OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-07

PROVINCIAL HEALTH SERVICES AUTHORITY

Carol Pakkala
Adjudicator

January 31, 2024

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Summary: An applicant requested the Provincial Health Services Authority (PHSA) provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to statistical information related to COVID-19 and vaccination status. PHSA argued that it did not have a record that responded to the request, and it was not required to create one under s. 6(2) (duty to assist applicant) of FIPPA. PHSA also said that if it was required to create a record, s. 19(1) (harm to individual or public safety) of FIPPA applied. The adjudicator confirmed that s. 6(2) does not require PHSA create the record requested by the applicant and it was not necessary to consider s. 19(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, s. 6(2).

Introduction

[1] This inquiry is about the Provincial Health Services Authority's (PHSA) response to an applicant's access request for statistical information related to the COVID-19 pandemic and vaccinations.

[2] PHSA initially refused to produce the information requested by the applicant based on s. 19(1) (disclosure harmful to individual or public safety) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).[1] PHSA later determined that it did not have an existing record responsive to the request and said it was not required to create one, citing s. 6(2).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review PHSA's decision. Mediation did not resolve the issues and the applicant requested the matter proceed to inquiry. Both parties made submissions in this inquiry.

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[1] For clarity, unless otherwise specified, when I refer to sections in this order, I am referring to sections of FIPPA.

Preliminary matters

Merits of COVID-19 vaccination

[4] Both PHSA and the applicant provided evidence and extensive submissions regarding COVID-19 vaccination. I consider these submissions about the merits of COVID-19 vaccination only in so far as they relate to the issues before me.

ISSUES

[5] The issues I must decide in this inquiry are:

1. Is PHSA required to create a record under s. 6(2)?

2. If PHSA is required to create a record, is PHSA authorized to refuse to disclose information in that record under s. 19(1)(a)?

[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.[2] 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

Background

[7] PHSA produces statistical information about public health issues through its program, the BC Centre for Disease Control (BCCDC). At the time of the applicant's access request, the BCCDC was actively publishing statistical information in relation to the COVID-19 pandemic. This information included Data Summary Reports published on the BCCDC website. The applicant requested vaccination status data for each of these reports using different definitions of vaccination status than the ones used by the BCCDC. For clarity, I describe the difference in those definitions in the table below[3]:

Vaccination Status	BCDC definition	Applicant's definition
Unvaccinated	No dose or not yet protected (<3 weeks since receipt of 1st dose)	No doses administered

[2] Order F23-55 2023 BCIPC 64 (CanLII) at para. 6, Order F20-13 2020 BCIPC 15 (CanLII) at para. 13.
[3] These definitions are from PHSA's response letter to the applicant's access request dated November 2, 2021.

Partially vaccinated	1 dose (≥3 weeks since receipt of 1st dose & <2 weeks after 2nd dose)	From the day of administration of dose 1 (day 1) to less than 14 days since administration of dose 2
Fully vaccinated	2 doses (2 weeks or more after receipt of 2nd dose)	Equal to or greater than 14 days after administration of dose 2

[8] PHSA declined to respond to the access request stating:

> The information sought in the Request seeks data along vaccine definitions that are not scientifically valid, not aligned with recognized definitions of vaccination status, and would deliberately contribute to disinformation about COVID-19.
>
> […]
>
> Responding to the Request could not only threaten anyone's safety or mental or physical health but also interfere with public safety. Ergo, section 19(1) applies to this information.[4]

Duty to create record, s. 6(2)

[9] Section 6(2) requires a public body to create a record that responds to an applicant's request 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] Paragraphs (a) and (b) are joined by the word "and", which means that a public body must create a record only if both conditions are met.

[11] The parties agree that the requested record does not currently exist using the applicant's definition of vaccination status. The issue in this inquiry is whether PHSA must create the requested record pursuant to ss. 6(2)(a) and (b).

Section 6(2)(a) – machine readable record

[12] Section 6(2)(a) requires me to consider the following questions:

[4] PHSA's response letter dated November 2, 2021.

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?

[13] Section 6(2)(a) has received only minimal consideration in British Columbia. Previous orders provide some limited guidance. They suggest that s. 6(2)(a) does not require a public body to manually adjust raw data beyond the incidental,[5] to use outside or specialized expertise[6] or to engage in extraordinary manual effort[7] to create the requested record; or to create a completely different type of record when there are already existing records that respond to the request.[8]

[14] I have issued this order concurrently with Order F24-06, which also addresses the interpretation of s. 6(2)(a).

Parties' submissions, s. 6(2)(a)

[15] PHSA does not dispute that the raw data needed to generate the record exists in digital form. PHSA says though that a responsive record can only be created if BCCDC staff generate a computer program capable of processing the specific data requested.[9] The program would combine the raw data from multiple streams and produce new statistics based on the applicant's custom parameters.

[16] PHSA says the generation of this new statistical information requires the sequential application of individual expertise, multiple levels of analysis, manual review, and approval before it can be released.[10] PHSA says this work requires deployment of highly specialized clinical staff, persons trained in data analytics, biostatisticians, and epidemiologists.[11] PHSA says the work and level of expertise required to create the record far exceeds what can be described as normal technical expertise.[12]

[17] In support of its position, PHSA provides evidence from BCCDC's Director of the BC Observatory for Population and Public Health (Director). The Director deposes that she is trained in both epidemiology and data cleaning and

[5] Order F10-30, 2010 BCIPC 43 (CanLII) at para. 18.
[6] Order F17-21, 2017 BCIPC 22 (CanLII) at para. 18.
[7] Order F21-07, 2021 BCIPC 08 (CanLII) at para. 41.
[8] Order F23-55, 2023 BCIPC 64 (CanLII) at para. 37.
[9] PHSA's initial submissions at para. 49.
[10] PHSA's initial submissions at para. 48.
[11] PHSA's reply submissions at paras 4-5.
[12] PHSA's reply submissions at para. 24.

analysis.[13] She identifies a nine-step process for creating the requested record. This process includes sourcing, cleaning, and organizing the data; writing, validating, and verifying a program code; running the code; and manually reviewing and verifying the results. While there was a process and code used to produce the Data Summary Reports, there is no existing statistical code for creating the requested record. The request seeks new results based on different definitions of vaccination. She says the work to produce the record requires an existing knowledge of the relevant COVID-19 data streams.[14]

[18] The Director further deposes that there are only a small number of individuals, perhaps two or three, at the BCCDC who have the expertise to work with these specialized data sources.[15]

[19] The applicant acknowledges that new data analysis is required. She says PHSA has access to the raw data and to the necessary expertise to generate a new record.[16] The applicant says PHSA is obligated under s. 6(2) to use the necessary manual effort to create the requested record.[17] She further says PHSA was able to generate the Data Summary Reports, so she does not understand why PHSA is unwilling to provide clear data based on different definitions of vaccinated.[18]

Analysis, s. 6(2)(a)

[20] For the reasons that follow, I find that that s. 6(2)(a) does not apply.

[21] PHSA does not dispute that it has a machine readable record in its custody and under its control. It acknowledges it has the raw data in PHSA's existing computer systems as well as the computer hardware and software from which it could conceivably create the requested record. Given that, the disputed issue under s. 6(2)(a) is whether the record can be created using the public body's *normal technical expertise*. For the following reasons, I find that it cannot. PHSA has the necessary computer expertise to create the record, but much more than that normal expertise is required here.

[22] In deciding this issue, I have considered the meaning of the terms "normal" and "technical expertise". To my knowledge, the two orders I have issued concurrently are the first orders of the OIPC that interpret the meaning of these terms and their relationship to each other. To determine the proper interpretation of these terms, I rely on the principles of statutory interpretation.

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[13] Affidavit of BCDC's Director of the BC Observatory for Population and Public Health [Director] at para. 2.
[14] Director's affidavit at para. 17.
[15] Director's affidavit at para. 14.
[16] Applicant's submissions at para. 21.
[17] Applicant's submissions at paras 16-19.
[18] Applicant's submissions at para. 22.

[23] Canadian courts take a modern approach to statutory interpretation. This approach requires that I read the words of FIPPA in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of FIPPA, the purpose of FIPPA, and the intention of the Legislature.[19] The courts also apply generally accepted rules to help them construe the grammatical patterns commonly found in statutes. These rules tell us to look at the surrounding words for context while considering the intent of the provision.

[24] 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.

[25] My interpretation of the statutory language in s. 6(2)(a), "normal computer hardware and software and technical expertise", is supported by a recent review of s. 7(2) of Nunavut's *Access to Information and Protection of Privacy Act* (ATIPPA), which uses the same language as s. 6(2) of FIPPA.[20] The Nunavut Information and Privacy Commissioner found that "normal" qualified "technical expertise" and considered the meaning of "normal technical expertise" in the context of whether a public body was required to create a statistical record related to COVID-19 and vaccination status.[21]

[26] The Nunavut Commissioner found that the phrase "technical expertise" in s. 7(2) means "information technology" expertise in the sense of computer technology. He said the phrase does not mean the expertise of the epidemiologists that the public body said would be required to extract, clean, match/link, and de-identify data so the resulting statistics are useful and reliable.[22] This interpretation supports my finding that normal technical expertise in s. 6(2)(a) means the public body's normal computer or information technology expertise.

[27] The applicant did not provide any evidence about the expertise required to create the requested record. On the other hand, PHSA's evidence, which I

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[19] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 21.
[20] *Department of Health (Re)*, 2022 NUIPC 7 (CanLII).
[21] The Nunavut Commissioner reviewed and applied two appellate cases from other jurisdictions: *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)* 2009 ONCA 20 (CanLII) [*Toronto Police*] and *Yeager v. Canada (Correctional Service)* 2003 FCA 30 (CanLII) [*Yaeger*]. The order applies these decisions to the interpretation of "technical expertise" within Nunavut's access law which has the same language as s. 6(2).
[22] *Department of Health (Re),* 2022 NUIPC 7 at para 63. The Nunavut Commissioner says this interpretation is consistent with *Yeager* and *Toronto Police*. I agree.

accept, demonstrates that creating the requested record would require far more than its normal computer information technology expertise. In particular, the requested statistical data does not already exist, and it would need to be created from multiple different raw data sources and systems. I also accept that turning that data into the requested record would require highly specialized expertise and multiple steps and oversight by epidemiologists and scientists familiar with the data. I conclude that doing what is needed to create the requested record would require much more than PHSA's normal technical expertise.

[28] For the reasons above, I conclude that the requested record cannot be created from a machine readable record in the custody or under the control of PHSA using PHSA's normal technical expertise. Therefore, the requirements of s. 6(2)(a) are not met in this case.

Section 6(2)(b) – unreasonable interference

[29] Section 6(2) requires a public body to create a record if the conditions of both (a) and (b) are met. Although it is not necessary to consider s. 6(2)(b) because I found above that the conditions of s. 6(2)(a) are not met in this case, I will do so for the sake of completeness.

[30] Section 6(2)(b) requires me to consider whether creating the record would unreasonably interfere with the operations of PHSA. FIPPA contemplates that creating records will require some effort and institutional resources and that some interference with a public body's operations is acceptable.[23]

[31] What constitutes an unreasonable interference "rests on an objective assessment of the facts" and "will vary depending on the size and nature of the operation".[24] Factors to consider include the nature of the machine readable records at issue, the public body's technical expertise and technological resources, the size and complexity of the task and "the burden that creating the record will place on a public body's information systems resources measured in relation to its total resources of that nature."[25]

Parties' submissions, s 6(2)(b)

[32] PHSA outlines the steps required to create the record, which it estimates will take 18 hours. PHSA says taking these steps will unreasonably interfere with its operations because utilizing the time and specialized expertise required to

[23] Order F21-07, 2021 BCIPC 08 (CanLII) at para. 55 citing Order 03-19, 2003 CanLII 49192 (BC IPC) at para. 25.
[24] Order F21-07, 2021 BCIPC 08 (CanLII) at para. 56 citing *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC) at para. 37; Order 03-19, 2003 CanLII 49192 (BC IPC) at para. 20.
[25] Order F21-07, 2021 BCIPC 08 (CanLII) at para. 56 citing Order 03-19, 2003 CanLII 49192 (BC IPC) at para. 21; Order 03-16, 2003 CanLII 49186 (BC IPC).

create the record will detract from its other operations. PHSA further says the BCCDC's important role and responsibilities and additional burdens during the COVID-19 pandemic are relevant considerations in assessing what constitutes "unreasonable interference".[26] Imposing a requirement to deploy specialized resources in order to respond to this and the related access requests will unreasonably interfere with the operations of the BCCDC.[27]

[33] In support of this argument, PHSA provided evidence that the BCCDC has a central leadership role in supporting British Columbia's response to the COVID-19 pandemic. This role includes research and data analysis and public health surveillance related to the virus.[28] PHSA provided evidence that the epidemiology team at BCCDC is responsible for collecting and analyzing data, understanding trends, managing and supporting outbreak response, and compiling information into statistical reports for all public health diseases, including COVID-19.

[34] The BCCDC's Executive Director of Data and Analytics Services (Executive Director) deposes that, since the start of the COVID-19 pandemic, BCCDC's time and resources have been diverted from other public health diseases. He says that because of this diversion, there is now an enormous backlog of public health surveillance of almost every public health disease outside of the respiratory area.[29] The Executive Director also says that BCCDC are actively trying to repatriate staff to their original portfolios and hiring dedicated staff for the respiratory area. BCCDC is trying to recruit 10 full-time equivalent positions, including epidemiologists, physicians, data analysts, and scientists for respiratory diseases.[30] PHSA also provided evidence that the BCCDC has few employees with the skills and qualifications to respond to the applicant's request[31] and that her request is one of several such access requests.[32]

[35] The applicant says 18 hours is less than the number of hours required in Order F21-07[33]. The applicant also says that responding to access requests should not take a back seat to the other activities of a public body, that there is no hierarchy of duties.[34]

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[26] PHSA's initial submissions at para. 54.
[27] PHSA reply submission at para. 34.
[28] Manager's affidavit at para. 16.
[29] Affidavit of BCCDC's Executive Director of Data and Analytics Services at para. 16 [Executive Director].
[30] Executive Director's affidavit at para. 17.
[31] Executive Director's affidavit at para. 18.
[32] Manager's affidavit at para. 9.
[33] Order F21-07, 2021 BCIPC 08 (CanLII).
[34] Applicant's submissions at para. 19.

Analysis, s. 6(2)(b)

[36] As I stated in my s. 6(2)(a) analysis, I accept PHSA's evidence that generating the record requested by the applicant requires the time and expertise of the epidemiology team. I further accept PHSA's evidence that these resources are already stretched beyond capacity. In particular, I accept that the strain placed upon the BCCDC by the COVID-19 pandemic caused it to divert resources from all other public health diseases which led to an enormous backlog of its work.[35] In this context, I accept that the 18 hours needed to respond to the access request would unreasonably interfere with the BCCDC's operations.

[37] In making my finding, I am aware of the fact that previous orders have found that 48 hours[36], two days[37], and 20-40 hours[38] of work to create the requested record would not unreasonably interfere with the operations of those public bodies. However, the context in those cases was quite different. Here, both the backlog of work and the degree and nature of the effort required to create the record is such that I am satisfied it would unreasonably interfere with PHSA's operations.

[38] For these reasons, I find that creating the record requested by the applicant would unreasonably interfere with PHSA's operations so the conditions of s. 6(2)(b) are not met.

Disclosure harmful to individual or public safety, s. 19

[39] Both the applicant and PHSA make extensive submissions on s. 19. Given my finding that PHSA is not obligated to create a new record responsive to the applicant's request under s. 6(2), I do not need to consider whether PHSA is authorized under s. 19(1) to refuse access to that record once created, and I decline to do so.

[35] Executive Director's affidavit at para. 16.
[36] Order 03-19, 2003 CanLII 49192 (BC IPC) at para. 28.
[37] Order F15-02, 2015 BCIPC 2 (CanLII) at paras 65 -67.
[38] Order F21-07, 2021 BCIPC 08 (CanLII) at para. 65.

Conclusion

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

January 31, 2024

ORIGINAL SIGNED BY

Carol Pakkala
Adjudicator

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