OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 03-43

VANCOUVER ISLAND HEALTH AUTHORITY

James Burrows, Adjudicator
December 18, 2003

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Summary: The applicant made a request for records relating to a complaint made by a third party. The health authority provided records to the applicant but severed some information and withheld other records. Section 22 requires the health authority to refuse access to third-party personal information. The health authority applied s. 22 properly to the severed and withheld records and complied with its s. 6(1) duty in searching for records.

Key Words: duty to assist – adequacy of search – personal privacy – unreasonable invasion – supplied in confidence

Statutes Considered: *Freedom of Information and Protection of Privacy Act, s. 2; Adult Guardianship Act, s. 46(2).*

Authorities Considered: B.C.: Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order 00-26, [2000] B.C.I.P.D. No. 29; Order 02-33, [2002] B.C.I.P.C.D. No. 33.

1.0 INTRODUCTION

[1] On August 28, 2002, the applicant made an access request to the Vancouver Island Health Authority ("VIHA") under the *Freedom of Information and Protection of Privacy Act* ("Act"). The request was for records contained in any file related to a complaint made by a third party. On November 4, 2002, VIHA responded to the applicant by denying access to the records under s. 22 of the Act. The applicant made a further request to VIHA on November 6, 2002. On December 5 and December 23, 2002, VIHA provided the applicant with records, severing some and withholding others under s. 22 of the Act and s. 46(2) of the *Adult Guardianship Act* ("AGA"). On January 6, 2003, VIHA again responded to the applicant by providing further details of its search and advising that no further records were found.

[2] As the matter did not settle in mediation, a written inquiry was scheduled under Part 5 of the Act. Third parties were notified of the inquiry on June 19, 2003 and the inquiry was held on July 11, 2003.

[3] I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[4] The issues before me in this inquiry are:

1. Was VIHA required by s. 22 of the Act to deny access to personal information?

2. Was VIHA required by s. 46(2) of the AGA to deny access to personal information?

3. Did VIHA fulfill its duty under s. 6(1) of the Act in its responses to the applicant's requests?

[5] Under s. 57(2), the applicant has the burden regarding s. 22. Previous orders have established that VIHA has the burden with respect to s. 6(1).

3.0 DISCUSSION

[6] **3.1 Procedural Issues –** The applicant has objected to the release of her reply submission to VIHA prior to the Information and Privacy Commissioner issuing an order in this matter, as the applicant would not have an opportunity to answer the reply submission of VIHA. As described in the rules for submissions in the Notice of Written Inquiry, supplied to all parties by this Office, a reply submission "must not raise any new issues or contain any new facts." VIHA's reply submission only addressed issues raised in the applicant's initial submission. The applicant has also supplied a sur-reply to the reply submission of VIHA. As the inquiry procedures limit the applicant to an initial and a reply submission, I have not considered it.

[7] The applicant has also objected to the fact that the submission of third parties and portions of VIHA's submissions were made *in camera.* At p. 4 of Order 00-07, [2000] B.C.I.P.C.D. No. 7, the Commissioner said the following about receiving *in camera* submissions:

> As far as reliance on *in camera* submissions generally is concerned, there is no doubt the Act gives me the authority to receive materials *in camera*. This should be done only where it is necessary to do so to protect information that is subject to one of the Act's exceptions to the right of access. This is what has happened here. If, however, a party submits material that should not properly be *in camera*, because it is not necessary to protect information, it risks having me reject that

> material. This office's published policies and procedures – and the notice of inquiry in each case – set out the procedure that will be followed on this point.

[8] I have reviewed the submission of the third parties and VIHA and found that the release of these portions of the submissions would provide the applicant with the information that she seeks from this inquiry and therefore potentially protected under s. 22 of the Act. I find that the submissions are properly received *in camera*.

[9] The public body has objected to the reply submission of the applicant, arguing that new issues have been raised, to which it has not been allowed to respond. I disagree with VIHA. While the applicant has supplied more detail about the overall circumstances which preceded her request for review, I do not consider this information raises any new issues or evidence respecting the applicant's burden of proof under s. 22 of the Act. Therefore, I have not asked for further submissions from VIHA. In any case, those aspects of the applicant's reply submission do not affect my views on the s. 22 outcome here.

[10] **3.2 Adequacy of Search by VIHA** – Section 6(1) of the Act reads as follows:

> **Duty to assist applicants**
>
> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[11] The Commissioner has examined the issue of adequate search on numerous occasions and has clearly stated the principles upon which reasonable effort should be judged. See, for example, Order 00-26, [2000] B.C.I.P.D. No. 29. I will not repeat that discussion here, but have applied the same principles in this decision.

[12] In its submission, VIHA has detailed the efforts that its staff undertook to search for records responsive to the applicant's request. In her affidavit, VIHA's Manager of Admitting Health Records and Information Services (Central and North Island) ("Manager") stated that she conducted searches for responsive records held by the various health agencies which she believed could have held those records. The Manager also deposed that, during the time of her searches, she was in contact with the applicant to clarify the request and discuss what areas of health services that the applicant thought should be searched.

[13] During the processing of the request, administrative changes in VIHA resulted in the conduct of the request being transferred to the VIHA Regional Coordinator for Information and Privacy ("Coordinator"). In her affidavit, the Coordinator described her efforts to conduct a second search of the appropriate agencies.

[14] Based on the search efforts described in the affidavits of the Manager and the Coordinator, I find that VIHA has performed a reasonable search and that it has fulfilled its duty under s. 6(1) of the Act.

[15] **3.3 Unreasonable Invasion of Third-Party Privacy** – Section 22(1) requires a public body to withhold personal information where its disclosure would be an unreasonable invasion of a third party's privacy. The relevant parts of s. 22 are:

> **Disclosure harmful to personal privacy**
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (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,
>
> … .

[16] As the burden of proof for s. 22 lies with the applicant, I will first describe the applicant's argument for the release of third-party personal information. The applicant's submissions are primarily a description of the events which precipitated the request for records. The only substantive argument the applicant has presented is that the withheld information could affect her rights. I will discuss this argument in more detail below.

[17] Although the burden of proof is with the applicant, the Act and numerous orders affirm that a public body has, at the very least, an incentive to show that it considered s. 22 in determining that disclosure of personal information would be an unreasonable invasion of third-party privacy. The submission provided by VIHA in this inquiry does not directly do this, but my review of the information in issue, and the rest of the material before me, enables me to conclude that the withheld information is third-party personal information that must be withheld under s. 22. The reasons for this follow.

Fair determination of the applicant's rights

[18] I will now describe the relevant circumstances in s. 22(2) of the Act that I considered, to determine if the release of this information would be an unreasonable invasion of third-party personal privacy. Although the applicant only mentions the issue of her rights in her submissions, the Commissioner has described the proper application of s. 22(2)(c) in previous orders. Following those orders, Adjudicator Lowe said the following in Order 02-33, [2002] B.C.I.P.C.D. No. 33:

> [29] … in order for the applicant to successfully argue that s. 22(2)(c) applies, it must, in accordance with the test re-affirmed in Order 01-53, show that the right in question is a legal right, that the right is related to a proceeding which is either under way or is contemplated, that the information sought has some bearing on the

> determination of the right in question, and that the information is necessary in order to prepare for the proceeding.

[19] In this matter, the applicant has only raised the issue of her 'rights' but not provided evidence as to how her legal rights are involved, including respecting any legal proceedings she is involved in or contemplates. Therefore, I find that s. 22(2)(c) is not a relevant circumstance in this case.

Supplied in confidence

[20] The evidence of whether or not the personal information was supplied in confidence to VIHA relies mainly on statements in the *in camera* affidavits of VIHA and third parties that the information was supplied with an expectation that it would be maintained in confidence.

[21] VIHA also submits that s. 46(2) of the AGA requires it to refuse to disclose the disputed personal information. That section reads as follows:

> 46(2) A person must not disclose or be compelled to disclose the identity of a person who makes a report under this section.

[22] Section 79 of the Act provides that the Act prevails over any other Act unless the other Act contains a clause that specifically overrides the Act:

> **Relationship of Act to other Acts**
>
> 79 If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

[23] No such clause appears in the AGA.

[24] While s. 46(2) of the AGA does not take precedence over the Act, it is a statutory indication of confidentiality that I consider relevant in this case. It supports the conclusion that there is an expectation that information provided under the AGA will be held in confidence. This supports the argument of VIHA, under s. 22(2) of the Act, that the information was supplied in confidence.

[25] Given the nature of the information, the evidence presented in the affidavits and s. 46(2) of the AGA, I have concluded that there is sufficient evidence to find that the withheld information was provided in confidence to VIHA.

[26] Therefore, I consider s. 22(2)(f) to be a relevant circumstance that supports withholding the third-party personal information supplied in confidence. There being no other relevant circumstances indicated by the applicant, or in the material before me, I find that the release of the withheld personal information would constitute an unreasonable invasion of third-party privacy under s. 22 of the Act.

4.0 CONCLUSION

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

1. I require VIHA to refuse to disclose the personal information that it has withheld under s. 22 of the Act; and

2. I confirm that VIHA has performed its duty under s. 6(1) of the Act to assist the applicant by conducting an adequate search for records.

[28] For the reasons given above, it is not necessary for me to make an order respecting s. 46(2) of the *Adult Guardianship Act*.

December 18, 2003

ORIGINAL SIGNED BY

James Burrows
Adjudicator