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BULLETIN

MINISTRY OF HEALTH NOT REQUIRED TO DISCLOSE LOCATION OF COVID19 CASES

A decision last week by BC's Information and Privacy Commissioner, Michael McEvoy, confirms that the positive duty to disclose information under section 25(1)(a) of the *Freedom of Information and Protection of Privacy Act* prevails over the *Public Health Act*. The decision, Order F20-57, also affirms the approach to interpreting and applying the positive duty, under section 25(1)(a) of FIPPA, to disclose information about a risk of significant harm. Order F20-057 also illustrates how the COVID-19 health emergency is affecting public bodies' responsibilities under FIPPA in new ways.

Order F20-057 deals with a complaint by three Indigenous governments that the Ministry of Health failed to comply with its duty to disclose information under section 25(1)(a) of FIPPA. That provision requires a public body to, "without delay, disclose to the public, to an affected group of people or to an applicant information about a risk of significant harm to the environment or to the health or safety of the public or a group of people". Heiltsuk Tribal Council, Tsilhqot'in National Government and Nuuchahnulth Tribal Council argued that the Ministry had to disclose information they specified about COVID-19 cases in communities they considered proximate to theirs. Commissioner McEvoy determined that, while COVID-19 creates a risk of significant harm to the public, sufficient information is already available to enable the public, and the complainants, to take steps to avoid or mitigate the risks connected with COVID-19. This meant that the Ministry was not required to disclose any further information.

In reaching his decision, the Commissioner rejected the Ministry's argument that the *Public Health Act* overrides section 25(1)(a). He also did not accept the Ministry's claim that, even if there is technically no override of FIPPA, he should defer to the Ministry's and Provincial Health Officer's decisions on information disclosure.

At the same time, he did not accept the complainants' argument that section 25(1)(a) should be interpreted consistent with the United Nations Declaration on the Rights of Indigenous Peoples. They relied on UNDRIP's implementation in British Columbia through the *Declaration on the Rights of Indigenous Peoples Act*, arguing that section 25(1)(a) of FIPPA "must be interpreted in a manner that recognizes Indigenous governments, particularly when they seek access to information about what they consider to be risks of significant harm to the health or safety of their members."

The Commissioner declined to interpret section 25(1)(a) through the lens of DRIPA, and therefore UNDRIP, to place an evidentiary burden on public bodies to rebut an Indigenous government's assessment about a risk of harm. He noted that this would require public bodies to "prove that the factors...that warrant disclosure of information have not been met". He added that, if the

Legislature were to conclude that such a burden should exist, it could amend FIPPA to do so expressly.

It is interesting that the Commissioner ended his decision with a comment that is perhaps intended to prompt the parties to work out information sharing arrangements. He noted First Nations' reported concerns about barriers to information-sharing and public health and safety, and concerns about the absence of a clear mandate, structure and arrangements, commenting that, whether "Indigenous governments and public institutions, like the Ministry...fashion such governance mandates, structures, and arrangements are matters within their purview".

Local governments will want to keep this decision in mind, as it handily outlines how section 25(1)(a) should be applied. It also shows how, where sufficient information about a risk is already in the public domain, the Commissioner will not necessarily require a public body to go through the process of releasing redundant information about the risk.

The decision can be found here: <https://www.oipc.bc.ca/orders/3494>.

If you have any questions about this decision, feel free to contact Amy O'Connor at the firm.

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