



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F23-09

VANCOUVER ISLAND HEALTH AUTHORITY

Lisa Siew
Adjudicator

February 15, 2023

CanLII Cite: 2023 BCIPC 11

Quicklaw Cite: [2023] B.C.I.P.C.D. No. 11

Summary: The Vancouver Island Health Authority (Health Authority) requested the Commissioner exercise their discretion, under s. 56(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA), to not conduct an inquiry regarding its decision to refuse an applicant access to a requested record. The Health Authority argued an inquiry should not be held because it is plain and obvious that the applicant already has a copy of the disputed record. The adjudicator determined there is an arguable case that merits adjudication as to whether the applicant is entitled to access the record at issue under FIPPA. Therefore, the adjudicator dismissed the Health Authority's s. 56(1) application and directed the matter to an inquiry.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, ss. 5(1), 22(1), 56(1). *Freedom of Information and Protection of Privacy Regulation*, s. 5.

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested the Vancouver Island Health Authority (Health Authority) provide access to her deceased husband's medical charts for a specified sixteen-day period.

[2] The Health Authority located a responsive record which it describes as a copy of the deceased husband's last will and testament. The Health Authority denied the applicant access to this record because the applicant had not proven she was authorized to act for the deceased in accordance with s. 5(1) of FIPPA and s. 5 of the *Freedom of Information and Protection of Privacy Regulation* (Regulation) or that the disclosure of the record would not be an unreasonable invasion of a third party's personal privacy under s. 22(1) of FIPPA.

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Health Authority's decisions. The OIPC's

investigation and mediation process did not resolve the issues between the parties and the applicant requested the matter proceed to an inquiry.

[4] After the matter was forwarded to inquiry, the Health Authority requested the Commissioner decline to hold an inquiry into this matter. Under s. 56(1) of FIPPA, the Commissioner has the discretion to choose whether to hold an inquiry. The Health Authority argued that it was plain and obvious that the applicant already had a copy of the requested record; therefore, it submits an inquiry into this matter should not be held.

ISSUE AND BURDEN OF PROOF

[5] As the Commissioner's delegate, I will determine whether to grant the Health Authority's request not to hold an inquiry under s. 56(1) because it is plain and obvious that the applicant already has a copy of the requested record.

[6] The Health Authority bears the burden of proving that its application under s. 56(1) to not hold an inquiry should be granted.¹

[7] As the respondent in this application, the applicant does not have to prove why the inquiry should proceed; however, as noted in earlier decisions, "where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide some cogent basis for arguing the contrary."²

DISCUSSION

Record at issue

[8] The record at issue is a nine-page document that the Health Authority describes as the will of the applicant's deceased husband, "a copy of which was retained on the deceased's health record."³ The Health Authority withheld the entire record from the applicant.

Discretion to conduct an inquiry – s. 56(1)

[9] Section 56(1) of FIPPA provides that if the matter in dispute between the parties is not referred to a mediator or settled under s. 55, the Commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry. It is well-established that s. 56(1) gives the Commissioner

¹ Order F16-37, 2016 BCIPC 41 (CanLII) at para. 10.

² Decision F07-04, 2007 CanLII 67284 (BC IPC) at para. 18

³ Health Authority's letter dated January 19, 2023 at p. 1.

or their delegate a “broad discretionary power to determine whether or not to hold an inquiry.”⁴

[10] As set out in earlier decisions, the Commissioner or their delegate may decline to conduct an inquiry on a number of grounds, including that it is plain and obvious that the disputed records are subject to an exception to disclosure under FIPPA.⁵ Regardless of the basis for the s. 56 application, in each case, it must be clear that there is no issue which merits adjudication in an inquiry.⁶ Put another way, the party asking that an inquiry not be held must establish there is “no arguable case that merits an inquiry.”⁷

Parties’ submissions on s. 56(1)

[11] The Health Authority submits an inquiry should not be held because the applicant can access a copy of the disputed record through the court process. The Health Authority says it searched court records and discovered a petition to the court regarding the deceased’s estate. The Health Authority provided a copy of the petition which shows that the deceased’s ex-wife and daughter are petitioning the court to prove an alleged copy of the deceased’s will and to be appointed executors of the estate. The applicant is the respondent in that court action.

[12] As part of the petition, the ex-wife and daughter filed supporting affidavits which include exhibits. Exhibit A to their affidavits is a copy of the purported will that they are petitioning the court to validate. The Health Authority submits Exhibit A is the same document as the record at issue in the inquiry. Therefore, the Health Authority submits the applicant already has access to the record that she is seeking to access under FIPPA. As a result, the Health Authority contends the inquiry should not be held because it “will place the burden of proof and associated costs” on the Health Authority to support its decision to deny access to a record which the applicant can already access through “a separate legal process.”⁸

[13] The applicant opposes the Health Authority’s application not to hold an inquiry. The applicant submits the Health Authority’s decision to refuse access to the responsive record under FIPPA is a matter that merits adjudication because that decision is legally incorrect, not transparent, arbitrary and unfair to the deceased and the applicant as the surviving spouse.

⁴ *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 (CanLII) at para. 47.

⁵ Decision F07-04, 2007 CanLII 67284 (BC IPC) at para. 16.

⁶ *Ibid.*

⁷ Decision F08-11, 2008 CanLII 65714 (BC IPC) at para. 8.

⁸ Health Authority’s letter dated January 19, 2023 at p. 2.

[14] Among other things, the applicant also contends the Health Authority has not provided any evidence which shows Exhibit A is identical to the record at issue in the inquiry. The applicant says the Health Authority is assuming the two documents are the same when the applicant submits there is evidence that shows the disputed record is different because it is incomplete and unsigned.⁹

[15] Furthermore, if in fact the Health Authority has satisfied itself that the two documents are the same, then the applicant argues the Health Authority should have disclosed the disputed record to her in response to her access request. I understand the applicant is arguing that, considering the relevant circumstances, it would not be an unreasonable invasion of the deceased's personal privacy under s. 22(1) to disclose information already known to the access applicant.

[16] Lastly, the applicant provided evidence that she filed a response to the court petition which disputes the validity of the will put forward by the petitioners. The applicant says the response also indicates that the record at issue in the inquiry is relevant and necessary to disprove material facts related to the court petition. I understand the applicant is arguing the record at issue in the inquiry is relevant to a fair determination of her rights under s. 22(2)(c) and, therefore, should be disclosed to her.

[17] The Health Authority chose not to respond to the applicant's submission and arguments.¹⁰

Analysis and findings on s. 56(1)

[18] I am not satisfied the applicant already has a copy of the record at issue in the inquiry. The Health Authority provided a copy of the court petition, but it did not provide a copy of Exhibit A, which is the purported will that the deceased's ex-wife and daughter are petitioning the court to validate. Therefore, I am unable to determine whether the record at issue in the inquiry and the alleged will in the court petition is the same document.

[19] Furthermore, even if the Health Authority had proven it was the same document, I am not persuaded that would be a reason not to conduct an inquiry. It is well-established that FIPPA places no restrictions on what an applicant may do with records that they receive in response to an access request.¹¹ On the other hand, parties in a court proceeding may be subject to restrictions regarding the use and disclosure of documents produced and exchanged during litigation.¹² Therefore, I find there are valid reasons why an access applicant would want

⁹ Applicant's response dated Jan 20, 2023.

¹⁰ Health Authority's email the OIPC registrar of inquiries dated February 13, 2023.

¹¹ For example, Order F17-01, 2017 BCIPC 1 (CanLII) at para. 77.

¹² The rule is known as the "implied undertaking of confidentiality."

access under FIPPA to the same record that they already have access to in a court proceeding.

[20] The applicant has also satisfied me that the Health Authority's decision to refuse access under FIPPA merits adjudication in an inquiry. The applicant has raised some valid questions about whether she qualifies as an appropriate person to act for the deceased and about the Health Authority's decision to withhold the entirety of the record under s. 22(1) given the relevant circumstances in this case. The Health Authority had the opportunity to respond to those arguments, but chose not to do so. As a result, I find there is an arguable case that merits adjudication as to whether the applicant is entitled to access the record at issue under FIPPA.

[21] To conclude, I find the Health Authority has not proven that it is plain and obvious that an inquiry should not be held into this matter.

CONCLUSION

[22] For the reasons given above, I dismiss the Health Authority's s. 56(1) application for the Commissioner not to hold an inquiry regarding the Health Authority's decision to refuse the applicant access to the responsive record.

[23] I conclude the matters at issue between the parties will proceed to an inquiry under Part 5 of FIPPA so the Commissioner or their delegate can consider the parties' evidence and argument and decide whether FIPPA authorizes or requires the Health Authority to refuse the applicant access to the record at issue.

February 15, 2023

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F22-89454