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Order F13-01

MINISTRY OF HEALTH
AND MINISTRY OF CITIZENS' SERVICES AND OPEN GOVERNMENT

Michael McEvoy, Assistant Commissioner

January 25, 2013

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Summary: A journalist requested records relating to medications for the treatment of Adult Macular Degeneration. The Ministries withheld portions of the requested information under ss. 13, 14, 16, 17, 21, and 22 of FIPPA. The Assistant Commissioner ordered the public bodies to disclose parts of the withheld information, authorized the public bodies to withhold parts of the withheld information under s. 13, 14, 16, and 17 of FIPPA, and required the public bodies to refuse to disclose parts of the withheld information under ss. 21 and 22 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, Schedule 1 and ss. 13(1), 14, 16(1), 17(1), 21(1), 22(1), 22(2), 22(3), and 22(4).

Authorities Considered: B.C.: Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order F05-06, [2005] B.C.I.P.C.D. No. 7; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order F09-17, [2009] B.C.I.P.C.D. No. 23; Order 01-39, [2001] B.C.I.P.C.D. No. 40, Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order 00-09, [2009] B.C.I.P.D. No. 9; Order F10-26, [2010] B.C.I.P.C.D. 38; Order F10-27, [2010] B.C.I.P.C.D. 39; Order F10-28, [2010] B.C.I.P.C.D. No. 40; Order F11-08, [2011] B.C.I.P.C.D. No. 10; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F12-01 [2012] B.C.I.P.C.D. No.1.

Cases Considered: *The College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)* 2002 BCCA 665, [2002] B.C.J. No. 2779; *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC); *K-Bro v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.

INTRODUCTION

[1] This case involves a journalist from the Canadian Broadcasting Corporation ("journalist") challenging decisions of the Ministry of Health ("MoH") and the Ministry of Citizens' Services and Open Government ("MCS")[1] to withhold information in response to a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The journalist requested records relating to medications for the treatment of Adult Macular Degeneration specifically drugs known as Lucentis and Avastin.

[2] The Ministries[2] withheld some information under s. 13(1) of FIPPA on the grounds that disclosure would reveal policy advice or recommendations. They withheld other information under s. 17(1) on the grounds that disclosure could be reasonably expected to result in financial harm. They also withheld information under s. 21(1) on the grounds that disclosure could harm the financial interests of Novartis, a pharmaceutical company and under s. 22(1) on the grounds that disclosure would be an unreasonable invasion of the personal privacy of third parties.

[3] Finally, MCS withheld some information under s. 14 on the grounds that it was subject to solicitor-client privilege.

[4] Mediation did not resolve all issues between the parties and the matter proceeded to inquiry under Part 5 of FIPPA.

[5] The Office of the Information and Privacy Commissioner ("OIPC") provided Novartis with written notice of the inquiry because it is a third party to the journalist's request for information.

[6] Subsequent to the parties filing initial and reply submissions, MoH discovered additional responsive records to the applicant's request. MoH provided those records in severed form applying ss. 13, 16, 17, 21 and 22 to withhold certain portions of them. These disputed records have been added to the scope of this inquiry. Both MoH and the third party made supplemental submissions regarding these additional records. The applicant did not.

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[1] At the time of the original request and request for review, the Ministry of Citizens' Services and Open Government was known as the Ministry of Citizens' Services. MCS became involved in this inquiry when some of the responsive records originated with the Public Affairs Bureau, which is part of MCS.

[2] MoH and MCS made a joint submission and for the most part I shall refer to them collectively as the "Ministries". I will refer to the MoH or MCS individually where it is necessary to do so in relation to records that are in the sole control of the named ministry.

ISSUES

[7] The questions that I must decide are:

1. Does FIPPA authorize the Ministries to withhold information under ss. 13(1), and 17(1) of FIPPA?

2. Does FIPPA authorize MCS to withhold information under ss. s. 14 of FIPPA?

3. Does FIPPA authorize MoH to withhold information under s. 16(1)(b) of FIPPA?

4. Does FIPPA require the Ministries to withhold information under ss. 21(1) and 22(1)?

DISCUSSION

[8] **Background—**MoH's Pharmaceutical Services Division is responsible for managing publicly funded pharmaceutical programs including PharmaCare. PharmaCare is a program that provides financial assistance to certain individuals for eligible prescription drugs. MoH evaluates the efficacy and cost of individual prescription drugs before designating the ones that qualify as eligible for PharmaCare deciding, along with information it receives from manufacturers, whether or not to list them as eligible prescription drugs.

[9] Novartis manufactures and distributes Lucentis, a prescription drug for the treatment of patients with macular degeneration. Novartis was engaged in PharmaCare's approval process for Lucentis.[3] I take it from the evidence just described before me that Lucentis and Avastin are competing products.

[10] **Records in Issue—**The records consist of approximately 150 pages of email correspondence and attachments, as well as briefing materials relating to, Lucentis, Avastin and other prescription drugs. The information the Ministries have withheld consists mostly of select passages in the records, as well as a few pages in their entirety.

[11] **Would disclosure reveal advice and recommendations under s. 13(1) of FIPPA?—**This exception has been the subject of many orders, for example, Order 01-15,[4] where former Commissioner Loukidelis said this:

> [22] This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while

[3] Novartis supplied the information about Lucentis in its initial submission.
[4] [2001] B.C.I.P.C.D. No. 16.

> the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations. …

[12] I have also taken account of *The College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner),* a British Columbia Court of Appeal decision that considered the application of s. 13(1).[5]

[13] I apply the same approach here as has been taken in these past orders and Court of Appeal decision.[6]

[14] I am unable to fully set out my analysis of the application of s. 13(1) of FIPPA to the correspondence and briefing material in this case because the Ministries' submissions relating to it was received, appropriately, *in camera*. What I can say is that it is clear MoH had a decision to make, and some of the material consists of options, implications, and recommendations concerning the decision that is similar to the kinds of information previous orders have found to constitute advice or recommendations. I find that s. 13(1) of FIPPA applies to this kind of information.

[15] Further, the Public Affairs Bureau of MCS assisted MoH by drafting Questions and Answers, and other briefing materials. Some of the information consists of advice and recommendations about what should be included with those materials. I find that s. 13(1) of FIPPA applies to this kind of information.

[16] However, other information is clearly factual. I find that s. 13(1) of FIPPA does not apply to that information.

[17] I have marked in green the passages that the Ministries must disclose.

[18] **Would disclosure reveal information subject to solicitor-client privilege?––**I begin my analysis by considering s. 14 of FIPPA which states:

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

[19] This provision encompasses two kinds of privilege recognized at law: legal advice privilege, which refers to the privilege that attaches to communications between a client and a solicitor for the purposes of obtaining legal advice; and litigation privilege, which covers communications and records produced for the primary purpose of existing or pending litigation.[7] MCS argues that the legal advice privilege applies here.

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[5] 2002 BCCA 665.

[6] See also Order 02-38, [2002] B.C.I.P.C.D. No. 38, at paras. 101-127.

[7] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665.

[20] Legal advice privilege protects confidential communication between a client and a lawyer that is related to the giving or receiving of legal advice, unless the client waives that privilege, either expressly or impliedly. The court in *B. v. Canada* set out the following test that the previous OIPC orders have consistently applied in its decisions regarding this exception:[8]

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
>
> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[21] The record identified as subject to s. 14 consists of comments in the margins of page 51 of PAB-2010-00013. The author is identified as a solicitor with the Province's Legal Services Branch. MCS asked her to provide advice concerning the proposed questions and answers. It is clear on the face of the record that the comments consist of legal advice or opinion. Therefore, I find that s. 14 of FIPPA applies to this information.

[22] **Did MoH Receive the Information from other provincial governments in Confidence?**—The relevant parts of s. 16 read as follows:

> **Disclosure harmful to intergovernmental relations or negotiations**
>
> 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
>
> (i) the government of Canada or a province of Canada; …

[8] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

[23] What I must determine is whether other provincial governments supplied the information at issue in confidence. Former Commissioner Loukidelis held in Order No. 331-1999[9] that for s. 16(1)(b) to apply "there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information." He provided the following, non-exhaustive list of factors to consider when determining whether such an understanding exists:

> 1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
>
> 2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
>
> 3. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)
>
> 4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)
>
> 5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
>
> 6. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?
>
> 7. What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?

[9] [1999] B.C.I.P.C.D. No. 44.

[24] I will now discuss the factors above that are relevant in this case.

[25] While limited in what I can discuss, because MoH provided its submissions on this point *in camera*, I can say, in general terms, it involves email communications between MoH and its counterparts in other provinces. While I am not satisfied that the general subject of the information is of a kind that the parties would always keep confidential, I agree that it is reasonable to expect that the parties would keep some of the specific details of the disputed information confidential. I see no reason to conclude that there was an expectation on the part of anyone that these communications would be disclosed to outside parties in the ordinary course of business.

[26] Nevertheless, there are no explicit indications that employees of the other provinces were supplying the information in confidence. MoH provided affidavit evidence from the Executive Director of Drug Intelligence who was a party to those communications. He deposed that there was a general expectation among the parties that MoH would keep the information confidential.[10] MoH has not provided, however, any corroboration from the other provinces with respect to their expectations of confidentiality. The only evidence that MoH provides is to refer to a generic disclaimer at the end of one of the emails that states that it might contain confidential information. Previous orders have held that "boilerplate" footers on email communications are not by themselves sufficient to demonstrate the parties intended confidential communications. In Order F09-17, I found:

> This type of automatic statement on email is insufficient, without more, to establish in this case that the information so supplied attached is confidential or was supplied on the basis that it will be kept confidential.[11]

[27] Moreover, numerous orders have dealt with the issue of whether information was supplied, explicitly or implicitly, "in confidence".[12] Order 04-06 found that assertions by one party alone, without corroboration from the other party or other objective evidence, were insufficient to establish that the information was provided "in confidence".[13] It held that there must be evidence of a "mutuality of understanding" between the parties for the information to have been considered to have been supplied "in confidence". MoH has not provided any objective evidence to establish that a mutuality of understanding existed with respect to the information at issue.

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[10] MoH's supplementary submission, affidavit of the Executive Director of Drug Intelligence, para. 13.
[11] [2009] B.C.I.P.C.D. No. 23 at para. 25.
[12] See for example, Order 01-39, [2001] B.C.I.P.C.D. No. 40.
[13] [2004] B.C.I.P.C.D. No. 6 at paras. 51-53.

[28] It appears that the other provinces sent the communications voluntarily. There is no reason to expect otherwise. I also accept that MoH's general practice is to keep such communications confidential.

[29] In this case, the indicators of confidentiality provide a mixed result. There is no explicit indication that the other provinces supplied the information to MoH in confidence. However, in reviewing the communications line by line, there is some information that parties clearly would be expected to treat in confidence, and would expect that other parties would do so as well. There is also information about the other provinces' relationships with Novartis that, if disclosed to other companies, could harm the interests of those provinces. Therefore, I find that s. 16(1)(b) of FIPPA applies to all of this information.

[30] **Would Disclosure Result in Financial Harm to the Ministries?**— Previous orders have considered the application of s. 17(1). Former Commissioner Loukidelis established the principles for its application in Order 02-50. He indicated that there must be:

> a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia's financial or economic interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information.[14]

[31] The Ministries have applied s. 17(1) to information that Novartis supplied through phone conversations and meetings with MoH officials. The Ministries provided most of their arguments on this issue *in camera*. The little they submitted that was not *in camera* relates to statements to the effect that pharmaceutical companies establish their prices in a complex and competitive environment. As a result, I am circumscribed from discussing in as much detail as I might otherwise do the arguments of the public bodies and the reasons for my findings.

[32] The Ministries' submissions satisfy me that it is in the financial interest of MoH to promote commercial interactions with pharmaceutical manufacturers, such as Novartis. To that end, it is necessary for MoH to maintain the types of communication with pharmaceutical manufactures that is the subject of the information at issue. Novartis submits that it would not share sensitive

[14] [2002] B.C.I.P.C.D. No. 51 at para. 137.

commercial information as part of these communications if it believed that MoH would disclose the information to its competitors. Therefore, I find that most of the information to which the Ministries have applied s. 17(1) of FIPPA meets the required threshold. There is some information supplied by Novartis, however, that is not of the kind that meets the requirements of s. 17(1) of FIPPA. Again, I am not able to describe my reasons except in the broadest sense, because doing so would disclose the *in camera* materials provided by the Ministries. I have marked in green the passages that the Ministries must disclose.

[33] **Harm to Third-Party Business Interests**—Numerous orders have considered the application of s. 21(1) and the principles for its application are well established.[15] They set out a three-part test for determining whether disclosure is prohibited, all three elements of which must be established before the exception to disclosure applies. Former Commissioner Loukidelis conducted a comprehensive review of the body of case decisions in several jurisdictions in Order 03-02.[16]

[34] The first part of the test requires the information to be a trade secret of a third party, or the commercial, financial, labour relations, scientific or technical information of, or about, a third party. The second part of the test requires the information to have been supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause significant harm to the third party's competitive position or other types of harm as set out in s. 21(1)(c).

Commercial or financial information

[35] The information at issue includes details of Novartis' products and pricing. I find that this information constitutes commercial, financial or technical information for the purpose of s. 21(1)(a) of FIPPA.

Supplied in confidence

[36] In order to undertake this analysis, it is necessary to separate the concept of "supplied in confidence" into two parts. The first is to determine whether the information was "supplied" to MoH. The second is to determine whether Novartis supplied that information "in confidence".

[15] See for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.
[16] At paras. 28-117.

[37] Previous decisions have dealt extensively with the application of s. 21(1)(b) of FIPPA with respect to determining whether information meets the criteria of being "supplied". Information that has been "negotiated" between a third party and a public body is not considered to be "supplied".[17]

[38] In this case, there was no negotiated agreement. It is clear from the submissions and on the face of the records that Novartis provided the commercial and financial information at issue. There is no evidence that MoH modified or agreed to accept the information as part of a negotiation. Therefore, I find that Novartis supplied the information.

[39] The next step is to determine whether Novartis supplied the information in confidence. MoH and Novartis each provided affidavit evidence that both parties understood that the communication of commercial, financial or technical information was done in confidence.

[40] Numerous orders have dealt with the issue of whether information was supplied explicitly or implicitly, "in confidence".[18] Order 04-06 found that assertions by a third party alone, without corroboration from a public body or other objective evidence, were insufficient to establish that the information was provided "in confidence".[19] It held that there must be evidence of a "mutuality of understanding" between the public body and the third parties for the information to have been considered to have been supplied "in confidence". In this case, there is sufficient evidence to demonstrate that there was a mutuality of understanding between MoH and Novartis that the commercial, financial and technical information that Novartis supplied was in confidence.

[41] Therefore, I find the Novartis supplied its commercial, financial and technical information in confidence.

Harm to third party interests

[42] Former Commissioner Loukidelis set out the standard of proof under the reasonable expectation of harm test in Order 00-10,[20] stating the following:

> Section 21(1)(c) requires a public body to establish that disclosure of the requested information could reasonably be expected to cause "significant harm" to the "competitive position" of a third party or that disclosure could reasonably be expected to cause one of the other harms identified in that

[17] Order 00-09, [2009] B.C.I.P.D. No. 9. I applied this approach in Order F10-26, [2010] B.C.I.P.C.D. 38, Order F10-27, [2010] B.C.I.P.C.D. 39, Order F10-28, [2010] B.C.I.P.C.D. No. 40 and Order F11-08, [2011] B.C.I.P.C.D. No. 10. Order F10-28 was upheld on judicial review. See *K-Bro v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.
[18] See for example, Order 01-39, [2001] B.C.I.P.C.D. No. 40.
[19] [2004] B.C.I.P.C.D. No. 6 at paras. 51-53.
[20] [2000] B.C.I.P.C.D. No. 11, p. 10.

> section. There is no need to prove that harm of some kind will, with certainty, flow from disclosure; nor is it enough to rely upon speculation. Returning always to the standard set by the Act, the expectation of harm as a result of disclosure must be based on reason. ... Evidence of speculative harm will not meet the test, but it is not necessary to establish certainty of harm. The quality and cogency of the evidence must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception. The probability of the harm occurring is relevant to assessing the risk of harm, but mathematical likelihood will not necessarily be decisive where other contextual factors are at work.

[43] Novartis submits that disclosure of its commercial, financial or technical information to its competitors would damage its competitive position, and result in Novartis no longer supplying such information to MoH in future. Novartis clarifies, however, that it has no concerns about disclosure of its opposition to what it calls the off-label use of the drug Avastin and what it considers to be a lack of transparency of the Adult Macular Degeneration program of MoH.

[44] The Ministries have submitted material *in camera* that explains how disclosure of some of the information in the records could reasonably be expected to harm the financial interests of Novartis. I am unable to describe this information, but I find that the argument and evidence meets the required standard for the application of s. 21(1)(c) of FIPPA.

[45] Novartis has disclosed in its submission some of the information that the Ministries submitted *in camera*. Novartis has also disclosed in its submission some of the information that the Ministries withheld under s. 21(1) of FIPPA. Consequently, the journalist is already aware of the information as a result of these disclosures, so there would be no harm in disclosing similar information in the records. I find that s. 21(1) of FIPPA does not apply to this information.

[46] The Ministries have also identified information that they originally decided to withhold under s. 21(1) of FIPPA, but have since determined that s. 21(1) does not apply. Having reviewed this information and considered the positions of the Ministries, Novartis and the applicant, I conclude that s. 21(1) of FIPPA does not apply to this information.

[47] I have marked in green the passages that the Ministries must disclose.

[48] **Would Disclosure be an Unreasonable Invasion of a Third Party's Personal Privacy?**—FIPPA requires public bodies to withhold personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy. The test for determining whether disclosure would be an unreasonable invasion of privacy is contained in s. 22 of FIPPA.

[49] Numerous orders have considered the proper analytical approach to s. 22. For example, Order 01-53[21] states:

> 1. First, the public body must determine if the information in dispute is personal information.
>
> 2. If so, it must consider whether disclosure of any of the information is captured by s. 22(4), in which case disclosure would not be an unreasonable invasion of third-party personal privacy and s. 22(1) would not apply.
>
> 3. If s. 22(4) does not apply, the public body is to determine whether disclosure of the information falls within s. 22(3), in which case it would be *presumed* to be an unreasonable invasion of third-party privacy.
>
> 4. If the presumption applies, it is necessary to consider whether or not the presumption has been rebutted by considering all relevant circumstances, including those listed in s. 22(2).

[50] As noted in Order 01-53, discussing the fourth stage of the analysis:

> According to s. 22(2), the public body then must consider all relevant circumstances in determining whether disclosure would unreasonably invade personal privacy, including the circumstances set out in s. 22(2). The relevant circumstances may or may not rebut any presumed unreasonable invasion of privacy under s. 22(3) or lead to the conclusion that disclosure would not otherwise cause an unreasonable invasion of personal privacy.[22]

[51] I adopt the same approach.

Is it personal information?

[52] The first step in applying s. 22(1) of FIPPA is to determine whether the requested information includes personal information. The information that the Ministries have withheld under s. 22(1) of FIPPA consist of the names of employees of private companies, details of the annual vacation of an employee of a public body, and the telephone number for contacting a private physician who MoH was consulting on MoH business.

[53] The definition of "personal information" in Schedule 1 of FIPPA excludes "contact information", which it defines as information to enable an individual at a place of business to be contacted, including business telephone number. As the telephone number was provided for the purpose of contacting the

[21] [2001] B.C.I.P.C.D. No. 56.
[22] *Ibid* at para. 24

physician in his professional capacity, his telephone number constitutes "contact information" and, therefore, does not constitute personal information.

[54] The names of the company employees and the details of the annual leave of a public body employee constitute information about identifiable individuals. Therefore, I find that this information constitutes personal information.

Section 22(4)––Not an unreasonable invasion of privacy

[55] The next step in applying s. 22 is to determine whether any of the provisions of s. 22(4) of FIPPA apply to the names of the employees and the annual leave of one employee. None of the parties have cited any provisions of s. 22(4) of FIPPA that apply, and I cannot see how any apply.

[56] Therefore, I proceed to consider the provisions of s. 22(3) of FIPPA.

Section 22(3)––Presumed unreasonable invasion of privacy

[57] If information falls within any of the listed categories in s. 22(3), disclosure is presumed to be an unreasonable invasion of the third party's personal privacy. None of the parties have cited any provisions of s. 22(3) of FIPPA that apply to the names of the employees of the company, and I cannot see how any apply.

[58] With respect to the annual leave of the employee of the public body, the Ministries have cited Order F12-01[23], in which I found that details of the annual leave of an employee constitute that employee's employment history under s. 22(3)(a) of FIPPA. Therefore, disclosure of that information is presumed to be an unreasonable invasion of the personal privacy of the employee. I find the same here.

[59] The final step in the analysis is to review the relevant circumstances to determine whether they indicate that disclosure would be an unreasonable invasion of the personal privacy of the employees of the company, or whether they rebut the presumption of unreasonable invasion of third party privacy with respect to the annual leave of the employee of the public body.

Section 22(2)––Relevant circumstances

[60] None of the parties have cited any provisions of s. 22(2) of FIPPA that apply, and I cannot see how any apply.

[23] [2012] B.C.I.P.C.D. No.1 at para. 36.

[61] With respect to the names of the employees of the company, one other relevant circumstance is that the names have been included in the email correspondence in their professional capacity as employees of the company, rather than in a strictly personal and private capacity. This argues in favour of the disclosure of their names.

[62] With respect to the annual leave of the employee of the public body, there are no circumstances that rebut the presumption that disclosure would be an unreasonable invasion of their personal privacy.

Conclusion

[63] I find that s. 22(1) of FIPPA applies to the details of the annual leave of the employee of the public body. I find that s. 22(1) does not apply to the names of the employees of the company or the business telephone number of the physician. I have marked in green the passages that the Ministries must disclose.

CONCLUSION

[64] For the reasons discussed above, I make the following orders under s. 58 of FIPPA:

1. Subject to para. 5 below, I authorize MoH to refuse to disclose, in accordance with ss. 13(1), 16(1), and 17(1) of FIPPA the information in the requested record.

2. Subject to para. 5 below, I authorize MCS to refuse to disclose, in accordance with ss. 13(1), 14 and 17(1) of FIPPA the information in the requested record.

3. Subject to para. 5 below, I require MoH to refuse to disclose, in accordance with ss. 21(1) and 22(1) of FIPPA the information in the requested record.

4. Subject to para. 5 below, I require MCS to refuse to disclose, in accordance with ss. 21(1) and 22(1) of FIPPA the information in the requested record.

5. I require MoH and MCS to disclose to the applicant the information highlighted in green in copies provided to MoH and MCS with a copy of this order.

6. I require MoH and MCS to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", which is on or before March 8, 2013. MoH and MCS must concurrently copy me on its cover letter to the applicant, together with a copy of the records.

January 25, 2013

ORIGINAL SIGNED BY

Michael McEvoy
Assistant Commissioner

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F10-42588