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Order F14-43

VANCOUVER COASTAL HEALTH AUTHORITY

Hamish Flanagan, Adjudicator

September 25, 2014

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Summary: The applicant requested access to his deceased father's health records from Vancouver Coastal Health Authority. VCHA withheld the responsive records on the basis that disclosure would be an unreasonable invasion of personal privacy under s. 22 of FIPPA. The adjudicator determined that VCHA was required to withhold all of the responsive records, except one, under s. 22 of FIPPA.

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

Authorities Considered: B.C.: Order F12-14, 2012 BCIPC 20 (CanLII); Order 01-20, 2001 CanLII 21574 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC), Order F06-14, 2006 CanLII 25574 (BC IPC); Investigation Report F13-05, 2013 CanLII 95961 (BC IPC); Order F13-09, 2013 BCIPC 10 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII); Order 02-44, 2002 CanLII 42478 (BC IPC); Order 02-23, 2002 CanLII 42448 (BC IPC); Order F14-09, 2014 BCIPC 11 (CanLII); Order F14-32, 2014 BCIPC 35 (CanLII); Order No. 200-1997, 1997 CanLII 719 (BC IPC).

INTRODUCTION

[1] The applicant requested a copy of his father's health records from the Vancouver Coastal Health Authority ("VCHA") for the period from July 2012 up to the date of his request for records in September 2012. The applicant's father ("father") died during this period.

[2] The applicant's request was accompanied by a copy of a will indicating that the applicant was executor of the father's estate. An executor is an "appropriate person" under s. 5 of the *Freedom of Information and Protection of Privacy Regulation* ("FIPPA Regulation") to exercise a deceased's rights to access to information on the deceased's behalf.[1]

[3] Before responding to the applicant's request, VCHA determined that the father had a more recent will than the one supplied by the applicant. That will revoked all previous wills and did not name the applicant as executor of his father's estate. VCHA therefore determined "appropriate person" status, under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for the purposes of s. 5 of the FIPPA Regulation, was held by the new executors appointed in the father's most recent will, not by the applicant. VCHA proceeded to consider the applicant's request for records on the basis that the request was made by the applicant as a third party, and not on behalf of his father. VCHA withheld the records from the applicant on the basis that disclosure would be an unreasonable invasion of the father's personal privacy under s. 22 of FIPPA.

[4] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review VCHA's decision. The applicant then raised s. 25 of FIPPA as a basis to require VCHA to release the records and also requested that the matter proceed to an inquiry without mediation. The OIPC granted the applicant's request for an inquiry.

[5] The applicant does not challenge VCHA proceeding on the basis that his request is as a third party and not on behalf of his father.[2] The applicant's request for the purpose of this inquiry therefore proceeds on the basis that he is a third party. This is consistent with the issues set out in the OIPC Investigator's Fact Report issued for the inquiry.

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[1] The exception to an executor being able to act on behalf of a deceased in s. 5 of the FIPPA Regulation is if there is a committee acting for the deceased under s. 24 of the *Patients Property Act.*

[2] The applicant's reply submission states that he intends to challenge the most recent will and attempt to be appointed executor. If he successfully does so, the applicant could make a new request for records on behalf of his father as an "appropriate person".

ISSUES

[6] This inquiry will consider whether VCHA must, without delay, disclose to the applicant the requested records under s. 25 of FIPPA. If the answer is no, it will consider whether VCHA is required to refuse to disclose information to the applicant because disclosure would be an unreasonable invasion of personal privacy of the father under s. 22 of FIPPA.

DISCUSSION

[7] **Records at issue**—The records are the father's health records for the period from July 2012 to September 2012.

[8] The records contain clinical charts, notes, medical certificates and test results which reveal the father's health information, including cause of death. Some of the records contain information about the father's family, including the applicant, arising from their involvement in his care.

Public Interest Disclosure — s. 25

[9] The applicant argues that the records should be disclosed because it is in the public interest under s. 25 of FIPPA. VCHA says s. 25 does not apply because the records are private in nature and have no bearing on the public interest.[3]

[10] Previous orders have discussed the application of s. 25,[4] and it was recently analyzed in an Investigation Report by Commissioner Denham.[5]

[11] The records contain the father's health information. The applicant does not explain why the records reveal a risk of significant harm to the environment or to the health or safety of the public or any group of people, as required under s. 25(1)(a), or why they reveal that disclosure is clearly in the public interest as required under s. 25(1)(b). I recognize the applicant's keen interest in the records, but this does not mean that it is "clearly in the public interest" to disclose them without delay.

[12] The applicant also offers no explanation as to why he believes there is a temporal urgency or a compelling need for disclosure of the records, as required by s. 25.[6]

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[3] VCHA initial submission at para. 26.
[4] See, for example, Order F12-14, 2012 BCIPC 20 (CanLII); Order 01-20, 2001 CanLII 21574 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC), Order F06-14, 2006 CanLII 25574 (BC IPC).
[5] Investigation Report F13-05, 2013 CanLII 95961 (BC IPC).
[6] Investigation Report F13-05, 2013 CanLII 95961 (BC IPC).

[13] It is clear to me from my review of the records that s. 25 does not apply to them, so I will proceed to consider the s. 22 exception to disclosure applied by VCHA to the withheld information.

The Parties' Positions

[14] VCHA submits that disclosure of the records would be an invasion of the father's privacy because they comprise his health care information, which is particularly sensitive information.[7]

[15] The applicant submits that disclosure of his father's personal information would not be an unreasonable invasion of privacy in the circumstances because:

a) the factors in ss. 22(2)(a),(b), (c) and (i) weigh in favour of releasing the records;

b) he had a right to access the records because he was his father's health care decision maker for a period of time before his father's death; and

c) he already knows some of the information in the records by virtue of his role as a family member involved in decisions about his father's health care.

Section 22

[16] Section 22(1) 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."

[17] Section 22 can be considered by answering the following questions:[8]

1) Is the information personal information?

2) If it is personal information, does it meet any of the criteria identified in s. 22(4)? If so, disclosure would not be an unreasonable invasion of third party personal privacy.

3) If none of the s. 22(4) criteria apply, do any of the presumptions in s. 22(3) apply? If so, disclosure is presumed to be an unreasonable invasion of third party privacy.

[7] VCHA initial submission at para. 25.
[8] See for example Order F13-09, 2013 BCIPC 10 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII).

4) If any s. 22(3) presumptions apply, are they rebutted after considering all relevant circumstances including those listed in s. 22(2)?

5) If no s. 22(3) presumptions apply, after considering all relevant circumstances including those listed in s. 22(2), would disclosure would be an unreasonable invasion of a third party's personal privacy?

Personal Information

[18] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information."[9]

[19] The information at issue is clearly personal information. The records contain the father's personal information, sometimes inextricably interwoven with that of others. For example, many of the records contain VCHA employees' opinions, evaluations or comments about the father's health. Other records contain information about the father's family members, including the applicant himself, as those family members had become involved in decisions about the father's care.

[20] The records contain a five page printout of a web page supplied by the applicant to VCHA. This record does not contain personal information except for a header at the top of the document that states the personal email address of the applicant. Because the document does not contain any personal information except the email address of the applicant, it does not contain the personal information of a "third party" so it does not need to be withheld. I am ordering this record disclosed; I need not refer to it further in discussing the application of s. 22 to the records.

[21] The document addressed in the previous paragraph aside, the information in issue is personal information of either the father or another third party. I will proceed to consider whether the s. 22 exception applies using the test I have set out above.

Disclosure is not unreasonable—s. 22(4)

[22] Section 22(4) sets out circumstances where disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. The parties did not identify any provisions of s. 22(4) that apply.

[23] The applicant says that his father consented to the sharing of the contents of his health records on various occasions. Section 22(4)(a) provides that

[9] Schedule 1 of FIPPA.

disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the third party consents to disclosure of the information. However, the applicant does not provide any evidence of the applicant's consent to disclosing the records in issue to him. Based on my review of the materials before me, none of the circumstances in s. 22(4) of FIPPA apply.

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

[24] Section 22(3) sets out the circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Therefore, the next step is to determine whether any of the presumptions set out in s. 22(3) apply.

[25] Section 22(3)(a) states that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. The applicant requested his father's health records, the contents of which I described above. The records clearly contain personal information whose disclosure is presumed to be an unreasonable invasion of his father's personal privacy under s. 22(3)(a) of FIPPA.[10]

Other relevant factors—s. 22(2)

[26] The s. 22(3)(a) presumption can be rebutted if a consideration of all relevant factors, including those in s. 22(2), indicates that disclosure would not be an unreasonable invasion of the father's personal privacy. The factors listed in s. 22(2) that the parties raise in this case are:

> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (f) the personal information has been supplied in confidence,
>
> …

[10] See Order 02-44, 2002 CanLII 42478 (BC IPC) at para. 43, for example, for a similar finding regarding patient records.

> (i) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

[27] VCHA argues s. 22(2)(f) is a relevant circumstance in this case because patients expect that their health records will be kept in confidence. The applicant states that ss. 22(2)(a) to (c) and (i) are relevant factors. I will discuss all of these factors in turn.

Public scrutiny and promotion of public health and safety— ss. 22(2)(a) and (b)

[28] The applicant argues these factors weigh in favour of releasing the information. He asserts that his father's care was negligent or substandard, and that exposing the care he received will prevent such poor care occurring for other VCHA patients, thereby promoting public health and safety.

[29] VCHA says the applicant has neither provided evidence to support his allegations about his father's care nor any argument as to how receiving a copy of his father's sensitive health information will subject the VCHA's activities to public scrutiny.

[30] Order 02-44[11] is relevant here. In that inquiry, the applicant believed her son's care may have been inadequate or substandard and that the public body's activities should therefore be subjected to scrutiny, in the interests of promoting "public health and safety by remedying the possible deficiencies in the care offered at a public hospital."[12] In Order 02-44 it was determined that the applicant had not provided evidence to support her allegations about her son's care. In further considering whether the applicant's argument supported the application of ss. 22(2)(a) and (b), former Commissioner Loukidelis stated that even if one assumed for argument's sake only, that review of the son's records might lead another health professional to disagree with some or all aspects of his treatment, or to say it was improper or deficient, he did not consider that the health information would disclose anything about the public body's activities that would materially contribute to or further public scrutiny of that public body. He went on to say that even if the information disclosed negligence on the part of the public body's staff, he did not agree that evidence of negligence in that one case would fit within s. 22(2)(a) or s. 22(2)(b).[13]

[11] 2002 CanLII 42478 (BC IPC).
[12] Order 02-44 at para. 47.
[13] Order 02-44 at para. 49.

[31] I do not believe ss. 22(2)(a) or (b) support disclosure. From my review of the records, and similarly to Commissioner Loukidelis in Order 02-44, I do not see how disclosure of the father's medical records would promote public health and safety or that disclosure of these sensitive records is desirable for subjecting VCHA's activities to public scrutiny.

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

[32] The applicant argues s. 22(2)(c) applies here. Previous orders[14] have outlined a four part test for the application of s. 22(2)(c) as follows:

> 1) The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
>
> 2) The right must be related to a proceeding which is either underway or is contemplated, not a proceeding that has already been completed;
>
> 3) The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
>
> 4) The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.

[33] The applicant's submission does not include information that addresses any of the parts of this test. From my review of the records and submissions, the elements of the four part test for the application of s. 22(2)(c) are not met, particularly because the applicant is a third party and not acting on behalf of his father. In my view it is difficult to see how obtaining his father's health records could assist the applicant in obtaining a fair determination of his own rights as required for s. 22(2)(c) to be relevant.

Confidential supply— s. 22(2)(f)

[34] VCHA states that the fact that information was gathered during medical treatment is evidence that the information was supplied in confidence and cites Order 02-44[15] in support.[16] As in Order 02-44,[17] VCHA did not place any evidence before me that the patient files were submitted explicitly in confidence. It did not, for example, provide affidavit evidence on this point from any treating medical staff. Nor did it point to any of the records in dispute in which one might

[14] See for example Order 02-23, 2002 CanLII 42448 (BC IPC) at para. 19.
[15] 2002 CanLII 42478 (BC IPC).
[16] Initial submission at para. 23.
[17] Order 02-44 at para. 46.

find recorded any assurances of confidentiality that staff may have provided to the father as a patient. I also note that much of the disputed information is not information that the father provided to his doctors; most is information generated by VCHA medical staff in the course of treatment. However, like in Order 02-44[18] and the cases that follow it,[19] I accept that health information typically is supplied implicitly in confidence because of its sensitive contents.

[35] While the information in the records was supplied in confidence, this does not mean that s. 22(2)(f) is a factor that supports withholding the information from the applicant.

[36] Here, unlike in Order 02-44 where the records demonstrated the applicant had little involvement with her son's care, the records demonstrate that the applicant was quite involved in decisions regarding his father's care. As a result the records show that medical staff verbally disclosed to the applicant general information contained in his father's health records. In effect, the father was supplying information to medical staff and they to him in confidence except with regard to the applicant, who was inside a circle of care with respect to his father.

[37] The parties agree the applicant was appointed as a temporary substitute decision maker[20] ("TSDM") for his father at one point. This appointment authorized the applicant to access all of the father's health information necessary for the applicant to make an informed decision about whether to give consent to health care on behalf of his father.[21] This is an express instruction that the applicant was entitled to receive access to his father's confidential information for the purpose of making medical decisions. This fact is relevant to any weight given to the generally confidential nature of the records with regard to the applicant's request.

[38] The applicant's submission also includes a document from his father's health records summarizing a family meeting he attended.[22] While there is no evidence about how the applicant obtained this record, it illustrates that medical professionals may not have consistently treated all of the records as confidential with respect to the applicant, presumably because of one or more of the circumstances mentioned above.

[39] Overall I place little weight on the implicit confidentiality that exists in the records because of the diminished confidentiality in the records in regard to the applicant.

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[18] Order 02-44 at para. 46.
[19] See for example Order F14-09 at para. 27 and Order F14-32, 2014 BCIPC 35 (CanLII) at para. 32.
[20] Under the the Health Care (Consent) and Care Facility (Admission) Act.
[21] Section 17(6) of the Health Care (Consent) and Care Facility (Admission) Act.
[22] Attachment B to the applicant's initial submission.

Information about a Deceased Person — s. 22(2)(i)

[40] Section 22(2)(i) requires public bodies to consider whether the length of time a person has been deceased indicates that disclosure of his or her personal information would not be an unreasonable invasion of privacy.

[41] VCHA's submission acknowledges that while privacy rights diminish over time, the relatively short time the father has been deceased do not diminish his privacy rights.[23] The father has been deceased for approximately two years. I agree that this is a short time relative to previous orders that found that disclosing information of a deceased person was not an unreasonable invasion of their privacy. [24] The relatively short period of time since the father died means that it is not a factor in favour of rebutting the presumption.

Other Relevant Factors

[42] The applicant argues that he should be given access to the records because he was designated as his father's TSDM under the *Health Care (Consent) and Care Facility (Admission) Act* ("HCCFA"). VCHA says that a TSDM under the HCCFA is authorized to access a patient's health information only insofar as the information is necessary to make an informed decision regarding a healthcare decision requiring substitute consent.[25] VCHA cites s. 17(6) of the HCCFA which provides:

> A person chosen [as a TSDM] has the right to all information and documents to which the adult is entitled and that are necessary for the person to make an informed decision [whether to give or refuse consent]

[43] VCHA says that the HCCFA does not authorize the applicant to access his father's records because it is not necessary for the applicant to access the requested information to make a decision about his father's healthcare. I agree with VCHA's interpretation of s. 17(6) of the HCCFA. While the applicant was a TSDM for his father at one time, the applicant no longer has a right under HCCFA to access the information at issue. However, I note that the applicant's status as a TSDM is still generally relevant, for example when considering the applicant's knowledge of the information in issue, a point I consider further below.

[44] When considering whether s. 22 applies to personal information of a deceased person, previous orders attempt to balance the needs of family members to deal with the death and its consequences, against the risk of an

[23] VCHA reply submission at para. 23.
[24] See the discussion in Order F14-09 at paras. 28-34.
[25] VCHA reply submission at para. 9.

unreasonable invasion of the deceased's privacy.[26] As such, previous orders have considered factors such as the applicant's purpose or motive for wanting the information, as well as their pre-existing knowledge of the information.[27]

[45] The purpose for why an applicant seeks information has been a factor both for and against disclosure.[28] VCHA says the applicant's motives are questionable because his submission makes several unsubstantiated allegations against his family members and VCHA. VCHA submits that the motive for obtaining the information is to further develop and repeat these allegations. I accept VCHA's concerns about the applicant's motives as they are substantiated by the materials in this inquiry. Balanced against that I also recognize that the applicant's request for records is ultimately motivated by a desire to substantiate his genuine belief his father was treated poorly by VCHA.

[46] I observe here that the nature of the records in issue means that their release is unlikely to assist the applicant if his motive is to establish that his father's treatment was improper or deficient. To this end I note the correspondence from VCHA's Patient Care Quality Office contained in the applicant's submissions[29] which demonstrate a sincere and thorough attempt by VCHA to address the applicant's concerns about the conduct of those providing care to the father, particularly near the end of his life. I recognize that the applicant may not trust VCHA given his view of the care they provided and wants to review records for himself, or to seek independent expert review of the records. Without prejudicing the applicant's rights under FIPPA to seek access to information, it is my view that the information in the correspondence from VCHA's Patient Care Quality Office provides more insight to the applicant into his father's care than the records in issue will do.

[47] An applicant's knowledge of the information at issue can be a factor in favour of disclosure.[30] VCHA acknowledges that the applicant was involved in his father's care and has some prior knowledge of his father's diagnosis and treatment. It argues however that the applicant did not have access to the sort of detailed health information it refers to as the father's "medical chart" that is contained in the records in issue. The applicant claims to already have received detailed medical information about his father from other health professionals including the father's doctor. The applicant's initial submissions include a copy of summary notes of a family meeting to discuss the father's health care[31] and a copy of information about a drug prescription issued to his father.

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[26] Order F14-09 at para. 36.
[27] F14-32, at para 39.
[28] F14-32, at para. 40.
[29] Attachment C to the applicant's initial submission.
[30] F14-32, at para. 42.
[31] Attachment A to the applicant's initial submission.

[48] I agree that the applicant's involvement and role in his father's care decisions means he has general knowledge of his father's condition and treatment. The applicant has also shown that he has some records that contain detailed health information about his father, which is consistent with his close relationship to his father and his involvement in his father's care.

[49] However, I also agree with VCHA that the applicant does not generally have the sort of detailed knowledge of his father's health information contained in the records. There is no evidence that VCHA has disclosed to the applicant copies of any of the more detailed records of the father. The evidence before me is that the applicant has a general knowledge of his father's health records that comes from various meetings and discussions with health care providers in the course of making care decisions, rather than knowledge of the mostly very detailed information in the records, such as patient charts.

[50] It is difficult to identify precisely what information in the records is known to the applicant. Further, where the records contain general information that is likely known to the applicant, it is intertwined with other information that the applicant does not know. This makes it impossible to separate out and disclose that information in the records that the applicant already knows. Nonetheless, that the applicant has knowledge of some of the withheld information is a relevant factor in favour of disclosure of this information.

[51] The impact of disclosing information at issue has also been considered in previous cases.[32] As stated in Order F14-09:

> An individual may not want family, friends or others to know certain details about them, some of which may change people's view or perceptions about them, or have other repercussions. These details frequently relate to medical information. The continuation of privacy rights after death recognizes the impact that disclosure of this information may have on others, and that the deceased may not want the information disclosed. However, this kind of impact often diminishes over time. Former Commissioner Flaherty addressed this point in Order No. 200-1997 with respect to an applicant seeking adoption records containing the name of her birth father who had been deceased for 46 years, stating that:
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> > Given that, in this case, the named individual was relatively young when he died, has likely been dead for forty-six years, there are no living siblings, the parents would be in their nineties (and therefore may not be alive) and the identities of former friends are unknown, I find that the prospects for unreasonable invasion of the privacy of the named father are extremely remote.[33]

[32] Order F14-32 at para. 44.
[33] Order F14-09 at para. 41 citing Order No. 200-1997, 1997 CanLII 719 (BC IPC) at para. 22.

[52] The applicant's involvement in his father's health care means that he already has general health information about his father, such as the factors that contributed to his death. This means that release of the records containing more detailed health information is not likely to have a significant impact with regard to the applicant because it will simply provide more detailed health information of which he already has general knowledge. However, against that, the applicant's motives suggest that he is likely to further disclose his father's health information to pursue his objectives. This likelihood, combined with the fact that the information comprises sensitive health information and that the father is not long deceased means that the potential impact of disclosure is significant, because the information could be further disseminated to others who may not have the same general knowledge of the father's medical history.

[53] Previous cases have also considered whether there is any indication that the deceased would not want the applicant to have the information in issue.[34] While the removal of the applicant as an executor could suggest that his father did not want the applicant to have access to his personal information, I do not have enough evidence to interpret the circumstance in that way, as this is only one of several possible reasons for a change in executor.

[54] Finally, that the applicant was a close familial relation of his father and they had an ongoing relationship, as evidenced by his close involvement in his father's care, weigh in favour of disclosure.[35]

Personal Information of applicant's father —s. 22(1)

[55] VCHA is required to refuse to disclose the information at issue if disclosure would be an unreasonable invasion of the father's personal privacy. The information at issue contains the father's health information. There is a presumption under s. 22(3)(a) that disclosing the information would be an unreasonable invasion of the father's personal privacy.

[56] I find the presumption that disclosure of the records would be an unreasonable invasion of the father's personal privacy has not been rebutted, considering all of the relevant circumstances in this case. The factors that weigh in favour of disclosure are insufficient to rebut the presumption and the circumstances that weigh against disclosure.

CONCLUSION

[57] For the reasons above, pursuant to s. 58 of FIPPA, I make the following orders:

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[34] F14-32, at para. 46.
[35] F14-32, at para. 46.

1. Subject to para. 2, VCHA must continue to withhold the information withheld under s. 22 of FIPPA.
2. I require VCHA to give the applicant access to the five page printout of a web page supplied by the applicant to VCHA that accompanies VCHA's copy of this Order **by November 7, 2014**.
3. VCHA must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the record.

September 25, 2014

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

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