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

Order F05-11

PROVINCIAL HEALTH SERVICES AUTHORITY

Celia Francis, Adjudicator
April 7, 2005

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Summary: Applicant requested access to records related to himself in the public body's security and infection control areas. PHSA correctly refused access to information under s. 14 and for the most part under s. 22. PHSA ordered to provide applicant with a few items of information withheld under s. 22 and with summary under s. 22(5). A few pages are not in PHSA's custody or control. Other pages are in PHSA's control and it is ordered to process them under the Act.

Key Words: legal advice – solicitor-client privilege – personal privacy – unreasonable invasion – submitted in confidence – medical history – employment history – public scrutiny – fair determination of rights – position, functions or remuneration of public body employees – custody or control.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 4(1), 14, 22(2)(c), (f), 22(3)(a), (d), 22(4)(e), 22(5).

Authorities Considered: B.C.: Order 04-25, [2004] B.C.I.P.C.D. No. 25; 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 02-01, [2002] B.C.I.P.C.D. No. 1; Order 02-29, [2002] B.C.I.P.C.D. No. 29; Order 02-30, [2002] B.C.I.P.C.D. No. 30; Order 04-19, [2004] B.C.I.P.C.D. No. 19; Order No. 247-1998, [1998] B.C.I.P.C.D. No. 41; Order F05-02, [2005] B.C.I.P.C.D. No. 2.

Cases Considered: *British Columbia* (*Ministry of Small Business, Tourism and Culture)* v. *British Columbia* (*Information and Privacy Commissioner),* 2000 BCSC 929; [2000] B.C.J. No. 1494; *Neilson* v. *British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640 (S.C.); *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

1.0 INTRODUCTION

[1] The applicant sent the following request, dated March 5, 2003, to the Provincial Health Services Authority ("PHSA"):

> Please consider this as a formal request. I herein ask for:
>
> - copies of correspondence, e-mails, and notes which relate to external agents who have been working for the PHSA and Children's and Women's Health Centre ["CWHC", part of the PHSA], and who have been in any way addressing issues related to myself.
>
> - copies of correspondence, e-mails, and notes which relate to the security staff of the Centre [CWHC] and who have in any way addressed issues relating to myself. This should include any individuals or agencies who have been contracted by the Centre for any investigative, monitoring, or security service.
>
> - copies of correspondence, e-mails, and notes which relate to the Infection Control Service and its members, and which to [*sic*] myself. I understand that the members of this service are employees of the hospital.

[2] The PHSA answered the third element of the request some months later and provided the applicant with copies of responsive records from the Infection Control Service, withholding some records and information under ss. 14 and 22 of the *Freedom of Information and Protection of Privacy Act* ("Act") and s. 51(5) of the *Evidence Act*. It also withheld records which it described as "personal notes of an employee of Children's & Women's Health Centre", on the grounds that the notes were not in the CWHC's custody or control and thus not subject to disclosure under the Act.

[3] The applicant requested a review of the PHSA's decision to withhold information and also complained that the response was incomplete.

[4] Soon after, the PHSA responded to the second element of the request, by providing a copy of the "security file", withholding information and records under ss. 15 and 22 of the Act and on the grounds that some information was not responsive to the request.

[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.

2.0 ISSUES

[6] The notice for this inquiry states that the issues before me in this case are:

1. Are certain records in the custody or control of the PHSA, for the purposes of ss. 3(1) and 4(1) of the Act?

2. Is the PHSA required by s. 22 to refuse access to information?

3. Is the PHSA authorized by ss. 14 and 15 to withhold information?

4. The PHSA's application of s. 51 of the *Evidence Act* to certain information.

[7] In post-inquiry correspondence, the PHSA informed this Office that it was withdrawing the application of s. 51 of the *Evidence Act* to pp. 20-23, 34-36 and 61 and instead applying s. 22 of the Act to portions of these pages. Accordingly, I do not need to consider s. 51 of the *Evidence Act* here.

[8] At para. 34 of its initial submission, the PHSA stated that it was no longer relying on s. 15 of the Act and that the CWHC agreed to the disclosure of the information previously withheld under s. 15. Accordingly, I do not need to deal with the s. 15 in this decision.

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

3.0 DISCUSSION

[10] **3.1 Preliminary Matters** – I will begin by dealing with some preliminary issues that arose in this inquiry.

Adequacy of PHSA's search for responsive records

[11] The applicant questioned in both his request for review and his submissions whether the PHSA had conducted an adequate search for responsive records. He said he had not, for example, received copies of a named individual's handwritten notes. Nor had he received copies of photographs or other types of records he expected.

[12] The PHSA objected at paras. 7 and 9-11 of its reply to the applicant's complaints about its search for records responsive to the second and third elements of the request. It points out, correctly, that the adequacy of its search for records is not listed as an issue in the notice for this inquiry and says that the inquiry timelines did not allow it time to respond on this issue. It also said that the applicant received the records of the named individual in a previous request that was the subject of another request for review (which led to Order 04-25, [2004] B.C.I.P.C.D. No. 25).

[13] The adequacy of the PHSA's search for records is not specified as an issue in the notice of inquiry. Moreover, the PHSA has not had an opportunity to make representations on it. The PHSA's search is not properly before me in this inquiry and I have therefore not considered it in this decision.

PHSA's response to first element of request

[14] The parties devoted considerable space in their submissions to the manner in which the PHSA responded to the first part of the applicant's request (records "related to external agents") and whether the PHSA had complied with its duty under s. 6(1) to assist the applicant in doing so.

[15] The PHSA says that initially it requested clarification of what the applicant meant by "external agents". Upon receiving further clarification, the PHSA told the applicant that it had no other records besides those he had already received in response to earlier requests. The PHSA provided details of its interactions with the applicant on this part of the request and attached copies of relevant correspondence. In closing, the PHSA said it had fulfilled its s. 6(1) duty regarding this part of the request (paras. 3-7, initial submission; paras. 1-4, reply submission).

[16] The applicant provides examples of "external agents" whose records he wants, as well as copies of his correspondence with the PHSA. He argues that the PHSA is willfully concealing responsive records (pp. 2 & 4, initial submission; p. 1, reply).

[17] The material before me indicates that certain aspects of the PHSA's responses to the second and third elements of the applicant's request of March 5, 2003 (*i.e.*, the PHSA's responses of August 13, 2003 and September 4, 2003) are in issue here but that the PHSA's responses to the first element are not, including whether or not the PHSA complied with s. 6(1) in its handling of this part of the request. I have therefore not considered here the parties' submissions on the first element of the request.

Non-responsive information

[18] The applicant objected to the PHSA's decision to sever information, including its severing of information on the grounds that it is not responsive to the request (*e.g.*, p. 3, applicant's reply). This issue relates to the PHSA's compliance with its duty under s. 6(1) of the Act to assist the applicant. This matter is also not specified as an issue in the notice for this inquiry.

[19] The PHSA nevertheless addressed this issue in its submission, saying that some of the records (pp. 35-39 and 70 and 96) that it retrieved in response to the applicant's request for security-related records contain information that does not relate to the applicant. It says it severed this latter type of information from the records and argues that it complied with its duty under s. 6(1) to assist the applicant in doing so (paras. 31-33, initial submission).

[20] It appears that the PHSA mistakenly identified pp. 37-39 in its submission as containing non-responsive information, as elsewhere it correctly identifies pp. 37-45 as submissions that Infection Control staff made to the human rights advisor who investigated human rights complaints made against the applicant (para. 8, initial submission). I have therefore not considered pp. 37-39 in the discussion of non-responsive information. As for pp. 35-36, 70 and 96, the supposedly non-responsive

information was not marked as such on the copies of these pages provided to me for this inquiry and I was unable to identify any. I therefore see no need to consider this issue here.

[21] **3.2 Personal Privacy** – The PHSA says that it severed a number of pages under s. 22 of the Act, as the withheld portions were:

- confidential patient information that it must withhold
- opinions about a CWHC physician that relate to that physician's performance and not to the position, functions or remuneration of that physician
- personal information related to complaints by CWHC employees through the British Columbia Nurses Union regarding alleged harassment by the applicant; the severed information included the complainants' identities and the substance of the complaints; the PHSA relies on Order 138-1996 in support of its severing
- third-party personal information in correspondence between various CWHC employees regarding the ongoing investigation into harassment complaints against the applicant, security concerns and concerns about working with the applicant

[22] The PHSA says it does not believe any of the withheld information relates to the position, functions or remuneration of any of the CWHC employees, which suggests it does not consider that s. 22(4)(e) applies to any of this information. The PHSA did not say which parts of s. 22(3) it believes apply to the withheld portions but its submission suggests that it considers ss. 22(3)(a), (d) and (g) to apply. The PHSA also argues that no relevant circumstances favour disclosure of the withheld information, although, again, it does not specify which parts of s. 22(2) it considered in concluding this (paras. 23-28 and 35-36, initial submission).

[23] The page numbers of the severed records listed in the PHSA's submissions on s. 22 did not match up with the severed records that were provided to me for this inquiry. For example, the severed versions do not include pp. 6-8, although the PHSA says it severed these pages under s. 22. I have therefore gone by the records themselves, the severed portions of which the PHSA highlighted in yellow and in many instances annotated with the exceptions it considers apply. In addition, I have considered whether s. 22 applies to the remaining withheld parts of pp. 20-23, 34-36 and 61, which the PHSA originally severed under s. 51 of the *Evidence Act* and later re-severed under s. 22 of the Act.

[24] The Information and Privacy Commissioner has considered the application of s. 22 in numerous orders, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56. I have applied here, without repeating it, the approach taken in those orders. The relevant provisions 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 …

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

(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, …

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

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party, …

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if …

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff, … .

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

[25] The severed and withheld records to which the PHSA applied s. 22 consist of emails, memos and minutes of meetings involving the applicant and CWHC employees, mainly those who complained against the applicant.

[26] A few items of withheld information in these pages are not personal information (*e.g.*, general statements about workplace incidents or situations), fall under s. 22(4)(e) (*e.g.*, factual accounts of things employees said or did in the workplace in terms of job duties, general comments about employees' actions in the workplace or statements of employees' workplace responsibilities) or are the applicant's own personal information (*e.g.*, accounts of things he said or did in the workplace), and are readily severed from the

records. The applicant is entitled to this information and I have prepared re-severed copies of the relevant pages for the PHSA to disclose to the applicant.

[27] Much of the withheld information consists of the personal views of identifiable CWHC employees about their dealings with the applicant in the workplace and about working with him. This information falls under s. 22(3)(d), as does information which the PHSA says relates to the performance of a CWHC physician. There is a small amount of medical personal information about patients which falls under s. 22(3)(a). The disclosure of these types of personal information is presumed to be an unreasonable invasion of third-party privacy.

[28] The applicant objects generally to the application of s. 22. With regard to the meeting minutes, he says at p. 5 of his initial submission that he should receive complete copies as he was present at the meetings. The PHSA responds (at para. 6 of its reply) that, while the applicant may have had a right to the minutes as an attendee and physician at the CWHC, he is making his request as a member of the public. The PHSA argues that his former status as a member of the committee and physician at the CWHC has no bearing on his entitlement to disclosure now. Without necessarily agreeing that the applicant's former position and role have "no" bearing whatsoever on this supposed right of access to this information now, I am of the view that they do not carry the day by any means. I discuss this further below.

[29] The applicant also makes arguments which appear to relate to s. 22(2)(c), saying the information he seeks is critical to his employment and that he needs to sort out what he considers to be conflicts of interest (*e.g.*, p. 6, initial submission). The Information and Privacy Commissioner has found that "rights" in the context of s. 22(2)(c) are "legal rights" (see Order 01-07, [2001] B.C.I.P.C.D. No. 7, for example). The courts have said the same thing in relation to s. 22. See *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner),* [1999] B.C.J. No. 198 (S.C.). The applicant provided no evidence or argument showing how the withheld personal information is relevant to any legal rights he may have had at stake in any proceedings in which he was involved at the time of his request. The records themselves also provide no support for the application of s. 22(2)(c). I conclude that it is not a relevant factor here.

[30] Although the PHSA does not address s. 22(2)(f) and does not provide any evidence from the CWHC employees involved on the confidentiality issue (which would have been helpful), it is abundantly clear from the records themselves that the CWHC employees supplied the personal information in confidence. I therefore accept that s. 22(2)(f) applies to the withheld third-party personal information, favouring its withholding.

[31] However, some of the information in the records consists of comments the applicant made in meetings or in e-mails in the course of his employment about other employees and his workplace interactions with them. While this third-party personal information falls under s. 22(3)(d), it would not be an unreasonable invasion of the employees' privacy for the applicant to receive this information, since he provided it in

the first place and is thus aware of it (see Order F05-02, [2005] B.C.I.P.C.D. No. 2, for example). In addition, the PHSA withheld minor items similar or identical to information it has already disclosed to the applicant. It would not, in my view, be an unreasonable invasion of third-party privacy for the applicant to receive duplicate versions of this information. I have therefore included both types of information in the re-severed pages for the PHSA to disclose the applicant.

[32] Four fully withheld pages (pp. 126-127 and 129-130) contain both personal information of the applicant that was provided in confidence and personal information of other individuals that falls under s. 22(3)(d) and that was provided in confidence under s. 22(2)(f). The personal information of these individuals is intertwined with the applicant's in such a way that it is not possible to sever the pages and disclose the applicant's personal information to him without unreasonably invading third-party privacy.

[33] The PHSA did not address the applicability of s. 22(5) in its submissions. However, I consider it possible in this case for the PHSA to give the applicant a summary of his personal information in pp. 126-127 and 129-130, as required by s. 22(5). I make the appropriate order below.

[34] The remainder of the withheld personal information is properly withheld under ss. 22(3)(a) and (d). No relevant circumstances apply favouring its disclosure to the applicant while s. 22(2)(f) does apply, favouring its non-disclosure. The applicant is not entitled to any of this remaining withheld information.

[35] **3.4 Section 14** – 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.

[36] 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, [2002] B.C.I.P.C.D. No. 1. I will not repeat those principles but will apply them here.

[37] The PHSA says that it applied s. 14 to pp. 106-107, a memo by counsel for the CWHC in relation to the ongoing legal proceedings between the applicant and the CWHC arising out of the harassment complaints made against the applicant by individuals at the CWHC. The PHSA provided affidavit evidence in support of its claim of litigation privilege from its external legal counsel. He deposed that he acted for the CWHC in relation to litigation arising out of a human rights complaint that a number of individuals had made against the applicant. He said the record in question is a memo he prepared of a meeting with a witness with respect to that complaint. He said he met with the witness and "prepared the memo for the purpose of obtaining evidence for use in the litigation involving [the applicant] and the Health Centre, which was ongoing at that time

and is still ongoing" (para. 2, Dowler affidavit). The applicant disputes these points, saying litigation is over (*e.g.*, p. 3, reply).

[38] Based on my review of pp. 106-107 and the affidavit evidence, I accept that the record was prepared in contemplation of litigation that was ongoing at that time and still underway at the time of the inquiry. I therefore agree with the PHSA that s. 14 applies to pp. 106-107.

[39] The PHSA also says that it severed information from pp. 74, 78-80 and 133 as it would reveal solicitor-client communications. It says that the basis for its claim of privilege is apparent on the face of the records. I find that disclosure of the severed information would reveal information protected by solicitor-client privilege and that s. 14 therefore applies to the severed portions. The withheld information on p. 133 also appears on p. 134 and s. 14 applies to it as well.

[40] **3.5 Custody or Control** – An applicant has a right under s. 5 of the Act to request access to records which are in the custody or under the control of a public body. In this case, if I find that the PHSA does not have custody or control of certain records, the matter ends there. If I find that the PHSA does have custody or control of these records, it must process them under 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, … .
>
> **Information rights**
>
> 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[41] In considering whether the PHSA has control of these records, I have applied, without repeating them, the principles for determining control discussed in Order 02-29, [2002] B.C.I.P.C.D. No. 29, Order 02-30, [2002] B.C.I.P.C.D. No. 30, Order 04-19, [2004] B.C.I.P.C.D. No. 19, and other orders which have looked at control, as well as the cases to which they refer.

"Personal notes" of an employee

[42] The PHSA takes the position that certain records from the Infection Control Service and its members, consisting of two sets of "personal notes of an employee" (pp. 1-3 and 46-48), are not within the custody or control of the PHSA or the CWHC. It says that the employee did not prepare them in her capacity as a CWHC employee but as an "aide mémoire" relating to her personal involvement with the applicant and that they were not used or intended to be used for any purpose relating to that employee's employment. The PHSA relies on *British Columbia* (*Ministry of Small Business,*

Tourism and Culture) v. *British Columbia* (*Information and Privacy Commissioner),* 2000 BCSC 929, [2000] B.C.J. No. 1494, in support of its position.

[43] The employee in question provided affidavit evidence on this issue:

> 3. Pages 1 to 3 are typewritten notes which were prepared by myself and [another employee] on my home computer as a means of recording events that related to [the applicant]. Neither myself or [the other employee] were instructed by anyone at the Health Centre to record these notes nor were these notes ever provided to anyone at the Health Centre.
>
> 4. Pages 46-48 are handwritten notes I prepared at home for my own use in dealing with [the applicant]. I was not instructed by anyone at the Health Centre to prepare these notes and I did not provide the notes to anyone at the Health Centre.

[44] The applicant's request was for records related to himself. Although the employee deposes that she prepared pp. 46-48 for her own use in dealing with the applicant, these pages do not on their face concern the applicant nor do they refer to him directly or indirectly. They are thus not responsive to the applicant's request. I do not therefore need to consider if they are in the custody or under the control of the PHSA.

[45] The applicant argues that pp. 1-3 were created before any human rights process was underway and were not used for that, but in preparation for a nursing grievance. (He does not explain why he thinks this.) He says it does not matter where the records are kept but that a record "becomes of the public body through its employee and especially in this case where the materials have been used against me in several instances. It matters not that the records were not created at the instruction of anyone" (pp. 1 & 4, reply).

[46] Pages 1-3 are typed notes outlining workplace incidents and events over some years involving the applicant, the employee who created them and others. First, while the records were created by an employee of the public body and relate to workplace events, the evidence establishes that the employee did not create them in the course of her employment or in her capacity as an employee of the CWHC but created them at home on her own time and for her own purposes. The employee states that no one at the PHSA instructed her to create them. Nor is there any indication that she was implicitly required to create them as was found to be the case with the counsellor in *Neilson* v. *British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640 (S.C.). Rather, she created them for personal reasons, as an "aide mémoire".

[47] The previous Commissioner was influenced by similar factors in Order No. 247-1998, [1998] B.C.I.P.C.D. No. 41, in finding that a former school principal's diary was not in the control of a school district. Similarly, in *Ministry of Small Business*, Shabbits J. was influenced by evidence that the employee was not required by her employer to create her diary but did so for personal reasons. He found that the Liquor Distribution Branch did not have control of the diary.

[48] In Order 02-30, the current Commissioner found that the public body's physical possession of the records was not enough to establish custody. In this case, there is no indication that the PHSA even knew of, let alone possessed, the records (until, I infer, the access request, in the wake of which the employee for some reason turned the records over to the PHSA). Nor is there any indication that the PHSA had any authority over their use or disposition or that pp. 1-3 were integrated with the PHSA's own records.

[49] The employee says she never provided the records to the PHSA (again, until the access request, I infer) and the PHSA says they were not used with respect to the employee's employment. There is also no evidence that the PHSA used or relied on the records in relation to the applicant's employment. Although the applicant disputes the PHSA's arguments on these points and says that the records were used in a nursing grievance and used against him, he does not provide any evidence in support of this assertion.

[50] For these reasons, I conclude that pp. 1-3 are not in the PHSA's custody or control for the purposes of ss. 3(1) and 4(1) of the Act.

Employees' submissions to human rights advisor

[51] It appears from the PHSA's decision letters that its original decision was to withhold pp. 37-45 under s. 22 of the Act and that it changed its mind during mediation, as it says in its initial submission that it does not have custody or control of pp. 37-45. In the alternative, the PHSA says that the records are the personal information of the complainants which they provided in confidence to the human rights advisor (paras. 8-15, initial submission).

