

SEP 09 2014



No.  
Vancouver Registry

In the Supreme Court of British Columbia

Between

VANCOUVER ISLAND HEALTH AUTHORITY

Petitioner

and

MARK WILLSON and THE INFORMATION AND PRIVACY  
COMMISSIONER OF BRITISH COLUMBIA

Respondents

**PETITION TO THE COURT**

**ON NOTICE TO:**

Mark Willson  
c/o Timothy Richards (Agent)  
1104 Hadfield Avenue  
Victoria, BC V9A 5N5

**AND ON NOTICE TO:**

The Information and Privacy Commissioner of British Columbia  
PO BOX 9038 Stn. Prov. Govt.  
Victoria, BC V8W 9A4

**AND ON NOTICE TO:**

Attorney General of the Province of British Columbia  
Ministry of the Attorney General  
Legal Services Branch  
1001 Douglas Street  
Victoria, BC V8V 1X4

**This proceeding is brought for the relief set out in Part 1 below, by**

The person named as Petitioner in the style of proceedings above

If you intend to respond to this Petition, you or your lawyer must

- (a) file a Response to Petition in Form 67 in the above-named Registry of this Court within the time for Response to Petition described below, and

- (b) serve on the Petitioner
- (i) 2 copies of the filed Response to Petition, and
  - (ii) 2 copies of each filed Affidavit on which you intend to rely at the hearing.

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the Response to Petition within the time for Response.**

### Time for Response to Petition

A Response to Petition must be filed and served on the Petitioner,

- (a) if you were served with the Petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the Petition anywhere else, within 49 days after that service, or, and
- (d) if the time for Response has been set by Order of the Court, within that time.

(1)	The address of the Registry is: The Law Courts 800 Smithe Street Vancouver, British Columbia V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the Petitioner is: c/o Bull, Housser & Tupper LLP 900 – 900 Howe Street Vancouver, British Columbia V6Z 2M4
(3)	The name and office address of the Petitioner's lawyer is: Bull, Housser & Tupper LLP 900 – 900 Howe Street Vancouver, British Columbia V6Z 2M4 Attention: James H. Goulden

## Part 1: ORDERS SOUGHT

1. The petitioner, Vancouver Island Health Authority ("VIHA") seeks:
  - (a) An order that order (a) of Order F14-27 dated July 28, 2014 (the "Order") of the delegate of the Information and Privacy Commissioner (the "Delegate") requiring VIHA to provide certain information and records pursuant to FIPPA be quashed or set aside;
  - (b) A declaration that VIHA is entitled to withhold portions of records as well as records in their entirety as being out of scope or non-responsive to requests made under the *Freedom of Information and Protection of Privacy Act* ("FIPPA");
  - (c) Costs; and
  - (d) Such further and other relief as this Honourable Court deems just.

## Part 2: FACTUAL BASIS

1. VIHA is a health authority constituted under the *Health Authorities Act*, R.S.B.C. 1996, c. 180 and has an address for service in this matter at 900 – 900 Howe Street, Vancouver, British Columbia.
2. The respondent Mark Willson (the "Respondent Willson"), is an individual with contact information through his agent, Timothy Richards, at 1104 Hadfield Avenue, Victoria, British Columbia.
3. The respondent Information and Privacy Commissioner for British Columbia (the "Respondent IPC"), is an officer of the Legislature appointed pursuant to and with the powers conferred by FIPPA. It has an address for service in this matter at PO BOX 9038 Stn. Prov. Govt, Victoria, British Columbia.
4. On or about August 16, 2010 the Respondent Willson made an initial freedom of information ("FOI") request to VIHA pursuant to FIPPA, seeking a copy of records relating to fixed site needle exchange. On or about September 8, 2010 the Respondent Willson clarified that he was seeking access to records relating to VIHA's decision-making process concerning fixed-site needle exchange services in Greater Victoria for the period February 2008 to August 16, 2010.
5. On or about February 9, 2011 VIHA provided some records and information which was responsive to the FOI request, but withheld some records and information on the basis that the records and information were outside the scope of the request and that other records and information within the scope of the request fell within the ss. 12(3)(b), 13, 14 and 22 exceptions of FIPPA.
6. On or about March 8, 2011 the Respondent Willson made a request for review to the Respondent IPC regarding VIHA's withheld records and information. During this review

process, VIHA identified additional responsive records and information to the Respondent Willson's request, which it disclosed to him on or about August 28, 2012. Again, VIHA withheld some records and information on the basis that they were outside the scope of the request and that other records and information fell within the ss. 12(3)(b), 13, 14, 21 and 22 exceptions of FIPPA.

7. On or about July 18, 2011 the Respondent Willson requested that the matter proceed to a written inquiry before the Respondent IPC, with the exception of the records and information which were withheld pursuant to s. 21.
8. Attached as **Schedule "A"** to this petition is the Notice of Inquiry dated July 19, 2012.
9. Attached as **Schedule "B"** to this petition is a copy of the Respondent IPC's Investigator's Fact Report dated July 19, 2012.
10. Attached as **Schedule "C"** to this petition is a copy of the initial submissions of VIHA and the Respondent Willson to the Respondent IPC on the written inquiry.
11. Attached as **Schedule "D"** to this petition is a copy of the reply and additional submissions of VIHA on the written inquiry.
12. Attached as **Schedule "E"** to this petition is a copy of the Respondent IPC's Investigator's Fact Report #2 dated May 6, 2014, which replaces the Fact Report dated July 19, 2012.
13. Attached as **Schedule "F"** to this petition is a copy of a letter dated May 15, 2014 regarding the Notice of Inquiry.
14. Attached as **Schedule "G"** to this petition is a copy of the Order, dated July 28, 2014, in which the Delegate made the following relevant findings:

[10] While the information marked "out of scope" in the responsive records may not itself be responsive to the applicant's request, VIHA cannot properly withhold it from the applicant on the basis that it is "out of scope". This is because the information is contained in records that are responsive to the applicant's request. This approach is consistent with ss. 4(1) and (2) of FIPPA, which state:

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.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[emphasis and underlining in original]

[11] The Legislature confers a right to access to "records" under s. 4(1) of FIPPA, which is subject to information excepted from disclosure under Division 2, Part 2 of FIPPA. These exceptions to disclosure each relate to "information" rather than "records". Therefore, even if only a portion of a record is responsive to an applicant's request, the public body is required to disclose all of the information in that responsive record unless an exception to disclosure applies.

[12] The requirement for a public body to disclose an entire responsive record to an applicant, as opposed to only the responsive information in that record, may result in the public body disclosing more information than if it was only required to disclose responsive "information". This broader disclosure makes it less likely that there will be a misunderstanding about the real weight or meaning of the disclosed information due to it being out of context. It also helps prevent access requests from being interpreted too narrowly. This more fulsome disclosure is consistent with the stated purpose in s. 2 of FIPPA to make public bodies more accountable, as well as the requirement in s. 6 of FIPPA that public bodies must respond to applicants openly, accurately and completely.

15. The Delegate ordered, under s. 58 of FIPPA that VIHA was:
  - (a) required to give the Respondent Willson a decision under FIPPA about whether he is entitled to have access to the information in the records that VIHA marked "out of scope" [or whether it could be withheld under a Division 2 exception];
  - (b) required to disclose the information VIHA is withholding under s. 12(3)(b) of FIPPA;
  - (c) authorized to refuse to disclose the information it is withholding under s. 13 of FIPPA, except as specified in (e);
  - (d) authorized to refuse to disclose the information it is withholding under s. 14 of FIPPA; and
  - (e) required to give the Respondent Willson access to information which the Delegate highlighted and that will be sent to VIHA.
16. Attached as **Schedule "H"** to this petition is a clarifying letter regarding the Order from the Delegate dated July 31, 2014.
17. VIHA does not dispute the Delegate's findings in (b) – (e) above but seeks judicial review of the remainder of the Order.

### Part 3: LEGAL BASIS

18. VIHA relies on:
  - (a) *Supreme Court Civil Rules* B.C. Reg. 168/2009, Rules 1-3, 2-1, 16-1 and 22-2;

- (b) *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 as amended;
- (c) *Administrative Tribunals Act*, S.B.C. 2004, c. 45 as amended;
- (d) *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 as amended; and
- (e) the inherent jurisdiction of this Honourable Court.

### Grounds for Judicial Review

19. The basis upon which this application for judicial review is brought is that the Delegate erred in law and breached the rules of procedural fairness by making an order regarding the records and/or information that were outside the scope of the request.

### Standard of Review

20. A determination of the standard of review must be determined on the basis of the common law as the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, does not apply to the decision of the Delegate.

*Weyerhaeuser Company Ltd. v. British Columbia*  
(Assessor of Area No. 4 - Nanaimo Cowichan), 2010 BCCA 46 at paras. 22 – 27

*Economical Mutual Insurance Company v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 903 [*Economical*] at para. 49

21. There are two standards of review: correctness and reasonableness.

*Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para. 34

22. The process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

*Dunsmuir* at para. 62

23. Questions of jurisdiction, procedural fairness and the statutory interpretation of s. 4 of FIPPA, are to be reviewed on a standard of correctness.

*Dunsmuir* at paras. 59 and 129

*Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*,  
2009 BCSC 1481 at para. 70, appeal dismissed as moot, 2011 BCCA 334

### Out of Scope

24. The Delegate erred in his conclusion regarding the out of scope information as follows.

### *Jurisdiction*

25. The Delegate did not have the authority to make the Order in relation to the out of scope information, as the Respondent Willson never requested the information which was deemed to be out of scope. A request defines and triggers the right of access and the duties of the public body. The Delegate has no jurisdiction to consider access to records or information outside the scope of the request or to order VIHA to produce such information or portions of records which have not been requested.
26. The Delegate further erred in requiring VIHA to process and release out of scope records pursuant to s. 58 of FIPPA. There is no duty on a public body under FIPPA to do so.

### *Procedural Fairness*

27. Even if the Delegate had the jurisdiction to consider the out of scope portions of records in the Inquiry, the Delegate had an obligation to advise VIHA that it may make an order regarding out of scope portions of records.
28. The Delegate did not afford VIHA a reasonable opportunity to make submissions with respect to the out of scope records and information and erred in making its finding on this issue without allowing VIHA to make such submissions. Neither the first or the second Notice of Inquiry identified this as an issue which would be considered by the Delegate. The inquiry was only to consider whether VIHA was required to refuse access to information under s. 22 of FIPPA and was authorized to refuse access to information under ss. 12(3)(b), 13 and 14 of FIPPA.
29. A Notice of Inquiry delineates the scope of the inquiry. If an issue does not appear in the Notice of Inquiry, a party cannot consider whether or not to lead evidence on a certain point. A party is entitled to know the case it has to meet and deciding an issue on a point on which the parties have not had a reasonable opportunity to present submissions breaches the rules of procedural fairness.

*Economical at paras. 79 – 89*

### *Law*

30. In addition, the Delegate did not carry out a proper analysis of the interpretation of s. 4 of FIPPA. He incorrectly concluded that right of access to a "record" in subsection (1) and exceptions to "information" in subsection (2) means that even if only a portion of a record is responsive to an applicant's request, the public body is required to disclose all of the information in that responsive record unless an exception to disclosure applies. Section 4 of FIPPA does not require this.
31. Alternatively, the duty to provide responsive records under s. 6 of FIPPA ought to be read to include responsive information but not irrelevant or unresponsive information.

32. In making his determination the Delegate failed to read s. 4 in conjunction with the legislation as a whole. In particular the Delegate:
- (a) incorrectly concluded that broader and unresponsive disclosure fulfills the s. 2 purposes by making public bodies more accountable;
  - (b) did not consider the interaction between ss. 4 and 6;
  - (c) did not properly consider the duties of public bodies and the associated jurisprudence of s. 6;
  - (d) failed to consider other sections concerning access rights in Part 2, Division 1 and failed to take into account the relevant context of other sections of FIPPA, specifically, ss. 8, 9, 24, 25, 57 and 58, all of which contemplate access to "part of a record" and disclosure of "information" rather than a "record"; and
  - (e) failed to consider the reason for the exceptions provided in Part 2, Division 2.
33. Finally, the Delegate failed to contemplate the applicable policy considerations. The public good and the efficient use of resources as balanced with the right of access, necessitate public bodies only providing access to those records which were requested, acting reasonably in support of transparency to provide related contextual information that enhances an applicant's understanding of the requested records. Providing non-responsive and unrelated information would substantially increase the use of resources. One example is the obligations of the public body to notify third parties pursuant to s. 23 of FIPPA which would become a significant undertaking if out of scope records were included in responses to access requests.
34. The non-inclusion of non-responsive information in a response to an access request accords with the overarching principles and framework of FIPPA, which includes and explicitly recognizes the concomitant, balancing principles of privacy and confidentiality. It also promotes accuracy and efficiency in the provision of public services.

### Conclusion

35. As a result of the above errors, the Delegate did not make a correct determination considering the facts and the law. Order (a) should therefore be quashed or set aside and this Court should declare that VIHA is entitled to withhold records and information which are not responsive to access requests.

### Part 4: MATERIALS TO BE RELIED ON

1. Affidavit #1 of Cathy Yaskow; and
2. Such further and other material as counsel may advise and this Honourable Court may allow.

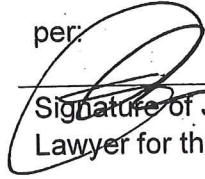


The petitioner estimates that the hearing of the petition will take one day.

Bull, Housser & Tupper LLP

per:

Date: 9/Sep/2014

  
Signature of James Goulden,  
Lawyer for the Petitioner

**To be completed by the court only:**

Order made

- in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this petition
- with the following variations and additional terms:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of  Judge  Master