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Order F18-08

ST. PAUL'S HOSPITAL

Meganne Cameron
Adjudicator

February 27, 2018

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Summary: The applicant requested copies of all discharge summaries relating to her deceased husband. The Hospital withheld the records on the basis that the applicant was not authorized to act on behalf of the deceased and because it considered disclosure to be an unreasonable invasion of third party personal privacy under s. 22 of FIPPA. The Adjudicator found that the applicant's request was not made on behalf of the deceased individual and that disclosure of the records would be an unreasonable invasion of the deceased's personal privacy under s. 22 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 5 and 22. *Freedom of Information and Protection of Privacy Regulation*, s. 5.

Authorities Considered: BC: Order F15-36, 2015 BCIPC 39 (CanLII); Order F14-32, 2014 BCIPC 35 (CanLII); Order F17-04, 2017 BCIPC 4 (CanLII); Order F07-16, 2007 CanLII 35477 (BC IPC); Order 02-44, 2002 CanLII 42478 (BCIPC); Order No. 53-1995, 1995 CanLII 1121 (BC IPC); Order 00-40, 2000 CanLII 14405 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); F15-52, 2015 BCIPC 55 (CanLII); F16-46, 2016 BCIPC 51 (CanLII); F12-08, 2012 BCIPC 12 (CanLII); F14-09, 2014 BCIPC 11 (CanLII).

INTRODUCTION

[1] This inquiry relates to a request by the applicant to St. Paul's Hospital (Hospital) for copies of all discharge summaries relating to a deceased individual she says was her spouse (the Deceased). The Hospital declined to disclose the records in dispute without the direction of a court. The applicant requested a review of the Hospital's decision by the Office of the Information and Privacy Commissioner (OIPC).

[2] During mediation, the Hospital sent an amended response to the applicant's request indicating it was also withholding the information in dispute pursuant to section 22 (harm to third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). Mediation did not resolve the issues and the matter proceeded to inquiry.

[3] The records at issue are 13 pages of medical discharge summaries relating to the Deceased. The records have been withheld in their entirety. Before the applicant submitted her request to the Hospital, the Hospital provided copies of the records at issue in response to a request it received from the Deceased's daughter (Recipient).¹

[4] According to the OIPC's fact report, in addition to her request for records, the applicant also made a complaint to the OIPC that the Hospital inappropriately disclosed the records to the Recipient. Although the fact report clearly states that applicant's complaint has been put on hold pending the outcome of this inquiry, both parties' submissions focus heavily on whether the Recipient should have received the records. As this complaint is not before me, I will not consider whether the Recipient was the appropriate person to receive the records.

ISSUES

[5] The issues to be decided in this inquiry are as follows:

1. Whether the applicant is acting on behalf of the deceased in accordance with s. 5(1)(b) of FIPPA and s. 5 of the *Freedom of Information and Protection of Privacy Regulation* (Regulation).
2. Whether Hospital is required to refuse access to the requested records pursuant to s. 22 of FIPPA.

[6] Section 57 of FIPPA states that if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

[7] Section 57 does not specify who has the onus for establishing that an applicant is authorized under FIPPA and the Regulation to act on behalf of another person. Previous orders have stated that where there is no statutory burden, it is in the interests of both parties to provide argument and evidence to justify their positions.²

¹ This statement is based on the parties' submissions and the Fact Report.

² Order F15-36, 2015 BCIPC 39 (CanLII) at para. 5; Order F07-10, 2007 CanLII 30395 (BC IPC) at paras. 10-11.

DISCUSSION

Who may act on behalf of a deceased person?

[8] Section 5(1)(b) of FIPPA specifies how an applicant may make a request on behalf of another person:

5(1) To obtain access to a record, the applicant must make a written request that

...

(b) provides written proof of the authority of the applicant to make the request, if the applicant is acting on behalf of another person in accordance with the regulations, ...

[9] Section 5 of the Regulation says that if an individual is deceased, an “appropriate person” may act for the deceased in relation to s. 5 of FIPPA.³ The Regulation defines “appropriate person” as follows:

5(1) In this section:

"appropriate person" means,

(a) in respect of a deceased adult, one of the following:

(i) a committee acting under section 24 of the *Patients Property Act* for the deceased;

(ii) if there is no committee acting for the deceased, the personal representative of the deceased;

(iii) if there is no committee acting for the deceased and no personal representative of the deceased, the nearest relative of the deceased; ...

"nearest relative" means the first person referred to in the following list who is willing and able to act under subsection (2) of this section for a deceased individual:

(a) spouse of the deceased at the time of death;

(b) adult child of the deceased;

...

"spouse" means a person who

(a) is married to another person and is not living separate and apart, within the meaning of the *Divorce Act* (Canada), from the other person, or

³ Regulation at s. 5(2)(a).

- (b) is living with another person in a marriage-like relationship for a continuous period of at least one year immediately before the death of the other person.
- (3) If a nearest relative who is acting under this section ceases to be willing or able to act, the right to act under subsection (2) of this section passes to the person who is next in the definition of "nearest relative" and who is willing and able to act.

[10] As such, there is a two part test for determining whether the applicant may access the information in dispute. First, I must determine if the applicant is an "appropriate person" pursuant to the Regulation. If she is, then I must determine if she is "acting on behalf of" the Deceased. Both elements must be established in order for the applicant to access the information in dispute.

[11] In the present case, the evidence as to whether the applicant is an appropriate person is conflicting. The applicant says that she was the Deceased's spouse and as such, is the appropriate person to act on his behalf.⁴ The Hospital submits that the applicant is not an "appropriate person" as defined by s. 5 of the Regulation because she was separated from the Deceased.⁵ However, it is unnecessary in this case to decide if the applicant meets the definition of "appropriate person" because, for the reasons that follow, I find that she is not "acting on behalf of" the Deceased.

Acting on Behalf – Section 5 of FIPPA

[12] As set out above, s. 5 of FIPPA specifies who may act "on behalf of" another person. Adjudicator Francis recently considered the meaning of "on behalf of" in Order F17-04, a case involving a father's request to access his children's personal information. Her analysis also included a consideration of the words "act for" in s. 5 of the Regulation. Adjudicator Francis noted that:

Dictionary definitions of "for" and "on behalf of" are somewhat circular. For example, definitions of "for" include: "in the interest of"; "to the benefit of"; "on behalf of"; "in place of"; and "representing". Definitions of "on behalf of" include: "in the interests of"; "as representative of"; "in the best interests"; "for"; "in aid of"; and "in support of".⁶

[13] She concluded that acting "on behalf of" a minor child in exercising the child's access rights means acting "to benefit the child, to further the child's own goals or objectives and in the child's best interests."⁷ Previous orders have also noted that if an applicant is seeking the information in question to further their own interests, they are not acting on behalf of another individual pursuant to

⁴ Applicant's submission, p. 2.

⁵ Hospital's submission, p. 7.

⁶ Order F17-04, 2017 BCIPC 4 (CanLII) at para. 16.

⁷ Order F17-04, 2017 BCIPC 4 (CanLII) at para. 17.

s. 5 of FIPPA.⁸ Where an applicant is not truly acting “on behalf” of an individual, the access request is to be treated as an ordinary, arm’s-length request under FIPPA, by one individual for another’s personal information.⁹

[14] In its submission, the Hospital said only that it “was concerned about the reason for the record request, and whether this was on behalf of the long deceased patient.”¹⁰ The applicant does not specify that her request for the information in dispute was made on behalf of the Deceased. In her submission, she says that the information in dispute would reveal that the Recipient provided fraudulent information to the Canada Revenue Agency and that she fabricated documents in a court action and in her access request to the Hospital.¹¹

[15] Furthermore, the evidence submitted by the applicant indicates that she seeks the information in dispute for her own interest. As part of her inquiry submission, the applicant provided a copy of an email her agent sent to the former Director of Investigations at the OIPC. In the email, the agent explains that he and the applicant want to obtain the information in dispute through a FIPPA request to defend an action against them and reduce their legal costs in that process.¹²

[16] I have reviewed a copy of the court’s decision for the action referred to in the agent’s email.¹³ The Recipient was the plaintiff in the action and the applicant and agent were two of the three defendants. The court dismissed the Recipient’s claim. There is no mention of the Deceased in the action and I have received no evidence that would explain how the applicant obtaining the information in dispute would further the Deceased’s interests with respect to that lawsuit.

[17] The applicant also asserts that the records will prove the Recipient committed taxation fraud. However, she does not explain how this relates to, or would benefit, the Deceased. Furthermore, while the applicant asserts that the records will establish that the Recipient provided fabricated documents to the Hospital, she does not explain how this relates in any way to the Deceased and his interests.

[18] For the above reasons, I am not persuaded that the applicant’s request was made “on behalf of” the Deceased. Therefore, the applicant is not authorized to exercise the Deceased’s access rights under FIPPA. However, that is not the end of the matter. The applicant wants access to the records, so I will now

⁸ For example, see: Order 17-04, 2017 BCIPC 04 (CanLII) at paras. 18-20; Order F07-16, 2007 CanLII 35477 (BC IPC) at paras. 19-20; Order 02-44, 2002 CanLII 42478 (BCIPC) at paras. 39-40; and Order No. 53-1995, 1995 CanLII 1121 (BC IPC) at p. 6.

⁹ Order 00-40, 2000 CanLII 14405 (BC IPC) at para. 40.

¹⁰ Hospital’s submission, p. 7.

¹¹ Applicant’s submission, para. 2.

¹² Applicant’s submission, “Document Disclosure” at Group C.

¹³ Applicant’s submission, “Document Disclosure” at Group J.

consider her request on the basis that it is made on her own behalf. Thus, the issue becomes whether disclosing the records to her would be an unreasonable invasion of third party personal privacy under s. 22 of FIPPA.

Disclosure harmful to personal privacy—Section 22

[19] Section 22(1) states that a “public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.”

[20] In the context of the applicant making an access request on her own behalf, the Deceased is a third party.¹⁴ The need to consider whether s. 22 applies does not change because an individual is no longer alive. A person’s privacy rights continue after their death, although they diminish over time to a degree that varies with the particular circumstances.¹⁵

[21] Numerous orders have considered the application of s. 22, and I will apply those same principles here.¹⁶ The Hospital submits that s. 22(2)(i) and 22(3)(a) apply.¹⁷ The applicant did not provide argument or evidence about s. 22.

Personal Information

[22] The first step in the s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined as “recorded information about an identifiable individual other than contact information.” Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”¹⁸

[23] Based on my review of the records, I find that all of the withheld information is the personal information of the Deceased. Some of it is also inextricably interwoven with the personal information of other third parties, for example, some of the records contain medical professionals’ opinions, evaluations or comments about the Deceased.

[24] The records also contain the names, addresses and telephone numbers for medical professionals. While this information might be classified as contact

¹⁴ Schedule 1 of FIPPA says: “third party” in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.

¹⁵ F14-32, 2014 BCIPC 35 (CanLII) at para. 19.

¹⁶ See for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 22; F15-52, 2015 BCIPC 55 (CanLII) at para. 32.

¹⁷ Hospital’s submission, p. 6.

¹⁸ See Schedule 1 of FIPPA for these definitions.

information as defined by FIPPA, I find that in this case it is the personal information of the Deceased because it reveals information about his health and treatment.

Section 22(4)

[25] Section 22(4) sets out a number of circumstances where the disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy. Based on my review of the information in dispute, I find that none of the circumstances in 22(4) of FIPPA apply.

Section 22(3)

[26] Section 22(3) states disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy in certain circumstances. Section 22(3)(a) applies to personal information that "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation."

[27] Based on my review of the records, I find that s. 22(3)(a) applies to all of the information in dispute with respect to the Deceased. The records detail the Deceased's medical history, diagnoses, treatment plans and evaluations and prognoses. Therefore there is a presumption that disclosure of the information at issue would be an unreasonable invasion of third party personal privacy.

Section 22(2)

[28] Section 22(2) requires that public bodies must consider all relevant factors, including those listed in s. 22(2), in determining whether disclosure of personal information is an unreasonable invasion of personal privacy. This includes considering whether any presumptions under ss. 22(3) have been rebutted. In my view, s. 22(2)(c) and (i) warrant consideration. These sections state:

22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(i) the information is about a deceased person and, if so, whether the length of time the person has been deceased

indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

[29] With regard to s. 22(2)(c), as noted above, the applicant asserted that she required the information in dispute to defend an action against her. However, that action was dismissed.¹⁹ Previous orders have stated that the right must relate to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed.²⁰ As such, I find that s. 22(2)(c) is not a relevant circumstance in this case.

[30] The other potentially relevant section is 22(2)(i), which deals with the length of time a third party has been deceased. FIPPA does not specify the set number of years after which third party personal information may be disclosed. Instead, s. 22(2)(i) requires a case by case assessment of whether the length of time a person has been deceased indicates the disclosure is *not* an unreasonable invasion of their personal privacy. Where a s. 22(3) presumption applies, the question is “whether the length of time is so significant as to override the presumption of a breach of the reasonable expectation of privacy.”²¹

[31] Previous BC orders have noted that the law in most jurisdictions in Canada provides that disclosing information of a person who has been dead for at least a specified period of time — usually in the range of 20 to 30 years — is not an unreasonable invasion of their privacy.²² In Order F14-09, the Adjudicator said the following when determining whether sufficient time had passed:

Section 36(1) of FIPPA states that public bodies are authorized—but not required—to disclose personal information for archival or historical purposes after a person has been dead for 20 years. This provision balances personal privacy rights with the societal interest of retaining and accessing information for archival and historical purposes. In my view, this provision means that it is at least possible for privacy rights to continue for 20 years or more after a person dies, since s. 36(1)(c) would otherwise be unnecessary.

Order No. 96-1996 and Order No. 200-1997 predate s. 22(2)(i), but they address the issue of how privacy rights are impacted by a person being deceased. In Order No. 96-1996, s. 22 did not apply to the disclosure of medical records to the deceased's sister 53 years after the deceased had passed away. Similarly, in Order No 200-1997, the public body was not required to refuse to disclose the applicant's adoption records containing the name of the applicant's birth father who had been deceased for 46

¹⁹ Applicant's submission, “Document Disclosure” at Group J.

²⁰ F16-46, 2016 BCIPC 51 (CanLII) at para. 43.

²¹ Order F12-08, 2012 BCIPC 12 (CanLII) at para. 42.

²² For example, see Order F14-09, 2014 BCIPC 11 (CanLII) at para. 33.

years. The length of time the third parties had been deceased was a relevant factor in each of those orders.²³

[32] In this case, the Deceased passed away in 2002, which is approximately 16 years ago. Based on the reasoning outlined above, and absent any relevant circumstances to the contrary, it is my view that personal privacy rights are likely to continue for at least 20 years. As such, not enough time has elapsed in this case to weigh in favour of disclosing the Deceased's medical information.

Conclusions for s. 22

[33] I have determined that all of the information in dispute contains the personal information of the Deceased, and that there is a presumption under s. 22(3)(a) that disclosure of this information would be an unreasonable invasion of his personal privacy.

[34] I have considered all of the relevant circumstances, including those listed in s. 22(2). I find that the presumption that disclosure of the personal information would be an unreasonable invasion of the Deceased's personal privacy has not been rebutted. I therefore find that pursuant to s. 22(1) the Hospital must refuse to disclose the Deceased's personal information to the applicant.

CONCLUSION

[35] For the reasons given, I have determined that applicant was not acting on behalf of the Deceased in accordance with s. 5(1)(b) of FIPPA and was not authorized to exercise the Deceased's access rights under FIPPA. Accordingly, it was not necessary to determine whether the applicant was the appropriate person pursuant to s. 5 of the Regulation.

[36] Under s. 58 of FIPPA, I order that the Hospital is required to refuse to disclose the information in dispute under s. 22 of FIPPA.

February 27, 2018

ORIGINAL SIGNED BY

Meganne Cameron, Adjudicator

OIPC File No.: F16-68162

²³ Order F14-09, 2014 BCIPC 11 (CanLII) at paras. 30-31.