Decision F10-05

**INTERIOR HEALTH AUTHORITY**

Celia Francis, Senior Adjudicator

June 7, 2010

Quicklaw Cite: [2010] B.C.I.P.C.D. No. 27
CanLII Cite: 2010 BCIPC 27
Document URL: http://www.oipc.bc.ca/orders/section56/DecisionF10-05.pdf

**Summary**: The IHA's request that an inquiry not be held is granted.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 56, 25(1)(b), 22(1); *Health Authorities Act*, s. 4(1)(b).

**Authorities Considered:** **B.C.:** Order F07-03, [2007] B.C.I.P.C.D. No. 5; Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Decision F08-08, [2008] B.C.I.P.C.D. No. 26; Decision F08-11, [2008] B.C.I.P.C.D. No. 36.

## 1.0 INTRODUCTION

[1] The Interior Health Authority ("IHA") has asked, under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), that an inquiry not be held regarding this request for review. For reasons given below, I have decided to exercise my discretion to grant the IHA's request.

## 2.0 DISCUSSION

***The access request***

[2] The applicant (the respondent in this application) asked the Kelowna General Hospital for the following records:

- The total number of abortions performed during the years 2006, 2007 and 2008

- The number of abortions performed after 15 weeks gestation during those years
- A list of any and all complications reported resulting from all abortions during those years

[3] The IHA, the public body responsible for the Kelowna General Hospital, responded that, under s. 22.1 of FIPPA, it was unable to provide access to the requested records. The applicant requested a review of this decision and said he intended to make use of s. 25 of FIPPA, the public interest override. Mediation was not successful and the applicant requested that an inquiry take place. At this point, the IHA asked under s. 56 of FIPPA that the inquiry not proceed.

***Preliminary matter***

[4] The applicant complained that the IHA had raised its s. 56 application late in the process. He said he had been given only five days "to come up with arguments that counter their one-sided vested self-interest on why the process should continue …. and how clearly, according to them, this appeal has no chance for success". The applicant likened this to the late raising of new exceptions after a notice of inquiry has gone out and argued that it is not conducive to the "fair, efficient and timely resolution" of reviews "to put forward a request to halt an inquiry, at the last moment".[1] He said his "appeal to the Public Interest Override" concerns the "one and only topic banned" in this province and said that Commissioner Loukidelis objected to the introduction of s. 22.1 in a letter of March 31, 2001.[2]

[5] There is no parallel between the raising of new issues at the inquiry stage and the VCHA's s. 56 application after the close of mediation in this case. The applicant correctly pointed out that past orders and decisions have frowned on the late raising of new issues, particularly at the inquiry stage, for the reasons he cited. However, when a public body makes an application under s. 56 that an inquiry not proceed, it is not raising a new issue. Rather, a s. 56 application is, in appropriate cases, a quick and cost-effective means of disposing of the issues. Moreover, such an application necessarily arises after mediation has proved unsuccessful and an applicant has requested an inquiry. Whatever views the applicant may hold about the VCHA's motives, the VCHA was entitled to make this s. 56 application and there was nothing improper in it doing so.

***Provisions in issue***

[6] The relevant provisions read as follows:

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[1] The applicant referred here to various decisions in support of his position, including Decision F07-03, [2007] B.C.I.P.C.D. No. 14.
[2] Pages 4-5, applicant's response.

**Disclosure of information relating to abortion services**

22.1(1) In this section, “abortion services” means lawful medical services for the termination of a pregnancy.

(2) The head of a public body must refuse to disclose to an applicant information that relates to the provision of abortion services.

(3) Subsection (2) does not apply to the following:

(a) information about abortion services that were received by the applicant;

(b) statistical information, including financial information, relating to the total number of abortion services provided throughout

(i) British Columbia, or

(ii) a region that is designated under section 4 (1) (b) of the *Health Authorities Act* if more than one health care body provides abortion services in that region;

(c) information about a public body’s policies on the provision of abortion services.

(4) Nothing in this section prevents any other provision of this Act from applying if a request is made under section 5 by an applicant for access to a record containing information about abortion services that were received by the applicant.

**Information must be disclosed if in the public interest**

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

***Parties’ arguments***

[7] The IHA argued that the requested information is for statistical information on the provision of abortion services for a specific site. The IHA said it is designated under s. 4(1)(b) of the *Health Authorities Act* and more than one health care body provides abortion services within IHA. Thus the exception in s. 22.1(3)(b) does not apply, it argued. Nor is the applicant asking for information that falls into the exceptions in s. 22.1(3)(a) or (c). The IHA argued that it was correct in refusing access to the requested information under s. 22.1(2) and that there is “no room for interpretation of this section given the applicant’s request”.

The IHA said that this case is similar to Order F07-03,[3] the "leading case" on this topic, where Commissioner Loukidelis upheld its decisions in that case and also found that s. 25 had no application.[4] The applicant has provided no evidence of a significant risk of harm as set out in s. 25, the IHA added, nor has he shown how disclosure is clearly in the public interest.[5]

[8] The applicant's arguments that the inquiry should proceed centered on his argument that the public interest override applies here. In his view, the IHA does not understand the nature of the public interest override. This type of provision is meant to be "a check and balance on the process of release or censorship of information", the applicant argued, and each case must be decided on its merits. It is therefore not appropriate, he said, to rely on previous orders.[6] The applicant asked how the government could be accountable and how democracy facilitated, if the "ban" on release of the requested information is continued.[7]

***Issue***

[9] Section 56(1) of FIPPA reads as follows:

> **Inquiry by Commissioner**
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> 56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[10] The principles for the exercise of discretion under s. 56 are well-established.[8] In Decision F08-11, for example, I said this:

> [8] A number of previous decisions and orders have laid out the following principles for the exercise of discretion under s. 56:
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> - the public body must show why an inquiry should not be held
> - the respondent (the applicant for records) does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide "some cogent basis for arguing the contrary"
> - the reasons for exercising discretion under s. 56 in favour of not holding an inquiry are open-ended and include mootness, situations

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[3] [2007] B.C.I.P.C.D. No. 5.
[4] IHA's initial submission.
[5] Paras. 6-7, IHA's reply.
[6] Pages 2-4, applicant's response. He also referred to cases in other jurisdictions in support of his argument on the public interest in disclosure.
[7] Page 6, applicant's response.
[8] See, for example, Decision F07-04, [2007] B.C.I.P.C.D. No. 20, Decision F08-08, [2008] B.C.I.P.C.D. No. 26, and Decision F08-11, [2008] B.C.I.P.C.D. No. 36.

where it is plain and obvious that the records fall under a particular exception or outside the scope of FIPPA, and the principles of abuse of process, *re judicata* and issue estoppel

- it must in each case be clear that there is no arguable case that merits an inquiry

[11] I take the same approach here.

***Relevant case law***

[12] Order F07-03 concerned a request for these records:

1. Amount of abortions performed at Kelowna General Hospital during the calendar year 2004.
2. Amount of abortions performed in the Interior Health District for the calendar year 2004.
3. List of hospitals providing abortion services in the Interior Health District in 2004.
4. Amount of abortions performed in the Okanagan in 2004.

[13] Commissioner Loukidelis found as follows in that case:

> [6] This exception to the public's right of access to information is mandatory; a public body must refuse to disclose information covered by s. 22.1 and has no discretion but to refuse. Nor is there any harms test under s. 22.1; as long as information falls within the class described in this section, that information must be withheld. As exceptions to this, a public body cannot refuse under s. 22.1 to disclose information "about abortion services that were received by the applicant" for access, statistical information falling under s. 22.1(3)(b) or "information about a public body's policies on the provision of abortion services".
>
> [7] The IHA was clearly required to refuse to disclose information that would identify specific hospitals or other health care facilities that perform abortions and it was required to refuse to disclose information about how many abortions were performed in 2004 at the Kelowna General Hospital. This information clearly falls under s. 22.1(2). The sole issue, rather, is whether other information the applicant requested can be disclosed under the exception for statistical information found in s. 22.1(3).
>
> [8] The IHA disclosed the number of abortions performed within the IHA's territory during calendar 2004. It refused, however, to provide information on numbers of abortions performed at specific hospitals or other health care facilities within "the Okanagan", on the basis that the Okanagan is a smaller area within the IHA's territory as designated under s. 4(1)(b) of the *Health Authorities Act*. The exception under s. 22.1(3)(b)(ii) that allows disclosure of statistical information is intended to apply only to the entirety of a health region as designated under the *Health Authorities Act* and not to any sub-territory of that region. Accordingly, the IHA was correct to refuse

> disclosure of the total number of abortions performed "in the Okanagan" during 2004.

***Analysis***

[14] The issue in this case is similar in all material respects to that in Order F07-03. The IHA clearly had no choice but to deny access to this information, on the grounds that disclosure of information specific to a hospital is prohibited under s. 22.1(2). No exceptions in s. 22.1(3) are relevant here.

[15] I also reject the applicant's contention that s. 25 has any application here. The applicant may disagree with the Legislature's decision to enact s. 22.1. This does not mean however that there is an urgent and compelling need to disclose the requested statistical information which, I observe, is for a period dating back some years. As the IHA noted, Commissioner Loukidelis rejected a similar argument in Order F07-03, with reference to relevant orders such as Order 02-38.[9]

## 3.0 CONCLUSION

[16] It is plain and obvious in my view that s. 22.1 applies here and there are no arguable issues that merit an inquiry. I see no reasonable prospect of an inquiry on this matter leading to a different result than in Order F07-03. The applicant's arguments as to why this inquiry should proceed in the face of the result of Order F07-03 are not persuasive, to say the least. As Adjudicator Austin-Olsen said in another s. 56 application:

> [18] That being said, it is in my view precisely this type of case which is contemplated by the permissive language of s. 56. In cases where it appears obvious from previous Orders and Decisions of this Office that the outcome of an inquiry will be to confirm that the public body has properly applied the provisions of FIPPA, the respondent must provide some cogent basis for arguing the contrary. That has not occurred here.[10]

For reasons given above, therefore, I grant the IHA's request that an inquiry on this matter not proceed. This Office will therefore close its file on this review.

June 7, 2010

**ORIGINAL SIGNED BY**

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Celia Francis
Senior Adjudicator

OIPC File: F09-39658

[9] [2002] B.C.I.P.C.D. No. 38
[10] Decision F07-04, [2007] B.C.I.P.C.D. No. 20.