OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 04-37

PROVINCIAL HEALTH SERVICES AUTHORITY

Celia Francis, Adjudicator
December 20, 2004

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Summary: Applicant requested records about himself within the PHSA's communications department. The PHSA applied ss. 14 and 22 properly, but is ordered to reconsider most information it withheld under s. 13(1). PHSA properly characterized certain information as non-responsive to request.

Key Words: legal advice – solicitor-client privilege – personal privacy – unreasonable invasion – fair determination of rights – advice or recommendations – exercise of discretion – factual material

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 13(1), 13(2)(a), 14, 22(1) and 22(2)(c).

Authorities Considered: B.C.: Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 03-34, [2003] B.C.I.P.C.D. No. 34; Order 00-14, [2000] B.C.I.P.C.D. No. 17; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 02-50, [2002] B.C.I.P.C.D. No. 51.

1.0 INTRODUCTION

[1] The applicant made a request to the Provincial Health Services Authority ("PHSA") for two types of records: files about himself within the PHSA's communications department; and files maintained by a named individual "in his position as the HR investigator of the former Human Rights Centre. The latter was formerly under the banner of the Vancouver/Richmond Health Board."

[2] The PHSA replied to the first part of the request by providing access to some records and denying access to information under ss. 13(1), 14 and 22 of the *Freedom of Information and Protection of Privacy Act* ("Act") or on the grounds that the information was not responsive to the applicant's request. With respect to the second part of the request, the PHSA said that, as it had previously told the applicant, the files of the named investigator, the Human Rights Centre and a named consulting business were not under its control but within the control of the consulting business.

[3] The applicant complained to this Office about the PHSA's decision to withhold information and said, "The information forwarded is only a portion of that which should have been submitted regardless of what has been severed." He also objected to the PHSA's response regarding the named investigator's records, arguing among other things that, at the time of the investigation, the investigator had been an employee of the Vancouver/Richmond Heath Board.

[4] According to the portfolio officer's fact report which accompanied the notice for this inquiry, mediation led to a resolution of the issue of the named investigator's files but not the remaining issues. Because the matter did not settle fully in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[5] The notice for this inquiry states that the issues before me in this case are:

1. Whether the PHSA is required by s. 22 of the Act to refuse access.

2. Whether the PHSA is authorized by ss. 13(1) and 14 to refuse access.

3. Whether the PHSA has met its duty to assist the applicant under s. 6(1) of the Act in determining that portions of the records were non-responsive to the applicant's request.

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

3.0 DISCUSSION

[7] **3.1 Preliminary Matters** – The applicant complained in his initial submission that the PHSA had not conducted an adequate search for records and had not adequately accounted for missing records, for example, p. 78. I note that, in his request for review, the applicant complained that not all information had been forwarded. It is not clear if he was thereby questioning the adequacy of the PHSA's search for responsive records. In any case, the PHSA's search for records was not listed as an issue in the notice of

inquiry and the PHSA has not had an opportunity to comment on it. I have therefore not considered it in this decision.

[8] **3.2 Non-Responsive Records** – The applicant complained that the PHSA severed information that it considered to be non-responsive to his request. He argued that he should receive this information since it was "included in my file" (pp. 3-4, initial submission; pp. 1-2 reply). This issue relates to the PHSA's duty under s. 6(1) of the Act which reads 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.

[9] The PHSA said that the applicant had requested files related to himself, that is, his own personal information. I agree with the PHSA's interpretation of the applicant's request. The PHSA went on to say that portions of four records, entitled "Heath Update" (pp. 96 & 97), "Daily Health News" (pp. 98 & 99), "PAC Major Communications Files" (p. 100) and "Media Risks" (pp. 132 & 133), were withheld as they did not contain the applicant's personal information and were therefore not responsive to the applicant's request (paras. 3-5, initial submission).

[10] These records are compilations and summaries of media articles. They consist of items about the applicant, which he received, and items about other topics, which he did not. These latter items are not related to the applicant and not responsive to his request. I find that the PHSA has complied with its duty under s. 6(1) on this issue.

[11] The applicant is of course free to ask for the rest of these pages in a new request, if he wishes to pursue them. I note that pp. 87-88 and 95, disclosure of which the PHSA said it did not oppose, are similar in nature and content to this material.

[12] **3.3 Advice or Recommendations** – The PHSA said that it had withheld a number of records on the grounds that they constitute advice or recommendations developed by or for a public body or minister. It said the withheld records are briefing notes and related documents prepared for ministers of health and the PHSA's Board (in the case of pp. 79-86, 93-94 and 140-147) and advice from a consultant (in the case of pp. 126-127). The PHSA said that it has drawn any factual information from other records in files already disclosed to the applicant (paras. 10-13, initial submission; para. 2, Chesney affidavit).

[13] The PHSA said it had originally withheld pp. 87-88 and 95 under s. 13(1) but now did not oppose their disclosure to the applicant (para. 13, initial submission). As these pages are simply compilations or summaries of news articles (including items about the applicant) and contain no advice or recommendations as s. 13(1) has been interpreted, the PHSA was correct to decide that they should be disclosed. (As an aside, it is not clear if the PHSA has provided the applicant with copies of these pages.)

[14] The relevant sections read 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.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
>
> …
>
> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
>
> …
>
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

[15] The applicant generally opposed the application of s. 13(1). He argued that the PHSA has abused it and applied it inappropriately. He also suggested that the PHSA should disclose factual information and consider s. 13(2)(k) or (n) (pp. 3-4, initial submission; p. 1-2, reply). The applicant provided no argument as to why ss. 13(2)(k) and (n) apply, as he says, to the records to which the PHSA applied s. 13(1). In any case, these sections have no application here. The records are clearly not a report or decision as contemplated by these sections.

[16] Although it has the burden of proof here, the PHSA did not point to parts of the records which in its view contain advice or recommendations nor did it explain how it considers that disclosure of the records would reveal such information. There is also no indication that the PHSA attempted to sever the records, as it is required to do under s. 4(2) of the Act.

[17] Pages 126-127 are a letter from a media consultant to the PHSA. It provides the PHSA with a overview of media coverage of the applicant's case. In my opinion, this information is not advice or recommendations but is factual information covered by s. 13(2)(a). The rest of the letter contains implicit or explicit advice to the PHSA on how and whether to respond to the media coverage. This information falls under s. 13(1).

[18] Most of the remaining records (pp. 82-86, 93-94, 140-147) consist of briefing notes on the applicant's involvement with the PHSA and include some duplicate pages and apparent drafts. Large portions consist of factual information about the applicant in the form of background details on, or summaries of, his situation and involvement in various proceedings with the PHSA. These background portions do not contain any implicit or explicit advice or recommendations but rather fall under s. 13(2)(a) and must be disclosed.

[19] The other portions are headed by terms such as "Communication Strategy" or "Key Messages". They are almost exclusively related to the applicant and do not differ greatly from the background information. However, these portions, while innocuous, also consist of advice or recommendations on how to respond to media inquiries or how to approach or deal with media issues. They therefore fall under s. 13(1).

[20] I note that the applicant attached a copy of one of the briefing notes to his initial submission, as well as other PHSA records purporting to contain "key messages" for the media. The PHSA did not comment on these attachments in its reply.

Exercise of Discretion

[21] Section 13(1) is a discretionary exception and public bodies should consider a variety of factors when exercising their discretion in deciding whether or not to apply these types of exceptions. The Information and Privacy Commissioner discussed the exercise of discretion at some length at paras. 145-150 of Order 02-38, [2002] B.C.I.P.C.D. No. 38, and paras. 142-151 of Order 02-50, [2002] B.C.I.P.C.D. No. 51. The Commissioner said the following in Order 02-50:

> [143] The word "may" in provisions such as s. 16 or s. 17 confers on the head of a public body a discretion to disclose information that can be withheld under one of Act's exceptions to the right of access. In Order 02-38, at para. 149, I affirmed once again that the head of a public body should always consider the public interest in disclosure of information that is technically protected from disclosure and cited some of the relevant factors in considering the public interest in disclosure. I will not repeat that non-exhaustive list of factors here.
>
> [144] The head must exercise that discretion in deciding whether to refuse access to information, and upon proper considerations. If the head of the public body has not done so, he or she can be ordered to re-consider the exercise of discretion. See, for example, Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, at p. 4. The commissioner can require the head to reconsider her or his exercise of discretion if it has been exercised in bad faith, has been exercised perversely or unfairly, where irrelevant or extraneous grounds have been considered or relevant ones have not been considered. See Order 02-38, at para. 147.

[22] I will not repeat the rest of those discussions but apply the same principles here.

[23] The PHSA did not explain how or if it had exercised its discretion in deciding to apply s. 13(1). It did not, for example, say that it had considered the age of the record, its past practice in releasing similar records, the nature and sensitivity of the record, the applicant's right to have access to his own personal information or any of the other factors that the heads of public bodies may, as contemplated by Order 02-50 and other decisions, consider in exercising discretion. Rather, the PHSA appears to have treated s. 13(1) as a blanket exception applying to these pages in their entirety. In the absence of any evidence that the PHSA's head considered her or his discretion under s. 13(1), much less on what grounds, it is appropriate in this case for me to order it to re-consider its

decision to refuse to disclose information covered by s. 13(1) in pp. 82-86, 93-94, 126-127 and 140-147. See p. 6, Order 00-14, [2000] B.C.I.P.C.D. No. 17, for a similar finding.

[24] The PHSA said that pp. 79-81 are records prepared to develop issues for a briefing binder and include an index. The applicant is listed as one of many such issues on pp. 79 and 80. (Page 81 does not mention the applicant). The introductory information on pp. 79 and 80 and the references to the applicant contain no implicit or explicit advice or recommendations. Rather, they are factual information that falls under s. 13(2)(a) and must be disclosed. The other information also contains no implicit or explicit advice or recommendations but is also factual information that falls under s. 13(2)(a) or is, in some cases, what appears to be third-party personal information. The PHSA must disclose these portions, subject to other exceptions.

[25] **3.4 Solicitor-Client Privilege** – The PHSA withheld three records (pp. 89-90, 101-102 and 134), saying they constitute communications for the purpose of obtaining and providing legal advice between the PHSA and its solicitors regarding ongoing legal proceedings involving the applicant. It said it had exercised its discretion in refusing to disclose these records to the applicant (paras 14-16, initial submission; para. 3, Chesney affidavit). The applicant argued that solicitor-client privilege does not apply to these records, saying, among other things, that the PHSA has waived any privilege in its distribution of the records within the PHSA, including its communications department (pp. 3-4, initial submission; pp. 1-2, reply).

[26] 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.

[27] 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.

[28] My review of these records confirms that they are communications between the PHSA and its solicitors concerning ongoing legal proceedings between the PHSA and the applicant. I am satisfied that they are protected by solicitor client privilege and that s. 14 therefore applies to them and that the PHSA has exercised its discretion in refusing to disclose these records.

[29] **3.5 Personal Information** – The PHSA severed minute amounts of personal information related to individuals other than the applicant on pp. 111-112 and 117-119. It said that disclosure of the information would be an unreasonable invasion of these individuals' privacy and s. 22 required it to withhold this information. The PHSA also

said none of the relevant circumstances applies in this case to favour disclosure (paras. 6-9, initial submission).

[30] The applicant objected to this severing, saying that there was no evidence that the PHSA had made any attempt to contact these third-party individuals to ask for their consent to disclose their names. He also argued that release of the information is critical to his employment and his life, although he does not explain how (p. 4, initial submission; pp. 1-2, reply). The PHSA responded, correctly, that a public body is not obliged to obtain the consent of third parties to the release of their names in response to requests. It also said that the applicant has not shown how the withheld personal information is relevant to a determination of the applicant's rights (paras. 1-3, reply).

[31] Numerous orders have considered the application of s. 22 (for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56). I will apply here the principles in those orders without repeating them. The relevant sections 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, ….

[32] The personal information in question consists of the names and contact information of two individuals who communicated with the PHSA about the applicant's case. I have found in past orders (see, for example, Order 03-34, [2003] B.C.I.P.C.D. No. 34) that this type of information falls under s. 22(1) and I so find here. The applicant has provided no argument or evidence to rebut the presumed invasion of privacy, including with regard to s. 22(2)(c). I find that s. 22(1) applies to the withheld personal information in pp. 111-112 and 117-119 and that no relevant circumstances apply here to favour a finding that disclosure would not unreasonably invade the third parties' personal privacy.

[33] I note that the PHSA's decision letter said that it was severing personal information from pp. 104-105 and 120, in addition to pp. 111-112 and 117-119. However, the PHSA dealt only with pp. 111-112 and 117-119 in its submission and provided copies of only these pages to me for the purposes of s. 22 in this inquiry. It seems therefore that the application of s. 22 to pp. 104-105 and 120 ceased to be an issue at some point during mediation and before this inquiry.

4.0 CONCLUSION

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

1. I find that the PHSA is authorized by s. 14 to withhold pp. 89-90, 101-102 and 134.

2. I require the PHSA to withhold the information it withheld under s. 22 on pp. 111-112 and 117-119.

3. I require the PHSA to disclose some of the information it withheld under s. 13(1), as follows:

   - pp. 82-86, 93-94, 126-127 and 140-147, subject to para. 4 below;
   - all of pp. 79-81, subject to other applicable exceptions; and,
   - if it has not already done so, all of pp. 87-88 and 95;

4. I find that the PHSA is authorized to withhold portions of pp. 82-86, 93-94, 126-127 and 140-147 under s. 13(1), as highlighted on the copies of those pages provided to the PHSA with its copy of this order.

5. I require the head of the PHSA to reconsider its decision to refuse access to the information on pp. 82-86, 93-94, 126-127 and 140-147 that I found it is authorized to withhold under s. 13(1).

6. Under s. 58(4) of the Act, I require the head of the PHSA to deliver its reconsideration decision, including reasons for the decision, to the applicant and to me within 30 days from the date of this order.

For the reasons given above, no order respecting s. 6(1) is necessary.

December 20, 2004

ORIGINAL SIGNED BY

Celia Francis
Adjudicator