



OFFICE OF THE  
INFORMATION & PRIVACY  
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Order F14-27

## VANCOUVER ISLAND HEALTH AUTHORITY

Ross Alexander  
Adjudicator

July 28, 2014

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**Summary:** The applicant requested information from the Vancouver Island Health Authority relating to VIHA's decision-making process concerning fixed site needle exchange services in Greater Victoria. VIHA withheld information under ss. 12(3)(b), 13, 14 and 22 of FIPPA. It also withheld other information on the basis that the information was outside of the scope of the applicant's request. The adjudicator was not satisfied that s. 12(3)(b) applies. However, he determined that ss. 14 and 22 apply to all of the information withheld under those sections and that s. 13 applies to most of the information withheld under that section. The adjudicator also ordered VIHA to process the applicant's request for the information it had marked out of scope.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 4, 12(3)(b), 13, 14 and 22.

**Authorities Considered:** **B.C.:** Order F14-07, 2014 BCIPC 8 (CanLII), [2014] B.C.I.P.C.D. No. 8 (QL); Order F13-10, 2013 BCIPC 11 (CanLII), [2013] B.C.I.P.C.D. No. 11 (QL); ); Order F09-02, 2009 CanLII 42408, [2009] B.C.I.P.C.D. No. 3 (QL). **ALTA.:** Order F2004-015, 2005 CanLII 78658 (AB OIPC), [2005] A.I.P.C.D. No. 13 (QL).

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

## INTRODUCTION

[1] This inquiry is about an applicant's request to the Vancouver Island Health Authority ("VIHA") for records related to VIHA's decision-making process from

February 2008 to August 16, 2010 concerning fixed site needle exchange services in Greater Victoria.

[2] VIHA initially disclosed some records to the applicant, but withheld information under ss. 12(3)(b), 13 and 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[3] The applicant made a request for review to the Office of the Information and Privacy Commissioner (“OIPC”) about VIHA’s decision to withhold information. During the OIPC review process, VIHA identified additional responsive records and disclosed additional information to the applicant. It is now withholding parts of the records on the basis that they contain information that reveals the substance of an *in camera* meeting authorized by statute (s. 12(3)(b)), reveals policy advice or recommendations (s. 13), is subject to solicitor client privilege (s. 14), could reasonably be expected to harm the business interests of a third party (s. 21), would be an unreasonable invasion of a third party’s personal privacy if disclosed (s. 22), or is outside the scope of the applicant’s request.

[4] The applicant does not seek the information withheld under s. 21, or the email addresses of individuals or their personal information (withheld under s. 22). However, the other issues remain in dispute and the applicant seeks confirmation that VIHA is not withholding other types of information under s. 22, so the applicant requested that this matter proceed to an inquiry under Part 5 of FIPPA.

## ISSUES

[5] The issues in this inquiry are as follows:

1. Is VIHA authorized to refuse to disclose information because disclosure would reveal the substance of deliberations of an *in camera* meeting within the meaning of s. 12(3)(b) of FIPPA?
2. Is VIHA authorized to refuse to disclose information because disclosure would reveal advice or recommendations under s. 13 of FIPPA?
3. Is VIHA authorized to refuse to disclose information because it is subject to solicitor client privilege under s. 14 of FIPPA?
4. Is VIHA required to refuse to disclose information because disclosure would unreasonably invade a third party’s personal privacy under s. 22 of FIPPA?

[6] Pursuant to s. 57(1) of FIPPA, VIHA has the burden of proof to establish that ss. 12(3)(b), 13 or 14 authorizes it to withhold the requested information. However, s. 57(2) of FIPPA places the burden of proof on the applicant to establish that disclosure of personal information would not be an unreasonable invasion of third party personal privacy under s. 22 of FIPPA.

[7] In addition to the issues listed above, there is a preliminary matter about the information VIHA identified as outside of the scope of the request that I will address first.

## DISCUSSION

### *Records at Issue*

[8] There are a significant number of records responsive to the applicant's request, most of which VIHA has already disclosed to the applicant. Most of the records are emails, but there are also other records such as meeting minutes, briefing notes, letters and a legal opinion. While VIHA has severed full pages in some instances, most of the withheld information is excerpts of parts of pages that have otherwise already been disclosed to the applicant.

### *Preliminary Matter*

[9] The responsive records contain a number of excerpts that VIHA withholds on the basis they are “out of scope” of the applicant’s request. While the applicant has confirmed that he is not seeking certain information withheld by VIHA, he wants to ensure that the provisions of FIPPA are properly applied to the other information withheld from him. I will therefore consider this information that is marked “out of scope”.

[10] While the information marked “out of scope” in the responsive records may not itself be responsive to the applicant’s request, VIHA cannot properly withhold it from the applicant on the basis that it is “out of scope”. This is because the information is contained in records that are responsive to the applicant’s request. This approach is consistent with ss. 4(1) and (2) of FIPPA, which state:

- 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.
- (2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

*[Emphasis and Underlining Added]*

[11] The Legislature confers a right to access to “records” under s. 4(1) of FIPPA, which is subject to information excepted from disclosure under Division 2, Part 2 of FIPPA. These exceptions to disclosure each relate to “information” rather than “records”. Therefore, even if only a portion of a record is responsive to an applicant’s request, the public body is required to disclose all of the information in that responsive record unless an exception to disclosure applies.

[12] The requirement for a public body to disclose an entire responsive record to an applicant,<sup>1</sup> as opposed to only the responsive information in that record, may result in the public body disclosing more information than if it was only required to disclose responsive “information”. This broader disclosure makes it less likely that there will be a misunderstanding about the real weight or meaning of the disclosed information due to it being out of context. It also helps prevent access requests from being interpreted too narrowly.<sup>2</sup> This more fulsome disclosure is consistent with the stated purpose in s. 2 of FIPPA to make public bodies more accountable, as well as the requirement in s. 6 of FIPPA that public bodies must respond to applicants openly, accurately and completely.

[13] For the above reasons, I find that VIHA is required to process the applicant’s request for the information it marked as “out of scope” and respond to the applicant about whether the information is subject to an exception from disclosure under Part 2 of FIPPA. If no exceptions apply to the information, then the information in the records must be released to the applicant.

### ***Local public body confidences – s. 12(3)(b)***

[14] VIHA is withholding part of the minutes of a VIHA Health Quality Committee meeting pursuant to s. 12(3)(b) of FIPPA.<sup>3</sup> This section authorizes public bodies to withhold the substance of deliberations of *in camera* council meetings.<sup>4</sup> It states:

12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal

...

(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

<sup>1</sup> Subject, of course, to the types of information exempted from disclosure under FIPPA.

<sup>2</sup> For clarity, I am not suggesting that these concerns are present in this case, or that there is information marked “out of scope” that could not be withheld under an exception in Division 2, Part 2.

<sup>3</sup> 1-45 and 1-46 (also numbered as 2010-252-045 and 2010-252-045)

<sup>4</sup> Section 12(3)(b) is subject to s. 12(4). However, there is no suggestion that s. 12(4) applies in this case.

[15] Previous orders have established three requirements that must be met in order for s. 12(3)(b) to apply:

- 1) there was statutory authority to meet in the absence of the public;
- 2) a meeting was actually held in the absence of the public; and
- 3) the information would, if disclosed, reveal the substance of deliberations of the meeting.<sup>5</sup>

[16] VIHA submits it is authorized to hold meetings in the absence of the public under s. 8(3) of the *Health Authorities Act*, and that it was appropriate for the *in camera* portion of the meeting at issue here to be held in private. VIHA further submits that the *in camera* portion of the meeting minutes was appropriately withheld because disclosure of this information would reveal sensitive deliberations that, if disclosed, would compromise the board's ability to effectively deliberate on matters before them.

[17] The applicant submits that s. 8(3) of the *Health Authorities Act* entitles VIHA's board to meet in the absence of the public, but that it is a qualified right that favours open meetings. He also submits VIHA is required to prove that the meeting was held *in camera*, that it was properly held *in camera*, and that the information withheld concerns the substance of deliberations.

[18] The first condition that must be met is that there was a statutory authority to meet in the absence of the public. Both parties refer to s. 8(3) of the *Health Authorities Act*, which states:

Meetings of a board are open to the public, but the board may exclude the public from a meeting if the board considers that, in order to protect the interests of a person or the public interest, the desirability of avoiding disclosure of information to be presented outweighs the desirability of public disclosure of the information. [Underline added]

[19] Subsection 8(3) of the *Health Authorities Act* relates to meetings of a "board", which that Act defines as a regional health board designated under s. 4 of that Act. However, the record at issue is the meeting minutes of the Health Quality Committee, not VIHA's board.

[20] Former Alberta Information and Privacy Commissioner Work addressed a similar issue in Alberta Order F2004-015.<sup>6</sup> In that order, a school district submitted that Alberta's statutory equivalent to s. 12(3)(b) of BC's FIPPA<sup>7</sup> applied

<sup>5</sup> See, for example, Order F14-07, 2014 BCIPC 8 (CanLII), at para. 12 and Order F13-10, 2013 BCIPC No. 11 at para. 8.

<sup>6</sup> 2005 CanLII 78658 (AB OIPC).

<sup>7</sup> Section 23(1)(b) of the Alberta *Freedom of Information and Protection of Privacy Act*.

to the meeting minutes of a committee of the school district's board of trustees because Alberta's *School Act* provided authority for "meetings of a board" to meet *in camera*. Commissioner Work determined that the committee meeting minutes could not be withheld on this basis, stating:

I cannot conclude that this section gives the required authority in this case. First, though the trustees who comprised the 'Conference Committee' of the Board were the same people who comprised the Board (in the meeting that immediately followed), I do not know if the 'Conference Committee' can be equated with the Board for the purposes of section 70. Therefore I cannot say that section 70 applies. Second, the Public Body says that it is common practice for boards of trustees to hold meetings *in camera* when they discuss individual students or personnel issues. However, there is nothing in the minutes themselves nor in any other material presented to me that allows me to know whether in the case of the meeting in question, the trustees asked themselves if the public interest would be served by holding the meeting in private, and passed a resolution to that effect, as the *School Act* requires. Because of this lack of clarity about whether section 70 of the *School Act* applies, and whether the Board or its committee complied with it, I am unwilling to permit reliance on section 23(1)(b) for refusal to disclose the records of its deliberations by reference to *School Act* section 70.<sup>8</sup>

[21] Similar to Alberta Order F2004-015, I am unable to conclude in this case that s. 8(3) of the *Health Authorities Act* provides the required authority for the Health Quality Committee to meet *in camera*.<sup>9</sup> VIHA has not demonstrated that the Health Quality Committee meeting is, in fact, a "meeting of the board" as set out in s. 8(3) of the *Health Authorities Act*. Further, unlike Alberta Order F2004-015 in which the committee members are all also board members, it is apparent from the record that most of the committee members in this case are not board members of VIHA. In my view, this makes the applicability of the statutory authority authorizing the board to meet *in camera* even less certain for the committee here than in Alberta Order F2004-015. Therefore, while I do not foreclose the possibility that the Health Quality Committee has the authority to meet *in camera*, I am not satisfied based on the materials before me that the committee had the statutory authority to meet *in camera*. Further, it appears from the record that the Health Quality Committee intended to discuss at least some of the withheld information at issue at a public portion of the meeting. Therefore, absent evidence about whether the committee considered it to be desirable to avoid disclosure of the information in order to protect the interests of

<sup>8</sup> 2005 CanLII 78658 (AB OIPC), at para. 36.

<sup>9</sup> I also note that s. 8(2) of the *Health Authorities Act* enables VIHA's board to pass bylaws (approved by the Minister) regarding the control and conduct of board meetings, and to establish committees and specify the functions and duties of those committees, among other powers. However, the parties did not provide submissions on this point, and I have not been able to conclude that there is a bylaw that provides the required authority within the meaning of s. 12(3)(b).

a person or the public interest, I question whether the committee considered whether it ought to meet *in camera* to discuss the information that is at issue even if s. 8(3) of the *Health Authorities Act* applied.

[22] Given my finding that the first requirement condition for s. 12(3)(b) has not been met, it is not necessary for me to consider the other conditions. For the above reasons, I am not satisfied that s. 12(3)(b) applies to the VIHA Health Quality Committee meeting minutes at issue.<sup>10</sup>

### ***Policy Advice or Recommendations – s. 13***

[23] Section 13(1) authorizes public bodies to “refuse to disclose information that would reveal advice or recommendations developed by or for a public body”, as long as it does not fall under any of the exceptions listed in s. 13(2).

[24] Previous orders have stated that the purpose of s. 13(1) “is to protect a public body's internal decision-making and policy-making processes by encouraging the free and frank flow of advice and recommendations.”<sup>11</sup>

[25] The applicant submits VIHA has withheld information under s. 13 that is not advice or recommendations within the meaning of s. 13.<sup>12</sup> Further, he requests that any information falling under s. 13(2) be disclosed. He also submits that VIHA has applied s. 13 in a blanket matter, in that it has not properly exercised its discretion about whether to withhold this information.

[26] VIHA submits it is withholding information that would reveal advice or recommendations developed by or for a public body. On the issue of discretion, VIHA submits that it considered the intent of s. 13 and exercised its discretion to release information that may have been addressed in the public domain or where disclosure of the information would not harm its interests. VIHA states it has already disclosed information to the applicant that it originally withheld under s. 13 as a result of exercising its discretion.

[27] Most of the information VIHA is withholding under s. 13 is the discussion and options components of briefing notes, or proposed changes to that information.<sup>13</sup> VIHA has also severed a short excerpt from an email (containing a suggestion about how VIHA should proceed with a certain issue) and a handwritten note (providing details about an option for another issue).<sup>14</sup> I find

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<sup>10</sup> 1-45 and 1-46 (also numbered as 2010-252-045 and 2010-252-045).

<sup>11</sup> Order F09-02, 2009 CanLII 42408 (BC IPC), at para. 10.

<sup>12</sup> The applicant's submission specifically refers to two pages that in his view do not fall within the scope of s. 13. VIHA has since disclosed both of those pages to the applicant.

<sup>13</sup> 1-20, 1-23 to 28, and 2-222.

<sup>14</sup> 1-3 and 2-135.

that all of this information is clearly advice or recommendations within the meaning of s. 13(1).

[28] VIHA is also withholding draft meeting minutes of the Victoria Needle Exchange Services Advisory Committee, which is a committee of stakeholders that VIHA formed to provide it with guidance and recommendations about needle exchange services.<sup>15</sup> Based on my review of the meeting minutes, I find that most of the withheld information is advice or recommendations developed by or for VIHA because it is discussion relating to what issues and recommendations the committee should provide VIHA. However, s. 13 does not apply to some of the information because it is merely about what happened at the meeting and does not reveal advice or recommendations under s. 13(1).<sup>16</sup>

[29] VIHA is also withholding an email from a stakeholder to a VIHA employee, which contains an offer to assist the employee with an issue and asks for a meeting with the employee. In my view, the information in this email does not reveal advice or recommendations developed by or for a public body, so I find that s. 13(1) of FIPPA does not apply.<sup>17</sup>

[30] The remainder of the information withheld under s. 13 is two different excerpts from an email chain between members of the Victoria Needle Exchange Services Advisory Committee discussing information the committee needed for its next meeting.<sup>18</sup> The first excerpt states the opinions of two people about an issue the committee was considering, and the second excerpt states information that may be relevant to an issue the committee was considering.

[31] In my view, considering the precise context and content of the opinions and whose opinions are referenced, I find the first withheld excerpt contains advice or recommendations. The second excerpt contains the opinion of the author of the email about an event, a statement about the outcome of that event, and the author's belief about what action a third party intended to take. Considering the context of the second excerpt withheld in the email, and the content of the statement and the issue being considered by the committee, I find that disclosure of this information would enable an accurate inference to be drawn as to advice or recommendations developed by or for a public body. I therefore find that disclosure of this excerpt would reveal advice or recommendations developed by or for a public body within the meaning of s. 13(1).

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<sup>15</sup> 1-31 to 36. Information about the formation and purpose of this committee has already been disclosed to the applicant at 1-22 and 1-31.

<sup>16</sup> 1-32.

<sup>17</sup> 200933900006.

<sup>18</sup> 200933900001, 200933900004 to 200933900005. Most of this email chain has already been disclosed to the applicant, so this is known to him.



[32] Public bodies must not refuse to disclose information under s. 13(1) if any of the circumstances in s. 13(2) apply. VIHA did not make submissions with respect to s. 13(2). The applicant states that he is unable to identify all of the s. 13(2) categories that may apply to the withheld information because he does not have access to the withheld information. However, he identifies ss. 13(2)(a), (i), (j), (k) and (l) as provisions that may apply to the withheld information. These provisions state that a public body must not refuse to disclose under s. 13(1):

- (a) any factual material,
- ...
- (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
- (j) a report on the results of field research undertaken before a policy proposal is formulated,
- (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,
- (l) a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body,
- ...

[33] Based on my review of the information that I found to be advice or recommendations under s. 13(1), I find none of the provisions in s. 13(2) apply. In my view, this information is not factual material within the meaning of s. 13(2)(a). Further, s. 13(2)(i) applies to feasibility or technical studies, s. 13(2)(j) applies to reports on the results of field research, s. 13(2)(k) applies to reports of committees and similar bodies, and s. 13(2)(l) applies to plans or proposals to establish or change a program or committee. However, none of these types of studies, reports or plans are part of the withheld records before me, so these provisions do not apply to the information before me.

[34] Further, I am also satisfied that VIHA exercised discretion about whether to withhold information under s. 13. I also commend VIHA for using its discretion to disclose some information to the applicant that is advice or recommendations, consistent with the purpose of accountability under s. 2 of FIPPA.

[35] In summary, I find that disclosure of most – but not all – of the information withheld under s. 13 would reveal advice or recommendations developed by or for a public body. I also find that s. 13(2) does not apply to any of the information withheld under s. 13, and that VIHA has properly exercised its discretion about whether to withhold information under s. 13. I therefore find that VIHA is authorized to withhold most of the information it is withholding under s. 13.

**Legal Advice – s. 14**

[36] Section 14 of FIPPA authorizes public bodies to withhold information that is subject to solicitor client privilege. VIHA is withholding one record under s. 14. VIHA submits that legal advice privilege applies to this record because it is correspondence where a legal advisor is providing advice, and there was a clear intention between VIHA and its lawyer that its contents would be confidential. The applicant did not make submissions on s. 14.

[37] The test for legal advice privilege is as follows:

[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 communications (and papers relating to it) are privileged.<sup>19</sup>

[38] The record at issue is a legal opinion to VIHA from its lawyer. Based on my review of the record withheld under s. 14, I find that it is a written communication of a confidential character between a client and a legal advisor. I also find that it directly relates to the seeking, formulating or giving of legal advice. Legal advice privilege applies to this record, and I therefore find that VIHA is authorized to withhold it under s. 14 of FIPPA.

**Disclosure Harmful to Personal Privacy – s. 22**

[39] Section 22 of FIPPA 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.

[40] In this case, VIHA is withholding a number of short excerpts of information under s. 22. The applicant states he is not seeking email addresses or personal

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<sup>19</sup> *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC). For example, see Order F13-10, 2013 BCIPC 11 (CanLII).

information of individuals, but he requested that I review the information severed under s. 22 to confirm that the withheld information only contains email addresses and personal information of third parties.

[41] I have reviewed the records at issue, and find that the information VIHA is withholding under s. 22 is email addresses and personal information of third parties. Given the applicant's submission that he does not seek this information, I will not consider whether s. 22 applies to it.

## CONCLUSION

For the reasons given above, under s. 58 of FIPPA, I order that VIHA is:

- (a) required to give the applicant a decision under FIPPA about whether he is entitled to have access to the information in the records before me that VIHA has marked “out of scope” by **September 10, 2014**;
- (b) required to disclose the information it is withholding under s. 12(3)(b);
- (c) authorized to refuse to disclose the information it is withholding under s. 13 of FIPPA, except as specified in (e);
- (d) authorized to refuse to disclose the information it is withholding under s. 14 of FIPPA; and
- (e) required to give the applicant access to the information that I have highlighted that will be sent to VIHA along with this decision by **September 10, 2014**, pursuant to s. 59 of FIPPA. VIHA must concurrently copy me on its cover letter to the applicants, together with a copy of the records it provides to the applicant.

July 28, 2014

## ORIGINAL SIGNED BY

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Ross Alexander  
Adjudicator

OIPC File No.: F11-44947