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Order F14-08

VANCOUVER COASTAL HEALTH AUTHORITY

Hamish Flanagan
Adjudicator

March 6, 2014

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Summary: A resident at a VCHA supportive housing facility requested all information relating to him from VCHA. VCHA disclosed some information but withheld parts of two Occupational Safety and Health reports on the basis that disclosure would be an unreasonable invasion of the privacy of a third party caregiver. The adjudicator required VCHA to continue to withhold the information in the reports.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s.22

Authorities Considered: B.C. Order F13-09, 2013 BCIPC 10 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII); Order 00-53, 2000 CanLII 14418; Order 03-12, 2003 CanLII 49180; Order F09-23, 2009 CanLII 66962; Order F06-06, 2006 CanLII 32975; Order F09-19, 2009 CanLII 63567; Order 01-53, 2001 CanLII 21607; Order F12-12, 2012 BCIPC 17 (CanLII); Order 01-07, 2001 CanLII 21561; Order 03-21, 2003 CanLII 49195; Order 01-37, 2001 CanLII 21591; Order F11-05, 2011 BCIPC 5 (CanLII); Order 01-19, 2001 CanLII 21573; Order F13-08, 2013 BCIPC 9 (CanLII); Order F07-19, 2007 CanLII 42408.

INTRODUCTION

[1] The applicant is a resident of a Vancouver Coastal Health Authority (“VCHA”) supported housing facility operated by a third party service provider. He requested access to information relating to him from VCHA.

[2] VCHA disclosed some information, but is withholding a small amount of information in two Occupational Safety and Health (“OSH”) reports created following an incident at the facility involving a caregiver, the applicant’s mother and himself. VCHA is withholding this information on the basis that disclosure would be an unreasonable invasion of the privacy of the caregiver within the meaning of s. 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[3] The applicant requested the Office of the Information and Privacy Commissioner (“OIPC”) review VCHA’s decision to withhold the information in the two reports. OIPC mediation did not resolve the issue, and the matter proceeded to this inquiry under Part 5 of FIPPA.

ISSUE

[4] The issue in this inquiry is whether VCHA is required to withhold information in two OSH reports because disclosure would be an unreasonable invasion of a caregiver’s personal privacy under s. 22 of FIPPA.

DISCUSSION

Information in Dispute

[5] The information in dispute is contained in an OSH incident report (“incident report”) and an (“OSH”) incident follow-up report (“follow-up report”). A total of four excerpts are being withheld. Two clauses are withheld from the incident report, and a clause and a sentence are withheld from the follow-up report. The rest of the information in the reports has been disclosed.

Position of the Parties

[6] VCHA submits that disclosing the withheld information would be an unreasonable invasion of the caregiver’s personal privacy under s. 22 of FIPPA.

[7] The applicant submits that he is entitled to the withheld information because it is his personal information and he needs it to address untrue statements made about him that could affect his care.

Approach to s. 22

[8] Section 22 is a mandatory exception requiring VCHA to refuse to disclose personal information to the applicant if the disclosure would be an unreasonable

invasion of a third party's personal privacy. The proper approach to s. 22 involves four steps that involve answering the following four questions:¹

1. Is the information personal information?
2. If it is personal information, does it meet any of the criteria identified in s. 22(4), where disclosure would not be an unreasonable invasion of third-party personal privacy?
3. If none of the s. 22(4) criteria apply, would disclosure of the information fall within any of the criteria in s. 22(3), whereby it would be presumed to be an unreasonable invasion of third-party privacy?
4. If s. 22(3) criteria apply, after considering all relevant circumstances, including those listed in s. 22(2), is any presumption rebutted?

Personal Information and Section 22(4) Factors

[9] The applicant's submission is that the withheld information is personal information about him and in some cases his mother. VCHA submits that the information is the personal information of the caregiver only.

[10] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.² Based on my review of the withheld information, I conclude it is the personal information of the caregiver for the purpose of s. 22. This means that the burden of proof is on the applicant to prove that disclosure of the information would not unreasonably invade the caregiver's personal privacy.³

[11] The definition of personal information makes it possible for information to be the personal information of more than one person. In this case, some of the withheld information is also the personal information of the applicant and/or the applicant's mother. In particular, the withheld information in the incident report is the personal information of the applicant's mother because the information is about the caregiver's feelings related to the applicant's mother. The first piece of withheld information in the follow-up report contains the caregiver's feelings in relation to the applicant and his mother, so it is the personal information of the applicant's mother and the applicant as well as the caregiver. The second piece of information in the follow-up report is not information about the applicant or his mother; it is solely the personal information of the caregiver.

¹ Order F13-09, 2013 BCIPC 10 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII) et al.

² Schedule 1 of FIPPA.

³ Section 57(2) of FIPPA.

[12] Section 22(4) sets out when disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. One example is where a third party consents to disclosure.⁴ In this case, an affidavit from the applicant's mother consents to disclosure to the applicant of any personal information about her in the withheld records. Therefore, disclosure of the withheld information would not be an unreasonable invasion of the applicant's mother's personal information. However, all of the mother's personal information is also the personal information of the caregiver. As the caregiver has not also consented to its disclosure under s. 22(4), the mother's consent does not allow disclosure of any of the withheld information to occur under s. 22(4). The remaining factors in s. 22 must be considered before any disclosure could occur.

[13] I find that there are no other s. 22(4) factors that apply to the withheld information.

Presumption of Invasion of Privacy – s. 22(3)

[14] Section 22(3) provides the circumstances in which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. It states in part:

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,

...

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

[15] VCHA says that s. 22(3)(a) applies to the withheld information in the incident report and the first piece of withheld information in the follow-up report, that s. 22(3)(d) applies to all the withheld information, and that s. 22(3)(g) applies to the second piece of information in the follow-up report. The applicant says that no s. 22(3) presumptions apply.

⁴ Section 24(4)(a) of FIPPA.

Does s. 22(3)(a) apply to the withheld information?

[16] I am not satisfied that this presumption applies to any of the withheld information. The information VCHA suggested this provision applied to reveals the caregiver's transitory emotions in relation to a particular incident. Without downplaying the personal nature of the information, from my review of the words of s. 22(3)(a) and its application in previous orders,⁵ the information is not subject to this presumption.

Does the withheld information fall within s. 22(3)(d)?

[17] Disclosing a third party's employment history is a presumed invasion of that person's privacy under s. 22(3)(d). Order 04-33⁶ distinguished between information that related to the duties and functions of third parties as public body employees, which is not covered by s. 22(3)(d), and information that relates solely to their past jobs, their individual actions, reactions, personal views, behaviour and other employment history, which is covered by s. 22(3)(d).

[18] Having reviewed the withheld information in the reports I am satisfied that the personal information relates to employment history under s. 22(3)(d). The withheld information in the incident report and the first piece of information in the follow-up report are the caregiver's evaluations of her emotional state arising from her involvement in workplace incidents. They are not merely statements of what the caregiver said or did in the course of discharging her work duties. The second piece of withheld information in the follow-up report is about an individual action to be taken by the caregiver in the course of her employment in response to the incident in her workplace. The information falls under s. 22(3)(d), so disclosure of this information is presumed to be an unreasonable invasion of third-party privacy.

Does the withheld information fall within s. 22(3)(g)?

[19] VCHA argues that the second piece of withheld information in the follow-up report also falls within s. 22(3)(g). Previous orders have held that in order to come within this section, the information must be evaluative of the third party's performance in the workplace.⁷ In the context in which the information appears in the OSH follow-up report, I am satisfied the second piece of withheld information in the follow-up report is evaluative and therefore falls within s. 22(3)(g) FIPPA.

⁵ See for example Order 00-53, 2000 CanLII 14418 at para. 38; Order 03-12, 2003 CanLII 49180; Order F09-23, 2009 CanLII 66962; Order F06-06, 2006 CanLII 32975; Order F09-19, 2009 CanLII 63567.

⁶ At paras. 28-29. See also Order 01-53, 2001 CanLII 21607 at para. 40; Order F12-12, 2012 BCIPC 17 (CanLII) at paras. 25-29.

⁷ See for example Order 01-07, 2001 CanLII 21561.

[20] In summary, disclosure of the withheld information is presumed to be unreasonable in this case. The presumption in s. 22(3)(d) applies to all of the withheld information, and the s. 22(3)(g) presumption also applies to the second piece of personal information in the follow-up report.

Other Factors – s. 22(2)

[21] The presumption that disclosure of the withheld information would be unreasonable can be rebutted. Section 22(2) states that public bodies must consider all relevant factors in determining whether disclosure of personal information is an unreasonable invasion of privacy, including certain specific factors. The factors listed in s. 22(2) that are at issue in this case are:

...

- (c) the personal information is relevant to a fair determination of the applicant's rights,

...

- (e) the third party will be exposed unfairly to financial or other harm,
- (f) the personal information has been supplied in confidence,
- (g) the personal information is likely to be inaccurate or unreliable, and
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, ...

[22] VCHA says that only s. 22(2)(e) is relevant to the information. The applicant disagrees that s. 22(2)(e) is a factor. The applicant also says that the other s. 22(2) factors listed above rebut any s. 22(3) presumptions that may arise. I will consider the s. 22(2) factors in turn.

Fair determination of applicant's rights - s. 22(2)(c)

[23] For this section to apply, the applicant must have at stake a legal right related to a proceeding which is existing or contemplated, not one that is completed; the personal information in issue must have some bearing on or be significant to the determination of the right in question; and the personal information must be required to prepare for the proceeding or to ensure an impartial hearing.⁸

[24] VCHA says s. 22(2)(c) does not apply because the information in issue is not the applicant's personal information.

⁸ See for example Order 03-21, 2003 CanLII 49195 at paras. 31-32.

[25] I earlier found one piece of withheld information was the applicant's personal information. However, my review of that piece of information, and the other withheld information satisfies me that at the time of the inquiry, given the nature of the information, the applicant had no live issue or legal rights at stake to which the withheld information might be relevant, as contemplated by s. 22(2)(c). Section 22(2)(c) is not relevant here.

Unfair exposure to harm - s. 22(2)(e)

[26] Section 22(2)(e) is a relevant factor if disclosure of the information would unfairly expose a third party to financial or other harm. Previous orders, such as Order 01-37, have stated that harm under s. 22(2)(e) includes "serious mental distress or anguish or harassment".⁹

[27] VCHA states that releasing the withheld information would cause the caregiver "other harm" namely mental distress or anguish or harassment. It says this will occur because releasing the information would:

- 1) reveal intimate personal details about the caregiver including her psychological state; and
- 2) the harm would be exacerbated because:
 - a. release would be to the applicant who was involved in the incident that led to the creation of the information; and
 - b. by virtue of her job function, the caregiver has an ongoing relationship with the applicant.

[28] The applicant challenges whether any harm to the caregiver could satisfy the threshold for harm set out in previous orders and also says that VCHA did not provide affidavit evidence to establish the harm to the caregiver VCHA asserts. The applicant also supplied evidence that the third party operator of the applicant's supportive housing facility changed after submissions in this inquiry closed.¹⁰ They submit this means the caregiver will no longer have an ongoing relationship with the applicant.

[29] Having reviewed the information in issue, I accept that releasing it may cause the caregiver some upset, but I am not satisfied disclosure would expose her to harm of the type typically required to significantly affect the weighing of interests under s. 22. VCHA has not provided direct evidence from the caregiver that exposure to harm would occur if the information is released. I also accept that in the circumstances the caregiver and the applicant are unlikely to have an

⁹ Order 01-37, 2001 CanLII 21591 at para. 42.

¹⁰ This information was admitted to the inquiry by the OIPC after giving VCHA the opportunity to object to its admission and the opportunity to comment on it.

ongoing relationship such that the caregiver is likely to be exposed to harassment or other harm. This factor therefore has little weight in this inquiry.

Information supplied in confidence- s. 22(2)(f)

[30] The confidential supply of information is not a bar to disclosure, but it is one relevant factor in deciding whether s. 22(1) applies.¹¹ The applicant submits that the withheld information was not supplied in confidence, which weighs in favour of disclosure. Confidentiality was not addressed by VCHA.

[31] The reports do not contain an explicit statement of confidentiality. It is also clear that the reports were shared with several staff involved in responding to them. However, the reports contain several parties' personal information in the context of the provision of medical care. This type of information is typically treated confidentially, though not to the extent that the person whose personal information it is should not have access to it. Weighing all the considerations, confidentiality is not a significant factor in favour of withholding the information.

Inaccurate or Unreliable information and Unfair Damage to Reputation – s. 22(2)(g) and s.22(2)(h)

[32] The applicant is concerned about inaccuracies in records about him and argues he needs access to the withheld information to address any inaccuracies. The applicant argues these two factors weigh in favour of disclosure because without access to the withheld information he cannot address potential inaccuracies in, and any resulting damage to his reputation from, the withheld information.

[33] Section 22(2)(g) and (h) are intended to prevent the harm that can flow from disclosing personal information about a person that may be inaccurate or unreliable, or may unfairly damage that person's reputation. An example of the former is that a public body's records may contain unfounded rumours about someone, the disclosure of which could embarrass that individual.¹² The applicant's concerns about potential harmful effects of non-disclosure are not intended to be weighed under these subsections.¹³ The applicant's concerns can be considered under s. 22 generally, and are considered below. Sections 22(2)(g) and (h) are not relevant factors in this inquiry.

¹¹ Order F11-05, 2011 BCIPC 5 at para. 40.

¹² Order 01-19, 2001 CanLII 21573 at para. 42.

¹³ See for example, Order 01-19, 2001 CanLII 21573; Order F13-08, 2013 BCIPC 9 (CanLII) at para. 53; Order F11-05, 2011 BCIPC 5 (CanLII) at para. 33; Order F07-19, 2007 CanLII 42408 at para. 54.

Other factors

[34] As noted above, the applicant argues complete disclosure of the information is necessary to correct any inaccuracies and to potentially take other actions. I place little weight on this factor, because only one piece of the withheld information is the applicant's personal information. Further, having reviewed the withheld information, it is not susceptible to challenge or change. The withheld information comprises the caregiver's subjective emotional response to an incident and a future action the caregiver is responsible for arising out of the incident. Releasing the withheld information to the applicant will not assist the applicant's efforts to correct information about him.

Section 22(1)

[35] To summarize, the records in dispute contain personal information. All of the information is subject to one or more presumptions under s. 22(3) that disclosure would be an unreasonable invasion of third-party privacy. Overall, the relevant factors, including those listed in s. 22(2), do not rebut the presumption that disclosure of the withheld information would be an unreasonable invasion of the personal privacy of the caregiver under s. 22(1).

Severance of the applicant's personal information

[36] If the applicant's personal information can reasonably be severed from the caregiver's personal information, the applicant has the right to access that information under s. 4(2) of FIPPA. I find that the withheld information of the applicant and his mother is inextricably intertwined with the personal information of the caregiver, and cannot reasonably be severed such that the applicant's personal information can be disclosed.

CONCLUSION

[37] For the reasons given above, under s. 58 of FIPPA, I order that VCHA is required to refuse to disclose to the applicant those portions of the report that it is withholding under s. 22 of FIPPA.

March 6, 2014

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator