



Community Care and Assisted Living Appeal Board

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DECISION NO. 2017-CCA-001(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: May Au-Yeung, Licensee (operating as Home Sweet Home Family Child Care) **APPELLANT**

AND: Dr. James Lu, Medical Health Officer, Vancouver Coastal Health **RESPONDENT**

BEFORE: Helen Ray del Val, Chair

DATE: Conducted by way of written submissions concluding on June 1, 2017

APPEARING: For the Appellant: Self-represented
For the Respondent: Self-represented

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 certain portions, namely three sentences in a document forming part of the Appeal Record, be received in confidence to the exclusion of the Appellant and accordingly, that those portions not be disclosed to the Appellant. In the rest of this decision, I will refer to those portions as the "Three Sentences".

BACKGROUND

[2] The Appellant is licensed to operate a community care facility. A number of conditions were imposed on her licence. The Appellant objects to two of these conditions and has filed an appeal to the Board.

[3] Once the licensing authority is notified that a new appeal has been filed with the Board, it must compile and file with the Board a complete copy of the licensing "appeal record". The Appeal Record consists of the decision being appealed, the Respondent's reasons for the decision, and all supporting

documentary evidence such as complaint forms, inspection and investigation reports and notes, policies, legislative provisions and submissions considered by the Respondent in making the decision. Subject to an order of the Board otherwise, the information contained in the record must not be edited or severed. The Respondent's responsibility for complete and accurate compilation of the Appeal Record is critical to the effectiveness and fairness of the appeal process. A copy of the Appeal Record must also be delivered to the Appellant at the same time it is delivered to the Board.

[4] In preparing the Appeal Record the Respondent identified one document that forms part of the record which contains the Three Sentences. The Three Sentences which the Respondent is seeking to exclude contain sensitive personal information about two children and their caregivers who are not connected to this Appeal.

[5] The Respondent has requested that the Board exercise its discretionary authority under section 42 of the *ATA* to direct that the Respondent be given the opportunity to redact the Three Sentences from the document prior to including it in the Appeal Record so that this sensitive personal information is not disclosed to the Appellant.

[6] Without disclosing the Three Sentences sought to be redacted, the Respondent also wrote to the Appellant to inform her of the application under section 42. That notice advised her that a document was located containing personal third party information that did not form part of the investigation and was not considered in the decision under appeal. The notice provided a summary description of the nature of the document, the circumstances under which it was created, and the Respondent's concerns with the inclusion of the Three Sentences in the Appeal Record. Accordingly, the notice advised her of the Respondent's preliminary application to the Board requesting that the Three Sentences be redacted so that the information is not disclosed in the Appeal Record.

[7] The Appellant was given an opportunity to comment on the application. The Appellant does not state whether she consents or objects to the Respondent's application to redact the Three Sentences or whether she is taking any position. However, she stated that the licensing officer had "sent the wrong info to the appeal file" and that the daycare has never taken care of those children.

ISSUE

[8] The issue to be determined on this preliminary application is whether the Board should exercise its discretionary authority under section 42 of the *ATA* to restrict the Appellant's access to portions of the Appeal Record that contain the Three Sentences.

RELEVANT LEGISLATION

[9] In support of this application the Respondent relies on section 42 of the *ATA*.

[10] Section 29(1.2) of the *Community Care and Assisted Living Act* makes sections 41 and 42 of the *ATA* applicable to the Board. Section 41 deals with restricting the *public's* access to evidence and section 42 deals with restricting a *party's* access. The test for restricting access to information by a party is more stringent than that for restricting access to the public. Those sections read as follows:

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.

(Emphasis added)

DISCUSSION AND ANALYSIS

[11] An application to receive evidence in confidence to the exclusion of a party is exceptional and contrary to the general rule that parties to an appeal each have access to the same information unless there is a strong argument for uneven disclosure.

[12] The question before me arising from section 42 is whether it is necessary to receive those portions of the record, namely the Three Sentences, in confidence to the exclusion of the Appellant in order to ensure the proper administration of justice. Section 42 does not define "the proper administration of justice", however, in this regard I will adopt the approach used in a previous decision of the Board¹ and weigh the following three principles:

- (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.

[13] The Three Sentences contain sensitive personal information about children and caregivers who are not connected to the appeal. While this information forms part of the Appeal Record, the Respondent has submitted that it did not form part of the investigation and consequently was not considered in the decision under appeal. The Appellant has indicated that this information does not belong with this appeal file.

[14] The very private nature of the information could hurt the children and their families if released. The information, being irrelevant, has no bearing on any party's case and therefore cannot be used to advance any party's position in the appeal.

[15] I find that nondisclosure of the information in the Three Sentences, which is not relevant to the issues under appeal, will not limit or impede the Appellant's ability to advance her appeal. I find no reason for disclosing the information in those sentences to the Appellant and find that the proper administration of justice requires that it be withheld. In my opinion, that information is of such a nature that the desirability of avoiding disclosure in the interest of the third parties here clearly outweighs the desirability of adhering to the general principle that full disclosure of the complete record be made to the Appellant.

[16] Further, the Respondent has not sought to exclude the entire document from the Appellant, rather only those portions that would in my view constitute an unreasonable invasion of the privacy of vulnerable third parties. Accordingly, I find that the redaction of those three sentences is a reasonably available solution to address the privacy issue while enabling disclosure of the rest of the document to the Appellant.

¹ See *X v. Y Health Authority*, Decision No. 2015-CCA-002(a) at paragraph [17].

[17] With respect to disclosure to the general public, I also find that the information in the whole of the document containing the Three Sentences is of such a nature that the desirability of avoiding disclosure in the interest of the children and caregivers named in the document clearly outweighs the desirability of adhering to the principle that hearings be open to the public. Therefore, although the parties have not specifically addressed this issue in their submissions, I would direct that the entire document not be made available to the public.

DECISION

[18] Pursuant to section 42 of the *ATA*, I allow the Respondent's application and direct that the Respondent be given the opportunity to redact the Three Sentences from the 3rd and 4th paragraphs of the document titled "Appendix A" and which are highlighted in the copy of the document provided to the Board, such that they are to be received to the exclusion of the Appellant.

[19] Accordingly, the document may be disclosed to the Appellant for insertion in the Appeal Record filed with the Board and provided to the Appellant with the redaction of the highlighted sentences referred to above.

[20] Further, pursuant to section 41 of the *ATA*, I direct that the entire document in question referred to as "Appendix A" is to be received to the exclusion of the public. This means that should a later request for public access to the Appeal Record (either at the hearing or afterwards) be made, this document is not to be included in any such disclosure.

"Helen Ray del Val"

Helen Ray del Val, Chair
Community Care and Assisted Living Appeal Board

June 9, 2017