



Order F24-39

NORTHERN HEALTH AUTHORITY

Celia Francis
Adjudicator

May 8, 2024

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Summary: The Northern Health Authority (NHA) requested authorization under ss. 43(a) and (b) to disregard part of the respondent's request. The adjudicator granted relief under s. 43(b) on the grounds that he had already received the records or they are accessible by him from another source. The adjudicator found it was not necessary to consider whether that part of the request was frivolous or vexatious for the purposes of s. 43(a). The adjudicator also declined to authorize relief for any future requests.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, s. 43(b).

INTRODUCTION

[1] The Northern Health Authority (NHA) has requested authorization under ss. 43(a) and (b) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to disregard part of the respondent's request on the grounds that it is frivolous and/or vexatious and that the records in question have already been disclosed to the respondent or are accessible by the respondent from another source.

[2] The respondent opposes the NHA's s. 43 application, saying he requested the records, in good faith, for his civil claim against the NHA.¹

[3] For reasons given below, I have decided to grant the NHA's request under s. 43(b).

¹ Respondent's response, para. 1. The respondent has had legal representation at various times. I have for convenience referred here only to the respondent.

BACKGROUND

[4] The respondent is an internationally trained physician and a former member of the NHA's medical staff. During his time with the NHA, he was a provisional registrant with the British Columbia College of Physicians and Surgeons (College). A condition of his provisional registration was that he have a sponsoring organization and a supervisor. His sponsor was the NHA and his supervisors were other NHA physicians. In response to concerns with the respondent's communications with the NHA and his supervisors, the NHA withdrew its sponsorship of the Respondent in late 2018.²

[5] The respondent has launched a number of legal proceedings in connection with these events: a complaint to WorkSafeBC; a complaint to the College; complaints to the British Columbia Human Rights Tribunal (BCHRT) against the NHA, and associated judicial review proceedings, which are now concluded; and a civil claim against the NHA and the College in the British Columbia Supreme Court (BCSC) that remains ongoing.³

[6] The respondent's June 2023 FIPPA request was for "any and all documents" relating to him, "including but not limited to: court documents, notes, letters, complaints and allegations, feedback, reports, or anything else regarding [the respondent] in practice, etc."

[7] In October 2023, the respondent wrote to the NHA to complain about the delay. He added:

This unjustifiable and improper delay continues to cause [me] considerable hardship. We have been forced to adjourn various processes in the overarching BC Supreme Court matter due to these FOI delays. The FOI documents we requested go to the heart of many issues in the BCSC matter. We need these documents right away.⁴

[8] NHA responded later in three phases, disclosing over 1,100 pages of records. It withheld information under a number of FIPPA exceptions.

PRELIMINARY MATTER

[9] In its last response, the NHA told the respondent that it had determined that a number of records that related to his complaint to the College were not in its custody or under its control. The NHA also said that it was submitting an application under s. 43 of FIPPA to the Office of the Information and Privacy

² NHA's initial submission, paras. 6-11.

³ NHA's initial submission, para. 13; Affidavit of NHA's Regional Director, Legal Affairs, Enterprise Risk & Compliance, paras. 10-26.

⁴ Respondent's letter October 18, 2023 to the NHA, Exhibit B, affidavit #1, Legal Administrative Assistant to NHA's legal counsel.

Commissioner (OIPC) to disregard the part of his request that relates to the BCHRT and WorkSafeBC records.⁵

[10] The respondent understood from this letter that the NHA said that it does not have custody and control of the BCHRT and WorkSafeBC records. He believes this means that, under s. 53 of the *Health Professions Act* (HPA), these records are not compellable except for proceedings under the HPA and that he cannot use them in the civil claim process.⁶

[11] The NHA did not say that it did not have custody or control of the BCHRT and WorkSafeBC records. Rather, the NHA said that it did not have custody or control of the College complaint records.⁷ In any case, the College complaint records are not part of the NHA's s. 43 application,⁸ so I need not deal with them here.

[12] The NHA said that, with the exception of the records that are the subject of the s. 43 application, it has provided a full response to the respondent's request.⁹ The respondent did not dispute this statement.

[13] I have reviewed the NHA's responses and am satisfied that it has responded to all of the request except as it pertains to the BCHRT and WorkSafeBC records, the part of the request for which the NHA seeks relief. I will, therefore, now deal with whether this part of the request merits relief under s. 43.

ISSUES

[14] At this inquiry, I must decide the following issues:

1. Is the part of the respondent's request that pertains to the BCHRT and WorkSafeBC records frivolous and/or vexatious within the meaning of s. 43(a)?
2. Have the BCHRT and WorkSafeBC records already been disclosed to the respondent or are they accessible by the respondent from another source within the meaning of s. 43(b)?

⁵ NHA's letter of January 25, 2024 to respondent, Exhibit F, Affidavit #1, Legal Administrative Assistant to NHA's legal counsel.

⁶ Respondent's response, paras. 18-35. Section 53 of the HPA states, generally, that records relating to the exercise of duties under that Act are not compellable in another proceeding.

⁷ NHA's reply, paras. 8-13.

⁸ NHA's reply, para. 17.

⁹ NHA's letter of January 25, 2024 to respondent, Exhibit F, Affidavit #1, Legal Administrative Assistant to NHA's legal counsel.

3. If the answer to either or both of these two questions is yes, what relief, if any, is appropriate?

[15] The burden of proof is on the NHA to show that its s. 43 application should be granted.¹⁰

SECTION 43

[16] Section 43 gives the commissioner the power to grant the extraordinary remedy of authorizing a public body to disregard an access request.

[17] Sections 43(a) and (b) say:

43 If the head of a public body asks, the commissioner may authorize the public body to disregard a request under section 5 or 29, including because

(a) the request is frivolous or vexatious,

(b) the request is for a record that has been disclosed to the applicant or that is accessible by the applicant from another source, ...

[18] As stated in Order F23-98:¹¹

Public bodies do not have the authority under FIPPA to disregard access requests on their own. Authorizing a public body to disregard an access request is part of the Commissioner's oversight function.¹²

Given that relief under s. 43 curtails or eliminates the rights to access information, s. 43 applications must be carefully considered.¹³ Granting s. 43 applications should be the "exception" and not a mechanism for public bodies to avoid their obligations under FIPPA.¹⁴

However, s. 43 serves an important purpose. It exists to guard against the abuse of the right of access.¹⁵ It recognizes that when an individual overburdens a public body with access requests, it interferes with the ability of others to legitimately exercise their rights under FIPPA.¹⁶ In this way, s. 43 is "an important remedial tool in the Commissioner's armory to curb abuse of the right of access."¹⁷

¹⁰ Order F21-31, 2021 BCIPC 39 (CanLII) at para. 12, for example.

¹¹ Order F23-98, 2023 BCIPC 114 (CanLII), at paras. 27-30.

¹² Order F18-25, 2018 BCIPC 28 (CanLII), at para 14.

¹³ Auth (s. 43) 99-01. Available at <https://www.oipc.bc.ca/decisions/170> at page 3.

¹⁴ Auth (s 43) (19 December 1997), available at <https://www.oipc.bc.ca/decisions/168> at page 1.

¹⁵ Auth (s. 43) 99-01. Available at <https://www.oipc.bc.ca/decisions/170> at page 7.

¹⁶ Auth (s. 43) 99-01. Available at <https://www.oipc.bc.ca/decisions/170> at page 7.

¹⁷ *Crocker v British Columbia (Information and Privacy Commissioner)* 1997 CanLII 4406 at para. 33.

Relief under s. 43 is at the Commissioner’s discretion.¹⁸

[19] I agree with, and will apply, these principles below. I will first consider s. 43(b) and then, if necessary, s. 43(a).

DISCUSSION

Have the records been disclosed to the respondent or are they accessible by him from another source – s. 43(b)?

Parties’ submissions

[20] The NHA said that there has been “extensive disclosure by Northern Health of all relevant, non-privileged documents to the [respondent] as part of the discovery process required in each proceeding. This includes, without limitation, the WorkSafeBC documents that the [respondent] referenced in his December 18, 2023 email” to the NHA’s legal counsel.¹⁹

[21] With regards to the now-concluded BCHRT complaint, NHA said that it followed the BCHRT’s Rules of Practice and Procedure, specifically Rule 20(3). That rule required that the NHA provide the respondent with a list of all documents in its possession or control that may be relevant to the BCHRT complaint or response to the complaint, as well as a copy of each document in the list, except for those for which it claimed privilege.²⁰

[22] The NHA also explained the document disclosure in the ongoing civil claim proceedings. The NHA said that it complied with Rule 7-1(1) of the Supreme Court Civil Rules which required it to prepare and provide the respondent with Form 22. The form lists all documents that are or have been in its possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and all other documents to which the NHA intends to refer at trial.²¹

[23] The NHA said that it has fully complied with its obligation under Supreme Court Civil Rule 7-1(1) to make available for inspection and copying any documents that “go to the heart of” the issues in the civil claim.²² The NHA said that, if the respondent is not satisfied with the extent or propriety of disclosure in relation to the civil claim, he can follow the Supreme Court Civil Rules to demand disclosure of documents he has not received and to examine NHA

¹⁸ Order F22-61, 2022 BCIPC 69 (CanLII), at para 56.

¹⁹ NHA’s s. 43 application, pp. 3-4; NHA’s initial submission at para 51; NHA’s reply, para. 13.

²⁰ NHA’s initial submission at para 50(a).

²¹ NHA’s initial submission at para 50(b).

²² NHA’s initial submission, paras. 52-58; Affidavit of NHA’s Regional Director, Legal Affairs, Enterprise Risk & Compliance, paras. 12-13, 19-20, 25-26.

representatives for discovery. The NHA said the respondent has not done so. In its view, the respondent should be required to use those legal avenues, not FIPPA, to ensure appropriate disclosure.

[24] The NHA said there is “a large volume of unprocessed records” that it has already disclosed to the respondent at least once.²³ It argued that it should not have to respond to a FIPPA request and “unfairly ... shoulder the time and expense of what will essentially be a duplicate disclosure of records, subject to appropriate severing, that have already been disclosed to the [respondent], or that may be accessible to the [respondent] through the civil litigation process.”²⁴ The NHA also questioned the usefulness of providing the respondent with access under FIPPA to records he has already received.²⁵

[25] The respondent takes issue with the NHA’s s. 43 application. He said he needs the BCHRT and WorkSafeBC records to pursue his civil claim against the NHA. However, he said, he is bound by an implied undertaking regarding the BCHRT and WorkSafeBC records the NHA disclosed during the BCHRT complaint process. Thus, he said, those documents might not be compellable in the civil claim process.²⁶

[26] The respondent said he made his request in good faith, as his only method of obtaining the desired records is through a FIPPA access request. In his view, the “purported availability of the records through other means does not constitute a practical or accessible alternative.”²⁷

[27] The respondent did not dispute the NHA’s claim that he has not used the process set out in the Supreme Court Civil Rules to obtain the records he said are missing and he needs for his civil claim.

Discussion and findings

[28] Under an implied undertaking, a party to a proceeding may not use documents he received in that proceeding for another purpose. I note that the BCHRT’s Rules of Practice and Procedure Rule 23.1 says that a party cannot use a document obtained through its disclosure process for any other purpose except (a) with the consent of the other party who disclosed the document, (b) by order of the BCHRT or (c) after the document is entered as evidence in a hearing. While I can appreciate the respondent is bound by that rule regarding the records he received during the BCHRT complaint process, he has not explained why he could not avail himself of the exceptions in Rule 23.1(2).

²³ NHA’s s. 43 application, p. 4.

²⁴ NHA’s initial submission, para. 59.

²⁵ NHA’s reply, paras. 19-20.

²⁶ Respondent’s response, paras. 18-35.

²⁷ Respondent’s response, paras. 31, 34, 42.

[29] Most importantly, the Supreme Court Civil Rules provide the respondent with a complete mechanism to address his disclosure needs and concerns regarding his civil claim. The NHA said that the respondent has not challenged the completeness of NHA's disclosure through the legal avenues available to him in the civil claim process. Although the respondent believes he may not be able to obtain the requested records under the Supreme Court Civil Rules, I agree with the NHA that this avenue is open to him. The respondent has not, in my view, adequately explained why the NHA should be put to the burden of retrieving, copying and severing the requested records under FIPPA, when he has a means of obtaining full, unredacted copies of the same records for use in the civil claim proceedings.

[30] I am, therefore, satisfied that s. 43(b) applies to the part of the respondent's request that relates to the BCHRT and WorkSafeBC records. That part of his FIPPA access request is for records that were already disclosed to him during the BCHRT complaint proceedings. The records are also accessible by him under the rules that govern the BC Supreme Court where he wants to use those records.

[31] I do not, as a result, need to consider if the relevant part of the request is also frivolous or vexatious under s. 43(a).

What relief is appropriate?

[32] The NHA has asked for the following relief:

1. Northern Health Authority is authorized to disregard the respondent's June 2023 access request as it pertains to records that have been disclosed to the respondent and/or his counsel through litigation proceedings, and as it pertains to records that were accounted for but not disclosed through the litigation due to a claim of privilege by Northern Health Authority; and
2. Northern Health Authority is authorized to disregard any future access requests made by the respondent or made on his behalf, for records that have been disclosed to the respondent and/or his counsel through any past or future litigation proceedings, and as it pertains to records that may be accounted for but not disclosed through the litigation due to a claim of privilege by Northern Health Authority.²⁸

[33] I am satisfied that it is appropriate to authorize the NHA to disregard the part of the respondent's request that is for the BCHRT and WorkSafeBC records. I make the appropriate authorization below.

²⁸ NHA's initial submission, para. 65.

[34] I may also make prospective authorizations.²⁹ Whether relief from responding to future requests is appropriate depends on the particular circumstances of each case. Some OIPC orders have authorized public bodies to disregard future requests, for example, when a respondent has barraged a public body with multiple, overlapping requests and shows no signs of stopping.³⁰

[35] In this case, I do not consider it appropriate to grant relief for FIPPA access requests that the respondent may make in the future. Unlike the past OIPC orders where future relief was necessary, there is no evidence here of a pattern of behaviour where the respondent repeatedly requests records that were disclosed to him or that are accessible to him within the forum where he wants to use the records. This is a single incident where part of the respondent's access request fits the criteria for relief under s. 43(b).

CONCLUSION

[36] For the reasons given above, I authorize the NHA, under s. 43(b), to disregard the part of the respondent's request for the BCHRT and WorkSafeBC records.

May 8, 2024

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F24-95646

²⁹ *Crocker v British Columbia (Information and Privacy Commissioner)* 1997 CanLII 4406 at paras. 41, 43.

³⁰ For example, Order F21-04, 2021 BCIPC 4 (CanLII), paras. 88-89.