



Order F24-53

**MINISTRY OF HEALTH AND PROVINCIAL HEALTH OFFICER,
COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA, et al.**

Elizabeth Barker
Director of Adjudication

June 21, 2024

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Summary: A group of health care professionals jointly complained that the Ministry of Health, the Public Health Officer, and several health profession colleges¹ collected, used and disclosed personal information, including COVID-19 vaccination status, contrary to the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found that the collection, use and disclosure of personal information took place pursuant to the emergency powers provisions in Part 5 of *the Public Health Act* and two orders made pursuant to those powers. The adjudicator concluded that FIPPA authorized the collection, use and disclosure of personal information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 3(7), 25.1, 26(a), 27(1)(a)(iii), 27(1)(b), 32(a), 33(2)(e), 33(2)(f), 33(2)(l) and Schedule 1 (definition of “personal information” and “contact information”). *Public Health Act*, SBC 2008, c 28, ss. 51 (definitions of “emergency”, “health officer” and “regional event”), 43, 44, 45, 52, 53, 54, 56, 57, 64, 65, 67 and 69. *Interpretation Act*, RSBC 1996, c. 238, s. 1 (definitions of “Act”, “enactment” and “regulation”) and s. 33(6).

¹ College of Physicians & Surgeons of British Columbia; College of Chiropractors of British Columbia; College of Massage Therapists of British Columbia; College of Opticians of British Columbia; College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia; College of Nurses & Midwives of British Columbia; College of Psychologists of British Columbia; College of Speech and Hearing Health Professionals of British Columbia; College of Physical Therapists of British Columbia; College of Optometrists of British Columbia; College of Occupational Therapists of British Columbia; College of Dietitians of British Columbia; College of Dental Surgeons of British Columbia; College of Dental Hygienists of British Columbia; College of Dental Technicians of British Columbia and College of Denturists of British Columbia (the latter four are now the amalgamated College of Oral Health, Professionals).

INTRODUCTION

[1] In 2022, the Provincial Health Officer (PHO) issued two orders (the Orders) directed at regulatory colleges that govern health care professionals (Colleges), College registrants, the Ministry of Health (Ministry) and post-secondary educational institutions. The Orders required the collection, use and disclosure of College registrants' personal information, including their COVID-19 vaccination status.

[2] A group of health care professionals (Complainants) jointly complained to the Office of the Information and Privacy Commissioner (OIPC) that the Ministry, the PHO and the Colleges (together the Respondents) collected, used and disclosed the Complainants' personal information contrary to the *Freedom of Information and Protection of Privacy Act* (FIPPA).² Investigation and mediation by the OIPC did not resolve the matter and it proceeded to inquiry. The OIPC issued an investigator's fact report and a notice of inquiry to summarize the dispute and set out the issues to be decided at the inquiry.

[3] During this inquiry, I considered the Complainants' initial submission outlining their complaint,³ the Ministry and the PHO's joint response,⁴ the joint response of the Colleges,⁵ and the Complainants final reply.⁶ From this point forward, for the sake of simplicity, when I refer to what the Ministry and the PHO said in their joint submissions, I will use the term Ministry/PHO.

BACKGROUND

[4] The PHO is an officer appointed by the Lieutenant Governor in Council, pursuant to the *Public Health Act* (PHA) with powers and duties under that Act.⁷ The Office of the PHO resides in the Ministry.

[5] The following emergency powers in Part 5 of the PHA are important to understand the context for this case.

Definitions for this Part

51 In this Part:

² There were 14 Complainants and they jointly provided two complaints, dated April 11, 2022 and August 29, 2022.

³ Complainants' initial submission dated January 19, 2024.

⁴ Ministry/PHO submission dated February 23, 2024.

⁵ Colleges' submission dated February 22, 2024. The response was provided on behalf of 12 Colleges. Only the College of Dietitians did not provide a submission.

⁶ Complainants' reply dated March 7, 2024.

⁷ *Public Health Act*, SBC 2008, c 28.

"emergency" means a localized event or regional event that meets the conditions set out in section 52 (1) or (2) [*conditions to be met before this Part applies*], respectively;

...

"regional event" means an immediate and significant risk to public health throughout a region or the province.

Conditions to be met before this Part applies

52 (2) ... a person must not exercise powers under this Part in respect of a regional event unless the provincial health officer provides notice that the provincial health officer reasonably believes that at least 2 of the following criteria exist:

- (a) the regional event could have a serious impact on public health;
- (b) the regional event is unusual or unexpected;
- (c) there is a significant risk of the spread of an infectious agent or a hazardous agent;
- (d) there is a significant risk of travel or trade restrictions as a result of the regional event.

Part applies despite other enactments

53 During an emergency, this Part applies despite any provision of this or any other enactment, including

- (a) in respect of the collection, use or disclosure of personal information, the *Freedom of Information and Protection of Privacy Act* and the *Personal Information Protection Act*, and
- (b) a provision that would impose a specific duty, limit or procedural requirement in respect of a specific person or thing,

to the extent there is any inconsistency or conflict with the provision or other enactment.

General emergency powers

54 (1) A health officer may, in an emergency, do one or more of the following:

...

- (k) collect, use or disclose information, including personal information,
 - (i) that could not otherwise be collected, used or disclosed,
 - or
 - (ii) in a form or manner other than the form or manner required.

(2) An order that may be made under this Part may be made in respect of a class of persons or things, and may make different requirements for different persons or things or classes of persons or things or for different geographic areas.

Emergency powers respecting reporting

57 (1) The provincial health officer may, in an emergency, order that a specified infectious agent, hazardous agent, health hazard or other matter be reported under this section.

(2) If an order is made under this section, a person required by the order to make a report must promptly report, to the extent of the person's knowledge, to a medical health officer the information required by the order.

(3) If a person is required to make a report under this Act, the provincial health officer may in an emergency order the person exempt from the requirement, or vary the requirement.

Delegation by provincial health officer

69 The provincial health officer may in writing delegate to a person or class of persons any of the provincial health officer's powers or duties under this Act, except the following:

- (a) a power to further delegate the power or duty;
- (b) a duty to make a report under this Act.

[6] Further, s. 1 of the PHA defines “health officer” to include the provincial health officer, for the purposes of s. 54, and s. 67(2) of the PHA says that during an emergency under Part 5, the PHO may exercise a power or perform a duty of a health officer.

[7] On March 17, 2020, the PHO gave notice under s. 52(2) of the PHA that transmission of SARS-CoV-2 was causing COVID-19 among the province's population and that it constituted a regional event as defined in s. 51 of the PHA.⁸ The Complainants and Respondents call this the “Emergency Declaration”, but I will refer to it as the “Notice of Regional Event” because that better reflects the language in s. 52(2) of the PHA.

[8] On March 7, 2022, the PHO issued the first of the Orders that concern the Complainants, titled *Health Professionals COVID-19 Vaccination Status Information and Preventative Measures – March 7, 2022* (the March Order). In it, the PHO explained why she believed the March Order was necessary and what

⁸ In addition, on March 18, 2020, the Minister of Public Safety and Solicitor General declared a state of emergency throughout BC pursuant to s. 9(1) of the *Emergency Programs Act*, RSBC 1996, c. 111. See Ministerial Order M073.

provisions of the PHA she was relying on to make it.⁹ In brief, the March Order required the Colleges, their registrants, and the Minister of Health to do the following:

- The Colleges must:
 - Provide to the PHO each registrant's legal names, gender, date of birth, college identification number, and home and work addresses, phone numbers, fax numbers and email addresses;
 - Record the vaccination status of their registrants by March 31, 2022;
 - Disclose to the PHO, upon request, aggregate information respecting the vaccination status of their registrants; and
 - Disclose to the PHO or medical health officer, upon request, on an aggregate or individual basis, the location of all places where registrants work and their vaccination status.
- The Minister of Health must verify each registrant's vaccination status using the data in the Provincial Immunization Registry and disclose that information to the registrant's College.
- College registrants must, upon request of their college, provide proof of vaccination or a vaccination exemption to their college.

[9] The PHO repealed the March Order by issuing a new order titled *Health Professionals COVID-19 Vaccination Status Information and Preventative Measures – June 10, 2022* (June Order). The June Order explained the PHO's reasons for issuing the order and cited the PHA provisions used to make it.¹⁰ The June Order required the following:

- The Colleges must:
 - Collect information about, and keep a record of, each registrant's vaccination status.
 - Disclose to the PHO, upon request, aggregate information respecting their registrants' vaccination status.
 - Disclose to the PHO or a medical health officer, upon request, on an aggregate or individual basis, the location of all places where registrants work and the vaccination status of the registrants who work in each place.
 - Disclose, upon request, to a post-secondary institution, information about the vaccination status of a college registrant applying for admission to, or enrolled in, a health science program offered by

⁹ The March Order cites ss. 30, 31, 32, 39, 53, 54, 56, 57, 67(2) and 69 of the PHA.

¹⁰ The June Order cites ss. 30, 31, 32, 39, 53, 54, 57, 67(2) and 69 of the PHA.

the post-secondary institution, or in the case of the University of British Columbia (UBC), disclose to UBC information about a registrant of the College of Physicians and Surgeons who is applying to enroll or who is enrolled with UBC as a postgraduate trainee, resident or clinical fellow.

- College registrants must, upon request of their college, provide proof of vaccination or a vaccination exemption.
- Post-secondary institutions may collect from a college information about the vaccination status of a registrant applying for admission to, or enrolled in, a health science program offered by the post-secondary institution. The post-secondary institution must only retain that information if the registrant is subsequently enrolled.
- UBC may collect information from the College of Physicians and Surgeons about the vaccination status of a registrant applying to enroll or who is enrolled with UBC as a postgraduate trainee, resident or clinical fellow. UBC must only retain that information if the registrant is subsequently enrolled.

[10] On April 11, 2022, the Complainants complained to the OIPC about the Respondents' collection, use, and disclosure of their personal information pursuant to the March Order.¹¹ On August 29, 2022, they updated their complaint to add their concerns about the June Order.¹²

[11] The PHO terminated the June Order on July 14, 2023.

PRELIMINARY MATTERS

[12] Before turning to issues in the notice of inquiry, I must address the following preliminary matters which are raised by the parties' submissions: collateral attack; the validity of the Orders; Charter values¹³; notice, retention, security and public disclosure of personal information; a request for an interim order; and statutory overrides.

Collateral attack

[13] The Respondents submit that while the Complaint is framed as a privacy complaint under FIPPA, it is actually a collateral attack on the exercise of the PHO's authority and exercise of discretion under the PHA.¹⁴ The Complainants

¹¹ They did not complain about the activities of any post-secondary institution.

¹² Complainant's initial submission at para 95. They say the differences between the two Orders have no meaningful bearing on the issues raised in their original complaint.

¹³ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11.

¹⁴ Ministry/PHO's submission at paras 3 and 26. Colleges' submission at paras 3 and 67-69.

dispute that their complaint is a collateral attack and also say that this is a new issue that should not be added into the inquiry at this late stage.¹⁵

[14] Although the rule against collateral attack was not listed as an issue in the notice of inquiry, I have decided I must consider it as a preliminary matter because it relates to the fairness and efficiency of these proceedings. In addition, the Complainants provided an extensive response to what the Respondents said about collateral attacks, so I have all the parties' views on the matter.

[15] The Supreme Court of Canada (SCC) has said that a collateral attack is an attack on an order "made in proceedings other than those whose specific object is the reversal, variation or nullification of the order".¹⁶ The SCC has also said the following about the hallmarks of a collateral attack and the reasons for the rule against collateral attacks:

...the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders, therefore the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*...). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.¹⁷

[16] The collateral attack rule applies to orders issued by a court as well as orders issued by an administrative body.¹⁸

[17] Turning to the present case, I am not persuaded the complaint is a collateral attack as argued by the Respondents. As discussed above, the SCC has said that cases of collateral attack involve a party, bound by a court or administrative order, seeking to avoid the effects of that order by challenging its validity in the wrong forum. The present case lacks that fundamental hallmark of a collateral attack because the Complainants are not trying to circumvent the effect of a decision rendered against them. This complaint is not about how the Orders require something of the Complainants, or impose a penalty, that they seek to avoid by challenging the validity of the Orders. The Orders impose

¹⁵ Complainants' reply at paras 9 and 19-25.

¹⁶ *Wilson v. The Queen*, 1983 CanLII 35 (SCC) at p. 599. See also *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, at paras 60-61; *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para 71.

¹⁷ *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para 72, citing *R. v. Litchfield*, 1983 CanLII (SCC) at p. 349.

¹⁸ *R. v. Consolidated Maybrun Mines Ltd*, 1998 CanLII 820 (SCC), [*Maybrun*].

obligations on the Respondents, not the Complainants. Therefore, I find that this complaint is not a collateral attack, and I will not dismiss it for that reason.

Validity of the Orders

[18] The Complainants devote a significant part of their submissions to explaining why they believe the Orders are invalid and illegal.¹⁹ The Respondents have also provided extensive submissions challenging the Complainants' position about this. While I have taken their full submissions into account, I will only briefly summarize what they have said.

[19] The Complainants say that the powers the PHO expressly relied on to make the Orders were all contingent on the existence of an “emergency” under the PHA, which they assert did not exist. In short, they submit the PHO’s assessment that there was a need for the Orders was “fundamentally misguided, and not based on a reasonable assessment of the available medical evidence.”²⁰ In support, they provide the opinions of medical experts who think the Orders were unnecessary. The Complainants say OIPC Decision F10-08 and OIPC Investigation Report F15-01 demonstrate the Commissioner’s role is to ensure the Respondents are “acting within their statutory authority, including that their discretion has been exercised reasonably and for a valid purpose.”²¹

[20] The Ministry/PHO submits the Orders are a valid and reasonable exercise of the powers under the PHA which are available to the PHO during a public health emergency. They assert the Commissioner should not interrogate the PHO’s exercise of authority under the PHA and should presume the validity of the Orders.²² The Ministry/PHO cites three judicial review decisions of COVID-19 health orders made by the PHO, and they submit the Courts did not declare the Notice of Regional Event and the PHO’s use of the emergency powers to be invalid.²³

[21] The Colleges say the PHO expressly engaged her statutorily granted powers in issuing mandatory orders which remained in effect and were valid until

¹⁹ Complainants’ initial submission at para 10, 269-307.

²⁰ Complainants’ initial submission at para 288.

²¹ Complainants’ initial submission at paras 209-215. Decision F10-08, *British Columbia (Education) (Re)*, 2010 BCIPC 42 [Decision F10-08]; Investigation Report F15-01, *Saanich (District) (Re)*, 2015 BCIPC 15.

²² Ministry/PHO’s submission at para 28.

²³ *Beaudoin v. British Columbia*, 2021 BCSC 512 [*Beaudoin*], upheld on appeal 2022 BCCA 427, leave to appeal to the SCC dismissed 2023 CanLII 72130 (SCC). *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, 2022 BCSC 1606 (CanLII). *Maddock v. British Columbia*, 2022 BCSC 1605, appeal dismissed as moot in *Kassian v. British Columbia*, 2023 BCCA 383 at para 46. In their reply at paras 58-66, the Complainants say that in these cases the Court did not actually turn its mind to the validity of the Notice of Regional Event and seems to have presumed its validity.

set aside or stayed by a court.²⁴ Further, the Colleges point out that Decision F10-08 and Investigation Report F15-01, cited by the Complainants, do not support a claim that the Commissioner has the authority to review how the PHO exercised her powers under the PHA. The Colleges say that in those two cases, the Commissioner was reviewing how public bodies exercised their discretion under FIPPA, and not how they exercised their discretion under other legislation.²⁵

Analysis and decision

[22] There are no provisions in the PHA or FIPPA that indicate that the Legislature intended the Commissioner to be the one to review the reasonableness or validity of the PHO's orders and how she exercised her discretion and powers under Part 5 of the PHA. In fact, there are indications to the contrary. For instance, ss. 43, 44 and 45 and 54(1)(k) of the PHA provide a scheme for orders made under the PHA to be reconsidered by officials within the PHO's office. When those options are exhausted or unavailable there is also, of course, judicial review, which is an effective and direct avenue to challenge the validity of the PHO's orders. This is demonstrated by the cases cited by the Respondents where the mechanism of a judicial review was used to challenge the PHO's orders, and the courts have not said that was not the appropriate forum in which to do so.

[23] Perhaps most significantly, s. 53 of the PHA says that during an emergency, Part 5 of the PHA applies despite any provision of the PHA or any other enactment, including "in respect of the collection, use or disclosure of personal information, the *Freedom of Information and Protection of Privacy Act* and the *Personal Information Protection Act* ... to the extent there is any inconsistency or conflict with the provision or other enactment". This strongly indicates the Legislature did not intend the Commissioner to review the validity or legality of orders made by the PHO pursuant to Part 5 of the PHA.

[24] Moreover, the purposes of FIPPA and the PHA are very different. Although there is no express purpose statement in the PHA, it is evident that its purposes relate to public health and the prevention or reduction of the public's exposure to disease and other health hazards. The PHA confers a broad scope of powers on the PHO that enables her to plan, report and regulate public health matters. On the other hand, the purposes of FIPPA are to make public bodies more accountable to the public and to protect personal privacy. FIPPA does this by giving the public a right of access to records, giving individuals a right of access to, and a right to request correction of, personal information about

²⁴ Colleges' submission at paras 56-57, citing *British Columbia (Information and Privacy Commissioner) v. British Columbia (Police Complaint Commissioner)*, 2015 BCSC 1538 at paras 128-129 and *R. v. Wilson*, [1983] 2 SCR 594 at 599.

²⁵ Colleges' submission at paras 56-61.

themselves, specifying limited exceptions to the right of access, preventing the unauthorized collection, use or disclosure of personal information by public bodies, and providing for an independent review of decisions made under FIPPA.

[25] Further, the skill set required by the PHO under the PHA differs from that of the Commissioner under FIPPA. The PHO is appointed by the Lieutenant Governor in Counsel to be the senior public health official for British Columbia. Section 65 of the PHA says the PHO must be a medical practitioner who is a Fellow of the Royal College of Physicians and Surgeons of Canada and holds a certificate in community medicine, or who, in the opinion of the minister, has equivalent training, knowledge, skills and experience. FIPPA, on the other hand, does not require the Commissioner to have any expertise in the matters of public health or medicine.

[26] Taking all of the above into consideration, I am satisfied that the Legislature did not intend a complaint or an inquiry before the Commissioner to be the forum in which to challenge the validity of orders issued under Part 5 of the PHA. Therefore, I will not do what the Complainants urge; I will not judge whether the PHO had a reasonable basis to believe the spread of COVID-19 warranted using the emergency powers in the PHA to issue the March and June Orders.

Charter values

[27] The Complainants' initial submission alleges that the PHO's exercise of discretion under the PHA was invalid and unlawful because it failed to incorporate or reflect *Charter* values.²⁶ This was not an issue listed in the investigator's fact report and a notice of inquiry, and I have decided it will not be added into the inquiry. In addition, it is clearly part of the Complainants' challenge to the validity of the Orders and, for the reasons provided above, I will not make any decisions about that.

Notice, retention, security and public disclosure

[28] The Respondents submit the Complainants' initial submission raises issues about notice, retention, security, and public disclosure of personal information that are not in the investigator's fact report or the notice of inquiry, so they should not be considered.²⁷ The Complainants deny they are trying to add new issues and say that they raised these matters to provide relevant context regarding the issues and the appropriate remedies. However, they also say that

²⁶ Complainants' initial submission at paras 285-287.

²⁷ Ministry/PHO submission at para 6. Colleges' submission at para 23. I note the Complainants did not respond to - or dispute - the Respondents' assertion that there was no public disclosure of registrant vaccination status and public disclosure was never required by the PHO.

“these issues are of critical importance, and require the Commissioner’s consideration for a proper adjudication of the Inquiry Issues.”²⁸

[29] The notice of inquiry specified the issues to be decided in this inquiry and said that, in general, the adjudicator will only consider the issues in the investigator’s fact report. In addition, the OIPC’s *Instructions for Written Inquiries* says that parties may not add new issues without the OIPC’s prior consent, and a request to add a new issue must be made before the date for initial submissions.²⁹

[30] In addition, what the Complainants say about notice, retention, security and public disclosure are, in effect, complaints that the Respondents did not comply with FIPPA in ways that are additional to those listed in the notice of inquiry. The Complainants did not request prior permission to expand the scope of the inquiry to include these issues or explain why they did not do so. I do not think it would be fair to add these complaint issues so late in the process. Also, adding them undermines and circumvents the OIPC investigation and mediation process which is designed to benefit all parties by clarifying the issues and potentially resolving them without the need for an inquiry. Therefore, I have decided these issues will not be added to this inquiry.

Request for an Interim Order

[31] At the end of their initial submission, the Complainants request an interim order, to take effect immediately while a decision is being made on the issues in this inquiry. They ask the Commissioner to order the Respondents to stop collecting, using, or disclosing the personal information at issue and to immediately destroy all the personal information already collected or take all reasonable steps to secure and keep it strictly confidential, pending the outcome of this inquiry.³⁰

[32] This raises the issue of whether the Commissioner has the authority to grant the requested interim order. For several reasons, however, I do not think it is necessary to answer that question in this inquiry. As explained above, the March Order was terminated in June 2022 and the June Order was terminated in July 2023, so the impugned collection, use or disclosure of information pursuant to the Orders ceased months ago. Therefore, the only parts of the requested interim order that are no longer moot are the Complainants’ request that the Commissioner order the Respondents to take all reasonable steps to secure and keep the information strictly confidential or destroy it.

²⁸ Complainants’ reply at para 16.

²⁹ Previous orders and decisions have reinforced this by saying that a party may only introduce a new issue into an inquiry if the OIPC grants permission to do so. For instance, see Order F21-21, 2021 BCIPC 26 (CanLII) at para 8 as well as the cases cited there.

³⁰ The Respondents did not respond to the Complainants’ request for an interim order.

[33] As explained above, I have already decided that the issue of the retention and security of the information is a new issue that I will not consider. Besides, I can see nothing in the parties' inquiry submissions and evidence that even reasonably suggests the Respondents have not maintained the security of the information they collected. Finally, ordering information to be destroyed would not be an appropriate interim order because it could not be reversed if I ultimately find the Respondents were authorized to collect, use and disclose the information.

Statutory override

[34] The parties' submissions raise the statutory override provisions in s. 3(7) of FIPPA and s. 53 in the PHA.

[35] Section 3(7) states that if a provision of FIPPA is inconsistent or in conflict with a provision in another Act, the FIPPA provision prevails unless the other Act expressly states that it, or a provision of it, applies despite FIPPA. The PHA contains that kind of override provision, specifically s. 53 which says that, during an emergency, Part 5 of the PHA applies despite any provision of the PHA or any other enactment, including "in respect of the collection, use or disclosure of personal information, the *Freedom of Information and Protection of Privacy Act* and the *Personal Information Protection Act*...to the extent there is any inconsistency or conflict with the provision or other enactment".

[36] First, there is no doubt in my mind that the impugned collection, use and disclosure of personal information took place pursuant to Part 5 of the PHA, during an "emergency", as that term is defined in s. 51 of the PHA. Therefore, if there is any inconsistency or conflict between the collection, use and disclosure of personal information in this case and what FIPPA requires, Part 5 of the PHA prevails. For that reason, it seems an academic exercise to decide whether the collection, use and disclosure, which clearly took place pursuant to Part 5 of the PHA, also complies with FIPPA.

[37] However, for the sake of completeness, I will consider whether FIPPA authorized the impugned collection, use and disclosure of personal information because that is what the notice of inquiry said would be decided in this inquiry. If I conclude that it did, then there is no conflict or inconsistency between the provisions of FIPPA and Part 5 of the PHA that needs to be resolved by the override provision in s. 53 of the PHA.

ISSUES

[38] The issues to be decided in this inquiry are set out in the OIPC's fact report and repeated in the notice of inquiry. The notice of inquiry says the following:

At the inquiry, the adjudicator will consider whether the following actions were authorized by FIPPA:

- 1) The disclosure of the registrant data by the Colleges to the Ministry and/or the PHO in order to facilitate the identification of the vaccination status of registrants;
- 2) The collection of the registrant data by the Ministry and/or the PHO and the use of that information for the purposes of identifying the vaccination status of College registrants;
- 3) The indirect collection of the registrant data by the Ministry and/or the PHO rather than from the registrants directly;
- 4) The disclosure of the vaccination status of registrants by the PHO and/or Ministry to Colleges.
- 5) The collection of registrants' vaccination status by the Colleges from their registrants; and,
- 6) The disclosure of vaccination status by the College of Physicians and Surgeons to UBC.

[39] For clarity, the matters complained about in the issues raise the following provisions in Part 3 of FIPPA: ss. 25.1 (unauthorized collection, use, disclosure), 26 (purpose for which personal information may be collected), 27 (how personal information is to be collected), 32 (use of personal information), and 33 (disclosure of personal information).

[40] Section 57 of FIPPA does not say who has the burden of proof regarding these issues. Therefore, in the absence of a statutory burden of proof, I conclude it is incumbent upon each party to provide evidence and argument to support their position.³¹

DISCUSSION

Personal Information

[41] Since, the collection, use and disclosure provisions in Part 3 of FIPPA only apply to personal information, I must first determine whether the information that the Respondents collected, used, and disclosed is “personal information” within the meaning of FIPPA. Personal information is defined in FIPPA as “recorded information about an identifiable individual other than contact information.” Contact information is defined as “information to enable an individual at a place

³¹ Order F07-10, 2007, *Board of Education of School District No. 75 (Re)*, CanLII 30395 (BC IPC) [Order F07-10] at para 11; Order F14-26, *British Columbia (Justice) (Re)*, 2014 BCIPC 29 (CanLII) [Order F14-26] at para 6.

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.”³²

[42] The Orders require the collection, use and disclosure of the following types of information about registrants: legal names, home and work addresses, phone and fax numbers, email addresses, and information about vaccination status. I am satisfied that any recorded information of that type about individual registrants that may have been collected, used or disclosed pursuant to the Orders is personal information.³³ It is information about identifiable individuals, and it was not contact information. While work addresses are often found to be contact information, I find that is not the case here. Based on what I read in the Orders, I am satisfied that the work addresses were collected, used and disclosed for the purpose of understanding vaccination-related public health risks in the facilities where registrants were working, and not to enable registrants to be contacted at their places of business.

[43] Finally, while the Orders also provide for the collection, disclosure and use of aggregate information, I do not understand the Complainants to be complaining about that information, so I will not consider it.³⁴

Did the collection, use and disclosure comply with FIPPA?

[44] The Complainants allege that the collection, use and disclosure of personal information under the March and June Orders contravened FIPPA.³⁵ The Respondents disagree and submit that FIPPA authorized the impugned collection, use and disclosure of personal information.

[45] The FIPPA provisions that are relevant in this case say the following:

Unauthorized collection, use and disclosure of personal information prohibited

25.1 An employee, officer or director of a public body or an employee or associate of a service provider must not collect, use or disclose personal information except as authorized by this Act.

³² See Schedule 1 of FIPPA for the definitions of personal information and contact information.

³³ I note that in the notice of inquiry, as well as in the parties' submissions several terms are used to describe the information, including “registrant data”, “personal health information”, and “vaccination status”. Regardless of the term used, if this information is about identifiable individuals and is not contact information, it meets the definition of personal information in FIPPA.

³⁴ The Respondents said the only vaccination status information collected by the PHO, and disclosed to the PHO by the Colleges, was aggregate data. (Ministry/PHO's submission at paras 72, 76. Colleges' submission at para 39). The Complainants did not dispute this.

³⁵ Complainants' initial submission at paras 263 and 372-425.

Purpose for which personal information may be collected

26 A public body may collect personal information only if

(a) the collection of the information is expressly authorized under an Act,

...

How personal information is to be collected

27(1) A public body must collect personal information directly from the individual the information is about unless

(a) another method of collection is authorized by

...

(iii) another enactment,

...

(b) the information may be disclosed to the public body under section 33,

...

Use of personal information

32 A public body may use personal information in its custody or under its control only

(a) for the purpose for which the information was obtained or compiled, ...,

...

Disclosure of personal information

33(2) A public body may disclose personal information in any of the following circumstances:

...

(e) in accordance with an enactment of British Columbia or of Canada that authorizes or requires the disclosure;

(f) if the information is made available to the public under an enactment that authorizes or requires the information to be made public;

...

(l) to comply with a subpoena, warrant or order issued or made by a court or person in Canada with jurisdiction to compel the production of information in Canada;

...

Complainants' submissions

[46] The Complainants submit the Respondents can only justify their “significant and unprecedented intrusions on the privacy of the Complainants and other registrants if they can establish some lawful basis in FIPPA, or some other overriding statute, that permits them to do so.”³⁶ The Complainants argue there is no statutory authority that authorized the Respondents’ impugned collection, use and disclosure of personal information.

[47] Therefore, the Complainants say that the Respondents cannot rely on s. 26(a) of FIPPA to justify their collection of personal information because neither the PHA nor the *Health Professions Act* contain language that expressly authorizes the collection of registrants’ health information, including vaccination status information.³⁷ The Complainants cite OIPC Orders F07-10 and F14-26 to demonstrate that s. 26(a) is only satisfied if there is express statutory language authorizing the collection of the personal information.³⁸

[48] The Complainants also allege the Ministry and/or the PHO contravened s. 27 of FIPPA because they collected registrants’ personal information indirectly from the Colleges rather than directly from the registrants.³⁹ They say that there is nothing in the PHA that expressly authorizes the “indirect” collection of personal information regarding registration status, vaccination status, or other personal health information from the Colleges, third parties or other public bodies.⁴⁰

[49] The Complainants also submit the Respondents cannot rely on ss. 32 and 33 to justify their use of the personal information.⁴¹ Specifically, they say the conditions necessary to satisfy ss. 32(a) and 33(2)(d) have not been met because the personal information was obtained or compiled in an unauthorized way (i.e., the Orders are not valid and lawful). Therefore, they submit, the personal information cannot be lawfully disclosed by the Respondents, even if the disclosure is for the same purpose for which it was obtained or compiled. They say that allowing that “merely compounds the original breach of FIPPA by exacerbating the original breach of privacy.”⁴²

³⁶ Complainants’ initial submission at para 265.

³⁷ Complainants’ initial submission at paras 333-338, 348. I have not summarized or made a decision about what the Complainants argue about s. 26(c) because the Respondents do not rely on that provision to justify their actions.

³⁸ Order F07-10, *supra* note 31 at para 29 and Order F14-26, *supra* note 31 at para 25-28.

³⁹ Complainants’ initial submissions at paras 411.

⁴⁰ Complainants’ initial submission at para 413. They cite Order F14-26, *supra* note 31 at para 55.

⁴¹ I have not summarized or made a decision about what the Complainants allege about “consistent purpose” in ss. 32(a), 33(2)(d) and 34 because the Respondents do not rely on that aspect of s. 33(a) to defend their actions.

⁴² Complainants’ initial submission at para 357.

[50] The Complainants add that the Respondents' disclosure of personal information was not authorized under s. 33(2)(e) of FIPPA, which says that a public body may disclose personal information in accordance with an enactment of British Columbia or of Canada that authorizes or requires the disclosure. The Complainants cite Order F14-06 and Investigation Report F10-02 where the decision makers concluded the public bodies had relied on statutes that did not clearly provide the authority to disclose personal information, so s. 33(2)(e) (formerly s. 33.1(1)(c)) did not apply.⁴³ The Complainants urge me to approach s. 33(2)(e) in the same way in order to safeguard the privacy interests in question and advance the purposes of FIPPA as much as possible. The Complainants submit that in this case there is no clear statutory authorization for the disclosure of the personal information, so the requirements of s. 33(2)(e) have not been met.⁴⁴

Ministry/PHO's submissions

[51] The Ministry/PHO submits the collection (including indirect collection), use and disclosure of personal information in compliance with the Orders was authorized by ss. 26(a), 27(1)(a)(iii), 27(1)(b), 32(a), and 33(2)(e) of FIPPA.⁴⁵

[52] To refresh the reader's memory, s. 26(a) authorizes collection if it is "expressly authorized by an Act". Section 27(1)(iii) requires direct collection unless another method "is authorized by another enactment". Section 27(1)(b) also requires direct collection "unless the information may be disclosed to the public body under s. 33", and s. 33(2)(e) says disclosure is permitted "in accordance with an enactment of British Columbia or of Canada that authorizes the disclosure". Finally, s. 32(a) says a public body may use personal information in its custody or under its control only "for the purpose for which the information was obtained or compiled".

[53] The Ministry/PHO argues those FIPPA provisions apply because the collection, use and disclosure was authorized by enactments, specifically the Orders, which were issued pursuant to s. 57(2) of the PHA.⁴⁶ The Ministry/PHO explain the Orders are "enactments" and "regulations" because of what the *Interpretation Act* says.⁴⁷

[54] The *Interpretation Act* contains the following definitions:

⁴³ Complainants' initial submission at paras 366-371, citing Order F14-26, *supra* note 31 and Investigation Report F10-02, *Electronic Health Information System (Re)*, 2010 BCIPC 13 (CanLII).

⁴⁴ Complainants' initial submission at para 371.

⁴⁵ Ministry/PHO's submission at para 98.

⁴⁶ Ministry/PHO submission at paras 66-81.

⁴⁷ *Interpretation Act*, RSBC 1996, c. 238.

Definitions

1 In this Act, or in an enactment:

"Act" means an Act of the Legislature, whether referred to as a statute, code or by any other name, ...;

"enactment" means an Act or a regulation or a portion of an Act or regulation;

"regulation" means a regulation, order, ... enacted

(a) in execution of a power conferred under an Act, ...

[55] The Ministry/PHO also explain why they believe the collection of personal information pursuant to the Orders qualifies as a collection “expressly authorized under an Act”, which is the language used in s. 26(a) of FIPPA.⁴⁸ Given the Orders meet the definition of “regulation” in the *Interpretation Act*, the Ministry/PHO says, s. 33(6) of the *Interpretation Act* applies. That provision states:

References in enactments

33 (6) If an enactment refers to a matter "under" a named or unnamed Act, an Act in that reference includes regulations enacted under the authority of that Act.

[56] Therefore, I understand the Ministry/PHO to be saying that because s. 26(a) of FIPPA uses the term “expressly authorized under an Act”, and the Act in this case is the PHA, regulations enacted under the authority of the PHA (i.e., the Orders) are captured by the language in s. 26(a).

[57] In addition, the Ministry/PHO also say s. 54(1)(k) of the PHA expressly authorized the Ministry and/or the PHO to collect registrants’ personal information, which they did for the purpose of verifying registrants’ vaccination status in the Provincial Immunization Registry. Section 54(1)(k) says a health officer may, in an emergency, collect, use or disclose information, including personal information, that could not otherwise be collected, used or disclosed, or in a form or manner other than the form or manner required.⁴⁹ For that reason, the Ministry/PHO submits their collection of the personal information was expressly authorized by the PHA so it complied with s. 26(a) of FIPPA.⁵⁰

⁴⁸ Ministry/PHO’s submission at paras 81-88.

⁴⁹ Section 1 of the PHA defines “health officer” to include: “the provincial health officer, for the purposes of ... section 54 [general emergency powers]”.

⁵⁰ Ministry/PHO submission at paras 77-78. They cite sections A.1 and B.1 of the March Order, which require Colleges to give the PHO the name, gender, date of birth, registration number and

[58] The Ministry/PHO argues that s. 33(2)(e) of FIPPA applies to the Ministry and/or PHO's disclosure of registrants' vaccination status to the Colleges. They say the disclosure was, to use the language of s. 33(2)(e), "in accordance with an enactment of British Columbia or of Canada that authorizes or requires the disclosure", namely the March Order.⁵¹ The Ministry/PHO says that s. 33(2)(e) of FIPPA also applies to the Colleges' disclosure of registrants' personal information to the Ministry and/or the PHO for the same reason.⁵²

[59] As for the indirect collection of registrants' personal information (i.e., from the Colleges rather than from the registrants), the Ministry/PHO says that ss. 27(1)(a)(iii) and 27(1)(b) of FIPPA apply. The indirect collection complied with s. 27(1)(a)(iii), they submit, because it was "authorized by ... another enactment", namely the March Order.⁵³ They add that the indirect collection also complied with s. 27(1)(b) because the information could be disclosed to the Ministry and PHO under s. 33 of FIPPA, specifically s. 33(2)(e) which permits disclosure "in accordance with an enactment of British Columbia or of Canada that authorizes or requires the disclosure". The enactment in this case, they say, was the March Order.⁵⁴

[60] Further, the Ministry/PHO says that s. 33(2)(e) of FIPPA also applies to the College of Physician and Surgeons disclosure of registrants' vaccination status information to UBC. The Ministry/PHO explains that the PHO delegated to the Colleges her power under s. 54(1)(k) of the PHA to collect, use or disclose personal information.⁵⁵ The June Order said:

Under the authority vested in me by section 69 of the *Public Health Act*, I delegate my authority under section 54(1)(k) of the *Public Health Act* to the colleges to disclose personal information about the vaccination status of their registrants to post-secondary institutions and to the University of British Columbia in accordance with the provisions of this Order.⁵⁶

[61] For that reason, they submit, when the College of Physician and Surgeons disclosed the information to UBC it was "in accordance with an enactment of British Columbia or of Canada that authorizes or requires the disclosure", namely s. 54(1)(k) of the *PHA*.⁵⁷

contact details of registrants, so the Ministry can verify their vaccination status in the Provincial Immunization Registry.

⁵¹ Ministry/PHO submission at para 86.

⁵² Ministry/PHO submission at paras 70-73

⁵³ Ministry/PHO submission at para 83.

⁵⁴ Ministry/PHO submission at para 84.

⁵⁵ Ministry/PHO submission at paras 89-96.

⁵⁶ Section D of the June Order.

⁵⁷ Ministry/PHO submission at para 96.

[62] Regarding the Ministry's use of the registrant's personal information, the Ministry/PHO say it complied with s. 32(a), which permits use "for the purpose for which the information was obtained or compiled". The Ministry/PHO says the Ministry used the registrants' personal information for the purpose of verifying their vaccination status in the Provincial Immunization Registry, and this was the purpose for which it was collected (as authorized by s. 26(a)).⁵⁸

Colleges' submissions

[63] The Colleges say that their collection and disclosure of personal information did not contravene FIPPA because it was authorized by valid, mandatory orders issued pursuant to Part 5 of the PHA.⁵⁹

[64] The Colleges submit s. 26(a) of FIPPA applies to their collection of personal information because it was expressly authorized under an Act. They explain that s. 54(1)(k) of the PHA gave the PHO the express authorization to collect personal information, and she delegated that authorization to the Ministry and the Colleges under s. 69 of the PHA. For that reason, the Colleges say, there is no substance to the allegation that they contravened FIPPA when they collected registrant data from the Ministry, the PHO or from registrants.⁶⁰

[65] In addition, the Colleges make the same argument as the Ministry/PHO about how the Orders are "regulations" and, therefore, "enactments" within the meaning of s. 1 of the *Interpretation Act*.⁶¹ For that reason, the Colleges say the Orders were enactments and regulations authorizing their disclosure of registrants' personal information.

[66] The Colleges argue s. 33(2)(e) of FIPPA applies to their disclosure of registrants' personal information to the PHO because the disclosure was "in accordance with an enactment of British Columbia of Canada that authorizes or requires the disclosure", which in this case they say was Part 5 of the PHA.⁶²

[67] The Colleges say s. 33(2)(l) of FIPPA also applies to their disclosure of registrants' personal information because they disclosed the information to comply with an order issued or made by a person in Canada with jurisdiction to compel the production of information in Canada.⁶³

[68] The Colleges submit some of the personal information they disclosed, such as registrants' names and registration numbers, is information that they are

⁵⁸ Ministry/PHO submission at paras 81-82.

⁵⁹ Colleges' submission at para 57. They also say refusing to comply with the Orders would have constituted a regulatory offence under s. 99(1)(k) of the PHA.

⁶⁰ Colleges' submission at paras 78-83.

⁶¹ Colleges' submission at para 47.

⁶² Colleges' submission at para 48.

⁶³ Colleges' submission at para 54.

already required by ss. 21(2)(a) and 22(1) of the *Health Professions Act* to post on a public register. For that reason, the disclosure of that specific information complied with s. 33(2)(f) of FIPPA, which says that disclosure is permitted if the information is available to the public under an enactment that authorizes or requires the information to be made public.”⁶⁴

[69] Further, the Colleges say that when the College of Physicians and Surgeons disclosed the vaccination status of certain individual registrants to UBC that disclosure was expressly ordered by the June Order, so s. 33(2)(e) and (l) applied.⁶⁵ Other than this disclosure by the College of Physicians and Surgeons, the Colleges say they did not disclose the vaccination status of individual registrants, even to the Ministry or the PHO.⁶⁶

Complainant’s reply

[70] In their reply, the Complainants say they continue to rely on their extensive initial submission, which already addresses what the Respondents say about the alleged breaches.⁶⁷

Analysis and decision

[71] I agree with the Respondents’ arguments about the *Interpretation Act*. Considering the s. 1 definitions in the *Interpretation Act*, I find the PHA is an “Act” and an “enactment”, and the March and June Orders are “enactments” as well as “regulations” enacted under the authority of the PHA. Guided by what s. 33(6) of the *Interpretation Act* says, I conclude that references in FIPPA to a matter “under an Act” include regulations enacted under the authority of that Act. An example where this phrasing occurs is in s. 26(a) of FIPPA.

[72] Further, I am satisfied that the Orders contain a delegation, authorized under s. 69 of the PHA, of the PHO powers under s. 54(1)(k) of the PHA to the Ministry and the Colleges.

[73] Given this, and for the additional reasons that follow, I find that the disputed collection, use and disclosure of personal information complied with FIPPA. I have organized my analysis according to the issues in the notice of inquiry.

[74] *Issue 1 – Did FIPPA authorize the disclosure of registrants’ personal information by the Colleges to the Ministry and/or the PHO in order to facilitate the identification of the vaccination status of registrants?*

⁶⁴ Colleges’ submission at para 55.

⁶⁵ Colleges’ submission at paras 19, 31 and 84-85.

⁶⁶ Colleges’ submission at para 39

⁶⁷ Complainants’ reply at para 93.

I find that the Colleges' disclosure of personal information to the Ministry and/or the PHO, pursuant to the Orders, complied with s. 33(2)(e) of FIPPA. That is because the disclosure was in accordance with an enactment of British Columbia that authorizes or requires the disclosure, which in this case was s. 54(1)(k) of the PHA and the Orders. Given the disclosure was authorized by s. 33(2)(e), it is unnecessary to decide if the disclosure was also authorized by ss. 33(2)(f) and (l) of FIPPA.

[75] *Issue 2 – Did FIPPA authorize the collection of registrants' personal information by the Ministry and/or the PHO and the use of that information for the purposes of identifying the vaccination status of College registrants?*

I accept the Ministry/PHO's evidence that personal information was collected by the Ministry and/or the PHO, pursuant to the Orders, for the purpose of verifying registrants' vaccination status in the Provincial Immunization Registry. I find that collection was authorized by s. 26(a) of FIPPA because it was "expressly authorized under an Act", specifically s. 54(1)(k) of the PHA and the Orders. As explained above, the Orders are regulations, so s. 33(6) of the *Interpretation Act* applies which means that the reference in s. 26(a) of FIPPA to a matter "under an Act" includes regulations enacted under the authority of that Act.

I am also satisfied that the Ministry and/or the PHO used the registrants' personal information for the purpose of verifying their vaccination status in the Provincial Immunization Registry. This was a use "for the purpose for which the information was obtained or compiled", so the use was authorized by s. 32(a) of FIPPA.

[76] *Issue 3 – Did FIPPA authorize the indirect collection of registrants' personal information by the Ministry and/or the PHO rather than from the registrants directly?*

I find that the Ministry and/or the PHO's indirect collection of the registrants' personal information from the Colleges rather than from the registrants directly complied with s. 27 of FIPPA. It complied with s. 27(1)(a)(iii) of FIPPA because the collection was "authorized by another enactment", which in this case was s. 54(1)(k) of the PHA and the Orders. It complied with s. 27(1)(b) of FIPPA because it was information "that may be disclosed to the public body under s. 33", which in this case was s. 33(2)(e) of FIPPA. Section 33(2)(e) permits disclosure of personal information in accordance with an enactment that authorizes the disclosure. In this case, s. 54(1)(k) and the Orders were the enactments that authorized the Colleges to disclose the personal information to the Ministry and/or the PHO.

[77] *Issue 4 – Did FIPPA authorize the disclosure of the vaccination status of registrants by the PHO and/or Ministry to the Colleges?*

I find that the Ministry and/or the PHO's disclosure of registrants' vaccination status to the Colleges complied with s. 33(2)(e) of FIPPA, for the same reasons as I identified in issue 3 above. The disclosure was in accordance with an enactment that authorizes the disclosure, specifically s. 54(1)(k) of the PHA and the Orders.

[78] *Issue 5 – Did FIPPA authorize the collection of registrants' vaccination status by the Colleges from their registrants?*

I find that the Colleges' collection of their registrants' vaccination status was authorized by s. 26(a) because, for the reasons provided in issue 2 above, it was "expressly authorized under an Act", specifically s. 54(1)(k) of the PHA and the Orders.

[79] *Issue 6 – Did FIPPA authorize the disclosure of vaccination status by the College of Physicians and Surgeons to UBC?*

I find that the College of Physicians and Surgeons' disclosure of registrant vaccination status to UBC complied with s. 33(2)(e) of FIPPA for the same reasons as the disclosures described in issues 3 and 4 above. The College of Physicians and Surgeons' disclosure of registrant vaccination status to UBC was in accordance with an enactment that authorizes the disclosure, namely s. 54(1)(k) of the PHA and the Orders.

[80] In conclusion, I find that the Respondents' collection, use and disclosure of registrants' personal information was authorized by FIPPA, specifically ss. 25.1, 26(a), 27(1)(a)(iii), 27(1)(b), 32(a) and 33(2)(e).

CONCLUSION

[81] In conclusion, for the reasons given, under s. 58(3)(e) of FIPPA, I confirm the Respondents' decisions in this case to collect, use or disclose personal information.

June 21, 2024

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

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