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Order F16-06

MINISTRY OF HEALTH

Elizabeth Barker
Senior Adjudicator

February 15, 2016

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Summary: The applicant requested a research data access report and associated background information. The Ministry disclosed some information but it withheld other information under s. 13 (policy advice or recommendations), s. 14 (solicitor client privilege) and s. 22 (harm to personal privacy) of FIPPA. The applicant argued that this information should be disclosed under s. 25(1) (public interest). The adjudicator determined that the Ministry was not required to disclose the requested information under s. 25(1). Further, the adjudicator found that the Ministry was authorized to refuse to disclose the information it withheld under s. 14. The adjudicator determined that disclosure of the personal information in dispute would not be an unreasonable invasion of third party personal privacy under s. 22(1), so the Ministry was ordered to provide this information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 22(1), 22(3)(d), 22(4)(e), 25(1)(a), 25(1)(b) and Schedule 1 (definition of "personal information").

Authorities Considered: B.C.: Order 01-53, 2001 CanLII 21607 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order No. 165-1997, 1997 CanLII 754 (BC IPC); Order F13-10, 2013 BCIPC 11 (CanLII).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII); *R. v. B.,* 1995 Can LII 2007 (BCSC); *Canada v. Solosky*, 1979 CanLII 9 (SCC).

INTRODUCTION

[1] The applicant made an access request to the Ministry of Health ("Ministry"), under the *Freedom of Information and Protection of Privacy Act* ("FIPPA").[1] The request was for a report concerning research data access, and associated background information, that was prepared by two named individuals for the Ministry's Assistant Deputy Minister of Health Sector Information Management, Information Technology.

[2] The Ministry initially withheld the requested records in their entirety under s. 14 (solicitor client privilege), s. 15 (harm to law enforcement) and s. 22 (harm to personal privacy) of FIPPA.

[3] The applicant disagreed with the Ministry's decision and asked for a review by the Office of the Information and Privacy Commissioner ("OIPC"). During investigation and mediation some information from the requested records was disclosed to the applicant; however, the Ministry continued to withhold other information under ss. 14, 15 and 22. Mediation did not resolve the issues in dispute, and the applicant requested that they proceed to inquiry. During the early stages of the inquiry, the Ministry clarified that it was withholding information under s. 13 (policy advice or recommendations) in addition to ss. 14, 15 and 22. Both parties made submissions regarding these four exceptions.[2]

[4] After the parties provided their initial and reply submissions, the applicant requested that s. 25 be added as an issue in the inquiry. I decided that s. 25 would be added to the inquiry, and the parties each provided initial and reply submissions regarding that provision.

[5] Also, after the parties provided their submissions, the Ministry disclosed a significant amount of additional information to the applicant.[3] The information remaining in dispute is being withheld under ss. 13, 14 and 22. There is no longer any information being withheld under s. 15.

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[1] This inquiry was initially a combination of two access requests made by the applicant: F12-50611 (Ministry file HTH-2012-00135) and F12-50793 (Ministry file HTH-2012-00125). After the inquiry submissions process was completed, the Ministry requested that the adjudication be postponed in order to allow it to reconsider the severing of what was a large volume of records. It was during this postponement that the OIPC decided to separate the requests into two discrete inquiries. This decision concerns only access request F12-50611.

[2] The parties' submissions pertain to both cases and the severing as it stood before the further disclosure and the splitting of the inquiry into two.

[3] The records in dispute for F12-50611 were reduced from 542 to 15 pages and were provided to the OIPC by way of email attachment on November 17, 2015.

ISSUES

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

1. Is the Ministry required by s. 25(1) of FIPPA to disclose the requested information without delay?

2. Is the Ministry authorized under ss. 13 and/or 14 of FIPPA to refuse access to the requested information?

3. Is the Ministry required to withhold information under s. 22(1) of FIPPA?

[7] Pursuant to s. 57 of FIPPA, the Ministry has the burden of proving that it is authorized under ss.13 and 14 to refuse to disclose the information at issue. However, the applicant has the burden of proving that disclosure of personal information contained in the requested records would not unreasonably invade third party personal privacy under s. 22(1) of FIPPA.

[8] Section 57 is silent on the burden of proof for s. 25(1)(b). However, I agree with the following statement from Order 02-38:

> Again, where an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does not apply, it is obliged to respond to the commissioner's inquiry into the issue, and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.[4]

DISCUSSION

[9] **Background** – In May 2012, the Ministry commenced an investigation of its Pharmaceutical Services Division regarding inappropriate data access, intellectual property infringement, standard of conduct violations, inappropriate procurement practices, contracting irregularities and suspected conflicts of interest. The applicant is one of several employees whose employment was suspended and then eventually terminated as a result of the investigation.

[10] **Records at issue –** The records remaining in dispute are three pages of emails between Ministry employees and a 12 page excerpt from the requested research data access report.[5]

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[4] Order 02-38, 2002 CanLII 42472 (BC IPC), at para. 39.
[5] Part 3: pp. 83-94; Part 5: pp. 7, 32 and 36.

Public Interest (s. 25)

[11] The parts of s. 25 that are relevant in this case are as follows:

> **25** (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
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> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[12] The applicant identifies s. 25(1)(a) specifically as being applicable in this case. She writes:

> The investigation… had the effect of crippling drug safety and effectiveness research in BC. Before these actions, BC was a world leader in protecting the health and safety of the population through targeted drug safety research and prescribing education programs for physicians… I argue that the public interest in good drug safety and effectiveness policy would be well served by releasing the information I have requested, and BC citizens would be endangered by withholding it.[6]

[13] The Ministry submits that the duty under s. 25 to disclose information exists only in the clearest and most serious of situations and that this is not one of those.[7] It also submits that there is no element of urgency or compelling need for disclosure in this case. The Ministry also submits that disclosure of the information in dispute here would not contribute in a substantive way to the body of information that is readily available.

[14] I have considered the parties' submissions as well as the content and context of the information. The information that remains in dispute is about legal and policy matters in their most general sense but, in my view, it does not pertain in any sense to specific facts or situations that might conceivably pose a risk of harm to anyone or to the environment. Further, some of the information withheld from the emails is simply about the non-work aspect of Ministry employees' personal lives.

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[6] Applicant's initial submissions for file F12-50611, para. 8.
[7] Ministry's s. 25 submissions, para. 5.

[15] In my view, s. 25(1)(a) does not apply because the information is plainly and obviously not about a risk of significant harm to the environment or to the health and safety of the public of a group of people.

[16] The applicant's submissions regarding s. 25 are ambiguous in the sense that it is unclear if she is also asserting that disclosure is clearly in the public interest, under s. 25(1)(b). Therefore, I have also considered whether s. 25(1)(b) applies and I find that it does not. Section 25 overrides all of FIPPA's exceptions to disclosure, and consequently there is a high threshold before it applies. Previous orders have explained this concept as follows: "…the duty under section 25 only exists in the clearest and most serious of situations. A disclosure must be, not just arguably in the public interest, but *clearly* (i.e., unmistakably) in the public interest...".[8] The fact that the public may have a potential interest in what the information reveals about an issue would not meet the threshold for disclosure of that information as being "clearly" in the public interest under s. 25(1)(b). Based on the content and context of the information in dispute, I am not satisfied that its disclosure meets that level of significance or magnitude.

[17] In conclusion, I find that the information in dispute is not about a risk of significant harm to the environment or to the health and safety of the public or a group of people. I also find that disclosure of the information is not clearly in the public interest. Therefore, s. 25 does not apply.

Solicitor client privilege - s. 14

[18] The Ministry is withholding several pages of the report and the body of an email under s. 14.[9] It submits that this information reveals confidential legal advice. The applicant submits that she would like a review of the s. 14 severing because she has no other way to know if it was appropriate.

[19] Section 14 states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The law is well established that s.14 encompasses both types of solicitor client privilege found at common law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege.[10] The Ministry submits that legal advice privilege applies in this case.

[20] For legal advice privilege to apply the following conditions must be satisfied:

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[8] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45 citing Order No. 165-1997, 1997 CanLII 754 (BC IPC).

[9] Report: pp. 83-94 (part 3). Email: p. 36 (part 5). The "from", "sent" and "subject" line and signature blocks of this email exchange have already been disclosed to the applicant.

[10] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII), para. 26.

1. there must be a communication, whether oral or written;
2. the communication must be confidential;
3. the communication must be between a client (or agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[21] Not every communication between client and solicitor is protected by solicitor client privilege, but if the four conditions above are satisfied, then privilege applies to the communications and the records relating to it.[11] The above criteria have consistently been applied in BC Orders, and I will take the same approach here.[12]

[22] The Ministry provides affidavit evidence that the information it is withholding from the report under s. 14 contains confidential legal advice provided by a named solicitor with the Ministry of Justice, Legal Services Branch, to the Ministry.[13] I have also considered what is communicated in the pages themselves, and I find that the author is clearly providing legal analysis and advice to the Ministry.

[23] The Ministry does not provide any submissions or evidence specific to the information severed under s. 14 from the email. The withheld information is the body of an email between two employees of the Ministry of Technology, Innovation and Citizens' Services. In it they discuss legal advice sought and received from the lawyers for their Ministry. Although the email is a discussion internal to the Ministry, and is not itself a direct communication between a client and its lawyers, it discloses communication that was. The email plainly reveals communication between the Ministry and its lawyers that was directly related to the seeking, formulating, or giving of legal advice.

[24] With regards to confidentiality, there is nothing to suggest that anyone other than Ministry of Health, the Ministry of Technology, Innovation and Citizens' Services and their solicitors were involved in the communications that are being withheld from the report and email under s. 14. I am satisfied that the communication was confidential.

[25] In conclusion, I find that the information to which s. 14 has been applied meets all of the conditions required for solicitor client privilege to apply.

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[11] For a statement of these principles see also *R. v. B., 1995 Can LII 2007* (BCSC) at para. 22 and *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.
[12] See: Order 01-53, 2001 CanLII 21607 (BC IPC) and Order F13-10, 2013 BCIPC 11 (CanLII).
[13] Ministry's initial submissions at para. 4.17 and 4.34 and Taylor affidavit at para. 24.

Therefore, I find that the Ministry is authorized to refuse to disclose it under s. 14 of FIPPA.

Policy Advice or Recommendations - s. 13

[26] All of the information being withheld under s. 13 was also withheld under s. 14. In light of my finding regarding s. 14, I do not need to address whether s. 13 also applies.

Disclosure harmful to personal privacy - s. 22

[27] The Ministry is withholding four excerpts from emails on the basis that disclosure would be an unreasonable invasion of third party personal privacy under s. 22.[14]

[28] In her submissions, the applicant says that some of the information being withheld under s. 22 is her own personal information, which she is entitled to have. She also says that the other personal information is the names of government officials acting in their official capacity and the names of individuals outside of government who were interviewed to assist with the preparation of the report. She disputes that disclosure of this information would be an unreasonable invasion of third party personal privacy.

[29] Numerous orders have considered the application of s. 22, and I will apply those same principles in my analysis.[15]

[30] *Personal information* - The first step in any s. 22 analysis is to determine if the information is personal information. Personal information is defined as **"**recorded information about an identifiable individual other than contact information". Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual".[16]

[31] Three of the excerpts withheld under s. 22 are about the personal life and family activities of a government employee. The fourth excerpt is about that same employee's position. His name has already been disclosed in the emails, so the information is about an identifiable individual. I find that all of the withheld information is this individual's personal information. None of this information is the applicant's personal information because it is not about the applicant.

[14] Pages 7 and 32 (part 5).
[15] See for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.
[16] See Schedule 1 of FIPPA for these definitions.

[32] *Section 22(4)* - The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). Section 22(4)(e) says that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff. I find that s. 22(4)(e) applies to one of the excerpts because it is about the employee's position .[17] Therefore, disclosure of this excerpt would not be an unreasonable invasion of his personal privacy under s. 22(1).

[33] *Presumptions* - I find that s. 22(4) does not apply to the other three excerpts, so the third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply, such that disclosure is presumed to be an unreasonable invasion of privacy. The Ministry submits that s. 22(3)(d) applies. Section 22(3)(d) says that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history.

[34] It is evident that the Ministry's submission on this point was written before it reconsidered the severing regarding this access request (i.e., OIPC file F12-50611), and it does not relate to the specific personal information in the remaining three excerpts, which is about the personal life and family activities of an employee. This information clearly does not relate to the employee's employment, occupational or educational history, so s. 22(3)(d) does not apply. In my view, none of the other presumptions in s. 22(3) apply either.

[35] *Relevant circumstances* –The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those in s. 22(2). Section 22(2) states in part.

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
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> (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 personal information is relevant to a fair determination of the applicant's rights,
> …
> (f) the personal information has been supplied in confidence,
> …

[17] Bottom excerpt on page 7 (part 5).

> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and…

[36] The applicant submits that disclosure of the personal information would allow for public scrutiny of government actions, so it is in the public interest. She also submits that the personal information is relevant to her because she needs to know what was said about her since it may have affected her employment. The Ministry's submissions regarding relevant factors do not specifically refer to personal information that remains in dispute.

[37] I have considered what the applicant says, but find that the circumstances she points to in favour of disclosure are not relevant because the personal information does not relate to her or to the activities of the Ministry or any other public body.

[38] The personal information is not about sensitive personal matters. Rather, it relates to commonplace family and weekend activities that occurred almost four years ago. This is the type of innocuous information people generally would have no objection to sharing even with strangers. Further, given the tone and context of the information, there was nothing to even remotely suggest that the third party would object to its disclosure, that it was supplied in confidence, or that it reflects in any way on the individual's reputation. In light of the applicant's submissions about the information she wants and why, it is unlikely that she will derive any value from this personal information. Nonetheless, having weighed all the relevant circumstances in this particular case, I find that disclosure would not be an unreasonable invasion of the third party's personal privacy under s. 22(1).

CONCLUSION

[39] For the reasons given above, I make the following orders under s. 58 of the Act:

1. The Ministry is not required under s. 25(1) of FIPPA to disclose the information in dispute.

2. The Ministry is authorized by s. 14 of FIPPA to refuse to disclose the information withheld under that exception.

3. The Ministry is not required to refuse access to the information it withheld under s. 22(1) FIPPA. It must disclose that information, which is on pages 7 and 32 (part 5) of the records to the applicant.

4. The Ministry must comply with the terms of this Order by March 30, 2016, and concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the record.

February 15, 2016

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F12-50611