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Order F16-19

COMMUNITY LIVING BC

Wade Raaflaub, Adjudicator

April 19, 2016

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Summary: The applicant, a former service provider for Community Living BC (“CLBC”), asked for records in which he was identified, many of which related to concerns about clients’ quality of care. CLBC withheld some of the requested information as policy advice or recommendations under s. 13(1), and because disclosure would be an unreasonable invasion of the personal privacy of third parties under s. 22(1) of FIPPA. The adjudicator found that CLBC was authorized or required to withhold the information on these grounds.

Statutes Considered: **B.C.:** *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 13, 13(1), 13(2), 13(3), 22, 22(1), 22(2), 22(2)(c), 22(2)(e), 22(2)(f), 22(2)(h), 22(3), 22(3)(a), 22(3)(d), 22(4), 22(5), 57(1), 57(2), 58, 58(2)(b), 58(2)(c) and Schedule 1 (definitions of “contact information” and “personal information”).
ON: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 13.

Authorities Considered: **B.C.:** Order 01-15, 2001 CanLII 21569 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F13-04, 2013 BCIPC 4 (CanLII); Order F14-47, 2014 BCIPC 51 (CanLII); Order F14-57, 2014 BCIPC 61 (CanLII); Order F15-12, 2015 BCIPC 12 (CanLII).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII).

INTRODUCTION

[1] This inquiry involves an applicant's access request to Community Living BC ("CLBC") under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for all records in which he is identified by name or role, including field note references, complaints, communications to the minister's office, and communications between specific individuals. CLBC refused to give access to some of the requested information under ss. 13 (policy advice or recommendations), 14 (legal advice), 15 (disclosure harmful to law enforcement) and 22 (disclosure harmful to personal privacy).

[2] The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review CLBC's decision. As investigation and mediation did not resolve the matter, the applicant asked for an inquiry.

ISSUES

[3] The issues in this inquiry are whether CLBC is authorized to refuse to disclose certain information under s. 13(1), and whether it is required to refuse to disclose other information under s. 22(1) of FIPPA.

[4] There are no issues in relation to the application of ss. 14 and 15. CLBC explains that it cited s. 14 in error at the time of its initial response to the applicant's access request, and that it no longer relies on s. 15.

[5] In accordance with s. 57(1), CLBC has the burden of proving that the applicant has no right of access to information under s. 13(1). In accordance with s. 57(2), the applicant has the burden of proving that disclosure of information would not be an unreasonable invasion of any third party's personal privacy under s. 22(1), and should therefore be released to him.

DISCUSSION

[6] **Background** -- The applicant was the administrative director for an organization receiving funding from CLBC in order to provide services to individuals with developmental disabilities, in the form of residential and day programs. Several clients, family members, employees and other stakeholders brought concerns to the attention of CLBC about staffing levels and quality of care provided by the organization. In 2011, CLBC initiated an independent review. In 2012, it terminated the organization's contract.

[7] **Information at Issue** --The information at issue is found within 535 pages of records. The records include letters, fax cover sheets, email correspondence, referral forms, file notes, an investigation report, a final report,¹ and notes arising from meetings and interviews.

[8] With its submissions, CLBC included a copy of records that it released in response to a related access request by another individual. These records are not at issue in the inquiry, but CLBC indicates that it has provided them for context. Moreover, CLBC did not provide the applicant with a copy of the material for the purpose of the inquiry, although it says that he has seen it because he knows the other individual. While CLBC did not seek prior approval to submit this additional material *in camera*, and the applicant argues that it is unfair for him to be unable to respond to it, the material has had no bearing on my decision.

Policy advice or recommendations – s. 13

[9] Section 13 of FIPPA authorizes a public body to withhold information that reveals policy advice or recommendations, subject to certain exceptions. It reads as follows:

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
- (2) The head of a public body must not refuse to disclose under subsection (1)
 - (a) any factual material,
 - (b) a public opinion poll,
 - (c) a statistical survey,
 - (d) an appraisal,
 - (e) an economic forecast,
 - (f) an environmental impact statement or similar information,
 - (g) a final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities,
 - (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,

¹ In the package of records that CLBC initially provided in the inquiry, it noted that the final report was “duplicate” and “irrelevant”, rather than indicating whether it was released or withheld and, if the latter, under which section(s) of FIPPA. After I sought clarification, CLBC explained that a copy of the final report had previously been released to the applicant, with the exception of a small amount of information withheld under s. 22. It provided me with a copy indicating what was redacted, which I have reviewed for the purpose of this order.

- (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
 - (j) a report on the results of field research undertaken before a policy proposal is formulated,
 - (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
 - (l) a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body,
 - (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

Policy advice or recommendations – s. 13(1)

[10] CLBC submits that the information that it withheld under s. 13(1) was prepared by CLBC staff for the purpose of providing advice and recommendations to the responsible minister, regarding the manner in which the minister should respond to the issues regarding quality of care.

[11] The Supreme Court of Canada has explained the rationale behind withholding information as advice or recommendations under freedom of information legislation as follows:

[...] The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.²

[12] The British Columbia Court of Appeal has stated that the provision of advice includes exercising judgment and skill in weighing the significance of matters of fact and offering an opinion to assist a public body in making

² *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at para. 45, considering *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 13.

a decision for future action.³ Previous OIPC orders have added that a public body is authorized to refuse access to information that would enable an individual to draw accurate inferences about advice or recommendations.⁴

[13] CLBC applied s. 13(1) to some email correspondence.⁵ I find the severed information to be advice or recommendations, as it consists of suggestions to the minister regarding a communication strategy. CLBC also relied on s. 13(1) to withhold information on three additional pages.⁶ I find that they contain advice or recommendations in the form of suggested courses of action in order to meet the health and safety needs of particular clients, along with issues to be considered.

Information that may not be withheld under s. 13(1) – s. 13(2)

[14] Section 13(2) states that a public body cannot rely on s. 13(1) to withhold certain information. On my review of the records, I find that CLBC withheld none of the types of information here.

Information in existence for 10 years or more – s. 13(3)

[15] Section 13(3) precludes a public body from withholding information under s. 13(1) if the information is more than 10 years old. The provision is not applicable in this inquiry. All of the records to which CLBC applied s. 13(1) date from 2008 or later.

Exercise of discretion – s. 13(1)

[16] Because s. 13(1) sets out a discretionary exception to disclosure, a public body must properly exercise its discretion when refusing to give access to information under it.⁷ In this case, CLBC notes that the exception is designed to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.⁸ As CLBC considered the purpose of s. 13(1) and the interests that it attempts to balance, I find that it properly exercised its discretion to withhold information under it.

³ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at para. 113.

⁴ See, e.g., Order F14-57, 2014 BCIPC 61 (CanLII) at para. 14.

⁵ At pp. 228-229 of the records.

⁶ At pp. 239-241 of the records.

⁷ A non-exhaustive list of factors relevant to the exercise of discretion was set out in Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 149.

⁸ It cites Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 22.

Conclusion – s. 13(1)

[17] I conclude that CLBC is authorized to withhold the information to which it applied s. 13(1), on the basis that it reveals policy advice or recommendations. CLBC has met its burden of proof.

Disclosure harmful to personal privacy – s. 22

[18] Section 22(1) of FIPPA requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. The section applies only to personal information, so the first step is to determine whether the information at issue is personal information as defined by FIPPA. If so, the next step is to decide whether the information falls within any of the situations set out in s. 22(4), in which case disclosure is expressly not an unreasonable invasion of personal privacy. If s. 22(4) does not apply, it is then necessary to determine whether any of the provisions of s. 22(3) are engaged, in which case disclosure is presumed to be an unreasonable invasion of third party privacy, although any such presumptions are rebuttable.

[19] Whether or not presumptions against disclosure arise under s. 22(3), it is necessary to consider all relevant circumstances, including those listed in s. 22(2), in determining whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy. If the conclusion is that disclosure would unreasonably invade the personal privacy of a third party, the final step is to decide whether s. 22(5) applies so as to require the public body to release a summary of any information to the applicant.

Personal information – definition

[20] Schedule 1 to FIPPA defines "personal information" as "recorded information about an identifiable individual other than contact information". In turn, "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". On my review of the records, I see no contact information.

[21] The Commissioner has adopted the following approach in determining whether information constitutes personal information:

I accept that, in order to be personal information, the information must be reasonably capable of identifying a particular individual either alone or when combined with information from other available sources. The information need not identify the individual to everyone who receives it; it is sufficient in a

case such as this if the information reasonably permits identification of the individual to those seeking to collect, use or disclose it.⁹

[22] CLBC partly or entirely withheld information under s. 22(1) on numerous pages. I find that all of this information at issue consists of the personal information of third parties. This includes names, information about clients' needs and care, information regarding staff performance, client opinions about staff and operational matters, and staff opinions about clients and operational matters.

[23] The information withheld from the applicant also includes his own personal information, for instance when third parties are expressing opinions about him. However, this is simultaneously the personal information of the third parties, as they are named or can otherwise be identified as the individuals conveying the opinion. An individual's opinion about another individual can constitute the former's personal information to the extent that he or she is revealed as the one who provided the opinion.¹⁰

[24] As the information that CLBC withheld under s. 22(1) is the personal information of third parties, including some that is inextricably intertwined with the applicant's own personal information, I must now decide whether disclosure of the information would be an unreasonable invasion of the personal privacy of the third parties.

No unreasonable invasion of person privacy – s. 22(4)

[25] Section 22(4) enumerates situations in which the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. I considered whether any of the situations exist here, but find that none of them do.

Presumptions against disclosure – s. 22(3)

[26] Section 22(3) enumerates situations in which there is a presumption against the disclosure of third party personal information. The provisions relevant to this inquiry are as follows:

- (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,

⁹ Order F13-04, 2013 BCIPC 4 (CanLII) at para. 23.

¹⁰ See, e.g., Order F14-47, 2014 BCIPC 51 at para. 14.

...

- (d) the personal information relates to employment, occupational or educational history,

...

[27] I find that there is a presumption against disclosure of some of the information at issue on the basis that it relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation under s. 22(3)(a). Specifically, there is information about the health, developmental disabilities and progress of the clients receiving care.

[28] I also find that there is a presumption against disclosure of some of the information at issue under s. 22(3)(d), on the basis that it relates to employment history. Specifically, the information is about staff performance allegedly falling short of expectations, and the extent to which additional training might be needed. It also consists of notes following staff interviews in which they gave their views about operational procedures, clients and other staff, essentially in the nature of a human resources matter. The interviews were carried out in response to the concerns raised about staffing levels and quality of care, which relate to the employment history of the staff involved.

[29] While there are presumptions against disclosure of some of the information at issue under ss. 22(3)(a) and (d), I must go on to review any relevant circumstances in favour of, or against, disclosure. I must do the same for the remaining information at issue, which is not subject to any presumption against disclosure.

Relevant circumstances – s. 22(2)

[30] Section 22(2) requires a public body to consider all relevant circumstances, both those enumerated in the section as well as any others, in determining whether the disclosure of third party personal information would be unreasonable. The provisions of s. 22(2) that are possibly applicable in this inquiry are:

- (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,

...

- (e) the third party will be exposed unfairly to financial or other harm,

- (f) the personal information has been supplied in confidence,
...
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and
...

[31] CLBC submits that s. 22(2)(e) is engaged because third parties will be exposed to harm, in the form of mental distress, if their personal information is disclosed. Without further explanation or evidence, I do not find this to be a relevant circumstance in this inquiry. Disclosure of one's personal information, even if related to a health condition or the nature of care, or to allegedly poor work performance, does not necessarily cause mental distress. CLBC itself refers only to "potential" mental distress.

[32] CLBC also submits that, if certain third party personal information is disclosed, reputations may be unfairly damaged, as contemplated by s. 22(2)(h). It notes that some of the information consists of negative evaluations relating to staff of the organization that provided services to CLBC. Given the complaints and allegations appearing in the records, I agree that s. 22(2)(h) is engaged for some of the information at issue.

[33] Finally, CLBC submits that some third party personal information was supplied in confidence under s. 22(2)(f). The nature of some of the information at issue makes it reasonable to conclude that it was provided with an expectation of confidentiality. In some instances, third parties provided sensitive information about their own or a family member's quality of care, which formed concerns that can readily be seen as conveyed on a confidential basis. In other instances, staff provided information about clients and other staff in the course of interviews with an investigator, which would have reasonably given rise to an understanding that the information was supplied in confidence.

[34] In his access request, the applicant wrote that he intended to sue for "contract misfeasance, defamation of character, libel and slander". He believes that the requested information includes false statements and allegations about him, and he wants to clear his name. I therefore considered whether disclosure of any of the third party personal information is relevant to a fair determination of the applicant's rights under s. 22(2)(c).

[35] Previous orders have established that the following four criteria must be met in order for s. 22(2)(c) to apply: (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.¹¹

[36] I find that s. 22(2)(c) is not triggered in this inquiry. The records include a 2000 court decision,¹² which was not withheld from the applicant and which dismissed his libel claim against an individual. The proceeding is therefore concluded. There is also a letter from what appears to be the solicitor for the organization that provided services for CLBC, its owner and the applicant, which indicates that a lawsuit against third parties for defamation commenced sometime prior to February 21, 2008 (being the date of the letter). However, there is no indication that this relatively old court action is still under way. Finally, if there is any other proceeding involving the applicant that is contemplated or in progress, he has not pointed to it.

[37] I considered whether there are any other relevant circumstances in this case, but find that there are not. Neither party drew any others to my attention.

Conclusion – s. 22(1)

[38] With respect to the information that CLBC withheld under s. 22(1), I find that the presumptions against disclosure under ss. 22(3)(a) and (d), where they are applicable, have not been rebutted on my consideration of the relevant circumstances. As for the information that is not subject to any presumption against disclosure, I find that the relevant circumstances weigh only against disclosure. I therefore conclude that disclosure of all of the personal information of third parties in the records would be an unreasonable invasion of their personal privacy. The applicant has not met his burden of establishing otherwise.

Possible summary of information – s. 22(5)

[39] Section 22(5) requires a public body to give an applicant a summary of personal information supplied in confidence about the applicant, unless the summary would identify the third party who supplied it. The relevant parts of section 22(5) state:

- (5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless
 - (a) the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information, or
 - ...

¹¹ See, e.g., Order F15-12, 2015 BCIPC 12 (CanLII) at para 34.

¹² At pp. 512-519 of the records.

[40] I have found that some of the information at issue consists of opinions about the applicant, which are simultaneously the personal information of the individuals providing the opinion. I have also found that this information was supplied in confidence in the context of client concerns and staff interviews. I now turn to whether a summary of any personal information about the applicant can be prepared in a manner that does not identify the third parties who supplied the information.

[41] I find that it cannot. The information provided by the third parties about the applicant is very fact-specific and relates to unique incidents involving him and the clients, or him and the staff. The context will almost certainly allow the applicant to ascertain who the incident is about, and therefore who drew it to the attention of CLBC. Because a summary of the applicant's personal information that has been withheld from him cannot be prepared without identifying the individuals who supplied the information, no obligation on the part of CLBC arises under s. 22(5). As an aside, I note that much of the information that has been released to the applicant by CLBC already provides a general sense of what third parties conveyed about him (without identifying the third parties).¹³

CONCLUSION

[42] For the reasons given above, I make the following orders under s. 58 of FIPPA:

1. CLBC is authorized to refuse the applicant access to the information at issue under s. 13(1), on the basis that it reveals policy advice or recommendations. Under s. 58(2)(b), I therefore confirm its decision.
2. CLBC is required to refuse the applicant access to the information at issue under s. 22(1), as disclosure would be an unreasonable invasion of the personal privacy of third parties. Under s. (58)(2)(c), I therefore require it to refuse access.

April 19, 2016

ORIGINAL SIGNED BY

Wade Raaflaub, Adjudicator

OIPC File No.: F14-57600

¹³ At pp. 67-68, 103-106, 112-118, 123, 154, 195-197, 199-201, 204, 210-213, 231, 235, 241, 243, 264-267, 310, 315-319, 322, 325-327, 333-334, 336, 338, 363, 378-380, 382-384, 402-403, 409-414, 417-419, 421, 424-425, 429, 431-432, 435-436, 439, 441-444, 446, 448, 450, 451, 453, 454-455, 458, 460, 462-464, 466, 485-487, 489, 492-493, 508, 510-511, 520-521, 523-524, 527, 529-530 and 533 of the records.