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Order F18-15

MINISTRY OF HEALTH

Celia Francis
Adjudicator

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Summary: A pharmacy's lawyer requested copies of complaints and allegations about the pharmacy's business practices. The adjudicator found that s. 15(1)(d) (reveal identity of confidential source of law enforcement information) and s. 22 (harm to third-party personal privacy) applied to almost all of the withheld information. The adjudicator also found that s. 19(1)(a) (harm to safety) did not apply to the names of three Ministry employees and ordered the Ministry to disclose this information to the lawyer.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 15(1)(d), 19(1)(a), 22(1), 22(4)(a), 22(3)(a), 22(3)(b), 22(2)(a), 22(2)(e), 22(2)(f).

INTRODUCTION

[1] This case concerns an investigation by the Ministry of Health (Ministry) into a pharmacy's business practices. In July 2015, a lawyer made a request for access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to records related to complaints and allegations of misconduct against the pharmacy or its staff, including three named individuals.[1] The Ministry responded in November 2015 by withholding all of the responsive records under s. 15 (harm to law enforcement) and s. 22 (harm to third-party personal privacy) of FIPPA.

[1] The request stated that the three individuals' consent for disclosure was attached. The consent was not included in the material before me. However, the Ministry's submissions indicate that it was satisfied that the lawyer was acting for the three named individuals.

[2] In April 2016, the lawyer asked that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision to withhold all of the records. In March 2017, the Ministry disclosed some records, withholding the rest under ss. 15, 19 (harm to safety) and 22. Mediation did not resolve the issues and the matter then proceeded to inquiry.

[3] The OIPC invited and received submissions from the Ministry and the lawyer. The Ministry's initial submission clarified that it was relying principally on ss. 15(1)(c), (d) and (f) and s. 19(1)(a). The Ministry expressed other s. 15(1) concerns in an *in camera* portion of its submission.

ISSUES

[4] The issues before me are whether the Ministry is required by s. 22 and authorized by ss. 15(1), mainly ss. 15(1)(c), (d) and (f), and s. 19(1)(a) to withhold information. Under s. 57(1) of FIPPA, the Ministry has the burden of proof respecting ss. 15 and 19. Under s. 57(2), the lawyer, as the applicant, has the burden of proving that disclosure of any personal information in the records would not be an unreasonable invasion of third-party personal privacy under s. 22.

DISCUSSION

Background

[5] The Ministry is responsible for the delivery of health services to British Columbians. As part of this, it operates the PharmaCare program, which provides financial assistance to eligible residents of BC for the purchase of pharmaceutical products. In order for PharmaCare to pay for a particular pharmaceutical product, it requires that an eligible BC resident obtain a prescription from a licenced health care professional and present the prescription to a pharmacy participating in PharmaCare. The pharmacy dispenses the product to the resident. PharmaCare then, in accordance with certain criteria, reimburses the pharmacy for all or part of the product cost and an associated dispensing fee.[2]

[6] The Ministry said that the pharmacy in this case was the subject of an audit by the Ministry after "an analysis of the Pharmacy's billings brought the Pharmacy" to the attention of the Ministry's PharmaCare audit unit (PharmaCare audit), which is part of the Ministry's Audit Investigation Branch (AIB). As a result of the audit, among other things, the Ministry determined that the pharmacy owed the Province approximately $1.4 million. The Ministry also denied the pharmacy

[2] Ministry's initial submission, paras. 9-30; Affidavit of Executive Director, Audit and Investigation Branch, paras. 3-6.

enrolment in PharmaCare. The pharmacy's judicial review of those decisions was ongoing at the time of this inquiry.[3]

Information in dispute

[7] The 79 pages of responsive records comprise emails, faxes, notes of interviews and telephone calls, and a transcript of a telephone call, for the period January 2013 to July 2015. The Ministry withheld almost all of the records, disclosing only one email in severed form.[4] The information in dispute is the information that the Ministry withheld under ss. 15, 19 and 22.

[8] Except for the email, the Ministry did not annotate individual portions of records with the applicable exceptions but applied them blanket fashion over entire pages.

In camera material

[9] The Ministry said that it was providing its submissions "under protest" in this case because the OIPC has denied it procedural fairness by excluding certain information. It said that the OIPC did not permit it to submit material *in camera* that it considered necessary to make its case on ss. 15 and 19 and disclosing this information during the inquiry could, in the Ministry's view, threaten the safety of individuals. The Ministry said that the OIPC's decision on the *in camera* material amounted to prejudging the merits of the exceptions.[5]

[10] As a general principle, the OIPC is required to consider proposed *in camera* information in light of its broad discretion to permit evidence into the inquiry and the need for procedural fairness for all parties. Accepting information *in camera* denies the opposing party the opportunity to respond to that information and restricts the adjudicator's ability to provide intelligible reasons. For that reason, it is problematic from a procedural fairness perspective.

[11] My role in this inquiry is not to review the reasonableness or correctness of the *in camera* decision of another Commissioner's delegate. That role is reserved for the court on judicial review. In this case, the Ministry was given the opportunity to provide three submissions in support of its *in camera* application before the delegate made a decision with written reasons.[6] The Ministry has provided no information that suggests that the *in camera* decision process was unfair. Therefore, I decline to revisit that decision.

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[3] Ministry's initial submission, paras. 31-34.
[4] Pages 1-2 and partial duplicates at pp. 33-34 (with handwritten annotations) and at pp. 59-60.
[5] Ministry's initial submission, paras. 38-41.
[6] Some of the Ministry's material was approved as being appropriately submitted *in camera*.

Harm to law enforcement

[12] The Ministry said that disclosure of "portions of the information withheld under s. 15" would result in the following: it would disclose PharmaCare audit's methods, which I take to be a reference to s. 15(1)(c); it could reasonably be expected to reveal the identity of a confidential source of law enforcement information under s. 15(1)(d); and it could reasonably be expected to endanger the physical safety of named third parties under s. 15(1)(f). The Ministry did not annotate specific information in the records to indicate how these provisions apply, in its view.

[13] I find below that s. 15(1)(d) applies to all of the information that the Ministry withheld under s. 15(1). Therefore, I will not consider ss. 15(1)(c) and (f) or the Ministry's *in camera* submission on its other s. 15(1) concerns.

[14] The relevant provisions read as follows:

> **Disclosure harmful to law enforcement**
>
> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
> …
> (d) reveal the identity of a confidential source of law enforcement information,
> …
> (3) The head of a public body must not refuse to disclose under this section
> (a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act,
> …

[15] Schedule 1 of FIPPA defines "law enforcement" as follows:

> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
>
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

Law enforcement information

[16] Previous orders have said that, in order to show that s. 15(1)(d) applies, it is necessary to establish that the public body was engaged in "law enforcement," that the complainant provided "law enforcement information" to the

public body and did so in confidence.[7] I have taken this approach in assessing the parties' arguments.

[17] The Ministry said that disclosure of "portions of the information" could reasonably be expected to reveal the identity of a confidential source of law enforcement information for the purposes of s. 15(1)(d).[8] Although the Ministry did not specify which portions of the records it meant here, it appeared to refer to those containing information that third parties provided.[9]

[18] The Ministry said that PharmaCare audit is responsible for carrying out compliance audits and investigations of the PharmaCare program to, among other things, detect and deter abuse of health care funding. The Ministry said that, where necessary, PharmaCare can disallow a claim and require repayments and recommend other enforcement action. The Ministry added that PharmaCare audit's investigations can lead to referrals to its Special Investigation Unit or to the College of Pharmacists. It said that these referrals can, in turn, result in criminal charges, de-enrolment in the PharmaCare program and cancellation of a pharmacist's licence.[10]

[19] The Ministry did not refer me to specific provisions in the *Pharmaceutical Services Act* (PSA) authorizing PharmaCare audit's activities. However, my review of the PSA shows that the Minister of Health may appoint inspectors to conduct audits and inspections of claims, and billing and business practices, of "providers" (which include pharmacies) to determine compliance with the PSA.[11] As a result of an audit or inspection, the Minister may require repayment of "non-entitled" benefits,[12] suspend payments[13] and impose an administrative penalty.[14]

[20] In Order 00-18,[15] former Commissioner Loukidelis noted that, under ss. 29 and 92 of the *Motor Vehicle Act* (MVA), the Superintendent of Motor Vehicles (Superintendent) is authorized to investigate a driver's fitness to drive a motor vehicle, may prohibit the driver from driving and may direct the Insurance Corporation of BC to cancel the person's driver's licence. The Commissioner also found that cancellation of a driver's licence under the *Motor Vehicle Act*

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[8] Ministry's initial submission, para. 88; Affidavit of Executive Director, Audit and Investigation Branch, paras. 36, 47.
[9] The Ministry referred to third parties who reported concerns and provided "tips" to the Ministry, at paras. 36 and 47 of its initial submission. It identified these third parties *in camera*.
[10] Ministry's initial submission, paras. 81-85, 88-93; Affidavit of Executive Director, Audit and Investigation Branch, paras. 13-14, 18-19, 33-36.
[11] Sections 34 and 35 of the PSA.
[12] Section 42 of the PSA.
[13] Section 45 of the PSA.
[14] Section 48 of the PSA.
[15] Order 00-18, 2000 CanLII 7416 (BC IPC).

constituted a "sanction" for the purposes of the definition of "law enforcement." The Commissioner concluded that the steps the Superintendent took under the MVA to investigate concerns about a driver's fitness to drive were an "investigation" that led or could lead to the imposition of a sanction for the purposes of the definition of "law enforcement."

[21] Guided by the Commissioner's findings in Order 00-18, I am satisfied that the steps a PharmaCare auditor takes to investigate and determine compliance with the PSA constitute an "investigation" for the purposes of s. 15(1)(d). The minister's authority to require the repayment of "non-entitled" benefits and to suspend payments can have serious consequences for a pharmacy, such as economic losses. In my view, these consequences qualify as "sanctions" for the purposes of s. 15(1)(d). I also consider administrative penalties under the PSA to be "penalties" under s. 15(1)(d). I find, therefore, that PharmaCare audit's activities under the PSA meet the definition of "law enforcement" for the purposes of s. 15(1)(d).

[22] The records contain information (*i.e.*, complaints and tips) that led to or formed part of PharmaCare audit's investigation into the pharmacy's compliance with the PSA. I find that this information is "law enforcement information" under s. 15(1)(d).

[23] The lawyer noted that, in Order F17-11,[16] I found that the Ministry of Health's residency investigations met the definition of "law enforcement" because the Medical Services Commission (MSC) had statutory authority to conduct investigations (which the MSC had delegated to Ministry of Health employees) and also had the power to impose sanctions. In this case, the lawyer argued, the Ministry's activities are not "law enforcement" because, while PharmaCare auditors have the authority to investigate, only the minister has the authority to require repayment or impose other sanctions.[17]

[24] I reject the lawyer's argument on this point, as it fails to acknowledge that, in the present case, the Minister is responsible for PharmaCare under the PSA[18] and has the authority to appoint auditors to determine compliance with the PSA.[19] Thus, in each case, the same public body has the statutory authority to investigate and to impose sanctions.

[16] Order F17-11, 2017 BCIPC 12 (CanLII).
[17] Lawyer's response submission, paras. 81-93. The Ministry disputed this argument in its reply submission, at paras. 30-36.
[18] Section 2 of the PSA.
[19] Sections 34 and 35 of the PSA.

Report of a routine inspection - s. 15(3)

[25] The lawyer argued that the information in question is "routine inspection information" for the purposes of s. 15(3) and cannot, therefore, be withheld under s. 15(1).[20] The Ministry disputed this, saying the records are not reports prepared in the course of routine inspections.[21]

[26] I could find no orders that interpreted the term "report" for the purposes of s. 15(3). However, previous orders have considered this term in the context of other FIPPA provisions. These orders found that a record that concerns a review of a public body's policies and practices, and contains findings and recommendations for improvement, was a "report" for the purposes of s. 13(2)(g).[22] Order F17-33[23] determined that a "report", for the purposes of s. 13(2)(k),[24] was "a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact." In my view, these interpretations apply equally to the term "report" in s. 15(3).

[27] While the records in this case relate to the pharmacy's compliance with the PSA, they did not arise as the result of a routine inspection of the pharmacy's compliance with that Act. They relate to specific concerns that third parties raised about the pharmacy's business practices. The records are not a formal review or account of PharmaCare audit's investigation into the pharmacy's business practices and do not contain any findings or recommendations flowing from that investigation. Rather, they consist of internal emails and rough, handwritten notes of telephone calls containing complaints and tips that led to or formed part of the investigation. For these reasons, and in light of previous orders on this topic, I find that the records at issue here are not a "report" for the purpose of s. 15(3).[25]

Reveal identity of "confidential source"

[28] The Ministry submitted that information provided to PharmaCare, including during a PharmaCare audit, is provided in confidence. It said that third parties providing the information do so with the expectation that it will remain in

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[20] Lawyer's response submission, para. 94. The lawyer's argument on this point appears to refer to s. 15(3)(a).
[21] Ministry's reply submission, paras. 43-46.
[22] Section 13(2)(g) refers to "a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies." See, for example, Order F11-04, 2011 BCIPC 4 (CanLII), and Order F17-08, 2017 BCIPC 09 (CanLII).
[23] Order F17-33, 2017 BCIPC 35 (CanLII).
[24] Section 13(2)(k) refers to "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."
[25] This finding is consistent with Order F17-33, which found that rough and draft meeting notes did not "contain the level of formality required" for a report under s. 13(2)(k).

confidence and that, correspondingly, it treats this information confidentially.[26] The lawyer did not specifically address this point.

[29] The Ministry did not point to any explicit policies on confidentiality in support of its position on this point. However, my review of the information in question suggests that the third parties who reported concerns about the pharmacy to the Ministry did so in confidence. I also accept the Ministry's submission that it receives and treats such information in confidence and that it did so in this case.

[30] The Ministry also submitted that third parties were the "source" of the law enforcement information and that disclosure of the information would reveal the identities of those third parties.[27] I can see from the records that named third parties provided "law enforcement information" (*i.e.*, complaints or tips that led to or formed part of PharmaCare audit's investigations) to the Ministry. It follows that disclosure of the information in issue would reveal the identities of those third parties. I find, therefore, that disclosure of the information in question would reveal the identity of a confidential source of law enforcement information and that s. 15(1)(d) applies to this information.[28]

Exercise of discretion

[31] Section 15(1) states that a public body "may" refuse to disclose certain types of information. It is thus a discretionary exception to disclosure. Past orders have discussed factors a public body should consider in exercising its discretion in deciding to withhold information. I may order the Ministry to re-consider its discretion if it has not done so, has exercised its discretion in bad faith, has considered irrelevant or extraneous factors or has not considered relevant factors.[29] In this case, I must therefore be satisfied that the Ministry exercised its discretion in deciding whether or not to disclose the information, having regard for the relevant factors.

[32] The Ministry did not specifically address this issue. It did, however, state that, as part of the judicial review proceedings mentioned above, the court ordered the Ministry to disclose certain documents, including those related to tips and complaints, to the pharmacy. The Ministry acknowledged that these documents are "similar in substance" to the records at issue in this case but

[26] Ministry's initial submission, para. 92; Affidavit of Executive Director, Audit and Investigation Branch, paras. 40, 47.
[27] Ministry's initial submission, para. 92; Affidavit of Executive Director, Audit and Investigation Branch, paras. 40, 47.
[28] This finding applies pages 3-30, 36-57, 61-69 in their entirety, and to those portions of pages 1-2 and 33-34 annotated with s. 15.
[29] See, for example, Order 02-38, 2002 CanLII 42472 (BC IPC), at paras. 145-149, and Order F09-02, 2009 CanLII 3226 (BC IPC), at paras. 26-32.

argued that disclosure of documents to the pharmacy in the judicial review proceedings would not determine the outcome in this case.[30]

[33] The lawyer said he was "not relying" on the court order.[31] He did not, however, explain what he meant by this.

[34] The Ministry characterized the court order as a preliminary issue. It is more properly, in my view, a factor to consider in the exercise of discretion. I have, therefore, considered it here.

[35] The Ministry did not explain how the documents the court ordered disclosed were "similar in substance" to those I am considering here. If they are indeed substantially similar, this could undermine the Ministry's position on withholding them. The parties did not, however, tell me what, if any, documents the Ministry provided to the pharmacy in response to the court order. Nor did they provide me with copies of those documents. Thus, I consider the court order to be irrelevant in the exercise of discretion in this case.

[36] Nevertheless, it is clear that the Ministry reviewed the records line by line. There is no evidence that it considered improper or irrelevant factors or that it acted in bad faith in deciding to withhold the information under s. 15(1)(d). I am satisfied that the Ministry exercised its discretion properly in this case.

Unreasonable invasion of third-party privacy - s. 22(1)

[37] The Ministry said it applied s. 22(1) to information related to, or provided by, identifiable third parties, including their names, personal email addresses and telephone numbers, and medical information.[32] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03:

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that 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." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those

[30] Ministry's initial submission, paras. 42-49, with reference to Order 01-52, 2001 CanLII 21606 (BC IPC), at para. 73.
[31] Lawyer's response submission, para. 62.
[32] Ministry's initial submission, para. 56.

> listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[33]

[38] I have taken the same approach in considering the s. 22 issues here. The Ministry applied s. 15 to most of the information to which it applied s. 22. Given my finding on s. 15(1)(d), I will consider next only the s. 22 information to which the Ministry did not apply s. 15.[34]

Is the information "personal information"?

[39] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information. Contact information is defined in Schedule 1 of FIPPA 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."

[40] The Ministry said the information that it withheld under s. 22(1) relates to or was provided by third-party individuals and is thus personal information.[35]

[41] The withheld information on the five pages at issue is the names of complainants and tipsters, together with information on their tips, complaints and allegations, such as the names of patients, patients' medical information, patients' personal telephone numbers and personal emails. There is also a small amount of information about the lawyer's clients (the individuals named in his request). This information is all recorded information about identifiable individuals and I find that it is all personal information.

[42] The lawyer said he is seeking information about the substance of complaints and allegations made about the pharmacy. He argued that the date, time and substance of the complaints and allegations are not personal information.[36] I disagree with the lawyer on this point. In my view, the complaint and allegation information to which the lawyer refers is all about identifiable individuals.[37]

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[33] Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.
[34] That is, the information annotated with s. 22 on pages 31, 32, 33, 35, 58.
[35] Ministry's initial submission, para. 56.
[36] Lawyer's response submission, para. 75.
[37] A third party is defined in Schedule 1 of FIPPA as follows: "in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body;"

Does s. 22(4) apply?

[43] The Ministry said that s. 22(4) does not apply here.[38] I agree with the Ministry that there is no basis for finding that s. 22(4) applies here. The information does not, for example, relate to a third party's position, functions or remuneration as an officer, employee or member of a public body (s. 22(4)(e)).

[44] The lawyer said he does not seek any personal information about named third parties. However, he said, where the complaints and allegations concerned the three individuals named in his request (*i.e.*, his clients), they provided their consent for disclosure of their personal information to him.[39] Therefore, I considered whether s. 22(4)(a) applies to the small amount of personal information about the clients.[40] I conclude that it does not, because, as I discuss below, its disclosure would reveal information I found above is protected by s. 15(1)(d) or is intertwined with the personal information of others, such that its disclosure would be an unreasonable invasion of third-party privacy.

Presumed unreasonable invasion of third-party privacy – s. 22(3)

[45] The Ministry said that ss. 22(3)(a), (b) and (h) apply to the information it withheld under s. 22(1). I find below that ss. 22(3)(a) and (b) apply to the withheld information at issue here. I will not, therefore, consider s. 22(3)(h).

[46] The relevant provisions read as follows:

> 22 (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,
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> …

[47] **Medical information - s. 22(3)(a) –** The Ministry said that the records contain medical information of identifiable individuals.[41] Some of the information on pages 32 and 35 is prescription information about identifiable individuals, including patients' names, type of medication and frequency of dosage. I find that

[38] Ministry's initial submission, para. 57.
[39] Lawyer's response submission, paras. 77-79
[40] Section 22(4)(a) says that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy, if the third party has, in writing, consented to or requested the disclosure.
[41] Ministry's initial submission, para. 61.

s. 22(3)(a) applies to this information. This means that its disclosure is presumed to be an unreasonable invasion of third-party privacy.

[48] **Compiled as part of an investigation - s. 22(3)(b) –** The Ministry said that audits are performed to ensure that providers, as well as their claims to PharmaCare, comply with legislation, regulations, College of Pharmacists rules and bylaws, PharmaCare policies and procedures and agreements. Thus, it argued, an audit can be considered an investigation into a possible violation of law. Moreover, in the Ministry's view, it is clear from the records themselves that the information falls under s. 22(3)(b).[42] The lawyer did not expressly address this issue.

[49] As noted above, following its receipt of complaints and allegations regarding the pharmacy's business practices, PharmaCare audit investigated the pharmacy to determine if the pharmacy had complied with the PSA. As a result of this audit, the Ministry determined that the pharmacy was required to repay approximately $1.4 million. Therefore, PharmaCare's investigation was, in my view, an investigation into a possible violation of law, that is, the PSA.

[50] The withheld information on all five pages at issue relates to, and forms part of, this investigation. I am satisfied that it was compiled and is identifiable as part of an investigation into a possible violation of law. I find that s. 22(3)(b) applies to it. This means that its disclosure is presumed to be an unreasonable invasion of third-party personal privacy.

Relevant circumstances – s. 22(2)

[51] The parties raised the following relevant circumstances:

> 22 (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
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> …

[42] Ministry's initial submission, paras. 62-69.

[52] **Public scrutiny - s. 22(2)(a) –** The lawyer argued that the requested information "is crucial to ensuring that the Ministry of Health is held accountable to the public." Among other things, he argued, without the information, "we cannot know if the Ministry is fairly and efficiently carrying out its statutory duties, in the public interest" and if PharmaCare audit and the Ministry are using their resources efficiently, fairly and reasonably.[43] I take these arguments to pertain to the factor in s. 22(2)(a).

[53] All of the withheld personal information at issue in this case relates to or flows from complaints and allegations that the pharmacy and its staff were engaging in improper business practices. That is, it is information that led to or formed part of PharmaCare audit's investigation. Some of the information is patients' medical information, as discussed above.

[54] I understand from the material before me that, following PharmaCare audit's investigation of the complaints and allegations, the Ministry made certain decisions about the pharmacy and that there is ongoing litigation as a result. The withheld information does not, however, reveal all the steps the Ministry took in its investigation. It also does not show how the Ministry arrived at its final decisions regarding the pharmacy. Disclosure of this information would not, in my view, shed any meaningful light on the conduct of the investigation itself or on the wider accountability and resource issues the lawyer raised. I find that s. 22(2)(a) does not apply here.

[55] **Unfair exposure to harm - s. 22(2)(e) –** The Ministry said that disclosure of the personal information would expose third parties unfairly to harm, including significant stress or other mental harm.[44] It said that some individuals named in the records have been subject to threats and intimidation and that "this is a continuing and pervasive matter."[45] It added that disclosure of portions of the withheld information "could reasonably be expected to heighten an already prevalent risk to the physical safety of a law enforcement officer or other person, even if such harm never occurs or if such harm is not likely to occur."[46]

[56] The Ministry said that guns have been found in pharmacies, some pharmacies have suspected ties to organised crime and some pharmacists have been found guilty of criminal charges for making threats against their own staff.[47] The Ministry added that Ministry staff have been yelled and sworn at, intimidated,

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[43] Lawyer's response submission, paras. 10-13. The Ministry said, in its reply submission at para. 9, that the lawyer had not established this point.
[44] Ministry's initial submission, paras. 75-76, 94-116. The Ministry referred here to its submissions on ss. 15(1)(f) and 19(1)(a).
[45] Ministry's initial submission on s. 19(1)(a), para. 111.
[46] Ministry's initial submission on s. 15(1)(f), paras. 94-98.
[47] Ministry's initial submission, paras. 109-111; Affidavit of Executive Director, Audit and Investigation Branch, paras. 21-23

made to feel uncomfortable and misinformed by pharmacy staff and owners.[48] The lawyer disputed these arguments, saying that none of these things applied to the pharmacy in question here.[49]

[57] The Ministry's submission on this point was vague and relied principally on hearsay and incidents involving other pharmacies. The Ministry's affiant stated her "belief" that unfair exposure to harm or harm to safety could occur on disclosure of the information but did not explain how.[50]

[58] I was, however, able to identify some information in the records themselves that supports the Ministry's concerns. I cannot say more without revealing the withheld information. I am satisfied that s. 22(2)(e) is a relevant circumstance in this case, favouring withholding the information at issue.

[59] **Supplied in confidence - s. 22(2)(f) –** The Ministry said that it is clear from the records and its evidence that the third parties supplied the information at issue in confidence. The Ministry also said that it treats this information confidentially.[51]

[60] As noted above, the Ministry did not point to a policy on confidentiality regarding complaints and allegations. However, the records themselves indicate that the third parties supplied the information in confidence and expected the Ministry to keep it confidential. In addition, the content and context of the information (complaints and allegations against the pharmacy) support the conclusion that third parties intended to supply the information in confidence.[52] I find, therefore, that s. 22(2)(f) is a relevant circumstance in this case, favouring withholding the information at issue.

Conclusion on s. 22(1)

[60] I found above that the information at issue under s. 22 is personal information and it falls under s. 22(3)(a) (medical information) and s. 22(3)(b) (information compiled as part of an investigation). I find that disclosure of this information is not desirable for public scrutiny of the Ministry and that, therefore, s. 22(2)(a) does not apply. I also find that the factors in s. 22(2)(e) (unfair exposure to harm) and s. 22(2)(f) (information supplied in confidence) apply.

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[48] Affidavit of Executive Director, Audit and Investigation Branch, paras. 19-23.
[49] Lawyer's response submission, 111-112; Affidavit of pharmacy staff member.
[50] Affidavit of Executive Director, Audit and Investigation Branch, paras. 26, 48.
[51] Ministry's initial submission, paras. 77, 92; Affidavit of Executive Director, Audit and Investigation Branch, paras. 40, 47.
[52] See Order F16-32, 2016 BCIPC 35 (CanLII), at para. 65.

[61] These two factors weigh heavily in favour of withholding the personal information. The lawyer has not met his burden of proof in this matter and I find that s. 22(1) applies to the personal information.[53]

[62] I recognize that the lawyer said he does not seek personal information but simply the substance of the complaints and allegations. I dismissed above his argument that such information is not personal information.

[63] **Is it reasonable to sever under s. 4(2)? –** A small amount of information in the pages at issue is the personal information of the lawyer's clients (*i.e.*, the subjects of the complaints and allegations). The lawyer argued that names and contact information "or any personal information" of individuals other than his clients can be "redacted" from the records.[54]

[64] It would not, in my view, be reasonable under s. 4(2)[55] to sever the records as the lawyer suggests, as disclosure of the remaining information would reveal information I found above was protected by s. 15(1)(d). It is, moreover, intertwined with third-party personal information that I found falls under ss. 22(3)(a) and (b). Disclosure of this intertwined information would in my view be an unreasonable invasion of third-party privacy.[56]

Harm to safety – s. 19(1)(a)

[65] In the Ministry's view, disclosure of any of the withheld information could result in harm under s. 19(1)(a) to individuals named in the records. The relevant provision reads as follows:

> **Disclosure harmful to individual or public safety**
>
> 19 (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
>
> (a) threaten anyone else's safety or mental or physical health,
>
> …

[53] This finding applies to the information annotated with s. 22 on pages 31, 32, 33, 35 and 58.
[54] Lawyer's response submission, paras. 16, 75-79. The Ministry countered that it had already done so, to the extent possible; Ministry's reply submission, para. 24.
[55] Section 4(2) of FIPPA states that, if excepted information can reasonably be severed from a record, an applicant has the right of access to the remainder of the record.
[56] A number of orders have considered the issue of joint or "inextricably intertwined" personal information of two or more individuals. They have generally found that it is not reasonable to separate an applicant's personal information from a third party's personal information in such cases and that disclosing the joint personal information would be an unreasonable invasion of third-party privacy. See, for example, Order F15-54, 2015 BCIPC 57 (CanLII), and the orders it refers to in footnote 19.

[66] The Ministry applied ss. 15 and 22 in varying combinations to almost all of the information it withheld under s. 19(1)(a). Given my findings on ss. 15 and 22, I will only consider s. 19(1)(a) where it is the sole exception. The information at issue here is the names of three Ministry employees and the work telephone and fax numbers of one of these employees.[57]

Standard of proof

[67] The Supreme Court of Canada has stated the following about the standard of proof for exceptions that use the language "reasonably be expected to harm":

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground… This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.[58]

[68] Furthermore, there must be a "clear and direct connection" between disclosure of the particular information and the harm alleged, and the burden rests with the public body to establish that the disclosure of the information in question could result in the identified harm.[59]

[69] I have taken these approaches in considering the arguments on harm under s. 19(1)(a).

Discussion

[70] The Ministry's submission on s. 19(1)(a) may be summarized as follows:

- guns have been held at pharmacies;
- most audited pharmacies are in high crime areas;

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[57] The information annotated with s. 19 on pages 1-2, 33 and 59.
[58] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, para. 54.
[59] Order F07-15, 2007 CanLII 35476 (BC IPC), para. 17, referring to *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII), [2002] 2 S.C.R. 773; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, para. 43.

- some pharmacies have ties to organized crime;
- the owners of several audited pharmacies have been charged criminally for threats to their own staff;
- the named individuals have been subject to threats and intimidation, a "continuing and pervasive matter";[60]
- Ministry staff have been yelled at, intimidated, made to feel uncomfortable, sworn at and misinformed by pharmacy staff and owners.[61]

[71] The Ministry's Executive Director, AIB, gave the following evidence:

- she is "aware" that some physicians will not agree to the release of their names on paper or speak out against particular pharmacists in fear for their personal safety;
- she has been "advised" that former College of Pharmacists staff members were informed of a threat to their safety as a result of their involvement in the revocation of a pharmacists' licence and that they were given full time protection at their residence for some time;
- she has been "advised" that the College's offices had since been modified with security upgrades;
- the Ministry has removed all direct contact information for its AIB staff from the publicly available online BC Government directory;
- the Ministry has taken other steps (specified *in camera*) to protect its AIB staff.[62]

[72] The lawyer disputed the Ministry's submission, arguing that it was vague, speculative and based on opinion and hearsay.[63] I agree. Much of the Ministry's submission also refers to incidents involving other people, public bodies and pharmacies and the Ministry did not link its concerns to the pharmacy in question here. The information at issue is not information about doctors or College of Pharmacists staff.

[73] Moreover, it is clear from the evidence that a pharmacy staff member dealt personally with the Ministry's auditors during the audit. This staff member also deposed that the Ministry's auditors expressed no concerns for their safety or security during the audit and were not uncomfortable being alone with her.

[74] In addition, although the Ministry withheld the name of an employee, it disclosed this person's title and work area. Finally, it is not clear why the steps

[60] Ministry's initial submission, paras. 108-111.
[61] Affidavit of Executive Director, Audit and Investigation Branch, paras. 19-23.
[62] Affidavit of Executive Director, Audit and Investigation Branch, paras. 41-45.
[63] Lawyer's response submission, paras. 107-119, 121-125; Affidavit of Pharmacy representative.

the Ministry took regarding security precautions for the AIB office (some of which, as noted above, the Ministry discussed *in camera*) would not suffice to protect AIB's employees.

[75] The Ministry argued that Order F08-22[64] supports the proposition that the evidentiary threshold for s. 19(1)(a) is lower than that for other harms-based exceptions and that this applies here. The Ministry argued that the threshold under s. 19(1)(a) is whether disclosure could reasonably be expected to "threaten" safety or health, *i.e.*, a reasonable expectation that disclosure "could create the possibility of risk of harm." This is a lower threshold, in its view, than a reasonable expectation that disclosure could cause harm.[65]

[76] The passage the Ministry referred to in Order F08-22 said this:

> [48] In short, harms-based exceptions to disclosure operate on a rational basis that considers the interests at stake. What is a reasonable expectation of harm is affected by the nature and gravity of the harm in the particular disclosure exception. There is a sharp distinction between protecting personal safety or health and protecting commercial and financial interests. There is also a justifiably high democratic expectation of transparency around the expenditure of public money, which is appropriately incorporated into the interpretation and application of s. 17(1) when a public body's and service provider's commercial or financial interests are invoked to resist disclosure of pricing components in a contract between them for the delivery of essential services to the public.[66]

[77] While the test for a reasonable expectation of harm may be affected by the interests at stake, I do not read Order F08-22 as lowering a public body's evidentiary burden in proving that it is authorized to withhold information under s. 19(1)(a). Rather, as former Commissioner Loukidelis has noted, s. 19(1) "involves the same standard of proof as other sections" of FIPPA and there must be a rational connection between disclosure and the threat.[67]

[78] In this case, the Ministry has not, in my view, provided evidence that is "well beyond" or "considerably above" a mere possibility of harm. It has not persuaded me that disclosure of the information at issue could reasonably be expected to harm the employees' or anyone else's safety or mental or physical health. I find that s. 19(1)(a) does not apply to the names and numbers.[68]

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[64] Order F08-22, 2008 CanLII 70316 (BC IPC).
[65] Ministry's initial submission, paras. 101-106.
[66] Order F08-22, at para. 48.
[67] Order 00-02, 2000 CanLII 8819 (BC IPC), at page 5.
[68] This finding applies to the names annotated with s. 19 on pages 1-2, 33 and 59.

CONCLUSION

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

1. Under s. 58(2)(b), I confirm that the Ministry is authorized to withhold the information it withheld under s. 15(1)(d).
2. Under s. 58(2)(c), I require the Ministry to withhold the information it withheld under s. 22(1).
3. Under s. 58(2)(a), I require the Ministry to give the lawyer access to the information that it withheld under s. 19(1)(a) on pages 1-2, 33 and 59. I require the Ministry to give the lawyer access to this information by June 26, 2018. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the lawyer, together with a copy of the records.

May 14, 2018

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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