



Order F24-60

VANCOUVER ISLAND HEALTH AUTHORITY

Jay Fedorak
Adjudicator

July 11, 2024

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Summary: The executor of a deceased person's estate requested the Vancouver Island Health Authority (VIHA) provide copies of the deceased's hospital and nursing home records. VIHA withheld some personal information of third parties on the grounds that disclosure would be an unreasonable invasion of the third parties' personal privacy. The adjudicator confirmed the decision of VIHA to withhold the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 22(1), 22(2)(c), 22(2)(f), 22(2)(h), 22(2)(i), and 22(3)(a).

INTRODUCTION

The access applicant in this case is the executor of their deceased mother's estate. The applicant requested, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), copies of the records of their mother's stay at a hospital and a nursing home administered by the Vancouver Island Health Authority (VIHA).

VIHA agreed the applicant was an appropriate person acting on behalf of their deceased mother in accordance with s. 5(1) of the *Freedom of Information and Privacy Regulation* and disclosed some records. However, VIHA withheld some information in other records under ss. 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of privacy). The applicant was dissatisfied with this response and requested a review from the Office of the Information and Privacy Commissioner (OIPC).

During mediation, VIHA ceased to rely on s. 14 and disclosed additional information to the applicant.

Mediation failed to resolve the matter and the applicant requested that it proceed to an inquiry. During the course of the inquiry VIHA disclosed further information.

ISSUE

The issue to be decided in this inquiry is whether s. 22(1) requires VIHA to refuse to disclose the information at issue.

Section 57(2) stipulates that the applicants have the burden to prove that disclosure would not be an unreasonable invasion of the personal privacy of a third party under s. 22(1). However, the public body has the initial burden to show that the information it is withholding under s. 22(1) is personal information.¹

DISCUSSION

Background – The applicant is involved in litigation concerning their mother’s estate and the estate of their stepfather, who died several years after the mother. The executor of the stepfather’s estate is the Public Guardian and Trustee (PGT). The matter in dispute is whether, at the time of her death, the mother and the stepfather were legally separated. The applicant, as executor for the mother’s estate, takes the position that the mother and stepfather were legally separated. The PGT applied to the court for a finding that the couple were not legally separated. The significance is whether the estate of the stepfather is entitled to part of the proceeds of the sale of the home in which he lived with the mother. The couple were both elderly, and once it became difficult for the stepfather to act as sole caregiver to the mother, she went into the nursing home. Eventually, the mother moved to the mainland to live with the applicant, and that is where she was living until her own death. The applicant believes that the information at issue may include evidence relevant to the determination as to whether the couple were legally separated.

Record at issue – The records consist of 340 pages of medical records from the hospital and nursing home, of which 25 pages contained information originally in dispute. During the course of the inquiry, VIHA disclosed additional information and now only 19 pages are in dispute.

Section 22(1) – unreasonable invasion of third-party privacy

Section 22(1) requires public bodies to withhold the personal information where disclosure of that personal information would be an unreasonable invasion of a third party’s personal privacy. The proper approach to the application of s. 22(1) of FIPPA is described in Order F15-03, where the adjudicator stated the following:

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

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 disclosing the personal information would be an unreasonable invasion of a third party’s personal privacy.²

I have taken the same approach in considering the application of s. 22(1) here.

Step 1: Is the information “personal information”?

Under FIPPA, “personal information” is recorded information about an identifiable individual, other than contact information. “Contact information” is “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”³

VIHA submits that the information it withheld under s. 22(1) is the personal information of individuals other than the mother, the applicant and one of the applicant’s sisters who provided consent to the disclosure of her personal information.

The applicant does not make submissions on whether the information in dispute constitutes personal information.

I have reviewed the information in dispute and can confirm that it is names and medical and other information about individuals other than the mother, the applicant and the sister. Given the context in which the names appear, I find that they do not constitute “contact information”.

For these reasons, I find that all of the names and medical and other information are third parties’ personal information for the purposes of s. 22(1).

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

The parties do not identify any provision of s. 22(4) that might apply. It does not appear to me that any of the provisions in s. 22(4) apply. Therefore, I find that s. 22(4) does not apply to the withheld personal information.

² Order F15-03, 2015 BCIPC 3 (CanLII), para. 58.

³ FIPPA provides definitions of key terms in Schedule 1.

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

VIHA submits that s. 22(3)(a) applies. The relevant provision reads as follows:

- 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,...

Section 22(3)(a) (medical history) – VIHA submits that some of the information at issue constitutes the medical information of third parties and that disclosure of this information is presumed to be an unreasonable invasion of their personal privacy. This includes the medical information of another patient that VIHA submits an employee inserted in the chart of the mother in error.⁴

The applicant does not make any submissions as to the application of s. 22(3)(a), other than to emphasize that this presumption is rebuttable.⁵

I have reviewed the information at issue and can confirm that some of it constitutes the medical information of third parties. I can also confirm that this information includes the medical information of another patient that does not appear to be relevant to the mother's chart, which is consistent with the submission of VIHA that it was recorded in error.

