



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F05-03

BRITISH COLUMBIA VETERINARY MEDICAL ASSOCIATION

Celia Francis, Adjudicator
February 2, 2005

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Summary: Applicant requested records related to her complaint to the BCVMA about a veterinarian. The BCVMA withheld the records on the grounds that they were excluded from the scope of the Act under s. 3(1)(h) or, in the alternative, that ss. 8(2), 13, 15 and 22 apply to the records. Section 3(1)(h) does not apply to the records in dispute but s. 15(1)(a) does apply.

Key Words: Scope of the Act – disclosure harmful to law enforcement – record relating to a prosecution.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(h) and 15(1)(a).

Authorities Considered: B.C.: Order No. 20-1994, [1994] B.C.I.P.C.D. No. 23; Order No. 202-1997, [1997] B.C.I.P.C.D. No. 63; Order No. 256-1998, [1998] B.C.I.P.C.D. No. 51; Order 290-1999, [1999] B.C.I.P.C.D. No. 3; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order 00-08, [2000] B.C.I.P.C.D. No. 8.

1.0 INTRODUCTION

[1] The applicant requested a number of types of information and records related to her complaint concerning her dog to the British Columbia Veterinary Medical Association (“BCVMA”) about a veterinarian, one of its members. The request included copies of any documents the BCVMA sent to the veterinarian pursuant to the investigation, any documents he sent to the BCVMA and notes in the complainant’s file.

[2] The BCVMA provided information on some aspects of the request and then asked the applicant to contact the BCVMA to clarify the type of notes she was seeking. After consulting with the veterinarian, the BCVMA told the applicant that the “balance of

the request” (the correspondence between the BCVMA and the veterinarian) fell outside the scope of the *Freedom of Information and Protection of Privacy Act* (“Act”) by virtue of s. 3(1)(h).

[3] The applicant requested a review by this Office of the BCVMA’s response, confirming that she wanted “full copies of the BCVMA file inclusive of notes”. She also said that the BCVMA’s registrar would be “looking into disclosing the disciplinary history of the member veterinarian”.

[4] According to the portfolio officer’s fact report that accompanied the notice for this inquiry, during mediation, the applicant received a list of records so that she could determine which records she already had. The BCVMA also informed the Office that it understood the review to relate to:

1. All correspondence between the member under investigation and the BCVMA; and
2. All notes created by the BCVMA on the same complaint file.

I confirm that the BCVMA seeks to withhold this information and in this regard is invoking s. 3(1)(h) of the Freedom of Information and Protection of Privacy Act (FIPPA), and in the alternative, sections 13, 14, 15(2), and 22.

[5] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

[6] The applicant and the BCVMA participated in the inquiry. I also invited the third-party veterinarian to make representations.

2.0 ISSUES

[7] The first issue before me in this case is whether or not s. 3(1)(h) applies to the records in question, excluding them from the scope of the Act.. If I find that it does, the matter ends there.

[8] If I find that it does not, the issues are whether:

1. The BCVMA is authorized by ss. 13 and 15 of the Act to refuse access; and
2. The BCVMA is required by s. 22 to refuse access.

[9] Under s. 57(1) of the Act, the BCVMA has the burden of proof regarding ss. 3(1)(h), 13 and 15 while, under s. 57(2), the applicant has the burden of proof regarding third-party personal information.

[10] In its initial submission, the BCVMA said, apparently for the first time, that it relied on ss. 8(2)(a) and (b) to refuse to confirm or deny the existence of “particular records in the list

containing information that falls within section 15 or 22” (paras. 12 & 67-70, initial submission). Section 8(2) was not listed as an issue in the notice for this inquiry. The BCVMA did not say why it thought this section applies. Nor did it say why it had waited until the inquiry to raise this section. It simply said, cryptically, that its reasons are included in its arguments on 13, 15 and 22. Because of my findings on s. 15(1)(a), however, I have decided that I do not need to deal with this issue.

[11] Although the BCVMA initially took the position that s. 14 applied, it said at para. 13 of its initial submission that it was not relying on this section. Accordingly, I need not consider it.

[12] The applicant’s request for review stated that she was awaiting a response from the BCVMA regarding disclosure of any disciplinary information about the veterinarian. There is no further mention of this issue. It therefore appears that mediation led to a resolution of this aspect of the matter.

3.0 DISCUSSION

[13] **3.1 Background** – The BCVMA said in its initial submission that the applicant’s dog died at the veterinarian’s facility “following a procedure involving the member [the veterinarian]”. The applicant then complained about the veterinarian to the BCVMA. The matter was to proceed to a disciplinary hearing before an Inquiry Committee in late November 2003 (para. 2, initial submission).

[14] According to post-inquiry correspondence from the BCVMA and legal counsel for the veterinarian, the BCVMA’s Council had not yet disposed of the matter as of November 2004. The BCVMA said that the November 2003 hearings before the Inquiry Committee had taken place and the matter had proceeded to the BCVMA’s Council for consideration of the Inquiry Committee’s report. While this process was still underway, the BCVMA said, “some procedural issues were identified and the Council has just ordered a new hearing”.

[15] The BCVMA confirmed that it was still relying on s. 3(1)(h) and said it would inform this Office once a new hearing date had been set. It confirmed that it had not provided the applicant with any of the disputed records in the meantime and that it had not been “served with any document compelling production for any civil court action that might be extant” (paras. 1 & 2, further submission).

[16] **3.2 Records in Dispute** – The BCVMA provided a list of records that it said were responsive to the applicant’s request and said that the applicant had already received 32 pages of records from this list, including her animal’s medical records. It said the remaining 53 pages were in dispute (paras. 7-10, initial submission). The 53 pages fall into the following categories: correspondence between the veterinarian or his lawyer and the BCVMA; correspondence between the BCVMA and other bodies; witness statements; discipline co-ordinator’s report; statements of facts; and handwritten notes. I have drawn these categories from the list the BCVMA provided with its initial submission and which the applicant received as part of the exchange of submissions in this inquiry.

[17] **3.3 Record Relating to a Prosecution** – The BCVMA takes the position that s. 3(1)(h) applies to the disputed records and that they are therefore excluded from the scope of the Act. The relevant sections of the Act read as follows:

Scope of this Act

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(g) reveal any information relating to or used in the exercise of prosecutorial discretion, ...

15(4) The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute

(a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or

(b) to any other member of the public, if the fact of the investigation was made public.

“exercise of prosecutorial discretion” means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power

(a) to approve or not to approve a prosecution,

(b) to stay a proceeding,

(c) to prepare for a hearing or trial,

(d) to conduct a hearing or trial,

(e) to take a position on sentence, and

(f) to initiate an appeal;

“law enforcement” means

(a) policing, including criminal intelligence operations,

(b) investigations that lead or could lead to a penalty or sanction being imposed, or (c) proceedings that lead or could lead to a penalty or sanction being imposed;

“prosecution” means the prosecution of an offence under an enactment of British Columbia or Canada;

[18] **3.4 Application of Section 3(1)(h)** – The current and previous Information and Privacy Commissioners have considered the interpretation and application of this section in a number of orders: Order No. 20-1994, [1994] B.C.I.P.C.D. No. 23; Order No. 202-1997, [1997] B.C.I.P.C.D. No. 63; Order No. 256-1998, [1998] B.C.I.P.C.D. No. 51; Order 290-1999, [1999] B.C.I.P.C.D. No. 3; and Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44. Commissioner Loukidelis also considered this section in a decision of March 28, 2003. They have consistently

interpreted the term “prosecution” in s. 3(1)(h) of the Act as meaning the “prosecution of a criminal or quasi-criminal offence”. I outline the findings from these orders below.

[19] In Order Nos. 20-1994, 202-1997 and 256-1998, Commissioner Flaherty made the findings that s. 3(1)(h) applies to records related to a prosecution that is underway, that is, where criminal charges have been laid, and, in the case of Order No. 202-1997, that it does not apply to records related to complaint proceedings under the *Police Act*.

[20] Order No. 290-1999 concerned records related to a complaint under the *Police Act*. In that order, the Commissioner commented on the need to analyze the term “offence” in its context. The Commissioner pointed out that the “exercise of prosecutorial discretion” in s. 15(1)(g) and as defined in Schedule 1 of the Act only has meaning in the context of a criminal or quasi-criminal prosecution. He found support for this interpretation of the term “prosecution” in s. 15(4) of the Act. He acknowledged at pp. 9-10 that, by contrast, the definition of “law enforcement” is not restricted to criminal and quasi-criminal matters:

The risk of penalty or sanction referred to in the definition of “law enforcement” is wider than true penal consequences associated with offence prosecutions under section 11 of the *Charter* and has been so interpreted in conjunction with the section 15 exception in the Act. Thus the Act distinguishes between “law enforcement” matters which may be criminal, quasi-criminal, regulatory, or disciplinary in nature, and “prosecution” matters which are limited criminal [*sic*] or quasi-criminal processes.

...

Conclusion on the section 3(1)(h) issue

I have concluded that the *Matsqui* case does not accord with the definition of “prosecution” in the Act. This is because the context of the Act does not support the same approach as under section 54.1 of the *Police Act*. **In my opinion, “prosecution” in Schedule 1 of the Act, and thus also in section 3(1)(h) of the Act, means a prosecution of a criminal or quasi-criminal offence.** Since police disciplinary proceedings under the *Police Act* or the *Police (Discipline) Regulation* do not meet this parameter, section 3(1)(h) of the Act does not apply to the applicant’s requests for information from the Police Department. [emphasis added]

[21] Similarly, Commissioner Loukidelis, in Order No. 331-1999, found that s. 3(1)(h) did not apply to records related to proceedings under the *Police Act*. He said he agreed with his predecessor’s findings in Order No. 290-1999, and would have made the same findings. He also agreed that the meaning of the term “offence” in the *Police Act* was not determinative of its meaning in the Act.

[22] In his March 28, 2003 decision, Commissioner Loukidelis commented at p. 4 that a “prosecution” for the purposes of s. 3(1)(h) is, in his view, the “prosecution of an offence against an accused”. He also noted, at p. 13, that criminal charges had been laid in that case.

[23] I have applied the principles from these orders to this decision.

[24] **3.5 The BCVMA’s Complaint and Discipline Process** – The BCVMA’s submission did not explain its complaint, investigation and disciplinary processes and also did not link these

processes to any legislative authority that might illuminate its position on this issue. I have, however, been able to glean information on these topics from the *Veterinarians Act*, the BCVMA's bylaws and complaint process information on the BCVMA's website.

[25] According to these documents, the BCVMA is responsible for regulating the practice of veterinary medicine in British Columbia in two areas: the competence and conduct of veterinarians and the ongoing practice of veterinary medicine. Complaints about a member of the BCVMA may come from the public, a veterinarian or the BCVMA itself. The BCVMA will investigate any complaint that "alleges facts that, if proven, would constitute misconduct or incompetence" (p. 1, "Complaint Process", <http://www.bcvma.org>).

[26] "Misconduct" is defined in s. 42 of the BCVMA's bylaws as including: failure to bring an adequate level of skill and knowledge to the practice of veterinary medicine; lack of capability; fitness or mental condition to practice; commission of any offence at law relevant to the fitness to practice; violation of the Act, bylaws and rules of the BCVMA; and obtaining membership by fraud or misrepresentation.

[27] After a complaint investigation under s. 15 of the *Veterinarians Act*, the BCVMA's Conduct Review Committee considers the investigator's report. Where the Conduct Review Committee decides that the matter should proceed to a hearing, it asks the BCVMA's Council to strike an Inquiry Committee to hear the matter. Under s. 17(1) of the *Veterinarians Act*, the Inquiry Committee must hear and decide on the facts, find whether the charge or complaint has been proven and report its findings to the BCVMA's Council. After considering the Inquiry Committee's report, the Council determines if the member is guilty of unprofessional conduct, is incapable or unfit to practice or should have his or her practice restricted (s. 17(2)). It may then suspend the member, restrict the member's practice or direct that the member's name be erased from the BCVMA's register (s. 17(3)).

[28] **3.6 Discussion of Section 3(1)(h)** – The BCVMA referred to the definitions set out in para. 17 above and noted the Commissioner's comments and findings in Order No. 290-1999 that the term "offence" in the Act is "limited to offences of a criminal or quasi-criminal nature and does not include those of a disciplinary or regulatory nature." It then presented its arguments on how, in its view, s. 3(1)(h) of the Act nevertheless applies to the disputed records in this case.

[29] If I understand the BCVMA correctly, a regulatory or disciplinary proceeding is, in its view, not only a "law enforcement" proceeding under s. 15(1) of the Act but also a "prosecution" for the purposes of s. 3(1)(h). It finds support for its views in the language of ss. 15(1)(g) and 15(4) and in the definition of "law enforcement". The BCVMA suggests therefore that the terms "offence" and "prosecution" in the Act are not limited to matters of a criminal or quasi-criminal nature. Rather, it says, they have a broad meaning that includes regulatory and disciplinary proceedings before an inquiry hearing panel under the *Veterinarians Act* and that s. 3(1)(h) therefore "captures all of the documents related thereto until the proceedings are completed" (paras. 14-33, initial submission).

[30] The applicant did not address s. 3(1)(h) in her initial submission but simply said she needs the records as “what is disclosed in litigation may differ than what is disclosed to your department under FOI provisions.”

[31] Legal counsel for the veterinarian also did not address s. 3(1)(h) specifically. He did say that his client was primarily concerned with the application of s. 22 but also agreed with the BCVMA on the applicability of the other sections it referred to. He confirmed that the disciplinary process involving his client was still ongoing and said that all of the records relate to that process.

[32] The BCVMA’s arguments on its complaint and disciplinary process are in direct contrast to the Commissioners’ findings on this point in several orders, as outlined above. The BCVMA’s submission did not point to a provision within the *Veterinarians Act* the violation of which, in its view, would constitute an “offence” nor did it elaborate on how it considers its disciplinary process to be a “prosecution” for the purposes of s. 3(1)(h) of the Act.

[33] Sections 30-32 of the *Veterinarians Act* establish certain “offences” related to the practice of veterinary medicine. There is, however, no evidence that the veterinarian in question has been charged with any of these “offences”. Rather, the material before me indicates that the veterinarian has been involved in the BCVMA’s internal complaint and inquiry processes, as contemplated by ss. 15 and 17 of the *Veterinarians Act*, and the relevant BCVMA bylaws. Where a veterinarian is the subject of a complaint under s. 15 of the *Veterinarians Act*, his or her actions do not lead to the laying of criminal charges by Crown counsel but to the BCVMA’s own internal disciplinary and regulatory process and possible sanctions as set out in s. 17 of the *Veterinarians Act*.

[34] The BCVMA’s complaint and discipline process is similar in all material respects to the police disciplinary process which the Commissioners examined in Order No. 290-1999 and Order No. 331-1999 and found not to be a “prosecution of an offence” for the purposes of s. 3(1)(h). I can see no material difference between the BCVMA’s complaint investigation and disciplinary process and the process discussed in those orders. I conclude that s. 3(1)(h) does not apply to the records in dispute in this case, which all relate to the complaint and disciplinary process that flowed from the applicant’s complaint. This means that the Act applies to those records. I will now consider the BCVMA’s alternative arguments.

[35] **3.7 Harm to Law Enforcement** – The BCVMA’s letter to this Office on its revised decision cited s. 15(2) as the only part of s. 15 on which it was relying. The notice and fact report for this inquiry simply state that s. 15 is an issue. However, the BCVMA argued in its initial submission that ss. 15(1)(a) and (h) and 15(2)(b) all apply to the records in dispute in this case.

[36] A public body should, as early as possible in mediation, settle on the exceptions it believes apply, before a matter proceeds to inquiry, so the applicant knows the issues he or she will have to address. The addition of new exceptions at the inquiry stage, without notice, can present difficulties to an applicant with only limited time to respond to a public body’s initial submission.

[37] In this case, although the BCVMA apparently refined its thinking on s. 15 only at the inquiry stage, the applicant received a two-month extension to the reply deadline for this inquiry. She thus had ample time to respond to the BCVMA's arguments on s. 15, even though she did not in the end make a reply. The third party also had the opportunity to comment on the BCVMA's s. 15 arguments. Both the BCVMA and the veterinarian's legal counsel expressed concern about the detrimental effect disclosure might have on the BCVMA's complaint and disciplinary process involving the veterinarian. These concerns relate to whether or not s. 15(1) applies to the disputed records. I have therefore decided to consider the BCVMA's arguments on s. 15(1)(a). Because of my finding on this exception, I do not need to consider s. 15(1)(h) or s. 15(2)(b).

[38] The relevant section reads as follows:

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

[39] The definition of "law enforcement", which I cited earlier, is also relevant.

Harm to a law enforcement matter

[40] Past orders have established that self-governing bodies have a "law enforcement" mandate for the purposes of s. 15(1)(a). See, for example, Order 00-08, [2000] B.C.I.P.C.D. No. 8, at p. 39. The Commissioner also discussed in that order the need for public bodies to demonstrate the harm to law enforcement activities that disclosure might cause.

[41] Under the *Veterinarians Act*, the BCVMA has the power to investigate complaints and impose sanctions, including suspension of, or restrictions on, a member's practice and erasure of the member's name from the register. I therefore accept that the BCVMA has a "law enforcement" mandate under the *Veterinarians Act* for the purposes of s. 15(1)(a). It must also prove a reasonable expectation of harm through disclosure of the disputed records in this case.

[42] The BCVMA argued that s. 15(1)(a) applies to all 53 pages in dispute (categories 4, 5, 7 and 10-17 of the BCVMA's list). The BCVMA said that the applicant has expressed anger, distrust and criticism towards the BCVMA because of its handling of her complaint and the discipline investigation. It believes the applicant will focus more on the BCVMA's role in these matters than her role as a witness, if she receives the disputed records. It suggested that the applicant's recollection of events and her forthrightness and effectiveness as a witness might therefore be detrimentally affected (paras. 41-44, initial submission). The lawyer for the veterinarian expressed similar concerns, suggesting that the applicant's evidence as a witness in a new hearing might be modified or tainted, if she had access to the disputed records (p. 2, initial submission).

[43] The BCVMA also has concerns about the applicant's potential deleterious effect on the health, impartiality and effectiveness of two witnesses on whose evidence the BCVMA's case strongly depends, and gave reasons for having these concerns. Loss of either witness could compromise the BCVMA's case, it argued (paras. 44-48, initial submission).

[44] As noted above, the BCVMA confirmed in correspondence of November 2004 that the disciplinary matter was still ongoing and that there would be a new hearing. The BCVMA also confirmed at that time that the applicant had not received any of the withheld records through the disciplinary process. Nor, it said, had the BCVMA been required to disclose the records in the course of any litigation that may still be underway. The applicant has not demonstrated any awareness of the contents of the records or similar information that she may have gained through the disciplinary process nor via any litigation she may be involved in.

[45] I have carefully reviewed the disputed records in this case. I cannot say much about them but can say that their contents support the arguments of the BCVMA and the third party about the reasonable expectation of harm, principally because the BCVMA's investigation and discipline process is still underway and because of the applicant's likely involvement as a witness in that process. In the circumstances of this case, I accept that disclosure of the records to the applicant at this time could reasonably be expected to harm the conduct of a law enforcement matter for the purposes of s. 15(1)(a). I find that s. 15(1)(a) applies to the records in dispute in this case. It is therefore not necessary to consider the applicability of ss. 8(2), 13(1), 15(1)(h), 15(2)(b) and 22.

4.0 CONCLUSION

[46] For the reasons given above, under s. 58 of the Act, I find that the BCVMA is authorized to withhold the disputed records under s. 15(1)(a).

[47] For reasons discussed above, no order is necessary respecting ss. 3(1)(h), 8(2), 13(1), 15(1)(h), 15(2)(b) and 22.

February 2, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator