



Order F24-27

PROVINCIAL HEALTH SERVICES AUTHORITY

Jay Fedorak
Adjudicator

April 8, 2024

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Summary: An applicant requested from the Provincial Health Services Authority (PHSA) statistical comparisons between individuals who had not been vaccinated and individuals who had recently been vaccinated as to rates of Covid-19 positive tests, hospitalizations and deaths. PHSA responded that the records did not exist and that s. 6(2) did not require it to create the records because it could not create them using its normal hardware, software or technical expertise and without unreasonably interfering with its operations. PHSA also responded that, if it had to create the records, then it would withhold all the information in those records under s. 19(1) (harm to public safety). The adjudicator found that s. 6(2) did not require the PHSA to create the requested records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 6(2)(a) and (b) and 19(1).

INTRODUCTION

[1] The applicant describes himself as a citizen concerned about the safety and efficacy of Covid-19 vaccines. He made a series of requests under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Provincial Health Services Authority (PHSA) relating to rates of Covid-19 positive tests, hospitalizations and deaths. The request at issue consisted of the following:

- a) The number of individuals who have not been vaccinated (“unvaccinated”),
- b) The number of individuals who have had 1 dose and <3 weeks since receipt of the 1st dose (“pre dose”),
- c) The number of cases for unvaccinated individuals and individuals with the same definition of pre dose,
- d) The number of hospitalizations for unvaccinated individuals and pre dose individuals,

- e) The number of deaths for unvaccinated individuals and pre dose individuals.

For the timeframe of July 27, 2021 – August 23, 2021.

[2] PHSA responded that disclosure of the information would harm public health and safety and that it was withholding the information under s. 19(1).

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the PHSA's decision. Subsequently, PHSA informed the applicant that the requested records did not exist, and it was not required to create them under s. 6(2).

[4] Mediation failed to resolve these issues and the applicant requested that the matter proceed to an inquiry.

ISSUES AND BURDEN OF PROOF

[5] The issues to be decided in this inquiry are:

1. Does s. 6(2) require PHSA to create the records?
2. Does s. 19(1) authorize PHSA to refuse to disclose the information in the records?

[6] FIPPA is silent on the burden of proof in a hearing related to s. 6(2) matters. Past orders have found that the burden is on the public body to show that it has performed its duties.¹ Section 57(1) places the onus on the public body to prove that the applicant has no right of access to the information in a record under s. 19(1).

DISCUSSION

[7] **Background** – PHSA is the health authority responsible for specialized health care and related services in British Columbia, including the BC Centre for Disease Control (BCCDC). These services include public health surveillance, detection, treatment, prevention and consultation. The BCCDC supports the Province's response to the COVID-19 pandemic, including in relation to research and data analysis and public health surveillance related to the virus. During the pandemic, the BCCDC generated a broad range of statistical information about the spread of infection among the population in British Columbia.

[8] **Requested records and information**– PHSA takes the position that there are no records currently in existence containing the information that the

¹ Order F23-55, 2023 BCIPC 64 (CanLII), para. 6, Order F20-13, 2020 BCIPC 15 (CanLII), para. 13.

applicant has requested. This information would consist of statistics representing the numbers during a specific four-week period of individuals who fell within the following categories: tested positive for Covid-19; were hospitalized; and died. The applicant is seeking a statistical comparison between all individuals in the Province who had not been vaccinated; those who had just been vaccinated within three weeks of the dates at issue; and those who had been vaccinated for more than three weeks prior to the dates at issue.

Duty to Assist – s. 6(2)

[9] The relevant provision reads as follows:

- 6 (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
- (2) Moreover, the head of a public body must create for an applicant a record to which section 4 gives a right of access if
- (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
 - (b) creating the record would not unreasonably interfere with the operations of the public body.

[10] The applicant does not dispute PHSA’s assertion that the records as requested currently do not exist. Therefore, the matter at issue is whether s. 6(2) requires PHSA to create the requested records. If the circumstances in both 6(2)(a) and 6(2)(b) apply, then PHSA must create the records. Sections 6(2)(a) and (b) are joined by the conjunctive word “and” which means that a public body must create a record only if both conditions are met. In other words, PHSA is not required to create the records if it can establish the records cannot be created in the manner described in s. 6(2)(a) or that creating the records would unreasonably interfere with its operations in accordance with s. 6(2)(b).

[11] **Section 6(2)(a) (normal hardware and software and technical expertise)** – The proper approach to applying s. 6(2)(a) is outlined in Order F24-07.² It involves considering the following questions:

1. Can the requested record be created from a machine readable record?
2. Is the machine readable record in the custody or under the control of the public body?
3. Can the record be created using the public body’s normal computer hardware and software and technical expertise?

² Order F24-07, 2024 BCIPC 10 (CanLII).

[12] PHSA submits that it cannot create the requested records from a machine readable record using its normal computer hardware and software and technical expertise. It acknowledges that it possesses some, but not all, of the raw data required to create the requested records. Nevertheless, it asserts that there is no computer program that can create an automated report that would provide the statistics responsive to the request, as requested. It says the process that would be necessary to create any record that would be partially responsive to the request would require “the sequential application of individual expertise and manual review”.³

[13] PHSA outlines the process that would be needed to generate the requested records. First, it would have to create a computer program capable of processing the data requested within the dates and parameters. Given that the vaccination status of some individuals would change over time, the PHSA says it could only generate statistical estimates, and it would have to design the methods required to generate those estimates.

[14] PHSA says it does not have any data relating to the total number of unvaccinated individuals, but that it has data representing the total number of vaccinated individuals. PHSA explains that it could calculate the total number of unvaccinated individuals by subtracting the number of vaccinated individuals from projections of the total population it could obtain from BC Stats. Nevertheless, it says that it does not have any statistics of its own on the total population. PHSA submits that these records of projection of the total population of the Province are not under its custody or control.⁴

[15] Therefore, the PHSA says that, to obtain some of the information necessary to respond to the applicant’s request, it would have to manually conduct research using the information holdings outside of its custody or control on behalf of the applicant.

[16] The PHSA also explains that generating some of the requested information would involve combining data from multiple sources and data systems. It says:

Responding to such requests requires familiarity with the data and information technology systems involved. ... [I]t takes time to understand how each of the data feeds function, how the data are organized and compiled, any limitations that exist, and how that data can be combined and analysed to produce a report.⁵

³ PHSA’s initial submission, paras. 49-50.

⁴ PHSA’s supplementary submission, pp. 2-5. During my deliberations, I invited the parties to make supplemental submissions in response to questions that occurred to me. These questions related to practical challenges in generating the requested statistics.

⁵ PHSA’s supplemental submission, p. 5.

[17] The PHSA submits this process would require PHSA employees to analyze and scrutinize a series of data sets, including those outside its custody, to identify gaps and limitations in the data. In the event that it could generate reports combining these data sources, PHSA says epidemiological experts would have to test the results manually to determine if the new computer program had generated accurate statistics.⁶

[18] The applicant's submission does not address the issue as to whether the PHSA is able to create the records from a machine readable record using its own hardware, software and technical expertise.

Analysis

1. Can the requested record be created from a machine readable record?

[19] This part of the analysis requires the public body to demonstrate whether there are machine readable records that can be used to create the new record. The PHSA says it possesses some, but not all, of the raw data in digital form required to create the requested records. PHSA indicated that it would be able to write a new computer program to extract some of the data from its own databases.

[20] The requested records and my findings are as follows:

- a) The number of individuals who have not been vaccinated ("unvaccinated").

I accept the PHSA does not have this information.

- b) The number of individuals who have had 1 dose and <3 weeks since receipt of the 1st dose ("pre dose").

I find the PHSA has the raw data on the dates of individual vaccinations.

- c) The number of cases for unvaccinated individuals and individuals with the same definition of pre dose.

I find the PHSA has the raw data on individuals reported to have tested positive for Covid and their vaccination status.

- d) The number of hospitalizations for unvaccinated individuals and pre dose individuals.

⁶ PHSA's supplemental submission, pp. 2-6.

I find the PHSA has the raw data on individuals reported to have been hospitalized and their vaccination status.

- e) The number of deaths for unvaccinated individuals and pre dose individuals.

[21] I find the PHSA has the raw data on individuals reported to have died and their vaccination status.

[22] It is also important to note that it is not possible to provide the data exactly as the applicant has requested it. This is because the applicant has requested statistics over the course of a four-week period that would fluctuate on a daily basis. For example, some individuals who were not vaccinated at the start of the four weeks would become vaccinated during the course of the four weeks. The status of individuals in the applicant's requested category of "pre dose"⁷ would also change during this period. Finally, some individuals would die, and others would be born during this period. Therefore, it is clearly not possible to provide more than an estimate for some of the statistics requested.

[23] In summary, I find there are machine readable records that can be used to produce the records requested by the applicant for the following parts of his access request: (c) Covid rates, (d) hospitalizations and (e) deaths. Moreover, there are machine readable records that can be used to produce fluctuating estimates for the following parts of the applicant's request: (a) unvaccinated and (b) pre dose. However, I note the applicant did not request fluctuating estimates and instead requested "the number" for those categories. Therefore, I conclude there is no machine readable record that can be used produce the records requested for parts (a) and (b) of the applicant's request.

2. Is the machine readable record in the custody or under the control of the public body?

[24] I find there is a machine readable record in the custody and under the control of PHSA that could produce records requested for parts (c) Covid rates, (d) hospitalizations and (e) deaths of the applicant's access request. However, I accept there is no machine readable record in the custody or under the control of PHSA that could produce the records requested for parts (a) unvaccinated and (b) pre dose of the applicant's access request.

⁷ Which the applicant defines as "individuals who have had 1 dose and <3 weeks since receipt of the 1st dose".

3. *Can the record be created using the public body's normal computer hardware and software and technical expertise?*

[25] The adjudicator in Order F24-07 defined the terms normal computer hardware and software and technical expertise as follows:

Reading the words in s. 6(2)(a) in their ordinary grammatical sense, “normal” qualifies each of the terms “computer hardware”, “software”, and “technical expertise”. In my view, s. 6(2)(a) is all about the technology required to produce the record and so “normal technical expertise” must be interpreted in this context. From the surrounding words of s. 6(2)(a), I find that this phrase refers to the technical expertise required to use the computer hardware and software. More precisely, “normal technical expertise” in this context means normal computer or information technology expertise.⁸

[26] I take the same approach here.

[27] Previous orders have also determined that s. 6(2)(a) does not require a public body to create a record if doing so would compel it to do any of the following:

- manually adjust raw data beyond the incidental,
- use outside or specialized expertise or to engage in extraordinary manual effort to create the requested record, or
- create a completely different type of record when there are already existing records that respond to the request.⁹

[28] I find that to create the requested records, PHSA would have to create and test a new software program to extract information from its own database and combine it with information from data systems outside of its custody and control. I am also satisfied that it would require PHSA employees with special expertise to review and verify the results that the software program produces. For some of the records relating to unvaccinated and pre dose individuals, they would then have to manually devise rough estimates of the statistics that fluctuate over the four-week period of the request and create a table to meet the parameters of the request. I find this process constitutes manual adjustments beyond the incidental and requires specialized expertise and an extraordinary effort. As such, s. 6(2)(a) does not apply in these circumstances.

[29] Based on my consideration of the s. 6(2)(a) criteria, I find the PHSA cannot create any of the requested records from a machine readable record in its custody or under its control, using its normal software and technical expertise. As

⁸ Order F24-07, 2024 BCIPC 10 (CanLII), para. 24.

⁹ Order F10-30, 2010 BCIPC 43 (CanLII), para. 18; Order F17-21, 2017 BCIPC 22 (CanLII), para. 18; Order F21-07, 2021 BCIPC 08 (CanLII), para. 41; Order F23-55, 2023 BCIPC 64 (CanLII), para. 37.

with a similar request to PHSA that resulted in Order F24-07,¹⁰ I conclude producing the requested records requires an extensive effort by several professionals to create new computer programs and combine multiple raw data sources and systems. This would involve multiple steps, including manual manipulation of the data by epidemiologists and scientists familiar with the data. In both cases, the processes require more than PHSA's normal technical expertise.

[30] Therefore, I find that PHSA cannot create the records from a machine readable record in its custody or under its control using its normal software and technical expertise, in accordance with s. 6(2)(a). Consequently, s. 6(2) does not require PHSA to create the records requested.

[31] As I have found that s. 6(2)(a) does not apply, I do not need to consider the application of s. 6(2)(b), and I decline to do so.

[32] As I have found that PHSA does not have to create the requested records, I do not need to consider the application of s. 19(1), and I decline to do so.

CONCLUSION

[33] For the reasons noted above, under s. 58, I confirm that s. 6(2) does not require PHSA to create a record in response to the applicant's access request.

April 8, 2024

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F22-88517

¹⁰ Order F24-07, cited above, para. 27.