Mediation Summary

F15-10-MS

Health authority refuses access to internal audit summaries

The *Freedom of Information and Protection of Privacy Act* (FIPPA) lists several specific exceptions to the general right of access in ss. 12 through 22. A public body receiving a request for information carefully reviews the application of those exceptions before responding to the request. It needs to ensure that, in the particular circumstances of the request, its application of FIPPA exceptions meets the rigorous tests required by FIPPA, as interpreted over the years in orders by the OIPC Commissioner and adjudicators, as well as by court cases. Public bodies that apply exceptions without ensuring that they have met each condition required by FIPPA do so at their peril.

A health authority that conducted an internal audit of employee expenses was leery about providing summaries of the audit findings to a journalist who requested them. It told him it was withholding them in their entirety under s. 12(3)(b) of FIPPA, which permits a local public body to not disclose information that would reveal the substance of deliberations of a meeting closed to the public and authorized by statute or regulation to be closed to the public. Our investigation revealed that the audit summaries appeared to have been only incidentally mentioned in the minutes of the *in camera* meeting, and it seemed to us a significant stretch to argue that disclosing them could reveal the "substance of deliberations" (described in OIPC Order F11-04 as meaning "discussions conducted with a view to making a decision or following a course of action").

Unable to make a strong case for the application of s. 12(3)(b), the health authority withdrew its reliance on that provision. Instead it turned to s. 22, which it had also cited in its response and which requires a public body to withhold information the disclosure of which would be an unreasonable invasion of a third party's personal privacy. Section 22 only comes into play if the information in question is about an identifiable individual. If the information might apply to any of a number of individuals, the strength of that argument regarding an unreasonable invasion of privacy falls away. In this case, the health authority had sought to apply the s. 22 exception not only to information that could not be linked to a specific individual but also to non-personal information such as page numbers, dates of audits, names of institutions and the name of an accounting firm. In a few other instances affecting a very small portion of the summaries, we concluded a case could be made for s. 22 severing.

When we told the health authority that there appeared to be little basis for its s. 22 argument, it told us that it had now decided to apply s. 15, an exception to the right of

access that had not been mentioned at all in its response to the journalist. Section 15(1)(c) permits a public body to withhold information the disclosure of which could reasonably be expected to "harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement." For s. 15 to apply, a public body must demonstrate that a specific harm is likelier than not to flow from the disclosure of the requested information (as discussed, for example, in OIPC Order 00-01). It appeared to us that the application of this exception to what appeared to be a standard audit practice (examination of expense records, travel records, etc.) fell far short of the rigorous requirements for meeting the section 15 harms test.

Stymied again, the health authority sought advice from its legal counsel on how next to proceed. It then proposed releasing to the journalist a summary of the audit summaries, reasoning that s. 22 might still apply to a very small portion of the records at issue, and s. 22(5) requires a public body to provide a summary of information withheld under s. 22. However, this rationale could only apply to the part of the record severed under s. 22, not to the records as a whole. We asked the journalist if he would consider that a satisfactory resolution, and he said no – he wished to stand by his original request.

The health authority then briefly considered attempting to apply s. 21, which addresses disclosures that could reasonably be expected to harm the business interests of a third party. Here again, the harms test is rigorous, and evidence for its application was weak. Having by this time exhausted its options for withholding the requested information, the health authority agreed to release the audit summaries to the journalist, having redacted a very small portion of personal information, approximately half a year after we began our mediation of his request for review.