



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

Order 04-25

**PROVINCIAL HEALTH SERVICES AUTHORITY  
AND  
CHILDREN'S AND WOMEN'S HEALTH CENTRE**

Celia Francis, Adjudicator  
September 9, 2004

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**Summary:** Applicant requested records related to himself. PHSA disclosed large number of records and withheld others under ss. 12(3), 13(1), 14 and 22. Applicant disputed decision to withhold information and also complained about delay in PHSA's response and records search. PHSA found to have applied s. 14 correctly and in some cases also ss. 13(1) and 22. PHSA found not to have complied with its duties under s. 6(1) and ordered to search again.

**Key Words:** duty to assist – adequacy of search – respond without delay – respond openly, accurately and completely – every reasonable effort – timeliness – time extension – advice or recommendation – local public body confidences – legal advice – solicitor client privilege – personal privacy – unreasonable invasion – workplace investigation – opinions or views – submitted in confidence – personal privacy – employment history – personal evaluations – public scrutiny – fair determination of rights.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 7, 12(3)(b), 13(1), 14, 22(1), 22(2)(c) and (f), 22(3)(a), (d), (g) and (h), 22(5).

**Authorities Considered: B.C.:** Order 00-15, [2000] B.C.I.P.C.D. No. 18; Order 326-1999, [1999] B.C.I.P.C.D. No. 39; Order 00-27, B.C.I.P.C.D. No. 30; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 01-53, B.C.I.P.C.D. No. 56; Order No. 153-1997, [1997] B.C.I.P.C.D. No. 11; Order 00-19, [2000] B.C.I.P.C.D. No. 22; Order 01-07, [2001] B.C.I.P.C.D. No. 7.

## 1.0 INTRODUCTION

[1] This inquiry concerns an applicant who had, for some years at the time of his request, been employed with the Children's and Women's Health Centre ("CWHC") and the Provincial Health Services Authority ("PHSA"). At the time of the inquiry, the applicant was involved in various proceedings with the CWHC and the PHSA.

[2] In September 2002, the applicant wrote to the Chief Executive Officer of the PHSA and requested access, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to files "which relate to me" and which he said were maintained at the CWHC, including by a series of named individuals, boards and committees of the CWHC and PHSA.

[3] In June 2002, the applicant had also made a request for his files in the CWHC's Human Resources department, specifically as related to his employment. The material before me indicates that the PHSA combined a later response to this June request with its responses to the September 2002 request which is the request in issue in this inquiry. This led to some confusion, as will be seen below.

[4] The CWHC was, at the time of the request, a public body under the Act in its own right and, as a hospital under the *Hospital Act*, remains a public body in its own right. It is also part of the PHSA, which was not a public body under the Act at the time of the applicant's access request, but was added as a public body under Schedule 2 of the Act on March 7, 2003. At the time of the inquiry, therefore, both the CWHC and the PHSA were public bodies. I refer below to these two public bodies collectively as the PHSA.

[5] The PHSA responded to the applicant's September 2002 request in stages from October 2002 to February 2003, and twice more in April 2003. In the first response, the PHSA told the applicant that it did not have control over the records of one of the individuals named in the applicant's request, as this individual was not an employee of the CWHC or the PHSA. The PHSA went on to say that it would include in this request records of the former Vice-President of Human Resources of the CWHC, which the applicant had asked for earlier. It also said that it was extending the date for responding to the rest of the access request to mid-December 2002. In subsequent responses, up to February 2003, the PHSA provided the applicant with copies of records, stating that information and records were being withheld under ss. 14 and 22 of the Act. At some point, the PHSA apparently also applied ss. 12(3)(a) and (b) and s. 13(1) to some information.

[6] The applicant sent this Office a series of requests for review of, and complaints about, the responses. First, he took issue with the statement that the records of one individual were not in the control of a public body, arguing that this person had been acting on behalf of the CWHC in carrying out his investigation. He also objected to the withholding of information from other records. Finally, he expressed concern about both the delay in receiving a complete response and the absence of certain records.

[7] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act, by making all findings of fact and law and the necessary order under s. 58.

## 2.0 ISSUES

[8] The issues before me in this inquiry are:

1. Whether the PHSA fulfilled its duties under ss. 6(1) and 7 of the Act.
2. Whether the PHSA was authorized by ss. 12(3)(b), 13(1) and 14 of the Act to withhold information.
3. Whether the PHSA was required by s. 22 to withhold information.

[9] Under s. 57(1) of the Act, the PHSA has the burden of proof regarding ss. 13(1) and 14 while, under s. 57(2), the applicant has the burden of proof regarding third-party personal information.

[10] The notice for this inquiry stated that two other issues were whether specified records are under the control of the PHSA for the purposes of ss. 3(1) and 4 of the Act and, if the specified records are not in the PHSA's control, whether the PHSA should have exercised its discretion under s. 11 to transfer the applicant's request.

[11] Having reviewed the material before me respecting these two latter issues, I decided to seek further evidence and argument on the issue of control from the individual whose records the PHSA said were not in its control. This individual informed me that, at the time of his involvement with the applicant, he was an employee of Vancouver Hospital. He said it was his understanding that Vancouver Hospital was sole respondent for any requests that the applicant might have for such records. He also said he and a colleague had turned their documentation and records with respect to the applicant over to Vancouver Hospital.

[12] In discussions with this Office, the applicant agreed to the Office providing a copy of his September 19, 2002 request to the information and privacy co-ordinator for the Vancouver Coastal Health Authority ("VCHA"), of which the Vancouver Hospital is now a part, on the understanding that the VCHA would process it as a new request for this individual's records. I informed the parties that, as a result of these developments, I proposed not to deal with the control and transfer issues in this decision. I received no comment from them on my proposal. Consequently, I do not deal with the control and transfer issues here.

## 3.0 DISCUSSION

[13] **3.1 Preliminary Issues** – I will first deal with a number of preliminary items.

### *Meeting notes and "draft resolution"*

[14] According to one of the tables of withheld records accompanying the records in dispute in this inquiry, the PHSA applied s. 12(3)(a) to a "draft resolution" of a committee. However, I could find no mention of this exception in any of PHSA's decision letters to the applicant in the material before me.

[15] In its April 30, 2003 decision letter, the PHSA told the applicant that it was providing more records, some of them duplicates of records it had disclosed earlier. Among other things, it also said it was applying s. 12(3)(b) to portions of two sets of handwritten notes of meetings of two committees, copies of which it provided for this inquiry.

[16] The parties did not make any submissions on either of these exceptions and I therefore requested additional representations from the parties on them. The PHSA provided a supplementary submission dated June 3, 2004, in which it provided some argument and evidence to support its position on ss. 12(3)(a) and (b). The applicant in turn provided a response dated June 10, 2004.

[17] I will therefore deal below with the application of ss. 12(3)(a) and (b) to the meeting notes and “draft resolution”.

### *Tape recordings*

[18] The PHSA’s decision letter of April 30, 2003 also told the applicant that it had located a tape recording of a meeting of August 7, 2001 and would provide a copy of it to him, after severing some information under s. 12(3)(b). It was not clear from the material before me whether the PHSA had ever disclosed this tape recording. Nor did the parties make any submissions on the applicability of s. 12(3)(b) to this record. I therefore requested submissions on the applicability of s. 12(3)(b) to the tape recording. I also asked the PHSA to provide me with an unsevered copy of the tape in question, together with a copy of any severed version.

[19] In a letter of June 3, 2004, the PHSA told the applicant that it was providing him with a complete copy of the tape recording. The application of s. 12(3)(b) to this record is therefore no longer in issue.

[20] In his supplementary submission of June 10, 2004, the applicant objected to being told by this Office that the tape recording of the August 7, 2001 meeting was no longer in issue, alleging that the tape was not complete. The original issue was the PHSA’s application of s. 12(3)(b) to this record. As the PHSA has now lifted the application of this exception from this record, I do not need to consider the original decision to withhold it. If the applicant believes the tape recording is incomplete, that is a new issue that he must first take up with the PHSA.

[21] In the case of another tape, a recording of a September 1999 meeting of a named committee, the PHSA said in its initial submission that the tape could not be located and might no longer exist. In a letter of July 7, 2004, legal counsel for the PHSA said:

It is come to the writer’s attention that a copy of the tape recording is in the possession of counsel representing various doctors in a defamation action commenced by the Applicant in this inquiry, and that the tape has recently been introduced into evidence during the trial of that defamation action. Further, it has also come to the writer’s attention that the original of the tape recording is in the custody of the Medical Affairs Office at the Health Centre.

The Health Centre has taken the position in the trial that the introduction into evidence of the tape recording of the [named committee] meeting was prohibited by section 51 of the *Evidence Act* ...

[22] As the only issue respecting this record was whether the PHSA had made reasonable efforts to search for it as required under s. 6(1) of the Act, I no longer need to deal with this issue. I informed the applicant of this and said that, once the PHSA informed him directly of its decision on this record with respect to his access request, he could request a review of that decision by this Office.

[23] The applicant objected to my decision not to consider this tape. He alleged, among other things, that it was incomplete and argued that s. 51 of the *Evidence Act* does not apply to it. However, as with the other tape, if the applicant believes it is incomplete, this is a new issue which he must first take up with the PHSA. Any decision respecting access to this tape is also not properly before me.

### ***Section 13(1) records***

[24] According to the tables of withheld records, the PHSA applied s. 13(1) to some information, although the decision letters provided to me did not cite this exception. Section 13(1) is listed as an issue in the notice of inquiry, however, and the parties provided representations on this issue. I will therefore consider this exception below.

[25] **3.2 Procedural Issues** – The applicant raised some objections about procedural matters to do with this inquiry.

### ***PHSA's affidavits on its search for records***

[26] In a letter of May 5, 2003, the applicant argued that the PHSA had submitted new evidence, in the form of affidavits, with its reply of April 30, 2003. He said that the notice for this inquiry told participants that replies may not raise new issues nor contain new argument or evidence, including affidavits.

[27] The applicant voiced concerns about the adequacy of the PHSA's search in his requests for review. He also devoted considerable space in his submissions to a discussion of alleged deficiencies of the PHSA's search for records.

[28] While the notice of inquiry did not specify the adequacy of the PHSA's search for records as an issue, its compliance with its duty under s. 6(1) is listed. This duty includes the requirement to respond completely and accurately to an applicant's request, including by carrying out an adequate search for responsive records.

[29] The PHSA's reply submission respecting its records search responds to the applicant's comments in his initial submission on this issue and does not raise any new issues. The affidavits to which the applicant objects support the PHSA's response to the applicant's complaints about supposed deficiencies in the PHSA's search for responsive records. I have therefore decided to accept and consider the affidavits in question, noting that the applicant has had an opportunity to make submissions respecting those affidavits.

***Alleged conflicts of interest and abuse***

[30] In his requests for review and his submissions in this inquiry, the applicant alleged that employees and legal counsel of the PHSA were in a conflict of interest in handling his freedom of information request, given their other dealings with him. He also raised allegations of abuse and abuse of process on the PHSA's part in the various proceedings involving the applicant. I agree with the PHSA that these issues are not within the scope of this inquiry and I have not considered them here.

[31] **3.3 Compliance with Section 6(1)** – The applicant raised two issues with respect to the PHSA's fulfilment of its s. 6(1) duty to assist him: the PHSA's delay in responding to his request; and the adequacy of its search for records. The PHSA's compliance with the deadlines in ss. 7(1) and (2) of the Act is also relevant to my consideration of the delay issue. Sections 6(1) and 7(1) and (2) read as follows:

**Duty to assist applicants**

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

**Time limit for responding**

7(1) Subject to this section and sections 23 and 24 (1), the head of a public body must respond not later than 30 days after receiving a request described in section 5 (1).

- (2) The head of the public body is not required to comply with subsection (1) if
- (a) the time limit is extended under section 10, or
  - (b) the request has been transferred under section 11 to another public body.

***Delay in responding***

[32] In his requests for review and submissions in this inquiry, the applicant complained that the PHSA had not responded to his request in a timely manner. He pointed out that the PHSA extended the deadline for responding to his request to December 16, 2002, but failed to complete its work on his request by that date. In a letter of April 30, 2003, the applicant also took issue with the PHSA's release of further records at the inquiry stage, asking why the PHSA had not provided the records earlier.

[33] The PHSA's decision letter of April 30, 2003 to the applicant indicates that, after reviewing the applicant's initial submission, it identified a Medical Advisory Committee administrative file that had not been provided earlier. It did not explain why the file had not turned up until then. The PHSA also said it was disclosing these records, some of which were duplicates of those it had disclosed earlier.

[34] The PHSA's decision letters show that it responded in stages from October 2002 to February 2003, and twice more in April 2003—this last time during the inquiry process. The PHSA acknowledged at para. 4 of its initial submission that it had failed to meet the

extended deadline of mid-December 2002 and that it also did not request a further extension from this Office under s. 10 of the Act. It provided no explanation for these lapses.

[35] I also note that the PHSA did not, as promised in its letter of April 30, 2003 to the applicant, provide the applicant with a decision on the tape recording of the August 7, 2001 meeting of the Medical Staff Member Review Subcommittee. It did not make the decision until I inquired about it in May 2004. The PHSA provided no explanation for the delay in disclosing the tape.

[36] The PHSA clearly did not meet its own extended time-line for responding to the applicant and, since it did not obtain a further extension from this Office under s. 10, did not meet the Act's requirements. I find that the PHSA did not fulfill its duty under s. 6(1) or ss. 7(1) and (2) in responding to the applicant's request.

[37] As the Information and Privacy Commissioner has noted in previous cases, there is, regrettably, no useful remedy for an applicant in such a case. The PHSA has responded, so I cannot order it to respond and there is no other sanction available to me. It bears emphasizing, however, the Act imposes legal obligations on public bodies to respond to access requests within certain time frames for good reason. It is often said that "access delayed is access denied". If a public body disregards the legislative timeframes, the individual who requested the records may no longer have any use for the information he or she requested. The effect of such delays is often the same as if the public body had refused to provide the records. The impact of such delays can be injurious, particularly where individuals are seeking access to their own personal information to deal with other issues in their lives. The Act's goals of accountability and openness are frustrated if public bodies choose to disregard the timeframes. I strongly recommend, therefore, that the PHSA review its request processes with a view to improving its compliance with the Act's requirements for response times and to meeting its s. 6(1) obligations.

#### *Adequacy of search for records*

[38] The Information and Privacy Commissioner has set out in numerous orders the standards he expects from public bodies in searching for responsive records and in accounting for such searches. See, for example, Order 00-15, [2000] B.C.I.P.C.D. No. 18. Without repeating those discussions, I will apply here the principles from those orders.

[39] The applicant offered numerous examples of categories of records which he believed were missing or fewer in number than he expected. For example, he asked why the files of certain employees, boards or committees produced so few or, in some cases, no records, given their involvement in his work situation. Regarding other employees, he said he received copies of e-mails from the files of some of these employees but did not receive copies of the same e-mails from the files of other employees involved in the e-mail exchanges. He also said two tape recordings of committee meetings and other committee records ought to exist and suggested that the contents of some records indicated the existence of still other records which he did not receive.

[40] In its reply submission of April 30, 2003, the PHSA responded in some detail to the applicant's contentions, with support from affidavit evidence from CWHC employees who

co-ordinated the searches for records in response to the applicant's request. It claimed it had located and reviewed all the categories of files that the applicant mentioned in his request and provided an account of this process (paras. 4-8, second McKerrow affidavit).

[41] In the case of two committees' records, the PHSA said, as noted above, that it had located some administrative records of one committee and the PHSA Board, which it had not located earlier but which it had now provided to the applicant. As also noted above, the PHSA also said that it had located handwritten notes from meetings of the two committees and was withholding them under s. 12(3)(b).

[42] In the case of one tape, a recording of a September 1999 meeting of a named committee, the PHSA initially said that the tape could not be located and might no longer exist. It provided affidavit evidence on this point with its reply submission of April 30, 2003 (para. 3, second McKerrow affidavit). This is the tape which, the PHSA told me in July 2004, it now knows is in the Medical Affairs Office.

[43] In the case of the other tape, a recording of a meeting of the Medical Staff Member Review Subcommittee held August 7, 2001, the PHSA said in its letter of April 30, 2003 to the applicant that it was withholding the tape under s. 12(3)(b). This is the tape the PHSA later disclosed in June 2004.

[44] In a few instances, the applicant has apparently interpreted references in the records he has received as indicating the existence of other records which he did not receive. On reading the records he refers to in these cases, I do not agree that the records lend themselves to such an interpretation. I should also note that, in other cases, where the applicant is suspicious that various categories of records have not been produced, the PHSA has actually withheld them under exceptions in the Act.

[45] In his further reply of August 13, 2004, the applicant questioned Ron McKerrow's evidence that he had co-ordinated the search for records. He provided a copy of an affidavit from another PHSA employee which he said indicates that she was responsible for the search. I note that this other affidavit appears to refer to another matter involving the applicant, not the search for records in issue here.

[46] The PHSA also said that the Chair of the PHSA Board of Directors "has retained some copies of correspondence related to [the applicant]" (para. 5, Prentice affidavit). It also said that it had created a binder of materials related to relevant meetings of the Medical Staff Member Review Subcommittee and the Medical Advisory Committee (para. 4, Cannon affidavit). The PHSA's decision letter of April 30, 2003 stated that it was providing a file maintained by the PHSA Chair and various committee records. It is not clear if they are the correspondence and binder referred to in the Prentice and Cannon affidavits.

[47] The applicant also suggested that the individual committee members "nevertheless have other materials relating to their interactions with a large number of people, both before and after the meeting. This is very much applicable to the [subcommittee] chair ...". The absence of the subcommittee chair's records is a recurring theme in the applicant's submissions.



[48] After reviewing the PHSA's response to the applicant's concerns about its search, I believe that the PHSA has made considerable efforts to search for records that respond to the applicant's request. There are some areas, however, in which I believe the PHSA has not shown that it met the standards required in searching for responsive records. I elaborate on this below.

[49] The applicant cited a number of individuals whose e-mails and other records appear among the records of other individuals which he received but whose own files were not produced in response to his request. These include: (1) members of his department; (2) past, present and past interim acting heads of his department; (3) the Acting Vice-President of Medical Affairs at the time; and (4) the chair of the Medical Staff Member Review Subcommittee that dealt with his case. I note that he named some of these individuals in his access request of September 2002.

[50] In response to these concerns, the PHSA said in its reply that the applicant had, in June 2002, requested and received records related to his employment. It said it had first provided a complete copy of the applicant's human resources department file. Later, after the applicant complained to this Office, the PHSA agreed to respond to what it called an "expanded request". It said it then provided the files of the head of the human resources department and the applicant's file within his own hospital department, withholding some information. The PHSA went to say at p. 3 of its reply:

[The applicant] is now alleging that the expanded request for the files in his name maintained by [the applicant's] Department included a request for records that may be within a number of individuals' email files or other files. It is the position of the Centre [CWHC] that [the applicant's] request for his employment files has been fully responded to and that the scope of that request did not require the Centre search the email files and personal files of individual members of [the applicant's] Department to locate records that may refer to [the applicant]. [see supplementary affidavit of Ron McKerrow]

[The applicant] has made requests for records from the email and personal files of members of the Centre (September 19, 2002 request) and in those requests he has specified the individuals whose records he is seeking.

[52] Despite PHSA's comments, I interpret the applicant's concerns about specific individuals' records as relating to his September 2002 request, not his "expanded" June 2002 request. The pertinent parts of the applicant's June 2002 request read as follows:

Please consider this letter as a formal request. I herein require copy of:

- the files under my name which are maintained in the Human Resources department of the Centre.

...

If it is unclear, this request relates to the files which are maintained in the offices of the Human Resources department of Centre and which relate to my employment. ...

[53] On a plain reading of this request, I can understand why the PHSA initially only provided records from the human resources department. Equally understandably, the PHSA later provided employment-related records in the applicant's own department and in the hands of the head of the human resources department, but only after the applicant complained to this Office that he had not received human resources records related to him from those two specified areas. It was

reasonable that, in responding to both phases of the June 2002 request, the PHSA did not ask all members of the applicant's department for any records they may have had that related to the applicant's employment.

[54] The difficulty with the PHSA's position arises from its apparent conflation of the scope of the "expanded" June 2002 request with the September 2002 request, which was for:

- the files which relate to me and which are being maintained by several members of the Centre. These include: ... [a series of named individuals, committees and boards].

[55] The September 2002 request was not restricted to records related the applicant's employment. Nor was it confined to records in the hands of the individuals, committees and boards named in his request. The September 2002 request may well have overlapped with the June 2002 request and was thereby potentially confusing to PHSA staff. It was, however, on its face more expansive and possibly intended to capture all records related to the applicant within the PHSA and CWHC.

[56] According to an e-mail string of September 20, 2002 about the applicant's September 19, 2002 request, which the applicant attached to his submission, the PHSA cast a wide net for records responsive to this request. However, it appears from a message that forms part of this string that the PHSA asked members of the applicant's department for any records they might have concerning the applicant only where the applicant had named them in his request.

[57] The PHSA apparently did not ask for records from all members of the applicant's department or its past and current heads, even where the applicant named them in his request. Nor does the PHSA seem to have asked for records related to the applicant from any other committees or individuals within the PHSA who might reasonably be expected to have had records about the applicant.

[58] In this e-mail string, the PHSA also specifically told the recipients not to include "any correspondence between you and legal counsel – however this means that no one else was copied on the correspondence". I take this to mean that the PHSA did not retrieve any such records. It is not clear why the PHSA narrowed its search for records in this way.

[59] The PHSA did not ask its external legal counsel for his records related to the applicant in this e-mail string. He was involved in many of the other e-mail exchanges about the applicant with PHSA employees and it is therefore reasonable to conclude that he has or had responsive records.

[60] Moreover, even though the PHSA listed the applicant's specific concerns about the absence of certain individuals' records on p. 2 of its reply, it failed to comment on them all. For example, it did not address files of the individuals listed in paras. (a), (b) and (j) on p. 2 of its reply, but addressed the records of selected individuals and committees only.

[61] In addition, the applicant stated in his supplementary submission of August 13, 2004 that he had not received copies of the PHSA Board Chair's correspondence about him referred to in the Prentice affidavit nor the binder or material related to the committee meetings referred to in the Cannon affidavit. He said he would like copies of both.

[62] The PHSA has not persuaded me that it made reasonable efforts to search for records responsive to the applicant's September 2002 request. The PHSA must therefore search the files of any other individuals, committees and boards who could reasonably be expected to have records responsive to the applicant's request and whose files it has not already searched, including, but not limited to, the following categories:

- (1) members of the applicant's department;
- (2) past and current heads (including interim and acting heads) of the applicant's department (including the files of the individuals listed in paras. (a), (b) and (j) on p. 2 of the PHSA's reply);
- (3) any other appropriate individuals, committees and boards elsewhere within the PHSA and CWHC, including those the applicant mentioned in his submissions.

[63] The PHSA must also search for responsive records with its legal counsel. It must also search for responsive records consisting of exchanges between PHSA employees and its legal counsel that were not copied to others and that it has not already retrieved in response to the September 2002 request, both in the files of individuals it has already searched and those which it searches as I have set out in the previous paragraph.

[64] The PHSA must then provide me with an affidavit from a knowledgeable person accounting in detail for its further searches. The PHSA must also make a decision on disclosure to the applicant of any new records it locates as a result of these further searches and provide me with a copy of any decision letter to the applicant on these records.

[65] **3.4 Local Public Body Confidences** – I will now consider the PHSA's application of ss. 12(3)(a) and (b). These sections read as follows:

**Cabinet and local public body confidences**

- 12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal
- (a) a draft of a resolution, bylaw or other legal instrument by which the local public body acts or a draft of a private Bill, or
  - (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

***The "draft resolution"***

[66] The PHSA applied s. 12(3)(a) to Record 16, Exhibit "H", which it says is a "draft resolution" for the CWHC Board. At para. 4 of its supplementary submission of June 3, 2004, the PHSA argued that the content of this record speaks for itself, but said nothing more. It did not, for example, show how the record is, in its view, a "draft of a resolution, bylaw or other instrument by which the local public body acts", as contemplated by s. 12(3)(a). The applicability of s. 12(3)(a) to this record is not self-evident and the paucity of argument and

evidence on this point was unhelpful to me in assessing whether or not s. 12(3)(a) applies to this record.

[67] However, in its discussion of s. 14, the PHSA said that it had also applied s. 14 to this record (see para. 48, McKerrow affidavit). As I have found elsewhere in this decision that solicitor-client privilege applies to all of the records to which the PHSA applied s. 14, including Record 16, Exhibit “H”, I need not also consider whether s. 12(3)(a) also applies to it.

### ***Substance of deliberations of in camera meetings***

[68] In order for this section to apply to a record, the public body must show three things: that it has the statutory authority to hold meetings of its governing body or a committee of that body in the absence of the public; that such a meeting took place; and that the withheld information would reveal the substance of deliberations (see, for example, Order 326-1999, [1999] B.C.I.P.C.D. No. 39).

[69] The PHSA’s decision letter of April 30, 2003 states that the PHSA had earlier provided the applicant with copies of the, apparently, official minutes of the meeting of August 7, 2001 of the Medical Staff Member Review Subcommittee and of the meeting of September 4, 2001 of the Medical Advisory Subcommittee. Yet the PHSA also stated in that letter that it was applying s. 12(3)(b) to two sets of handwritten notes of the same meetings.

[70] The first set, 19 pages of notes by an unidentified individual – the purpose of which is not clear – relates to a meeting of August 7, 2001 of the CWHC’s Medical Staff Member Review Subcommittee. The PHSA disclosed approximately 16 pages in full to the applicant and withheld approximately 3 pages under s. 12(3)(b). The PHSA withheld in its entirety the second set of handwritten notes, six pages of notes by an unidentified individual – the purpose of which is again not clear – related to a meeting of September 4, 2001 of the CWHC’s Medical Advisory Committee.

[71] I quote below the PHSA’s entire argument on s. 12(3)(b) from its supplementary submission of June 3, 2004:

2. The PHSA and the Health Centre applied Section 12(3)(b) of the Act to records containing the deliberations of the Medical Advisory Committee and the Medical Staff Member Review Sub Committee meetings of August 7, 2001 and September 4, 2001. The Medical Advisory Committee and Medical Staff Member Review Sub Committee are committees of the Board of the Health Centre and the PHSA. The PHSA and the Health Centre have exercised their discretion under Section 12(3)(b) to refuse to disclose the substance of deliberations of the meetings of those committees. Section 51 of the *Evidence Act*, not only authorizes those committees to hold their deliberative processes in camera, but requires that the material provided to the committee or any findings or conclusions of the committees not be disclosed outside the Committee and the Board.

3. We enclose a copy of an Affidavit sworn by Dr. Douglas Cochrane, the Vice President of Medical Affairs of the PHSA which deals with the committee structure at the Health Centre. Dr. Cochrane’s Affidavit was prepared for another inquiry involving this applicant and the PHSA and the Health Centre, OIPC [file number omitted]. (Exhibit “A” of Dr. Cochrane’s Affidavit sets out the committee structure).

[72] Dr. Cochrane deposed to the CWHC's quality assurance committees in operation in 2000, which, he said, were designated by the PHSA and CWHC Board as quality assurance committees for the purposes of s. 51 of the *Evidence Act*. The affidavit and attached Exhibit "A" include mention of the Medical Advisory Committee as such a committee, but not the Medical Staff Member Review Subcommittee. Exhibit "A" (the purpose or origin of which is not identified) describes the functions of the Medical Advisory Committee. These include monitoring and reporting on the standards and conduct of the medical staff and taking action where appropriate. The PHSA provided no evidence as to the functions of the Medical Staff Member Review Subcommittee.

[73] The records themselves indicate that the Medical Staff Member Review Subcommittee was an *ad hoc* subcommittee of the Medical Advisory Committee struck under the Medical Staff Rules (see for example, the letter of July 5, 2001 from the Chair of the Medical Advisory Committee to the Chair of the Medical Staff Member Review Subcommittee). The CWHC's Human Rights Policy says (para. 4.04, CWHC's Human Rights Policy, Exhibit "B", first McKerrow affidavit):

The Chair of the MAC [Medical Advisory Committee], shall direct the formation of a Peer Review Committee [apparently the Medical Staff Member Review Subcommittee] to consider the complaint, the report and the recommendations and to make recommendations to the MAC, President & CEO, and the Board.

[74] The PHSA did not, in its submission, refer to specific parts of s. 51 of the *Evidence Act* as support for its position on s. 12(3)(b). However, I take the salient provisions to be these:

51(1) In this section:

**"board of management"** means a board of management as defined in the *Hospital Act*;

**"committee"** means any of the following:

- (a) a medical staff committee within the meaning of section 41 of the *Hospital Act*;
- (b) a committee established or approved by the board of management of a hospital, that includes health care professionals employed by or practising in that hospital, and that for the purpose of improving medical or hospital care or practice in the hospital
  - (i) carries out or is charged with the function of studying, investigating or evaluating the hospital practice of or hospital care provided by health care professionals in the hospital, or
  - (ii) studies, investigates or carries on medical research or a program;
- (c) a group of persons who carry out medical research and are designated by the minister by regulation;
- (d) a group of persons who carry out investigations of medical practice in hospitals and who are designated by the minister by regulation;

**"health care professional"** means

- (a) a medical practitioner,
- (b) a person qualified and permitted under the *Dentists Act* to practise dentistry or dental surgery,
- (c) a registered nurse as defined in the *Nurses (Registered) Act*,
- (d) [Repealed 1998-42-7.]

- (e) a person registered as a member of a college established under the *Health Professions Act*,
- (f) a pharmacist as defined in the *Pharmacists Act*, or
- (g) a member of another organization that is designated by regulation of the Lieutenant Governor in Council;

...

**“organization of health care professionals”** means an organization of health care professionals that is designated by regulation of the Lieutenant Governor in Council for the purposes of this section;

...

(5) A committee or any person on a committee must not disclose or publish information or a record provided to the committee within the scope of this section or any resulting findings or conclusion of the committee except

- (a) to a board of management,
- (b) in circumstances the committee considers appropriate, to an organization of health care professionals, or
- (c) by making a disclosure or publication
  - (i) for the purpose of advancing medical research or medical education, and
  - (ii) in a manner that precludes the identification in any manner of the persons whose condition or treatment has been studied, evaluated or investigated.

(6) A board of management or any member of a board of management must not disclose or publish information or a record submitted to it by a committee except in accordance with subsection (5) (c).

(7) Subsections (5) and (6) apply despite any provision of the *Freedom of Information and Protection of Privacy Act* other than section 44 (2) and (3) of that Act.

[75] The applicant disputed the PHSA’s position in his supplementary submission of June 10, 2004, arguing that the Medical Advisory Committee is not a committee of the Board of the CWHC and PHSA. He said that the Medical Staff Member Review Subcommittee was also not a committee of the Board but a subcommittee of the Medical Advisory Committee. It is, he said, an *ad hoc* committee struck to deal with individual staff members, as happened in his case. He said that the PHSA did not exist in 2001 and that the CWHC was then part of the Vancouver-Richmond Health Board. The applicant also argued that the PHSA’s disclosure of minutes of meetings of the Medical Staff Member Review Subcommittee, including those of August 7, 2001, means that the PHSA has waived the application of s. 12(3)(b) to the handwritten notes in question. The PHSA said in a letter of June 21, 2004 that it had no comment on the applicant’s supplementary submission of June 10, 2004.

[76] The PHSA raised s. 51 of the *Evidence Act* for the first time in its June 2004 submission. Section 51 of the *Evidence Act* was not listed as an issue in this inquiry and the PHSA did not argue that the notes are excluded from the scope of the Act by virtue of ss. 51(5) and (6) of the *Evidence Act*. As I understand the PHSA’s argument on this point, it relies on s. 51 of the *Evidence Act* as support for its argument that the two committees in question had authority to hold *in camera* meetings.

[77] The PHSA has not established, in my view, that s. 12(3)(b) applies to the two sets of notes. First, the PHSA did not show how the two committees in question are its “governing body or a committee of its governing body”, as required by s. 12(3)(b). Dr. Cochrane’s 2004 affidavit states that the CWHC’s Board designated the Medical Advisory Committee as a quality

assurance committee for the purposes of s. 51 of the *Evidence Act*. This does not support the conclusion that the Medical Advisory Committee is a committee of the governing body of the CWHC or the PHSA, as required by s. 12(3)(b). The fact that the CWHC Board designated the Medical Advisory Committee as a committee for *Evidence Act* purposes does not mean it is a committee of the governing body, the Board.

[78] The PHSA's submission and Dr. Cochrane's affidavit do not mention the Medical Staff Member Review Subcommittee, as noted above. While the records and the CWHC's Human Rights Policy indicate that it was an *ad hoc* subcommittee of the Medical Advisory Committee, this does not, in my view, establish that the subcommittee was a committee of the CWHC's governing body. If the Medical Advisory Committee is not, as I have found, a committee of the governing body, I do not see how, without more, a subcommittee of the Medical Advisory Committee could be a committee of the governing body.

[79] Second, even assuming for discussion purposes that the two committees are committees of the governing body, the PHSA did not point to any statutory authority for these two committees to hold their meetings *in camera*. It simply cited s. 51 of the *Evidence Act* in this regard. As the PHSA noted, this section prohibits disclosure of certain information except in certain circumstances. Contrary to what the PHSA suggested in its supplementary submission, a statutory prohibition against disclosure or publication of "information or a records" provided to a s. 51 committee does not, in my view, translate into, as expressly required by s. 12(3)(b), authority "under an Act or a regulation" under the *Freedom of Information and Protection of Privacy Act* to hold the meetings in question "in the absence of the public". Nor does the s. 51(7) override of the *Freedom of Information and Protection of Privacy Act* change this view.

[80] The s. 51 non-disclosure requirement is to be contrasted with, for example, the *Community Charter* and the *School Act*, which, respectively, unambiguously authorize local government governing bodies and school boards to meet *in camera*. The PHSA has not pointed me to any other statutory authority for the two committees here in question to hold *in camera* meetings at the relevant time.

[81] Third, assuming that the first part of the s. 12(3)(b) requirements is met, the PHSA has also failed to show that the committee meetings in question were held in the absence of the public. See pp. 3-4, Order 326-1999, where the Commissioner found that a municipality failed to prove that its council had held *in camera* meetings.

[82] Last, although the PHSA did not point to any information in the records which, if disclosed, would reveal the substance of deliberations – which is at the core of the s. 12(3)(b) exception – I can see from my review of the records that they contain what appears to be some deliberative material. Yet the PHSA itself has acknowledged that it disclosed the actual minutes of the meetings to the applicant. The PHSA did not provide copies of the minutes but it is difficult to see how disclosure of these individuals' notes would reveal anything that the PHSA itself has not already disclosed.

[83] I make this last comment only in passing. The PHSA's failure to establish that the first two parts of the test for applying this exception have been met means that s. 12(3)(b) has not been shown to apply, regardless of the nature of the notes' contents.

[84] I find that s. 12(3)(b) does not apply to the withheld information in the two sets of meeting notes.

[85] **3.6 Advice or Recommendations** – According to its tables of withheld records, the PHSA initially applied s. 13(1) to a number of records, some of which it disclosed later with its letter of April 30, 2003. The material before me indicates that the PHSA continued to withhold four records under s. 13(1). There is no indication in the material before me that it attempted to sever the records as it is required to do under s. 4(2) of the Act.

[86] Section 13(1) reads as follows:

**Policy advice, recommendations or draft regulations**

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[87] The PHSA states that these records contain advice and recommendations to the CWHC “on specific issues arising from the Human Rights investigation” into complaints against the applicant (paras. 11-12, initial submission; paras. 54-56, first McKerrow affidavit). Despite the fact that it has the burden of proof on this issue, the PHSA said little on the application of s. 13(1) to these records. For example, it did not explain which parts of the records it considers fall under s. 13(1), nor did it demonstrate how any of the information in the withheld records would, in its view, reveal implicit or explicit advice or recommendations.

[88] The applicant objects generally to what he views as the PHSA’s overly broad application of s. 13(1), calling it misplaced and abused (see last paragraphs, pp. 5 & 6, initial submission; first paragraph, p. 13, reply).

[89] The PHSA describes the first record, a letter of July 27, 2001 (Record #4, Exhibit “D”), as “a letter to the Peer Review sub-committee with recommendations regarding the remedy to the complainant as a result of the finding of harassment against [the applicant] under the Human Rights Policy”. The “Peer Review sub-committee” is, I gather, the same as the Medical Staff Member Review Subcommittee.

[90] The letter contains a statement of accountability of the author, factual statements about the conduct of the human rights investigation and comments about the applicant. The final section of the letter refers to a recommended remedy that apparently arose from the investigation report on the complaint investigation but does not state what the recommended remedy was.

[91] The PHSA did not link this reference to any other record containing the recommendation. Nor could I find such a record among those the PHSA provided for this inquiry. I was also unable to identify any explicit or implicit recommendations in the letter itself, with the exception of two sentences which, on their face, fall under s. 13(1) and may be withheld.

[92] There is also a small amount of third-party personal information which describes, from a personal point of view, the effect that the applicant’s conduct was having on his colleagues. The PHSA did not apply s. 22 to this information but as I considered that s. 22(1) might apply to



it, I offered the applicant an opportunity to make submissions on this point. He argued in his further reply of August 13, 2004 that “the small part of third party information is waived” because he has already received notes from the meeting referred to in the letter. The applicant did not provide any support for this assertion. I am also not aware from any other source that the applicant has prior knowledge of the withheld third-party personal information. In my view, s. 22(1) applies to it and it must be withheld.

[93] The second record (Record #92, Exhibit “F”) is a draft letter of January 9, 2001. Attached to it is a template on which the draft appears to be based. The PHSA does not address this record in its submissions and it is not at all clear from the record how the information in it constitutes implicit or explicit advice or recommendations. Section 13(1) does not apply to it simply because it is a draft (see Order 00-27, B.C.I.P.C.D. No. 30, for example). I am unable to conclude that any of the information in this record falls within s. 13(1). No other exception applies, in my view, and the PHSA must disclose this record in full.

[94] The third record is a letter of September 19, 2001 (Record #7, Exhibit “H”). The PHSA says that it “is a letter to the CEO of the Health Centre with recommendations regarding the procedure used in Board hearings”. In fact, only one sentence contains such a recommendation and it may be withheld under s. 13(1). The rest of the letter documents a discussion between two people in which one of them expresses his views on the hearing procedure. I do not consider these portions to be implicit or explicit advice or recommendations within the meaning of s. 13(1).

[95] The fourth record, a letter of November 20, 2001 (Record #15, Exhibit “H”), is, according to the PHSA, “a letter from a media consultant providing media and communications advice”. The first part of the letter provides a factual overview of media coverage of the applicant’s situation to which s. 13(1) does not apply. Much of the rest provides implicit or explicit advice to the CWHC on how and whether to respond to this coverage. This information falls under s. 13(1) and may be withheld.

[96] The PHSA did not apply any other exceptions to these records and no others apply in my view. Where applicable, I have prepared severed copies of these records for the PHSA to disclose to the applicant.

[97] **3.7 Solicitor Client Privilege** – The PHSA says it withheld approximately 200 records under s. 14, which reads as follows:

**Legal advice**

- 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[98] The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well-established. See, for example, Order 00-08, [2000] B.C.I.P.C.D. No. 8. I will not repeat those principles but will apply them here.

[99] The PHSA stated at para. 13 of its initial submission that the records in question fall into the class of solicitor-client communications and that it is not relying on litigation privilege. It describes the records at para. 15 of its initial submission as

... communications between the Health Centre and its legal counsel for the purpose of providing legal advice in relation to the ongoing dispute between the Health Centre and [the applicant]. These communications are in the form of letters, emails and memos and include draft letters, letters and emails providing copies of correspondence to and from [the applicant] and his legal counsel, and draft resolutions for use by the Health Centre. These records are on their face solicitor client communications and are protected from disclosure under section 14 [citation omitted].

[100] The PHSA said, at paras. 13-16 of its initial submission, that a number of the records are e-mail communications between members of the CWHC discussing legal advice provided by the CWHC's legal advisors in relation to the dispute and "discussing issues or developments in the proceedings on which legal advice was required". Other records are, the PHSA says, communications between legal counsel for individuals named in a defamation suit that the applicant commenced and "communications between those individuals for the purpose of discussing or relaying the legal advice".

[101] Still others are records in "the files of the PHSA executive and Board of Directors that relate to the communications with legal counsel for the PHSA Board on the proceedings involving [the applicant]." The PHSA says all of these records are also subject to solicitor client privilege and that it has correctly exercised its discretion in withholding the records (paras. 17-19, initial submission and paras. 33-53, first McKerrow affidavit).

[102] The applicant generally regards the PHSA's application of s. 14 as overly broad, abused and misplaced, although he conceded that solicitor client privilege applies to direct communications between solicitor and client for the purpose of obtaining and giving legal advice. He argued that the PHSA has waived privilege, in some cases by copying communications with legal counsel to other individuals, including himself, or more generally in its subsequent distribution or use of documents. He also argued that simply copying a lawyer on a communication does not mean it is protected by solicitor client privilege. He further suggested that privilege does not attach to communications between individuals who are discussing legal advice. He also suggested that the lawyer hired by what the PHSA referred to as the "Province of British Columbia Health Risk Management" (see para. 34, PHSA's initial submission) to defend the individual defendants in the applicant's defamation action was not their lawyer.

[103] Upon careful review of the records in question, I am satisfied that they are protected by solicitor client privilege. As the PHSA argues, they all relate to the giving, seeking or formulating of legal advice, as described above. While, as the applicant points out, the PHSA has disclosed some records that might well be protected by solicitor client privilege, while withholding others that are similar, the PHSA has apparently chosen to waive privilege over these items. This does not mean that the PHSA has waived privilege over all other s. 14 records.

[104] Nor do I agree with the applicant's argument that discussions of legal advice by PHSA employees are not protected by solicitor client privilege. Simply because such information appears in records which are not direct communications between solicitor and client does not

mean it is not privileged. Nor do I agree with the applicant's suggestion that the individual defendants in the applicant's defamation action are not the clients of the lawyer hired by the "Province of British Columbia Health Risk Management" and are thus not entitled to protection of the advice given by this lawyer. They are his clients and the records in this case are protected by solicitor client privilege.

[105] I find that s. 14 applies to all of the records to which the PHSA applied it in this case.

[106] **3.8 Personal Privacy** – The PHSA severed or withheld a number of records under s. 22. The relevant parts of s. 22 read as follows:

**Disclosure harmful to personal privacy**

22(1) The head of 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.

(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,

...

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

....

(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,

...

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

(h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation, ... .

...

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

[107] The Information and Privacy Commissioner has discussed the application of s. 22 in a number of orders (see, for example, Order 01-53, B.C.I.P.C.D. No. 56). I will not repeat that discussion but have applied the same principles in this decision.

[108] The PHSA said that these records contain the personal information of the applicant and of third parties and that it withheld the third-party personal information under s. 22. It amplified this argument somewhat at p. 5 of its reply submission, saying that most of the records it severed under s. 22 were e-mails referring in varying degrees to the legal proceedings involving the applicant and various members of the CWHC. It described these proceedings as involving human rights complaints in the workplace, judicial review proceedings and the applicant's defamation action against some CWHC employees. It said that the e-mails reveal "the sensitive nature of the communications and poisoned atmosphere at the Health Centre resulting from the legal proceedings".

[109] The PHSA said that the deleted portions include the following: information that would identify third parties where the e-mail related to the ongoing legal proceedings and did not relate to the third party's position or functions; personal information of third parties that relates to their employment or occupational history, such as their employment status, conditions of employment and opinions about their conditions of employment; and information that would reveal that the third parties supplied, in confidence, personal evaluations of the applicant to members of the administration of the CWHC.

[110] The PHSA acknowledged, at p. 5 of its reply, that some of the withheld information in these records

... is arguably the personal information of [the applicant], in that it includes indirectly the opinions of third parties about [the applicant], in particular, emotions engendered by his behaviour and presence at the Health Centre. However, as the information is primarily the personal information of the third parties and only indirectly the personal information of [the applicant], a balancing of factors favoured not disclosing the information.

[111] The applicant argued that s. 22 is "largely abused once more" and says that the withheld information is relevant to a fair determination of his rights. He said in this regard that the withheld information directly relates to his status and employment and that "much if not all of the material has been used against me at some point in time". The applicant also rejected the PHSA's arguments about records involving other members of the CWHC, suggesting that the withheld information was generated in the course of their employment or that it is not reference or evaluation information.

### ***Records 1-6, Exhibit "A"***

[112] The PHSA's table of withheld records indicates that it applied s. 22(3)(g) to these six records: four confidential references provided to the applicant's department in 1987 in relation to his application for employment (Records #1-4, Exhibit "A"); a memorandum of July 28, 1997 (Record #5, Exhibit "A"); and a letter of February 26, 1999 (Record #6, Exhibit "A"). Its initial submission, at para. 22, said, however, that s. 22(3)(h) applies to all six items.

[113] The purpose of s. 22(3)(g) is to protect reference and evaluation information about third parties. The information in the letters in Records # 1-6, Exhibit "A", is primarily the applicant's personal information and thus s. 22(3)(g) does not apply to it.

[114] The purpose of s. 22(3)(h) is to protect the identities of third parties who supplied, in confidence, evaluation, reference and similar information about an individual. I take this to be the actual exception that the PHSA believes applies to these six records and this is the exception I have considered.

[115] The PHSA said that it obtained Records # 1-4, Exhibit "A", in accordance with the CWHC's established policy of the time for obtaining references on applicants for medical staff positions on a confidential basis (para. 22, initial submission; para. 7, first McKerrow affidavit). It was not clear if the PHSA intended this statement to support the application of s. 22(3)(h) or in relation to the relevant circumstance in s. 22(2)(f). In any case, as the PHSA did not provide any supporting documentation for its position, I requested a further submission from it on this topic and then gave the applicant an opportunity to respond.

[116] In its supplementary submission of June 3, 2004, the PHSA said that it had not been able to locate any written policies from 1987 respecting the confidentiality of references and could not say if there ever had been such a written policy. It said it relied on the evidence of Ron McKerrow regarding his recollection of the policy and practice in 1987. That evidence is as I describe it above.

[117] The applicant generally cast doubt on the PHSA's supplementary submission on confidentiality in his supplementary submission of June 10, 2004, saying that the CWHC did not exist in 1987. However, he did not comment specifically on Records # 1-4 in his submissions, although he did comment on Records # 5 and 6. It is therefore not clear if he is even interested in the reference letters.

[118] One letter is marked "confidential" and the evidence and other material before me support the PHSA's position that it received the letters in confidence from the referees. I therefore find that s. 22(3)(h) applies to the referees' identifying information in Records #1-4, Exhibit "A", and that the circumstance in s. 22(2)(f) is relevant, favouring withholding that information. I note that the previous Information and Privacy Commissioner made a similar finding in Order No. 153-1997, [1997] B.C.I.P.C.D. No. 11, as did the current Commissioner in Order 00-19, [2000] B.C.I.P.C.D. No. 22. It is reasonable in this case to sever the third-party identifying information and release the rest of the records to the applicant.

[119] The PHSA first withheld Record # 5 and later disclosed it in severed form. The disclosed information included the applicant's own personal information and the name of the author of the memorandum. The PHSA withheld some third-party personal information which in my view falls under s. 22(3)(d). However, possibly through an oversight, the PHSA also withheld a few words of the applicant's own personal information to which s. 22 does not apply and which he is entitled to receive. Sections 22(3)(h) and 22(2)(f) are not relevant to this record.

[120] The PHSA said that members of the hospital's Department of Pediatrics provided Record # 6 in confidence, in relation to an external review conducted in 1998, following

complaints by that department against the applicant. The PHSA named the recipient of the letter in its submission (paras. 11-12, McKerrow affidavit).

[121] Record # 6 is marked “confidential” and contains some personal employment history information of the third-party authors of the letter which falls under s. 22(3)(d). From my reading of the other records in issue in this inquiry, I am satisfied that s. 22(2)(f) applies to the third parties’ identifying and other personal information, favouring its withholding. While the applicant claims he was shown the letter at one point, he does not provide any support for this assertion. In any case, this does not mean the letter was not supplied in confidence.

[122] The PHSA has revealed the name of the letter’s recipient and some general information about the contents. The bulk of the letter concerns the applicant, however, and is similar to comments about the applicant that the PHSA disclosed in other records (for example, the investigation report of May 2001, a letter of June 20, 2001 from the Vice-President, Medical Affairs and Quality to the Acting Director of the applicant’s department, letters of January 10 and 15, 2001 from the investigator to the applicant, the latter of which included a summary of the complaints against the applicant, an e-mail of June 18, 2001 from the Acting Director and an e-mail of November 13, 2001 from a colleague). It is therefore not clear why the PHSA did not disclose this letter in severed form. I see no reason why the applicant should not receive a severed copy of this record, minus the names of the authors and a few other items of third-party personal information.

[123] The applicant argued that the withheld information is relevant to a fair determination of his rights, the factor in s. 22(2)(c). The Information and Privacy Commissioner has said that “rights” in this context are “legal rights” (see, for example, Order 01-07, [2001] B.C.I.P.C.D. No. 7). The material before me indicates that various proceedings involving the applicant and the PHSA had been ongoing for some time when this inquiry took place. The applicant did not explain how the factor in s. 22(2)(c) applied in this case. He did not, for example, explain what rights were at stake, how the information withheld under s. 22 might be relevant to a fair determination of those rights nor how the material had been used against him.

[124] Nor is it evident from the face of the records how the withheld information and records, four of which date back to 1987, might be relevant to a fair determination of any rights the applicant may have had in those proceedings. I find that s. 22(2)(c) is not relevant to Records #1-6, Exhibit “A”.

[125] To summarize, I find that s. 22(3)(h) applies to some information in Records # 1-4 and 6, Exhibit “A”, and that s. 22(3)(d) applies to portions of Records #5 and 6, Exhibit “A”. I also find that the factor in s. 22(2)(c) does not apply but that s. 22(2)(f) is a relevant circumstance favouring the withholding of third-party identifying information in Records #1-4 and 6. I find that the applicant is entitled to his own personal information in Records #1-6 and, accordingly, I have prepared severed copies of these records for the PHSA to disclose to the applicant.

### ***Other s. 22 records***

[126] Apart from the six records that I discuss above, the many records to which the PHSA applied s. 22 consist mainly of e-mail exchanges between PHSA staff members and others regarding the applicant. Since a number of people were involved in these e-mail exchanges,

there are multiple copies of many of the messages. Of these, the PHSA withheld two records in full and disclosed the remainder in severed form.

[127] The withheld information in these records is primarily the names and personal views of the complainants and others on their dealings with the applicant and his presence at the hospital. I agree with the PHSA that this severed information is the employment history information of the individuals in question and is not the applicant's personal information. In the case of the two fully-withheld records (Records #1 and 4, Exhibit "G"), it is also the personal medical information of an individual. The withheld information in these records therefore falls under ss. 22(1) and 22(3)(a) and (d) and its disclosure is presumed to be an unreasonable invasion of third-party privacy.

[128] The PHSA did not argue that s. 22(2)(f) applied to these records and did not provide any submissions from the employees themselves on the issue of confidential supply, which would have been helpful. Based on my reading of these other records as a whole, however, it is clear to me that the employees involved were providing this information in confidence. I therefore find that s. 22(2)(f) applies to the withheld third-party personal information in these records, favouring its withholding.

[129] I have already discussed above the applicant's arguments on s. 22(2)(c), which apparently applied to all of the records to which the PHSA applied s. 22. I make the same finding with respect to the records I discuss here as I did above. The parties did not raise any other s. 22(2) factors nor do I think that any other is relevant here.

[130] In my view, the PHSA has, for the most part, applied s. 22 correctly to these other records. There are, however, a few comments about the applicant in a handful of unnumbered records which the PHSA withheld but which in my opinion the applicant is entitled to receive. These comments are similar to the comments about the applicant in Record #6, Exhibit "A", and other records which I noted above the PHSA disclosed. These comments are also similar to each other and would not, in my view, identify the authors of the correspondence. It is reasonable, in my view, to re-sever these records to disclose the applicant's personal information to him. I have therefore provided re-severed copies of these records to the PHSA for its disclosure to the applicant.

### ***Summary under s. 22(5)***

[131] The applicant pointed out in his initial submission that the PHSA had not summarized the withheld information. The PHSA acknowledged this in its reply but did not otherwise address the feasibility of summarizing personal information it had withheld as supplied in confidence. Section 22(5) of the Act requires a public body to summarize an applicant's personal information in certain circumstances but I do not consider it applicable here. Virtually all of the s. 22 information is third-party personal information supplied in confidence, to which the applicant is not entitled and to which s. 22(5) does not apply.

[132] Records #1 and 4, Exhibit "G", are essentially duplicates of each other and refer in few areas to the applicant. In my view, however, they do not lend themselves to summarizing without revealing the identity of the person who supplied sensitive third-party medical and other information in confidence in the records. Section 22(5) does not apply to them either.

#### 4.0 CONCLUSION

[133] For the reasons given above, I make the following orders:

1. I confirm that the PHSA is authorized to withhold all of the information it withheld under s. 14.
2. Subject to para. 3 below, I order the PHSA to disclose information that it withheld under s. 13(1) in Record #4, Exhibit "D"; Record #7, Exhibit "H"; Record #15, Exhibit "H"; and Record #92, Exhibit "F".
3. I confirm that the PHSA is authorized to withhold under s. 13(1) some information in Record #4, Exhibit "D"; Record #7, Exhibit "H"; and Record #15, Exhibit "H", as highlighted in the copies provided to the PHSA with this order.
4. Subject to para. 5 below, I require the PHSA to withhold the information it withheld under s. 22 and the portions marked in Record #4, Exhibit "A".
5. I order the PHSA to disclose the applicant's personal information in Records #1-6, Exhibit "A", and in portions of some unnumbered records, as highlighted in the copies of these records provided to the PHSA with this order.
6. I require the PHSA to disclose the two sets of meeting notes to which it applied s. 12(3)(b), subject to any other applicable exceptions, and to provide the applicant with its written decision on these items, copied to me.
7. I order the PHSA to perform its duty under s. 6(1) to search the files of any other individuals, committees and boards who could reasonably be expected to have records responsive to the applicant's request of September 19, 2002 and whose files it has not already searched, including, but not limited to, the following categories:
  - (a) members of the applicant's department;
  - (b) past and current heads (including interim and acting heads) of the applicant's department (including the files of the individuals listed in paras. (a), (b) and (j) on p. 2 of the PHSA's reply);
  - (c) any other appropriate areas, committees, boards or individuals elsewhere within the PHSA and CWHC, including those the applicant mentioned in his submissions; and
  - (d) its external legal counsel.
8. I order the PHSA to perform its duty under s. 6(1) to search the files of individuals it has already searched, and those which it searches as set out in paragraph 7.(a to (c) above, for responsive records consisting of exchanges between PHSA employees and its legal counsel that were not copied to others and that it has not already retrieved in response to the September 19, 2002 request.



9. Under s. 58(4), I require the PHSA to complete these searches within 30 days after the date of this order and to deliver to me (with a copy to the applicant directly and concurrently) within 10 days after the completion of its search, an affidavit sworn by a knowledgeable person as to the efforts in undertaking these searches and the results of those searches. The PHSA must then make a decision on disclosure to the applicant of any new records it locates as a result of these further searches and provide me with a copy of that decision.

[134] For reasons given above, it is not necessary to make an order respecting the delay in the PHSA's response to the applicant's request.

September 9, 2004

**ORIGINAL SIGNED BY**

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Celia Francis  
Adjudicator