



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

Order 03-07

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Michael T. Skinner, Adjudicator
February 27, 2003

Quicklaw Cite: [2003] B.C.I.P.C.D. No. 7
Document URL: <http://www.oipc.bc.ca/orders/Order02-07.pdf>
Office URL: <http://www.oipc.bc.ca>
ISSN 1198-6182

Summary: The applicant sought records from the public body relating to her deceased husband's election of a particular pension payout option. The public body refused disclosure on the basis that the applicant was not acting on behalf of the deceased and that, under s. 22(1), disclosure would unreasonably invade the personal privacy of the deceased. The applicant is acting on behalf of the deceased and is entitled to the records. Alternatively, disclosure of the requested records would not be an unreasonable invasion of the personal privacy of the deceased husband.

Key Words: Acting on behalf of – personal representative – unreasonable invasion of personal privacy – medical history – employment history – financial history – public scrutiny – necessary for fair determination of the applicant's rights – personal information supplied in confidence – unfairly damage reputation of person.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*; s. 22(2)(a), (c), (f) and (h); s. 22(3)(a), (d) and (f); *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93, s. 3(c).

Authorities Considered: B.C.: Order 00-11, [2000] B.C.I.P.C.D. No. 13; Order 02-44, [2002] B.C.I.P.C.D. No. 44.

1.0 INTRODUCTION

[1] In April of 2002 the applicant, with the assistance of legal counsel, applied to the British Columbia Hydro and Power Authority ("B.C. Hydro"), the public body, for

records relating to the context within which the applicant's deceased husband ("the husband") made a particular election (choice) to accept a certain option regarding his pension payout. The applicant had made two earlier requests to B.C. Hydro for records relating to the husband's pension election, to which B.C. Hydro responded. In the third request, which is the subject of this inquiry, the applicant seeks records relating primarily to the husband's medical condition and extent of disability at all times relevant to the pension election.

[2] The applicant's husband was, during his working life, a long-time employee of B.C. Hydro. Late in his career, the husband developed a disability which prevented him from carrying out the normal functions of his position. He was terminated with pension benefits, and chose among a number of available options to accept a life pension guaranteed for ten years. That is, payments would be made for the duration of his remaining lifetime, and, should he die less than ten years after payments commenced, the amount remaining to the ten-year anniversary would be paid to his beneficiary. Other than that, no provision was made for pension benefits that would accrue to his wife should he die before her.

[3] The husband lived beyond the ten-year guarantee period, and continued to receive benefits until his death several years after the ten-year anniversary. At that point, pension benefits ceased. The applicant then began to investigate the husband's choice of pension options. The husband had been on extended medical leave during the time the pension election was made. It is the applicant's contention that this decision had a material impact on her rights as the husband's beneficiary and that B.C. Hydro should have involved her in the election process. The applicant seeks the requested records to assist in substantiating this contention.

[4] B.C. Hydro responded to the applicant's request in May 2002. It interpreted the request as purporting to be made on behalf of the husband and accordingly considered s. 3(c) of the *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93 ("FOI Regulation"), made under the *Freedom of Information and Protection of Privacy Act* ("Act"). B.C. Hydro concluded that the applicant was acting on her own behalf and did not qualify for the status conferred by s. 3(c) of the FOI Regulation. Therefore, B.C. Hydro treated the applicant as an arm's-length third party, with no special standing. It then proceeded to consider whether s. 22 of the Act required B.C. Hydro to refuse disclosure on the basis that it would unreasonably invade the husband's privacy. B.C. Hydro answered that question affirmatively and refused disclosure of the requested records.

[5] In October of 2002, the applicant, through her legal counsel, requested a review of B.C. Hydro's decision. As mediation was not successful in resolving the issue, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUES

[6] As B.C. Hydro considered and applied s. 3(c) of the FOI Regulation, this is the first issue I must consider, *i.e.*, is the applicant acting on her late husband's behalf within the meaning of s. 3(c)? If she is not, I must then consider whether B.C. Hydro is required by s. 22 of the Act to refuse access to the requested records.

[7] Section 57 is silent on the issue of burden of proof in the context of the application of s. 3(c) of the FOI Regulation. However, the Commissioner in Order 02-44, [2002] B.C.I.P.C.D. No. 44, confirmed that a determination of whether an applicant is acting on behalf of the deceased under s. 3(c) must be made on the basis of all of the evidence available in the inquiry. Under s. 57(2) of the Act, the applicant has the burden of proving that disclosure of the requested records would not unreasonably invade the personal privacy of her deceased husband.

