Order F06-05

PROVINCIAL HEALTH SERVICES AUTHORITY

Celia Francis, Adjudicator

April 21, 2006

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Summary: The applicant requested records of four specified individuals. The PHSA disclosed records and applied ss. 14 and 22 to other records and information. It also said that one individual was not its employee and another had no responsive records. The PHSA is found to have correctly withheld information and records under ss. 14 and 22.

Key Words: solicitor-client privilege—workplace investigation—supplied in confidence––personal privacy—employment history—fair determination of rights—inaccurate or unreliable—personal information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 22(1), 22(2)(f) & (g), 22(3)(d).

Authorities Considered: B.C.: Order 04-25, [2004] B.C.I.P.C.D. No. 25; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43.

1.0 INTRODUCTION

[1] The applicant in this case made a request under the *Freedom of Information and Protection of Privacy Act* ("Act") to the public body, the Provincial Health Services Authority ("PHSA"), for the following:

> - details of the service contract or terms of employment between [a named human rights investigator] and the PHSA.

> - all correspondence, notes, and e-mail between [Lawyer A] and others in regards to my employment, human rights investigation, and any other matter relating to me.
>
> - all correspondence, notes, and e-mail between [Lawyer B] and others in regards to my employment, human rights investigation, or any other matter relating to me.
>
> - all correspondence, notes, and e-mail between [a named physician] and other[s] in regards to employment, human rights investigation, and any other matter relating to myself. This material would be inclusive from the point where [the physician] has previously ended submission under previous Freedom of Information requests and up until the present time.

[2] The PHSA responded regarding the requested records for Lawyer B by saying that she was neither its employee nor its contractor and it would therefore not respond to that part of the request. The portfolio officer's fact report that accompanied the notice for this inquiry states that the applicant complained about this response to this office and that the matter was resolved through mediation.

[3] Some time later, the PHSA responded regarding the other three parts of the request by saying that it was withholding the records related to Lawyer A under ss. 13, 14, 19 and 22 of the Act. As for the investigator's contract or terms of employment, the PHSA said that this information was subject to solicitor-client privilege and it was withholding the records under s. 14 of the Act. Finally, it said that the physician in question had no records that responded to the applicant's request.

[4] The applicant requested a review of the public body's second response, saying that it was "abusive". For example, he said, it attempted to use solicitor-client privilege to deny him access to the investigator's service contract, although the investigator was not a lawyer and solicitor-client privilege would not apply to her. He also said that "all of the other excuses given are also bizarre at best".

[5] Mediation led to the staged disclosure of records from Lawyer A's files and records related to the investigator. The PHSA also said it was withholding some information under ss. 14 and 22 of the Act but that it was abandoning its reliance on ss. 13 and 19.

[6] The applicant expressed continued dissatisfaction with the PHSA's response and, because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. The office invited representations from the applicant, the PHSA and a third party.

2.0 ISSUE

[7] The issues before me in this case are:

1. Is the PHSA authorized by s. 14 of the Act to withhold information?

2. Is the PHSA required by s. 22 of the Act to withhold information?

[8] Under s. 57(1) of the Act, the PHSA has the burden of proof regarding s. 14 while, under s. 57(2) the applicant has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[9] **3.1 Preliminary Matters**—I will deal first with some preliminary matters that arose in this inquiry.

Post-Inquiry correspondence

[10] About ten days after the close of this inquiry, the PHSA sent a letter to this office saying that the applicant had included with his reply submission confidential material from the second human rights investigation. It referred to the CWHC's Human Rights policy, asked that I not refer in my decision to any details from this confidential material and provided reasons for its request. In keeping with this office's inquiry procedures, the Registrar of Inquiries provided the other parties with a copy of this letter and said she would bring the PHSA's request to my attention.

[11] The applicant in turn wrote a letter commenting on the lateness and impropriety of what he called this "surreply" and suggested that he was at liberty to respond. He then made a number of remarks to the effect that the PHSA had breached the confidentiality of its own human rights policy in its investigation processes.

[12] I do not consider the PHSA's request to be a sur-reply. It is more in the nature of a procedural objection, of the type that parties to an inquiry are expected to raise as soon as possible after the exchange of submissions. However, I have decided that I do not need to deal with the PHSA's request or the timing of its arrival in this office, as I consider it neither necessary nor appropriate to include in this decision any details from the confidential human rights material to which the PHSA referred. It follows that I do not need to consider the applicant's comments on this request.

In camera submissions

[13] In his reply submission, the applicant objected to the PHSA's inclusion of *in camera* argument and evidence with its initial submission, calling them "an abuse of process". He asked that I release the material to him so that he can make a full reply, as this "would be in keeping with justice".[1]

[14] I understand the applicant's concerns but am satisfied that the material that the PHSA submitted on an *in camera* basis is properly received as such. I am of the same view regarding the third party's *in camera* submission.

Search for physician's records

[15] The applicant cast doubt on the PHSA's argument that the physician whose records he requested has no records. She is said to have "secretive notes" about him, he said, although she has not produced them in response to previous access requests. Moreover, he said, although she claimed she could not produce them in a court proceeding, this later "proved to be false". The applicant referred to examples from the past of records[2] which he said the third party had created and which the PHSA should have produced, either in court proceedings, in response to earlier freedom of information requests or as a result of Order 04-25,[3] but which he did not receive until much later. (The applicant apparently received these items during the second human rights investigation, but his submission is not entirely clear on this point.)[4]

[16] The PHSA has a duty under s. 6 of the Act to assist him, the applicant argued, and its search for the physician's records, although "not forwarded by the mediator", was always an issue. He said that this may be seen in his correspondence with the PHSA and this Office.[5]

[17] The PHSA rejected the applicant's arguments on s. 6, saying it was not listed as an issue in the notice for this inquiry. It said that, according to the portfolio officer's fact report for this inquiry, the applicant's request for this physician's records was not part of his request for review and thus not an issue here.[6] The third party also objected to the applicant's remarks on s. 6 and the

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[1] Para. 1, reply submission.
[2] A complaint letter of December 2000 from the third party and her handwritten notes. Although the applicant said he was providing copies of both items, his submission included only the complaint letter.
[3] [2004] B.C.I.P.C.D. No. 25, an order involving the same applicant and public body, in which the PHSA's search for records, including those of the third party in this case, was one of the issues.
[4] Paras. 17-18, initial submission; pp. 3-6, reply submission.
[5] Para. 22, initial submission.
[6] Paras. 2 & 4, reply submission.

third party's records, pointing out that this inquiry concerns the PHSA's response only to the first two parts of the applicant's request.[7]

[18] The PHSA's initial response to the applicant's request said that the physician had no records in her files that respond to the applicant's request. Its later responses all appear to deal only with records related to the first two parts of the applicant's request, that is, records related to the investigator and records from Lawyer A's files. There is no further explicit mention of the physician's records in the PHSA's decision letters.

[19] I outlined above the applicant's request for review of this response. In that letter, he did not specifically express dissatisfaction with the PHSA's response that the physician had no records. His letter requesting an inquiry was also not specific regarding the PHSA's alleged deficiencies in searching for this physician's records. Rather, it dealt with his complaint regarding the PHSA's alleged delays, including in disclosing further records in mediation, his dissatisfaction that the PHSA denied access to information in those records under s. 22 and the PHSA's alleged failure to account for the records it was withholding.

[20] I do not agree with the applicant that it is clear, at least from his request for review correspondence,[8] that the PHSA's search of this physician's records has always been an issue in this case, although it is clear from his inquiry submissions that he has been concerned about the PHSA's efforts in this area in the past. Because I am not privy to what occurred during mediation of the applicant's request for review by this office, I have no way of knowing if the applicant complained about the PHSA's search for the physician's records during that time and, if he did, if it was considered resolved or he asked that it be included as an issue for this inquiry.[9] In any event, the notice and fact report for this inquiry do not list the PHSA's search of the physician's records as an issue and the PHSA has not had an opportunity to make representations on its efforts to search for these records.

[21] For all these reasons, I decline to consider the applicant's concerns about the PHSA's search for this physician's records.

[22] **3.2 Solicitor-Client Privilege**—The PHSA said that the majority of the records to which it applied s. 14 are communications between its external legal

[7] Page 2, reply submission.
[8] That is, among the material before me in this inquiry.
[9] One of the purposes of mediation of a complaint or a request for review is to clarify and attempt to resolve the issues in dispute. Mediation also provides an opportunity for an applicant to raise additional issues and, if a matter proceeds to an inquiry, to ask that they be included in the portfolio officer's fact report as one of the issues that the inquiry will dispose of.

counsel at Fasken Martineau DuMoulin LLP ("Fasken") and itself for the purpose of seeking and providing legal advice or exchanging information in order to obtain or provide legal advice. It said the records include internal working papers and records related to procedural issues in the human rights investigation involving the applicant. The PHSA said that the investigator was appointed by the applicant's employer, the Children's and Women's Health Centre ("CWHC"),[10] to carry out an investigation under the CWHC's human rights policy. The investigator was therefore an agent of the PHSA for the purpose of establishing solicitor-client privilege respecting communications between the investigator and Fasken. The PHSA said that other records are communications between its external legal counsel at Fasken and external legal counsel at Alexander, Holburn, Beaudin & Lang LLP ("AHBL") for the purpose of providing legal advice from both firms to the PHSA.[11]

[23] The PHSA provided affidavit evidence from a Fasken lawyer in support of its position on s. 14. The lawyer also provided some background on a previous human rights investigation involving harassment complaints against the applicant, in which AHBL had represented the PHSA. She then deposed that the PHSA hired Fasken to provide legal advice to the PHSA regarding the conduct of a new human rights investigation into the same harassment complaints.[12] She also provided *in camera* evidence on the nature of Fasken's retainer and the work that she and Lawyer A undertook for PHSA.[13]

[24] The third party in this case provided a short *in camera* submission supporting PHSA's application of s. 14 to some of the information and records in dispute.[14]

[25] For his part, the applicant commented on situations in which solicitor-client privilege does and does not apply. He then alleged that the PHSA's application of s. 14 is a delaying tactic, saying the human rights investigator is not a lawyer, "nor is her work bound by any form of client-solicitor privilege". He argued that Lawyer A's role in the second human rights investigation does not attract privilege as, in his view, she simply organized the investigation. Her communications with the human rights investigator and the third party's lawyer are "relevant for disclosure", he said.[15] In his reply submission, the

[10] The CWHC was and is a public body in its own right. It is now part of the PHSA.
[11] Para. 4, initial submission. The PHSA says that one page, p. 308, which it had initially identified as subject to solicitor-client privilege is in fact not responsive to the applicant's request. This is so, and I therefore need not deal with it.
[12] According to the third party, this second investigation concluded with a report in May 2005, see p. 2, third party's reply submission.
[13] Paras. 2-10, Janzen affidavit.
[14] Pages 1-2, *in camera* initial submission.
[15] Paras. 11-16, initial submission.

applicant provides further argument in support of his view that s. 14 does not apply.[16]

[26] Section 14 reads as follows:

> **Legal advice**
>
> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[27] The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well established. See, for example, Order 02-01.[17] I will not repeat those principles but apply them here.

[28] The PHSA applied s. 14 to a series of letters, notes, emails and memoranda. There are numerous duplicates and drafts among these records. I am satisfied from the material before me that the records which the PHSA withheld under s. 14 all relate to the giving, seeking or formulation of confidential legal advice between solicitor and client. They are thus protected by solicitor-client privilege and I find that they fall under s. 14.

[29] **3.3 Personal Information**—The PHSA says that, in general, the information that it severed and withheld under s. 22 of the Act is the personal information of a third party and not the applicant's personal information. In its view, disclosure of this information would be an unreasonable invasion of the third party's personal privacy and the PHSA is therefore required to withhold this information. In the PHSA's view, s. 22(4) does not apply here and no relevant circumstances in s. 22(2), including s. 22(2)(c), favour disclosure. The PHSA provided some *in camera* argument on these points, as well as on its view that the third party's personal information falls under s. 22(3)(d) and the factor in s. 22(2)(f) applies, favouring withholding this individual's personal information.[18]

[30] The third party, who was the complainant in the human rights investigations, said she opposes the disclosure of any of her personal information to the applicant, who was the respondent in those investigations. With reference to relevant orders, the third party then explained how, in her view: s. 22(4) does not apply; her personal information falls under ss. 22(3)(b) and (d); ss. 22(2)(f) and (g) apply in this case, favouring withholding her personal information; and any disclosure of this information would thus be an unreasonable invasion of her privacy.[19]

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[16] paras. 16-20, reply submission.
[17] [2002] B.C.I.P.C.D. No. 1.
[18] Paras. 5-11, initial submission.
[19] Pages 2-8, initial submission.

[31] The applicant rejected the third party's arguments on these points, saying that his request was for records related to himself. He said he does not seek the third party's personal information, although he does seek records in the possession of the third party. He argued that, under the CWHC's human rights policy, he is entitled to know all the information regarding the complaints against him.[20] The matters reflected in the records are "in direct relation" to him, he said, and the material is also "part of the entirety which proves malicious prosecution".[21]

[32] The material is "false, vexatious, and defamatory", he continued. The applicant then disputed the PHSA's arguments on confidentiality under the human rights policy, alleging, among other things, that the CWHC disclosed complaint records to a newspaper reporter. He also rejected the argument that s. 22(2)(g) applies and says that the use of s. 22(3) is "ridiculous", reiterating that he is entitled to his own personal information from the harassment complaint investigation.[22]

[33] The applicant also asked why the PHSA would wish to "suppress" the investigator's service contract.[23] However, I saw nothing resembling a service contract or terms of employment with the investigator among the records in dispute in this inquiry.

[34] Numerous orders have considered the principles for applying s. 22. See, for example, Order 01-53.[24] I will not repeat those principles but have applied them in this decision.

[35] The relevant portions of s. 22 read as follows:

> **Disclosure harmful to personal privacy**
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (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, …

[20] Paras. 2-7, reply submission.
[21] This argument appears to relate to the circumstance in s. 22(2)(c).
[22] Paras. 8-15 & 21-24, reply submission.
[23] Para. 27, reply submission.
[24] [2001] B.C.I.P.C.D. No. 56.

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable, …

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

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation, …

(d) the personal information relates to employment, occupational or educational history, …

Whose personal information is in issue?

[36] The first step in the s. 22 analysis is to determine if personal information is at stake and, if so, whose it is. Although the applicant believes that the information and records to which the PHSA has applied s. 22 relate to him, they in fact concern the third party and her dealings with the PHSA on matters related to her complaint against the applicant. I therefore find that the withheld information is personal information and is the third party's personal information.

[37] I also find that the withheld information does not fall under s. 22(4), which sets out categories of personal information, the disclosure of which is not an unreasonable invasion of privacy.

Unreasonable invasion of privacy

[38] Previous orders have found that personal information related to workplace complaints, investigations and discipline falls under s. 22(3)(d),[25] as it is considered to form part of an individual's employment history. I have already noted that the third party complained about the applicant in relation to workplace matters. The personal information that the PHSA withheld or severed under s. 22 in this case relates to matters associated with this complaint and in my view falls under s. 22(3)(d). Its disclosure is therefore considered to be an unreasonable invasion of the third party's privacy.

[39] Given this finding, I do not need to consider the third party's argument that s. 22(3)(b) applies to the same information.[26] I will, however, note that the

[25] See Order 01-53 and Order 01-07, [2001] B.C.I.P.C.D. No. 7, for example.

[26] The third party argued that s. 22(3)(b) applied on the grounds that an investigation under the CWHC's human rights policy is an investigation into a possible violation of law, as harassment is a human rights violation and violations of the policy are subject to legal sanction. See pp. 5-6, initial submission. Under the CWHC's human rights policy of January 1, 2000 ("Exhibit "B",

Commissioner has found that an investigation that could lead to employment discipline is not "an investigation into a possible violation of law" within the meaning of s. 22(3)(b). See, for example, Order No. 330-1999,[27] where the Commissioner said the following, at p. 12:

> The Ministry did not point to any "law" the possible violation of which was involved here. The Ministry's own submissions in effect characterize its investigation as a disciplinary investigation conducted by the Ministry as the author's employer.
>
> In my view, the ordinary meaning of s. 22(3)(b) is against the Ministry on this point. One does not normally think of an employment-related disciplinary investigation, with no statutory disciplinary flavour, as involving a "prosecution" of a "violation of law". An employer's contractual right **–** under an individual employment contract or a collective agreement **–** to discipline an employee for misconduct is not, in my view, a "law" for the purposes of this section. Nor can I accept the Ministry's apparent invitation to extend s. 22(3)(b), by analogy, to this information. If s. 22(3)(b), given its ordinary meaning, does not apply to the disputed information, I have no authority to force it to fit. Nor does the Ministry.

Relevant circumstances

[40] I accept from the material before me, including the third party's submissions on this point and the CWHC's human rights policy (which states that investigations will be conducted in confidence), that the third party's personal information was supplied in confidence to the PHSA. Thus, the factor in s. 22(2)(f) applies, favouring its non-disclosure.

[41] It is not clear from the applicant's arguments, which appear to relate to s. 22(2)(c), how any legal rights he may have are at stake in this matter. This is also not evident from the records themselves. The human rights investigations in which he was the respondent are over and he did not cite any other proceedings in which his rights might be at stake. There is no basis in the material before me on which to conclude that s. 22(2)(c) applies in this case. I find that it is not relevant here.

[42] The third party argues that s. 22(2)(g) applies in this case. Her concern appears to be directed at handwritten notes which she says are "made in a short hand, which made sense to the recipient".[28] She says this means she cannot verify their content and therefore cannot be certain of their accuracy.

Janzen affidavit), an investigation can lead to progressive discipline, up to and including termination of employment or withdrawal of privileges.

[27] [1999] B.C.I.P.C.D. No. 43.

[28] Page 5, initial submission.

[43] There are a few pages of handwritten notes among the records to which the PHSA applied s. 22 but, in my opinion, they are legible and their meaning is clear. I do not therefore consider that s. 22(2)(g) has any relevance here.

Conclusion on Section 22

[44] No other relevant circumstances are reflected in the material before me that would favour disclosure of the withheld and severed records. The applicant has the burden of proof in this matter and has failed to discharge that burden. I find that s. 22(1) requires the PHSA to refuse to disclose the third party's personal information to the applicant.

4.0 CONCLUSION

[45] For the reasons given above, under s. 58 of the Act, I make the following orders:

1. I confirm that the PHSA is authorized to refuse the applicant access to the information it withheld under s. 14; and

2. I require the PHSA to refuse the applicant access to the information it withheld under s. 22.

April 21, 2006

ORIGINAL SIGNED BY

Celia Francis
Adjudicator

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