is vexatious for two reasons: it is open-ended; and it covers records that the respondent has already received. Without viewing the records at issue, I am unable to determine whether the second concern is justified. Nevertheless, even if I were to accept that either, or both, of these concerns were justified, there are other means for the PHSA to address them, without resorting to an application under s. 43 of FIPPA, which I discuss next.

[25] I first will deal with the issue of whether the request covers records that the respondent has already received. The respondent denies that this is the case. He states, “I am not making a request for records I know either do not exist or those already received.”²⁹

²⁶ Respondent’s reply submission, p. 4.

²⁷ Respondent’s reply submission, p. 5.

²⁸ Decision 07-08, para. 36.

²⁹ Respondent’s reply submission, p. 5.

[26] While there might be some circumstances where a public body would be required to provide another copy of a record that it had already disclosed to a respondent, previous orders have found that, in most cases, FIPPA does not require public bodies to do so, particularly in cases where the respondent indicates expressly that the respondent is not seeking them.³⁰

[27] Therefore, the PHSA does not require relief under s. 43 regarding records it already provided to the respondent, as he has made it clear that he does not want duplicate copies of those records.

[28] The other issue is that, while the respondent has identified some of the records in sufficient detail, he has also asked for records about himself held by all employees and all departments. If the PHSA is suggesting that it is not reasonable for it to have to conduct such a broad ranging search, there is an existing remedy. Section 5 of FIPPA requires the following of individuals making requests:

- 5(1) To obtain access to a record, the applicant must make a written request that
 - (a) provides sufficient detail to enable an experienced employee of the public body, with a reasonable effort, to identify the records sought ...

[29] The onus is on the respondent to provide sufficient information to enable the PHSA to determine where responsive records might be located. There is no requirement to conduct a blind search for records where there is no reason to expect that any would exist.

[30] Previous orders³¹ have established that the required standard for an adequate search for records is reasonableness, rather than perfection. In other words, public bodies must search files only where a reasonable person would consider it reasonable that responsive records might be located. The PHSA's knowledge of its dealings with the respondent since May 2006 should provide a good indication of the likely location of records relating to the respondent. The PHSA does not need to look in any file banks where it has no reason to expect responsive records would be filed.

[31] By taking these two approaches, the PHSA can reduce the administrative burden it envisions would result from having to respond to the request at issue and avoid some of the consequences that it submits would unreasonably interfere in its operations. Therefore, with the exception of solicitor-client communications, I find that his request is not vexatious for the purposes of s. 43.

³⁰ For example, see Order 01-34, [2001] B.C.I.P.C.D. No. 35.

³¹ Order 00-26, [2000] B.C.I.P.C.D. No. 29; Order 02-18, [2002] B.C.I.P.C.D. No. 18.

Is the request systematic or repetitious?

[32] The PHSA has also requested relief on the grounds that the request at issue is part of a pattern of systematic and repetitious requests.³² It has not provided any argument or evidence in support of these assertions, other than a list of the respondent's previous requests. The request at issue covers records created in the three years since his request of May 2006 and the respondent has made it clear that he is not requesting records that he has already received. Therefore, I find that his requests are not repetitious.

[33] Nor does this list alone establish that the requests were systematic. The respondent has demonstrated that the records are relevant to his ongoing disputes with the PSHA. There is no particular pattern to his requests, and I see no evidence that he has taken a "systematic approach" to his requests, as it has been interpreted in other decisions.³³ Therefore, I find that his requests are not systematic.

Solicitor-client communications

[34] I do find that the PHSA has a legitimate concern, however, with the requirement to respond to the portion of the request relating to records of communications between the PHSA and CWHC and their legal counsel. I agree with the respondent that not all communications with legal counsel must necessarily be subject to solicitor client privilege. If this were the first time that he had asked for such records, there would not have been an issue.

[35] This is not the first time he has done so, however. This request is the latest in a series of identical requests that have led to identical results. He has made repeated attempts to access these kinds of records, and each time s. 14 of FIPPA applied to the records because they are subject to solicitor-client or litigation privilege. Nevertheless, he continues to request them. He makes the same request, with only a change of the timeframe. The result is always the same: he receives no records. Every time he has asked the OIPC to review these decisions, as the PHSA noted above, the numerous resultant orders and decisions confirm that s. 14 applies to the records. In fact, it has become so patently obvious that s. 14 applies that the OIPC has denied two of his requests for inquiries on the matter. Despite these results, the respondent continues to request the records, without providing any reasonable grounds to expect s. 14 will not apply to any of the records. There has been no change of circumstances in his relationship with the PHSA, and there is no other reason to expect that the results of the current request (or any more that he might make in the near future) would be any different. The respondent is aware of this but persists anyway in requesting the records to no good purpose.

³² PHSA's submission, para. 4.

³³ See for example, Decision F05-01, [2005] B.C.I.P.C.D. No. 4, paras. 19-23; Decision F06-03, [2006] B.C.I.P.C.D. No. 6, paras. 34-37.

[36] In applying s. 43(b) with respect to whether requests are frivolous or vexatious, Commissioner Loukidelis indicated that applicants have an obligation to exercise their information rights responsibly. He stated:

Access to information legislation confers on individuals such as the applicant a significant statutory right, *i.e.*, the right of access to information (including one's own personal information). All rights come with responsibilities. The right of access should only be used in good faith. It must not be abused. By overburdening a public body, misuse by one person of the right of access can threaten or diminish the legitimate exercise of that same right by others, including as regards their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to public bodies' costs of complying with the Act. Section 43 exists, of course, to guard against abuse of the right of access.³⁴

[37] I consider repeated requests for records, which the respondent has no reason to expect that he will receive, to be an illustration of Commissioner Loukidelis's concerns. For this reason and others noted above, I find that this aspect of his request is frivolous.

[38] The PHSA is also correct that, in response to the respondent's requests for communications with its legal counsel, it must request that its counsel conduct a search to retrieve responsive records. The fact that privilege applies to those records does not absolve the PHSA from having to retrieve those records for the purpose of processing the request. In addition to the administrative burden that this search imposes, the PHSA submits that it suffers financial costs, as its legal counsel bill for the time and effort required to produce the records. It does not describe the extent of those costs, even *in camera*. Nevertheless, I accept that it does incur these costs. The respondent might be correct to point out that the PHSA has the discretion whether to hire legal counsel and for which purposes. Once engaged, however, the PHSA is not at liberty to refuse to pay the costs for conducting these searches.

[39] The consequence of these searches is that the PHSA incurs costs to retrieve records that the respondent never receives. Knowing that there is little if any chance that he will receive this type of information and that the PHSA will incur legal costs, he nevertheless continues to request it. For this reason, I find that this aspect of his request is also vexatious.

[40] Consequently, I find that his persistent requests for solicitor-client communications to be both frivolous and vexatious in accordance with s. 43(b) of FIPPA and this warrants relief for the PHSA and the CWHC.

³⁴ Auth. (s. 43) 99-01.

[41] The PHSA and the CWHC have asked for relief from any future requests for two years. Given the respondent's history of requests and follow up requests, it is reasonable to conclude that he will continue to make more requests until he resolves his outstanding issues with the PHSA. Therefore, in addition to granting relief from responding to the portion of his current request relating to solicitor-client communications under s. 43(b), I grant the PHSA and the CWC relief from responding to any portion of future requests relating to solicitor-client communications for a period of two years from the date of this decision.

[42] The PHSA and CWHC were also seeking relief with respect to any records relating to the respondent, other than solicitor-client communications, that legal counsel may have in its custody. My having granted relief with respect to solicitor-client communications might not cover all of the records. The issue then arises as to whether PHSA's legal counsel will still have to conduct a search for other records, with resulting costs for the PHSA and CWHC.

[43] The same principles of conducting a reasonable search would also apply to the records in the custody of legal counsel. Public bodies must search for records only where there is a reason to expect that responsive records would be filed. The PHSA and CWHC have an obligation to require their legal counsel to conduct a search only in the event that they have a reasonable expectation that their legal counsel would have copies of records that fall within the scope of the request and meet all of the following criteria:

1. the records are not solicitor-client communications;
2. the public body has not already disclosed copies of the same records to the respondent; and
3. there are no other copies elsewhere within the public body.

[44] If there is no evidence to suggest that any such records exist, there is no requirement for legal counsel to conduct the search.

4.0 CONCLUSION

[45] In the circumstances, I grant the following authorization under s. 43(b) of FIPPA:

1. I authorize the PHSA and the CWHC to disregard the portion of his March 2009 request as it relates to records of communications between lawyers and law firms acting for the PHSA or the CWHC Centre and individuals at the PHSA or the CWHC and communications subject to solicitor-client privilege between lawyers and law firms acting for the PHSA and the CWHC.

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2. I also authorize the PHSA and the CWHC to disregard, for a period of two years from the date of this decision, any future requests from this respondent or anyone acting on his behalf for the records as outlined above in para. 1.
 3. With respect to the remaining records subject to the respondent's request, I require the PHSA and CWHC to complete the processing of the request within the timelines required under FIPPA.

September 29, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

OIPC File: F09-37664