3.0 DISCUSSION

[8] **3.1 Is the applicant acting on behalf of the deceased?** – Counsel for the applicant (“counsel”), in his initial submission to this inquiry, argued that “the [a]pplicant is the Executrix of the Estate of ... [the husband] and as such stands in his stead and place and is entitled to full access to all of his papers and documents as if she was him.” This straightforward statement asserts the applicant's legal authority to access records by virtue of her position as executor of the husband's estate. However, in an application for records under the Act, the applicant's position as executor is not solely determinative. Under the Act, the applicant may access the husband's records “as if she was him” only if she fully satisfies the requirements of s. 3(c) of the FOI Regulation, the text of which follows:

3. The right to access a record under section 4 of the Act and the right to request correction of personal information under section 29 of the Act may be exercised as follows:

...

- (c) on behalf of a deceased individual, by the deceased's nearest relative or personal representative.

[9] As can be seen, the two requirements incorporated in s. 3(c), both of which must be satisfied, are that the applicant be acting *on behalf of* the deceased and that she occupy the position of nearest relative or personal representative.

[10] B.C. Hydro accepts that the applicant, as executor of the husband's estate, is his personal representative – that point is not in dispute. The issue therefore is whether the applicant's request can truly be said to be made on behalf of the husband. Counsel's

submission, and the applicant's affidavit provided in support of the submission, are instructive. Counsel argues, at para. 4 of the applicant's submission, that

... B.C. Hydro and Power Authority are holding documents that reflect their knowledge of [the husband's] degree of incapacity and inability to comprehend and they had a duty to ensure they fully put before both he and the Applicant pension options to ensure that the proper pension was selected for the Decedent and family.

[11] At para. 8 of her affidavit, the applicant asserts that

... the sole purpose for wanting access to the said medical records is for no other purpose than to have determined my late husband's incapacity in relation to understanding the election that was made and the knowledge of B.C. Hydro and Power Authority of his incapacity.

[12] It is clear from the preceding paragraph that the applicant seeks records to establish that her husband was incapacitated at the time of his pension election and that the applicant has suffered as a result. B.C. Hydro argues that no benefit flowing from the applicant's request for records could conceivably accrue to the deceased. Obviously, the fact of the husband's death makes this statement true on its face, but if that were the test, no one could ever act "on behalf of" a deceased individual. As the Commissioner noted in Order 02-44 at para. 32:

... [a]t common law, any cause of action the son [or in this case, the husband] might have had for negligence or any other wrong that he allegedly suffered would have perished with him... [t]he harsh common law was amended by statute, the relevant provision now being s. 59 of the *Estate Administration Act*.

[13] In this case, the husband had a choice to make and, had he chosen a survivor's pension, he would have provided something of tangible benefit for the needs of those whom he loved or felt a duty to assist. B.C. Hydro argues, at para. 14 of its public submission, that the pension option chosen by the husband provided the maximum benefit to him during his lifetime and that any other pension option, such as "joint and survivor without reduction in benefit to the survivor" – what I have been referring to as a "survivor's pension" – would have meant that

... the deceased would actually have benefited less, personally, by virtue of the fact that a joint and survivor option reduces the monthly payments to the pensioner by introducing the interests of the survivor. A posthumous change of election would be in the interests of the survivor (i.e., presumably the applicant) rather than in the interest of the deceased.

[14] This assertion unavoidably speculates as to the motivations and concerns of the husband. It is based on the assumption that the husband would have sought only to maximize his personal financial benefit during his own lifetime. Given that all parties acknowledge that the husband's health was marginal, to the extent of disabling him from

the performance of his employment duties, it is possible that the husband may not have fully comprehended the consequences of his election decision and that his desire – which in its submission B.C. Hydro discusses generally under the heading of “non-pecuniary interests” – may well have been to provide for the future needs of his wife, particularly if the state of his health was such that it was foreseeable that he would predecease her.

[15] A husband’s knowledge that he has made provision for his wife after his passing can, in my opinion, be considered a “benefit” to the husband during his lifetime, albeit a non-pecuniary benefit. It is no different from the peace of mind that can accrue from the knowledge that one has in place adequate insurance to provide for family needs in the event of an unexpected tragedy. While this observation also contains a speculative element in respect of the husband’s intent, I include it for the purpose of showing that theories of intent alone are insufficient in attempting to address the question of whether the applicant is acting on the husband’s behalf. What is needed, and what the applicant seeks, is evidence. To the extent that the applicant wishes to obtain records that would be relevant in determining the husband’s true intent, the applicant is acting on behalf of the husband.

[16] The fact that the applicant may, unavoidably, have an economic interest in the matter does not invalidate this view. It is also worth noting that the economic interest in this case extends beyond that of the applicant personally: her husband’s will, appended as an exhibit to B.C. Hydro’s affidavit sworn by Susan Doutre, shows many other individuals – children of the applicant and the husband – who would be entitled to a share of the husband’s estate in the event of the applicant’s death. Counsel for the applicant argues that “she is the principal beneficiary provided for under the Estate but is duty bound to make the inquiry for the benefit of the beneficiaries.” I agree with this assertion. This is an important point, upon which I would find that the applicant is in any event acting on behalf of the husband, by virtue of standing in his place as executor of his estate.

[17] In this respect the applicant’s circumstances can be distinguished from those presented by Order 02-44, where the Commissioner found that the nearest relative (the mother) of a deceased son could not be said to be acting on the son’s behalf. These observations do not lay down a blanket rule that an executor will always satisfy the requirements of s. 3(c) of the FOI Regulation.

[18] For the above reasons, I find that the applicant is acting on behalf of the deceased husband and satisfies the conditions set down in s. 3(c) of the FOI Regulation. On this basis alone, the applicant is entitled to the records withheld by B.C. Hydro. Section 22 of the Act does not apply, as the applicant has standing to make the request, to use counsel’s words, “as if she were him.” However, given the detailed submission that B.C. Hydro has made concerning the application of s. 22, it deserves to be considered as an alternative argument, and I now turn to it.

Are the records properly withheld under s. 22?

[19] The records at issue, properly submitted *in camera* – along with *in camera* argument – consist of:

- correspondence between B.C. Hydro and the husband,
- internal B.C. Hydro memos relating to the husband’s employment, pension options and related issues,
- medical forms attesting to the husband’s condition,
- numerous forms relating to the ongoing administration of benefits by Confederation Life Insurance Company, acting for B.C. Hydro’s Benefit Plans Compensation Department,
- external verification of the husband’s employment income during the benefits period, submitted periodically by a private accounting firm to the B.C. Hydro Benefits Department, and
- a small number of miscellaneous records and notes, which relate to the records described above.

[20] On their face, the records attract the operation of ss. 22(3)(a), (d) and (f); these provisions are set out below:

- 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if
- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
...
 - (d) the personal information relates to employment, occupational or educational history,
...
 - (f) the personal information describes the third party’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, ...

[21] At this juncture I consider it useful to refer to an excerpt from Order 00-11, [2000] B.C.I.P.C.D. No. 13 at para. 48 (Q.L.):

Having considered the circumstances of this case, including those found in s. 22(2) of the Act, I find, for two reasons, that disclosure of the deceased’s personal information would not unreasonably invade the deceased’s personal privacy under s. 22(1). First, the applicant has sought access for a legitimate purpose connected

with the circumstances surrounding her sister's death. Second, much of the deceased's personal information has already been disclosed to the applicant or is known to her. This latter factor will not always favour subsequent disclosure through an access request under the Act, but it does so in the circumstances of this case.

[22] I will note here, generally, that my thoughts parallel the Commissioner's in Order 00-11. The applicant is seeking access to these records for a legitimate purpose. Nor is the husband's personal information in the records, with the exception of the medical information, particularly sensitive. In addition, the general circumstances of the husband's dealings with B.C. Hydro would, it is reasonable to conclude, have been known to the applicant, although specific details might have remained unknown.

[23] To complete the analysis of whether disclosure of the records would constitute an *unreasonable* invasion of the husband's personal privacy, I must consider relevant circumstances as noted in the following excerpt from s. 22(2):

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

...

(f) the personal information has been supplied in confidence, [or]

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

Personal information supplied in confidence – s. 22(2)(f)

[24] B.C. Hydro has submitted *in camera* argument on this point. I do not agree with this aspect of its submission; however, I am not at liberty to provide further reasons, given that the argument was submitted *in camera*.

Unfair damage to reputation – s. 22(2)(h)

[25] The information in the records relating to the husband's disability borders on cryptic, and disclosure to the applicant – who, counsel asserts, quit her job as a registered nurse to care for the husband in the last years of his life – or to any other family member would not in my view unfairly damage the reputation of the husband. B.C. Hydro has submitted *in camera* argument on this point, with the substance of which I do not agree. Again, I am not at liberty to discuss B. C. Hydro's submissions by way of *in camera* argument.

Character of the records and general finding regarding s. 22

[26] The bulk of the records are innocuous and administrative in nature and should be disclosed. The records that make reference to the husband's medical condition are of a more personal nature, but do not contain intimate details of the husband's life. The medical evidence in the records, such as it is, tends toward cryptic summary diagnoses and tick marks on multiple-choice forms. Collectively, the records by definition relate to medical, employment and financial history. However, in the context of this application, I find that disclosure would not be an unreasonable invasion of the deceased husband's personal privacy.

4.0 CONCLUSION

[27] For the reasons given above, I make the following orders under s. 58 of the Act:

1. I find that the applicant has satisfied the requirements of s. 3(c) of the *Freedom of Information and Privacy Regulation*, B.C. Reg. 323/93, and is entitled to access the requested records on behalf of her husband. I therefore require the B.C. Hydro and Power Authority to disclose the requested records to the applicant.
2. In the alternative, I find that the B.C. Hydro and Power Authority is not required under s. 22 of the Act to refuse access to the requested records. I therefore require the B.C. Hydro and Power Authority to disclose the requested records to the applicant.

February 27, 2003

ORIGINAL SIGNED BY

Michael T. Skinner
Adjudicator