



Order F23-48

PROVINCIAL HEALTH SERVICES AUTHORITY

D. Hans Hwang
Adjudicator

June 19, 2023

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Summary: The applicant made a request to the Provincial Health Services Authority (PHSA) under the *Freedom of Information and Protection of Privacy Act* for records about her employment with PHSA. PHSA disclosed the responsive records to the applicant but withheld some information in the records under ss. 13(1) (advice and recommendations), 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of a third party's personal privacy). The adjudicator determined that PHSA correctly applied ss. 14 and 22(1). As a result, it was unnecessary to consider s. 13.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 13(1), 14, 22(1), 22(2)(a), 22(2)(b), 22(2)(e), 22(2)(h), 22(3)(d), 22(4).

INTRODUCTION

[1] An individual (applicant) made an access request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Provincial Health Services Authority (PHSA) for records relating to her employment with PHSA.

[2] PHSA provided some records to the applicant but withheld some information in the records under ss. 13(1) (advice and recommendations), 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of a third party's personal privacy) of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the PHSA's decision. Mediation by the OIPC did not resolve the matter and it proceeded to inquiry.

ISSUES

[3] The issues I must decide in this inquiry are:

1. Is PHSA authorized to refuse to disclose the information at issue under ss. 14 and 13(1) of FIPPA?
2. Is PHSA required to refuse to disclose the information at issue under s. 22(1) of FIPPA?

[4] Under s. 57(1), PHSA, the public body in this case, has the burden of proving that the applicant has no right of access to the information it withheld under ss. 14 and 13(1).

[5] Section 57(2) places the burden on the applicant to prove that disclosing the information at issue would not unreasonably invade a third party's personal privacy under s. 22(1). However, PHSA has the initial burden of proving the information at issue is personal information.¹

DISCUSSION

Background

[6] PHSA is responsible for the design and delivery of health care and specialized health services on a province wide basis. The applicant is a former employee of PHSA and her employment was terminated by PHSA.²

Records at issue

[7] PHSA provided me with 14 pages of the records at issue. They are seven pages of emails (email chain)³ and six pages of other types of records (materials).⁴ In addition, there is a one-page complaint against a named health care professional.⁵

Solicitor-client privilege, s. 14

[8] PHSA applied s. 14 to completely withhold the email chain and the materials.

[9] Section 14 states that a public body may refuse to disclose information that is subject to solicitor-client privilege. The term "solicitor-client privilege" in the

¹ Order 03-41, 2003 CanLII 49220 (BCIPC) at paras 9-11.

² Affidavit #1 of Senior Legal Counsel for PHSA (PHSA Lawyer) at paras 2-5.

³ Pages 2-8 of the records in dispute.

⁴ Pages 9-14 of the records in dispute.

⁵ Page 15 of the records in dispute.

context of s. 14 encompasses both legal advice privilege and litigation privilege.⁶ PHSA is claiming only legal advice privilege.⁷

[10] Legal advice privilege applies to confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.⁸ The essential elements of the test for legal advice privilege are that there must be a communication between solicitor and client (or their agent) that entails seeking or providing legal advice and that is intended by the solicitor and client to be confidential.⁹ Legal advice privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information (e.g., internal client communications that transmit or comment on privileged communications with lawyers).¹⁰

[11] Not every communication between a solicitor and their client is privileged, but if the conditions above are satisfied, then legal advice privilege applies to the communication and the records relating to it.¹¹

Evidentiary basis for solicitor-client privilege

[12] PHSA did not provide me with the information it withheld under s. 14. Instead, it provided sworn affidavit evidence from the PHSA's legal counsel (PHSA Lawyer) to support its claims that the information is protected by solicitor-client privilege.¹²

[13] The applicant says "PHSA has failed to produce the documents to [OIPC], thereby, compromising the integrity of this process" and "it is crucial the Disputed Documents are produced without redaction to allow for [OIPC] to make a full, unbiased assessment of the documents".¹³

[14] Section 44(1) gives me, as the commissioner's delegate, the power to order production of records so I may review them during the inquiry. However, in order to minimally infringe on solicitor-client privilege, the commissioner's practice is to only order production of records in dispute under s. 14 when absolutely necessary to adjudicate the issues and not before first providing the public body with an opportunity to provide additional information to support its

⁶ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para 26.

⁷ PHSA's initial submission at para 21; PHSA's reply submission at para 12.

⁸ *College* at paras 26-31.

⁹ *Solosky v. The Queen*, [1980] 1 SCR 821 [Solosky] at p 837; *R. v. B.*, 1995 CanLII 2007 (BCSC) at para 22.

¹⁰ *Solosky* at p 834.

¹¹ *Solosky* at p 829.

¹² PHSA's initial submission at paras 10-12.

¹³ Applicant's submission at p 4.

privilege claim. That approach is warranted due to the importance of solicitor-client privilege to the proper functioning of the legal system.¹⁴

[15] In this case, after reviewing PHSA's submissions and affidavit evidence, I determined that I have enough information to decide whether s. 14 applies to the information in dispute for the reasons that follow.

[16] I am satisfied that the PHSA Lawyer has direct knowledge of the records in question. Her evidence is that she was involved in the communications in the email chains and she provided the materials to PHSA's external legal counsel. She also gives evidence about the nature of the email chain and the materials, as well as the names and titles of individuals involved in these records. Therefore, I am satisfied that I have sufficient detail to make an informed decision and it is not necessary to order production of the records.¹⁵

Parties' submissions

[17] PHSA says that the withheld information consists of a confidential communication between PHSA and the PHSA Lawyer for the purpose of seeking, formulating and receiving legal advice.¹⁶

[18] In her affidavit, the PHSA Lawyer says that she has been employed as legal counsel with PHSA since 2011.

[19] The PHSA Lawyer deposes that the email chain was between a human resources director at PHSA's care facility (HR Director) and a director of risk management at PHSA. She says that the content of the email chain explicitly refers to confidential communications she had with the HR Director for the purposes of seeking legal advice relating to the applicant's employment. She deposes that the email includes information that would allow others to infer information about the nature and content of that legal advice.¹⁷

[20] The PHSA Lawyer also deposes that the records in dispute consist of materials¹⁸ that she received from a PHSA employee which she then sent to PHSA's external counsel for the purposes of seeking, formulating and providing legal advice to PHSA relating to the applicant's employment.

¹⁴ Order F19-14, 2019 BCIPC 16 (CanLII) at para. 10; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para. 17; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII) at para. 68.

¹⁵ For similar reasoning, see *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para. 78; Order F22-23, 2022 BCIPC 25 (CanLII) at paras 17-19.

¹⁶ PHSA's initial submission at para 21.

¹⁷ Affidavit #1 of PHSA Lawyer at paras 8 and 8bi-ii.

¹⁸ Pages 9-14 of the records in dispute.

[21] The applicant disputes that the withheld information is protected under s. 14. Specifically, she asserts that the disputed records on pages 9 to 14 are notes made by PHSA employees and the notes were about structural changes to the applicant's role. She therefore argues that the materials should not be withheld under s. 14.¹⁹

[22] In reply, PHSA says that the records comprise confidential communication between the PHSA Lawyer and PHSA's external counsel and attaching other materials for the purpose of seeking, formulating and providing legal advice. It also says that solicitor-client privilege applies to the entire chain or continuum of communications related to the legal advice, therefore, the privilege applies to the withheld information.²⁰

Analysis and findings

[23] I am satisfied that legal advice privilege applies to the information in dispute for the reasons that follow.

[24] Based on the PHSA Lawyer's affidavit evidence, which I accept, I am satisfied that the email chain²¹ contains communications that the PHSA Lawyer had with the HR Director and other employees at PHSA.²² I am also satisfied that the materials²³ contain communications between PHSA and PHSA's external counsel and communications between the PHSA Lawyer and a PHSA employee.²⁴ I find that the PHSA Lawyer, in her role as legal counsel for PHSA, had these communications. Also, the affidavit evidence sufficiently demonstrates that these communications were provided for the purpose of seeking, formulating and providing legal advice regarding the applicant's employment.

[25] Furthermore, I accept that a "continuum of communication" 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.²⁵ Therefore, I find the withheld information in the materials reveals the communications between a client and solicitor about the legal advice.

[26] Finally, I accept the PHSA's affidavit evidence that PHSA intended these communications to remain confidential between PHSA and its legal counsel. There is nothing to suggest otherwise.

¹⁹ Applicant's submission at p 3.

²⁰ PHSA's reply submission at para 11.

²¹ Pages 2-8 of the records in dispute.

²² Affidavit #1 of PHSA Lawyer at paras 8b(i)-(ii).

²³ Pages 9-14 of the records in dispute.

²⁴ Affidavit #1 of PHSA Lawyer at paras 8c(i)-(ii).

²⁵ *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras 40-46.

[27] In conclusion, I find that all three parts of the test for legal advice privilege are met. Disclosing the withheld information would reveal PHSA's confidential communications with its lawyers about legal advice PHSA sought and received from its lawyers.

[28] For the above reasons, I conclude that the information withheld²⁶ under s. 14 is protected by legal advice privilege, and it may be withheld on that basis.

[29] PHSA also applied ss. 13 and 22 to the information that I have found is privileged. Given that s. 14 applies, I do not need to consider if ss. 13 or 22 also apply to that same information.

Unreasonable invasion of personal privacy, s. 22

[30] Section 22 requires a public body to refuse to disclose personal information if disclosure would be an unreasonable invasion of a third party's personal privacy.²⁷

[31] PHSA submits that s. 22(1) applies to the information it withheld from a complaint that was received by PHSA (Complaint) about a medical professional working with PHSA (subject professional).²⁸

[32] The applicant disputes the PHSA's application of s. 22(1).²⁹ While the applicant does not dispute PHSA's decision to withhold names of the third parties, she argues that PHSA must provide "as much of the records as can reasonably be severed."³⁰

[33] Previous orders have considered the application of s. 22, and I will apply those same principles here.³¹

Personal information

[34] The first step in any s. 22 analysis is to determine if the information in dispute is personal information within the meaning of FIPPA.

[35] Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information."³² Previous orders have

²⁶ Pages 2-14 of the records in dispute.

²⁷ Schedule 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.

²⁸ PHSA's initial submission at para 8c.

²⁹ Applicant's submission at p 4.

³⁰ Applicant's submission at p 5.

³¹ See, for example, order F15-03, 2015 BCIPC 3 (CanLII) at para 58.

³² Schedule 1 of FIPPA.

said that personal 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.³³ 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.”³⁴

[36] I am satisfied that all of the information PHSA withheld from the Complaint³⁵ is about identifiable individuals. It is about the subject professional and several other individuals who were involved in the subject professional’s alleged misconduct. I find that the information is personal information of these third parties. Further, there are several instances where the information is about interactions between the third parties at the workplace. While some of the information is not associated with their names, in my view, the information is fact specific or incident-related information and an individual who knows the incidents could use the information to identify these individuals, so it is personal information.

[37] I also find that the information in the Complaint is not about the applicant so it is not the applicant’s personal information.

Disclosure not an Unreasonable Invasion of Privacy, s. 22(4)

[38] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If so, disclosure would not be an unreasonable invasion of a third party’s personal privacy and the public body cannot withhold it under s. 22(1).

[39] PHSA says that s. 22(4) does not apply³⁶ and the applicant does not specifically address s. 22(4).

[40] I have considered all of the subsections in s. 22(4) and I find that none of them apply.

Presumptions of Unreasonable Invasion of Privacy, s. 22(3)

[41] The third step in the s. 22 analysis is to determine whether s. 22(3) applies to the personal information. If so, disclosure is presumed to be an unreasonable invasion of a third party’s personal privacy.

³³ Order F19-13, 2019 BCIPC 15 (CanLII) at para 16, citing Order F18-11, 2018 BCIPC 14 at para 32.

³⁴ Schedule 1 of FIPPA.

³⁵ Page 15 of the records in dispute.

³⁶ PHSA’s initial submission at para 27.

[42] PHSA says that s. 22(3)(d) applies to the Complaint.³⁷ It submits that the personal information withheld from the Complaint identifies a third-party against whom allegations of professional misconduct have been made. Thus, PHSA argues the third-party personal information falls into employment or occupational history within the meaning of s. 22(3)(d).³⁸

[43] The applicant says that the Complaint does not meet the criteria under s. 22(3)(d) because it is about safety concerns.³⁹

[44] Section 22(3)(d) creates a presumption against releasing personal information related to a third party's employment, educational or occupational history.

[45] Past orders have found s. 22(3)(d) applies to comments about a third party's workplace actions or behaviour in the context of a workplace complaint or discipline investigation.⁴⁰ I find that the disputed information is about allegations concerning the third party's professional conduct. The information also contains the complainant's statements and opinions about workplace behaviour concerning several individuals. I am satisfied that s. 22(3)(d) applies and, therefore, that disclosing the third parties' personal information is presumed to be an unreasonable invasion of their personal privacy.

Relevant circumstances, s. 22(2)

[46] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). It is at this step that any s. 22(3) presumptions may be rebutted.

[47] The applicant suggests that ss. 22(2)(a) and (b)⁴¹ are relevant.⁴² PHSA says ss. 22(2)(e) and (h) are relevant circumstances that support withholding the disputed information.⁴³

[48] Public scrutiny of a public body, s. 22(2)(a): Section 22(2)(a) requires a public body to consider whether disclosing the personal information is desirable for the purpose of subjecting the activities of the government of British Columbia

³⁷ PHSA's initial submission at para 28.

³⁸ PHSA's initial submission at paras 27-28.

³⁹ Applicant's submission at p 4, citing Order 18-29, 2018 BCIPC 32.

⁴⁰ Order F22-07, 2022 BCIPC 7 at paras. 41-43 and Order F20-38, 2020 BCIPC 44 at para 79.

⁴¹ Applicant's submission at pp 5-6.

⁴² For added clarity, in her submission, the applicant refers to an investigation being handled by the Office of the Ombudsperson (Ombudsperson) regarding her complaint concerning PHSA. That investigation appears to have a subject matter that is separate from the issues of this inquiry. Therefore, I decline to consider the applicant's argument relating to the Ombudsperson's investigation.

⁴³ PHSA's initial submission at para 28.

or a public body to public scrutiny.⁴⁴ One of the purposes of s. 22(2)(a) is to make public bodies more accountable.⁴⁵ Therefore, for s. 22(2)(a) to apply, the disclosure of the specific information at issue must be desirable for subjecting the public body's activities to public scrutiny as opposed to subjecting an individual third party's activities to public scrutiny.⁴⁶

[49] For the reasons that follow, I find disclosing the information in dispute is not desirable for subjecting PHSA or another public body's activities to public scrutiny. I find that the third parties' personal information here is very specific to those individuals. Specifically, the withheld information is really about the individuals' behaviour and actions. I do not see how identifying and scrutinizing the individuals will allow the public to scrutinize PHSA's activities and how it handles reports about "patient and staff safety", as the applicant asserts.⁴⁷

[50] Public health and safety, s. 22(2)(b): Section 22(2)(b) asks whether disclosure of personal information is likely to promote public health and safety or to promote the protection of the environment. I cannot see, and the applicant has not adequately explained, how disclosure of the disputed information would promote public health, safety or the environment. I find, therefore, s. 22(2)(b) is not a relevant circumstance.

[51] Unfair harm and damage to reputation, ss. 22(2)(e) and (h): Section 22(2)(e) asks whether disclosure will unfairly expose a third party to financial or other harm. Past orders have interpreted "other harm" as serious mental distress, anguish, or harassment.⁴⁸ Section 22(2)(h) asks whether disclosure may unfairly damage the reputation of a person referred to in the records.

[52] I am satisfied that s. 22(2)(h) is a relevant circumstance in this case. As I have found earlier, none of the withheld information is about the applicant. In this case, the only information at issue is information about several third parties provided by an anonymous complainant. In my view, disclosure of the withheld information would identify these individuals who allegedly committed the professional misconduct or who were involved in the misconduct. Also, I have considered the fact that the information is only about alleged wrongdoing with no detail about whether the allegations were ever found to be substantiated or not. Disclosing this kind of incomplete information could unfairly harm their reputations. Therefore, I conclude that s. 22(2)(h) weighs against disclosure.

[53] However, I am not persuaded by PHSA's submission on s. 22(2)(e). There is no evidence before me of the type of harm, financial or otherwise, that PHSA

⁴⁴ Order F05-18, 2005 CanLII 24734 at para 49; Order F22-38, 2023 BCIPC 32 at para 65.

⁴⁵ Order F18-47, 2018 BCIPC 50 (CanLII) at para 32.

⁴⁶ Order F16-14, 2016 BCIPC 16 (CanLII) at para 40.

⁴⁷ Applicant's submission at p 6.

⁴⁸ Order 01-37, 2001 CanLII 21591 (BC IPC) at para 42.

contemplates that the third parties will suffer if their personal information is disclosed. I find therefore this factor does not apply.

Conclusion, s. 22(1)

[54] I find that the information PHSA withheld under s. 22 is the personal information of third parties. I find that the s. 22(3)(d) presumption against disclosing information related to a third party's employment history applies. I also find that the circumstance in s. 22(2)(h) weighs against disclosure and the presumption against disclosure has not been rebutted. Therefore, PHSA is required to withhold the information in dispute.

CONCLUSION

[55] For the reasons given above, under s. 58(2) of FIPPA, I confirm PHSA's decision that it is authorized by s. 14 and required by s. 22(1) to refuse to access to the information in dispute.

June 19, 2023

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

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