Therefore, I find that s. 22(3)(a) applies to the medical information that third parties provided about themselves to VIHA employees and the medical information of the other patient recorded in error.

Step 4: do the relevant circumstances in s. 22(2) rebut the presumption of unreasonable invasion of privacy?

The relevant provisions read as follows:

- 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
- ...
- (c) the personal information is relevant to a fair determination of the applicant's rights,
- ...

⁴ VIHA's initial submission, paras. 28, 35-36.

⁵ Applicant's response submission, para. 48.

- (f) the personal information has been supplied in confidence,
...
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant,
...
- (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.

Section 22(2)(c) (fair determination of an applicant's rights) – This provision applies to personal information that is relevant to a fair determination of the applicant's rights. Previous OIPC orders have established the following test for s. 22(2)(c) to apply:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.⁶

The applicant submits that her relevant rights include the right to defend the estate of her mother in litigation with the PGT. If the court finds that there was no legal separation between her mother and stepfather one year or more prior to her mother's death, it will impact how much beneficiaries will receive from the mother's estate.⁷

The applicant speculates that some of the information at issue may be the medical information of the stepfather. She submits that, if that is the case, it is likely to be relevant to the litigation because it relates to his ability at the time for him to care for the mother.⁸

VIHA replies that the applicant has not explained how such information would be relevant to the matters at issue in the litigation. VIHA submits that the applicant

⁶ Order F23-13, 2022 BCIPC 15 (CanLII), para. 120; Order 01-07, 2001 BCIPC 7 (CanLII), para. 31.

⁷ Applicant's response submission, para. 73.

⁸ Applicant's response submission, para. 35.

has failed to set out the legal test for a marital separation or to explain how the information at issue would be relevant to that test.⁹

I will address the four elements of the test below.

Legal right

The first part of the test relates to whether the right in question is a legal right drawn from the common law or a statute as opposed to a non-legal right based on moral or ethical grounds. The applicant is involved in litigation concerning a dispute over assets under the *Estate Administration Act*.¹⁰ VIHA makes no submissions as to whether this legal right is relevant to the application of s. 22(2)(c).

I find that the applicant, as executor of her mother's estate, has legal rights at issue in the litigation over the estate's assets. This meets the first part of the test.

Proceeding under way or contemplated

I find that, the applicant is involved in litigation that is currently under way and not yet completed. The applicant has provided affidavit evidence to show that the PGT has filed a petition in the Supreme Court asserting a claim on the estate of the mother.¹¹ I was provided with no evidence that suggests the litigation has concluded. This meets the second part of the test.

Information has a bearing on the legal right

The third part of the test involves whether the personal information at issue has some bearing on, or significance for, a determination of the legal right in question.

The applicant speculates that some of the information at issue may be relevant to the litigation. In particular, she submits that any information about the health of the stepfather would be relevant. I have reviewed all of the personal information at issue. I am unable to reveal the identities of any of the third parties or the nature of the information at issue, other than to confirm that medical information of third parties is included.

As VIHA has submitted, the applicant has not demonstrated how any of the information at issue would be relevant to the litigation. Even if, for the sake of argument, the medical information of the stepfather was included, the applicant has not adequately explained how this information would be determinative to the issues

⁹ VIHA's reply submission, para. 34.

¹⁰ RSBC 1996, c. 122.

¹¹ Applicant's response submission, Affidavit of Applicant, paras. 13-15.

under litigation. The applicant merely states that it would be relevant.

I have reviewed the information at issue. Without disclosing anything about its contents, I cannot see how the information would have any bearing on, or significance for, the determination of the legal right at issue. Therefore, I find that the information does not meet this part of the test for the application of s. 22(2)(c) and this circumstance does not apply in this case.

Given that I have found that the information at issue has no bearing on the applicant's legal rights in the litigation, I do not need to consider whether the information would be necessary for the applicant to prepare for the litigation or ensure a fair hearing.

In summary, I find that s. 22(2)(c) is not a relevant circumstance in this case.

Section 22(2)(f) (supplied in confidence) – VIHA submits that the third parties provided their personal information, including their own medical information, in confidence. VIHA provided no documentation to demonstrate that this was the case. Nevertheless, VIHA argues that when clinical personnel collect and record personal information in the context of providing care for a patient, they treat that information as having been supplied in confidence. The only exception is when the individual who provided the information expressly consents to it being disclosed to the patient, which did not occur in this case. VIHA submits that the disclosure of this type of information without the consent of the third parties could harm its ability to collect this information in future. It also submits that previous orders have found that individuals generally provide medical information to medical professionals in confidence.¹²

The applicant responds that the determination as to whether a third party has supplied personal information, including their own medical information, in confidence in the health care environment depends on the context and circumstances of a particular case. The applicant also submits that the expectation of confidentiality of information provided to hospital social workers and administrative staff should not necessarily receive the same level of confidentiality as information supplied to medical professionals.¹³

I have reviewed the information at issue in the context of the entire record and the submissions of the parties. I find it reasonable to conclude that there were unstated expectations of confidentiality on the parts of both the third parties that supplied the information and the employees who documented it.

¹² VIHA's initial submission, paras. 40-41.

¹³ Applicant's response submission, para. 60.

Therefore, I find that s. 22(2)(f) is a relevant circumstance with respect to the personal information that the third parties supplied. This circumstance weighs in favour of withholding that information.

Section 22(2)(h) (damage to reputation) – VIHA submits that the disclosure of the personal information, particularly their own medical information, that the third parties provided about themselves could expose them to reputational harm, embarrassment and stigma. This is because it is information about personal health and family matters.¹⁴

The applicant submits that disclosure of the information at issue is unlikely to cause reputational harm, embarrassment or stigma.¹⁵

I have reviewed the information at issue in the context of the entire record and the submissions of the parties. I find it reasonable to conclude that that the third parties who provided their personal information might suffer reputational harm, embarrassment or stigma.

Therefore, I find that this is a relevant circumstance in the case that supports the withholding of the information.

Section 22(2)(i) (deceased person) – The applicant submits that s. 22(2)(i) would apply to any personal information about the stepfather. She argues that, as he has been dead for six years, this circumstance weighs in favour of disclosing the information.¹⁶

VIHA replies that it is relevant to consider that there was a documented dispute between the stepfather and the applicant and that there is ongoing litigation. VIHA submits that these considerations argue in favour of a conclusion that the passage of time of six years is not sufficient to extinguish the privacy rights of the stepfather.¹⁷

I note that FIPPA does not specify a timeframe for determining when disclosure of a deceased third party's personal information is not an unreasonable invasion of privacy. However, past orders have found that a deceased's privacy rights generally continue for at least 20 years after death.¹⁸ I note that this does not mean that there could not be circumstances where this consideration would apply in cases where a third party has been deceased for a shorter period of time.

¹⁴ VIHA's initial submission, paras. 40 and 43.

¹⁵ Applicant's response submission, para. 58.

¹⁶ Applicant's response submission, para. 55.

¹⁷ VIHA's reply submission, paras. 44-45.

¹⁸ Order F24-47, 2024 BCIPC 55 (CanLII), para. 61; Order F24-05, 2024 BCIPC 7 (CanLII), paras. 46-48; Order F23-92, 2023 BCIPC 108, paras. 60-63.

While I am unable to confirm or deny whether the personal information at issue involves the stepfather, in the event that it did, I would make the following observations. Given that the circumstances of this case involve the applicant being in an adversarial position with the estate of the third party, these circumstances heighten the privacy interests of the third party. In addition, I see no convincing evidence that this case would warrant a finding, contrary to previous orders, that the privacy rights of a deceased have ceased after only six years.

Therefore, I find that s. 22(2)(i) does not apply in this case.

Other considerations – In addition to the circumstances listed in s. 22(2), I may consider others that the parties have raised. I may also identify other relevant considerations.

VIHA raises the consideration of the sensitivity of the information. It notes that previous orders have found that where personal information is sensitive, that it weighs in favour of withholding the information.¹⁹ It submits that it is clear on the face of the record that the medical information at issue is sensitive and is the type of information that it is reasonable to expect that third parties would not want to be widely disclosed.²⁰

The applicant does not make any submissions as to the sensitivity of the personal information.

I have reviewed the information at issue. I find that the personal medical information at issue is sensitive, and this consideration weighs in favour of withholding the personal medical information.

The parties have not raised any other relevant considerations, and I cannot identify any.

Conclusion on s. 22(1)

I find that the information in dispute is personal information.

I find that none of the provisions in s. 22(4) apply.

I find that s. 22(3)(a) applies and that the disclosure of the medical information of the third parties is presumed to be an unreasonable invasion of privacy.

¹⁹ VIHA's initial submissions, para. 44; Order F22-38, 2022 BCIPC 43 (CanLII), paras. 95 and 96; Order F19-15, 2019 BCIPC 17 (CanLII), para 99.

²⁰ VIHA's initial submission, para. 46.

I find that s. 22(2)(f) applies to the medical information and other personal information supplied in confidence and that this favours withholding the information.

I find that s. 22(2)(h) applies to the personal information that the third parties supplied, including their own medical information, the disclosure of which would damage the reputation of the third parties and that this favours withholding the information.

I find that s. 22(2)(c) does not apply to the personal information at issue.

I find that s. 22(2)(i) does not apply to the personal information at issue.

I find the s. 22(3)(a) presumption that disclosure is an unreasonable invasion of third-party personal privacy has not been rebutted.

In conclusion, I find that s. 22(1) applies to the personal information at issue.

CONCLUSION

For the reasons given above, under s. 58 of FIPPA, I require VIHA to refuse access to all of the information in dispute under s. 22(1).

July 11, 2024

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

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