



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

Order F09-23

VANCOUVER COASTAL HEALTH AUTHORITY

Michael McEvoy, Adjudicator

November 18, 2009

Quicklaw Cite: [2009] B.C.I.P.C.D. No. 29

Document URL: <http://www.oipc.bc.ca/orders/2009/OrderF09-23.pdf>

Summary: The VCHA investigated abuse allegations concerning an elderly woman. Four family members related to the elderly woman requested records from the VCHA about themselves because of concerns they were the subject of these allegations. In considering all of the relevant circumstances, the VCHA is required to withhold the information in dispute under s. 22 of FIPPA. Though the *Adult Guardianship Act* did not trump FIPPA, VCHA's obligations under that Act were relevant to determining that the disputed records were provided in confidence.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), (c) and (f), 22(3)(a); *Adult Guardianship Act*, ss. 46(2) and 62(3).

Authorities Considered: **B.C.:** Order F07-03, [2003] B.C.I.P.C.D. No. 5; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F06-11, [2006] B.C.I.P.C.D. No. 18; Order F05-02, [2005] B.C.I.P.C.D. No. 2; Order No. 62-1995, [1995] B.C.I.P.C.D. No. 35; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order 03-43, [2003] B.C.I.P.C.D. No. 44.

1.0 INTRODUCTION

[1] This case arises from an investigation by the Vancouver Coastal Health Authority ("VCHA") into whether an elderly woman was a vulnerable adult in need of support or assistance due to neglect or abuse. As a result of the investigation, four family members (the applicants) were concerned they were the subject of wrongful allegations and separately asked for all information the VCHA had connecting them with their elderly family member,¹ to understand what had led to

¹ The elderly woman was related to all of the applicants but not the mother of all of them. For convenience, however, I will refer to the woman alternately as applicant #1's mother or simply the mother.

the investigation. After a lengthy delay, the VCHA refused access, citing s. 62(3) of the *Adult Guardianship Act*² (“AGA”) which prohibits disclosure of information obtained under that legislation. One of the applicants (“applicant #1”) reiterated she was only seeking her own records connected with the investigation and not her mother’s. Contemporaneously, applicant #1 also sought a review of VCHA’s decision from this Office. The VCHA responded by releasing further records, although it said it severed personal information of third parties under s. 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). The VCHA also refused disclosure of other parts of records as not being within the scope of applicant #1’s request, *i.e.*, the information did not concern the applicant. The VCHA said it had not found any personal information about the other three applicants. During the course of mediation, the VCHA also agreed that s. 62(3) of AGA did not apply but argued that ss. 32(1) and 46(2) of the AGA did. Mediation resulted in the release of a few more records but did not resolve all matters. An inquiry therefore took place under Part 5 of FIPPA.

[2] The applicants consented to the disclosure of their personal information to each other and applicant #1 served as the main contact for the others. It is therefore appropriate to consider all four requests together and accordingly this Office gave notice of this inquiry to all four applicants, along with the VCHA.

2.0 ISSUES

[3] The issues in this inquiry are:

1. Whether VCHA is required by s. 22 of FIPPA to refuse to disclose certain records, having regard to ss. 32(1) and 46(2) of the *Adult Guardianship Act*, and
2. Whether other portions of the records not disclosed are outside the scope of the original request.

[4] Under s. 57(2) of FIPPA the burden of proof concerning personal information of third parties is on the applicants.

3.0 DISCUSSION

[5] **3.1 Preliminary Issues**—After this Office had issued the notice for this inquiry, but before submissions were due, the VCHA wrote to applicant #1 saying that it had again reviewed the records in dispute and had decided to disclose portions of another 71 pages. VCHA relied on s. 22 of FIPPA for withholding some of these portions, added ss. 13 and 19 as a basis to except some portions and said the rest of the withheld items were not responsive to the request. The VCHA’s submissions in this inquiry did not rely on s. 13 but did add s. 14 as a further ground for withholding information.

² [RSBC 1996] Chapter 6.

[6] Both ss. 14 and 19 are discretionary exceptions to access. A public body is not generally permitted to invoke new discretionary exceptions this late in the process.³ I would add that this is not a case in which a public body seeks to rely on a new discretionary exemption because it has discovered new relevant facts that it did not know when it made its decision and could not have known using due diligence. Indeed, VCHA does not assert any new facts. It simply seeks to apply additional exemptions based on the facts already known when it delivered its original response under s. 8. Given my findings below, however, it is not necessary for me to decide whether to permit VCHA to raise ss. 14 and 19.

[7] **3.2 Background**—The VCHA is obligated, under the terms of the AGA, to investigate alleged or suspected cases of adult abuse, neglect or self-neglect. It must also determine whether the adult requires support or assistance and then provide assistance where necessary. The North Shore-Coastal Abuse and Neglect Program (“Program”), operating under the VCHA umbrella, undertakes these obligations.

[8] Applicant #1’s mother was referred to the Program for investigation and assessment to determine whether she might be a vulnerable adult, in accordance with the terms of the AGA. Physicians examined the mother and interviews were conducted with family members and others. It was determined that the mother was not abused but did require support and live-in care. VCHA’s submission sets out a detailed explanation of the services provided to the mother and the family in the course of, and because of, the investigation. It is apparent from the submissions that there was considerable acrimony among family members concerning care of the mother and many other matters, including family finances. The mother later died after moving into a care home.

[9] **3.3 The Records in Issue**—The investigation of the allegations concerning applicant #1’s mother and the care and services provided her generated a considerable number of records, which consist of reports, notes and emails involving the applicants and others. Some of the information in these records was obtained from, or created by, third parties. It is this information to which the applicants seek access.

[10] In total, VCHA identified and reviewed 400 pages of material. It refused to disclose third-party personal information on many of these pages⁴ and deemed all of the other withheld portions as non-responsive to the applicants’ requests.

[11] **3.4 Records Alleged to be Non-Responsive**—With respect to records and information the VCHA withheld as outside the scope of the applicant’s request, I have carefully reviewed that information and agree that it is

³ See for example F07-03, [2007] B.C.I.P.C.D. No. 5.

⁴ Specifically pp. 3-8, 10, 15, 16, 20, 22, 23, 28, 44, 50-55, 58, 73, 82, 86, 88, 94,95, 97-99, 105-108, 110-118, 120-131, 133, 134, 136-140, 142-144, 148, 150-152, 154, 155, 157-159, 160, 165, 166, 169, 190, 197-225, 231, 233, 238, 242, 244, 347, 348, 368, 369, 378, 379, 384, 385 and 386.

in fact non-responsive to the applicants' requests. This is because the information the VCHA removed on this basis does not relate to the applicants.

[12] **3.5 Third-Party Privacy**—The parts of s. 22 relevant to this inquiry are as follows:

- 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...
 - (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
 - ...
 - (c) the personal information is relevant to a fair determination of the applicant's rights,
 - ...
 - (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,

[13] **3.6 Section 22 Analysis**—The Commissioner discussed the application of s. 22 in Order 01-53⁵ and I apply that and other decisions on this provision without further elaboration.

Do the records contain personal information?

[14] The withheld information is primarily contained in "Clinical Service Event Detail" forms, which the Program uses to record interactions with, and reports about, clients and others. Other portions of the withheld records are notes of meetings or letters from third parties that for the most part relate to the VCHA's investigation of abuse allegations.

[15] In some cases, the personal information withheld is simply the name of the third party who provided the personal information about the applicants, in a record that the applicants have already received. In other cases, the withheld information includes reports, notes, letters or emails that record the opinions of

⁵ [2001] B.C.I.P.C.D. No. 56.

third parties (witnesses or VCHA employees) about the applicants. These opinions are the applicants' personal information. The nature of the opinions about the applicants reveals the identity of those persons expressing the opinions even if their names are withheld. I therefore consider below whether disclosing these opinions to the applicants would unreasonably invade the privacy of the identifiable third parties expressing those opinions.

Is disclosure not an unreasonable invasion of privacy?

[16] Section 22(4) sets out the circumstances in which a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. None of those circumstances applies here.

Unreasonable invasion of personal privacy

[17] Some of the withheld personal information concerns the medical condition and treatment of the mother, specifically portions of pp. 3-5, 22-23, 28, 99 and 166. Accordingly, its disclosure is presumed to be an unreasonable invasion of third-party privacy under s. 22(3)(a).

[18] **3.7 Relevant circumstances**—Section 22 contains a non-exhaustive list of relevant circumstances that a public body must consider in determining whether or not disclosure of personal information would constitute an unreasonable invasion of third-party privacy. The applicants' submissions do not directly address these circumstances, but, read cumulatively, imply the applicants were unfairly targeted, their rights were infringed upon and VCHA staff and service providers were malicious, corrupt and incompetent. There is a suggestion in these allegations that the circumstances in ss. 22(2)(a) and 22(2)(c) might apply here.

Public Scrutiny

[19] Having carefully reviewed the records, it is my view their disclosure would not assist in subjecting VCHA's actions to public scrutiny. Nor would it further illuminate, in any meaningful way, public understanding of the activities of the Program or assist in casting light on matters alleged by the applicants. This is because the information is either the opinions of individuals collected in accordance with the Program's mandate under the AGA or simply the names of individuals providing previously disclosed information. The fact that the applicants are unhappy with the Program's intervention does not, in the words of Adjudicator Francis in Order F05-02,⁶ "move the scale" in favour of subjecting the activities of the VCHA to scrutiny under s. 22(2)(a) by disclosing personal information that would unreasonably invade third-party personal privacy.⁷

⁶ Order F05-02, [2002] B.C.I.P.C.D. No. 2.

⁷ See also Order No. 62-1995, [1995] B.C.I.P.C.D. No. 35 and Order 02-56, [2002] B.C.I.P.C.D. No. 58.

Fair Determination of Rights

[20] The applicants obviously feel wronged by the actions of the Program and appear to believe that their reputations were unfairly maligned during the Program's investigation and later care of their mother. However, in my view, this does not demonstrate that s. 22(2)(c) is a relevant factor here favouring disclosure of the requested records. There is no evidence of any legal proceeding underway or contemplated involving the rights of the applicants, nor that the personal information sought has any bearing on a determination of their rights. The applicants provide no evidence as to how their legal rights are involved in respect to s. 22(2)(c) and therefore I find this provision is not a relevant circumstance in this case.

Supplied in Confidence

[21] The VCHA asserts that the personal information in issue was supplied in confidence within the meaning of s. 22(2)(f). The records, VCHA argues, were created in accordance with its duties under the AGA. It submits the legislative scheme the AGA establishes is a relevant consideration under s. 22(2). Under this scheme, any person with information indicating that an adult may be abused or neglected, and that the adult is unable to seek support or assistance, may report the circumstances to an appropriate agency. The designated agency is required to do several things when it receives a report. These include determining if the adult needs support and assistance and, if so, refer the adult to a variety of health and social services. It also includes informing the Public Guardian and Trustee or investigating to determine if the adult is abused or neglected and is unable to seek support and assistance. In carrying out an investigation, the VCHA is empowered to interview anyone who may assist and to obtain any information required in the circumstances. The VCHA notes that s. 46(2) of the AGA provides that a person must not be compelled to disclose the identity of someone who makes a report under the AGA.⁸ It also points to s. 62(3) of the AGA, which says that a designated investigating agency must not disclose information obtained under the AGA except in certain limited circumstances. While the VCHA concedes these provisions do not trump FIPPA, it submits that they do show a clear legislative intent that designated agencies should be able to conduct investigations without the risk of having to disclose the identity of their sources or the information provided.

[22] Amanda Brown is an employee of a VCHA program called "Re:Act" that investigates abuse allegations. Dr. Kathleen Bell-Irving is the physician who conducted the investigation in this case that included many of the interviews in issue here. Both swore affidavits in this inquiry and, although portions were

⁸ The VCHA also referred to a proposed amendment to s. 46(2). This amendment does not have the force of law and therefore it is not appropriate to consider it. The Notice of Inquiry also refers to "s. 32(1)" of the AGA. The VCHA did not refer to s. 32(1) in its submission and I will not consider it here because it is also a proposed amendment to the AGA.

in camera, none of the *in camera* affidavit evidence is necessary in determining whether the personal information was supplied in confidence.

[23] Brown stated:

As a matter of policy, and as mandated by the AGA, people who report cases of adult abuse to Re:Act, as well as those who provide further collateral information to AGA investigators, are assured confidentiality. We consider this extremely important. ... people are often reluctant to provide information and get involved in the investigation unless their confidentiality can be assured.

[24] Bell-Irving's evidence is more specific:

As required under the *Adult Guardianship Act...*, an investigation was conducted to determine whether [the mother] was a vulnerable adult in need of support or assistance due to neglect or abuse.... As a matter of routine, I advised all the people I interviewed that their information would be strictly confidential and that they would not be identified as sources of any information obtained by the program.

[25] It is clear that the VCHA collected the third-party personal information in the records in accordance with its mandate under the AGA. That legislation establishes a scheme predicated on the expectation that third-party personal information is supplied to the VCHA, or any other appropriate agency, in confidence. Section 46(2) of the AGA reads as follows:

A person must not disclose or be compelled to disclose the identity of a person who makes a report under this section.

[26] The adjudicator in Order 03-43⁹ made note of that section and stated the following with which I agree:

While s. 46(2) of the AGA does not take precedence over [FIPPA], it is a statutory indication of confidentiality that I consider relevant in this case. It supports the conclusion that there is an expectation that information provided under the AGA will be held in confidence. This supports the argument of [the public body], under s. 22(2) of [FIPPA], that the information was supplied in confidence.

[27] Having considered the legislative rubric provided in the AGA and all of the evidence in this case, including the above affidavits, I conclude that the responsive undisclosed information, including the names and information provided by third parties about the applicants, was supplied in confidence. This confidential supply of information is a significant factor favouring withholding the requested information in this case.

⁹ [2003] B.C.I.P.C.D. No. 44.

[28] I found above that disclosure of some of the information is presumed to be an unreasonable invasion of third-party privacy under s. 22(3)(a). The evidence provided does not rebut this presumption. Taken together with other relevant matters, including my finding that the personal information was provided in confidence, I find that disclosure of any of the information withheld by the VCHA would be an unreasonable invasion of third-party privacy under s. 22 of FIPPA.

[29] Section 22(5) requires a public body to provide a summary of the information about an applicant supplied in confidence unless the summary cannot be prepared without disclosing the identity of the individual who provided the information in confidence. In my view, it is not possible, in this case, to summarize the information about the applicant without disclosing the identity of the third party who supplied the information in confidence.

4.0 CONCLUSION

[30] For the reasons set out above under s. 58(2)(c) of FIPPA I require the VCHA to refuse access to those portions of the records in dispute that it withheld under ss. 22(1) of FIPPA.

[31] Given my finding above, no order is necessary with respect to the information the VCHA identified as outside the scope of the applicant's request.

November 18, 2009

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator