



Order F24-96

VANCOUVER COASTAL HEALTH AUTHORITY

Erika Syrotuck
Adjudicator

November 22, 2024

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Summary: The applicant requested a copy of the results of their own psychological assessment. The Vancouver Coastal Health Authority (Authority) asserted that it could not provide the record under the *Freedom of Information and Protection of Privacy Act* because the record was not in its custody or under its control. The adjudicator found that the record was under the Authority's control and ordered it to respond to the applicant's access request as required by Part 2 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 3(1), and 4(1).

INTRODUCTION

[1] This inquiry is about whether a particular record is in the custody or under the control of the Vancouver Coastal Health Authority (Authority).

[2] An applicant requested their own medical records relating to Vancouver General Hospital, including results of a psychological test called a Personality Assessment Inventory (Assessment).¹

[3] The Hospital refused to provide the applicant with the results of the Assessment on the basis that the results could only be released to a registered psychologist or under a court order. It did not cite any provision of the *Freedom of Information and Protection of Privacy Act* (FIPPA). However, the Hospital told the applicant that the applicant could seek review of the decision with the Office of the Information and Privacy Commissioner (OIPC).

[4] The applicant then requested the OIPC review the Hospital's response.

¹ The applicant requested other types of records, but those are not at issue in this inquiry.

[5] Following this, the Authority provided another response, which I gather included a partially severed record. It did not cite a provision of FIPPA on which it was relying to withhold any part of the record. After receiving this response, the applicant further complained that the Authority did not provide the clinical results.

[6] About a month later, the Authority provided a further response in which it asserted that it could not give the applicant the results of the Assessment because the results were not in its custody or under its control. Rather, the Authority said that the results were owned and administered by a third party, namely Psychological Assessment Resources Inc (Third Party).

[7] Mediation did not settle the issue, and the applicant asked that the OIPC hold an inquiry.

[8] The OIPC invited the Third Party to the inquiry as an appropriate person under s. 54(b).

[9] The Authority did not provide the results of the Assessment to the OIPC. After giving the parties an opportunity to comment on whether a production order was necessary, I issued an order under s. 44(1)(b) to produce the results of the applicant's Assessment for my review in conducting this inquiry. In response to the production order, the Authority provided me with the results of the Assessment.

[10] The Authority, the applicant and the Third Party all made submissions in this inquiry. While I have read and considered all of the parties' submissions, I will refer only to the material that I find is relevant to the issues in this inquiry.

[11] Finally, some of the inquiry materials state that the public body is the "Vancouver General Hospital and Sciences Centre and the Vancouver Coastal Health Authority." The Authority's submissions indicate that the "Vancouver Coastal Health Authority" is the public body. I wrote to the parties about this issue and the applicant agreed that the Authority is the appropriate public body.² I find that the Authority alone is the appropriate public body for the purpose of this inquiry.

ISSUE

[12] In this inquiry, I must decide whether the Report is in the Authority's custody or control under ss. 3(1) and 4(1) of FIPPA.

[13] FIPPA is silent on the burden of proof; however, past orders have established that the burden is on the public body to prove that the records at

² Applicant's October 3, 2024 communication. The other parties did not provide comment.

issue fall outside of the scope of FIPPA.³ The Authority acknowledges that it has the burden of proof in this case.

DISCUSSION

Background

[14] The Authority says that the Assessment is used to assess personality in adolescents and adults. It explains that, after a clinician administers the Assessment to a client, the Third Party's software platform is used to generate a clinical interpretive report. The clinical interpretive report provides a potential interpretation of the client's Assessment scores, including a potential diagnosis. The Authority says that the clinical interpretive report is meant to be one of many resources that assists the clinician in making an actual diagnosis, rather than constituting an actual diagnosis itself.

[15] In this case, the record at issue is the clinical interpretive report generated from the results of the applicant's Assessment (Report). The Report provides a potential interpretation of the applicant's Assessment scores, including a potential diagnosis.

[16] The applicant says that the Authority provided all of the Report except for two lines indicating a primary and secondary potential diagnosis.⁴

Section 3(1) of FIPPA - Custody and Control

[17] Section 3(1) says that:

Subject to subsections (3) to (5), this Act applies to all records in the custody or under the control of a public body, including court administration records.

[18] In addition, s. 4(1) gives an applicant a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant. However, s. 4(2) specifies that the right of access does not extend to information that is excepted from disclosure under Part 2 of FIPPA. Either custody or control of a record is sufficient to bring it within FIPPA's scope, and both are not required.⁵

³ See, for example, Order F13-23, 2013 BCIPC 30 (CanLII) at para 10 and Order F17-13, 2017 BCIPC 14 (CanLII) at para 5.

⁴ There was no severing indicated in the version provided to me for the purposes of adjudicating this inquiry. However, the question of custody and control is about the right of access to a *record* not the information in it, so the issue in this inquiry does not turn on whether there was any severing.

⁵ Order F18-45, 2018 BCIPC 48 (CanLII) at para 15.

[19] In other words, if the Report is in the custody or under the control of the Authority, then FIPPA applies and the applicant has a right to access it, subject to any exclusions under s. 3 or exceptions to disclosure in Part 2. If the Report is not in the custody or under the control of the Authority, then the Report is outside the scope of FIPPA, and the applicant does not have a right to access it under this act.

[20] FIPPA does not define “custody” or “control,” but past orders have interpreted these terms.

[21] Past orders have established that to have custody of a record the public body must have both physical possession of the record and some “right to deal with the records and some responsibility for their care and protection.”⁶

[22] In past cases where a public body has physical possession of the record in dispute, but denies the record is under its control, the OIPC has looked at a number of factors to determine whether the record is under its control, including:

- Whether the record was created by an officer or employee of the public body in carrying out their duties;
- Whether the public body has statutory or contractual control over the record;
- Whether the public body has relied on the record;
- Whether the record is integrated with the public body’s other records;
- Whether the public body has authority to regulate the use and disposition of the record; and,
- Whether the contents of the record relate to the public body’s mandate and functions.⁷

Parties’ submissions

[23] The Authority admits that it has physical possession of the Report. However, it says that it does not have the right to release the Report to the applicant because the Report is owned by the Third Party and intended for use by qualified clinicians only.

[24] First, it says that various documents contain language confirming that the Report is owned by the Third Party, as it holds the intellectual property rights in the Report. The Authority points to language on the Report itself, in the terms and conditions that govern the use of the Third Party’s online platform which generates the interpretive reports, and the Third Party’s IP position statement. For example, the terms and conditions state, in part:

⁶ Order F18-45, 2018 BCIPC 48 (CanLII) at para 17.

⁷ Order F24-32, 2024 BCIPC 39 (CanLII) at paras 15-17.

This License does not authorize you to copy, reproduce, distribute, publish, transmit, modify, display, or create derivative or collective works from, or exploit any assessment tools, scores, results, information, or other content contained within or available on or through [the Third Party's software platform] for any purpose.

[25] Second, the Authority says that various documents contain language clarifying that the Report is intended for use by qualified clinicians only. For example, it says that the Report itself states:

This report is intended for use by qualified professionals only and is not to be shared with the examinee or other unqualified persons.

[26] The Authority says that clients do not have the clinical expertise to interpret the reports generated by the Third Party's platform. As such, it says that there is a risk that releasing interpretive reports to clients may expose them to clinical harm.

[27] Further, the Authority submits that the Report is not under its control and says the following:

With respect to "control," [the Authority] submits that a number of indicators of control are not present in this case. For example, [the Authority] does not have statutory or contractual control over the Interpretive Report, [the Authority] does not have authority to regulate the Interpretive Report's use and disposition, and contract restricts [the Authority] from sharing the Interpretive Report, for the reasons outlined above in the discussion regarding "custody."⁸

[28] The Third Party objects to disclosure of the Report to the applicant. It says that disclosure poses several risks including:

- compromising the validity and reliability of the Assessment;
- harm or misinformed decisions based on a misunderstanding of the test results; and
- a breach of a psychologist's ethical obligations to release test results and interpretations only to individuals qualified to understand them and use them appropriately.

[29] The applicant says that the Report is part of their medical records, and therefore has a right to access them. The applicant says that the Authority has possession of the Report because, at the relevant time, the Authority's Chief Psychologist had a copy of the Report. The applicant says the Chief Psychologist showed them the Report and allowed the applicant to make a note of its contents.

⁸ The Authority's initial submissions at para 24.

[30] The applicant says that observance of a contractual clause does not take precedence over FIPPA. More specifically, the applicant says that the Report cannot be excluded from obligations to disclose information under FIPPA based on copyright. Further, the applicant says that the information in dispute does not reflect any proprietary information, such as the questions or raw scores.

[31] With respect to control, the applicant says that the Report was created by an officer or employee of the Authority carrying out their duties. The applicant says that a named Hospital psychologist administered the Assessment. The applicant also says that the content of the Report relates to the public body's mandate and functions. Further, the applicant says that the Report formed the basis of the diagnoses they received from Authority clinicians and therefore that the public body relied on the Report.

[32] In reply, the Authority reaffirms its position that it does not have custody or control of the Report. In addition, it says that the Report was not intended to be relied on for an actual diagnosis. Rather, it says that when the applicant was a patient at the Authority, the Authority clinician was responsible for determining a diagnosis.

Is the Report in the custody or under the control of the Authority?

[33] For the reasons that follow, I find that the Report is under the Authority's control.

[34] First, while I acknowledge the concerns that both the Authority and the Third Party have raised about the potential harm that releasing the Report to the applicant may cause, in my view, those concerns are not relevant to the sole issue of whether the Report is in the custody or under the control of the Authority. In other words, any harm that may be caused by providing a record to an applicant is outside the scope of a determination with respect to custody or control; rather, any harms may be relevant to a public body's decision to withhold information in the record under an exception in part 2 of FIPPA. Similarly, I am not persuaded that the fact that the Report was intended for use by qualified professionals is relevant to whether the Report is in the Authority's custody or under its control.⁹

[35] Second, I am not persuaded that the language regarding the Third Party's intellectual property rights means that the Authority does not have control over the Report. I can see that this language contains some restrictions on the Report's distribution and use; however, I am not persuaded that this is to such a degree as to bring the Report outside the Authority's control. For example,

⁹ The Authority did not argue that it does not have custody and control because the Report is in the custody or under the control of a clinician or other qualified professional, rather than the Authority.

nothing in this language suggests that the Third Party, rather than the Authority, can choose when or how to dispose of the Report. In any case, whether the public body can regulate the record's use is only part of one factor in the control analysis.

[36] I find that other factors I have set out above support a finding of control. For example, while I accept that the Report was not the sole factor in diagnosing the applicant, I accept that Authority clinicians relied on the Report in providing psychological services to the applicant. I further accept the applicant's submission that providing psychological services is part of the Authority's mandate. It also seems to me that the Report is integrated with the Authority's records insofar as it is part of the applicant's medical record held by the Authority.

[37] As for whether the record was created by an employee in the course of their job duties, it is undisputed that an Authority clinician administered the Assessment and used the Third Party's software to create the Report. In these circumstances, it seems to me that creating the record involved both the Authority and the Third Party. I find that this is a neutral factor in the control analysis.

[38] Taking all of this together, I am persuaded that the Report is under the Authority's control for the purpose of ss. 3(1) and 4(1) of FIPPA. As I have found that the Report is under the Authority's control, I do not need to make a finding about custody, as only one is necessary to bring a record under the scope of FIPPA.

CONCLUSION

[39] For the reasons above, I make the following order under s. 58(3)(a) of FIPPA:

1. As I have found that the Report is in the Authority's control, I require that the Authority respond to the applicant's access request for the Report in accordance with Part 2 of FIPPA.

[40] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **January 8, 2025**.

November 22, 2024

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

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