



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

Order F10-35

PROVINCIAL HEALTH SERVICES AUTHORITY

Michael McEvoy, Adjudicator

October 29, 2010

Quicklaw Cite: [2010] B.C.I.P.C.D. No. 53

CanLII Cite: 2010 BCIPC No. 53

Document URL: <http://www.oipc.bc.ca/orders/2010/OrderF10-35.pdf>

Summary: The applicant requested records about the Health Centre's Peer Review Committee examination of a harassment complaint against him. The PHSA refused to disclose the information because it said some records were personal notes and communications of persons acting in a quasi-judicial capacity and others were subject to solicitor-client privilege. The adjudicator found that s. 3(1)(b) excluded some records from FIPPA's application while the balance of the records were subject to solicitor-client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(b) and 14.

Authorities Considered: **B.C.:** F09-07, [2009] B.C.I.P.C.D. No. 10; F09-25, [2009] B.C.I.P.C.D. No. 31; Decision F10-09, [2010] B.C.I.P.C.D. No. 47; Order 00-16, [2000] B.C.I.P.C.D. No. 19; Order 02-12, [2002] B.C.I.P.C.D. No. 12. **AB:** Order 99-025, [1999] A.I.P.C.D. No. 31

Cases Considered: *Cimolai v Children's and Women's Health Centre of British Columbia*, 2007 BCCA 562; *Provincial Health Services Authority v. British Columbia, (Information and Privacy Commissioner)*, 2010 BCSC 931; *Cimolai v Children's and Women's Health Centre of British Columbia*, 2003 BCCA 338; *Cimolai v. Hall*, 2004 BCSC 153; *Cimolai v Children's and Women's Health Centre of British Columbia*, 2006 BCSC 1473; *M.N.R. v. Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.); *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597; *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC).

1.0 INTRODUCTION

[1] The applicant is a physician at the Children's and Women's Health Centre of British Columbia ("Health Centre") who was the subject of a workplace personal harassment complaint by another member of the Health Centre medical staff. The complaint resulted in the suspension of the applicant's employment and hospital privileges at the Health Centre in 2001. What has followed are a series of internal Health Centre review proceedings, numerous access to information requests under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") and several court applications.¹

[2] The Health Centre's "Peer Review Committee" ("PRC") is now considering the complaint against the applicant. The applicant requests:

...tapes, notes, transcripts and any such material relating to the Peer Review Committee's meetings of this month of April, 2009.

[3] The applicant directed his request to the Provincial Health Services Authority ("PHSA") because the Health Centre is a member agency of the PHSA. The PHSA provided the applicant an audio tape of the PRC's "Pre-hearing Conference" proceedings. The applicant wrote to the Office of the Information and Privacy Commissioner ("OIPC") complaining the tape was severed and that the PHSA had failed to produce any notes, transcripts or other related material he believed existed. According to the Portfolio Officer's Fact Report, the PHSA wrote the applicant confirming the tape was unsevered and the PRC did not create a transcript. The PHSA acknowledged that members of the PRC created notes in the course of their deliberations but said those were being withheld under s. 3(1)(b) of FIPPA as personal notes of persons acting in a quasi-judicial capacity. As well, the PHSA said it was withholding records in the custody of the PRC's legal counsel because those were subject to solicitor-client privilege under s. 14.

[4] The Portfolio Officer, under his delegated authority, told the applicant he was satisfied the PHSA had conducted a proper search of the records. The PHSA's decision to withhold documents responsive to the applicant's request remained in dispute, resulting in the issuance of an inquiry notice under Part 5 of FIPPA.

¹ Several previous Orders describe material events arising from the complaint (e.g., F09-07, [2009] B.C.I.P.C.D. No. 10 and F09-25, [2009] B.C.I.P.C.D. No. 31). Several court decisions do also, including *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2007 BCCA 562, cited by the PHSA, and most recently in *Provincial Health Services Authority v. British Columbia, (Information and Privacy Commissioner)*, 2010 BCSC 931.

2.0 ISSUE

[5] The stated issues in the inquiry notice are whether:

1. The PHSA is authorized to refuse access under s. 14;
2. Some of the records the applicant requested fall outside the scope of FIPPA under s. 3(1)(b); and
3. Sections 51(5) and (6) of the *Evidence Act* apply to some of the disputed records.

[6] The PHSA's submissions did not address this last matter nor did the applicant. I therefore take the PHSA to have abandoned this argument and I will confine this inquiry to the first two matters noted above.

[7] Section 57 is silent regarding the issue of whether records are excluded from the scope of FIPPA under ss. 3(1)(b) of FIPPA. Past orders have stated that in such cases it is in the interests of the parties to provide argument and evidence to support their positions on these issues. Section 57(1) of FIPPA provides that the Ministry must prove that the applicant has no right of access under s. 14.²

3.0 DISCUSSION

[8] The records at issue relate to the work of the PRC and will be described more fully below. I will begin discussion with a consideration of whether s. 3(1)(b) of FIPPA applies to some of these records.

[9] **3.1** Section 3(1)(b) reads as follows:

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: ...

(b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity;

[10] **3.2 How the records in issue came to be created**—When a member of the Health Centre's medical staff lodges a human rights complaint against a colleague it triggers a prescribed process under the Health Centre's Medical Staff Bylaws and Medical Staff Rules. That process, instituted in accordance with the *Hospital Act* and its Regulation, may be summarized as follows:³

² The Ministry received authorization to disregard the applicant's future requests for solicitor-client records for two years in Decision F10-09, [2010] B.C.I.P.C.D. No. 47. The applicant's request here predates that Decision.

³ PHSA initial submission, para. 27.

- (a) where a formal investigation is required, the complaint is investigated by a Human Rights Advisor in accordance with the Health Centre's Human Rights Policy;
- (b) the Human Rights Advisor prepares a report which sets out the Advisor's findings on whether or not the member's conduct is in violation of the Human Rights Policy;
- (c) the report of the Human Rights Advisor is provided to representatives of the management of the Health Centre, the complainant and the medical staff member;
- (d) the representatives of management consider their recommendations on the appropriate action to be taken and discuss those recommendations with the medical staff member;
- (e) if no agreement is reached on the recommendations, the report and recommendations are forwarded to the Medical Advisory Committee;
- (f) the Chair of the Medical Advisory Committee directs the formation of a Medical Staff Member Review Committee or Peer Review Committee to consider the complaint, the report and the recommendations of management;
- (g) the Peer Review Committee makes recommendations to the Medical Advisory Committee, the Chief Executive Officer and the Board of the Health Centre;
- (h) the Medical Advisory Committee can accept or reject the recommendation of the Peer Review Committee or it can hold a new hearing; and
- (i) the Board makes a decision on the disposition of the complaint.

[11] The Human Rights Advisor conducting the investigation giving rise to the present matter found that the applicant's conduct violated the Human Rights Policy. The Health Centre's management staff and the complainant disagreed about this finding. Therefore, the complaint advanced to the Medical Advisory Committee (MAC) chaired by Dr. Nardia Strydom. Dr. Strydom directed the formation of the PRC under paragraph (f) above. She also retained John Ankenman, a lawyer, to provide legal advice to the PRC.

[12] Articles 9.2.2.11 to 9.2.2.15 of the Health Centre's Medical Staff Rules set out the role of the PRC (referred to in the articles as the Medical Staff Member Review Committee):⁴

- 11 When a complaint is referred to the MAC, the Chair will strike a Medical Staff Member Review Subcommittee. This subcommittee will consist of the chair of the MAC (who will chair the meeting), the chair of the Credentials Committee, the president of the Medical Staff, a department head, and a member of the Medical Staff

⁴ PHSa initial submission, paras. 19 and 20.

executive. The membership of the subcommittee will be chosen to avoid conflict of interest and, when necessary, alternatives will be selected from the permanent MAC membership, the Department Heads, or from the Medical Staff Executive.

- 12 The Medical Staff Member Review Subcommittee will examine the documentation, will receive input from the Department Head, who will present the report, and will also receive input from others who can speak directly to concerns raised in the report.
- 13 The member of the Medical Staff and his/her counsel shall be permitted to make a presentation of their own, including references to any supporting materials they may wish to submit together with comments from others who can speak directly to the concerns raised in the report. (These details would normally be worked out in advance of the subcommittee meeting).
- 14 Following the investigation by the subcommittee, the Department Head will make a recommendation to the subcommittee on the action he/she feels to be appropriate.

And similarly, the Health Centre, through the Senior Medical Administrator, will also make a recommendation.
- 15 In the absence of the Department Head, the Medical Staff member, his/her counsel, the Senior Medical Administrator and Health Centre counsel, the subcommittee will reach a conclusion and formulate a recommendation to submit for consideration by the MAC.

[13] Under Article 9.2.2.17, the MAC “may accept or reject the subcommittee’s recommendation or decide to have the full MAC hear the case against the Medical Staff member and the Medical Staff member’s defense.”

[14] The PRC held a pre-hearing conference on April 7, 2009 to hear submissions about what materials it should receive in advance of its proceedings.⁵ At that time, each PRC member received a binder of documents related to the matter.

[15] **3.2 The records in dispute under s. 3(1)(b)**—The PHSA described these records as including notes and markings made by each member of the PRC in her/his own binder. As well, Dr. Nardia Strydom, the Committee chair, made other notes during the pre-hearing conference “related to her initial deliberations on the issues raised and concerns she wished to raise with the other PRC members.”⁶

⁵ PHSA initial submission, para. 14.

⁶ PHSA initial submission, para. 15.

[16] The PHSA identified other records relating to communications between members of the PRC and lawyer John Ankenman. I have considered these under my analysis of solicitor-client privilege below.⁷

Arguments

[17] The PHSA argues that the purpose of s. 3(1)(b) is to protect deliberative secrecy. It refers to a series of previous court cases involving the Health Centre and the applicant.⁸ The PHSA says it discerns the following principles from those cases:

- The PRC is required to provide an independent review of the complaint.
- A high degree of procedural fairness is required of the entire internal review process including the PRC.
- The statutory regime under the *Hospital Act* that provides for the cancellation of hospital privileges of a medical staff member at the Health Centre including the PRC creates a quasi-judicial process.
- The decision makers within the PRC act in a quasi-judicial capacity in fulfilling their obligations.

[18] The PHSA contends that the Supreme Court of Canada decision of *M.N.R. v. Coopers and Lybrand* (1978)⁹ establishes the criteria for determining whether an individual is exercising a quasi-judicial function and that that test is met in this case.

[19] The PHSA summarizes the test as follows:¹⁰

- (a) Is there anything in the language in which the function is conferred, or in the general context in which it is exercised, which suggests that a hearing is contemplated before a decision is reached?
- (b) Does the decision or order directly or indirectly affect the rights and obligations of persons?
- (c) Is the adversary process involved?
- (d) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

⁷ The PHSA did not distinguish the communications that went from client to lawyer from those going from lawyer to client. I treat them here as communications from lawyer to client necessitating their consideration under s. 14 of FIPPA; see Order 00-16, [2000] B.C.I.P.C.D. No.19.

⁸ *Cimolai v Children's and Women's Health Centre of British Columbia*, 2003 BCCA 338; *Cimolai v. Hall*, 2004 BCSC 153; *Cimolai v Children's and Women's Health Centre of British Columbia*, 2006 BCSC 1473; *Cimolai v Children's and Women's Health Centre of British Columbia*, 2007 BCCA 562.

⁹ 92 D.L.R. (3d) 1 (S.C.C.).

¹⁰ PHSA initial submission, para. 44.

[20] The PHSA submits the PRC's recommendation to the MAC directly affects the applicant because:

- the MAC may accept the recommendation of the PRC and forward it to the Board without conducting its own hearing.
- the MAC may also adopt the recommendation of the PRC after conducting a hearing.
- the Board, after conducting a hearing, may also accept the recommendation of the PRC, as forwarded by the MAC.

[21] The PHSA argues that the PRC recommendations can have significant consequences for the applicant at any stage of the process and, therefore, a high degree of procedural fairness is required. The PHSA says that, consistent with *Coopers and Lybrand*, the seriousness of the sanctions for a medical staff member strongly support the conclusion that the power exercised by the PRC in its process is quasi-judicial. It contends this case also involves the adversarial process in that there are two competing parties making representations to the PRC.

[22] The PHSA acknowledges that FIPPA applies to the PRC's administrative records but that such records are limited to matters like hearing schedules or the parties' submissions. The PHSA contends that, by contrast, the personal notes and communications of PRC members are excluded from FIPPA. It points to other orders it says explain the meaning of "personal notes and communications" that are outside the scope of FIPPA under s. 3(1)(b). An Alberta Order¹¹ describes "personal notes" as those taken by an individual that were intended only for that individual's use. The PHSA cites Order 02-12¹² as an example where notes recording the views of Workers Compensation Review Board panel members on such things as evidentiary issues were captured by s. 3(1)(b). The PHSA says Commissioner Loukidelis made similar findings in Order 00-16¹³. The PHSA does not say so explicitly but I take it to argue that the notes and markings in the binders conform to the types of records described in the above orders and are thus excluded from FIPPA's reach.

[23] The applicant does not directly address the s. 3(1)(b) issue and whether the PRC was acting in a quasi-judicial capacity when creating the records. In general terms, he argues the process followed by the PRC is not fair and does not follow the principles of natural justice. He believes that all arguments proffered by the PHSA are an attempt to improperly suppress information.

¹¹ PHSA initial submission, para. 72. The PHSA relies here on the finding by the Alberta Commissioner in Order 99-025 (Alberta) under that province's equivalent to s. 3(1)(b).

¹² [2002] B.C.I.P.C.D. No. 12

¹³ [2000] B.C.I.P.C.D. No. 19

Analysis

[24] The B.C Supreme Court commented on the purpose of s. 3(1)(b) in *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*:¹⁴

All are agreed that the purpose of s. 3(1)(b) is the protection of deliberative secrecy. One aspect of that is the need to protect the ability of those exercising judicial or quasi-judicial functions to express preliminary and tentative remarks and conclusions that might later have to be changed. The risk of their being published could have a constraining effect on the creative process. That consideration would apply to commissions of inquiry reviewing the propriety of conduct of individuals.

[25] Whether the notes and communications were created by PRC members acting in a quasi-judicial capacity is related to whether the PRC itself is a quasi-judicial body. In my view, the judgement in *PHSA v. British Columbia (Information and Privacy Commissioner)*¹⁵ specifically and conclusively addressed this issue.

[26] *PHSA v. British Columbia (Information and Privacy Commissioner)*, a decision of the Supreme Court of British Columbia, concerns a judicial review application of Order F09-07.¹⁶ It involves the same parties to this proceeding. At issue was whether the Human Rights Advisor was acting in a quasi-judicial capacity.

[27] Justice Pitfield stated that he did not accept:¹⁷

...that the only person or persons who serve in a quasi-judicial capacity in the discipline and privilege context are the members of the Board of the Health Centre charged with the responsibility of making the final determination in respect of the suspension or cancellation of privileges. Because of the process which has been created for the purpose of addressing human rights and privilege issues, all deliberative steps must be protected. In that way, those charged with the responsibility of formulating opinions which are essential to the eventual disposition of a complaint will be able to formulate their opinions free from concerns about inquiries into their thought-making processes.

[28] The PRC is one of those deliberative steps in the process described above. Moreover, this case involves not only the same complaint process but also the very same complaint under consideration by Pitfield, J. Given the findings in *PHSA v. British Columbia (Information and Privacy Commissioner)*,

¹⁴ 2004 BCSC 1597, at para. 70.

¹⁵ *PHSA v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 931.

¹⁶ [2009] B.C.I.P.C.D. No. 10

¹⁷ *PHSA v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 931, para. 33.

I am compelled to conclude that the members of the PRC act in a quasi-judicial capacity in the course of evaluating the applicant's complaint.

[29] The final question requiring determination is whether the PRC members created the personal notes and markings in their binders while acting in a quasi-judicial capacity.

[30] In Order 00-16 Commissioner Loukidelis described and distinguished records of an administrative nature subject to FIPPA from the type of personal note, communication or draft decision that would be excluded from FIPPA under s. 3(1)(b). I adopt that analysis and with it in mind, I have carefully reviewed the notes made by members of the PRC in their binders, the additional notes made by Dr. Strydom, the Chair of the PRC and the communications between members of the PRC. I have no difficulty finding that s. 3(1)(b) of FIPPA captures these personal notes and communications. For example, they include emails between Dr. Strydom and the PRC members with regard to the PRC's deliberative process. They also include personal notes recorded by Dr. Strydom and other PRC members for apparent potential use during the proceeding and later individual reflection. In short, I find these records in dispute to be personal notes and communications of persons acting in a quasi-judicial capacity thereby excluding them from review under FIPPA.

[31] **3.3 Solicitor-Client Privilege**—The PHSA claims solicitor-client privilege over the balance of the records in dispute. The PHSA describes these records as consisting of:

- (a) written communications between John Ankenman and members of the Peer Review Committee created for the purpose of providing legal advice and seeking legal advice;
- (b) notes of meetings between John Ankenman and members of the Peer Review Committee created for the purpose of providing legal advice and seeking legal advice;
- (c) drafts of documents prepared by John Ankenman for review by members of the Peer Review Committee;
- (d) personal file notes and internal memoranda of John Ankenman and others in his office; and
- (e) accounts for legal services

[32] The PHSA argues that these records were created for the purpose of providing and seeking legal advice.

[33] John Ankenman deposes that the Chair of the PRC, Dr. Strydom, retained him to provide legal advice to members of the PRC:

...primarily to ensure that the process followed by the [Committee] for addressing and resolving the complaints against [the applicant] accords with the common law principals of natural justice and administrative law, the

applicable internal rules and procedures, and the considerable body of jurisprudence developed in earlier decisions of the Courts relating to the complaints against [the applicant].

[34] He states that in his capacity as counsel to the PRC, he created or requested from the PRC members various documents. He provides additional detail concerning the nature of the records already outlined above:

- a) Letters to and from the PRC members, by fax, mail and email;
- b) Drafts of documents for the consideration of PRC members and the PRC Chair relating to the proceedings;
- c) Personal notes relating to my review of the material documents including the applicable jurisprudence and internal Policies, Rules and Bylaws of the Health Centre;
- d) Internal memoranda within my firm;
- e) Statements of account directed to PRC Chair Dr. Nardia Strydom.

[35] He also deposes that the following documents are in the possession of the applicant or “available to the public”:¹⁸

- a) Correspondence from and to [the applicant] and from counsel to the Health Centre, by mail and email;
- b) Documents proposed to be included and included in a binder of core documents;
- c) Decisions of the Courts and from the Office of the Information and Privacy Commissioner relating directly or indirectly to the proceedings;
- d) The relevant Policies, Rules and Bylaws of the Health Centre.

[36] The applicant disputes that solicitor-client privilege applies here. He submits that there “is no indication in the medical staff rules or bylaws that a lawyer has any standing on a [PRC].¹⁹ For this reason, the applicant argues there is a waiver of “secrecy” concerning anything John Ankenman does for the PRC or anything that PRC members communicate with him.²⁰

[37] The applicant also sets out a series of reasons²¹ why he believes that the PRC is not acting in accordance with the principals of natural justice.

¹⁸ Affidavit of John Ankenman, para. 6.

¹⁹ Applicant’s reply submission, p. 4.

²⁰ Applicant’s reply submission, p. 4.

²¹ Applicant’s reply submission, pp. 6 and 7.

Analysis

[38] Section 14 of FIPPA reads as follows:

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

[39] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal advice privilege and litigation privilege. The PHSA asserts that legal advice privilege applies here.

[40] Decisions of this office have consistently applied the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:²²

[T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:

1. there must be a communication, whether oral or written;
2. the communication must be of a confidential character;
3. the communication must be between a client (or his agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[41] The PHSA's sworn affidavit evidence demonstrates that the communications at issue, and the papers relating to it, are in writing. The PHSA's submissions establish that Dr. Strydom, as the PRC's Chair, has authority to retain a lawyer and that the communications between the members of the PRC and its lawyer, John Ankenman, are of a confidential character. I also find the communications at issue clearly relate to the provision of legal advice. John Ankenman deposes that the advice in question, among other things, relates to counseling PRC members on the applicable rules of natural justice and administrative law.²³ This point is confirmed by Dr. Strydom who states it is critical that the PRC ensures there is "strict adherence to the procedural rules within the [Medical Staff] Rules, and strict adherence to the procedural rules recognized in the common law decisions of the courts considering the applicable principals of natural justice in similar matters...".²⁴ The importance of following this approach is critical, according to Dr. Strydom, given "the extensive previous judicial proceedings involving the parties...".²⁵

²² *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC).

²³ Affidavit of John Ankenman, para. 3.

²⁴ Affidavit of Nardia Strydom, para. 9.

²⁵ Affidavit of Nardia Strydom, para. 9.

[42] In summary, the PHSA's sworn evidence and detailed description of the disputed records persuade me that the communications and papers identified at paragraph 31 relate to the seeking, formulating or giving of legal advice. Therefore, the PHSA has properly applied the exception to disclosure under s. 14 of FIPPA to those records.

[43] I would add that the applicant's claim that the Medical Staff Bylaws or Medical Staff Rules prohibit John Ankenman's "participation" on the PRC is without merit. I have already noted that the PRC Chair acted within her authority to retain counsel. There is nothing in the Rules and Bylaws that would negate such authority.

[44] The applicant's submissions that the PRC's process lacks natural justice are not matters over which I have authority and I will therefore not comment on them. My sole task here is to determine whether certain records are within the scope of FIPPA and whether for other records the PHSA has properly applied any claimed exceptions to those records.

4.0 CONCLUSION

[45] Having confirmed that s. 3(1)(b) of FIPPA excludes the records identified at paragraph 30 above from FIPPA's application, it is not necessary that I make an order about them.

[46] Under s. 58 of FIPPA, I confirm the PHSA is authorized under s. 14 of FIPPA to withhold the records identified at paragraph 31 of this Order.

October 29, 2010

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator