



Order F21-54

FRASER HEALTH AUTHORITY

Lisa Siew
Adjudicator

November 2, 2021

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Summary: An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to a copy of an audit conducted by the Fraser Health Authority. The audit focused on several companies that the Fraser Health Authority contracted to provide home care support services. Fraser Health Authority refused to disclose all of the information in the record under s. 14 (solicitor-client privilege) and parts of the record under ss. 13(1) (advice and recommendations) and 17(1) (harm to a public body's financial or economic interests) of FIPPA. The applicant claimed the record should be disclosed under s. 25(1)(b) since the disclosure is clearly in the public interest. The adjudicator confirmed Fraser Health Authority's decision to refuse access to the record under s. 14 and concluded s. 25(1)(b) did not apply in the circumstances. The adjudicator did not find it necessary to also consider whether Fraser Health Authority was authorized to withhold information in the record under ss. 13(1) and 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 25(1)(b), 14, 13(1) and 17(1).

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), a media company (applicant) requested the Fraser Health Authority (Fraser Health) provide a copy of an audit referred to in a March 2019 news release. The audit investigated four companies that Fraser Health had contracted with to provide home care services. Fraser Health issued the news release to announce changes to the delivery of its home care support services.

[2] Fraser Health refused to disclose all of the information in the record under s. 14 (solicitor-client privilege) and parts of the record under ss. 13(1) (advice and recommendations) and 17(1) (harm to a public body's financial or economic interests) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review Fraser Health's decision and claimed the record should be disclosed under s. 25(1)(b) (disclosure clearly in the public interest). Mediation did not resolve the matters at issue and they were forwarded to an inquiry. The applicant and Fraser Health provided submissions for the inquiry.

[4] Fraser Health's evidence includes pre-approved *in camera* material. The OIPC allows parties to seek approval to provide materials *in camera* on a number of limited grounds, including where those materials would reveal the information in dispute in the inquiry. Where information is approved *in camera*, the decision-maker considers this information privately and the other party will receive the inquiry submissions with the *in camera* material redacted.

ISSUES

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

1. Is Fraser Health authorized to refuse to disclose the information at issue under s. 14?¹
2. If s. 14 does not apply, then is Fraser Health authorized to refuse to disclose the information at issue under ss. 13(1) and 17(1)?
3. Is Fraser Health required by s. 25(1)(b) to disclose the information at issue?²

[6] Section 57(1) places the burden on Fraser Health, as the public body, to prove the applicant has no right of access to all or part of the record in dispute under ss. 13(1), 14 and 17(1).

[7] FIPPA does not identify which party has the burden to prove that s. 25(1) applies. However, previous OIPC orders have concluded that it is in the interests of both parties to provide whatever arguments and evidence they can to assist the adjudicator with the s. 25(1) determination.³ I adopt that approach. Both parties have made submissions to support their positions on s. 25(1).

¹ I will consider s. 14 first since Fraser Health withheld the entire audit record under this exemption.

² I will consider s. 25(1)(b) last since the analysis under s. 25(1)(b) includes weighing the public interest in disclosure against the interests protected by FIPPA's exemptions to disclosure.

³ For example, Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 39 and Order F17-56, 2017 BCIPC 61 at para. 10.

DISCUSSION

Background

[8] Fraser Health is responsible for the delivery of hospital and community-based health services to over 1.9 million people in 20 diverse communities from Burnaby to the Fraser Canyon on the traditional territories of the Coast Salish and Nlaka'pamux Nations.⁴

[9] As previously noted, the applicant requested access to a record referred to in a March 13, 2019 news release issued by Fraser Health regarding changes to the delivery of its home care support services. These support services include assisting individuals in their homes with daily living activities such as bathing, dressing, grooming and other care needs.

[10] The news release announced that Fraser Health and Vancouver Coastal Health planned to shift the majority of their home support services to an in-house delivery model where the services are directly managed and delivered by each respective health authority. At that time, both health authorities were contracting out most of their home support services to external service providers.

[11] The news release also referred to the “audits of contracted home support providers” that both Fraser Health and Vancouver Coastal Health undertook in 2018. The applicant is seeking access under FIPPA to the audit undertaken by Fraser Health of its home support providers.

[12] The audit was handled internally by Fraser Health’s Internal Audit Service, which employs auditors certified in various areas to investigate allegations of wrongdoing, identifies areas of risk and provides analysis and opinions to Fraser Health’s management, Board and its legal counsel.⁵ The Internal Audit Service completed the audit and outlined its methods and findings in a document that Fraser Health refers to as the “audit summary”.

Record at issue

[13] Fraser Health describes the record at issue as a 25-page “audit summary” completed by its “Internal Audit Services”.⁶ For reasons that relate to solicitor-client privilege, as I will explain below, Fraser Health did not provide the record for my review. Therefore, I cannot determine whether calling it an “audit summary” is an accurate description.

⁴ This information is cited from Fraser Health’s website <www.fraserhealth.ca>.

⁵ Affidavit of SM at para. 3.

⁶ Fraser Health submission dated June 7, 2021 at para. 9.

[14] I also note that the parties refer to this document by several different names. For example, the applicant refers to the document as the “audit report”. For consistency and clarity, I will refer to the record at issue as the “audit record”.

Section 14 – solicitor-client privilege

[15] Fraser Health withheld the entire audit record under s. 14. Section 14 authorizes a public body to refuse to disclose information that is subject to solicitor-client privilege, which encompasses both legal advice privilege and litigation privilege.⁷ Fraser Health claims the audit record is protected under both types of privileges. I will first consider whether legal advice privilege applies to the audit record. If so, then it is not necessary for me to also consider whether litigation privilege applies.

[16] Fraser Health submits that the following four-part test should be used to determine whether legal advice privilege applies to the information in dispute:

1. there must be a communication, whether oral or written;
2. the communication must be of a confidential character;
3. the communication must be between a client (or their agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating or giving of legal advice.⁸

[17] I accept this four-part test is appropriate for determining whether legal advice privilege applies to the information in dispute.⁹

[18] Courts have also found that solicitor-client privilege extends to more than the individual document that actually communicates or proffers legal advice. It includes communications that are “part of the continuum of information exchanged” between the client and the lawyer in order to obtain or provide the legal advice.¹⁰

⁷ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para. 26.

⁸ Fraser Health’s submission dated June 7, 2021 at para. 32. Also adopted in previous OIPC orders citing *R. v. B.*, 1995 CanLII 2007 BCSC at para. 22 and cited in *British Columbia (Securities Commission) v. C.W.M.*, 2003 BCCA 244 (CanLII) at para. 46.

⁹ For a full discussion about the analytical framework for determining whether legal advice privilege applies, see *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at paras. 70-75.

¹⁰ *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [Camp Development] at paras. 40-46.

[19] A “continuum of communications” involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as “history and background from a client” or communications to clarify or refine the issues or facts.¹¹ The continuum also covers communications at the other end of the continuum, after the client receives the legal advice, such as internal client communications about the legal advice and its implications.¹²

Section 14 evidence

[20] Fraser Health chose not to provide a copy of the audit record for my review because it asserts this document is protected by solicitor-client privilege under s. 14. Where a public body declines to provide the information or records withheld under s. 14, it is expected to provide a description of the information or records in a manner that, without revealing privileged information, enables the other parties and the adjudicator to assess the validity of the claim of privilege.¹³

[21] I note that where ss. 14 and 25 are both at issue, previous OIPC orders have accepted a public body’s description and evidence about the information at issue instead of requiring the public body to produce for the commissioner the disputed records under s. 44(1) of FIPPA.¹⁴ However, this determination is assessed on a case-by-case basis and depends on the sufficiency of the description and the evidence given by the public body to support its position.

[22] In the present case, Fraser Health provided a description of the withheld information in its submissions and its affidavit and *in camera* evidence. Fraser Health generally describes the focus of the audit as “contract compliance and financial matters regarding the billing of home support services”.¹⁵

[23] Fraser Health also openly describes the information in the audit record as:

- Page 2: Background revealing advice given to Internal Audit Services.
- Pages 4-5: Internal Audit Services’ analysis of contract expenditures and explanation of data provided by service providers and observations regarding data.

¹¹ *Camp Development* at para. 40.

¹² *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.

¹³ *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para. 78.

¹⁴ For example, Order F20-42, 2020 BCIPC 51 (CanLII) at para. 14. The commissioner and their delegate has the power pursuant to s. 44(1) of FIPPA to order production of records over which solicitor client privilege is claimed.

¹⁵ Fraser Health submission dated June 7, 2021 at para. 15.

- Pages 6-7: Internal Audit Services' explanation of its objectives, methodology and findings.
- Pages 8-9: Internal Audit Services' explanation of methodology and findings.
- Pages 10-12: Advice received [*in camera* information].
- Pages 13-25: Appendices showing results of analysis.¹⁶

[24] I find the detailed description of the records in Fraser Health's submissions and evidence, including an affidavit from a lawyer, is sufficient to allow me to determine whether s. 14 applies and whether Fraser Health is required under s. 25 to disclose the audit record. I will refer to that evidence and information as required throughout this order in my determination of those issues.¹⁷

Fraser Health's initial submission on s. 14

[25] Fraser Health submits that the entire audit record should be withheld under s. 14 since it forms part of the continuum of communications between a lawyer and a client. For reasons provided *in camera*, Fraser Health explains that its President/Chief Executive Officer directed its Internal Audit Services to conduct a comprehensive audit of all four home service providers. It says the purpose of the audit was to enable its lawyers to provide legal advice to Fraser Health's management and Board about certain issues that it describes *in camera*. Fraser Health says its lawyers were engaged in the process of providing legal advice and the audit record was sent to them on a confidential basis to assist in the formulation of that legal advice.¹⁸ Fraser Health emphasizes that its lawyers did provide it with the sought-after legal advice.

[26] In support of its position, Fraser Health provided an affidavit from a lawyer who used to be its previous in-house general counsel. The lawyer explains that her role with Fraser Health consisted of acting as a legal advisor and also occupying a management role. The lawyer attests that her involvement regarding the audit record was in her role as in-house legal counsel and consisted of providing legal advice in confidence about certain matters that she describes *in camera*. The lawyer confirms that the audit record was provided to her and another named lawyer and she describes, *in camera*, the contents of the audit record. She attests the audit record was marked and treated as confidential and

¹⁶ Fraser Health submission dated June 7, 2021 at paras. 51 and 65.

¹⁷ As previously noted, if I find s. 14 applies, then it is not necessary for me to also then consider whether some of the information in the audit record can be withheld under ss. 13(1) or 17(1).

¹⁸ Fraser Health submission dated June 7, 2021 at para. 40.

formed the basis of the legal advice that she and the other lawyer provided to Fraser Health as their client.

Applicant's position on s. 14

[27] The applicant contends that a continuum of communications only applies “where a third party serves as a ‘channel of communication between the client and the solicitor.’”¹⁹ Citing *Fresco v. CIBC*, 2019 ONSC 3309 [*Fresco*], the applicant argues that solicitor-client privilege is not intended to protect “all communications or other material deemed useful by the lawyer to properly advise his client.”²⁰ It submits that a record created and provided by a third party, that is then relied upon by a lawyer to assist in a legal defence or action, is not protected by solicitor-client privilege.

[28] The applicant says it is clear from Fraser Health’s submissions that the audit was conducted to obtain “factual and background” information about whether various service providers were in compliance with their contractual obligations.²¹ The applicant says it understands the audits were being conducted “at the request of [Fraser Health’s previous] internal legal counsel, who would then provide legal advice based on the outcome of these audits.”²²

[29] As a result, the applicant submits solicitor-client privilege does not apply to the audit record because it is a factual report that Fraser Health’s previous internal legal counsel felt would be useful in giving legal advice. The applicant says “while the advice [the lawyer] ultimately gave (if any) is undeniably privileged, the factual summary report with which she was provided is not.”²³

Fraser Health's response submission on s. 14

[30] Fraser Health contests the applicant’s understanding of what constitutes a “continuum of communications” between a lawyer and a client. It says the applicant incorrectly describes the test as only applying where a third party serves as a channel of communication between the client and solicitor. Fraser Health says nothing further on this point, but I understand it relies on its previous submission where it describes a continuum of communication as “the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as ‘history and background from a client’ or communications to clarify or refine the issues or facts.”²⁴

¹⁹ Applicant’s submission at p. 2.

²⁰ Applicant’s submission at pp. 2-3, citing *Fresco v. CIBC*, 2019 ONSC 3309 and *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ONCA).

²¹ Applicant’s submission at p. 2.

²² *Ibid.*

²³ *Ibid* at p. 3.

²⁴ Fraser Health’s submission dated June 7, 2021 at para. 31, citing Order F20-29, 2020 BCIPC 35 at para. 21.

[31] Fraser Health also distinguishes the case law that the applicant relies on to support its position. It submits that the record, facts and circumstances in *Fresco* are entirely different from the present case. Fraser Health submits the documents in *Fresco* were not part of any communication between a solicitor and a client or the client's agent and there was no evidence that the reports were directly related to the seeking, formulating or giving of legal advice.

[32] Fraser Health submits the facts and circumstances in the present case could not be more different from *Fresco* since the audit record was a confidential written communication between its Internal Audit Services and its previous in-house legal counsel. It says the content of the audit record, "as well as the evidence explaining its genesis and purpose, establish that it was directly related to the formulating or giving of legal advice to [Fraser Health]'s Executive."²⁵

Analysis and findings on s. 14

[33] I will first address whether Fraser Health's lawyers were acting in a legal capacity when they received the audit record. Fraser Health's evidence establishes there were two lawyers involved in this matter: its previous in-house general counsel and another named lawyer. Fraser Health describes, *in camera*, the identity, credentials and role of the other named lawyer and their involvement in the matter. Without disclosing any of that *in camera* information, I am satisfied this other lawyer was acting in a legal capacity.

[34] With regards to Fraser Health's previous in-house general counsel, solicitor-client privilege extends to in-house counsel provided they are acting in a legal capacity and not a business or management capacity. The Supreme Court of Canada has said, "owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose."²⁶

[35] Fraser Health's previous in-house counsel acknowledges that she occupied two distinct roles within the health authority, but attests that she was acting as a legal advisor in relation to the audit record. She recounts the circumstances leading to and surrounding the audit record and describes, *in camera*, the specific issues that she and the other lawyer provided legal advice on. Based on this evidence, I am satisfied Fraser Health's previous in-house counsel was acting in a legal capacity and not a management capacity. Furthermore, I note the applicant does not appear to dispute Fraser Health's

²⁵ Fraser Health's submission dated August 12, 2021 at p. 3.

²⁶ *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 20.

evidence that its previous in-house counsel was acting as a legal advisor at the time.²⁷

[36] Turning now to the record at issue, it is well-established that sending documents to a lawyer when those documents were created outside the solicitor-client relationship and not for the purpose of obtaining legal advice will not make those documents privileged.²⁸ However, legal advice privilege may apply where the evidence establishes that a document was prepared and forwarded to a lawyer for their review in order to obtain legal advice in confidence on a matter.²⁹ The test in every case is whether the document was created for the purpose of giving or receiving legal advice and the onus lies on the party asserting the privilege.³⁰

[37] In the present case, Fraser Health’s previous in-house counsel describes, openly and *in camera*, the events leading up to the creation of the audit record and her involvement in the matter. This evidence shows that certain concerns regarding various service providers were brought to the attention of Fraser Health’s executives and to her, in her role as legal advisor, resulting in the audit and its written record.

[38] Fraser Health’s previous in-house counsel also attests to the fact that the audit record was marked and treated as confidential. She says the audit record was part of the communication that she and the other lawyer, in their role as legal advisors, had with the executives of Fraser Health. She affirms the audit record “formed the basis of the legal advice that they were being asked to provide” and did provide to Fraser Health.³¹

[39] Taking all of this into account, Fraser Health has persuaded me the audit record was created within the solicitor-client relationship and provided to its lawyers for the purpose of giving Fraser Health legal advice in confidence. Based on Fraser Health’s evidence, I am satisfied the audit record came into existence because Fraser Health’s previous in-house counsel requested the audit to assist her in formulating and providing legal advice about certain matters.³²

[40] I also agree with Fraser Health that the facts in this case are distinguishable from the case law cited by the applicant. In *Fresco*, a class action lawsuit was brought against CIBC for requiring its branch staff to work overtime

²⁷ Applicant’s submission at p. 2.

²⁸ *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 (CanLII) at para. 61 and *Life Labs LP (Re)*, 2020 CanLII 24923 (ON IPC) at paras. 43-63, 68-72 and 77-80.

²⁹ *British Columbia (Securities Commission) v. C.W.M.*, 2003 BCCA 244 (CanLII) at para. 45 and *Saturley v. CIBC World Markets Inc.*, 2010 NSSC 361 (CanLII) at paras. 14, 28, 39 and 41.

³⁰ *British Columbia (Securities Commission) v. C.W.M.*, 2003 BCCA 244 (CanLII) at paras. 42 and 47.

³¹ Applicant’s submission at p. 2.

³² Fraser Health submission dated June 7, 2021 at para. 15.

without pay. As part of the disclosure process, CIBC discovered that it had mistakenly given the plaintiff what it believed were three privileged documents referred to as the “2007 Theme Reports”.³³ CIBC requested the documents back and when the plaintiff refused, it applied to the court seeking a declaration the reports were privileged and should be returned immediately.

[41] In *Fresco*, Mr. Justice Belobaba was not satisfied the reports were created at the request of legal counsel, that the reports were part of any confidential communication between a solicitor and client or were directly related to the seeking, formulating or giving of legal advice. Fraser Health notes Justice Belobaba found legal advice privilege did not apply because CIBC did not prove the reports were “created for and sent to CIBC in response to Legal’s request.”³⁴ It says Justice Belobaba found, among other things, that the reports were similar to routine business reports and there was no evidence of any request from CIBC’s legal counsel for the reports.

[42] In the present case, I find the audit was conducted internally by Fraser Health at the request of its previous in-house legal counsel. It is also clear that a copy of the audit record was provided to Fraser Health’s lawyers who then relied on that document to give legal advice in confidence to Fraser Health. Given these factual and evidentiary differences, I am not persuaded that I should reach the same conclusion as the court did in *Fresco*.

[43] Furthermore, I agree with Fraser Health that a “continuum of communications” is not limited to a situation where a third party serves as a channel of communication between the client and lawyer. To be clear, the term “continuum of communications” refers to the chain of communications and the exchange of information that occurs between the lawyer and client, or their authorized representatives, in order to obtain or provide the legal advice and which is given in confidence for that purpose.³⁵ These communications do not require an intermediary and may occur directly between the client and the lawyer, as occurred in the present case between employees of Fraser Health and its lawyers.

[44] In conclusion, I am satisfied solicitor-client privilege applies to the audit record since it was a confidential document requested by, prepared for and given to Fraser Health’s lawyers so they could provide legal advice in confidence to Fraser Health as the client.

[45] Given my conclusion on s. 14, it is not necessary to also consider whether litigation privilege applies or whether some of the information in the audit record may also be withheld under ss. 13(1) and 17(1).

³³ *Fresco v. CIBC*, 2019 ONSC 3309 at para. 3.

³⁴ Fraser Health’s submission dated August 12, 2021 at p. 2.

³⁵ *Camp Development* at paras. 40-46.

Exercise of discretion under s. 14

[46] Section 14 is a discretionary exemption to access under FIPPA. A public body must exercise that discretion in deciding whether to refuse access to information, and upon proper considerations.³⁶ The public body must establish that they have considered, in all the circumstances, whether information should be released even though the discretionary exemption applies.³⁷ For reasons set out below, the applicant challenges Fraser Health's decision to exercise its discretion not to disclose the audit record.

[47] If the head of the public body has failed to even exercise its discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where the decision was made in bad faith or for an improper purpose, the decision took into account irrelevant considerations or the decision failed to take into account relevant considerations.³⁸

[48] Previous OIPC orders have stated that when exercising discretion to refuse access under a discretionary exemption, a public body should typically consider relevant factors such as the age of record, the general purposes of FIPPA, the public interest in disclosure and the nature and sensitivity of the record.³⁹

Parties' position on exercise of discretion

[49] Fraser Health submits that it exercised its discretion properly and on appropriate grounds. In support of its position, Fraser Health provided an affidavit from its current in-house general counsel (general counsel), who is also the delegated head of Fraser Health for the purposes of FIPPA.

[50] Fraser Health's general counsel says she considered the following factors in refusing to disclose the audit record under s. 14:

- “The general purpose of FIPPA...to make information available to make public bodies more accountable to the public by providing a right of access to records subject to limited and mandatory exceptions to disclosure set out in Part 2.”
- The interests which s. 14 is designed to protect.

³⁶ Order 02-50, 2002 CanLII 42486 at para. 144.

³⁷ Order No. 325-1999, 1999 CanLII 4017 at p. 4.

³⁸ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52. See also Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 at para. 147.

³⁹ See Order 02-38, 2002 CanLII 42472 at para. 149, for a full list of non-exhaustive factors that a public body may consider in exercising its discretion.

- “The purpose of s. 14 which is intended to protect the confidentiality of internal communications on the continuum of seeking legal advice.”
- Fraser Health’s “historical practice of not waiving solicitor-client privilege absent extenuating circumstances.”
- “The fact that the audit [record] was obtained specifically to provide a considered legal assessment of, and advice with respect to [*in camera*].”
- “The nature of the record in dispute which is an internal confidential report prepared by [Internal Audit Service] for in-house and external legal advisors in the expectation that it would be held in strict confidence because of its intended purpose.”
- The fact that “the audit [record] was never intended to be released outside of [Fraser Health] as it contains highly sensitive information.”
- “Whether disclosure would increase public confidence in the operation of the public body but concluded that it would not given that it does not focus on or address the conduct of [Fraser Health].”
- “There were no safety or other public interest considerations that militated in favour of waiving the discretionary exceptions to disclosure”, apart from “fiscal responsibility concerns which were outweighed by the risk of disclosure.”
- “Unaware of any previous orders that have ruled that an internal document of this nature, prepared for the purposes of providing legal advice to a public body, has been ordered to be disclosed.”
- “Noted that members of the public are not already aware of the information contained in the audit [record].”⁴⁰

[51] The applicant submits that Fraser Health determined whether s. 14 applies, but did not go far enough in asking “whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.”⁴¹ Specifically, the applicant says Fraser Health “does not appear to have assessed the public interest in understanding the basis for a major policy change

⁴⁰ Affidavit of S.M. at paras. 4-6 and 8.

⁴¹ Applicant’s submission dated July 22, 2021 at p. 6, citing *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23 at para. 66.

in how home support care is delivered, nor does it appear to have weighed that interest against the purpose of the exemption and the public interest in [disclosure].”⁴²

[52] In response, Fraser Health submits that its general counsel properly considered the relevant factors in accordance with guidance provided by past orders. It also says that its general counsel “turned her mind to the ‘various interests at play’ which included a reasonable expectation of financial harm from disclosure and accountability” and “reflected the type of balancing of competing factors that must be considered in determining whether to exercise discretion to release sensitive information.”⁴³

Analysis and conclusion on exercise of discretion

[53] Based on the list of factors considered by Fraser Health’s general counsel, I am satisfied that, as Fraser Health’s delegated head for the purposes of FIPPA, she reflected on whether the audit record should be released even though s. 14 may apply. I accept that Fraser Health’s general counsel considered various competing factors in exercising her discretion to refuse access to the audit record, including the purpose of the FIPPA exemption and public interest considerations.

[54] There is also no evidence before me to suggest Fraser Health exercised its discretion in bad faith or for an improper purpose or based on irrelevant considerations. Therefore, I conclude this is not a situation which requires me to order Fraser Health to reconsider the exercise of its discretion.

Section 25 – disclosure clearly in the public interest

[55] The applicant submits Fraser Health should disclose the record at issue under s. 25(1)(b) since it clearly reveals a matter of public interest. Section 25(1)(b) requires a public body to proactively disclose information when the disclosure is clearly in the public interest. This provision states:

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

...

(b) the disclosure of which is, for any other reason, clearly in the public interest.

⁴² Applicant’s submission dated July 22, 2021 at p. 6.

⁴³ Fraser Health’s submission dated August 12, 2021 at p. 4.

[56] This section overrides all of FIPPA's discretionary and mandatory exceptions to disclosure.⁴⁴ As a result, there is a high threshold before disclosure will be considered in the public interest under s. 25(1)(b).⁴⁵ Previous OIPC orders have determined that the duty to disclose under s. 25(1)(b) "only exists in the clearest and most serious of situations" where the disclosure is "clearly (i.e. unmistakably) in the public interest."⁴⁶

[57] Analyzing the application of s. 25(1)(b) in a specific situation begins by considering whether the information at issue concerns a subject, circumstance, matter or event justifying mandatory disclosure.⁴⁷ One should consider whether the matter is the subject of widespread public debate or discussion by the media or the Legislature, for example, or if the matter relates to a systemic problem rather than to an isolated situation.⁴⁸

[58] Once it is determined that the information is about a matter that may engage s. 25(1)(b), the nature of the information itself should be considered to determine whether it meets the high threshold for disclosure.⁴⁹ Disclosure will be required under s. 25(1)(b) where a disinterested and reasonable observer, knowing the information and knowing all the circumstances, would conclude that disclosure is plainly and obviously in the public interest.⁵⁰

[59] Several, non-exhaustive factors that may be considered in making this determination include whether disclosure would:

- contribute to educating the public about the matter;
- contribute in a substantive way to the body of information that is already available;
- facilitate the expression of public opinion or allow the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions.⁵¹

⁴⁴ *Tromp v. Privacy Commissioner*, 2000 BCSC 598 at paras. 16 and 19.

⁴⁵ Investigation Report F15-02, 2015 BCIPC 30, at pp. 28-29; Order 15-64, 2015 BCIPC 70 at para. 12.

⁴⁶ Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3.

⁴⁷ Investigation Report F16-02, 2016 BCIPC No. 36 at p. 27 <Available at <https://www.oipc.bc.ca/investigation-reports/1972>>.

⁴⁸ Order F20-51, 2020 BCIPC 60 (CanLII) at para. 18. Investigation Report F16-02, *supra* note 47 at p. 27.

⁴⁹ Investigation Report F16-02, *supra* note 47 at p. 27.

⁵⁰ *Ibid* at p. 26.

⁵¹ *Ibid* at p. 27.

[60] When determining whether disclosure is in the public interest, there may be competing public interests that weigh against disclosure and those interests may “be found in the exceptions to disclosure set out in ss. 12 to 21 of FIPPA.”⁵² Former Commissioner Denham clarified that the importance of considering the exceptions under Part 2 of FIPPA as part of the s. 25(1)(b) determination is “because the exceptions themselves are indicators of classes of information that in the appropriate circumstances may weigh against the disclosure of information.”⁵³

Parties’ position on s. 25(1)(b)

[61] Fraser Health describes the audit record as “an internal privileged document” that was prepared for its legal advisors in order to advise its management and Board on certain issues.⁵⁴ Fraser Health submits the disclosure of the audit record would not contribute in a meaningful way to holding it accountable for its actions or decisions since the subject matter of the audit focuses on the service providers’ actions such as “contract compliance and financial matters regarding the billing of home support services.”⁵⁵

[62] Fraser Health emphasizes that the “audit [record] does not address the quality of services provided to the public nor does it speak to changes that should be made to the delivery of home care services to the public.”⁵⁶ It acknowledges that there may be some “public interest in fiscal responsibility”; however, it says the specific information at issue in this case does not meet the “level of magnitude that would engage s. 25(1)(b) and warrant overriding all other provisions in FIPPA.”⁵⁷

[63] It also says the audit’s contents have never been disclosed and the public is not directly involved in the administration of home service provider contracts.⁵⁸ Fraser Health submits, therefore, that disclosure of the audit record would not contribute in a substantive way to the body of information already publicly available or allow the public to make informed political decisions.

[64] In terms of weighing competing interests, Fraser Health says the public interest in disclosure under s. 25(1) must be balanced with its right to maintain solicitor-client privilege over the audit record under s. 14, its right to a zone of

⁵² Investigation Report F16-02, *supra* note 47 at p. 38.

⁵³ *Ibid.*

⁵⁴ Fraser Health submission dated June 7, 2021 at para. 21.

⁵⁵ *Ibid* at para. 15.

⁵⁶ *Ibid* at para. 22.

⁵⁷ *Ibid* at para. 23, citing Order F21-15, 2021 BCIPC 19 (CanLII).

⁵⁸ Fraser Health also made submissions regarding s. 25(1)(a). However, I will only address s. 25(1)(b) since the applicant only argued and made submissions on s. 25(1)(b) and did not claim s. 25(1)(a) was relevant in these circumstances.

confidentiality to consider advice and recommendations on a proposed course of action under s. 13, and its right not to disclose information the disclosure of which could reasonably be expected to harm its financial or economic interests under s. 17.

[65] The applicant submits the information is of “grave public interest” since it involves “the safety and comfort of vulnerable individuals who require outside assistance for their daily basic needs.”⁵⁹ It contends the audit resulted in a dramatic shift in how home support care will be delivered which affects thousands of people across the region in need of special assistance, and is, therefore, clearly a matter of public interest. It says the public and those affected by this change are entitled to know why these significant changes were made.

[66] The applicant also challenges Fraser Health’s assertion that the audit record will not contribute in a meaningful way to hold Fraser Health accountable for its actions or decisions. It points out that Fraser Health cited the audit record as the reason for bringing its home support services in-house in order to “ensure effective and efficient care.”⁶⁰ Therefore, it says “it defies credulity that the audit [record] reveals nothing about the accountability of [Fraser Health] for that decision when it has stated publicly that the decision to modify how [sic] home support services for thousands of people was based on the content of that very same report.”⁶¹

[67] In response, Fraser Health insists the audit does not focus on or analyze its actions or accountability in any way and does not focus on the quality of the home support services provided. It explains that “the singular focus of the audit is on the billing practices of the companies in question.”⁶² Fraser Health says the audit record does not address “the risks to the safety and comfort of vulnerable individuals who require home support.”⁶³ It adds that, contrary to the applicant’s suggestion, there was no element of risk involved in Fraser Health’s shift to an in-house delivery model in providing home support care.

[68] Fraser Health submits that this is not a case where the high threshold for disclosure under s. 25(1)(b) has been met since this is not “the clearest and most serious of situations where the disclosure is clearly (i.e. unmistakably) in the public interest.”⁶⁴ It says the applicant is setting the bar too low by arguing the disclosure of the audit record is in the public interest as opposed to clearly and unmistakably in the public interest.

⁵⁹ Applicant’s submission at p. 1.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Fraser Health submission dated August 12, 2021 at p. 1.

⁶³ *Ibid.*

⁶⁴ *Ibid* at p. 2.

Analysis and findings on s. 25(1)(b)

[69] I agree with Fraser Health that the threshold under s. 25(1)(b) is a high bar that applies only in the clearest and most serious of situations where disclosure is plainly and obviously in the public interest. As set out below, I do not find that high bar is met in this case.

[70] First, the applicant's evidence does not establish that Fraser Health's decision to change the way it delivers and provides home support care, and the reasons underpinning that decision, were the subject of widespread public debate, media attention or discussion by the Legislature. The only public attention about the matter provided for my review was the March 2019 news release. In my opinion, this single news release issued by Fraser Health does not qualify as widespread public interest or media coverage about the matter.

[71] Second, the public may be generally interested in the quality of care provided to those who receive home support services. However, I accept that the audit record does not reveal any information about that matter. Fraser Health's detailed description of the contents of the audit record indicates the information in the audit record is about "the billing practices of the companies in question" and not the quality of care.⁶⁵

[72] Lastly, I note that "proactive disclosure under s. 25 must be of such import and significance that it justifies the override of the exceptions to access and the privacy protective provisions of FIPPA that would otherwise apply."⁶⁶ Fraser Health recognizes that there may be some public interest in "fiscal responsibility", but argues this public interest is far outweighed by the other interests engaged here, including its right to maintain solicitor-client privilege over the audit record under s. 14. It adds that the specific information at issue in this case does not meet the "level of magnitude that would engage s. 25(1)(b) and warrant overriding all other provisions in FIPPA."⁶⁷ I agree.

[73] Section 25(1) overrides all of FIPPA's discretionary and mandatory exceptions to disclosure. Therefore, it is important to weigh the public interest in disclosure under s. 25(1) against the interests protected by the FIPPA exceptions to disclosure.⁶⁸ Section 14 allows public bodies to withhold information protected by solicitor-client privilege, which Canadian courts view "as a substantive legal right with constitutional value and a principle of fundamental justice."⁶⁹ The specific information at issue is about the billing practices of certain companies.

⁶⁵ Fraser Health submission dated August 12, 2021 at p. 1.

⁶⁶ Order F20-42, 2020 BCIPC 51 (CanLII) at para. 41.

⁶⁷ Fraser Health submission dated June 7, 2021 at para. 23, citing Order F21-15.

⁶⁸ Order F19-49, 2019 BCIPC 55 (CanLII) at para. 25 and the cases cited therein.

⁶⁹ Order F19-49, 2019 BCIPC 55 (CanLII) at para. 25.

I am not satisfied in this case that the public's general interest in this information outweighs the important interests protected by s. 14.

[74] Therefore, considering all the circumstances, I am not satisfied that disclosing the information in dispute meets the required threshold under s. 25(1)(b) of being clearly in the public interest.

CONCLUSION

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

1. I confirm Fraser Health's decision to refuse access to the audit record under s. 14.
2. I confirm Fraser Health's decision that it is not required under s. 25(1)(b) to disclose the audit record.

November 2, 2021

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F19-80822