Order F22-25

VANCOUVER ISLAND HEALTH AUTHORITY

Jay Fedorak
Adjudicator

May 19, 2022

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Summary: The applicant requested access to his own human resources file from the Vancouver Island Health Authority (VIHA). VIHA responded refusing access to the records under s. 19(2) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) on the grounds that disclosure would cause immediate and grave harm to the applicant. VIHA subsequently disclosed some records to the applicant. The adjudicator found that s. 19(2) applied to some, but not all, of the information in dispute and ordered VIHA to disclose the remainder.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 19(2).

INTRODUCTION

[1] An employee (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Vancouver Island Health Authority (VIHA) for his human resources file. VIHA responded by withholding the records in their entirety under s. 19(2) on the grounds that disclosure could reasonably be expected to cause immediate and grave harm to the applicant.

[2] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the decision of VIHA. VIHA subsequently disclosed some information to the applicant but continued to withhold the remainder under s. 19(2).

[3] Mediation failed to resolve the matter and the applicant requested that it proceed to an inquiry.

ISSUES

[4] The issue to be decided in this inquiry is whether s. 19(2) permits VIHA to withhold the information.

[5] Under s. 57(1) of FIPPA, VIHA has the burden of proving that it is authorized to refuse access to the information withheld under s. 19(2).

DISCUSSION

[6] **Background –** The applicant has been on medical leave from his employment for several years. VIHA had disciplined the applicant on several occasions for inappropriate behaviour. This included an incident where the applicant "emailed and texted multiple coworkers and threatened to commit suicide in front of them for maximum effect."[1] Several years later, VIHA arranged for the applicant to return to work. During a meeting to discuss the arrangements, the applicant "made comments about harming himself."[2] The applicant subsequently failed to provide adequate medical clearance and remains on leave.

[7] **Records at issue –** VIHA initially withheld the applicant's entire human resources file. After the applicant requested the OIPC review the response, VIHA disclosed 466 pages of records that it believed were no longer of concern, including documents that the applicant had already seen. In preparation for this inquiry, VIHA determined that it could release a further 129 pages of records that were no longer of concern. It continues to withhold 366 pages of records. These records include VIHA's internal and external communications, and charting history about the applicant concerning certain topics.[3]

[8] **Section 19(2) –** The relevant provision reads as follows:

> **19** (2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

[9] Cases involving the application of s. 19(2) involve serious and significant considerations. On the one hand, s. 4(1) of FIPPA gives individuals a particular statutory right to access their own personal information. On the other hand, cases such as the present one deal with the risk that the exercise of this right may put the health and safety of the applicant in danger.

[10] The Supreme Court of Canada has established that the "reasonable expectation of harm" standard is "a middle ground between that which is probable and that which is merely possible."[4] There is no need to show on a balance of probabilities that the harm will occur if the information is disclosed,

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[1] VIHA's initial submission, para. 16.
[2] VIHA's initial submission, para. 21.
[3] VIHA's initial submission, para. 42.
[4] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, para. 201.

but the public body must show that the risk of harm is well beyond the merely possible or speculative.[5] It found that the phrase "could reasonably be expected" means that the disclosure of specific information at issue must lead directly to the injury that is anticipated.[6]

[11] In Order 02-32, which dealt with s. 19(2), former Commissioner Loukidelis described the appropriate harms test:

> … the reasonable expectation of harm test requires evidence the quality and cogency of which is commensurate with a reasonable person's expectation that disclosure of the disputed information could cause the harm specified in the relevant section of the Act. Although it is not necessary to establish a certainty of the harm being caused, evidence of speculative harm will not suffice. There must be a rational connection between the disclosure and occurrence of the feared harm.[7]

[12] I apply the same test here.

[13] VIHA obtained prior approval from the OIPC to submit parts of its submissions and evidence *in camera* because they either revealed the information in dispute or contained information that may itself be subject to s. 19(2). Information that the OIPC accepts *in camera* will not be shared with the other party or be disclosed in the Order. During the course of the inquiry, however, I concluded that disclosing the precise nature of the harm would assist in providing clearer and more fulsome reasons. I contacted VIHA to ask if it would reconsider its position that the precise nature of the s. 19(2) harm must remain *in camera*. VIHA refused, indicating that it was only prepared to openly describe the harm as having "material and life altering implications."

[14] VIHA submits that it has no interest of its own in withholding the requested information. It has done so out of concern for the well-being of the applicant. It argues:

> As the Applicant's employer, VIHA has knowledge of the Applicant's mental health and his behaviour in the workplace (including threats of violence against other staff members and himself), and his behaviour when confronted with certain information about himself, his physical and mental health and his work performance.[8]

[15] As a result of this knowledge of his past behaviour, VIHA sought confidential medical advice about the risk to the applicant of disclosing the

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[5] Ibid, para. 206. See also *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, paras. 52-54.
[6] *Lavigne* v. *Canada (Office of the Commissioner of Official languages)*, 2002 SCC 53.
[7] Order 02-32, 2002 CanLII 42466 (BC IPC), para. 9.
[8] VIHA's initial submission, para. 6.

information to him. The advice it received outlined harms that VIHA describes in the *in camera* portion of its submission. VIHA says in the open portion of its submission that it has withheld information from the applicant "Based on the medical advice provided to VIHA, and the Applicant's past conduct, where he threatened to kill himself at work in front of co-workers for maximum effect."[9]

[16] VIHA submits that the applicant breached its human resources policies multiple times and engaged in inappropriate behaviour in the workplace. His family physician subsequently deemed him unfit for work and the applicant went on leave.

[17] VIHA accepts that it must establish that disclosure of the records in dispute will cause the applicant to suffer "immediate and grave harm." It also accepts that its case must meet the harms test outlined above.

[18] VIHA outlines all of the harms it envisions in the *in camera* portion of its submissions. It submits that there is a direct connection between the disclosure of the records and these harms. It also argues that the impacts on the applicant constitute "immediate and grave harm." It notes that it need not establish that there is a certainty of the harm occurring. It only must establish that the apprehension of harm is more than speculative and that there is a direct connection between the harm and the disclosure of information in the records. VIHA argues that "if any of the Records in Dispute containing any of the Triggers are released to the Applicant, there is a substantial likelihood" of the harms occurring.[10]

[19] The term "Triggers" refers to categories of information in the records in dispute. It is VIHA's position that if the applicant views any information related to any of these categories, he will suffer immediate and grave harm.

[20] The submission of the applicant indicates that he believes that VIHA fears he will take action to harm himself, up to and including committing suicide, if he reads the information in dispute. I am unable to confirm or deny the accuracy of his assessment because doing so could reveal VIHA's *in camera* materials. He admits that he suffered a mental health crisis in the past, but submits that, through medical care and counselling, he has his condition under control. He concedes that, he has had thoughts of harming himself, for example by committing suicide in front of his former colleagues. He asserts that he disclosed to his physician and therapists that he had these thoughts. He now has a plan in place that, in the event he experiences these thoughts again, he will contact his family doctor, the hospital or a crisis line.[11]

[9] VIHA's initial submission, paras. 8-9.
[10] VIHA's initial submission, para. 86.
[11] Applicant's response submission, p. 1.

[21] In support of his submission, he attaches his medication history and reports from medical professionals who have provided him with therapy. In summary, the evidence of these professionals is that the applicant has a particular diagnosis. It also indicates that, while the applicant has experienced thoughts about harming himself (including fantasies about committing suicide), which are concerning, he has taken no concrete steps to attempt suicide or otherwise harm himself. There is also evidence to suggest that the applicant has no genuine intent to harm himself, but rather he has other purposes for making these threats.[12] The conclusion of these professionals is that the applicant should be able to return to work after treatment and therapy.[13]

[22] VIHA contests the applicant's response submission. It submits that most of the evidence the applicant has provided is out of date. VIHA asserts that the information it has provided *in camera* is more current and accurate.[14]

Analysis

[23] I will first deal with whether the harm VIHA has contemplated would meet the threshold of "immediate and grave." I will then address the issue as to whether the prospect of that harm occurring is within the range of the established test.

Immediate and grave harm

[24] I have considered the specific harm that VIHA believes could occur. In my view, if it were to occur directly and without delay from the applicant gaining access to the disputed information, it would correctly be characterized as "immediate and grave" harm.

[25] The next question is whether disclosing the disputed information could reasonably be expected to cause the alleged immediate and grave harm. For the reasons that follow, I find that VIHA has proven that disclosing a small amount of the disputed information could reasonably be expected to result in immediate and grave harm to the applicant. However, VIHA has not met its burden with respect to the balance of the information in dispute.

Reasonable expectation of harm

[26] The key consideration is whether it is reasonable to expect that the alleged harm would immediately occur if the applicant read the information at issue. The applicant has tried to demonstrate that no harm would occur. He indicated that he has been receiving treatment through medication and

[12] Applicants' response submission, fifth attachment, Emergency Documentation, p. 2.
[13] Applicant's response submission, first attachment, Psychological Assessment, pp. 4-13.
[14] VIHA's reply submission, paras. 7-10.

behavioural therapy to deal with his thoughts. He has a plan in place for dealing with situations where he begins to fantasize in an obsessive manner about harm. There is no evidence before me that he has ever attempted the alleged harm. The professionals that he has cited indicate that they have no evidence to suggest that it is likely that the harm may occur, but that he still requires careful observation as a precaution.

[27] VIHA asserts that a more recent assessment from its medical professional rates the risk of harm to the applicant to be higher. The assessment has identified certain subject matters that could trigger this risk of harm. VIHA asserts that all of the information that it has withheld from the applicant relate to these triggers.

[28] I have reviewed some of the information that VIHA has disclosed to the applicant as well as all of the information that it has withheld, in the context of the triggers that VIHA has identified. The information withheld consists of two pages of handwritten meeting notes, two pages of emails, a one-page letter and 360 pages of an electronic information system that records communications related to the applicant. The majority of the communications in the information system is dated prior to the most serious incident involving the applicant. The handwritten notes are from a meeting that took place five years prior to that same incident.

[29] I find it significant that some of the records that VIHA has disclosed to the applicant contain information that is similar to the information in dispute. VIHA has disclosed information that appears to relate to the triggers it described in its submission.[15] I am unable to explain further without revealing the nature of the triggers. I also note that the records that VIHA has withheld include transcripts of correspondence between the applicant and VIHA of which the applicant would already be aware. Some of this material relates to subject matters that are mundane and do not appear to have any direct connection to the alleged triggers. The applicant has seen this information relatively recently without suffering immediate and grave harm. This makes less persuasive VIHA's case that disclosure of such information would cause the applicant to suffer immediate and grave harm now. It is difficult to see how the disclosure of certain information that the applicant has previously read would now pose a risk of harm that it did not pose previously. VIHA has not explained how this could be the case.

[30] I also consider it significant that, in the event that disclosure of the records caused the chain of thoughts and events VIHA alleges, there is already a mitigation plan in place to reduce the risk of harm. Based on the information in the submission, it is reasonable to expect that, if the risk of harm increased, there would be an opportunity to mitigate that risk further.

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[15] Some of the records provided deal with subject matter that falls clearly within the scope of triggers (a), (b), and (d), VIHA Initial Submission, Affidavit 1 *in camera*, para. 21.

[31] This is a difficult case. There is conflicting testimony from medical professionals about the risk of harm to the applicant. There is conflicting evidence as to the state of mind of the applicant. It is significant that there are previous Orders that have found that s. 19(2) did not apply, even though the public bodies provided medical opinions that disclosure would harm the applicants.[16] I also note that the medical professional that provided affidavit support in VIHA's submissions did not indicate that they have specialist credentials in the diagnosis and treatment of the applicant's particular health conditions.

[32] The key consideration is whether VIHA has established a direct connection between the disclosure of the records and the risk of harm. In this respect, there is an issue with VIHA's submission. This is that the medical professional has not explained the rationale for determining which categories of records could be expected to provoke a risk of harm. The medical professional identifies the "Triggers" but does not explain why they are triggers or provide any evidence as to why disclosures of particular types of information pose a risk to the applicant.

[33] I understand and appreciate the desire of VIHA and its witness to proceed cautiously, and I believe they are acting in the best interests of the applicant. Nevertheless, the majority of records in dispute appear to be only marginally connected to the triggers to harm that the medical professional has identified. Therefore, I find that VIHA has severed information that goes beyond addressing concerns that the medical professional identified and beyond VIHA's arguments in its submissions.

[34] Moreover, VIHA has not provided sufficient explanation and evidence to demonstrate why the disclosure of certain categories of information would put the applicant at risk. VIHA has not demonstrated that the risk of harm related to the disclosure of those categories of records is well beyond the merely possible or speculative and has not established a clear and direct connection between the disclosure of that information and the expected harm.

[35] I also note that the applicant has a mitigation plan in place for dealing with circumstances where he is dealing with thoughts related to harm. This, combined with the fact that there is no evidence that he has ever taken steps related to the alleged harm, undermines VIHA's case that the prospect of harm in this case is more that merely possible.

[36] After full consideration of all of the arguments and evidence as to the risks involved in this case, I find that s. 19(2) applies only to a small portion of the records in dispute. For the reasons state above, all I can say is that the evidence

[16] See for example, Order 01-29, 2001 BCIPC 30 (CanLII) and Order 02-32, 2002 BCIPC 32 (CanLII).

satisfies me that some of the information in dispute is a type of information that in the past has provoked the applicant to indicate that the alleged harm is imminent. The evidence persuades me that the risk of the applicant suffering immediate and grave harm from viewing this information, meets the midpoint between being merely possible and being probable. This information satisfies the statutory test.

[37] Therefore, I find that s. 19(2) applies to a few entire pages of records and parts of others. In some cases, they include multiple copies of the same record. VIHA may continue to withhold that information. I also find that s. 19(2) does not apply to the remainder of the information and VIHA must disclose it. I have provided a marked copy of the records indicating the passages VIHA may continue to withhold.

CONCLUSION

[38] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. Subject to item 2 below, I confirm in part the decision of VIHA to withhold the applicant's personal information under s. 19(2).

2. VIHA is not authorized under s. 19(2) to withhold the remainder of the applicant's personal information. I have provided VIHA with copies of pages of records containing information that it may continue to withhold highlighted in yellow.

3. I require VIHA to give the applicant access to the information that it is not authorized to withhold. VIHA must concurrently provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order, along with a copy of the relevant records.

[39] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **July 4, 2022**.

May 19, 2022

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F19-81479