



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

Decision F10-02

VANCOUVER ISLAND HEALTH AUTHORITY

Jay Fedorak, Adjudicator

April 8, 2010

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Summary: VIHA's request that an inquiry not be held is denied.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 56; s. 22; s. 13; s. 15.

Authorities Considered: **B.C.:** Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Decision F08-08, [2008] B.C.I.P.C.D. No. 26; Decision F08-11, [2008] B.C.I.P.C.D. No. 36; Order F06-11, [2006] B.C.I.P.C.D. No. 18; Order F10-10, [2010] B.C.I.P.C.D. No. 17; Decision F09-02, [2009] B.C.I.P.C.D. No. 4; Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38; Order 00-02, [2000] B.C.I.P.C.D. No. 2.

1.0 INTRODUCTION

[1] The Vancouver Island Health Authority ("VIHA") has asked that, under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), an inquiry on the respondent's request for review not be held respecting his request for records. For reasons which follow, I have exercised my discretion not to grant VIHA's request.

2.0 DISCUSSION

The access request

[2] The respondent, a surgeon who previously had hospital privileges with VIHA, requested a copy of a letter of complaint that a general practitioner with

VIHA had written about him to the chief of surgery of VIHA. VIHA originally refused to provide him with a copy of the letter. The respondent made a complaint to the Office of the Information and Privacy Commissioner (“OIPC”) concerning VIHA’s failure to respond. During mediation, VIHA released the letter, withholding information under s. 22 of FIPPA. VIHA subsequently informed the respondent that it was also applying ss. 13 and 15 of FIPPA to the information withheld. Later, VIHA provided the respondent with a summary of the information withheld. When the respondent requested that the matter proceed to inquiry under Part 5 of FIPPA, the VIHA asked, under s. 56, that the inquiry not proceed.

Issue

[3] Section 56(1) of the Act reads as follows:

Inquiry by Commissioner

56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[4] A number of previous decisions and Orders have laid out the principles for the exercise of discretion under s. 56.¹ I have taken the same approach here without repetition.

Parties’ Arguments

[5] VIHA argues that the undisclosed portions of the requested record contain third parties’ personal information, specifically information relating to their medical history, diagnosis, condition and treatment.² VIHA submits that s. 22 applies to this information and the review raises no arguable issue otherwise.³ It also argues that s. 13 applies, on the grounds that it is obvious on the face of the record. VIHA states that it is not relying on s. 15 for the purpose of this s. 56 application, but it reserves the right to raise it as grounds for withholding information in the event its application fails and the request proceeds to an inquiry.⁴

[6] The respondent claims that it is not obvious on the face of the record that s. 13 applies. He submits that the letter does not provide advice to VIHA: it is a letter of complaint. The respondent points out what he believes to be inconsistencies in VIHA’s application of s. 22. He notes that information that VIHA disclosed to him in the letter also contains information relating to the

¹ See for example Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Decision F08-08, [2008] B.C.I.P.C.D. No. 26; and Decision F08-11, [2008] B.C.I.P.C.D. No. 36.

² VIHA’s initial submission, para. 19.

³ VIHA’s initial submission, para. 22.

⁴ VIHA’s initial submission, para. 25.

medical history, diagnosis, condition and treatment of third parties. Therefore, he submits that VIHA is applying s. 22 selectively.⁵

Analysis

[7] The primary issue in this case is whether the public body has shown that it is plain and obvious that ss. 13 and 22 apply. First, I will deal with s. 22. The information at issue is in a letter of complaint about the respondent made by a general practitioner. The severed information includes medical details about unnamed (though otherwise possibly identifiable) patients, which the general practitioner had referred to the respondent for surgery. It also includes information about the respondent, specifically the general practitioner's concerns about how the respondent treated these patients. It is worth noting that VIHA has already released to the respondent information from the letter including personal information about the respondent and the general practitioner, including his name as well as information about the unnamed patients.

[8] The withheld information is not only the medical information of third parties but also includes the personal information of the respondent. Previous Orders have held that it would only be in rare circumstances where disclosure to individuals of their own personal information would be an unreasonable invasion of a third party's personal privacy.⁶ The information is also about how the respondent treated the third parties as his patients. It is information of which he is already aware. I am not offering an opinion as to whether or not this is one of these rare cases. I have reviewed the information at issue and, without expressing any views (much less findings) on the merits of this matter, in the particular circumstances of this case, the application of s. 22 is at least arguable. VIHA's submissions do not persuade me that it is clear and obvious the respondent is not entitled to his own personal information. Section 56 applications are successful when the public body can establish that an inquiry would serve no good purpose because the obvious outcome is that the respondent would not receive any information. In this case, I find that the outcome is not obvious.

[9] There are strong parallels between this case and a similar application by TransLink in 2004, where the respondent was the subject of a workplace investigation. In that case, the severed information included the personal information of the respondent, and Adjudicator Carlson found that it was a case where an inquiry would be appropriate.⁷

[10] I find similarly with respect to the application of s. 13. It is not plain and obvious that the withheld information consists of advice or recommendations. In

⁵ Respondent's submission, paras. 23, 26.

⁶ See for example Order F06-11, [2006] B.C.I.P.C.D. No. 18; and Order F10-10, [2010] B.C.I.P.C.D. No. 17.

⁷ Letter of August 18, 2004 <http://www.oipcbc.org/orders/section56/18806TransLinkprelimdec.pdf>.

addition, VIHA has provided no evidence that it has exercised discretion appropriately in applying this section. Section 13 is a discretionary exception. As Adjudicator McEvoy noted in Decision F09-02⁸, the Commissioner discussed FIPPA's discretionary sections in Order No. 325-1999⁹ and stated the following:

In inquiries that involve discretionary exceptions, public bodies must be prepared to demonstrate that they have exercised their discretion. That is, they must establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception.

[11] The Commissioner has also identified circumstances where it would be appropriate for public bodies to consider exercising discretion in favour of disclosing records.¹⁰ Therefore, even if s. 13(1) applies here, VIHA must establish that it exercised its discretion appropriately in the manner the Commissioner described in Order No. 325-1999. VIHA has not provided any evidence in support of its exercise of discretion.

3.0 CONCLUSION

[12] VIHA has the burden of demonstrating why its s. 56 application should be granted and it has not done so in this case. An inquiry will therefore be held.

[13] Nothing in this decision reflects any opinion or decision as to the merits of the VIHA's case. The merits remain to be decided in the Part 5 inquiry, on the basis of the evidence and argument the parties submit.

April 8, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

OIPC File: F09-37243

⁸ [2009] B.C.I.P.C.D. No. 4.

⁹ [1999] B.C.I.P.C.D. No. 38.

¹⁰ Order 00-02, [2000] B.C.I.P.C.D. No. 2.