



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F23-80

VANCOUVER COASTAL HEALTH AUTHORITY

David S. Adams
Adjudicator

September 25, 2023

CanLII Cite: 2023 BCIPC 96
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Summary: This inquiry concerns the medical records of a deceased individual (the deceased). An applicant, who is the deceased's mother, requested that Vancouver Coastal Health Authority (VCHA) provide her access to the deceased's medical records. VCHA refused to disclose the requested records on the basis that the applicant was not authorized to make an access request on behalf of the deceased under s. 5(1)(b) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and s. 5 of the *Freedom of Information and Protection of Privacy Act Regulation*, and also on the basis that disclosure would be an unreasonable invasion of the deceased's personal privacy under s. 22(1) of FIPPA. The adjudicator determined that the applicant was not making a request on behalf of the deceased under s. 5(1)(b) of FIPPA and confirmed VCHA's decision to withhold the record under s. 22(1) of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 5(1)(b), 22(1), 22(2)(f) and (i), 22(3)(a) and (d), 22(4), 57(2); *Freedom of Information and Protection of Privacy Regulation*, BC Reg 155-2012, s. 5(1) and (2).

INTRODUCTION

[1] This inquiry is about the medical records of a deceased adult (the deceased). The deceased's mother (the applicant) asked Vancouver Coastal Health Authority (VCHA) for access to the deceased's medical records. VCHA refused access on the basis that the applicant was not acting on behalf of the deceased under s. 5(1)(b) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and s. 5 of the *Freedom of Information and Protection of Privacy Act Regulation* (Regulation) and disclosure of the information would be an unreasonable invasion of the deceased's personal privacy under s. 22(1) of FIPPA.

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review VCHA's decision. Mediation did not resolve the matter and it proceeded to inquiry.

ISSUES AND BURDEN OF PROOF

[3] The issues I must decide in this inquiry are:

1. Whether the applicant is acting on behalf of the deceased in accordance with s. 5(1)(b) of FIPPA and s. 5 of the Regulation; and
2. Whether VCHA must refuse to disclose the records under s. 22(1).

[4] Section 57 of FIPPA does not set out who has the burden of establishing that an applicant is authorized under FIPPA and the Regulation to act on behalf of another person. Previous orders have said that where no statutory burden is established, it is in the interests of both parties to provide evidence and argument supporting their positions.¹

[5] Section 57(2) provides that the burden is on the applicant to prove that disclosure of personal information in the records would not be an unreasonable invasion of third-party personal privacy. However, it is up to the public body first to establish that the information it withheld is personal information.²

DISCUSSION

Background

[6] VCHA is a regional health authority that provides hospital services to patients in the Vancouver area. The deceased attended a hospital operated by VCHA in the summer and fall of 2020 and was discharged. He died in December 2020. In January 2021, the applicant sought the deceased's medical records from VCHA.

Records at issue

[7] The responsive records in this inquiry consist of 382 pages of the deceased's medical records for a series of stays at a hospital operated by VCHA. VCHA is withholding the entirety of these records from the applicant.

¹ Order F18-08, 2018 BCIPC 10 (CanLII) at para 7.

² Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.

Acting on behalf of a deceased person – s. 5(1)(b)

[8] Section 5(1)(b) of FIPPA sets out how an access applicant may make a request on behalf of another person:

How to make a request

5 (1) To obtain access to a record, the applicant must make a written request that

...

(b) provides written proof of the authority of the applicant to make the request, if the applicant is acting on behalf of another person in accordance with the regulations...

[9] The Regulation provides as follows:

Who may act for a deceased individual

5 (1) In this section:

“appropriate person” means,

(a) in respect of a deceased adult, one of the following:

(i) a committee acting under section 24 of the *Patients Property Act* for the deceased;

(ii) if there is no committee acting for the deceased, the personal representative of the deceased;

(iii) if there is no committee acting for the deceased and no personal representative of the deceased, the nearest relative of the deceased...

“nearest relative” means the first person referred to in the following list who is willing and able to act under subsection (2) of this section for a deceased individual:

...

(c) parent of the deceased;

...

(2) If an individual is deceased, an appropriate person may act for the deceased in relation to any of the following sections of [FIPPA]:

(a) section 5;

...

[10] Previous OIPC orders have established that in order to be entitled to exercise the rights a deceased person may have had under FIPPA, an applicant must establish, first, that they are an appropriate person under the Regulation, and second, that they are making their FIPPA request on the deceased's behalf under s. 5(1)(b) of FIPPA.³

Appropriate person – s. 5 of the Regulation

[11] Where a deceased person is not represented by a committee or personal representative, to be an “appropriate person” under the Regulation, an applicant must be the deceased person's nearest relative. Neither party provided submissions or evidence addressing whether there is a committee or personal representative acting for the deceased. The applicant says that she is the deceased's mother.

[12] VCHA does not appear to dispute that the applicant is an “appropriate person” for the purposes of FIPPA. It does not allege that the deceased is represented by a committee or a personal representative, and it does not dispute that the applicant is his mother. It does not allege that the deceased had a spouse or adult child who would take priority as an appropriate person over the applicant pursuant to the Regulation. Having considered all the information provided by both parties, I am satisfied that the applicant is the deceased's mother and an “appropriate person” as the deceased's nearest relative for the purposes of the Regulation.

Acting on behalf of the deceased – s. 5(1)(b) of FIPPA

[13] I must now decide whether the applicant's access request was made on behalf of the deceased as required by s. 5(1)(b) of FIPPA. The phrase “acting on behalf of” is not defined in FIPPA. Previous OIPC orders have interpreted the phrase to mean acting to benefit the other individual, to further that individual's goals and objectives, and in the other individual's best interests; they have also said that if an applicant is seeking the disputed information to further their own interests, they are not acting on behalf of the deceased.⁴

[14] VCHA says that the applicant has not established that she is acting on behalf of the deceased. It says, rather, that she is seeking the records for a variety of purposes, none of which are on the deceased's behalf.⁵

[15] The applicant provided a completed authorization form by which she attempted to access the deceased's medical records. In the field “reason for request”, the applicant wrote “investigating medical history”. In her request for

³ F18-08, *supra* note 1 at para 10; Order F22-42, 2022 BCIPC 47 (CanLII) at para 16.

⁴ Order F22-42, *ibid* at para 23.

⁵ VCHA's initial submission at paras 6 and 8.

review, she says that police in another country require the record for their own investigative purposes. However, she does not explain, and I am unable to tell, how she intends her access request to benefit the deceased's interests. In reply, VCHA says that the applicant has not provided any evidence establishing that she has legal standing to act on the deceased's behalf.

[16] While I sympathize with the applicant's difficult situation, I do not find that what she says about why she is making the access request is sufficient to establish that she is acting on behalf of the deceased.

Conclusion on s. 5(1)

[17] I have found that while the applicant is an appropriate person pursuant to the Regulation, she has not established that she is acting on behalf of the deceased.

[18] Previous orders have established that where an applicant is not acting on behalf of an individual, the access request is to be treated as an arm's length request by one individual for another's personal information.⁶ Therefore, I will now turn to consider whether disclosure of the records would be an unreasonable invasion of the deceased's personal privacy under s. 22(1).

Unreasonable invasion of third-party personal privacy – s. 22

[19] Since I have found that the applicant is not making the access request on behalf of the deceased, I will consider whether giving the applicant access to the information would be an unreasonable invasion of anyone's personal privacy.

[20] The analytical framework for s. 22, which I will apply, is well-established:

Numerous orders have considered the approach to s. 22 of FIPPA, which states that 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." This section [applies only] to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.⁷

⁶ Order 00-40, 2000 CanLII 14405 (BC IPC) at section 3.3; Order F22-42, *supra* note 3 at para 29.

⁷ Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.

[21] VCHA says that s. 22 applies but does not make a detailed submission on its application, except as discussed below. The applicant did not say anything specifically about the application of s. 22.

Personal information – s. 22(1)

[22] The first step in the s. 22 analysis is to determine whether the withheld information is personal information. Both “personal information” and “contact information” are defined in Schedule 1 of FIPPA:

“personal information” means recorded information about an identifiable individual other than contact information;

“contact information” means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;

[23] Previous OIPC orders have said that information is about an identifiable individual when it is reasonably capable of identifying a particular individual or a small group of people, either alone or when combined with other available sources of information.⁸

[24] VCHA does not make a submission about whether the records contain the deceased’s personal information. However, based on my review of the records (which are, as noted above, the deceased’s medical records), I can see that the withheld information is, on its face, about the deceased. It is therefore his personal information. The medical records also contain the names and miscellaneous details about identifiable individuals who interacted with the deceased. That information is not contact information, so I find it is personal information.

Not an unreasonable invasion – s. 22(4)

[25] The next step in the s. 22 analysis is to determine whether the personal information falls into one of the circumstances set out in s. 22(4). If it does, disclosure of the personal information is not an unreasonable invasion of third-party personal privacy.

[26] Neither party made a submission on the application of s. 22(4). On my examination of the information in light of the s. 22(4) circumstances, I find that none of them apply.

⁸ Order F20-13, 2020 BCIPC 15 (CanLII) at para 36; Order F16-36, 2016 BICPC 40 (CanLII) at para 17.

Presumed unreasonable invasion of third-party personal privacy – s. 22(3)

[27] Section 22(3) sets out circumstances where disclosure of personal information is presumed to be an unreasonable invasion of third-party personal privacy. It provides, in relevant part:

(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,

[28] Neither party made a submission on the application of s. 22(3). However, I can see that all of the personal information relates directly to the deceased's medical history, diagnoses, and treatment. I therefore find that its disclosure is presumed to be an unreasonable invasion of the deceased's personal privacy under s. 22(3)(a). A small amount of the information is about the deceased's occupational and employment history, so its disclosure is presumed to be an unreasonable invasion of his personal privacy under s. 22(3)(d). I do not find that any other s. 22(3) presumptions apply. I now turn to consider whether, in all the relevant circumstances, the presumptions have been rebutted.

Relevant circumstances – s. 22(2)

[29] The final step in the s. 22 analysis is to consider all relevant circumstances, including those set out in s. 22(2). It is at this step that any applicable s. 22(3) presumptions may be rebutted.

Supplied in confidence – s. 22(2)(f)

[30] Neither party made a submission about whether the information in the records was supplied in confidence. However, I can readily infer that the information supplied by the deceased to the medical staff was supplied with a reasonable expectation that it would be kept confidential, so I find that this factor weighs against disclosure.

Information is about a deceased person – s. 22(2)(i)

[31] Section 22(2)(i) of FIPPA says that where the information is about a deceased person, a relevant circumstance may be the length of time the person

has been deceased. VCHA submits that not enough time has passed for this circumstance to weigh in favour of disclosing the information.⁹

[32] Section 22(2)(i) does not specify a set length of time that must pass before a deceased third party's personal information may be disclosed. Several OIPC orders have considered the question of how much time must pass before this factor begins to weigh in favour of disclosure. In Order F22-42, the deceased had died 12 years before the order was issued, and the Director of Adjudication found that this had not been enough time to diminish the deceased's right to privacy over her medical information.¹⁰ In Order F18-08, the adjudicator concluded that even 16 years was not enough time for this circumstance to weigh in favour of disclosing a deceased person's medical information, absent other relevant circumstances to the contrary.¹¹

[33] In the present case, the deceased died in December 2020, less than three years ago. I find that this is far too short a time for this factor to favour disclosure, and find that it weighs against disclosure.

Other s. 22(2) factors

[34] I understand the applicant to be saying that her family relationship to the deceased weighs in favour of disclosure of the records. In Order F22-42, the Director of Adjudication found that the applicant's relationship with the deceased person who was the subject of a set of medical records was a factor slightly favouring disclosure. In that case, the applicant was the deceased's daughter, and the Director was satisfied that the two had a caring relationship that involved "a level of trust".¹² Here, however, without revealing the substance of the information in dispute, I can say only that I do not find that the applicant's relationship with the deceased weighs in favour of disclosure. The applicant has not provided any facts to support a finding that there was a relationship of trust. I do not think I can assume a level of trust from the fact of the family relationship alone.

[35] I also find that all of the personal information is highly sensitive in nature, and that this factor weighs strongly against disclosure.

[36] To summarize, I find that there are no relevant factors, either those set out in s. 22(2) or otherwise, that favour disclosure and could rebut the presumptions raised by s. 22(3)(a) and (d). Instead, I find that all the relevant factors weigh against disclosure.

⁹ VCHA's initial submission at para 10.

¹⁰ Order F22-42, *supra* note 3 at para 53.

¹¹ Order F18-08, *supra* note 1 at para 32.

¹² Order F22-42, *supra* note 3 at paras 56-57 and 62.

Conclusion on s. 22(1)

[37] I have found that all the withheld information is personal information. I have found that disclosure of the personal information would be a presumed unreasonable invasion of the deceased's personal privacy under s. 22(3)(a). I have not found any factors favouring disclosure under s. 22(2) that could rebut that presumption. I therefore conclude that VCHA must refuse to disclose the record to the applicant.

CONCLUSION

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

1. I confirm VCHA's decision that the applicant is not acting on behalf of the deceased for the purposes of s. 5(1)(b) of FIPPA; and
2. I confirm VCHA's decision that it is required to refuse to disclose the information in dispute under s. 22(1).

September 25, 2023

ORIGINAL SIGNED BY

David S. Adams, Adjudicator

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