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

Order F05-12

PROVINCIAL HEALTH SERVICES AUTHORITY

Celia Francis, Adjudicator
April 7, 2005

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Summary: Applicant requested records related to his interactions with a number of named doctors at the PHSA. The PHSA withheld some information under ss. 14 and 22. Applicant objected to decision to withhold information and also questioned the completeness of the PHSA's response. The PHSA applied s. 14 correctly and in some cases s. 22. The PHSA is ordered to disclose some of the information it withheld under s. 22. The PHSA did not show that it complied with s. 6(1) in its response and is ordered to do so.

Key Words: duty to assist – respond openly, accurately and completely – every reasonable effort – legal advice – solicitor-client privilege – personal privacy – unreasonable invasion – submitted in confidence – employment history – public scrutiny – fair determination of rights – position, functions or remuneration of public body employees.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 14, 22(1), 22(2)(c) & (f), 22(3)(a) & (d), 22(4)(e).

Authorities Considered: B.C.: Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order F05-02, [2005] B.C.I.P.C.D. No. 2; Order 00-15, [2000] B.C.I.P.C.D. No. 18.

Cases Considered: *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

1.0 INTRODUCTION

[1] This inquiry arises out of two requests that the applicant made to the Children's & Women's Health Centre ("CWHC")—now part of the Provincial Health Services

Authority ("PHSA")—under the *Freedom of Information and Protection of Privacy Act* ("Act") for records related to interactions of a number of named individuals which have "bearing on my standing, profession, employment, and similar things at the [Children's & Women's Health] Centre and the University [of British Columbia]."

[2] The PHSA responded by providing a number of records while withholding information and records under ss. 14 and 22 of the Act and under s. 51 of the *Evidence Act*. The PHSA said that one named individual had no responsive records. The applicant requested a review of the PHSA's response and also complained that the PHSA's response was incomplete.

[3] Because the matter did not settle in mediation, a written inquiry on both requests was held under Part 5 of the Act. 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 ISSUES

[4] The notice for this inquiry states that the issues in this case are:

1. Whether the PHSA is authorized by s. 14 to refuse access to information.

2. Whether the PHSA is required by s. 22 to refuse access to information.

3. Whether the PHSA complied with its duty under s. 6(1) by accounting for all the records.

4. The PHSA's application of s. 51 of the *Evidence Act* to certain records.

[5] During the inquiry process, the PHSA informed this office that it had determined that certain records it had originally withheld under s. 51 of the *Evidence Act* (minutes of Infection Control Committee meetings, pp. 406-407 and 417-420) did not concern quality assurance matters and were therefore not covered by s. 51. The PHSA said it was disclosing these pages to the applicant (letter of July 16, 2004). These pages are thus no longer in issue in this inquiry.

[6] The PHSA also originally withheld pp. 4-6 under s. 51 of the *Evidence Act*. In post-inquiry correspondence, the PHSA said that it was now taking the position that s. 22 of the Act applies to portions of pp. 4-6 (minutes of an Infection Control Committee meeting). It said it had provided severed copies of these pages to the applicant (letter of March 21, 2005). Accordingly, I need not consider whether s. 51 of the *Evidence Act* applies to these pages but will consider below whether the PHSA is required to withhold the severed portions under s. 22 of the Act.

[7] Under s. 57(1) of the Act, the PHSA has the burden of proof regarding s. 14 while, under s. 57(2), the applicant has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[8] **3.1 Solicitor-Client Privilege** – The PHSA says that it withheld information that constitutes confidential communications between solicitor and client for the purpose of obtaining and providing legal advice sought and given in connection with two British Columbia Supreme Court actions commenced by the applicant against the doctors whose files are the subject of this inquiry. It says that the privilege is the individual doctors', not the PHSA's or the CWHC's, and argues that some of the information is on its face communications that are subject to solicitor-client privilege. The PHSA also provides affidavit evidence in support of its position from two of the doctors who were defendants in these actions (paras. 10-12, initial submission; doctors' affidavits).

[9] The applicant generally disputes the PHSA's application of s. 14 and suggests that it waived privilege in circulating the correspondence. He casts doubt on the PHSA's argument that the privilege belongs to the individual doctors, suggesting that the doctors are not clients in this context. Elsewhere he suggests, however, that the doctors have waived privilege in providing the disputed records to the PHSA (pp. 5 & 6, initial submission; pp. 2, 3 & 4, reply submission).

[10] Section 14 reads as follows:

> **Legal advice**
>
> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[11] The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well established. See, for example, Order 02-01, [2002] B.C.I.P.C.D. No. 1. I will not repeat those principles but apply them here.

[12] I have carefully reviewed the records to which the PHSA applied s. 14 (of which there are numerous duplicates). I am satisfied that they are all protected by solicitor-client privilege and I find that s. 14 applies to these records.

[13] **3.2 Personal Privacy** – As with the s. 14 records, there are numerous duplicates among the records to which the PHSA applied s. 22. These records are principally e-mails, memos, meeting minutes and letters concerning workplace incidents, matters or encounters involving CWHC employees, including medical professionals, and the applicant.

[14] In his initial submission, the applicant stated that he did not dispute the s. 22 severing on a number of specified pages, copies of which he provided to me in post-inquiry correspondence for purposes of clarification. He still questions the severing in the remaining pages, however, and I have therefore dealt with the PHSA's application of s. 22 only to those pages.

[15] The Information and Privacy Commissioner has considered the application of s. 22 in numerous orders, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56. I have applied here, without repeating it, the approach taken in those orders. The relevant provisions read as follows:

> **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, …
>
> (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, …
>
> (d) the personal information relates to employment, occupational or educational history, …
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if …
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff, … .

[16] The PHSA says that it considered it was obliged to withhold medical and employment history information of CWHC medical professionals and employees, as well as patient medical information, under ss. 22(3)(a) and (d) of the Act (paras. 6-9, initial submission). The PHSA does not say if it considered whether s. 22(4) applies. With respect to pp. 4-6, it says no relevant circumstances in s. 22(2) favour disclosure although it did not mention s. 22(2) in connection with the other pages severed under s. 22.

[17] The applicant believes that the PHSA has applied s. 22 inappropriately in some cases although, as noted above, he does not dispute all of the severing. The applicant

makes a number of arguments and allegations which appear to relate to the factor in s. 22(2)(c) (pp. 2 & 6, initial submission; further submission of March 14, 2005). The applicant says, for example, that the doctors whose files he requested are "plainly jealous individuals who thought they could obtain 'turf' at a time when the hospital administration was changing" and who have "abused me by way of defamatory writings and malicious actions". The applicant alleges that there was an attempt to structure a review in which he was to be forced to participate but in which he was not to be given details of complaints about him that led to the review. He also says that release of the information is critical to his employment and to his life.

[18] The Information and Privacy Commissioner has said that "rights" in this context are "legal rights" (see Order 01-07, [2001] B.C.I.P.C.D. No. 7, for example), noting that the British Columbia Supreme Court has said this also in relation to s. 22 (see *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)). The applicant provided no evidence or argument showing how the withheld personal information is relevant to any legal rights he may have had at stake in any proceedings in which he was involved at the time of his request or this inquiry. The records themselves also provide no support for the application of s. 22(2)(c). I conclude that it is not a relevant factor here.

[19] The withheld personal information in the remaining pages in dispute consists of the following: the applicant's own personal information in the form of comments he made about his own actions in the workplace; information related to other employees' general workplace activities or responsibilities that is not personal or which, in my view, falls under s. 22(4)(e); information related to workplace incidents or exchanges involving the applicant and others, where s. 22(3)(d) applies to the portions related to third parties; and third-party employee or patient medical information to which s. 22(3)(a) applies.

[20] Although the PHSA does not address s. 22(2)(f) and does not provide any evidence on the confidentiality issue (which would have been of assistance), it is evident from the face of the records that the personal medical information was supplied in confidence. This is not the case with the employment history information, however. Some appears in the context of workplace e-mail exchanges between the applicant and other employees regarding workplace activities in which the applicant comments on the actions of the other employees. Other information appears in minutes of a meeting in which the applicant himself supplied the employment history information about other employees (in the form of comments about their workplace actions) or was present when they described their workplace actions. I therefore accept that s. 22(2)(f) applies to the withheld third-party medical information, favouring its withholding, but not to the third-party employment history information. I am not aware of any other relevant circumstances that might apply in this case.

[21] While I find that the PHSA withheld most of the third-party personal information correctly under s. 22, there are a few areas where the PHSA withheld information that is not personal, that clearly falls under s. 22(4)(e) or that is the applicant's own personal information. These items can reasonably be severed from the records without

unreasonably invading third-party personal privacy and disclosed to the applicant. I have re-severed these records for the PHSA to disclose to the applicant.

[22] The PHSA also withheld some information that consists of comments the applicant made in the course of his employment, either in meetings or in e-mails, about other employees or his workplace interactions with them. As noted above, this information falls under s. 22(3)(d). It would not, however, be an unreasonable invasion of these employees' privacy for the applicant to receive this information, since he provided it in the first place and is thus aware of it (see Order F05-02, [2005] B.C.I.P.C.D. No. 2, and Order 01-53 for examples of similar findings). These items can also, in my view, reasonably be severed from the records without unreasonably invading third-party personal privacy and disclosed to the applicant. I have re-severed these records for the PHSA to disclose to the applicant as well.

[23] **3.3 Duty to Assist the Applicant** – The PHSA says that the individual doctors named in the applicant's request all made reasonable efforts to identify and produce records responsive to the applicant's request. It provides affidavit evidence in support of this point from most of the doctors whose files the applicant requested and from the corporate director of medical affairs. Some of the doctors say that they provided their records in 2001 to the corporate director for the purposes of the litigation that the applicant had commenced and say they had no other records. Other doctors say they provided their records to the PHSA's information and privacy officer for the purposes of responding to the applicant's request and had no others. One doctor deposes that she had no responsive records and had never had any.

[24] The corporate director deposes that, in 2001, she had gathered records from a number of the doctors in connection with the litigation that the applicant commenced. She says she retained them and provided copies of these records to the PHSA's legal counsel for the purposes of responding to the applicant's freedom of information requests (para. 13, initial submission; doctors' affidavits; Miller affidavit).

[25] The applicant complains in various places that the PHSA took a year to respond to his requests (*e.g.*, p. 6, initial submissions). The issue of the length of time that the PHSA took to respond to the applicant's requests is not listed in the notice for this inquiry and I therefore will not consider it here.

[26] With respect to the issue of whether the PHSA has accounted for all the records, the applicant gives a number of examples of correspondence he says is incomplete (*e.g.*, two records which are missing their second pages). The applicant also says, in the case of some individual doctors, there are fewer records than he expected. In the case of others, he says there is little or nothing that pre- or post-dates 2001. He gives examples of other records he believes he should have received (*e.g.*, where he has received only one person's copy of correspondence between that person and another person whose records he also requested). He also voices suspicions regarding the doctor who is said to have no responsive records (pp. 5-6, initial submission; pp. 2-3, reply). The PHSA does not comment on any of the examples of missing or incomplete records the applicant cites in his submissions.

[27] The issue of whether the PHSA has accounted for the records—that is, whether it has provided an open, complete and accurate response—is an aspect of whether the PHSA has complied with its duty under s. 6(1) of the Act, which 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.

[28] The Information and Privacy Commissioner has considered s. 6(1) in many orders and has set out what he expects from public bodies in searching for records and in accounting for such searches (see, for example, Order 00-15, [2000] B.C.I.P.C.D. No. 18). I will apply here, without repeating them, the principles from those orders.

[29] Public bodies are not required to rise to a standard of perfection in complying with s. 6(1). In this case, I would not suggest, for example, that the PHSA must attempt to match up or account for every single copy of correspondence involving two or more individuals. However, the Act does require the PHSA to make every reasonable effort to assist the applicant and to provide an open, complete and accurate response. In this case, it may be that, for a number of reasons, the records themselves are incomplete. For example, the individuals involved may have deleted or destroyed copies of certain correspondence over time, or never have retained them in the first place. They may not remember what they did with other records. Records may have been misplaced or lost in office moves.

[30] The material before me shows that the PHSA disclosed over 1,200 pages of responsive records from doctors' files to the applicant. It is clear therefore that the PHSA searched for responsive records. The question is, however, whether it responded openly, accurately and completely. The applicant has provided a number of explicit examples, which I accept as accurate, of records which he says are missing or incomplete (noting that pages are missing), periods of time for which no records exist when he believes records ought to exist and other specific concerns about the openness, accuracy, completeness of the response, many of which on their face have validity. The PHSA has not, however, responded to the applicant's examples of gaps and has made no attempt to explain them, although it had an opportunity to comment on the applicant's specific examples and areas of concern. I find that the PHSA has not responded openly, accurately and completely to the applicant's request.

[31] The PHSA has not, therefore, in my view, shown, in this inquiry, that it fulfilled its s. 6(1) duty to make every reasonable effort assist the applicant and to respond "openly, accurately and completely" to the applicant's request. I therefore make the appropriate order below.

4.0 CONCLUSION

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

1. I confirm that the PHSA is authorized to withhold the information which it withheld under s. 14.

2. Subject to para. 3 below, I require the PHSA to withhold the information it withheld under s. 22.

3. I require the PHSA to disclose some of the information it withheld under s. 22, as highlighted on the copies of the records provided to the PHSA with its copy of this order.

4. I require the PHSA to perform its duty under s. 6(1) to make every reasonable effort to assist the applicant and to respond openly, accurately and completely to the applicant's request by responding to the applicant's points as to the incompleteness of the PHSA's response, as set out in the applicant's submissions in this inquiry.

5. Under s. 58(4), I require the PHSA to provide the applicant with the response described in para. 4 above, within 30 days after the date of this order and to deliver a copy of it to me directly and concurrently.

April 7, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator