Office of the Information & Privacy Commissioner for British Columbia

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Order F17-11

MINISTRY OF HEALTH

Celia Francis
Adjudicator

March 20, 2017

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Summary: An applicant requested records related to a residency investigation regarding him and his family. The Ministry denied access to information under ss. 15(1)(c) (harm to effectiveness of investigative techniques and procedures), 15(1)(l) (harm to security of property or system), 17(1) (harm to financial interests) and 22(1) (harm to third-party personal privacy). The adjudicator found that s. 15(1)(c) applied to some information but not to other information, including information which had already been disclosed. The adjudicator found that s. 17(1) did not apply at all. The applicant was not interested in the information withheld under ss. 15(1)(l) and 22(1) and it was therefore not necessary to consider these exceptions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(c), 17(1).

Authorities Considered: B.C.: Order F16-28, 2016 BCIPC 30 (CanLII); Order F11-13, 2011 BCIPC 18 (CanLII); Order 36-1995, [1995] B.C.I.P.C.D. No. 8; Order 00-52, 2000 CanLII 14417 (BCIPC); Order F15-26, 2015 BCIPC 23 (CanLII); Order 00-18, 2000 CanLII 7416 (BC IPC); Order F15-12, 2015 BCIPC 12 (CanLII); Order F11-13; Order No. 50-1995, [1995] B.C.I.P.C.D. No. 23; Order No. 125-1996, [1996] B.C.I.P.C.D. No. 52; Order F16-28, 2016 BCIPC 30; Order F15-12; Order F07-04, [2007] B.C.I.P.C.D. No. 6.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875.

INTRODUCTION

[1] This order flows from a "residency investigation" by the Ministry of Health ("Ministry") into the eligibility of an applicant and his family to receive publicly funded medical care in this province. In the fall of 2014, the applicant requested all records related to this investigation under the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] Early in 2015, the Ministry disclosed the responsive records in severed form, withholding information under ss. 15 (harm to law enforcement), 17 (harm to public body's financial interests) and 22 (harm to third-party personal privacy). The applicant requested a review by the Office of the Information and Privacy Commissioner ("OIPC") of the Ministry's decision to deny access to some of the information.[1]

[3] Mediation by the OIPC did not resolve the request for review and the applicant asked that the matter proceed to inquiry. In its initial submission, the Ministry said it had reconsidered its decision. It later disclosed some of the information it had previously withheld. The Ministry continued to withhold the rest of the information. The Ministry maintained its decision to withhold information under ss. 15(1)(c) and (l), 17(1) and 22(1).

[4] The applicant then told the OIPC that he was not interested in pursuing the information that the Ministry had withheld under ss. 15(1)(l) and 22(1), which included employee identification codes and diagnostic codes in computer printouts.[2] Consequently, I need only consider the information that the Ministry withheld under ss. 15(1)(c) and 17(1) in a series of investigation reports on the applicant and his family members.

ISSUES

[5] The issues before me are whether the Ministry is authorized by ss. 15(1)(c) and 17(1) to withhold information. Under s. 57(1) of FIPPA, the Ministry has the burden of proving that the applicant has no right of access to the withheld information.

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[1] The applicant also complained that the Ministry had not carried out an adequate search for the requested records. The Fact Report does not say what happened with this complaint. However, the material before me indicates that it is no longer an issue.

[2] Emails of January 24 to February 9, 2017 with the OIPC. This information was withheld in some computer printouts.

DISCUSSION

Background

[6] BC's health care system is administered under the *Medicare Protection Act* ("MPA"), under which access to medical care is based on need and not the ability to pay. In accordance with the MPA, the Medical Services Commission ("Commission") manages the Medical Services Plan ("MSP") on government's behalf.[3] Among other things, the Commission has the power to investigate and determine whether a person is a "resident" for the purposes of the MPA and thus entitled to benefits under that Act. The Commission may require the person to provide satisfactory evidence that the person is a "resident" under the MPA. It may also cancel a person's entitlement to benefits under the MPA.

[7] The Commission has delegated some of its powers and duties to employees of the Ministry's Eligibility, Compliance and Enforcement Unit ("ECE Unit"). The main objective of the ECE Unit's investigations is to determine the residency status of an individual and thus if he or she qualifies to receive benefits under the MPA.

[8] In this case, the Ministry received information that raised the issue of whether the applicant and his family were "residents" for the purposes of the MPA. The ECE Unit then conducted a "residency investigation". The material before me indicates that the investigation was still underway at the time of the applicant's request, although it is not clear if it has since been concluded.

Information in dispute

[9] The 815 pages of responsive records relate to the residency investigation into the applicant and his family. They include the following: emails and letters between the applicant's lawyer and the Ministry; emails between Ministry staff; copies of the lawyer's submissions to the ECE Unit on behalf of the applicant and his family; handwritten notes; and internal investigation reports and their appendices (such as computer printouts and charts), which the ECE Unit staff created or compiled.

[10] The Ministry has disclosed the majority of the records, withholding some information in the investigation reports and in the attached computer printouts. The withheld information in the investigation reports is the only information in dispute in this case.

[3] The Commission is a separate public body under Schedule 2 of FIPPA.

Standard of proof for harms-based exceptions

[11] The Supreme Court of Canada set out the standard of proof for harms-based provisions in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences".[4]

[12] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[5] Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm and that the burden rests with the public body to establish that the disclosure of the information in question could reasonably be expected to result in the identified harm.

[13] I have taken these approaches in considering the arguments on harm under ss. 15(1)(c) and s. 17(1).

Harm to law enforcement – s. 15(1)(c)

[14] The relevant provisions read as follows:

> **Disclosure harmful to law enforcement**
>
> **15** (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
> …
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
> …

[4] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, at para. 94.

[5] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.

> **"law enforcement"** means
>
> (a) policing, including criminal intelligence operations,
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

Are the ECE Unit's investigations "law enforcement"?

[15] The Ministry argued that s. 15(1)(c) applies to the withheld information because the Ministry's ECE Unit conducts investigations under the authority of the MPA. The Ministry added that these investigations can lead to a sanction being imposed, in the form of the cancellation of benefits. It argued that, for these reasons, the ECE Unit's investigations are "law enforcement" for the purposes of s. 15(1)(c).[6] The applicant did not address the Ministry's submission but simply said the Ministry had not met its burden regarding this exception.

[16] Previous orders have found that in order for a public body's investigation to meet the definition of law enforcement in FIPPA, the public body must have a specific statutory authority or mandate to conduct the investigation and to impose sanctions or penalties.[7] The Ministry's evidence establishes the following:

- the Commission has the power under ss. 5(1) and 5.01 of the MPA to investigate for the purposes of that Act, such as determining whether a person is a "resident"; this includes requiring the person to provide satisfactory evidence establishing residency
- under s. 6 of the MPA, the Commission may delegate its investigative powers and duties under that Act
- the Commission delegated these powers and duties to the Ministry employee who conducted the residency investigation on the Commission's behalf[8]
- the Commission has the authority under s. 7.4 of the MPA to cancel enrolment in MSP under that Act

[17] I am satisfied from this evidence that the ECE Unit has the Commission's delegated statutory authority under the MPA to investigate matters under that Act, including the investigation that took place in this case. I am also satisfied

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[6] Ministry's initial submission, paras. 4.23-4.35; Affidavit of Mike Kastelein, Senior Eligibility Investigator, ECE Unit, Audit and Investigations Branch, Ministry of Health.

[7] See Order F16-28, 2016 BCIPC 30 (CanLII), at para. 53; Order F11-13, 2011 BCIPC 18 (CanLII), at para. 18; Order 36-1995, [1995] B.C.I.P.C.D. No. 8, at p. 14; Order 00-52, 2000 CanLII 14417 (BCIPC); Order F15-26, 2015 BCIPC 23 (CanLII).

[8] See Commission Minutes of May 16 and October 20, 2014, Delegation of Duties and Authorities, including under ss. 5(1) and 5.01 of the MPA, to a number of Ministry employees, including the investigator who conducted this particular residency investigation.

that cancellation of enrolment in MSP – and thus benefits under the MPA – by the Commission constitutes a "sanction" for the purposes of the definition of "law enforcement".[9] I therefore find that the ECE Unit's residency investigation in this case qualifies as "law enforcement" for the purposes of s. 15(1)(c).

Harm to investigative techniques and procedures

[18] The Ministry said that disclosure of the information in dispute would reveal the specialized investigation techniques and procedures that the ECE Unit uses in conducting its investigations. It said that these techniques and procedures include collecting information from third-party "sources" and looking for "indicators" that reveal whether someone is a resident of BC. The Ministry said that disclosure of these sources and indicators would harm the effectiveness of techniques and procedures the ECE Unit currently uses, or is likely to use, as individuals could take steps to avoid detection. The Ministry also said that these activities are not generally known to the public.[10]

[19] Past orders have said that investigative techniques and procedures for the purposes of s. 15(1)(c) include technologies and technical processes used in law enforcement, including equipment, practices and methods. Some orders have determined that activities such as covert police surveillance techniques or coroners' investigative methods constitute "investigative techniques" and that disclosure of information about these activities could harm their effectiveness.[11]

[20] Other orders have found that the name of forensic software, confidential interviews and accepting 911 calls are not investigative techniques or procedures. These orders go on to say that, in any case, such activities are routine, commonly known or common sense procedures or steps, and disclosure of information about them would not harm their effectiveness.[12]

[21] The Ministry provided *in camera* evidence about the ECE Unit's "sources" and "indicators", as well as steps non-resident individuals could take to avoid detection. These sources and indicators show what ECE Unit investigators look for and how they look for it.[13] In my view, these particular sources and indicators constitute investigative techniques and procedures for the purposes of s. 15(1)(c). I accept that the ECE Unit uses them currently, or is likely to use them, and that they are not commonly known to the public. I also accept that non-resident individuals could use this information to evade detection by the

[9] In Order 00-18, 2000 CanLII 7416 (BC IPC), former Commissioner Loukidelis found that cancellation of a driver's licence under the *Motor Vehicle Act* constituted a "sanction" for the purposes of the definition of "law enforcement".
[10] Ministry's initial submission, paras. 4.23-4.35; Kastelein affidavit.
[11] See, for example, Order F15-12, 2015 BCIPC 12 (CanLII); Order F11-13; Order No. 50-1995, [1995] B.C.I.P.C.D. No. 23; Order No. 125-1996, [1996] B.C.I.P.C.D. No. 52.
[12] See, for example, Order F16-28, 2016 BCIPC 30; Order F15-12; Order F07-04, [2007] B.C.I.P.C.D. No. 6.
[13] See Order F11-13.

Ministry and procure benefits under the MPA to which they are not entitled. I am therefore satisfied that disclosure of the sources and indicators the Ministry identifies in its *in camera* evidence would harm the effectiveness of investigative techniques and procedures currently used or likely to be used.

[22] Some of the withheld information in this case refers to the investigative techniques and procedures the ECE Unit used in this investigation. This information is a subset of the investigative techniques and procedures, examples of which the Ministry provided in its *in camera* evidence. The question is: in the circumstances of this case, would disclosure of this particular withheld information harm the effectiveness of investigative techniques and procedures the ECE Unit currently uses or is likely to use? In my view, for the most part, it would not.

[23] The Ministry has disclosed much of the information in the investigation reports. On page 1 of each investigation report, it disclosed the heading "Reason for Investigation" but withheld the reason itself (*i.e.*, what the Ministry would refer to as an "indicator" of non-residence). The Ministry also disclosed each report's appendices, including the number of each appendix. In the body of each report, although the Ministry disclosed the heading "List of Appendices" and the information the investigator learned from each "source", it withheld the names and numbers of the appendices.

[24] I agree that disclosure of the reason for each investigation and the names of the appendices would reveal the ECE Unit's sources and indicators and thus its investigative techniques and procedures. However the Ministry has already disclosed the reason for each investigation elsewhere. I do not see how re-disclosure of this information, in the reports, could reasonably be expected harm the effectiveness of the ECE Unit's current or likely use of investigative techniques or procedures. I also do not see how disclosure of the number assigned to each appendix could result in such harm, particularly since the Ministry has already disclosed appendix numbers elsewhere.

[25] Moreover, in some cases, the identities of the "sources" of the records in the appendices are either stated on the (already disclosed) appendices themselves or are obvious. In these particular cases, I do not see how re-disclosure of the identities of the "sources" (*i.e.*, appendix names), in the reports, could reasonably be expected harm the effectiveness of the ECE Unit's current or likely use of investigative techniques or procedures.

[26] However, regarding a few withheld appendix names, I accept that these names reveal the identity of ECE Unit's "sources" and that these sources are currently used and not generally known to the public. The Ministry has not disclosed these sources elsewhere in the records and they are not obvious on the face of the records themselves. I am therefore satisfied that disclosure of the names of these particular appendices could reasonably be expected

to harm the effectiveness of the ECE Unit's current use of these investigative techniques and procedures.

[27] The Ministry also withheld some boilerplate wording in the reports. This boilerplate language is of a different character from the other withheld information. It does not, for example, set out indicators or sources the ECE Unit uses in its investigation. Rather, under a series of headings, it sets out generic wording on possible situations or outcomes that might arise during investigations, with reference to relevant legislation.[14] I gather that the investigator selects and fleshes out the appropriate wording for each case and deletes the inapplicable wording.

[28] The Ministry did not specifically address this boilerplate information in its submission. It did not, for example, explain how it constitutes investigative techniques or procedures for the purposes of s. 15(1)(c). It also did not explain how disclosure of this information could reasonably be expected to harm the effectiveness of any such investigative techniques or procedures, either currently or likely to be used. This is also not obvious from the information itself. The Ministry has not persuaded me that disclosure of the boilerplate language could reasonably be expected to harm the effectiveness of investigative techniques and procedures for the purposes of s. 15(1)(c).

Conclusion on s. 15(1)(c)

[29] The Ministry has not, in my view, established that there is a confident and objective evidentiary basis for concluding that disclosure of most of the information in dispute could reasonably be expected to result in harm to the effectiveness of investigative techniques or procedures currently used or likely to be used, which is required to show that s. 15(1)(c) applies. The Ministry has not met its burden with respect to this information. For reasons given above, I find as follows:

- s. 15(1)(c) applies to the withheld names of some of the appendices and
- s. 15(1)(c) does <u>not</u> apply to the remaining withheld information, that is, the names of the other appendices, the number assigned to each of the appendices, the reasons for each investigation and the boilerplate language.

Harm to financial interests – s. 17(1)

[30] I will now consider whether s. 17(1) applies to the information to which I found s. 15(1)(c) does <u>not</u> apply. The Ministry said that the ECE Unit's investigations result in "significant cost savings" to the BC government, through preventing the approval of fraudulent claims for payment for medical services

[14] The Ministry disclosed the heading "Summary of Evidence" in each report but withheld the other headings in most cases.

to which non-resident individuals are not entitled. It said that, from 2009 to 2016, the ECE Unit's investigations resulted in an estimated financial savings of $13.9 million. The Ministry argued that disclosure of the information in dispute would allow individuals to avoid detection and to continue to submit fraudulent claims. In its view, disclosure could therefore reasonably be expected to result in financial harm to the BC government under s. 17(1), through the loss of "hundreds of thousands if not millions" of dollars.[15] As above, the applicant did not address the Ministry's submission but simply said the Ministry had not met its burden regarding this exception.

[31] I accept the Ministry's evidence that the ECE Unit's investigations can result in substantial cost savings through the prevention of approval of fraudulent claims. It is not, however, clear to me how disclosure of the information I am considering under this exception could, in this particular case, reasonably be expected to lead to financial harm. I found above that some of this information had already been disclosed elsewhere in the records or is obvious from the records themselves. In this light, I do not see how its re-disclosure in the reports could result in harm under s. 17(1). I also noted above that the withheld boilerplate language simply sets out generic, possible outcomes and legislative references. The Ministry did not explain, nor do I see, how disclosure of this boilerplate information could reasonably be expected to result in harm under s. 17(1). For these reasons, I find that s. 17(1) does not apply to the withheld information.

Conclusion on s. 17(1)

[32] The Ministry has not, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 17(1). It has not demonstrated a clear and direct connection between disclosing the information in dispute and the alleged harm. The Ministry had not met its burden in this case. I find that s. 17(1) does not apply to the information in dispute.

CONCLUSION

[33] For reasons given above, I make the following orders:

1. Under s. 58(2)(a) of FIPPA, subject to item 2 below, I require the Ministry to give the applicant access to the information it withheld under ss. 15(1)(c) and 17(1) (*i.e.*, the names of some of the appendices, the number assigned to each of the appendices, the reason for each investigation and the boilerplate language).

[15] Ministry's initial submission, paras. 4.54-4.59; Kastelein affidavit, paras. 39-40. It added that disclosure could also result in financial harm to other public bodies and provided an *in camera* example of a public body which, it said, could suffer such financial harm.

2. Under s. 58(2)(c) of FIPPA, I require the Ministry to refuse the applicant access to some of the information it withheld under ss. 15(1)(c) (*i.e.*, the names of the other appendices), as highlighted in yellow in the copies of the records provided to the Ministry with its copy of this order.

[34] I require the Ministry to give the applicant access to this information by May 3, 2017. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

March 20, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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