SUPREME COURT OF NOVA SCOTIA

Citation: *Coates v. Capital District Health Authority*, 2011 NSSC 62

Date: 20110209
Docket: Hfx No. 314177
Registry: Halifax

Between:

Roseanne Coates

Appellant

v.

Capital District Health Authority

Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	January 4 and 6 and March 9, 2010, in Halifax, Nova Scotia
Final Written Submissions:	January 30 and January 31, 2011
Decision:	February 9, 2011
Counsel:	Roseanne Coates, self-represented appellant Peter M. Rogers, Q.C. and Carrie Ricker, for the respondent Colin Clarke, for the third parties

Robertson, J.:

[1] The original decision in this matter was rendered orally on March 9, 2010 and in writing on April 14, 2010 (2010 NSSC 143). The decision was appealed. In the course of the appeal, the Court of Appeal held that the previous decision reported at 2010 NSSC 143 was issued without jurisdiction by virtue of the fact that inadvertently s. 41(1A) of the *Freedom of Information and Protection of Privacy Act* had not been complied with by reason of the failure of the applicant to give notice to the Minister of Justice of the proceeding. The Court of Appeal ordered the Minister of Justice to be served notice pursuant to s. 41(1B) of the *Act*. Subsequently, the Minister indicated to the parties that it did not intend to participate as a party under s. 41 (1B) of the *Act.* The Court of Appeal further ordered that in that event the matter was to be remitted to me to render a newly dated decision on the matter, without the parties making any further filings or submissions.

[2] I have included a description of the proceeding by way of background material to explain the various days of appearance and process of document review. As well, I have more accurately described the volumes of material that

were the subject of the Court's review and Capital District Health Authority's ("CDHA") redactions.

[3] In all other respects, the decision remains the same as rendered on March 9, 2010.

Background:

[4] Prior to the CDHA responding to the 2009 *FOIPOP* application, the appellant commenced these proceedings pursuant to s. 41 of the *Act* for review.

[5] A pre-hearing conference was held before me on September 18, 2009, and an order on that date required the CDHA issue a response to the 2009 *FOIPOP* application.

[6] CDHA provided the appellant partial access to the requested documentation. CDHA redacted certain portions of documentation, claiming the redacted portions were not required to be disclosed on the basis of exemptions provided under the *Act* for solicitor-client privileged materials and personal information. Certain

documents were redacted in their entirety on the basis of these exemptions. Other redactions were made as a result of materials being unrelated to the matters raised in the 2009 *FOIPOP* application.

[7] The 2009 *FOIPOP* Application makes reference to documentation redacted from a previous Application for Access to a Record (form 1) pursuant to the *Freedom of Information and Protection of Privacy Act* issued to CDHA on or about August 18, 2008 ("2008 *FOIPOP* Application"). The 2009 *FOIPOP* Application requested some of the same documentation requested in the 2009 *FOIPOP* Application, however, the applicants were not the same parties. Counsel for CDHA reviewed the materials provided pursuant to the 2008 *FOIPOP* Application in the preparation of the response to the 2009 *FOIPOP* Application and additional materials were able to be produced in the course of the 2009 *FOIPOP* Application as a result of the appellant seeking her own personal information as outlined in the affidavit of Susan Jakeman and as a result of the order of September 18, 2009, which included investigator Dunphy's file.

[8] CDHA submitted that some additional factual information in relation to the interactions of the appellant, CDHA and certain third parties was relevant and should be consider by this Court. These materials were filed with the Court.

[9] The appeal proceeding pursuant to the s. 41 of the *FOIPOP Act* commenced on January 4, 2010.

[10] The Court sought additional time to review the large volume of materials before it and re-convened on January 6, 2010.

[11] At this time, the Court sought the assistance of the CDHA in reconciling all of the duplicate materials found in the Dunphy package.

[12] The Court determined that these materials were in fact the property of the CDHA and would have been returned to the CDHA, in the ordinary course as Mr. Michael Dunphy was the hired investigator of the CDHA.

[13] The Court asked Ms. Ricker's assistance in identifying the duplicate materials and in highlighting previously redacted duplicate materials, already

delivered to Ms. Coates. As well, the Court sought identification of some handwritten notes, also duplicated in the materials.

[14] In the process of this subsequent review by CDHA, certain additional materials came to light identified as package #1 (immediately sent to the appellant in its entirety) and package #2, from which a few pages were redacted on the basis of protected third party information, solicitor-client privilege or irrelevance. This package was then reviewed by the Court as to the appropriateness of the redactions. Package #2 (redacted) was then disclosed to the appellant.

[15] Ms. Coates then requested that the original of the tapes, used for the transcription of conversations held between she and Dr. Rickhi and disclosed in this process be held by the Court, as she believed these tapes may have been altered.

[16] As well, she requested that all of the investigator Michael Dunphy's materials be similarly held by the Court, for future review and not be returned to the CDHA.

[17] These materials were thus sealed and filed with the Court.

[18] The Court also received various correspondence from the appellant during the course of these proceedings. That correspondence and the Court's reply remain in the court file.

[19] Lastly, at the conclusion of this hearing on March 9, 2010, the Court reviewed all of the volumes of the material before it with Ms. Ricker of CDHA for the single purpose of ensuring that all documents redacted by CDHA and reviewed by the Court had been actually delivered to Ms. Coates, the appellant, and that the materials Ms. Coates requested the Court to seal and hold (the Dunphy materials) were in the possession of the Court and did not remain with the CDHA.

[20] The Court explained this last procedure to Mr. O'Neill, then solicitor for Ms. Coates.

[21] The Court rendered its decision dismissing the appellant's application.

Oral Decision:

[22] Thank you counsel for your submissions. They have been very helpful to me. This has been a lengthy process, but simply so because of the requirements of the *Act* respecting document review and the shear volume of materials to be reviewed.

[23] So, this is the matter of an appeal pursuant to s. 41 of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c.5 between Roseanne Coates, the appellant, and Capital District Health Authority ("CDHA").

[24] The relevant sections of the *FOIPOP Act* are as follows:

> **3 (1)(I)** "personal information" means recorded information about an identifiable individual, including
>
> (I) the individual's name, address or telephone number,
>
> (ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
>
> (iii) the individual's age, sex, sexual orientation, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, blood type or inheritable characteristics,

(vi) information about the individual's health-care history, including a physical or mental disability,

(vii) information about the individual's educational, financial, criminal or employment history,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

5 (2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.

16 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. 1993, c. 5, s. 16 .

20 (1) The head of a public body shall 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 pursuant to 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 shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;

(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

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(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, dental, psychiatric, psychological or other health-care 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;

(c) the personal information relates to eligibility for income assistance or social-service benefits or to the determination of benefit levels;

(d) the personal information relates to employment or educational history;

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations; (h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations; or

(I) the personal information consists of the third party's name together with the third party's address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure;

(b) there are compelling circumstances affecting anyone's health or safety;

(c) an enactment authorizes the disclosure;

(d) the disclosure is for a research or statistical purpose and is in accordance with Section 29 or 30;

(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;

(f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;

(g) the information is about expenses incurred by the third party while travelling at the expense of a public body;

(h) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the request for the benefit; or

(I) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the request for the benefit or is referred to in clause (c) of subsection (3).

41 (1) Within thirty days after receiving a decision of the head of a public body pursuant to Section 40, an applicant or a third party may appeal that decision to the Supreme Court in such form and manner as may be prescribed by the Nova Scotia Civil Procedure Rules or by the regulations

42 (1) On an appeal, the Supreme Court may

(a) determine the matter de novo; and

(b) examine any record in camera in order to determine on the merits whether the information in the record may be withheld pursuant to this Act.

(2) Notwithstanding any other Act or any privilege that is available at law, the Supreme Court may, on an appeal, examine any record in the custody or under the control of a public body, and no information shall be withheld from the Supreme Court on any grounds.

(3) The Supreme Court shall take every reasonable precaution, including, where appropriate, receiving representations ex parte and conducting hearings in camera, to avoid disclosure by the Supreme Court or any person of

(a) any information or other material if the nature of the information or material could justify a refusal by a head of the public body to give access to a record or part of a record; or

(b) any information as to whether a record exists if the head of the public body, in refusing to give access, does not indicate whether the record exists.

(4) The Supreme Court may disclose to the Minister or the Attorney General of Canada information that may relate to the commission of an offence pursuant to another enactment by an officer or employee of a public body.

(5) Where the head of the public body has refused to give access to a record or part of it, the Supreme Court, if it determines that the head of the public body is not authorized to refuse to give access to the record or part of it, shall

(a) order the head of the public body to give the applicant access to the record or part of it, subject to any conditions that the Supreme Court considers appropriate; or

(b) make any other order that the Supreme Court considers appropriate.

(6) Where the Supreme Court finds that a record falls within an exemption, the Supreme Court shall not order the head of the public body to give the applicant access to the record, regardless of whether the exemption requires or merely authorizes the head of the public body to refuse to give access to the record. 1993, c. 5, s. 42 .

45 (1) 45 (1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.

(2) Where the record or part that the applicant is refused access to contains personal information about a third party, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

(3) At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,

(a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and

(b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part. 1993, c. 5, s. 45 .

47 (1) 47 (1) Every person who maliciously collects or discloses personal information in contravention of this Act or the regulations is guilty of an offence and liable on summary conviction to a fine of not more than two thousand dollars or to imprisonment for six months, or both.

> (1A) Every person who knowingly alters a record that is subject to a request in order to mislead the person who made the request is guilty of an offence and liable on summary conviction to a fine of not more than two thousand dollars or to imprisonment for six months, or both.
>
> (2) Section 4 of the Summary Proceedings Act does not apply to this Act. 1993, c. 5, s. 47; 1999 (2nd Sess.), c. 11, s. 18 .

[25] The appellant's request was for disclosure of:

> 1) Any and all written complaints files (sic) against me by either the CDHA or an external agency.
>
> 2) Any and all correspondence, supporting documentation, evidence related to any complaint which should include but not limited to, the six (6) documents withheld from previous application; audio recordings of personal conversations involving me and a CDHA physician, Dr. Anil Rickhi; photographs of an alleged car vandalism incident claimed by Dr. Rickhi in a complaint filed against me inferring me as a suspect; third party/witness statements/notes referencing or discussing me with CDHA or an external party/agency (including Dr. Jeff Champion and Dr. Steve Sheean); as well as client/solicitor documents that discuss me.

[26] There had been a previous request for some financial costs paid to external investigator Mr. Dunphy but that was subsequently withdrawn.

[27] The CDHA responded to this *FOIPOP* application dated February 15, 2009, having received some direction from the court by order dated September 18, 2009. The CDHA provided the appellant partial access to the requested documentation.

CDHA redacted certain portions of documentation, claiming the redacted portions were not required to be disclosed on the basis of exemptions provided under the *Act* for solicitor-client privileged materials (s. 16) and personal information fo third parties (s. 20 (1)). Certain documents were redacted in their entirety on the basis of these exemptions. Other redactions were made because the materials were unrelated to the 2009 *FOIPOP* application.

[28] Throughout the relevant period, it should be noted that the appellant Ms. Coates was employed be CDHA as a casual registered nurse. The appellant brought informal harassment concerns forward to the CDHA management and subsequently, one of the third parties made a formal harassment complaint against the appellant. Pursuant to its harassment policy (referenced in the Affidavit of Susan Travis, Exhibit 1 to the proceeding), CDHA referred the complaints to an external investigator, Mr. Michael Dunphy, for review. Mr. Dunphy issued a report in April 2009 and he concluded the evidence did not establish that CDHA's harassment policy had been breached. Mr. Dunphy was provided with CDHA file materials and also received copious materials from Ms. Coates directly. Mr. Dunphy had not returned any materials to the CDHA, at the time of Ms. Coates original application.

[29] This proceeding falls under *Civil Procedure Rule* 85.07.

[30] CDHA filed with the Court:

(a) Copy of 2008 *FOIPOP* application response (redacted) - yellow volume

(b) Copy of redacted 2008 *FOIPOP* application response (unredacted) - green volume

(c) Copy of the 2009 *FOIPOP* application response (redacted) - blue volumes 1 and 2

(d) Copy of the unredacted from 2009 *FOIPOP* (unredacted) - red volume

(e) Sealed materials provided to the Court by external investigator, Michael Dunphy in six volumes

(f) Court requested analysis by CDHA of the Michael Dunphy materials to (1) identify duplication of materials with the earlier disclosed 2009 highlighted *FOIPOP* application response ensuring notation of redactions made by CDHA in these duplicate materials pursuant to s. 16 and s. 20 (1) of the *FOIPOP Act*, along with a table of concordance identifying the material.

(g) Additional materials generated in the course of the CDHA review (1) package #1 (which was completely disclosed to Ms. Coates) (2) package #2 not completely disclosed to Ms. Coates by reason of the operation of s. 16 or s. 20 (1) of the *Act* - redactions made and highlighted and delivered to Ms. Coates and copy of unredacted materials provided to the Court for review.

(h) The solicitor's notes which are work product and protected by s. 16.

Law and Analysis

[31] Now, with respect to the law we all agree the law is reasonably straight forward. We have personal information as defined by s. 3(1)(I) of the *FOIPOP Act* governed by the considerations of s. 20 of the *Act.*

[32] CDHA is under certain duties not to disclose personal information if it results in an unreasonable intrusion of privacy.

[33] The burden is on CDHA to show that the appellant has no right of disclosure.

[34] CDHA has made its case for its' redactions for some of the following reasons: that there was personal information under s. 3(1)(1) of the *Act*, i.e. names, addresses, telephone numbers, etc.; there were materials related to health care history of third parties; where the third parties expressed personal views or opinions including their concerns in participating in the harassment policy process or concerns over their own health or employment situation.

[35] Where the third parties expressed opinions about the appellant CDHA did disclose in its entirety.

[36] With respect to my approach to these issues, I am also governed by the *Act* and by some common law and the case in question that we all have referred to is *Re: House*, [2000] N.S.J. No. 473, that sets out the procedure as follows:

> The Approach to the Issues. The appeal raises issues touching upon a number of interrelated provisions of the Freedom of Information and Protection of Privacy Act, ... has suggested a four step approach for determining this appeal. ...
>
> 5 Subsection 5(1) of the Act provides a general right of access to records in the control of public bodies. The Act makes various exceptions to this general right, and then it deals with personal information. Consistent with the purpose of the Act, as stated in section 2, subsection 20(1) does not deal with personal information merely as an exception to the general right of access. It prohibits disclosure "if the disclosure would be an unreasonable invasion of a third party's personal privacy." According to subsection 20(2) the question of an unreasonable invasion of privacy is to be determined upon "all the relevant circumstances", and the subsection goes on inclusively to provide a list of factors. Subsection (3) specifies nine classes of information, the disclosure of which is presumed to be an unreasonable invasion of privacy. Subsection (4) provides that "disclosure of personal information is not an unreasonable invasion of ... privacy" in any of nine circumstances. Finally, subsection 45(2) places the burden on the applicant to prove disclosure would not be an unreasonable invasion of privacy where access to personal information is sought.
>
> 6 ... *Dickie v. Department of Health*, [1999] N.S.J. No. 116; (1999), 176 N.S.R. (2d) 333 (C.A.) established a "four step analysis to be followed in determining whether or not disclosure ... would constitute an unreasonable invasion of privacy", and he characterized those four steps as follows:
>
> (1) Do the disputed documents contain "personal information" within the meaning of the Act?

> (2) If so, is the personal information presumed not to be an unreasonable invasion of privacy pursuant to s. 20(4)?
>
> (3) Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?
>
> (4) Does the balancing of all the relevant circumstances, including those listed in s. 20(2), favour disclosure?

[37] So, the *Act* itself and this four-step process as articulated in *Re: House* have guided me in my determination and I have examined all of these pages many times and come to the following conclusion.

[38] I agree with the CDHA that the materials are fraught with highly personal information about both the appellant and third parties. Its disclosure in certain circumstances could lead to an unreasonable evasion of third party personal privacy and in certain circumstances breach of solicitor-client privilege.

[39] I have reviewed the redacted materials in the 2008-2009 *FOIPOP* volumes forwarded to the appellant and also reviewed the Dunphy materials. I have asked for and received the assistance of the CDHA in reviewing the Dunphy materials to

identify all duplicated CDHA response materials and to review new materials for required redactions.

[40] Although the Dunphy materials were delivered directly to the Court, these materials are the property of CDHA as Mr. Dunphy is their contracted investigator. It became apparent to one in January 6, 2010, that the Court required CDHA's assistance in identifying these materials and CDHA acceded to this request and returned these materials to the Court in early March 2010 before the conclusion of this proceeding.

[41] The Court then reviewed the Dunphy materials again, pursuant to the requirements of the *Act.*

[42] The redactions made by the CDHA in the 2008 - 2009 responses were in my view reasonable and accord with the principles and requirements of the *Act*.

[43] Similarly, the redactions subsequently made in what I call package two of the extra materials found in this process are proper redactions. One of the extra

volumes of materials had already been released to Ms. Coates. The second package with its few redactions was then released to Ms. Coates.

[44] In Mr. Dunphy's materials volumes one through six, there were certain pages in volumes two and three, redacted by CDHA in their January 2010 review. In my view, these are proper redactions. So all of the Dunphy materials have been disclosed minus a few pages that were redacted.

[45] I have also excluded of Mr. Ricker's own work product, her own solicitor notes.

[46] The table of concordance provided by Ms. Ricker in her January 2010 analysis of the Dunphy materials has been very helpful and explains the exercise of her review of all of the materials. It clearly sets out the materials now disclosed and those few materials that are the subject of the redaction highlighted in green on the table. All of these materials have been reviewed by the Court.

[47] In the result, I am satisfied that the redactions made in all circumstances are appropriate and were done in compliance with s. 20 or s. 16 of the *Act.*

[48] There are no circumstances here where I believe consideration of the balancing provision step 4 of the analysis in *Re: House* would require a disclosure over these identified third party privacy interests.

[49] I appreciated that neither the appellant nor her counsel has access to the redacted pages. I can say, as I have earlier today, that none of the redacted materials are heavily significant, but simply are redactions properly made and identified as a necessity by CDHA pursuant to the statutory requirements either privacy interest or solicitor-client privilege.

[50] In my view, there has been a very fulsome, open and appropriate disclosure to the appellant of the records she sought and with these records in hand she will be able to along with her counsel make decisions about the future course she may wish to take against the CDHA or third parties respecting the discharge from her employment, matters that are beyond the scope of this inquiry.

[51] As earlier discussed, the digital recorder which belonged to Dr. Anil Rickhi and the tape from a phone recording device which belonged to Ms. Coates shall be held by the Court in a sealed packet for the subject of future applications or judicial consideration along with the balance of the Dunphy file, at her request.

[52] The transcripts from these two tape sources being conversation between Ms. Coates and Dr. Rickhi (not earlier in the possession of CDHA) have now been disclosed and exchanged by the parties. Ms. Coates has expressed the concern that these tapes were tampered with.

[53] In the final result, the appellant's appeal against CDHA is dismissed. I believe the exercise was a worthy one and resulted in the disclosure of all the available material held by CDHA and to which the appellant was entitled. All of the redactions made by the CDHA in these proceedings were correctly made pursuant to the requirements of the *Act*.

Justice M. Heather Robertson