Order F06-07

PROVINCIAL HEALTH SERVICES AUTHORITY

Celia Francis, Adjudicator
May 24, 2006

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Summary: Applicant requested records in hands of a named PHSA employee. The PHSA withheld many records on the grounds they are protected by solicitor-client privilege and that disclosure would be an unreasonable invasion of third-party privacy. Most records are protected by s. 14 and some information is also protected by s. 22. Small amounts of information are not protected by either exception and must be disclosed.

Key Words: legal advice—solicitor-client privilege—litigation privilege—unreasonable invasion—personal privacy—employment history—fair determination of rights.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 22(1), 22(2)(c) & (f), 22(3)(d).

Authorities Considered: B.C.: Order 04-37, [2004] B.C.I.P.C.D. No. 38; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order F05-12, [2005] B.C.I.P.C.D. No. 14; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

1.0 INTRODUCTION

[1] The applicant in this case was employed by the public body, the Provincial Health Services Authority ("PHSA"). Under the *Freedom of Information and Protection of Privacy Act* ("Act"), he requested from the PHSA "all materials in possession of Georgene Miller[1] and which relate to myself".

[1] Corporate Director of Medical Affairs, Quality, Safety, and Risk Management for the PHSA, located at the Children's and Women's Health Centre – see para. 1, Miller affidavit.

[2] The PHSA responded by telling the applicant that it had interpreted his request as including records held by Ms. Miller and in the Medical Affairs Office. It then listed several categories of responsive records and said that it was disclosing some of these records and withholding others under ss. 13, 14 and 22 of the Act. It said that the records contain or relate to solicitor-client communications regarding two court actions involving individual members of the Children and Women's Health Centre ("CWHC")[2] as defendants. The PHSA also told the applicant that other responsive records had been the subject of previous access requests from the applicant and reviews with this Office.

[3] The applicant requested a review of the PHSA's response by this Office and mediation led to the disclosure of a few more records. Because the matter did not settle fully in mediation, I held a written inquiry under Part 5 of the Act.

2.0 ISSUE

[4] The issues before me in this case are:

1. Is the PHSA authorized to withhold information under s. 14?

2. Is the PHSA required to withhold information under s. 22?

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

[6] The PHSA originally also applied s. 13(1) to some records, pp. 38-40 in the file entitled "2002-2003 Media". In para. 5 of its initial submission, however, it said that these records had been disclosed to the applicant as a result of Order 04-37[3] (as pp. 82-84 in that case) and that it would therefore not be dealing with these records in its submission. The applicant did not object to this. I agree with the PHSA's approach to this issue and need not consider the s. 13(1) records here.

3.0 DISCUSSION

[7] **3.1 Preliminary Matters**—I will first deal with some preliminary matters that arose in this inquiry.

[2] The CWHC is a public body in its own right and is also part of the PHSA.
[3] [2004] B.C.I.P.C.D. No. 38.

In camera material

[8] In his reply, the applicant objected to the submission of *in camera* material by the PHSA and the third parties. He acknowledged that the Act provides for "such behaviour" but said that "there is no legitimate reason why the submission should be submitted so". The inappropriate submission of *in camera* material could lead to "a breach of natural justice regarding the ability to address issues", he suggested.[4]

[9] The material the PHSA and the third parties submitted on an *in camera* basis is properly received as such, as it reflects the contents of the records.

Completeness of response

[10] In various places in his submissions,[5] the applicant said he believes the public body has more records (although he did not explain why) and that all of them should be released. He stated that he wishes "the issue of incompleteness" added as an issue to this inquiry. The PHSA responded that the adequacy of its search for records and its overall compliance with s. 6[6] of the Act are not issues in this inquiry.[7]

[11] The PHSA's decision letters indicate that it disclosed a certain number of records to the applicant but do not tell the applicant how many pages of records it withheld. The withheld records number upwards of 840 pages, according to the records provided to me as the records in dispute in this inquiry. Many of them are duplicates and triplicates. Given the volume of records, I see no reason to question the completeness of its search, although, to be helpful, the PHSA could have told the applicant how many pages it was withholding.

[12] In any event, the completeness of the PHSA's response is not listed as an issue in the notice for this inquiry. The s. 6 issue is thus not properly before me and I will not consider it here.

