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Order F18-30

**PROVINCIAL HEALTH SERVICES AUTHORITY
(BC Emergency Health Services)**

Erika Syrotuck
Adjudicator

July 25, 2018

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Quicklaw Cite: [2018] B.C.I.P.C.D. No. 33

Summary: The applicant made a request to the Provincial Health Services Authority (PHSA) for all records, emails, documents or any hand written notes or files that named or discussed her. PHSA refused to disclose portions of the records on the basis that it would reveal advice or recommendations under s. 13 of FIPPA or that it would be an unreasonable invasion of third party personal privacy under s. 22. The adjudicator found that ss. 13 and 22 apply to some of the information and that PHSA is required to disclose the remaining information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2), 22(1), 22(2)(c), 22(2)(e), 22(2)(f), 22(2)(g), 22(2)(h), 22(3)(a), 22(3)(d), 22(3)(g), 22(4), 22(5).

INTRODUCTION

[1] The applicant requested all records, emails, documents or any hand written notes or files held by named individuals that named or discussed her from PHSA. PHSA provided over 1000 pages of responsive records but withheld some information under ss. 13 (advice or recommendations), 15 (disclosure harmful to law enforcement), 17 (disclosure harmful to financial and economic interests) and 22 (disclosure harmful to third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the PHSA's decision to withhold the information in the records. Mediation

failed to resolve the issues and the applicant requested that the matter proceed to inquiry.

Preliminary Issue – Issues to be decided in this Inquiry

[2] After the close of the inquiry, I wrote to PHSA to clarify the information in dispute. In its submissions, PHSA said it had reconsidered its application of ss. 13, 15, 17 and 22 and that it was “able”, “willing” or had “no objection” to disclosing some information but it was unclear to me if PHSA had actually disclosed this information to the applicant. In response, PHSA disclosed additional information to the applicant, including all of the information it had withheld under ss. 15 and 17. As a result, I do not need to consider these sections as issues in this inquiry.

[3] In my letter to PHSA, I also noted that it referenced a document in its submissions that was not in the original records package. In response, PHSA disclosed the additional document but withheld some information from it under ss. 13, 22 and 21 (disclosure harmful to business interests of a third party).¹

[4] The OIPC fact report and notice of inquiry do not include s. 21 as an issue in this inquiry and neither party made submissions on it. Past orders have said that parties may raise new issues at the inquiry stage only if permitted to do so.² PHSA did not ask permission to add another issue to this inquiry, nor did it explain why it was bringing it up at this late stage. I do not permit PHSA to add s. 21 as an issue to this inquiry and I will not consider it.

ISSUES

[5] The issues in this inquiry are:

1. Is PHSA authorized to refuse to disclose the information in dispute under section 13(1) of FIPPA?
2. Is PHSA required to refuse to disclose the information in dispute under section 22 of FIPPA?

[6] Under s. 57 (1) of FIPPA, the burden of proof is on PHSA to establish that the applicant has no right of access to all or part of a record withheld under s. 13(1). Section 57(2) of FIPPA places the burden of proof on the applicant to establish that disclosure of information would not be an unreasonable invasion of third party personal privacy under section 22.

¹ The applicant was asked if she wanted to make further submissions based on the additional disclosures. She did not respond.

² See, for example Order F12-07, 2012 BCIPC 10 (CanLII) at para. 6 and Order F16-47, 2016 BCIPC 52 (CanLII) at para. 9.

DISCUSSION

Background

[7] The applicant was a unionized paramedic employed by BC Emergency Health Services Commission (BCEHS), an agency operated by PHSA. During her employment, she was involved in workplace disputes with other paramedics. BCEHS investigated these disputes. The applicant is seeking to access records in which she was named or discussed relating to BCEHS' investigations into these disputes. PHSA responded to her request and provided submissions in this inquiry.³

Records at issue

[8] The records that contain information in dispute are:

- A complaint by a co-worker about the applicant (Complaint),
- Occurrence reports about incidents involving the applicant, co-workers and patients (Occurrence Reports),
- Emails between BCEHS employees (Emails),
- Letters to third parties about the workplace disputes (Letters),
- A set of interview questions (Questions),
- A note to file about one of the disputes (Note to File),
- Notes from a conclusion meeting about one of the disputes (Notes),
- Investigative reports relating to two separate workplace disputes (Investigative Reports); and,
- An internal review of an incident (Review).

[9] PHSA withheld most of the disputed information under s. 22 and a small amount under s. 13.

Section 22

[10] Section 22 requires that a public body withhold personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy.⁴ The portions of s. 22 pertaining to this inquiry state:

³ PHSA is a public body listed in Schedule 2 of FIPPA.

⁴Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.

(1) The head of 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.

(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

...

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

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

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

...

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

...

(d) the personal information relates to employment, occupational or educational history,

...

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

...

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

Personal Information

[11] The first step in any s. 22 analysis is to determine whether the information is personal information.

[12] FIPPA defines personal information as “recorded information about an identifiable individual other than contact information.” FIPPA defines contact information as “information to enable an individual at a place of business to be contacted and includes the name, position or title, business telephone number,

business address, business email or business fax number of the individual.”⁵ Previous orders have held that information is about an identifiable individual when it is reasonably capable of identifying an individual alone or when combined with information from other available sources.⁶

[13] PHSA withheld information in the Letters and the Emails that is not capable of identifying an individual. BCEHS sent form letters to third parties about the investigation that include template language. This template language does not identify an individual. Similarly, parts of some Emails such as subject lines and text in the body do not identify the senders or recipients. I find that this is not personal information as defined by FIPPA.

[14] Some of the information in dispute is about the applicant and other BCEHS employees, such as what they told investigators about the workplace events under investigation. The information includes the names of the individuals, so they are clearly identifiable. This information is about the applicant’s interactions with others, so it is simultaneously the applicant’s personal information and third party personal information.

[15] Some of the personal information about the applicant and her co-workers is also intertwined with information about patients. The Complaint and the Review each provide details about an unnamed patient’s age, gender and specific details about the patient’s medical condition. The Occurrence Reports provide some information about the treatment the applicant and her co-worker provided to unnamed patients. I find that the information about the patients is their personal information because it can identify them to the applicant. This is because the applicant was one of the paramedics who attended the events, and as not too much time has passed, she may remember them.

[16] PHSA withheld employee numbers in the Emails and the Occurrence Reports. The names relating to those numbers have been disclosed. I find that, when combined with information that has already been disclosed, the numbers are capable of identifying third parties and therefore are personal information.

[17] PHSA also withheld several email addresses that have domain names commonly associated with personal email addresses and the addresses include the name of the individual. I find that these email addresses are third party personal information.

⁵ *Freedom of Information and Protection of Privacy Act*, Schedule 1.

⁶ See for example, Order F16-38, 2016 BCIPC 42 (CanLII) at para. 112; Order F13-04, 2013 BCIPC 4 (CanLII) at para. 23.; Order P12-01, 2012 BCIPC 25 (CanLII) at para. 85.

Section 22(4)

[18] The next step is to determine whether any of the circumstances in s. 22(4) apply. Section 22(4) describes circumstances where disclosure of personal information is not an unreasonable invasion of personal privacy.

[19] PHSA submits that s. 22(4) does not apply. I have reviewed the records and find none of the information falls into any of the categories in s. 22(4).

Section 22(3)

[20] The next step in the analysis is to determine whether s. 22(3) applies to any of the personal information. Section 22(3) describes circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's privacy. For the reasons that follow, I find that one or more of ss. 22(3)(a)(d) and (g) apply to all of the personal information in dispute.

22(3)(a) – medical treatment

[21] Information relating to a third party's medical treatment is presumed to be an unreasonable invasion of third parties personal privacy under s. 22(3)(a). The personal information in the Complaints, Occurrence Reports and Investigative Reports relates to patients' medical treatments. I find that 22(3)(a) applies to this information and that disclosure is presumed to be an unreasonable invasion of the patients' personal privacy.

22(3)(d) – employment history

[22] Personal information relating to employment history is presumed to be an unreasonable invasion of third party personal privacy under s. 22(3)(d). PHSA submits that all of the personal information is about the third parties' employment or occupational history within the meaning of s. 22(3)(d). The applicant did not address this matter in her submissions.

[23] All of the third party personal information in this case is about a workplace investigation into complaints about or disputes with the applicant. In this context, the information relates to the workplace history of the third parties. In my view, s. 22(3)(d) applies to all of the third party personal information.

22(3)(g) – personal recommendations or evaluations

[24] Personal information that consists of personal recommendations or evaluations, character references or personnel evaluations about the third party is presumed to be an unreasonable invasion of third party privacy under s. 22(3)(g). PHSA submits that s. 22(3)(g) applies. Previous orders have found

that s. 22(3)(g) applies to an investigator's evaluative statements of a third parties' performance in the workplace.⁷

[25] I find that s. 22(3)(g) applies to some of the withheld portions of the Notes and the Investigative Reports because they are an investigator's statements about the third party's performance at work relating to the disputes.

Section 22(2)

[26] The next step is to consider all relevant circumstances, including the circumstances listed under s. 22(2) to determine if the disclosure of the personal information is an unreasonable invasion of third party personal privacy. It is at this stage that any presumptions under s. 22(3) can be rebutted.

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

[27] Section 22(2)(c) is about whether the personal information is relevant to a fair determination of the applicant's rights.

[28] The applicant submits that she needs full disclosure for a human rights and a labour relations complaint.

[29] In Order 01-07⁸ former Commissioner Loukidelis adopted a four part test to determine whether s. 22(2)(c) applies:

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 under way 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.

[30] If all of the criteria are met, then a fair determination of the applicant's rights is a factor that I must consider in determining whether the applicant has

⁷ Order F16-12, 2016 BCIPC 14 (CanLII) at para. 28; Order F16-46, 2016 BCIPC 51 (CanLII) at para. 33.

⁸ Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 31.

rebutted the presumption. For the reasons that follow, I find that the applicant has not established that the four criteria are met in this case.

[31] While a complaint under the *Human Rights Code* is a legal right, the applicant has not stated the basis on which she intends to file a human rights complaint and it is not apparent from the records themselves what grounds there could be for such a complaint. She does not explain how the personal information in the records has some bearing on or significance for determining her rights under the *Human Rights Code* or why the personal information is necessary to prepare for a proceeding or ensure a fair hearing.

[32] Further, it is unclear to me what the applicant means by a “labour relations complaint.” The applicant’s submissions show that a complaint process under the collective agreement was underway in 2015, but there is no information on its current status. Given the length of time that has passed, I am not satisfied that this proceeding is still underway. Even if the proceeding was still underway, the applicant has not explained why the third party personal information is necessary to prepare for the proceeding or ensure a fair hearing.

[33] I am not satisfied that the personal information in dispute is relevant to a fair determination of the applicant’s rights.

22(2)(e) – Financial or other harm

[34] PHSA submits that it is reasonable to believe that disclosure of the records in dispute would unfairly expose the third parties to financial or other harm. PHSA has not provided specific arguments on what kind of financial or other harm it believes the third parties would face, other than harm to a third parties’ reputation, which I will address below. No financial or other harm is apparent from my review of the records.

22(2)(f) – Supplied in Confidence

[35] PHSA says that the information in dispute was supplied in confidence. It says that the records contain information from individuals who brought forward concerns and individuals who were interviewed, each of whom would have had an expectation of confidentiality. PHSA further submits that the content of the information provided by the third parties would allow the applicant to identify the third parties, and so redacting the names would not be sufficient.

[36] Many of the records contain personal information that was supplied by third parties to BCEHS during the investigation. While there is no direct evidence from the third parties about their expectations regarding confidentiality, there are several indicators that support PHSA’s submission that the information it received from the third parties was supplied in confidence. Communications from

BCEHS to third parties states that BCEHS expects the third parties to keep their involvement in the investigation confidential. Additionally, the draft and final copies of the Investigative Reports are marked “Confidential”, as are some Emails sent between BCEHS staff.⁹ In my view, all of this indicates that BCEHS conducted the investigation confidentially and supports PHSA’s assertion that the personal information it received from the third parties in conducting the investigation was supplied in confidence.

22(2)(g) – Information likely inaccurate or unreliable

[37] Section 22(2)(g) is intended to prevent the harm that can flow from disclosing third party personal information that may be inaccurate or unreliable.¹⁰ PHSA says that section 22(2)(g) is relevant and weighs against disclosure of the records. It does not further explain why this is a relevant circumstance. The applicant did not make submissions on whether the information is inaccurate or unreliable. In my view, there is no record or evidence to support PHSA’s assertion that the personal information is inaccurate or unreliable.

22(2)(h) – Unfair damage to reputation

[38] Section 22(2)(h) requires a public body to consider whether the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant. PHSA submits that it is reasonable to believe that disclosure of the information in dispute would unfairly damage the reputations of the third parties. PHSA submits that the records include highly personal information provided by those bringing allegations and who were interviewed to investigate the allegations. In Order F15-54, the adjudicator accepted that information in a workplace investigation report could unfairly damage an employee’s reputation in light of its character.¹¹

[39] The information in the Investigative Reports describes what the applicant and third parties observed and thought about the applicant’s disputes with her co-workers. In Order F06-11, the adjudicator found that other people’s opinions and views about the applicant did not unfairly damage a third party’s reputation.¹² I find that the same rationale applies here and that disclosure of the third party’s observations and opinions would not unfairly damage their reputation.

[40] On my review of the records, I also find that disclosure of some of the personal information in the Emails may unfairly damage the reputation of a BCEHS employee. This is because there are comments by BCEHS employees

⁹ For example, pages 18, 21 and 22 of the records.

¹⁰ Order F14-47, 2014 BCIPC 51 at para. 34.

¹¹ Order F15-54, 2015 BCIPC 57 at para. 22.

¹² Order F06-11, 2006 CanLII 25571 (BC IPC) at para. 62.

about another employee's motivations for taking a specific action. In context, the comments appear to be speculative and nothing else before me provides a basis for them. The comments are negative and critical. I find that disclosure of these comments may damage the third party's reputation because of their negative character and that the damage would be unfair since the comments appear to be baseless.

Applicant's Personal Information

[41] As I found above, some of the third party personal information is the applicant's personal information because it is about her involvement in workplace disputes. Previous orders have stated that it would only be in rare circumstances that disclosure to an applicant of her own personal information would be an unreasonable invasion of a third party's personal privacy.¹³ The fact that the information is the applicant's personal information is a factor that I have considered.

Applicant's Knowledge

[42] It is clear from the applicant's submissions as well as some of the records that the applicant has knowledge of some of the information that PHSA has withheld. The applicant states that she was compelled to read a copy of the Complaint by her supervisor. In a letter written by the applicant, she quotes portions of the Complaint.¹⁴ For this reason, I am satisfied that the Complaint has already been disclosed to the applicant. Further, some of the information in the Investigative Reports clearly originated from the applicant because it repeats what she said during the investigations. PHSA also withheld employee numbers of the applicant's co-workers in an email sent to the applicant. The fact that the applicant knows this information is a relevant circumstance weighing in favour of disclosure.

Sensitivity of the Information

[43] I have considered the sensitivity of the information as a circumstance in determining whether disclosure would be an unreasonable invasion of third party privacy.¹⁵ Some of the third party personal information is sensitive medical information about patients. This is a factor weighing against disclosure of this information.

¹³ See, for example, Order 14-47, 2014 BCIPC 51 (CanLII) at para. 36; Order F17-05, 2017 BCIPC 6 (CanLII) at para. 70.

¹⁴ Records Package, pages 66-68.

¹⁵ For similar findings, see Order F17-39, 2017 BCIPC 42 at para. 120 and Order F16-38, 2016 BCIPC 42 at paras. 136, 138.

Section 22(2) – findings and analysis

[44] I have established that most of the information in dispute is personal information and that ss. 22(3)(a),(d) and/or (g) apply to all of it, meaning that disclosure of the personal information in dispute is presumed to be an unreasonable of third party personal privacy. I found that the third parties supplied information in confidence, and that some of the information may unfairly damage the reputation of third parties. I also found that the fact that some of the information is the applicant's personal information, that the applicant has demonstrable knowledge of some of the third party personal information and that some of the personal information is medically sensitive are all circumstances that are relevant to whether disclosure would be an unreasonable invasion of third party privacy.

[45] In my view, the presumption is rebutted with regards to employee numbers withheld from one of the emails. This email was sent to the applicant so she already knows it. PHSA has not explained how employee numbers warrant special consideration. I find that it would not be an unreasonable invasion of the third party's personal privacy to disclose this information.

[46] I also find that the presumption is rebutted with regards to portions of the Complaint. The applicant states that she was given a copy of the Complaint, which is supported by the fact that she quoted portions of it. In addition, some of the disputed information is about the applicant so it is the applicant's personal information. I find that disclosing most of the Complaint to the applicant would not be an unreasonable invasion of third party personal privacy. The portions of the complaint that would constitute an unreasonable invasion of a third party's personal privacy are the portions that reveal medical information about a patient. Despite the fact that the applicant has previously seen this patient information, I find that the presumption that applies to this medical information has not been rebutted because of the sensitivity of it. I find that it would be an unreasonable invasion of the patient's privacy to disclose it.

[47] I find that the presumption is rebutted for portions of the Investigative Reports. In my view, it would not be an unreasonable invasion of third party privacy to disclose the general fact that the third parties made complaints about the applicant, and the nature of the complaints. That is because it is evident from the Investigative Reports that the applicant was interviewed about those very matters. Similarly, it would not be an unreasonable invasion of third party privacy to disclose to the applicant information describing her complaints, what she said in the investigations or information that is only about her. However, there is nothing to indicate that the applicant knows other information in these reports about what the third parties said to the investigator about the workplace incidents. I find that disclosing that information would be an unreasonable invasion of third party personal privacy.

[48] For the balance of the third party personal information, there are no circumstances that rebut the presumption that disclosure would be an unreasonable invasion of third parties personal privacy and s. 22(1) applies to it, so it must not be disclosed.

Section 22(5)

[49] I have found that some of the information is about the applicant and was supplied in confidence. Section 22(5)(a) requires that the public body give the applicant a summary of information about the applicant that was supplied in confidence unless the summary cannot be prepared without disclosing the identity of the third party who supplied the information.

[50] In my view, the information about the applicant that was supplied in confidence could not be meaningfully summarized without disclosing the identity of the third parties.

[51] PHSA withheld some information under s. 13 that it is not authorized to refuse to disclose under s. 22, so I will consider it next.

Section 13

[52] Section 13 gives public bodies discretion to refuse to disclose information that would reveal advice or recommendations developed by or for a public body subject to the exceptions listed in section 13(2).

[53] As stated by the Supreme Court of Canada, the purpose of s. 13 is to provide for the full, free and frank participation of public servants or consultants in the deliberative process.¹⁶ In *College of Physicians and Surgeons*, the BC Court of Appeal interpreted “advice” as an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.”¹⁷ Previous orders have held that this section applies to information that would allow an accurate inference to be made about advice or recommendations.¹⁸

[54] The first step in any s. 13 analysis is to determine whether the information is advice or recommendations developed by or for a public body. The next step is to determine whether the information falls within any of the circumstances described in s. 13(2); if so, the public body must not refuse to disclose the information under s. 13(1).

¹⁶ *John Doe v Ontario (Finance)* 2014 SCC 36 (CanLII) at para. 51.

¹⁷ 2002 BCCA 665 at para. 113.

¹⁸ See for example, Order F15-12, 2015 BCIPC 12 (CanLII), Order F16-28, 2016 BCIPC 30 (CanLII).

[55] PHSA withheld some information in one Investigative Report under s. 13. PHSA submits that the withheld information constitutes advice or recommendations squarely within the terms of s. 13(1).¹⁹ PHSA further submits that Courts and previous OIPC orders have allowed s. 13(1) to be applied to some or all of investigative reports commissioned by a public body to gather facts and recommend courses of action.

[56] I find that some of the withheld information in the Investigative Reports is clearly advice or recommendations because it is the investigators' analysis of the underlying causes of the dispute and specific opinions on a future course of action.

[57] The remaining information in the report is background information that would not reveal advice or recommendations or allow accurate inferences to be made about advice or recommendations. I find that s. 13(1) does not apply to this information.

[58] Neither party made submissions on s. 13(2). I have considered whether the information falls within any of the circumstances described in s. 13(2) and in my view, s. 13(2) does not apply.

CONCLUSION

For the reasons provided above, under s. 58 of FIPPA, I order that:

1. PHSA is required, in part, to refuse to disclose the information in dispute under s. 22.
2. PHSA is authorized, in part, to refuse to disclose the information it withheld under s. 13.
3. PHSA is not authorized to refuse to disclose the information that I have highlighted on the pages that I have sent to PHSA along with this order.
4. I require PHSA to give the applicant access to this information by September 7, 2018. PHSA must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

July 25, 2018

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F16-65758

¹⁹PHSA initial submissions at para. 3, page 5.