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Order F15-36

VANCOUVER ISLAND HEALTH AUTHORITY

Elizabeth Barker
Senior Adjudicator

August 13, 2015

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Summary: The applicant requested a copy of her deceased mother's medical records. VIHA refused to disclose the records on the basis that the applicant was not authorized to act on behalf of her deceased mother and because it considered disclosure would be an unreasonable invasion of third party personal privacy under s. 22 of FIPPA. The adjudicator found that the applicant was not authorized to act on behalf of her deceased mother and that disclosure of the medical records would be an unreasonable invasion of the deceased's personal privacy under s. 22 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 5 and 22. *Freedom of Information and Protection of Privacy Regulation*, s. 5.

Authorities Considered: B.C.: Order 01-53, 2001 CanLII 21607 (BC IPC); Order 01-07, 2001 CanLII 21561 (BC IPC); Order F15-11, 2015 BCIPC 11 (CanLII); Order F14-32, 2014 BCIPC 35 (CanLII); Order F14-09, 2014 BCIPC 11 (CanLII); Order 02-44, 2002 CanLII 42478 (BC IPC); Order F12-08, 2012 BCIPC 12 (CanLII); Order F14-43, 2015 BCIPC 46 (CanLII); Order F15-14, 2014 BCIPC 14 (CanLII); Order F15-01, 2015 BCIPC 1 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII); Order 96-1996, 1996 B.C.I.P.C.D. No. 22; Order 00-11, 2000 CanLII 10554.

INTRODUCTION

[1] This inquiry is about whether the applicant can access her deceased mother's medical records. The records relate to the deceased's hospitalization at Hospice Victoria, a Vancouver Island Health Authority ("VIHA") facility.

The applicant's mother was hospitalized in Victoria Hospice for a month until she passed away in the spring of 2013. In her access request, the applicant explains that she wants to see her mother's medical records in order to know what happened during her hospice stay. The applicant feels that this will help her grieve and find closure.

[2] VIHA denied the applicant access to the records pursuant to s. 5 of the *Freedom of Information and Protection of Privacy Regulation* ("Regulation"). That section sets out who is authorized to act on behalf of a deceased person for the purposes of exercising the deceased's rights under s. 5 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[3] The applicant requested a review of the public body's decision by the Office of the Information and Privacy Commissioner ("OIPC"). During investigation and mediation, VIHA indicated that it was also withholding the medical records under s. 22 of FIPPA (disclosure harmful to personal privacy). Mediation did not resolve the issues, and the applicant requested that the matter proceed to inquiry. A written inquiry was held and both parties provided initial submissions. VIHA also provided a reply submission.

ISSUES

[4] There are two issues in this inquiry:

1. Is the applicant acting on behalf of her deceased mother in accordance with s. 5 of FIPPA and s. 5 of the Regulation?
2. Is VIHA required to refuse access to the requested records because disclosure would be an unreasonable invasion of third party personal privacy under s. 22(1) of FIPPA?

[5] Section 57 of FIPPA states that if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. Section 57 does not state who has the onus for establishing that an applicant is authorized under FIPPA and the Regulation to act on behalf of another person. In such a case, it is in the interests of both parties to provide argument and evidence to justify their positions.

RECORDS

[6] The records at issue comprise approximately 250 pages of medical records related to the deceased. They include patient progress records, patient

care orders, physicians' and nurses' notes, admission and discharge records and a record of death.

DISCUSSION

Authority to act on behalf of a deceased individual

[7] Section 5(1)(b) of FIPPA explains how an applicant may make a request on behalf of another person:

5(1) To obtain access to a record, the applicant must make a written request that

...

- (b) provides written proof of the authority of the applicant to make the request, if the applicant is acting on behalf of another person in accordance with the regulations, ...

[8] The Regulation states that if an individual is deceased, an "appropriate person" may act for the deceased in relation to a request under s. 5 of FIPPA.¹ The Regulation defines "appropriate person" as follows:

5(1) In this section:

"appropriate person" means,

- (a) in respect of a deceased adult, one of the following:

...

- (iii) if there is no committee acting for the deceased and no personal representative of the deceased, the nearest relative of the deceased;

"nearest relative" means the first person referred to in the following list who is willing and able to act under subsection (2) of this section for a deceased individual:

- (a) spouse of the deceased at the time of death;
- (b) adult child of the deceased;
- (c) parent of the deceased;
- (d) adult brother or sister of the deceased;
- (e) other adult relation of the deceased other than by marriage;
- (f) an adult immediately related to the deceased by marriage;

¹ Section 5(2) of the Regulation. The appropriate person may also act for the deceased in relation to other sections in FIPPA, which I have not listed here as they are not relevant to the facts of this case.

"**spouse**" means a person who

- (a) is married to another person and is not living separate and apart, within the meaning of the *Divorce Act* (Canada), from the other person, or
 - (b) is living with another person in a marriage-like relationship for a continuous period of at least one year immediately before the death of the other person.
- (3) If a nearest relative who is acting under this section ceases to be willing or able to act, the right to act under subsection (2) of this section passes to the person who is next in the definition of "nearest relative" and who is willing and able to act.
- (4) If the right to act under subsection (2) of this section passes to persons of equal rank in the listed order in the definition of "nearest relative", the right passes to the person who is the eldest of the persons and descends in order of age to the next person who is willing and able to act.

...

[9] VIHA says that the applicant has not provided proof of her authority to act on behalf of her deceased mother. Further, they submit that she has not established that she is an "appropriate person" as defined by s. 5 of the Regulation.

[10] Neither the records at issue nor the applicant's submissions prove the applicant's authority, as required by s. 5(1)(b) of FIPPA, to make the request for records on behalf of her deceased mother. Other than asserting that she is her mother's "next of kin,"² the applicant provides no information that establishes that she is an "appropriate person" as defined by s. 5 of the Regulation. The applicant indicated in her access request that she is the "sole" next of kin. However, the deceased's medical records suggest otherwise.

[11] The records contain multiple references to a man who is alternatively referred to as the deceased's husband, spouse or common law (with the same address as the deceased) and to an older daughter. Before the applicant would meet the definition of appropriate person in the Regulation, the deceased's husband and the eldest daughter – both of whom take precedence over the applicant in the hierarchy established in the s. 5 definitions in the Regulation - would need to be unwilling or unable to act on the deceased's behalf. There is no evidence before me that either is unwilling or unable to act on behalf of the deceased. Therefore I find that the applicant has not established that she is an "appropriate person" for the purpose of exercising her deceased mother's rights to access records under s. 5 of FIPPA.

² Applicant's request for records.

[12] However, that is not the end of the matter. It is evident that the applicant wants access to the records regardless of whether the request is made on her own or her mother's behalf. As a result, I will now consider her request on the basis that it is made on her own behalf. Thus, the issue becomes whether disclosing the records to her would be an unreasonable invasion of third party personal privacy under s. 22.

Disclosure harmful to personal privacy - s. 22

[13] VIHA submits that disclosing the deceased's medical records would be an unreasonable invasion of the deceased's and other individuals' personal privacy under s. 22. The applicant makes no submission regarding whether disclosure of the records at issue would be an unreasonable invasion of third party personal privacy.

[14] Numerous orders have considered the correct approach to the application of s. 22, and I have adopted the same approach below.³

Personal information

[15] The first step in any s. 22 analysis is to determine if the records contain personal information. Personal information is defined as "recorded information about an identifiable individual other than contact information". Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."⁴

[16] I find that all of the information is the deceased's personal information because it is in her medical records and is about her stay in hospice and her physical, psychological and emotional health and treatments. In some instances the information is also the personal information of third parties, because it is about what medical professionals and visitors said, did and thought about issues related to the deceased's care.

[17] Some of the deceased's personal information is also the applicant's personal information. For example, there are staff notes about the applicant's interactions with the deceased and others and the impact of those interactions on the deceased's wellbeing and care.

[18] In addition, the applicant's name, phone number and address appear on the deceased's hospice admission form as an emergency contact, and this is the applicant's personal information. The applicant's submissions indicate that she is

³ See for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.

⁴ See Schedule 1 of FIPPA for these definitions.

aware that she was one of her mother's emergency contacts, and there is nothing to suggest that she wants access to her own name, phone number and address information. Therefore, for simplicity sake, I will not consider that information any further.

Section 22(4)

[19] The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If it does, disclosing the information would not be an unreasonable invasion of personal privacy. I find that none of the categories of information listed in s. 22(4) apply to the personal information in the records.

Section 22(3)

[20] For personal information that does not fall within s. 22(4), the third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply, such that disclosure is presumed to be an unreasonable invasion of third party privacy. VIHA submits that the presumption in s. 22(3)(a) applies. Section 22(3)(a) states:

- 22(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,

[21] I find that s. 22(3)(a) applies to all of the information in the medical records because it is about the deceased's medical history, diagnosis, condition and treatment. Section 22(3)(a) also applies to those instances where the deceased's personal information is concurrently the personal information of third parties (including the applicant) because it is about what the third parties said, did and thought about the deceased's medical condition and care.

Relevant Circumstances

[22] The next step in a s. 22 analysis is to consider all relevant circumstances, including those listed in s. 22(2), to determine if disclosure of the personal information would be an unreasonable invasion of third party privacy. The s. 22(3)(a) presumption can be rebutted if a consideration of all relevant factors, including those in s. 22(2), indicates that disclosure would not be an unreasonable invasion of the third party's personal privacy. VIHA made submissions regarding ss. 22(2)(c), (f) and (i), which state as follows:

22(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

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(f) the personal information has been supplied in confidence,

...

(i) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

Fair determination of the applicant's rights - 22(2)(c)

[23] Because VIHA says that it considered s. 22(2)(c) when deciding whether to disclose the records, I too have considered whether the personal information is relevant to a fair determination of the applicant's rights. In order for s. 22(2)(c) to apply, the following four criteria must be met:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.⁵

[24] VIHA says that it is not aware of any reason why the information in the records would be relevant to a fair determination of the applicant's rights, and they point out that the applicant did not make any such claim. The applicant provides no information that suggests that access to the records is relevant to a fair determination of any particular rights she may wish to assert. I find that the above four criteria have not been met, so disclosure of the records is not relevant to a fair determination of the applicant's rights.

⁵ 6 For example, see Order 01-07, 2001 CanLII 21561 (BC IPC) and Order F15-11, 2015 BCIPC 11 (CanLII).

Supplied in confidence - 22(2)(f)

[25] VIHA submits that the deceased's personal health information was supplied and gathered in confidence in the context of the trust relationship between a patient and her physicians or other caregivers. VIHA adds that it is reasonable for people to expect that such information would be kept in confidence by one's caregivers, so s. 22(2)(f) is a relevant consideration that weighs strongly against disclosure.

[26] The information at issue here is the deceased's medical and health information, which she supplied to her caregivers when she allowed them to observe, diagnose and treat her. Previous orders have found that such information is inherently supplied in confidence.⁶ I agree and find that s. 22(2)(f) is a factor that weighs against disclosure of the deceased's personal information in this case.

Length of time person has been deceased - 22(2)(i)

[27] Section 22(2)(i) requires public bodies to consider whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

[28] VIHA submits that the applicant's mother has not been deceased for very long and disclosure of the information at issue should be considered as if she were still alive. Given that she only recently died, VIHA submits that others should not be privy to the intimate details of her medical condition and treatment without her knowledge and consent.

[29] Past orders have said that deceased individuals have privacy rights, although such rights may diminish with time.⁷ There have been several orders where the time elapsed between the death and the access request were similar to the time frame in this case. In Order F14-43, the applicant requested the health records of his father who had died approximately two years earlier. In Order F15-14, only two and a half years passed between the death of the individual and the request for the personal information. In Order F15-01, a similarly short period of time elapsed between the death and the request for Coroner's records about the deceased. In all three cases, the adjudicator found that the short period of time was a factor weighing against disclosure.⁸

⁶ This is consistent with what other orders have found. See Order F14-32, 2014 BCIPC 35 (CanLII) at para 32 and Order F14-09, 2014 BCIPC 11 (CanLII) at para. 27 and Order 02-44, 2002 CanLII 42478 (BC IPC) at para. 46.

⁷ Order F12-08, 2012 BCIPC 12 (CanLII) and Order F14-09, 2014 BCIPC 11 (CanLII).

⁸ Order F14-43, 2015 BCIPC 46 (CanLII); Order F15-14, 2014 BCIPC 14 (CanLII); Order F15-01, 2015 BCIPC 1 (CanLII).

[30] Approximately two years has passed since the applicant's mother died, and in my view insufficient time has elapsed for her personal information to have lost any of its currency or sensitivity. Two years is a relatively short period compared to the time that elapsed in the orders where disclosure was found not to be an unreasonable invasion of a deceased's personal privacy.⁹ I find that the relatively short period of time since the deceased passed away is a factor that weighs against disclosure of her personal information.

Other relevant factors

[31] I have also taken into account the applicant's stated motive for seeking access to her mother's medical records. The motive for an access request is not usually relevant in FIPPA access requests. However in the context of cases involving family members seeking information in order to deal with a death and its aftermath¹⁰, it has been considered, and I think it appropriate to do so in this case as well.

[32] The applicant says that she would like to know what happened during her mother's stay in hospice, so that she can grieve and find closure. The applicant's submissions reveal that she is trying to understand and come to terms with how rapidly her mother's health deteriorated. While the applicant is a close relative and hopes that the records will help her grieve, and these factors weigh in favour of disclosure, they are not sufficient to outweigh the deceased's privacy interests in this case.

Conclusion – s. 22

[33] I find that all of the information is the deceased's personal information and that its disclosure would be an unreasonable invasion of the deceased's personal privacy under s. 22(1). The medical nature of the information, the fact that it was supplied confidentially, and the short period of time that has elapsed since the deceased passed away are the key factors that lead me to conclude that disclosure would be an unreasonable invasion of the deceased's personal privacy. In my view, the fact that the applicant is a close relative and is motivated by the belief that the records will help her grieve is insufficient to rebut the presumption under s. 22(2)(a) that disclosure would be an unreasonable invasion of the deceased's personal privacy.

⁹ For example: 34 years in Order F14-32, 2014, BCIPC 35 (CanLII); 18 years in Order F12-08, 2012 BCIPC 12 (CanLII); 42 years in F14-09, 2014 BCIPC 11 (CanLII).

¹⁰ Order F14-09, 2014 BCIPC 11 (CanLII); Order 96-1996, 1996 B.C.I.P.C.D. No. 22; Order 00-11, 2000 CanLII 10554.

ORDER

[34] For the reasons above, pursuant to s. 58 of FIPPA, I order VIHA to continue to refuse to disclose to the applicant the records in dispute under s. 22(1) of FIPPA.

August 13 2015

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

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