Post-inquiry correspondence

[13] After the close of this inquiry, legal counsel for the third parties submitted a response to the applicant's reply submission. The applicant in turn sent a reply to that response. The Registrar of Inquiries for this office informed both parties

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[4] Paras. 2-3, reply submission.
[5] For example, para. 23, initial submission.
[6] Section 6(1) deals with a public body's duty to assist applicants and reads as follows: **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.
[7] Para. 1, reply submission.

that such further submissions are not normally permitted or required and that I would decide whether or not to accept them.

[14] While I have reviewed these additional submissions, I have not considered them in this decision. This is largely because they concern extraneous issues or repeat earlier submissions and also because they post-date the close of the inquiry.

Public interest

[15] The PHSA took issue with certain comments by the applicant[8] which it interpreted as raising s. 25 of the Act. The PHSA said that the applicant has not provided any evidence or argument the disclosure of the records in issue in this case would be in the public interest for s. 25 purposes.[9]

[16] Section 25 requires public bodies to disclose information in the public interest, in certain circumstances.[10] I do not read the applicant's comments as arguing that s. 25 applies. In any case, I agree with the PHSA that the records in issue here do not constitute the type of information subject to mandatory disclosure under s. 25, as this section has been interpreted in past orders.[11]

[17] 3.2 **Solicitor-Client Privilege**—The PHSA applied s. 14 to almost all of the records. Section 14 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.

[18] 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 02-01.[12] I will not repeat those principles but apply them here.

[19] The PHSA said that there are two broad categories of records to which it claims s. 14 applies:

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[8] At para. 16 of his initial submission.
[9] Para. 3, reply submission.
[10] It reads as follows: **25** (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or (b) the disclosure of which is, for any other reason, clearly in the public interest. **25** (2) Subsection (1) applies despite any other provision of this Act.
[11] See, for example, Order 02-38, [2002] B.C.I.P.C.D. No. 38.
[12] [2002] B.C.I.P.C.D. No. 1.

- Communications made through Georgene Miller between individuals who were defendants in legal proceedings that the applicant commenced and their legal counsel, Dives Grauer & Harper. The PHSA takes the position that the solicitor-client privilege that attaches to these records belongs to the individual defendants, the third parties in this inquiry, and adopts and relies on their submissions.

- Solicitor-client communications between the CWHC and its legal counsel on a variety of issues, as well as communications within CWHC related to seeking legal advice.

[20] The PHSA provided affidavit evidence from Georgene Miller in support of its position on the "second broad category" above. The PHSA said that the claim for solicitor-client privilege over these records is established through the evidence of Ms. Miller and on a reading of the documents themselves.

[21] In her affidavit, Georgene Miller deposed that her responsibilities include being the Risk Management representative. She further deposed as follows:

> 3. The Health Care Protection Program (HCPP) is a self insurance program for hospitals, their employees and administrators, funded by the Ministry of Health. Prior to 2003 it worked with the British Columbia Health Care Risk Management Society ("BCHCRMS") to provide risk management services and liability coverage to the Health Centre [CWHC]. In 2003 BCHCRMS was dissolved and all services it had provided now are provided solely by the HCPP.
>
> 4. As part of its mandate, HCPP provides for the defence of legal proceedings filed against the Health Centre, its employees and administrators.
>
> 5. In April 2000 the Applicant commenced an action in the Supreme Court of British Columbia against [a named physician], claiming damages for alleged defamatory statements made by [the physician]. [*in camera* material omitted]

[22] Ms. Miller said that the applicant commenced a second proceeding against seven other named parties, including other doctors at the CWHC, and also issued subpoenas to three individuals employed at, or who had hospital privileges at, the CWHC. She said that the applicant's legal actions proceeded to trial and the judge dismissed the two actions in January 2005. She said that the applicant has commenced an appeal of the judge's orders and that the appeal is still outstanding. Her affidavit also describes, *in camera*, the four categories of correspondence from the second "broad category" between the CWHC and its legal counsel on a variety of issues. Ms. Miller provided further *in camera*

evidence on these matters, including the nature of the retainer and of other records in her files, and on her role in the proceedings.[13]

[23] The third parties provided a similar description of the litigation, the records, the role of their legal counsel and Ms. Miller's role in the proceedings (much of it also on an *in camera* basis). They argued that the records are communications between the third parties as clients and their solicitors for the purposes of obtaining and providing legal advice. The records are subject to solicitor-client privilege, they said, and thus s. 14 protects them, referring to my finding in Order F05-11 on what they describe as "similar or identical documents".[14]

[24] The PHSA and the third parties did not state which branch of solicitor-client privilege they were relying on, legal professional privilege or litigation privilege or both. Both referred to the communications in question as relating to the "legal proceedings", *i.e.*, the applicant's defamation suits. I therefore infer that they are relying at least in part on litigation privilege. Both also referred to some communications as being related to seeking and providing legal advice. The third parties also said in an open part of their submission that the records would reveal legal advice and the terms of the solicitor-client relationship relating to financial arrangements between solicitor and client.[15] In light of all of this, I have considered both branches of solicitor-client privilege.

[25] The applicant provided his view of the situations in which solicitor-client privilege does and does not apply and generally disputed the PHSA's application of s. 14. Among other things, he said that the CWHC was not a party to the litigation and thus anything passing between individual defendants or their counsel and Ms. Miller "is therefore open to release". He argued that Ms. Miller's assistance to the CWHC in litigation for other reasons and her role as "conduit" in receiving documents from the defendants and forwarding them to their legal counsel—and thus, he argues, her function as a "third party"—do not attract solicitor-client privilege. That privilege would only exist between the third parties and their lawyer, he said, and "[a]ny material going through her is waived".[16]

[26] The PHSA applied s. 14 to a series of letters, notes, emails and memoranda. There are numerous duplicates and drafts among these records. I do not accept the applicant's arguments regarding Ms. Miller's participation in the process. She was clearly acting as the agent of the defendants or the PHSA and not as a third party. With a few exceptions, I am satisfied from the material

[13] Paras. 6-18, Miller affidavit
[14] Paras. 2-44, initial submission; *in camera* affidavit.
[15] Paras. 6 & 7, PHSA's initial submission; paras. 5 & 6, 8-1114 & 15 & 17-18, Miller affidavit; paras. 7 & 8, 10, 13, 30-36, & 43-44, third parties' initial submission; paras. 2-13, Dives affidavit.
[16] Paras. 5-11, 13-20, initial submission; paras. 6-18, reply submission.

before me that the majority of the records which the PHSA withheld under s. 14 were created with the dominant purpose of preparing for or conducting litigation which was underway at the time and which was still ongoing at the time of this inquiry. They are therefore protected by litigation privilege and I find that s. 14 applies to them. In many cases the records also relate to the giving, seeking or formulation of confidential legal advice between solicitor and client. They are thus protected by legal professional privilege and I find that they fall under s. 14.

[27] The exceptions are pp. 789-791. There is no indication on their face, or elsewhere in the material before me, that they are protected by litigation privilege or legal professional privilege and the PHSA's submissions do not otherwise explain how s. 14 applies to them. I find that s. 14 does not apply to these pages.

[28] **3.3 Personal Privacy**—The PHSA said that it refused to disclose a number of records that contain the personal employment history information of third parties, disclosure of which would be an unreasonable invasion of the third parties' privacy. Moreover, the third parties have not consented to the disclosure of this information. It said the third parties' personal information is contained in communications between the third parties and their legal counsel in the legal proceedings and that it is implicit in the relationship between solicitor and client that communications between them will be confidential. It says that the factor in s. 22(2)(f) therefore applies.[17]

[29] The PHSA acknowledged that the applicant is involved in legal proceedings with the third parties. It said, however, that he has had the right of document discovery in those legal proceedings and access to the remedies provided by the *Rules of Court* to compel production of documents held by the parties to the legal proceeding or by non-parties that were relevant to the issues in the action. The PHSA said that the applicant has not provided any evidence or argument to establish that disclosure of the third parties' personal information is relevant to a determination of his legal rights. In its view, therefore, the factor in s. 22(2)(c) does not apply.[18]

[30] The third parties argued that the information that relates to them that is protected by solicitor-client privilege is also their personal information, disclosure of which would be an unreasonable invasion of their privacy. They referred to my finding in Order F05-12[19] that s. 22(3)(d) applies to "information related to workplace incidents or exchanges involving the applicant and others" and said that the records in dispute here are "very similar documents". They said that the information in this case falls under ss. 22(3)(a)[20] and (d) and that the factor in

[17] Paras. 8-11, initial submission.
[18] Paras. 12-13, initial submission.
[19] [2005] B.C.I.P.C.D. No. 14.
[20] A small amount of patient medical information in record 58.

s. 22(2)(f) weighs in favour of non-disclosure of their personal information. They rejected any notion that the information is relevant to a fair determination of the applicant's legal rights as contemplated by s. 22(2)(c). They said that the applicant has chosen the British Columbia Supreme Court as the venue for pursuing those rights, that he has had rights of discovery, cross-examination of witnesses and other measures in that process and he has since commenced an appeal of the judge's decision in the defamation action dismissing his suits. They do not believe he has any further legal rights at stake here. The third parties provided some *in camera* argument on ss. 22(2)(c) and (f) as well.[21]

[31] The applicant claimed that release of the information he seeks is critical to his employment and to his life,[22] an argument that appears to relate to the factor in s. 22(2)(c). He also said, among other things, that the PHSA has used some of the material public court proceedings and that "the public body has gone out of its way to destroy the applicant's profession and credibility by spreading falsehoods and rumours" and its behaviour is therefore "relevant to open to the public eye".[23]

[32] The applicant also rejected the PHSA's arguments about s. 22 and, regarding s. 22(2)(c), said that the material in question could have been "of value for defending myself in the subsequent bogus human rights review". He also suggested that "the recognition that the discovery has been greatly flawed due to the inappropriate forwarding of material in discovery has great relevance and on its own merit, could be sufficient grounds for the Appeal to be won".[24]

[33] Numerous orders have considered the principles for applying s. 22. See, for example, Order 01-53.[25] I will not repeat those principles but have applied them in this decision. The relevant parts of s. 22 of FIPPA 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 …

[21] Paras. 48-71, initial submission.
[22] Para. 21, initial submission.
[23] Paras. 25-26, initial submission.
[24] Paras. 19-26, reply submission
[25] [2001] B.C.I.P.C.D. No. 56.

> (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 …
>
> (d) the personal information relates to employment, occupational or educational history, …

[34] With only a handful of exceptions, the PHSA and third parties argue that s. 22 applies to records that I found above fall under s. 14. I do not therefore need to consider whether s. 22 applies to the same records. The exceptions are p. 29 from the Media 2001 file and pp. 37 and 41 from the Media 2002/2003 file.

[35] Page 29 from the Media 2001 file is an email from which the PHSA severed, under s. 22 only, two lines of information about an identified individual (who is not one of the third parties in this inquiry). The information in question relates to this person's work practices and, in my view, falls under s. 22(3)(d). While there is nothing to show that it was supplied in confidence, equally there is no support for the application of s. 22(2)(c). No relevant circumstances favour the disclosure of this information and I find that s. 22(1) applies to it, requiring the PHSA to withhold it.

[36] Pages 37 and 41 from Media file 2002/2003 are also emails, which overlap in content. The PHSA severed, again under s. 22 only, some information about one of the third parties in this case. It also severed a brief reference to the applicant and some other more general information. The third-party information falls under s. 22(3)(d), in my view, as it relates to this individual's participation in work-related events. No relevant circumstances favour disclosure of this third-party information, which can reasonably be severed and withheld, so that the rest may be disclosed to the applicant. I have prepared a re-severed copy of these two pages for the PHSA to disclose to the applicant.

4.0 CONCLUSION

[37] For the reasons given above, under s. 58 of the Act, I make the following order(s):

1. Subject to para. 2 below, I confirm that the PHSA is authorized to withhold the information it withheld under s. 14.

2. I require the PHSA to give the applicant access to the information it withheld under s. 14 on pp. 789-791.

3. Subject to para. 4 below, I require the PHSA to refuse the applicant access to the information it withheld under s. 22 on p. 29 from the Media 2001 file and pp. 37 and 41 from the Media 2002/2003 file, as shown in pink on the copies of these pages provided to the PHSA with its copy of this order.

4. I require the PHSA to give the applicant access to the information it withheld under s. 22 on pp. 37 and 41 from the Media 2002/2003 file, as shown on the copies of these pages provided to the PHSA with its copy of this order.

May 24, 2006

ORIGINAL SIGNED BY

Celia Francis
Adjudicator

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