



Order F23-58

FRASER HEALTH AUTHORITY

Alexander Corley
Adjudicator

August 3, 2023

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Summary: An applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for records related to the implementation of medical assistance in dying practices and procedures by the Fraser Health Authority (FHA). FHA disclosed some information in the responsive records but withheld the remaining information under several exceptions in Part 2 of FIPPA. The adjudicator found that ss. 12(3)(b) (local public body confidences), 13(1) (advice or recommendations) and 22(1) (unreasonable invasion of privacy) applied to some, but not all, of the information FHA withheld. The adjudicator ordered FHA to disclose the information which was not covered by ss. 12(3)(b), 13(1), or 22(1) of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, ss. 12(3)(b), 13(1), 13(2), 13(3), 22(1), 22(2)(a), 22(2)(b), 22(2)(h), 22(2)(i), 22(3)(a), 22(3)(d), 22(4)(e), 58(2)(b) and Schedule "1"; *Health Authorities Act*, [RSBC 1996] c. 180, ss. 4(1), 5(1), and 8(3); *Regional Health Boards Regulation*, B.C. Reg. 293/2001, s. 4(2) and Schedule "B".

INTRODUCTION

[1] A journalist (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Fraser Health Authority (FHA) for copies of records related to the development and implementation of FHA's medical assistance in dying (MAiD) practices and procedures. FHA disclosed some records and withheld others either in part or in their entirety under ss. 13(1) (policy advice or recommendations), 12(3)(b) (local public body confidences), and 22(1) (unreasonable invasion of privacy) of FIPPA.

[2] The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC). During mediation, FHA reconsidered its decision to sever certain records and provided additional information to the applicant while continuing to withhold some information under ss. 13(1), 12(3)(b), and 22(1) of

FIPPA. Mediation did not resolve the outstanding issues and the applicant requested that the matter proceed to an inquiry.

[3] Concurrent with providing its submissions in this inquiry, FHA again reconsidered its severing decisions and released additional information to the applicant.¹ Only the information which remains severed is at issue in this inquiry.

ISSUES

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

1. Whether s. 13(1) authorizes FHA to withhold the information at issue.
2. Whether s. 12(3)(b) authorizes FHA to withhold the information at issue.
3. Whether s. 22(1) requires FHA to withhold the information at issue.

[5] Under FIPPA s. 57(1), FHA bears the burden of proving that the applicant has no right of access to the information FHA has withheld under ss. 12 and 13. Section 57(2) of FIPPA places the burden on the applicant to prove that disclosure of the information FHA has withheld under FIPPA s. 22(1) would not be an unreasonable invasion of the personal privacy of third parties.²

DISCUSSION

Background

[6] FHA is a regional health board designated under the *Health Authorities Act* (HAA)³ at s. 4(1).⁴ Under s. 5(1) of the HAA FHA is responsible, among other things, for:

- developing and implementing a regional health plan for the Fraser Health Authority region (region);⁵
- developing policies, setting priorities, and delivering budgets to the Minister of Health and allocating resources for the delivery of health services in the region; and
- developing and implementing regional standards for the delivery of health services in the region.⁶

¹ Affidavit #1 of S.M. dated December 22, 2022 at paras. 3-7.

² However, FHA bears the initial burden of demonstrating that the information it is withholding under s. 22(1) meets the definition of “personal information” under FIPPA: Order F23-49, 2023 BCIPC 57 at para. 5 and note 1, citing Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.

³ [RSBC 1996], c. 180.

⁴ FHA’s Initial Submission dated December 22, 2022 at para. 2.

⁵ The geographic scope of the region is defined in the *Regional Health Boards Regulation*, B.C. Reg. 293/2001 at s. 4(2) & Schedule “B”.

⁶ HAA, *supra* note 3 at s. 5(1).

[7] The applicant is a freelance journalist engaged in investigative reporting on issues of interest to Roman Catholics across the Lower Mainland of British Columbia.⁷ On March 10, 2020, the applicant submitted a freedom of information request to FHA requesting, among other things, all records created by or for FHA's Board of Directors (board) "... regarding the implementation of [MAiD] practices at [FHA] institutions."⁸

Records at issue

[8] At issue in this inquiry are 131 pages of disputed records (records). Based on my review, I find that the records are agendas, meeting minutes, and associated materials such as briefing notes and slide decks. FHA has withheld information on 34 pages of the records.⁹

Advice or recommendations, s. 13(1)

[9] FHA has withheld information on 27 pages of the records under s. 13(1).¹⁰ Some of this information is not noted on the face of the records as being withheld under s. 13(1), but FHA's submissions clarify that it is refusing access under s. 13(1), so I will consider the information here.¹¹

[10] Section 13(1) gives the head of a public body discretionary authority to refuse to disclose information to an applicant if that information would reveal advice or recommendations developed by or for a public body. The purpose of s. 13(1) is to protect public bodies' "internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations"¹² and, "to prevent the harm that would occur if the deliberative process was subject to excessive scrutiny."¹³ The deliberative process includes "the investigation and

⁷ Applicant's Response Submission dated January 13, 2023 at para. 1.

⁸ Applicant's Access Request dated March 3, 2020.

⁹ Pages 18, 20, 23, 29, 39-40, 42-47, 75-77, 79-83, 94-96, 100, 107, 109, 112-113, 117-118, 121, and 127-129 of the records.

¹⁰ Pages 20, 23, 29, 39, 43-47, 75-77, 79-80, 82-83, 94-96, 100, 107, 109, 112-113, 117-118, and 128 of the records.

¹¹ See FHA's Initial Submission, *supra* note 4 at para. 16. Specifically, I accept that certain information severed from section 2.1 on page 76 and section 5.2 on page 79 was intended to be withheld under both s. 12(3)(b) and s. 13(1) notwithstanding that it is only marked as "s. 12" in the records.

¹² Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 22.

¹³ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 [ICBC] at para. 65, citing *B.C. Freedom of Information and Protection of Privacy Association v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162 at para. 64 and *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 726 [College] at para. 104.

gathering of facts and information necessary to the consideration of specific or alternative course [sic] of action.”¹⁴

[11] When examining the head’s decision to withhold information under s. 13(1), the first step is to determine whether disclosing the information would reveal advice or recommendations. If it would, the next step is to decide whether the information falls within the scope of ss. 13(2) or 13(3). Section 13(2) sets out certain types of records and information that the head must not refuse to disclose under s. 13(1), even if disclosing the records or information would reveal advice or recommendations.

[12] Section 13(3) says the head cannot apply s. 13(1) to information contained in a record that is more than ten years old. All the records FHA has applied s. 13(1) to are clearly dated as created within 2016 or 2017. Based on this, I find that s. 13(3) does not apply to the records in issue.

[13] Numerous prior orders and court cases have considered the scope and application of s. 13(1). In Order F22-39,¹⁵ the adjudicator canvassed the relevant case law and distilled the following interpretive principles for applying s. 13(1) [emphasis in original]:

- Section 13(1) applies to information that *would reveal* advice or recommendations and not only to information that *is* advice or recommendations.¹⁶
- The terms “advice” and “recommendations” are distinct, so they must have distinct meanings.¹⁷
- “Recommendations” relate to a suggested course of action that will ultimately be accepted or rejected by the person being advised.¹⁸
- “Advice” has a broader meaning than “recommendations”.¹⁹ It includes setting out relevant considerations and options, and providing analysis and opinions, including expert opinions on matters of fact.²⁰ “Advice” can be an opinion about an existing set of circumstances and does not have to be a communication about future action.²¹

¹⁴ ICBC, *ibid* at para. 29.

¹⁵ Order F22-29, 2022 BCIPC 44 at para. 67. See also Order F23-29, 2023 BCIPC 33 at para. 27.

¹⁶ Citing Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135.

¹⁷ Citing *John Doe v. Ontario (Finance)*, 2014 SCC 36 [*John Doe*] at para. 24.

¹⁸ Citing *John Doe*, *ibid* at paras. 23-24.

¹⁹ Citing *John Doe*, *ibid* at para. 24.

²⁰ Citing *John Doe*, *ibid* at paras. 26-27 and 46-47; *College*, *supra* note 13 at paras. 103 and 113.

²¹ Citing *College*, *ibid* at para. 103.

- “Advice” also includes factual information “compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.”²² This is because the compilation of factual information and weighing of significance of matters of fact is an integral component of an expert’s advice and informs the decision-making process.

[14] I rely on all the above principles in assessing how FHA has applied s. 13(1) to the records.

Positions of the parties

[15] FHA submits that it was authorized to withhold the information in question under s. 13(1) because it is advice or recommendations prepared for the board or the board’s quality performance committee (QP committee).²³ FHA does not make specific arguments on this point, apart from asserting that each time it has severed information under s. 13(1) that information either is or would reveal advice or recommendations prepared for the board or QP committee.²⁴ FHA also does not specifically address s. 13(2) but I take it from FHA’s submissions that FHA objects to the application of s. 13(2) to the information it has withheld under s. 13(1).

[16] The applicant does not directly address the application of ss. 13(1) or 13(2) to the information in dispute. However, the applicant argues that certain information now released to them by FHA was initially improperly withheld under s. 13(1) and raises concerns about the fairness of FHA’s severing decisions on that basis.²⁵

Analysis

[17] FHA bears the burden of proof regarding FHA’s application of s. 13(1) to the information in dispute. To meet this burden FHA needed to explain both how FHA was applying s. 13(1) to the information and how the information itself would reveal advice or recommendations if disclosed.²⁶ FHA asserts that the information in dispute would reveal advice or recommendations if disclosed but has not specifically explained why and how this would occur in each case. However, I also have the evidence that the records themselves provide before

²² Citing *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94; *ICBC*, *supra* note 13 at paras. 52-53.

²³ FHA’s Initial Submission, *supra* note 4 at para. 17.

²⁴ FHA’s Initial Submission, *ibid* at para. 16.

²⁵ Applicant’s Response Submission, *supra* note 7 at paras. 5-7. I deal with these concerns below when discussing FHA’s exercise of discretion in severing information under ss. 12(3)(b) and 13(1).

²⁶ Order F23-39, 2023 BCIPC 47 at para. 17. See also Order F23-27, 2023 BCIPC 31 at para. 18 and Order F23-49, *supra* note 2 at para. 14.

me. Based on what I can see on the face of the records and the limited explanation provided by FHA, for the reasons that follow, I find that only some of the information FHA has severed under s. 13(1) would reveal advice or recommendations if disclosed.

Information which would not reveal advice or recommendations

[18] Below are some examples where I find the severed information would not reveal advice or recommendations if disclosed:

- FHA has severed information under section 3.2 on page 20. The passage references the board receiving recommendations, but the severed information only explains actions that FHA will take going forward and does not reveal the advice or recommendations which the board received or the underlying deliberative process.
- On page 23, FHA has severed two sentences from an information note. These sentences are a statement of an action FHA plans to take and reveal nothing regarding the QP committee's deliberative process as required for s. 13(1) to apply.
- FHA has severed from the first bullet under section 6.2 on page 80 a reference to a commercial dispute between two third-party entities. An opinion on a state of affairs can be or reveal advice or recommendations in some cases.²⁷ However, I do not see how this reference does so. Particularly as FHA has not severed the steps the QP committee proposes taking in response to the dispute.
- FHA has severed the first bullet point on page 94.²⁸ The severed information only recounts present circumstances and reveals no advice or recommendations.
- On page 109, FHA has severed what I consider to be a statement of fact regarding an unnamed Ministry. I do not see how disclosing this statement would reveal advice or recommendations and FHA has not explained how it would do so.

[19] I find on the same bases as provided above that other information severed by FHA would not reveal advice or recommendations if disclosed.²⁹

²⁷ *College*, *supra* note 13 at para. 103.

²⁸ I find below that FHA is required to withhold a small amount of identifying information from this bullet point pursuant to s. 22(1).

²⁹ Specifically, certain information severed from: section 3.3 on page 20; the third bullet from the top on page 39; section 6.2, third bullet on page 80; and, the third bullet from the top of page 107.

[20] In addition, FHA has severed information which is revealed either expressly or by implication in the portions of the records FHA has already released. Prior orders are clear that a public body cannot rely on s. 13(1) to sever information which it has already revealed elsewhere.³⁰ I find that releasing the following information would not reveal advice or recommendations beyond what FHA has previously disclosed to the applicant:

- FHA has withheld the “recommendations” section from the briefing note spanning pages 45 through 47 but has elsewhere released the contents of the severed recommendation “2”. Some of the other information severed from the note would also not reveal advice or recommendations beyond that contained in recommendation “2” or already released elsewhere in the records.
- Other information already released to the applicant clearly reveals both that the “recommendation” severed from the briefing note spanning pages 43 through 44 was made and the full contents of that recommendation.
- On page 77, FHA has severed the first bullet of section 2.4. This bullet explains the scope of practice of certain healthcare professionals and the process for expanding that scope. It does not reveal advice or recommendations and anything that could be inferred from it is already disclosed elsewhere in the records.
- FHA has severed from the “Issue” section of the briefing note spanning pages 112 through 114 a projection that is already revealed elsewhere in the records.
- Some of the information FHA has severed from the second bullet in section 3.1 on page 118 is revealed elsewhere in the records.

[21] I find that FHA has not demonstrated that disclosing any of the information discussed in this section would reveal advice or recommendations. For that reason, FHA is not authorized to refuse to disclose that information under s. 13(1).

³⁰ Order F23-42, 2023 BCIPC 50 at para. 89, citing Order F20-32, 2020 BCIPC 38, Order F12-15, 2012 BCIPC 21, and Order F13-24, 2013 BCIPC 31. I note that Order F23-42 is presently the subject of an application for judicial review (B.C. Supreme Court, Vancouver Registry, No. S-234349). However, the portions of that order pertaining to s. 13(1) are not in issue before the court.

Information which would reveal advice or recommendations

[22] I find that disclosing some of the information which FHA has severed from the records under s. 13(1) would reveal advice or recommendations. I find in each case that this information is:

- advice prepared for the board;³¹
- recommendations for the board;³²
- advice prepared for the QP committee;³³
- recommendations for the QP committee;³⁴ or,
- would allow a reader to draw accurate inferences about any of the above if disclosed.³⁵

[23] For the reasons provided above, I conclude that some, but not all, of the disputed information would reveal advice or recommendations prepared by or for FHA if it were disclosed to the applicant.

Sections 13(2)

[24] The next step is to consider whether any of the information that I found above would reveal advice or recommendations falls within s. 13(2).

³¹ Information severed from the “Issue” section on page 112; information severed from the second and third full paragraphs on page 113; certain information severed from the second and eighth bullets of section 3.1 on page 118; and, information severed from the second bullet under section 2.1 on page 128 of the records.

³² The second bullet of section 2.1 on page 117 and the third bullet of section 2.1 on page 118 of the records.

³³ Information severed from the third bullet on page 29; information severed from section 2.1 on pages 75-76; information severed from the second bullet in section 2.4 on page 77; information severed from section 5.7 on pages 79-80; certain information severed from section 6.2 on page 80; information severed from section 3.1 on pages 94-95; and, information severed from the sixth bullet under section 5.1.1 on page 96 of the records.

³⁴ Information severed from page 43; information severed under “Recommendations” on page 45; information severed from the top of page 47; certain information severed from page 83; information severed from the fourth and fifth bullets under section 5.1.1 on page 96; information severed from page 100; and, certain information severed from the third bullet from the top of page 107 and the information severed from section 2.3 on page 107 of the records.

³⁵ Certain information severed from the third bullet under section 3.3 on page 20; information severed from the last sentence on page 45 through to the end of the first paragraph on page 46; information severed from the final sentence of the third paragraph and the bulk of the fifth and sixth paragraphs on page 46; information severed from the final bullet of section 5.2 on page 79; information severed from the “Background” section on page 82 and just below point “3” on page 83; and, information severed from section 4.1 on page 95 of the records.

Section 13(2) lists specific categories of records and information to which the head of a public body cannot apply s. 13(1).

[25] Neither of the parties provided submissions on the relevance of s. 13(2) to the information in dispute. I have reviewed the records with an eye to s. 13(2). Based on all of the evidence before me, I find that s. 13(2) does not apply to any of the information I have found above would reveal advice or recommendations if disclosed.

Conclusion on s. 13

[26] For the reasons provided above, I found above that FHA has established that s. 13(1) applies to some of the information FHA has withheld under that section. However, FHA has not proven that s. 13(1) authorizes it to withhold some of the information in dispute.³⁶

[27] In the copy of the records provided to FHA alongside this order I have highlighted the information which I find FHA is authorized to withhold under s. 13(1).

Local public body confidences, s. 12(3)(b)

Positions of the parties

[28] FHA applies s. 12(3)(b) to certain information on six pages of the records.³⁷ I found above that FHA is authorized to withhold the relevant information on four of those pages³⁸ under s. 13(1) and it is not necessary to decide if s. 12(3)(b) also applies to that information. Therefore, I will only consider FHA's application of s. 12(3)(b) to the information severed from pages 128 and 129 of the records, located in the board's October 17, 2017 meeting minutes titled "Board of Directors Full In Camera Meeting."³⁹

[29] FHA asserts that the information withheld under s. 12(3)(b) on pages 128 and 129 is contained in the minutes of an *in camera* meeting of the board and reveals a decision made at that meeting (page 128) and a discussion point from that meeting (page 129).⁴⁰

³⁶ See pages 20 [I consider some of this information again below in the context of s. 22(1)], 23, 39, 44-47, 77, 80, 94 [I consider some of this information again below in the context of s. 22(1)], 107, 109, 112, and 118 of the records.

³⁷ Pages 76, 79, 94, 95, 128, and 129 of the records. While the records themselves only note s. 13 as the basis for severing the information under bullet 3.1 on pp. 94-95 and s. 22 as the only basis for severing the information on page 129, FHA's Initial Submission, *supra* note 4 makes clear at para. 12 that FHA also relies on s. 12(3)(b) in severing this information from the records.

³⁸ Pages 76, 79, 94, and 95 of the records.

³⁹ The minutes span pages 126-131 of the records.

⁴⁰ FHA's Initial Submission, *supra* note 4 at para 12.

[30] The applicant does not specifically address s. 12(3)(b) but does express concern with the board holding *in camera* meetings and clearly objects to FHA relying on s. 12(3)(b) to withhold any information contained in the records.⁴¹

Analysis

[31] Section 12(3)(b) states:

12 (3) The head of a local public body may refuse to disclose to an applicant information that would reveal

...

- (b) the substance of deliberations of a meeting of its elected officials or its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

[32] FIPPA defines a local public body as follows:

“local public body” means

...

- (b) a health care body[.]

[33] and defines a health care body as including:

...

- (g) a regional health board designated under section 4(1) of the *Health Authorities Act*[.]

[34] As explained above, FHA meets this definition by operation of HAA s. 4(1) and *Regional Health Boards Regulation*,⁴² s. 4(2) and Schedule “B”. FHA is therefore a “local public body” for purposes of FIPPA and the board is FHA’s governing body. FHA may, in principle, rely on s. 12(3)(b) to withhold information contained in the minutes of board meetings.

[35] To appropriately rely on s. 12(3)(b) in severing the information at issue, FHA must demonstrate that:

1. The board has statutory authority to meet in the absence of the public (*in camera*);
2. The meeting in question was held in the absence of the public; and,

⁴¹ Applicant’s Response Submission, *supra* note 7 at paras. 8-9.

⁴² *Supra* note 5.

3. The severed information would, if disclosed, reveal the substance of the deliberations which occurred at that meeting.⁴³

[36] I will consider whether FHA has met these standards in turn.

The board's statutory authority to hold meetings *in camera*

[37] Section 8 of the HAA sets out the powers and procedures granted to and required of FHA when it exercises its rights and performs its obligations under the HAA. Section 8(3) of the HAA says:

Meetings of a board are open to the public, but the board may exclude the public from a meeting if the board considers that, in order to protect the interests of a person or the public interest, the desirability of avoiding disclosure of information to be presented outweighs the desirability of public disclosure of the information.

[38] Based on the wording of HAA s. 8(3) there are two preconditions on the board taking a meeting *in camera*:

1. either the “public interest” or the “interests of a person” must be implicated in what the board will discuss during the *in camera* portions of the meeting; and,
2. the board must consider that the desirability of avoiding disclosure of the information that will be presented during the *in camera* portions of the meeting outweighs the desirability of public disclosure of that information.

[39] Where these conditions are met, the board possesses statutory authority to hold meetings *in camera* at the board's discretion.⁴⁴ Only the information severed from pages 128 and 129 under s. 12(3)(b) is at issue here. Therefore, I only need to assess the board's compliance with HAA s. 8(3) in taking the October 17, 2017 meeting *in camera*.

Positions of the Parties

[40] FHA generally asserts the authority of the board to meet *in camera* based on HAA s. 8(3).⁴⁵ FHA does not directly address how the board's decision to take the October 17, 2017 meeting *in camera* complied with HAA s. 8(3).

⁴³ See Order F20-10, 2020 BCIPC 12 at para. 8, citing Order F13-10, 2013 BCIPC 11 at para. 8. See also Order 00-14, 2000 CanLII 10836 (BC IPC) at p. 4.

⁴⁴ See *Hospital Employees' Union v. Health Authorities (British Columbia)*, 2003 BCSC 778 at para. 76.

⁴⁵ FHA's Initial Submission, *supra* note 4 at paras. 11-12.

[41] The applicant does not specifically address the board's authority to go *in camera* at the October 17, 2017 meeting but generally challenges the appropriateness of the board meeting *in camera* any time that the board is "developing policy".⁴⁶

Analysis

[42] As noted above, FHA does not explain how the board's decision to take the October 17, 2017 meeting *in camera* complied with HAA s. 8(3). Prior orders point to the need for clear evidence on this point.⁴⁷ However, in this case I find that the records themselves provide a sufficient evidentiary basis to assess the board's compliance with HAA s. 8(3) in taking the meeting *in camera*.

[43] In the first place, the contents of the meeting minutes demonstrate that the "public interest" or the "interests of a person" were implicated by what the board discussed during the October 17, 2017 meeting.

[44] Secondly, the following resolution is marked as having been moved and unanimously passed by the board at the outset of the October 17, 2017 meeting:

THAT upon review of the proposed agenda items and the related information to be presented, the Board of the Fraser Health Authority resolves to exercise its discretion to go *in camera* and exclude the public from its deliberations in order to protect the interests of the public or individuals identified in such information.⁴⁸

[45] This demonstrates that the board considered the desirability of taking the meeting *in camera* and exercised its discretion to do so. The wording of the resolution explains (in broad terms) the board's reasons for taking the meeting *in camera* and implies that the board weighed the desirability of taking the meeting *in camera* against the desirability of public disclosure of the information to be discussed at the meeting.

[46] Taken together, these facts support FHA's position that the board complied with HAA s. 8(3) in taking the October 17, 2017 meeting *in camera*.

[47] Turning to the applicant's arguments, I accept that where the board will discuss policy related information this is a relevant factor which the board should consider when deciding if it is desirable to take a meeting *in camera*. However, I find that this is one of many factors which the board should consider.

⁴⁶ Applicant's Response Submission, *supra* note 7 at para. 8.

⁴⁷ See Order 00-14, *supra* note 43 at p. 4. However, I note that in this order, notwithstanding the call for "clear evidence", the Commissioner's conclusion on s. 12(3)(b) was based primarily on their own assessment of the records in question and the relevant statutory scheme and not on supplementary evidence provided by the public body.

⁴⁸ Page 126 of the records.

Furthermore, I find that this factor could weigh in favour of or against the board taking a meeting *in camera* depending on the overall context.

[48] Moreover, on the wording of HAA s. 8(3), I find that the board is clearly authorized to develop policy *in camera* as long as the requirements of HAA s. 8(3) are otherwise satisfied. Based on this, the applicant's concerns regarding the board's decision to take the October 17, 2017 meeting *in camera*, while relevant, do not meaningfully change my assessment of the evidence before me.

[49] Based on all of the above, I find that under HAA s. 8(3) the board possessed statutory authority to take the October 17, 2017 meeting *in camera*.

Was the meeting held in the absence of the public?

[50] FHA submits that the information at issue is contained in the minutes of an *in camera* meeting of the board that the public was excluded from.⁴⁹ The applicant does not contest this point.

[51] It is clear from the wording of the resolution reproduced in the previous section that the meeting was intended to be held in the absence of the public. I have been provided no evidence indicating that the public was not in fact excluded from the meeting as intended. On this basis, I find that the October 17, 2017 board meeting was held in the absence of the public.

Would disclosing the information reveal the substance of deliberations?

[52] Prior orders explain that the "substance" of deliberations is something more than just the "subject" or "basis" of deliberations but refers to the "essential or material part" of what was discussed.⁵⁰ Deliberations include "discussions conducted with a view to making a decision or following a course of action."⁵¹ Further, where information does not directly reveal the substance of deliberations but would allow the "drawing of accurate inferences with respect to the substance of *in camera* deliberations" it may also meet the definition.⁵²

[53] Previous orders have found that disclosing the wording of a specific motion would reveal the substance of deliberations.⁵³ This has been extended to

⁴⁹ FHA's Initial Submission, *supra* note 4 at para. 12.

⁵⁰ Order F22-51, 2022 BCIPC 58 at para. 26, citing Order 00-11, 2000 CanLII 10554 (BC IPC) at p. 5.

⁵¹ Order F22-51, *ibid* at para. 26, citing Order 00-11, *ibid* at pp. 5-6.

⁵² Order 00-11, *ibid* at p. 6, citing Order No. 326-1999, 1999 CanLII 4353 (BC IPC) at p. 3.

⁵³ Order F22-51, *supra* note 50 at para. 35, citing Order 03-09, 2003 CanLII 49173 at paras. 22-24 and Order F16-03, 2016 BCIPC 3 at para. 13.

how board members voted on the motion.⁵⁴ However, if “one cannot reasonably conclude ... what [board] members thought, said, or decided regarding the material being considered” based on the information, then the information does not reveal the substance of deliberations.⁵⁵

[54] FHA submits that disclosing the information at issue would reveal the substance of the board’s deliberations at the October 17, 2017 board meeting.⁵⁶ The applicant does not address this point.

Analysis – substance of deliberations

[55] I find the information at issue to be a summation of a discussion point (page 129) and the content of a motion passed by the board (page 128).

[56] I find that the content of the motion on page 128 would reveal the substance of the board’s deliberations if disclosed. However, I find that FHA is not authorized to withhold the names of the board members who moved and seconded the motion because disclosing this information would not reveal the substance of the board’s deliberations.

[57] Concerning the information withheld from page 129, I find that disclosing this information would at most reveal the “subject” of the board’s deliberations and would not reveal what board members thought, said, or decided regarding the material before them. Therefore, I find that FHA is not authorized to refuse to disclose the summation on page 129 under s. 12(3)(b).⁵⁷

[58] In the copy of the records provided to FHA alongside this order I have highlighted the information which I find FHA is authorized to refuse to disclose under s. 12(3)(b).

Exercise of discretion under ss. 12(3) and 13(1)

[59] The word “may” in ss. 12(3) and 13(1) confers on the head of a public body the discretion to disclose information that it is otherwise authorized to withhold under those sections. If the head of a public body has failed to consider exercising their discretion to disclose such information, the Commissioner can require the head to reconsider their severing decisions. The Commissioner can also order the head to reconsider the exercise of discretion where the decision to withhold information was made in bad faith or for an improper purpose, the

⁵⁴ Order F19-18, 2019 BCIPC 20 at paras. 27 and 31. See also Order F15-20, 2015 BCIPC 22 at para. 25 where the adjudicator found that revealing “how voting proceeded” on motions could reveal the substance of deliberations.

⁵⁵ Order F19-18, *ibid* at para. 27, citing Order F12-11, 2012 BCIPC 15 at para. 14.

⁵⁶ FHA’s Initial Submission, *supra* note 4 at para. 12.

⁵⁷ I consider the application of s. 22(1) to this information below.

decision took into account irrelevant considerations, or the decision failed to take into account relevant considerations.⁵⁸

Positions of the parties

[60] The applicant contends that FHA's ability to fairly decide which information it is authorized to withhold is brought into question by FHA's initial decision to apply ss. 12(3)(b) and 13(1) to information that it subsequently released to the applicant.⁵⁹ The applicant has presented specific arguments that in two instances information which (the applicant alleges) was not appropriately covered by ss. 12(3)(b) or 13(1) was severed from earlier copies of the records before being released to the applicant during the submissions stage of this inquiry. On this basis, the applicant seems to suggest I should draw an adverse inference regarding FHA's discretionary severing decisions which remain at issue in this inquiry.⁶⁰

[61] FHA submits that it appropriately exercised its discretion in deciding not to release the information which remains severed from the records under ss. 12(3)(b) and 13(1).⁶¹ FHA indicates that it considered the following factors in deciding to continue withholding this information:

- continued sensitivity of the information notwithstanding the passage of time since the records were created;⁶²
- the expectation at the time the records were created that the information contained within them would remain confidential and not be released outside of FHA;⁶³ and,
- a weighing of the public interest in disclosure of the information against the public interest in the board and QP committee being able to continue receiving and deliberating on sensitive information confidentially.⁶⁴

[62] Further, FHA asserts that it did not err in reconsidering its initial severing decisions and deciding to release more information to the applicant as this matter moved through the OIPC review process.⁶⁵ Rather, FHA explains that in preparation for this inquiry FHA reviewed the records again with the assistance of

⁵⁸ Order F23-51, 2023 BCIPC 59 at para. 142, citing *John Doe*, *supra* note 17 at para. 52 and Order 02-38, *supra* note 16 at para. 147. See also Order F21-15, 2021 BCIPC 19 at para. 57 and FIPPA s. 58(2)(b).

⁵⁹ Applicant's Response Submission, *supra* note 7 at para. 5.

⁶⁰ Applicant's Response Submission, *ibid* at paras. 6-7.

⁶¹ FHA's Initial Submission, *supra* note 4 at paras. 13 and 17; Affidavit #1 of S.M., *supra* note 1 at paras. 4-7.

⁶² FHA's Initial Submission, *ibid*; Affidavit #1 of S.M., *ibid* at paras. 4 and 5.

⁶³ Affidavit #1 of S.M., *ibid* at para. 6.

⁶⁴ FHA's Initial Submission, *supra* note 4 at paras. 13 and 17; Affidavit #1 of S.M., *ibid* at paras. 4-6.

⁶⁵ FHA's Reply Submission dated February 13, 2023 at p. 1.

legal counsel. FHA says that this review led FHA to conclude that the sensitivity of certain information which FHA initially withheld had diminished due to the passage of time.⁶⁶

[63] FHA also argues that a public body's choice to reconsider prior severing decisions is not relevant to whether the public body has properly applied ss. 12(3)(b) or 13(1) to the records remaining in dispute at the inquiry stage.⁶⁷ Finally, FHA says that "a public body should be encouraged to revisit [disclosure] packages to determine whether additional information can be released – not penalized for engaging in that process in good faith."⁶⁸

Analysis and conclusion

[64] Based on FHA's submissions and affidavit evidence, I accept that FHA considered the factors listed above in applying ss. 12(3)(b) and 13(1) to sever information from the records. I am, therefore, satisfied that FHA reflected on whether to release or withhold information under those sections of FIPPA and appropriately considered whether to exercise its discretion.⁶⁹

[65] Moreover, there is nothing in the records or in the parties' submissions that supports concluding that FHA exercised its discretion in bad faith or for an improper purpose or based on irrelevant considerations. Prior orders have implicitly accepted passage of time and an attendant reduction in the sensitivity of information as a legitimate basis for a public body reconsidering their severing decisions.⁷⁰ I find FHA's explanation on these same grounds to be reasonable.

[66] While it is possible that some information FHA initially withheld and later released to the applicant falls outside the ambit of ss. 12(3)(b) and 13(1) as the applicant contends, that information is not at issue in this inquiry. Examining just the information which remains severed at this stage, the applicant has not demonstrated why I should draw an adverse inference regarding FHA's exercise of discretion in severing the records.

[67] For these reasons, I find that FHA appropriately exercised its discretion in deciding whether to release the information FHA has withheld under ss. 12(3)(b) and 13(1).

⁶⁶ FHA's Reply Submission, *ibid* at p. 1; Affidavit #1 of S.M., *supra* note 1 at para. 3.

⁶⁷ FHA's Reply Submission, *ibid*.

⁶⁸ *Ibid*.

⁶⁹ See Order F23-51, *supra* note 58 at para. 145.

⁷⁰ See Order F21-15, *supra* note 58 at paras. 22 and 55-58 where passage of time was relied on by a public body to justify reconsidering their initial severing decisions and this change in the public body's position on severing did not raise concerns related to their exercise of discretion.

Unreasonable invasion of privacy, s. 22(1)

[68] Section 22(1) requires FHA to refuse to disclose personal information contained in the records if revealing that information would be an unreasonable invasion of a third party's personal privacy. FHA has applied s. 22(1) to sever information from 14 pages of the records.⁷¹

[69] The analytical framework for s. 22(1) is well established and was succinctly set out in Order F15-03 as follows:

This section only applies to 'personal information' as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy.⁷²

[70] I follow this same approach below.

Step 1: Is the information "personal information"?

[71] The first step is to determine whether the information FHA has withheld under s. 22(1) is "personal information" as defined in FIPPA. At Schedule 1, FIPPA defines personal information as "recorded information about an identifiable individual other than contact information" and defines contact information as "information to enable an individual at a place of business to be contacted [including] the name, position name or title, business telephone number, business address, business email or business fax number of the individual." Information is "about an identifiable individual" when the information is reasonably capable of identifying that individual, either on its own or when combined with other available sources of information.⁷³

[72] FHA asserts that all the information it has withheld under s. 22(1) is "personal information" as defined in FIPPA.⁷⁴ The applicant does not specifically address s. 22(1) but I take it from their submissions that the applicant generally objects to FHA withholding the information in question.⁷⁵

⁷¹ Pages 18, 20, 39, 40, 42, 44, 80, 81, 94, 112, 113, 121, 127, and 129 of the records.

⁷² Order F15-03, 2015 BCIPC 3 at para. 58.

⁷³ Order F19-13, 2019 BCIPC 15 at para. 16, citing Order F18-11, 2018 BCIPC 14 at para. 32.

⁷⁴ FHA's Initial Submission, *supra* note 4 at paras. 18-21.

⁷⁵ Applicant's Response Submission, *supra* note 7 at para. 9.

Analysis

[73] I accept that much of the information FHA has withheld under s. 22(1) is personal information as defined in FIPPA. This is particularly the case where individuals are referred to by name;⁷⁶ or, where the details of an incident discussed in the records (date, location, animating cause) could, when combined with other available information, lead to the parties involved in the incident being reidentified.⁷⁷ Further, I accept that some information related to the actions of board members during meetings is the personal information of those board members as they are identified in the records.⁷⁸ I also find that none of the information FHA has withheld under s. 22(1) is contact information.

[74] However, I find that some of the information FHA has withheld under s. 22(1) is not personal information because it could not reasonably be linked to an identifiable individual. Specifically,

- throughout the records FHA has withheld non-identifying information which is beside personal information.⁷⁹ FHA has not explained how this non-identifying information meets the definition of “personal information.” I find that this information cannot be withheld under s. 22(1);
- FHA has not explained how the information withheld from page 129 could reasonably be linked to an identifiable individual. I find that the information is general in character and that it is not personal information so it cannot be withheld under s. 22(1); and,
- on pages 44 and 112, FHA has withheld purely numerical/statistical information regarding the number of patients who received MAiD during a specific period and the number who had certain medical conditions.⁸⁰ FHA has not explained how this information, whether alone or combined with other information, would reveal the identity of these MAiD recipients. I cannot see how it reasonably would. I find that this information is not personal information and cannot be withheld under s. 22(1).

[75] Section 22(1) does not apply to the information that I found above is not personal information, so I will not consider it any further. I will now move on to

⁷⁶ As on pages 18, 20, 39, 40, 42, 121, and 127 of the records.

⁷⁷ As on pages 20, 40, 80, 81, 94, 112, 113, and 121 of the records.

⁷⁸ As on pages 18, 20, 40, 80, and 94 of the records.

⁷⁹ See sections 3.2 and 3.3 on page 20, section 3.1 and the motion following it on page 40, section 6.2 on page 80, the “action item” at the top of page 81, the top bullet on page 94, the final paragraph on page 113, and the paragraph immediately above section 7.0 on page 121 of the records.

⁸⁰ However, I accept that the date the first MAiD application was received by FHA is the personal information of the requestor (page 112 of the records).

consider whether disclosure of the information that I found is personal information would be an unreasonable invasion of third-party personal privacy.

Step 2: Does section 22(4) apply?

[76] The second step in the s. 22 analysis is to determine whether the personal information falls into any of the categories of information listed in s. 22(4). FHA submits that s. 22(4) does not apply to any of the personal information at issue.⁸¹ The applicant does not make any submissions on this point.

[77] I have reviewed the information in dispute and I find that some of the personal information which FHA has withheld under s. 22(1) falls within the scope of s. 22(4)(e) which reads:

22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

- (e) the information is about the third party's position, functions, or remuneration as an officer, employee or member of a public body or as a member of a minister's staff[.]

[78] Numerous prior orders have considered the meaning and scope of s. 22(4)(e). Recently, in Order F23-28,⁸² the adjudicator recounted the general principles for applying s. 22(4)(e):

- s. 22(4)(e) applies to information that reveals a public body employee's name, job title, duties, functions, remuneration (including salary and benefits) or position;⁸³
- s. 22(4)(e) also applies to information that relates to a public body employee's job duties in the normal course of work-related activities, namely objective, factual information about what the individual did or said in the course of discharging their job duties;⁸⁴
- whether s. 22(4)(e) applies in a particular case depends on the context in which the information at issue appears and where the information would reveal personal information about the third party such as disciplinary action or severance information, s. 22(4)(e) will not apply;⁸⁵

⁸¹ FHA's Initial Submission, *supra* note 4 at para. 22.

⁸² Order F23-28, 2023 BCIPC 32 at paras. 41-43.

⁸³ Citing Order F20-54, 2020 BCIPC 63 at para. 56 and note 45.

⁸⁴ Citing Order 01-53, 2001 CanLII 21607 at para. 40 and Order F18-38, 2018 BCIPC 41 at para. 70.

⁸⁵ Citing Order F10-21, 2010 BCIPC 32 at para. 24.

- similarly, where the information at issue appears in a context that reveals more than just the third party's name, job title, functions, remuneration, or what they did in the normal course of their work or activities as a public body officer, employee, or member, then s. 22(4)(e) does not apply to the information.

[79] On five pages of the records, FHA has withheld information related to actions taken by or delegated to board members during board meetings.⁸⁶ FHA has also withheld the name of the site medical director for a hospital facility within FHA's purview from page 42 of the records.

[80] I find that s. 22(4)(e) applies to all of this information. Disclosing this information would only reveal the name of a FHA employee and factual information about the regular duties of that FHA employee and some members of the board. This kind of information falls within the scope of s. 22(4)(e).⁸⁷ Because s. 22(4)(e) applies, FHA cannot refuse to disclose this information under s. 22(1). So, I will not consider this information any further.

Step 3: does s. 22(3) apply?

[81] The next step is to consider whether disclosing the remaining personal information is presumed to be an unreasonable invasion of third-party personal privacy under s. 22(3). FHA asserts that s. 22(3)(d) applies to certain information FHA has withheld.⁸⁸ The applicant does not make submissions regarding s. 22(3). In addition to s. 22(3)(d), I find that s. 22(3)(a) also warrants consideration.

[82] The parts of s. 22(3) that are relevant here state:

22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

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

...

- (d) the personal information relates to employment, occupational or educational history[.]

⁸⁶ Pages 18, 20, 40, 80, and 94 of the records. While the board is a public body and therefore not a "third party" for FIPPA purposes, I find that the individual board members whose personal information I am considering here are "third parties". See Order F23-28, *supra* note 82 at para. 40.

⁸⁷ See Order 01-53, *supra* note 84 at para. 40 and Order F18-38, *supra* note 84 at para. 70.

⁸⁸ FHA's Initial Submission, *supra* note 4 at para. 22.

[83] I find that s. 22(3)(a) applies to some of the personal information.⁸⁹ Section 22(3)(a) applies to this information because it contains details about the medical, psychiatric, or psychological history, condition, or treatment of several FHA patients and related third parties. I also find that the details contained in the information are not vague or general in character but are specific enough for s. 22(3)(a) to apply.⁹⁰

[84] Regarding s. 22(3)(d), I find that it applies to the remainder of the personal information.⁹¹ Section 22(3)(d) applies to this information because the information relates to the occupational performance of FHA employees including the opinions of superiors and, in some cases, to on-the-job disciplinary action. Some of the information also relates to the employment status of current, former, and prospective FHA employees and is the employment history of those individuals on that basis. This kind of personal information clearly falls within the scope of s. 22(3)(d).⁹²

Step 4: does s. 22(2) apply?

[85] The final step in the s. 22 analysis is to consider all the relevant circumstances, including those listed in s. 22(2), to determine whether disclosure of the personal information would be an unreasonable invasion of third-party personal privacy. It is at this stage that the ss. 22(3)(a) and (d) presumptions I found applicable could be rebutted.

[86] FHA submits that ss. 22(2)(a) and (b) do not weigh in favour of disclosing any of the information at issue and that s. 22(2)(h) weighs against disclosing some of the information.⁹³ The applicant does not make any submissions related to s. 22(2). In addition to the sections of s. 22(2) referenced by FHA, I find that s. 22(2)(i) also warrants consideration.

[87] The relevant portions of s. 22(2) read:

22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

⁸⁹ This information is on pages 20 (under section 3.2), 80 (under the second and fourth bullets of section 6.2), 112, and 113 of the records.

⁹⁰ See, for example, Order F23-26, 2023 BCIPC 30 at para 68, citing Order F22-34, 2022 BCIPC 38 at para. 200.

⁹¹ This information is on pages 18, 20 (under section 3.3), 39, 40, 80 (under the fourth bullet of section 6.2), 81, 94, 121, and 127 of the records.

⁹² Order 04-04, 2004 CanLII 34258 (BC IPC) at para. 17. See also See Order F23-26, *supra* note 90 at para. 74 where workplace performance information including the opinions of superiors about employee performance was found to fall within s. 22(3)(d).

⁹³ FHA's Initial Submission, *supra* note 4 at para. 22.

- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
- (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
- ...
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and
- (i) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

[88] Turning first to s. 22(2)(a), one of the purposes of this section is to make public bodies more accountable to the public. Therefore, for s. 22(2)(a) to apply, disclosure of the specific information at issue must be desirable for subjecting a public body's activities to public scrutiny as opposed to subjecting an individual third party's activities to public scrutiny.⁹⁴ I do not see how disclosure of the information at issue would be desirable for the purpose of subjecting FHA, the government of British Columbia, or any other public body to scrutiny. At most, disclosure of the information could subject the activities of certain individuals to scrutiny. I find that s. 22(2)(a) does not apply to the information on that basis.

[89] Considering s. 22(2)(b), I accept that in a general sense information related to the provision of MAiD or other healthcare services rendered by FHA relates to public health. However, I do not see how disclosing any of the specific information in dispute would promote public health or safety as required for s. 22(2)(b) to apply to it.⁹⁵ Given this, I find that s. 22(2)(b) does not apply to the personal information in dispute.

[90] However, I do find that s. 22(2)(h) applies to some of the personal information that I have found above s. 22(3)(d) applies to.⁹⁶ This information reveals allegations of misconduct against FHA employees and is one-sided in that it does not include the employees' explanations for their actions.⁹⁷ On this basis, I find that releasing this personal information would unfairly damage the reputations of those FHA employees and s. 22(2)(h) favours withholding it on that basis.

[91] I also find that s. 22(2)(i) favours withholding some of the personal information I am considering here. Some of this information is about deceased persons. However, prior orders indicate that it will usually be 20 to 30 years after an individual's death before s. 22(2)(i) weighs in favour of disclosing that

⁹⁴ See Order F23-34, 2023 BCIPC 40 at para. 106.

⁹⁵ See Order F23-26, *supra* note 90 at paras. 88-90.

⁹⁶ For example, the information on pages 80, 81 and 94 of the records.

⁹⁷ See, for example, Order F23-26, *supra* note 90 at para. 96.

individual's personal information. Any deceased person whose information is contained in the records died much more recently than that. Based on this, I find that s. 22(2)(i) favours withholding those deceased persons' personal information.⁹⁸

Conclusion on s. 22

[92] I have found that much of the information FHA has withheld under s. 22(1) is not personal information. For that reason, FHA is not authorized or required to refuse to disclose it to the applicant under s. 22(1). However, I have found that some of the information FHA has withheld under s. 22(1) is personal information.

[93] Further, I have found that some of the personal information falls within the scope of s. 22(4)(e) and disclosure of that information is deemed not to be an unreasonable invasion of third-party personal privacy.

[94] The balance of the personal information falls within the scope of ss. 22(3)(a) or (d) such that disclosure is presumed to be an unreasonable invasion of third-party personal privacy.

[95] Finally, I have considered the relevant circumstances and find that they do not rebut the presumptions under ss. 22(3)(a) and (d). Disclosing that personal information would be an unreasonable invasion of third-party personal privacy pursuant to s. 22(1).

[96] Based on all of the above, I find that FHA is required to withhold under s. 22(1) the information which I have highlighted in the copy of the records provided to FHA alongside this order.

CONCLUSION

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

1. Subject to item 3 below, I confirm that FHA is authorized, in part, to refuse to disclose information in the records pursuant to ss. 12(3)(b) and 13(1).
2. Subject to item 3 below, I confirm that FHA is required, in part, to refuse to disclose information in the records pursuant to s. 22(1).
3. FHA is only authorized by ss. 12(3)(b) and 13(1), and required by s. 22(1), to refuse to disclose to the applicant the information which I have

⁹⁸ See Order F23-26, *ibid* at paras. 98-101 where the adjudicator took a similar approach to s. 22(2)(i).

highlighted in the copy of the records delivered to FHA alongside this order.

4. FHA is required to provide the applicant access to the portions of the records that have not been highlighted as described in item 3 above.
5. FHA must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at item 4, above.

[98] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **September 18, 2023**.

August 3, 2023

ORIGINAL SIGNED BY

Alexander Corley, Adjudicator

OIPC File No.: F21-85749