



Order F20-22

FRASER HEALTH AUTHORITY

Ian C. Davis
Adjudicator

June 2, 2020

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Summary: The applicant made a request to the Fraser Health Authority (FHA) for access to records relating to an investigation the FHA conducted under the *Adult Guardianship Act*. The FHA withheld the information in dispute under ss. 14 (solicitor-client privilege) and 22 (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that the FHA was not authorized to refuse to disclose the information withheld under s. 14 and that the FHA was required to refuse to disclose the information withheld under s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 22(1), 22(2)(a), 22(2)(c), 22(2)(f), 22(2)(g), and 22(2)(h).

INTRODUCTION

[1] The applicant made a request to the Fraser Health Authority (FHA) for access to records relating to an investigation the FHA conducted under the *Adult Guardianship Act (AGA)*.¹ The FHA provided the applicant with some of the responsive records in their entirety and the others with parts severed under ss. 13 (advice or recommendations), 14 (solicitor-client privilege) and 22 (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act (FIPPA)*.²

[2] The applicant asked the Office of the Information and Privacy Commissioner to review the FHA's decision. During mediation, the FHA found an additional responsive record and disclosed it to the applicant with some information withheld under s. 22.³ Mediation failed to resolve matters and the applicant requested an inquiry.

¹ R.S.B.C. 1996, c. 6.

² Letter from the FHA to the applicant dated October 2, 2017.

³ Letter from the FHA to the applicant dated April 26, 2019.

PRELIMINARY MATTER

[3] During the inquiry, the FHA disclosed some information to the applicant that had previously been withheld under s. 13(1).⁴ Since that information has now been disclosed and the FHA is not withholding any other information under s. 13(1),⁵ I conclude that s. 13(1) is no longer an issue in this inquiry.

ISSUES

[4] The issues to be decided in this inquiry are as follows:

1. Is the FHA authorized to refuse to disclose the information in dispute under s. 14 of FIPPA?
2. Is the FHA required to refuse to disclose the information in dispute under s. 22 of FIPPA?

[5] According to s. 57(1) of FIPPA, the FHA has the burden of proof under s. 14. Based on s. 57(2) of FIPPA, the applicant has the burden under s. 22 to show that disclosure of any personal information would not be an unreasonable invasion of a third party's personal privacy.

BACKGROUND

[6] The disputed records relate to an investigation conducted under the AGA. Part 3 of the AGA deals with support and assistance for abused and neglected adults. Section 46 states that anyone who has information indicating that an adult is abused or neglected and is unable to seek support and assistance, for example because of a physical handicap or disease, may report the circumstances to a designated agency. The AGA grants powers to designated agencies, such as the FHA,⁶ to investigate reports made under s. 46.

[7] The applicant made a report to the FHA under s. 46 about an individual (Adult).⁷ As a result of the applicant's report, the FHA commenced an investigation under Part 3 of the AGA (Investigation). A clinical specialist in adult abuse and neglect, who was employed by the FHA (Investigator), led the Investigation.

[8] The applicant made her access request after the Investigation concluded. Specifically, the applicant requested:

⁴ Records at p. 90.

⁵ FHA's submissions dated November 13, 2019 at para. 4.

⁶ See *Designated Agencies Regulation*, BC Reg. 19/2002, s. 3.

⁷ Records at p. 18.

... access to records of communications entailed in this investigation (and any other reportable incident reports and associated file records) which include my name or otherwise reference me (reporter, she, family friend, or whatever other referent may be used) or reference my decisions (course of action). I am requesting access only to emails, memos, reports, minutes, notes, conversation transcripts, and other records of communication which include my name (or otherwise reference me) and I am not requesting any records to which 22(3)(a) might apply.⁸

RECORDS AND INFORMATION IN DISPUTE

[9] The records in dispute are emails or email chains, a summary of the Investigation prepared by the Investigator, handwritten and transcribed notes of telephone calls made during the Investigation, and a document called a “Home Health External Referral” for the Adult.⁹

SECTION 14 – SOLICITOR-CLIENT PRIVILEGE

[10] Section 14 provides that the head of a public body “may refuse to disclose to an applicant information that is subject to solicitor client privilege.” This section encompasses both legal advice privilege and litigation privilege.¹⁰ The FHA submits that legal advice privilege applies to the information in dispute under s. 14. In these reasons, when I say “solicitor-client privilege”, I mean “legal advice privilege” only.¹¹

[11] The test for solicitor-client privilege has been expressed in various ways, but the essential elements are that there must be:

1. a communication between solicitor and client (or their agent¹²);
2. that entails the seeking or providing of legal advice; and
3. that is intended by the lawyer and client to be confidential.¹³

⁸ Letter from the applicant to the FHA dated July 4, 2017.

⁹ Records at pp. 7, 9-11, 13, 28-30, 37-39, 51, 60-68, 82-84, 86, and 88; applicant’s submissions at p. 1; FHA’s submissions dated November 13, 2019 at paras. 7, 12 and 17.

¹⁰ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.

¹¹ See e.g. *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paras. 7-8.

¹² *Descoteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at pp. 872-873.

¹³ *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837, cited in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 15; *R. v. B.*, 1995 CanLII 2007 (BC SC); *Festing v. Canada (Attorney General)*, 2001 BCCA 612 at para. 92.

[12] A communication does not satisfy this test merely because it was sent to or from a lawyer; the lawyer must be acting in a legal capacity.¹⁴ That said, solicitor-client privilege is so important to the legal system that it should apply broadly and be as close to absolute as possible.¹⁵ The confidentiality ensured by solicitor-client privilege allows clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients.¹⁶

Does solicitor-client privilege apply?

[13] The information in dispute under s. 14 is in one email chain, consisting of two emails, between a social worker and FHA's General Counsel (General Counsel).¹⁷

[14] The FHA submits that a review of the email chain will confirm that:

... it is a written communication of a confidential nature between a social worker employed by Fraser Health and [General Counsel] in her role as general counsel. It is a communication that forms part of the exchange of information relating to the legal advice that [General Counsel] was providing to Fraser Health staff who were involved in the investigation of [the Adult].¹⁸

[15] The FHA provided affidavit evidence from its Freedom of Information Coordinator (FOI Coordinator). The FOI Coordinator says that General Counsel "had a dual role as legal advisor and as a manager" and that "[o]ther records authored by [General Counsel] were disclosed where they related to her management role rather than her role as legal advisor."¹⁹

[16] The applicant questions whether solicitor-client privilege applies, but argues that if it does, the FHA waived privilege.²⁰

[17] Based on my review of the records, I find the disputed email chain is a follow-up to an earlier email sent from General Counsel to the social worker, which the FHA already disclosed to the applicant (March 21 email).²¹ In the March 21 email, General Counsel states that she is seeking the social worker's

¹⁴ *Kefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras. 61 and 81; *R. v. McClure*, 2001 SCC 14 at para. 36; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10.

¹⁵ *McClure*, *ibid* at para. 35; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 10 and 13.

¹⁶ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34.

¹⁷ Records at p. 88.

¹⁸ FHA's submissions dated November 13, 2019 at para. 12.

¹⁹ Affidavit #1 of FOI Coordinator at para. 5.

²⁰ Applicant's submissions at p. 5.

²¹ Records at p. 89.

assistance to address “some ancillary questions” that were posed to her “by the person who reported the allegation of abuse/neglect”, i.e. the applicant. General Counsel described the questions posed by the applicant as “(somewhat) general in nature”, and asked the social worker to call her. The disputed emails were sent the next morning.

[18] In my view, the records, affidavit evidence and submissions do not establish that the disputed emails form “part of the exchange of information relating to” the providing of legal advice. I find the disputed emails are like the other emails that the FHA disclosed which involved General Counsel acting as a manager rather than a lawyer. I find the content of the disputed emails is not legal in nature. The records show that General Counsel sought the social worker’s assistance so that she could respond to the applicant’s questions. I fail to see how that communication relates to providing legal advice to FHA staff. The FHA does not explain even in general terms how the disputed emails are connected to legal advice. Nor do the other records provide sufficient detail or context to show how the disputed information reveals the legal advice that the FHA refers to. As a result, I am unable to find the connection that the FHA says exists between the disputed emails and legal advice.

[19] I conclude that s. 14 does not apply. Given my conclusion, I do not need to address the applicant’s argument regarding waiver of privilege or the FHA’s submission that it properly exercised its discretion not to disclose the disputed emails.

SECTION 22 – THIRD-PARTY PERSONAL PRIVACY

[20] The FHA submits that s. 22 applies to most of the withheld information. Section 22(1) provides 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.

[21] The information withheld under s. 22 consists of:

- the Investigator’s personal email;
- third parties’ whereabouts or availability;
- steps taken in the Investigation;
- names, titles, and roles of third parties involved in the Investigation and details about their involvement with the Investigation;
- details about the Adult provided by third parties during the Investigation; and
- details about the applicant’s involvement with the Adult.

[22] The proper approach to the s. 22 analysis is well-established.²² I will apply that approach here.

Personal Information

[23] Under FIPPA, “personal information” means “recorded information about an identifiable individual other than contact information”.²³ Information is “about an identifiable individual” when it is “reasonably capable of identifying an individual, either alone or when combined with other available sources of information.”²⁴ FIPPA defines “contact information” 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”.²⁵

[24] The applicant stated in her access request that she is only seeking access to information that includes her name or otherwise references her or her actions or decisions. The applicant reiterated in her submissions that she is “requesting disclosure of only statements about (and/or attributed) to [her]” made by professional service providers other than the Adult’s care providers.²⁶

[25] Given the applicant’s access request and submissions, I am satisfied she is only seeking access to her personal information. Therefore, the first question under s. 22 is whether any of the withheld information is the applicant’s personal information.

[26] Having reviewed the records, I find that a relatively small amount of the withheld information is the applicant’s personal information.²⁷ This information is what third parties said about the applicant during the course of the Investigation, as well as facts about the applicant’s connection to the Adult, as set out in the Investigator’s summary of the Investigation. I also find that the applicant’s personal information is simultaneously the personal information of the third parties who provided the information about the applicant. I am satisfied that the third parties’ identities are reasonably identifiable from what they said, in combination with the applicant’s background knowledge.²⁸ Finally, I find that some of the applicant’s personal information is also the Adult’s personal information because it is about the applicant’s involvement with the Adult.

²² See e.g. Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58.

²³ Schedule 1 of FIPPA.

²⁴ Order F19-13, 2019 BCIPC 15 (CanLII) at para. 16 citing Order F18-11, 2018 BCIPC 14 (CanLII) at para. 32.

²⁵ Schedule 1 of FIPPA.

²⁶ Applicant’s submissions at pp. 1-3.

²⁷ Records, parts of pp. 9-10, 29, 37-39, 51, 66-68, 82 and 84. None of this is contact information.

²⁸ See Order F09-23, 2009 CanLII 66962 (BC IPC) at paras. 14-15.

[27] The rest of the withheld information is not the applicant's personal information, so it is not in dispute because the applicant is not seeking access to it. I will not consider that information any further.

Presumptions of no unreasonable invasion – s. 22(4)

[28] The next step is to analyze s. 22(4), which sets out various circumstances in which disclosure of personal information is not an unreasonable invasion of a third party's personal privacy.

[29] The applicant raises s. 22(4)(a), which states that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the third party has, in writing, consented to or requested the disclosure.²⁹ The applicant suggests that the FHA was required to seek the third parties' consent to disclose their personal information.

[30] The FHA submits that none of the presumptions in s. 22(4) apply.³⁰ Regarding s. 22(4)(a), the FHA submits that the third parties "could not consent to the disclosure of information that was either about [the Adult] or provided by him as that would breach their professional obligations."³¹

[31] There is no evidence before me that the third parties consented in writing to disclosure of their personal information, and s. 22(4)(a) does not say that a public body is required to seek consent. I find s. 22(4)(a) does not apply, and that no other circumstances under s. 22(4) apply.

Presumptions of unreasonable invasion – s. 22(3)

[32] The third step in the s. 22 analysis is to determine if any of the presumptions in s. 22(3) apply. Section 22(3) sets out various circumstances in which a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy.

[33] The FHA submits that s. 22(3)(a) applies to "much of the information".³² Section 22(3)(a) states 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 a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

²⁹ Applicant's submissions at p. 2.

³⁰ FHA's submissions dated November 13, 2019 at para. 18.

³¹ FHA's reply submissions dated January 9, 2019 at p. 2.

³² FHA's submissions dated November 13, 2019 at para. 18.

[34] The applicant submits that the FHA's reliance on s. 22(3)(a) is "not clear" because her access request expressly stated that she did not want any information to which s. 22(3)(a) might apply.³³

[35] Based on my review of the records, I find that s. 22(3)(a) does not apply to any of the information that remains in dispute, i.e. the applicant's personal information (which, as I found above, is also the personal information of certain third parties). The parties did not raise any other presumptions under s. 22(3) and, in my view, none apply.

All relevant circumstances – s. 22(2)

[36] The fourth step in the analysis is to consider, given all the relevant circumstances, including those in s. 22(2), whether disclosure of the disputed personal information would be an unreasonable invasion of third-party personal privacy.

[37] The FHA submits that the applicant has not discharged her burden to establish that disclosure of the withheld information would not be an unreasonable invasion of the third parties' personal privacy.³⁴ In response, the applicant argues that several considerations weigh in favour of disclosure under s. 22(2).³⁵

i. Public scrutiny – s. 22(2)(a)

[38] First, the applicant argues that s. 22(2)(a) applies. That section states that a relevant consideration is whether disclosure is desirable for the purpose of subjecting the activities of a public body to public scrutiny. The applicant says that if the disputed information reveals that the FHA's investigative process under Part 3 of the AGA "creates a venue by which reporters of acute Elder Abuse concerns may be subjected to debasing accusations behind closed doors", then disclosure of the information is desirable to subject the FHA to public scrutiny.³⁶

[39] In response, the FHA says that the applicant's allegation is "speculative and baseless" and that this case does not raise concerns about the propriety of the FHA's activities because the FHA "simply conducted an investigation as it was mandated to do."³⁷

[40] I find that s. 22(2)(a) does not weigh in favour of disclosure. In my view, the evidence does not reveal anything improper about how the FHA conducted

³³ Applicant's submissions at p. 1.

³⁴ FHA's submissions dated November 13, 2019 at paras. 18-19.

³⁵ Applicant's submissions at pp. 2-5.

³⁶ Applicant's submissions at p. 5.

³⁷ FHA's reply submissions dated January 9, 2019 at p. 2.

the Investigation that would be of concern to the public. Specifically, I do not find that the FHA allowed the Investigation to devolve into a venue for third parties to debase the applicant. On the evidence before me, I am satisfied that the FHA simply collected and critically assessed the information necessary to fulfill its statutory responsibilities under Part 3 of the AGA.

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

[41] Second, the applicant argues that s. 22(2)(c) applies. That section provides that a relevant circumstance is whether the personal information is relevant to a fair determination of the applicant's rights. The applicant submits that the disputed information likely contains false and/or misleading statements about her and that she has a right to correct that information.³⁸

[42] The FHA responds that "this is not a case about correcting personal information."³⁹

[43] I am not persuaded that s. 22(2)(c) weighs in favour of disclosure. Generally, s. 22(2)(c) applies where the personal information is relevant to a fair determination of the applicant's rights in a legal proceeding. The applicant does not point to any such proceeding here. Further, the information in dispute is the applicant's personal information as well as the personal information of third parties who provided information to the FHA during the Investigation. In my view, the applicant is not entitled to correct the information provided by third parties because it is not exclusively her personal information. The applicant had an opportunity to provide her own evidence and opinions, which was for the FHA to assess in light of the other information collected.

iii. Information supplied in confidence – s. 22(2)(f)

[44] Third, the applicant argues that s. 22(2)(f) applies. According to that section, a relevant circumstance under s. 22(1) is whether the disputed personal information was supplied in confidence. The applicant says that she supplied her identity to the FHA in confidence, but it was then repeatedly disclosed.⁴⁰ However, that is a separate issue from whether information about the applicant, which is the information that she wants, was supplied in confidence by third parties to the FHA.

[45] In my view, s. 22(2)(f) applies to the disputed information and weighs against disclosure of that information. The notes in the records expressly indicate that the evidence recorded was supplied in confidence.⁴¹ Further, in Order F09-

³⁸ Applicant's submissions at p. 4.

³⁹ FHA's reply submissions dated January 9, 2019 at p. 2.

⁴⁰ Applicant's submissions at p. 4.

⁴¹ For example, records at p. 35.

23, the adjudicator found that personal information collected in the course of an investigation under Part 3 of the AGA was supplied in confidence given the scheme of the AGA and the policies of designated agencies authorized to conduct investigations.⁴² I agree with that analysis and make a similar finding here.

iv. Inaccurate information – s. 22(2)(g)

[46] Fourth, the applicant argues that s. 22(2)(g) applies. That section states that it is relevant whether the personal information is likely to be inaccurate or unreliable. The applicant says that the disputed information about her is likely inaccurate.⁴³

[47] In my view, this argument is essentially the same as the applicant's argument under s. 22(2)(c), which was that the disputed information likely contains false and/or misleading statements about her and that she has a right to correct that information. However, as stated above, I find the applicant does not have the right to correct information provided to the FHA in the course of the Investigation, particularly given that the applicant also had an opportunity to provide information. I find s. 22(2)(g) does not weigh in favour of disclosure.

v. Unfair damage to reputation – s. 22(2)(h)

[48] Fifth, the applicant submits that s. 22(2)(h) applies. Section 22(2)(h) provides that a relevant circumstance under s. 22(1) is whether the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant. The applicant says that disclosure of the disputed information would only cause unfair damage to the third parties' reputations if the information they provided during the Investigation was false, misleading or incompetent.⁴⁴

[49] In response, the FHA submits that s. 22(2)(h) is only one factor in the analysis and does not, in itself, militate in favour of disclosure.⁴⁵

[50] Having reviewed the records, I find that disclosure would not unfairly damage the reputation of any of the third parties. I conclude this factor does not weigh for or against disclosure.⁴⁶

⁴² Order F09-23, *supra* note 28 at paras. 21-27.

⁴³ Applicant's submissions at p. 3.

⁴⁴ Applicant's submissions at p. 3.

⁴⁵ FHA's reply submissions dated January 9, 2019 at p. 1.

⁴⁶ See e.g. Order F08-19, 2008 CanLII 66913 (BC IPC) at para. 86.

vi. Applicant's knowledge

[51] In addition to the considerations raised by the applicant, I find that the applicant's knowledge is also relevant. Some of the applicant's personal information is information that I am satisfied she already knows. However, the FOI Coordinator provided evidence, which I accept, that this information was provided by third parties and not the applicant herself.⁴⁷ I find that, given the applicant's extensive knowledge of this matter, disclosure of this information would reveal the identities of third parties who participated in the Investigation. In my view, this is another consideration that weighs against disclosure.

vii. Conclusion

[52] To summarize, I find that the disputed information was supplied in confidence and that this weighs strongly against disclosure. I find that the other relevant factors do not tip the balance in favour of disclosure. Having regard to all the relevant circumstances, I conclude that it would be an unreasonable invasion of the personal privacy of the Adult and/or certain third parties involved the Investigation to disclose the disputed information.

Section 22(5) – Summary of applicant's personal information

[53] In this case, the final step in the s. 22 analysis is to determine whether s. 22(5) applies. That subsection provides, in relevant part:

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless

(a) the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information ...[.]

[54] As I found above, the disputed personal information is about the applicant and was supplied by third parties to the FHA in confidence. Therefore, s. 22(5)(a) requires the FHA to give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

[55] In my view, a summary cannot be prepared without disclosing the identity of the third parties who supplied the personal information. I find the applicant's extensive knowledge of the background circumstances and the people involved in the Adult's life, in combination with the information already disclosed, would

⁴⁷ Affidavit #1 of FOI Coordinator at para. 4.

allow her to make accurate inferences as to the identity of the third parties who supplied the personal information.⁴⁸

CONCLUSION

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

1. The FHA is not authorized to refuse to disclose the information withheld under s. 14 of FIPPA.
2. The FHA is required to refuse to disclose the information withheld under s. 22 of FIPPA.
3. The FHA is required to give the applicant access to the information withheld under s. 14 of FIPPA. The FHA must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

Pursuant to s. 59 of FIPPA, the FHA is required to comply with this order by July 15, 2020.

June 2, 2020

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F17-72233

⁴⁸ For a similar finding, see Order F09-23, *supra* note 28 at para. 29.