



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

Order F11-05

VANCOUVER ISLAND HEALTH AUTHORITY

Celia Francis, Senior Adjudicator

February 14, 2011

Quicklaw Cite: [2011] B.C.I.P.C.D. No. 5

CanLII Cite: 2011 BCIPC No. 5

Document URL: <http://www.oipc.bc.ca/orders/2011/OrderF11-05.pdf>

Summary: A nurse requested a copy of a job reference about her that her employer, a physician, had sent to VIHA. VIHA refused access to the record in its entirety under s. 22(2)(f), saying the physician had supplied the reference in confidence. VIHA did not establish that the physician supplied the reference in confidence. It also did not discharge its burden of proving that the applicant was not entitled to have access to her own personal information. VIHA is ordered to disclose the entire record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 22(1), 22(3)(d), 22(3)(g), 22(3)(h), 22(2)(e), 22(2)(f), 22(2)(g).

Authorities Considered: B.C.: Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-36, [2001] B.C.I.P.C.D. No. 37; Order F07-02, [2007] B.C.I.P.C.D. No. 2; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order F05-30, [2005] B.C.I.P.C.D. No. 41; Order F05-31, [2005] B.C.I.P.C.D. No. 42; Order 01-30, [2001] B.C.I.P.C.D. No. 31; Order 01-48, [2001] B.C.I.P.C.D. No. 50; Order F10-37, [2010] B.C.I.P.C.D. No. 55; Order F08-02, [2008] B.C.I.P.C.D. No. 2; Order F08-16, [2008] B.C.I.P.C.D. No. 28; Order F05-02, [2005] B.C.I.P.C.D. No. 2.

1.0 INTRODUCTION

[1] In November 2009, the applicant, who is a nurse, requested a copy of a job reference about her that a named physician (“third party”) sent to the Vancouver Island Health Authority (“VIHA”). VIHA denied access to the reference under s. 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), saying it had been supplied in confidence. The applicant requested a review of VIHA’s decision by this Office (“OIPC”).

[2] During mediation of the review, VIHA contacted the third party seeking his representations on the decision to deny access. The third party indicated verbally, and later in writing, that he had supplied the reference in confidence and did not consent to its disclosure.¹

[3] Mediation did not resolve the request for review and an inquiry under Part 5 of FIPPA took place. The OIPC invited representations from the applicant, VIHA and the third party. The applicant and VIHA made submissions but the third party did not.

2.0 ISSUES

[6] The issue before me is whether the public body is required by s. 22(1) of FIPPA to withhold the record in dispute.

[7] Section 57(1) of FIPPA states that a public body has the burden of proof where it has denied access to information in a record. Under s. 57(2), where the public body has denied access to third-party personal information, the applicant has the burden of proving that disclosure of the information would not be an unreasonable invasion of third-party privacy. None of the parties addressed the burden of proof.

[8] As I discuss below, the majority of the information in dispute in this case is the applicant's personal information. Some relates to the third party. Commissioner Loukidelis had this to say about the burden of proof facing a public body and an applicant where the personal information of an applicant and a third party is involved:

... The burden under s. 57(2) applies, however, only where the issue is about unreasonable invasion of the personal privacy of someone other than an applicant. In my view, the Ministry has the burden of proving, under s. 57(1) of the Act, that the applicant has no right of access to the parts of the disputed records that contain her own personal information. This is because s. 57(2) only places the burden of proof on the applicant in relation to "personal information about a third party". ...²

[9] Thus, in this case, VIHA has the burden under s. 57(1) of proving that the applicant does not have a right of access to her own personal information. Under s. 57(2), the applicant has the burden of showing that disclosure of third-party personal information would not be an unreasonable invasion of third-party privacy.

¹ VIHA's initial submission, para. 4 & Exhibit 3, a letter of September 28, 2010 from the third party to VIHA.

² See Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43.

3.0 DISCUSSION

[10] **3.1 Background**—The applicant said she has worked as a registered nurse since 1973. She obtained casual employment in a medical facility in 2008 and worked directly with the third party and another physician (“other physician”). She said she performed a number of nursing duties at the facility “at or above the expected level” and the two physicians gave no indication that her performance was in question. She said that in fact they had approached her about working more shifts if the medical facility became busier.³

[11] In the fall of 2009, the applicant said that VIHA was seeking nurses to assist with H1N1 immunizations. The applicant applied, believing it would not conflict with her duties at the medical facility. As part of the application process, VIHA required references and the applicant gave the third party’s name as a referee. Believing “she had an excellent working relationship” with the two physicians at the facility, the applicant said she assumed they would be willing to provide references. It appears she did not inform the third party ahead of time that she would be giving his name as a reference, as the applicant said the third party “was upset and angry with the Applicant for not having discussed the reference request prior to providing his name to the Public Body”. The other physician gave a reference without any objection. When the applicant approached the third party later to discuss the matter, she said he “terminated her without cause or explanation”, saying he “never wanted to see her around” the facility again. The applicant said she obtained temporary employment with VIHA but has not returned to work at the medical facility.⁴

[12] **3.2 Record in Dispute**—The record in issue is an “employment reference form” that two, possibly three, individuals filled in by hand.

[13] It appears that one person (a VIHA employee or possibly the applicant) filled in the following information: the name of the applicant for employment with VIHA (the applicant in this inquiry); the VIHA position the applicant was being considered for; the name, telephone and fax numbers of the third party as referee; and the third party’s “working relationship” with the applicant.

[14] It appears that the third party (the referee) filled in the following information: the “company/hospital name”; the position the applicant held at the facility and for how long; the number of hours per week she worked; her employment status; comments on a series of listed “Attributes/Skills” about the applicant; the third party’s name, signature; and the date he completed the form.

[15] It appears that a VIHA employee (possibly the same one as before, although this is not clear) recorded the last comment in the “Attributes/Skills” section.

³ Paras. 2-5, applicant’s initial submission.

⁴ Paras. 3-11, applicant’s initial submission; applicant’s affidavit.

[16] The applicant seems to think that more than one reference is in issue. It is not clear if she thinks the third party provided more than one reference or if she is now asking for all references VIHA received about her.⁵ In any event, as VIHA noted, her request asked for a copy of the reference sent on her behalf by the third party, her (named) former employer. VIHA says the reference check form he completed is the only record in dispute.⁶

[17] **3.3 Application of Section 22**—The relevant parts of s. 22 are these:

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 ...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable, and ...

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if ...

(d) the personal information relates to employment, occupational or educational history, ...

"personal information" means recorded information about an identifiable individual other than contact information;

"contact information" means 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;

[18] Numerous orders have considered the application of s. 22, for example, Order 01-53.⁷ First, the public body must determine if the information in dispute is personal information. Then, it must consider whether disclosure of any of the information is not an unreasonable invasion of third-party privacy under s. 22(4).⁸ Then the public body must determine whether disclosure of the information is

⁵ At paras. 19-21 of her initial submission, for example, she refers to "reference letter(s)".

⁶ Para. 1, VIHA's reply submission.

⁷ [2001] B.C.I.P.C.D. No. 56.

⁸ This section states that disclosure of a number of types of personal information is not an unreasonable invasion of third-party privacy.

presumed to be an unreasonable invasion of third-party privacy under s. 22(3). Finally, it must consider all relevant circumstances, including those listed in s. 22(2), in deciding whether disclosure of the information in dispute would be an unreasonable invasion of third-party privacy. I take the same approach here.

[19] **3.4 Is it personal information?**—VIHA acknowledged that the information about the applicant in the record in dispute is her personal information.⁹ Although the applicant did not specifically address this issue in her submissions, she clearly believes the form contains her personal information.

Analysis

[20] The record contains three categories of information.

[21] The first is the third party's name, title, business address and business telephone and fax numbers. This information appears in a form the third party completed in his business capacity. The purpose of the information was to enable VIHA to contact him at his place of work, which the record indicates VIHA did. I conclude that it is the third party's "contact information".¹⁰ As "contact information" is excluded from the definition of "personal information", no s. 22 considerations attach to it.

[22] The second category, information on the third party's "working relationship" with the applicant, is the third party's employment history information. This information is "about" the third party and is thus his "personal information".

[23] The third category is the applicant's personal information in the form of details about her position at the medical facility and the third party's evaluative comments about the applicant's "attributes" and "skills" in the workplace. It is recorded information about her as an identifiable individual and thus her "personal information". This is the majority of the information on the form.

[24] None of the parties argued that s. 22(4) applied and I see no basis for its application here.

[25] **3.5 Presumed Unreasonable Invasion of Privacy**—VIHA did not assert that any presumptions under s. 22(3) apply in this case.¹¹ The applicant provided argument on ss. 22(3)(d), (g) and (h).

⁹ VIHA's initial submission, para. 3; VIHA's reply submission, para. 6.

¹⁰ See Order F05-31 for a discussion of this issue.

¹¹ Paras. 2 & 4, VIHA's reply submission.

Personal or personnel evaluations

[26] The applicant argued that s. 22(3)(g) only applies to personal evaluation information about a third party and is thus not relevant, as she seeks only her own information. For the same reason, I agree that this section does not apply.¹²

[27] The applicant argued that s. 22(3)(h) creates a presumption where personal information was supplied in confidence. She is of the view that the presumption can be rebutted in this case.¹³

[28] The purpose of s. 22(3)(h) is to protect the identity of a third party who provided, in confidence, evaluative information of the type described in s. 22(3)(g).¹⁴ However, because the applicant is already aware of the third party's identity as the individual who provided information about her, s. 22(3)(h) does not apply here.

Employment history

[29] The applicant argued that s. 22(3)(d) does not apply here as she is only seeking her own personal information.¹⁵ VIHA agreed, saying

... the VIHA respectfully submits that section 22(3)(d) is not at issue for the purposes of this inquiry.¹⁶

[30] The applicant is not a third party to her own personal information and therefore I agree that s. 22(3)(d) does not apply to details of the applicant's position at the medical facility. The personal information about the third party's "working relationship" with the applicant is his occupational or employment history and falls under s. 22(3)(d). Disclosure of information that falls under s. 22(3)(d) is presumed to be an unreasonable invasion of a third party's privacy.¹⁷

[31] **3.5 Relevant Circumstances**—Past orders have said that an applicant may be denied access to her own personal information in order to protect third-party privacy, although such occasions will be rare.¹⁸ I must therefore consider whether, having regard to the relevant circumstances, disclosure to the applicant of her own personal information that the third party provided, would be an unreasonable invasion of her former employer's privacy as the third party.

¹² See Order F05-02, [2005] B.C.I.P.C.D. No. 2, where I made a similar observation.

¹³ Paras. 28-29, applicant's initial submission.

¹⁴ See Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43, and Order F05-30, [2005] B.C.I.P.C.D. No. 41, for similar comments on the purpose of this provision.

¹⁵ Paras. 25-26, applicant's initial submission.

¹⁶ Para. 3, VIHA's reply submission.

¹⁷ See Order F10-37, [2010] B.C.I.P.C.D. No. 55, at para. 52, for example.

¹⁸ See Order 01-53 at para. 53 and Order F06-11, [2006] B.C.I.P.C.D. No. 18 at para. 77, for example.

I must make the same determination respecting the small amount of third-party personal information.

[32] The applicant provided argument on a number of factors in s. 22(2), while VIHA relied only on s. 22(2)(f), saying the other sections the applicant cited were not in issue here.¹⁹

Unfair harm or damage to reputation

[33] The applicant argued that “it is difficult to imagine how production of the reference letter can result in any harm to the Third Party” or damage to his reputation.²⁰ I agree with the applicant that there is no evidence that disclosure might result in such harm to a third party. I find that ss. 22(2)(e) and (g) do not apply here.²¹

Personal information is likely to be inaccurate or unreliable

[34] The applicant believes there is a connection between her request for a reference and her “unexpected termination” by the third party. She suggested that this raises an inference that the form may contain inaccurate and unreliable information about her and she should therefore see it.²² VIHA asserted, without elaborating, that s. 22(2)(g) is not in issue here.²³

[35] While I understand the applicant has concerns about how matters unfolded, her submission on this point is misguided. The applicant may disagree with the third party’s perceptions of her but this does not necessarily make them “inaccurate or unreliable”.²⁴ I conclude that s. 22(2)(g) is not relevant here.

Confidential supply

[36] VIHA relied solely on s. 22(2)(f) as authority for withholding the record in dispute, referring to it as an “exception”.²⁵ VIHA also said this:

The VIHA respectfully submits that section 22(2)(f) of *FIPPA* requires the VIHA to withhold the “Employment Reference Form” as the information has been provided in confidence ...²⁶

¹⁹ Paras. 2-4, VIHA’s reply submission.

²⁰ Paras. 15-16, 23-24, applicant’s initial submission.

²¹ See para. 62, Order F06-11 for a similar finding.

²² Paras. 19-22 & 29-30, applicant’s initial submission. The applicant made similar arguments in her reply submission.

²³ Para. 2, VIHA’s reply submission.

²⁴ See paras. 53-58, Order F05-30 for a similar comment.

²⁵ Para. 2, VIHA’s reply submission.

²⁶ Page 1, VIHA’s initial submission.

[37] The reference check form has a box in the top right corner with the following text:

Information provided is subject to the FOIPP Act. The applicant has the right to access the information you are providing, unless the information provided is “in confidence”, with adequate rationale for non-disclosure. Is some or all of the information you are providing confidential?

Yes No

If yes, why:

[38] The third party did not fill out this box, although he wrote “confidential” on the form. VIHA said that the third party confirmed verbally and in writing that he had provided the reference in confidence and that the third party did not consent to its disclosure.²⁷ VIHA said that it

... would be breaching its agreement with the third party and possibly its ability to obtain reference checks in relation to other employment opportunities for any applicant if it were seen to ignore the intent of section 22(2)(f) when a referee specifically requests confidentiality.²⁸

[39] The applicant acknowledged that the fact the third party supplied the reference in confidence is a consideration. However, it is one among others, she argued, and should be given little weight.²⁹

[40] VIHA’s interpretation of s. 22(2)(f) is incorrect. This provision does not “require” that VIHA withhold the information. The applicant is correct that confidential supply of personal information is simply one relevant circumstance that public bodies must consider among others in deciding whether s. 22(1) applies.³⁰ As Commissioner Loukidelis said:

[25] Section 22(2)(f) is, of course, only one relevant circumstance in determining whether personal information must be withheld. Confidentiality is not a bar against disclosure of information under the Act. For this reason, a public body must, in embarking on an investigation, be cautious in giving assurances of confidentiality to potential witnesses or others. An assurance of confidentiality is certainly not a veto on disclosure. There can be no absolute guarantee of confidentiality, under the Act or otherwise. (In unionized workplaces, labour arbitrators have ruled that ‘confidential’ investigation reports and interview notes must be disclosed, in certain circumstances, to enable a party to prepare for an arbitration.

²⁷ Page 3, VIHA’s initial submission.

²⁸ Para. 6, VIHA’s reply submission.

²⁹ Paras. 17-18, applicant’s initial submission.

³⁰ See for example Order 01-48, [2001] B.C.I.P.C.D. No. 50, Order 01-30, [2001] B.C.I.P.C.D. No. 31, and Order F07-02, [2007] B.C.I.P.C.D. No. 2.

See, for example, *British Columbia Ferry Corp. v. British Columbia Ferry and Marine Workers' Union*, [1999] B.C.C.A.A.A. No. 385 (R.B. Blasina).³¹

[41] It is first necessary to establish whether or not the reference information was supplied in confidence in the first place. Commissioner Loukidelis discussed this issue in Order 01-36, in the context of s. 21(1)(b):

[23] ... To establish confidentiality of supply, a party must show that information was supplied under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided.

[24] An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.

...

[26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:

1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
3. not otherwise disclosed or available from sources to which the public has access;
4. prepared for a purpose which would not entail disclosure.

[42] I infer from the above-quoted box on the reference form that VIHA will, under certain circumstances, receive references in confidence. VIHA did not however provide any policies or procedures on its hiring processes to show that it receives and treats some or all references in confidence. Past orders have shown that such evidence is helpful in establishing confidentiality of supply.³²

[43] Moreover, although the form specifically requests reasons for supplying the reference in confidence, the third party provided no such reasons. Nor did he

³¹ Order 01-07, [2001] B.C.I.P.C.D. No. 7.

³² See para. 50 of Order 01-48 and para. 61 of Order F07-02.

provide, as the form also requested, any rationale, “adequate” or otherwise, for “non-disclosure”. There is also no evidence of any “agreement” that VIHA agreed to receive and treat this particular reference in confidence. Rather, it appears VIHA sought to claim confidentiality only after the fact. VIHA also failed to provide any evidence as to how “breaching” its supposed agreement with the third party might “possibly” cause it difficulty in obtaining references in future.

[44] The third party may have had expectations of confidentiality when providing the reference. For reasons given above, however, I find that VIHA has not established that the reference information was supplied in confidence as past orders have interpreted this provision.³³ I therefore find that s. 22(2)(f) does not apply to the information on the form that the third party provided.

Conclusion on section 22(1)

[45] I found above that the information in the record in dispute falls into three categories:

- the third party’s “contact information”
- the third party’s employment history information (in the form of information on the third party’s working relationship with the applicant) and
- the applicant’s personal information, in the form of information about her position at the medical facility and the third party’s evaluative comments about her performance and behaviour in the workplace

[46] Section 22(1) does not apply to the third party’s “contact information” because it is not “personal information”.

[47] Disclosure of the third party’s employment history information is presumed to be an unreasonable invasion of third-party privacy under s. 22(3)(d). The applicant is obviously aware of this information, however, and indeed probably provided it to VIHA as part of her job application. It is also not particularly sensitive personal information. In any case, her knowledge of this information rebuts any presumption under s. 22(3)(d) and I find that s. 22 does not apply to this information.

[48] Turning to the applicant’s own personal information, it appears that the applicant may have provided some of the information in the top part of the form. There is obviously no invasion of third-party privacy if she gets back her own personal information that she provided.

[49] I also found above that VIHA has not established that it received the reference information about the applicant in confidence from the third party. Section 22(2)(f) thus does not apply.

³³ See Order F06-11 and Order 01-36 for similar findings.

[50] As for the consent issue, as I have noted before, consent may in appropriate circumstances be a factor in a public body's decision to apply s. 22. However, I have no information on the third party's reasons for refusing consent. Refusal of consent is not in any case a deciding factor.³⁴ I therefore attach no significance to the fact that, some time after the fact, the third party refused consent to the disclosure of his reference about the applicant.

[51] No other relevant circumstances apply.

[52] I said earlier that an applicant will only rarely be denied access to her or his own personal information.³⁵ This is not one of those cases. The personal information of the applicant is only "about" her. It is not intertwined with third-party personal information.

[53] VIHA has not discharged its burden of proving that the applicant is not entitled to have access to her own personal information. The applicant is entitled to have access to her personal information in the form.

[54] The applicant has met her burden of showing how disclosure of the third-party personal information would not be an unreasonable invasion of the third party's privacy.

[55] In sum, I find that s. 22(1) does not apply to any of the information in the record in dispute. VIHA must therefore disclose the record in its entirety to the applicant and I make the appropriate order below.

[56] Given my finding that s. 22(1) does not apply to the information in the record in dispute, I need not consider whether VIHA should provide a summary under s. 22(5).

4.0 CONCLUSION

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

1. I require VIHA to give the applicant access to the information in the record in dispute which it withheld under s. 22(1).

³⁴ See paras. 54-57, Order F10-37, [2010] B.C.I.P.C.D. No. 55.

³⁵ See para. 48 of Order 01-07 and para. 36 of Order F08-02, [2008] B.C.I.P.C.D. No. 2, for example. See also Order F08-16, [2008] B.C.I.P.C.D. No. 28 for a discussion of intertwined and shared personal information.

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2. I require VIHA to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before March 28, 2011 and, concurrently, to copy me on its cover letter to the applicant,

February 14, 2011

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File No. F09-40647