Community Care and Assisted Living Appeal Board

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NOTE: This is not the original version of this decision. It is a revised version that has been edited for public disclosure to protect confidential and third party personal information.

DECISION NO. 2015-CCA-002(a)

In the matter of an appeal under s.29 of the Community care and Assisted Living Act, S.B.C. 2002, c. 75

BETWEEN:	X Licensee, (operating as Z, a child care facility)	**APPELLANT**
AND:	Medical Health Officer, Y Health Authority	**RESPONDENT**
BEFORE:	Lynn McBride, Member	
DATE:	Conducted by way of written submissions concluding on August 24, 2015	
APPEARING:	For the Appellant: Self-represented For the Respondent: Kathryn Stuart, Counsel	

PRELIMINARY APPLICATION FOR DOCUMENTARY EVIDENCE TO BE RECEIVED IN CONFIDENCE TO THE EXCLUSION OF THE APPELLANT

INTRODUCTION

[1] This decision deals with the Respondent's request that the Community Care and Assisted Living Appeal Board (the "Board") exercise its discretionary authority under section 42 of the *Administrative Tribunals Act* (the "*ATA*") and direct that a number of specific documents be received in confidence to the exclusion of the Appellant.

[2] In the alternative, the Respondent requests that the documents in question be redacted so that certain information and names are not disclosed to the Appellant.

[3] In the further alternative, if the Board denies the request to receive some or all of the documents in confidence to the exclusion of the Appellant, then the Respondent requests that the Board make an order as to the conditions of disclosure to the Appellant.

BACKGROUND

[4] The Appellant's license to operate a community care facility was cancelled by the Respondent effective April 30, 2015. The Respondent determined that the Appellant did not meet the requirements set out for a licensee under section 7(1)(b) of the *Community Care and Assisted Living Act*, and that the Appellant had also contravened a number of sections of the *Child Care Licensing Regulation*.

[5] The Appellant appealed that decision, and the Respondent is seeking to restrict the Appellant's access to certain documents which were considered by the Respondent in making the decision to cancel the license.

[6] There are six documents in issue on this preliminary application:

a. An email dated September 25, 2014 from D, Ministry of Children and Family Development ("MCFD") to C, Licensing Officer, Y Health Authority (2 pages);

b. Notes recorded on a "Staff Interview Record" relating to an interview conducted on September 30, 2014[1] by C, Licensing Officer, Y Health Authority (3 pages);

c. Notes recorded on a "Parent Interview Form" relating to an interview conducted on October 1, 2014; there is no interviewer's name or signature on this document (4 pages);

d. Notes recorded on a "Parent Interview Form" relating to an interview conducted on October 8, 2014; there is no interviewer's name or signature on this document (4 pages);

e. An email dated October 23, 2014 from MCFD to E, Licensing Officer, Y Health Authority (3 pages); and

f. An email dated November 24, 2014 from RCMP to E, Licensing Officer, Y Health Authority (6 pages).

(collectively, the "Contested Documents")

[7] The Respondent asserts that the Contested Documents should be received by the Board in confidence to the exclusion of the Appellant on the ground that the nature of the information contained in the Contested Documents requires that direction to ensure the proper administration of justice.

[8] The Appellant has been served with a summary of the application made by the Respondent, but has not seen the complete written submissions of the Respondent.

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[1] This document is dated September 30, 2014 on the first page; on the final page, where the interviewer's signature appears, it is dated October 6, 2014.

[9] The Appellant opposes the application and requests that all the Contested Documents be disclosed to her.

ISSUES

[10] The issues to be determined are whether and to what extent the Board should exercise its discretionary authority to restrict access to all, some, or parts of the Contested Documents.

RELEVANT LEGISLATION

[11] In support of this application, the Respondent relies on Rule 20(2) of the Rules for Appeals under the *Community Care and Assisted Living Act* (the "CCALAB Rules"), and on section 42 of the *ATA*.

[12] CCALAB Rule 20(2) states:

> **Rule 20 – Access and Restriction of Access to Hearings and Documents**
> . . .
>
> (2) A document submitted in the hearing of an appeal will be accessible to the public unless:
>
> > (a) the Board directs that all or part of the document be received to the exclusion of the public because, in the opinion of the Board, the desirability of avoiding disclosure in the interests of any person or participant affected, or in the public interest, outweighs the desirability of adhering to the principle that hearings be open to the public, or
> >
> > (b) the Board directs that all or part of the document be received in confidence to the exclusion of a participant or participants because, in the opinion of the Board, its nature requires that direction to ensure the proper administration of justice.

[13] Section 29(1.2) of the *Community Care and Assisted Living Act* makes sections 41 and 42 of the *ATA* applicable to the Board. Sections 41 and 42 of the *ATA* state:

> ***Hearings open to public***
>
> **41** (1) An oral hearing must be open to the public.
>
> (2) Despite subsection (1), the tribunal may direct that all or part of the information be received to the exclusion of the public if the tribunal is of the opinion that

> (a) the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, or
>
> (b) it is not practicable to hold the hearing in a manner that is open to the public.
>
> (3) The tribunal must make a document submitted in a hearing accessible to the public unless the tribunal is of the opinion that subsection (2) (a) or section 42 applies to that document.

Discretion to receive evidence in confidence

> **42** The tribunal may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties or any interveners, on terms the tribunal considers necessary, if the tribunal is of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice.

[14] It is noteworthy that in both CCALAB Rule 20 and sections 41 & 42 of the *ATA*, the test for restricting the *public's* access to evidence is strikingly distinct from the test for restricting a *party's* access.

DISCUSSION AND ANALYSIS

[15] This is the first section 42 decision rendered by this Board. However, there are a number of section 42 decisions by the Health Professions Review Board (the "HPRB") which set out the relevant principles to be considered and applied on this type of application. I adopt those principles, as discussed below, for the purposes of the application before me.

[16] The HPRB discussed section 42 of the *ATA* in detail in Decision No. 2009-HPA-0027(a):

> Section 42 recognizes every party to a proceeding normally has the right to advance or defend its case based on access to the same relevant information as all other parties. This reflects the common law's strong inclination against "star chamber" proceedings where evidence is considered in private. However, this principle is not absolute. Occasions can arise where the nature of the evidence being considered by a tribunal is so sensitive that an exception to the usual rule must be made, because the risk of damage to the administration of justice caused by its disclosure to one or more parties outweighs the benefits of the usual principle of full disclosure.

> However, section 42 does not articulate a lax test. To make an order under s. 42, the tribunal must be of the opinion that the nature of the information or documents *requires* that direction to *ensure* the proper administration of *justice*. Unless that test is met, the ordinary rule applies – full and equal disclosure of all relevant evidence to all parties.
>
> (HPRB Decision No. 2009-HPA-0027(a), paragraphs [20 – 21])

[17] Section 42 of the *ATA* does not provide a definition of "the proper administration of justice". However, the HPRB's Practice Directive No. 3 defines the factors to be considered on section 42 applications:

> Proper administration of justice
>
> . . . In applying this term, the Review Board will ordinarily weigh:
>
> (a) the importance of the individual's interests at stake on the review and the impact of nondisclosure on their ability to advance their case,
>
> (b) the importance of the countervailing privacy or other interest sought to be protected and the impact of disclosure on that opposing interest, and
>
> (c) whether there are any reasonably available solutions that would address privacy or other interest while enabling disclosure.
>
> . . . While not binding in BC, parties may find it helpful to consider the factors that govern the Ontario Health Professions Appeal and Review Board in making these decisions. That Board may refuse to give a party any evidence that may, in its opinion:
>
> - disclose matters involving public security;
> - undermine the integrity of the complaint investigation and review process;
> - disclose financial or personal or other matters of such a nature that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that disclosure be made;
> - prejudice a person involved in a criminal proceeding or in a civil suit or proceeding; or
> - jeopardize the safety of any person.

> . . . Information that could potentially fall within the scope of s. 42 includes the names of family members, sexual or mental health information whose prejudicial effect outweighs its probative value, and personal information of third parties from whom witness statements were taken during an investigation."
>
> (HPRB Practice Directive No. 3, Section IV, pages 3 – 4)

[18] Although HPRB Practice Directive No. 3 is not binding on this Board, it provides useful guidance in deciding this application, and the Respondent specifically relies upon it.

[19] The Respondent submits that some of the Contested Documents "are witness statements of third parties taken during the investigation that contain the personal information of the third parties" and asserts that "this information will not assist the Appellant in advancing her appeal, primarily because the information generally contained in these documents is information that the Appellant already has, as evidenced by her own records provided to the Respondent." (Respondent's written submissions, paragraphs 20 – 21)

[20] That assertion does not address the test that must be met to succeed with this type of application. The Respondent has not established how disclosure of information *that is already known to the Appellant* causes a "risk of damage to the administration of justice" that "outweighs the benefits of the usual principle of full disclosure." (HPRB Decision No. 2009-HPA-0027(a), paragraph [20])

[21] The Respondent also submits that all of the Contested Documents "contain information that disclose personal or other matters that include the names of family members and the children as well as … information about the children whose prejudicial effect outweighs its probative value" and argues that "the interests of the children in releasing this sensitive … information about them weighs against disclosing it to the Appellant". (Respondent's written submissions, paragraphs 22 & 24)

[22] The Contested Documents do contain the names of children and family members (the "Names") as well as sensitive personal information about the children (the "Information"). However, I have reviewed the entire Appeal Record and with one exception which I discuss below, the Names and Information that are contained in the Contested Documents are also contained in other documents within the Appeal Record. The Information is not expressed in identical words in each document in the Appeal Record nor in each of the Contested Documents, but it is clear that the Appellant is aware of the Information and knows all the Names.

[23] The Respondent concedes that the Appellant is fully aware of the Names.

[24] Some of the Contested Documents contain more specific details about the Information than appear elsewhere in the Appeal Record, and the Respondent argues that these more detailed descriptions of the Information "if disclosed has

tremendous potential to impact negatively on the children and their families in the community." (Respondent's written submissions, paragraph 25)

[25] I find that a compelling argument for restricting the public's access to the Contested Documents, but not for restricting the Appellant's access.

[26] The Appellant's license to operate a community care facility has been cancelled. She has serious interests at stake in this appeal. She "bears the burden of proving that the decision under appeal was not justified." (*Community Care and Assisted Living Act*, s. 29(11))

[27] The question before me is whether the Appellant "should be deprived of [her] ordinary right to know the information being relied on by everyone else involved in the matter. The context here is about whether the law should countenance the procedure of considering certain information privately, or *ex parte*, so that not even a party to the proceeding can see it." (HPRB Decision No. 2009-HPA-0027(a), paragraph [40])

[28] An application to receive evidence in confidence to the exclusion of a party "is to be granted only in exceptional circumstances. The general rule is that the parties each have access to the same relevant information unless there is a strong argument for uneven disclosure." (HPRB Decision No. 2012-HPA-082(a), paragraph [3])

[29] With the exception of one paragraph in one of the Contested Documents, I am not satisfied that it is necessary to receive the Contested Documents in confidence to the exclusion of the Appellant in order to ensure the proper administration of justice.

[30] The one paragraph that I find should be received in confidence to the exclusion of the Appellant is contained on page 5 of the email dated November 24, 2014 from RCMP to E, Licensing Officer, Y Health Authority (the "RCMP email"). That paragraph contains information that is highly personal and sensitive in nature and relates to matters unconnected with the Appellant and her community care facility. It is information about a child and members of his family, none of whom are parties to this appeal. It includes names of family members and personal information of third parties from whom witness statements were taken during an investigation. There is nothing in the Appeal Record or the submissions before me on this application to suggest that the Appellant knows the information in this paragraph.

[31] The child and his family members "have a clear and significant privacy interest in not having their names" and this highly personal and sensitive information about them "disclosed to the [Appellant] or to other third parties and there should be no such disclosure unless there is a compelling reason for doing so." (HPRB Decision No. 2009-HPA-0090(a), paragraph [30])

[32] The information in that paragraph of the RCMP e-mail has little or no relevance to the matters in issue in this appeal. Nondisclosure of the information in that paragraph will not limit or impede the Appellant's ability to advance her appeal. I find no compelling reason for disclosing the information in that

paragraph to the Appellant. In my opinion, the information in that paragraph is of such a nature that the desirability of avoiding disclosure in the interest of the child and family members outweighs the desirability of adhering to the principle that disclosure be made to the Appellant.

[33] All of the Contested Documents contain names and personal information about children and their family members, and they all have a significant privacy interest in not having that information disclosed to the public. In my opinion, the desirability of avoiding disclosure of the Contested Documents in the interests of those children and their families outweighs the desirability of adhering to the principle that hearings be open to the public.

[34] There are many other documents in the Appeal Record which also contain names and personal information about those children and their families, and one or both of the parties to this appeal may seek to restrict public access to those documents at the hearing of the appeal pursuant to Rule 20(2)(a) and section 41 of the *ATA*. That will be a matter for the Panel that hears the appeal to rule upon.

DECISION

[35] In making this decision, I have considered all of the information and submissions before me, whether or not they are referred to in these reasons.

[36] Pursuant to Rule 20(2)(a) and section 41 of the *ATA*, I direct that all of the Contested Documents be received to the exclusion of the public.

[37] I dismiss the Respondent's application that the Board receive the following five documents in confidence to the exclusion of the Appellant:

a. An email dated September 25, 2014 from D, Ministry of Children and Family Development ("MCFD") to C, Licensing Officer, Y Health Authority (2 pages);

b. Notes recorded on a "Staff Interview Record" relating to an interview conducted on September 30, 2014 by C, Licensing Officer, Y Health Authority (3 pages);

c. Notes recorded on a "Parent Interview Form" relating to an interview conducted on October 1, 2014; there is no interviewer's name or signature on this document (4 pages);

d. Notes recorded on a "Parent Interview Form" relating to an interview conducted on October 8, 2014; there is no interviewer's name or signature on this document (4 pages); and

e. An email dated October 23, 2014 from MCFD to E, Licensing Officer, Y Health Authority (3 pages).

Those five documents will be disclosed to the Appellant without any redactions on the conditions set out in paragraph [40].

[38] With respect to the email dated November 24, 2014 from RCMP to E, Licensing Officer, Y Health Authority (6 pages), the Respondent's application is allowed in part. That email will be disclosed to the Appellant on the conditions set out in paragraph [40] and with the following redaction: on page 5, the penultimate paragraph which begins "On October 30, 2014" and consists of 11 lines concluding with the words "and MCFD." will be redacted.

[39] Consistent with the principle expressed in HPRB Practice Directive No. 3, this is a reasonably available solution that addresses the privacy interests of non-parties while enabling disclosure of the document to the Appellant.

[40] Pursuant to section 42 of the *ATA* and the Board's general power to make orders (s.14 of the *ATA*), I order that the six documents identified in paragraphs [37] and [38] be produced to the Appellant on the following conditions:

a. The Appellant will not disclose the documents to anyone other than her legal counsel and will not use the documents for any purpose other than this appeal proceeding.

b. Before the documents are produced to the Appellant, she will sign an agreement that she will not reproduce or create paper, electronic or any other form of copy of the documents, save and except to provide a copy to her legal counsel in this matter, and that she will return the documents to the Board upon completion of the appeal proceeding.

[41] Finally, the Respondent will have until October 16, 2015 to advise Board staff in writing as to whether he intends to challenge this decision by way of judicial review. If the Board does not receive such notification by that date, it will provide the Contested Documents to the Appellant subject to the requirements set out in paragraphs [38] and [40] above.

"Lynn McBride"

Lynn McBride, Member
Community Care and Assisted Living Appeal Board

September 29, 2015