[52] The PHSA describes pp. 37-45 as "written submissions made by various members of the Infection Control Service" to a human rights advisor conducting an investigation into human rights complaints made against the applicant in 2000. The PHSA says that its affidavit evidence establishes that the human rights investigation conducted by the human rights advisor was independent of the CWHC and that the CWHC was not provided with materials from the investigation, including the submissions made by the complainants and others to the human rights advisor. The PHSA said that the service agreement between the Human Rights Centre at the Vancouver/Richmond Health Board and the CWHC agreement for the provision of human rights services to the CWHC establishes that the Human Rights Centre has custody and control over any investigation materials and that the CWHC has no right to copies of materials in the investigation file, including the complainants' submissions.

[53] The PHSA provided affidavit evidence in support of its position from the former vice-president of Human Resources and Organizations Development for the CWHC:

> 2. In 2000 the Health Centre [CWHC] retained the services of the Human Rights Centre of the Vancouver/Richmond Health Board to provide services to the Health Centre. Now shown to me and marked as Exhibit "A" to this my Affidavit

> is a true copy of the Service Contract entered into between the Health Centre and the Vancouver/Richmond Health Board ("Contract").
>
> 3. In or about November 2000, pursuant to the Contract, the Human Rights Centre commenced an investigation into allegations of personal harassment made against [the applicant], a physician in practice at the Health Centre, that were alleged to be in violation of the Health Centre's Human Rights Policy. Now shown to me and marked as Exhibit "B" to this my Affidavit is a true copy of the Children & Women's Health Centre Human Rights Policy in effect in the year 2000.
>
> 4. The Contract provided that the Human Rights Centre maintained custody of all investigation materials, including the submissions of the complainants in the harassment allegations against [the applicant]. The Health Centre did not receive copies of the submissions made by the complainants in the harassment investigation. [Crist affidavit]

[54] The service agreement states that it is made between the Vancouver General Hospital and the CWHC, that the CWHC requires services to be carried out, that the CWHC "is desirous of using the services of the Human Rights Centre" at Vancouver General Hospital and that the Human Rights Centre has "indicated its willingness to provide these services in a capable manner". The agreement then sets out the services the Human Rights Centre will provide, including:

- consultation to CWHC management staff, medical staff and unions on human rights issues
- impartial and confidential intake of complaints as defined by CWHC's human rights and workplace dignity policy
- informal complaints resolution process including mediation of complaints between complainants and respondents
- formal investigation and decisions as specified in CWHC's policy and
- behavioural counselling for respondents

[55] The Human Rights Centre agrees in the service agreement to be available for consultation, to provide 24 hours a week of staff resources to CWHC in order to provide services under the agreement and to dedicate an individual staff person to be the "Human Rights Advisor" responsible for providing the majority of services to CWHC. The agreement also sets out a time frame for the services that the Human Rights Centre will provide under the contract and a schedule of fees that the CWHC will pay to the Vancouver General Hospital for the services of the Human Rights Centre. The CWHC agrees to provide the Human Rights Centre with the use of facilities (including a computer) and office space. The computer may be housed at the CWHC or the Human Rights Centre at the Vancouver Hospital "as circumstances warrant", becoming the property of the Human Rights Centre on severance of the agreement.

[56] The remaining pertinent parts of the contract read as follows:

> 5. Liability – The parties agree that the services provided by the HRC at VH [Human Rights Centre at the Vancouver General Hospital] are governed by C & W's [CWHC's] Policies and Bylaws, as well as the laws of British Columbia, Canada. All legal expenses that may, in any way, result from the services provided by the HRC at VH as a contractor for C & W will be covered by C & W, except by reason of illegal acts or careless actions on the part of staff of the HRC at VH.
>
> 6. Confidentiality – All information of any kind collected by the HRC at VH will be considered the property of the HRC at VH. The HRC will not divulge information of a confidential nature to the C & W without the written consent of the individual who provided the information or as prompted by valid legal proceedings.

[57] The CWHC's Human Rights Policy is a 13-page document the purpose of which is to provide a fair complaint resolution process which respects the rights of complainant and respondent. It says this is a remedial process which may first involve informal procedures and progressive discipline. It applies to CWHC's employees, volunteers, suppliers, medical and dental staff, students, patients and others associated with the CWHC. The policy states that the CWHC makes available the services of a Human Rights Advisor to resolve concerns internally where possible and to discuss other options.

[58] The policy goes on to define discrimination and harassment and then describes the procedures for processing and resolving human rights complaints: informal resolution of complaints, with the involvement of Human Rights Advisor as mediator; and formal investigation of complaints, normally with the Human Rights Advisor as investigator. A formal investigation leads to an investigation report for consideration by senior management of the CWHC and ends with a disposition of the complaint, together with the imposition of any appropriate remedies.

[59] The applicant describes the human rights investigation in question at some length in his submissions, including his perception of the human rights advisor's role in the process. He says that the investigation led, among other things, to his suspension without pay. He objects to the PHSA's position on pp. 37-45 on grounds that relate more to the applicability of s. 22 than the issue of whether the PHSA has custody or control of the records. He says that, under the human rights policy, he was supposed to have full disclosure of the complaint allegations but that he received only an "abbreviated version". He says the complainants' submissions relate to the human rights investigation and are about him, and he should therefore receive them.

[60] This situation overlaps considerably with the one I considered in Order 04-19. I had the following to say in that order about the meaning of "control":

> [46] Control is to be given a liberal and purposive meaning that promotes the objectives of British Columbia's access and privacy legislation. The nature of requested records and all aspects of their generation and use must be assessed in relation to the public body's mandate and functions. Records that are created or

> acquired by or for a public body as part of its mandate and functions will be under the public body's control. That control need not be exclusive. For example, a preliminary ruling respecting Order 03-19, [2003] B.C.I.P.C.D. No. 19, concluded that both the College of Pharmacists of British Columbia and the Ministry of Health had control of records in PharmaNet. The duty to provide access to records under the Act is not defined by the willingness of the public body or its staff, contractors or agents. It also prevails over outsourcing of the public body's functions and contractual silence or wording that would negate rights or obligations under the Act.

[61] In Order 04-19, the applicant was the respondent in a workplace harassment complaint investigation and requested the investigator's interview notes. The School District had hired a contract investigator to conduct the investigation and prepare a report. It maintained that the investigator's interview notes were not in its custody or control but in the investigator's, and that the terms of the contract had required only the preparation of his report. I found, after considering the relevant circumstances, that the investigator's interview notes were in the School District's control and I ordered the School District to process the notes under the Act.

[62] Instrumental in my decision in Order 04-19 was my conclusion that the investigator was performing a function of the School District—investigation of a workplace harassment complaint—which its own harassment policy required it to do and which it could have done itself. I said there was no principled reason to differentiate between the report, which the investigator was explicitly required to create under the terms of reference for the investigation, and his interview notes, which he was implicitly required or at least authorized to create. I also said that I found no reason in that case to differentiate between records created by an investigator who was an employee of the public body who conducts a workplace harassment investigation and those created by an investigator contracted to perform that function.

[63] The evidence here shows that the CWHC contracted with the Human Rights Centre at Vancouver Hospital for the Human Rights Centre to perform a function of the CWHC, the provision of human rights services to CWHC employees, including the investigation and resolution of human rights complaints, in accordance with the requirements of the CWHC's own human rights policy. This is a function which the CWHC could carry out itself, if it wished. The CWHC's policy does not require that the Human Rights Advisor be internal or external to the CWHC. As I noted in Order 04-19, a public body may contract with an external investigator to perform its functions for any number of reasons, including resources, expertise, impartiality and speed. The PHSA seems to suggest that the investigation's independence, which it says is established by contract, means it does not have control of the records. As I said in Order 04-19, however:

> [63] Public body control of files and other records of harassment complaint investigations and the conduct of independent, impartial and fair investigations are not mutually exclusive. It is common for an individual appointed as an independent investigator to be an agent of the appointing client or government body, whose files and records of the investigation are in the control of the principal

> (*Nova Scotia (Attorney General) and Sun Alliance Insurance Co. of Canada*, [2003] N.S.J. No. 423 (S.C.)) and for a public body to control files and other records of workplace investigations conducted by external contractors (*Canada (Information Commissioner)* v. *Canada (Minister of Citizenship and Immigration)*; *Canada (Information Commissioner)* v. *Canada (Immigration and Refugee Board)* [citations omitted].

[64] The evidence here also shows that, pursuant to the service agreement, the Human Rights Centre began an investigation in November 2000 of human rights complaints against the applicant under the CWHC's human rights policy and that the Human Rights Centre at the Vancouver Hospital maintained custody of the investigation records. The Human Rights Advisor at the Human Rights Centre at the Vancouver General Hospital (also an employee of the CWHC under the extended definition of "employee" in the Act) was apparently the person designated under the CWHC's Human Rights Policy to conduct the investigation into the complaints. He was thus authorized to collect, use and disclose personal information, on the CWHC's behalf, in the course of carrying out his contracted duties under the CWHC Human Rights Policy. He was also required to act in accordance with the requirements of the CWHC's Human Rights Policy. The Human Rights Centre at the Vancouver General Hospital was, in my view, performing, under contract, functions of the CWHC, required or authorized by the CWHC's Human Rights Policy.

[65] The PHSA says that pp. 37-45 are submissions prepared by CWHC employees to the Human Rights Advisor responsible for conducting the human rights investigation. The records themselves indicate that certain CWHC employees wrote to the Human Rights Advisor in their capacity as CWHC employees, recounting a number of workplace incidents and exchanges involving themselves and the applicant. I am satisfied that the complainants created the records in the course of their employment, as part of their workplace activities and functions and in order for the Human Rights Advisor to conduct his investigation into their human rights complaints against the applicant. The material before me also indicates that the CWHC used or relied on the records in a process affecting the applicant's employment.

[66] The service agreement says that the information that the Human Rights Centre at the Vancouver General Hospital collects under the agreement is the property of the Human Rights Centre and that the Human Rights Centre will not provide any of this information to the CWHC without consent "or as prompted by valid legal proceedings". The issue here is not one of legal ownership, however, but whether the CWHC has control of the material produced or compiled under the service agreement, an outsourcing agreement. CWHC cannot escape its obligations under the Act by outsourcing the human rights services that its human rights policy requires it to provide to its employees, as part of its responsibilities for the management of its employees. Outsourcing of these functions does not mean that the CWHC has no control over the records compiled or generated under the outsourcing agreement.

[67] The CWHC's human rights complaint and investigation process in this case is similar in all material respects to the harassment complaint investigation process which I examined in Order 04-19, where I found the investigator's notes to be under the control

of the public body. There is no material difference in my view between the material that the contractor produced during the investigation in question here and the material that the complainants produced for this investigation and which the investigator collected as part of his investigation. I conclude that the PHSA has control of pp. 37-45 for the purposes of ss. 3(1) and 4(1) of the Act. The PHSA must therefore process the applicant's request under the Act respecting these pages and must provide the applicant with a decision on whether or not he is entitled to access to all or part of the records.

4.0 CONCLUSION

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

1. I find that the PHSA is authorized to refuse access to the information it withheld under s. 14.

2. Subject to paras. 3 and 4, below, I require the PHSA to refuse access to the information it withheld under s. 22.

3. I find that the PHSA is not required to refuse access to some of the information it withheld under s. 22, as highlighted on the pages provided to the PHSA with its copy of this order.

4. I require the PHSA to perform its duty under s. 22(5) to provide the applicant with a summary of his personal information in pp. 126-127 and 129-130 within 30 days of the date of this order. As a condition under s. 58(4) of the Act, I require the PHSA to provide me with a copy of that summary.

5. I confirm that, in responding to the applicant as it did regarding pp. 1-3, the PHSA performed its duties under the Act.

6. I require the PHSA to comply with Part 2 of the Act by determining whether to apply one or more exceptions to all or part of pp. 37-45 within 30 days (as defined in the Act) of the date of this order and by providing a response to the applicant that meets requirements of s. 8 of the Act. As a condition under s. 58(4), I require the PHSA to provide me with a copy of that response concurrently with its delivery to the applicant.

April 7, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator