Order 02-44

FORENSIC PSYCHIATRIC SERVICES COMMISSION

David Loukidelis, Information and Privacy Commissioner
September 10, 2002

Quicklaw Cite: [2002] B.C.I.P.C.D. No. 44
Document URL: http://www.oipc.bc.ca/orders/Order02-44.pdf
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

Summary: The applicant sought her deceased son's medical records. The applicant is the nearest relative of the deceased son within the meaning of s. 3(c) of the FOI Regulation, but in the circumstances of this case is not acting on his behalf under that section. Assessing her request as a third party, the Commission has correctly refused access to the son's personal information under s. 22(1).

Key Words: personal representative – nearest relative – applicant's motives – medical information – unreasonable invasion of privacy – public scrutiny of public body – fair determination of rights – supplied in confidence.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), (b), (c) and (f) and 22(3)(a); Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 323/93, s. 3(c).

Authorities Considered: B.C.: Order No. 31-1995, [1995] B.C.I.P.C.D. No. 2; Order No. 53-1995, [1995] B.C.I.P.C.D. No. 26; Order No. 96-1996, [1996] B.C.I.P.C.D. No. 22; Order 00-11, [2000] B.C.I.P.C.D. No. 13; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-26, [2002] B.C.I.P.C.D. No. 26.

Cases Considered: *Allan Estate* v. *Co-operators Life Insurance Co.*, [1999] B.C.J. No. 94, 1999 BCCA 35 (C.A.); *Ruiz* v. *Mount Saint Joseph Hospital*, [2001] B.C.J. No. 514, 2001 BCCA 207 (C.A.).

1.0 INTRODUCTION

[1] Last September, the applicant requested access, under the *Freedom of Information and Protection of Privacy Act* ("Act") to records that the Forensic Psychiatric Services Commission ("Commission") held about her late son. In her request she said, "I am acting on his behalf because I would like to ensure that he received adequate medical care before he died and help me put closure to this matter." The Commission responded later the same month by denying access. It told the applicant she had not established that she was acting on behalf of her late son within the meaning of s. 3(c) of the Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 323/93 ("FOI Regulation"). The Commission had, therefore, treated her request as if she were a third party and denied access under ss. 22(1) and (3) of the Act.

[2] The applicant requested a review of this decision under Part 5 of the Act. As mediation was not successful in resolving the matter, I held an inquiry under s. 56 of the Act.

2.0 ISSUE

[3] The issue in this case is whether the Commission was required by s. 22 of the Act to refuse the applicant access to the requested records. In light of the Commission's decision under s. 3(c) of the FOI Regulation, I will first decide if the applicant is acting on the son's behalf or as a third party.

[4] Under s. 57(2) of the Act, the applicant has the burden of proving that disclosure of the personal information in the records would not unreasonably invade third-party privacy. The applicant argues that she does not have a burden to show that she is acting on the son's behalf under s. 3(c). I do not consider, however, that a presumption can be applied that the applicant is acting on her son's behalf, based only on her status as the son's nearest relative. This is clear from previous decisions on this point. I must, therefore, decide on all the evidence before me whether the applicant is, in making her request, acting on the son's behalf and not in her own right.

3.0 DISCUSSION

[5] **3.1 Background** – The Commission is a corporation created under the *Forensic Psychiatry Act*. One of its functions is to provide in-patient and out-patient psychiatric care for individuals who have been detained under a court order, a *Criminal Code* review board order or under the *Mental Health Act*. The son was, by order, under the Commission's care, at its Forensic Psychiatric Hospital, from 2000 to early the next year. The deceased was discharged subject to conditions, including that he was to continue receiving psychiatric care from the Vancouver Forensic Out-Patient Clinic. He died some weeks after his discharge and the coroner looked into the matter in the ordinary course.

[6] During the deceased's detention in hospital, the Commission says, he had limited contact with his family. One of the deceased's psychiatrists contacted the applicant after he was hospitalized. A few weeks later, the deceased told the psychiatrist that his sister had told him to co-operate with his psychiatrist. The applicant says she tried to visit her son, but was told that he was not allowed visitors.

[7] There are 550 pages of records in dispute. They cover the deceased's detention, diagnosis and treatment in great detail. They include notes taken by treating psychiatrists and other health professionals and paint a detailed picture of the deceased's mental health, his condition and treatment. The records disclose highly sensitive medical information of the deceased that shows, among other things, that he had a history of mental illness. The records are detailed in this respect. They contain information disclosing the deceased's opinions and feelings, including about other people. The personal information in the records is of a very sensitive, personal kind. The records contain a great deal of information that many people would not necessarily share with their spouses or families. This is not comparable to a case where, for example, medical records disclose only that a deceased was admitted to hospital with chest pains and died hours later of a massive heart attack.

[8] The material before me indicates the applicant first requested these records in 2001, with her son-in-law's help, from what was then the Ministry of Health ("Ministry") (now the Ministry of Health Services). At the time, the Minister of Health was the head of the Commission for the purposes of the Act. The Ministry denied access for much the same reasons as those the Commission later gave. The applicant requested a review by my Office, but later withdrew that request, as the Minister had ceased to be the head of the Commission under the Act.

[9] The applicant is clearly distressed by her son's death and, as she says in various places in her submissions, wishes some closure over his death. She also wants to make sure that her son was adequately cared for before his death. I recognize that the outcome of this inquiry will not assist the applicant in resolving these concerns. She has my sympathy, as does the entire family, but the privacy interests of the deceased are not, for the reasons given below, overcome by his recent unfortunate death.

[10] **3.2 The Applicant's Status** – I will first consider whether the applicant falls within s. 3(c) of the FOI Regulation, such that she can gain access to her son's personal information on the basis that she is acting on his behalf. If she is not acting on her son's behalf, I must consider her request in light of s. 22 of the Act. See, for example, Order No. 96-1996, [1996] B.C.I.P.C.D. No. 22.

The applicant says she is acting for her son

[11] The applicant argues that, because she is her deceased son's nearest relative, she is acting on his behalf within the meaning of s. 3(c) of the FOI Regulation, which reads as follows:

Who can act for young people and others

3. The right to access a record under section 4 of the Act and the right to request correction of personal information under section 29 of the Act may be exercised as follows:

…

(c) on behalf of a deceased individual, by the deceased's nearest relative or personal representative.

[12] The applicant argues she is acting on her son's behalf because she believes the medical care he received before his death was substandard and may have been a contributing factor in his death. She says she wishes to investigate this matter on his behalf to ensure he received adequate medical care and to provide reassurance and closure to his family (paras. 3-10, initial submission). She supports these arguments with affidavit evidence from her son-in law.

[13] The applicant further outlines her position at para. 17 of her initial submission and paras. 6-7 and 10-14 of her reply submission. She relies on her own affidavit and affidavits sworn by her daughter and son-in-law. She says she has reason to believe that her son's care was inadequate, but gives no particulars or evidence to support her assertion. The applicant says she wishes to restore dignity to the name her son's children have inherited. She reiterates that she wishes the records to help bring closure for the family respecting her son's death, again expressing the view, without evidence or particulars, that her son's treatment may have been insufficient and may have contributed to his death. She will continue with the coroner's process, the applicant says, but (for some unstated reason) does not consider it relevant here.

[14] The applicant also says she is not acting for her daughter, but that her daughter and son-in-law have been assisting her, as her English is weak. Further, she says, the son was close to his family, who were genuinely interested in his care. She says she tried twice to visit him while he was in the care of the Commission, but he was not allowed visitors.

[15] The applicant's daughter deposes that she suspected her brother may have been suicidal and provides reasons at para. 10 of her affidavit for her believing this. She believes that her brother was not supported by his treatment team, although she does not give particulars of this alleged lack of support or a basis for her belief.

[16] The applicant's other stated reason for requesting her son's medical records is to investigate her son's care before his death and possibly to bring a lawsuit against the Commission on his behalf. She wishes to carry out this investigation before taking any such action, she says at para. 6 of her reply submission. The applicant says she might bring a lawsuit against staff of the Commission's forensic hospital for negligence or medical malpractice. Such a lawsuit, she argues, could only be undertaken on behalf of the deceased. The deceased's rights are in question, she says, and if those rights were violated, his family can exercise them on his behalf and pursue the remedies available to any victim or personal injury plaintiff.

[17] I do not doubt the applicant's sincerity in wanting to know more about her son's life and treatment in the months before he died. Her wish to "bring closure" and reassurance to the family is also understandable. After careful consideration, however, I have decided that the material before me does not establish that the applicant is acting on her deceased son's behalf, as contemplated by s. 3(c) of the FOI Regulation, in requesting his medical records.

The Commission says the applicant is not acting for her son

[18] The Commission reminds me that previous orders have held that applicants seeking records for their own interests cannot be said to be acting on behalf of or in the best interests of the deceased person for the purposes of s. 3(c) of the FOI Regulation. It cites Order No. 96-1996, and Order No. 53-1995, [1995] B.C.I.P.C.D. No. 26, as examples.

[19] The Commission argues that, although an applicant's reasons for making a request are generally not relevant, the applicant's motives are relevant in deciding the s. 3(c) issue. It refers to Order 00-11, [2000] B.C.I.P.C.D. No. 13. (The applicant has also explicitly put her motives in issue, albeit in relation to the s. 22 analysis.) It also argues that the applicant's earlier request to the Ministry is relevant in considering her motives. The Commission says the applicant first requested her son's medical records in May 2001, through her son-in-law. As noted above, the request was made to the Minister of Health, as the Commission's head under the Act. The Ministry said that its staff had spoken with the son-in-law about the reasons for that request.

[20] According to the Commission, its staff did not ask the applicant for reasons for her request in this case, although the applicant's son-in-law deposes here that he spoke to Commission staff last summer about the applicant's reasons for her request. He told Ministry staff that his wife – who is the applicant's daughter and is the sister of the deceased – wanted to review the son's psychiatric records "to learn about the circumstances just before his death." The applicant's son-in-law also told Ministry staff that his wife "is a medical doctor" (paras. 53-55, initial submission). The Commission says, at paras. 25 and 60 of its initial submission, that the sister is a practicing psychiatrist. The applicant's son-in-law deposed that he was, in fact, asked why the applicant had requested the records. He deposed that he told Commission staff that

> … the information was required to help determine the cause of death of the Applicant's son, and if there was anything untoward in his treatment that may have been a contributing factor in his death.

[21] According to the Commission, the Ministry found that the applicant's request did not fit under s. 3(c) of the FOI Regulation and denied access to the son's records under s. 22 of the Act. The Commission has quoted from a letter from the son-in-law requesting a review of the Ministry's decision, in which he gave much the same reasons for his wife requesting access to the records. The Commission says the son-in-law apparently asked his lawyer to write to the Ministry in support of the mother's request,

but it has not seen this letter and cannot say if it provides other reasons for requesting the information.

[22] The Commission suggests that, in light of the daughter's failed attempt to get access to records through the Ministry, the applicant is effectively making the request on behalf of her daughter, who is not the son's nearest relative, and that the applicant is trying to circumvent the intent and purpose of s. 3(c) of the FOI Regulation in light of that earlier failed request. In any event, the Commission argues, the daughter's reasons for requesting the records do not establish that she was, or the applicant is, acting "on behalf of" the deceased son as contemplated by s. 3(c) of the FOI Regulation. The Commission has also provided *in camera* argument on this point. It concludes its submission by arguing that it is difficult to understand how disclosure of the son's medical records would assist the applicant (or her daughter) to better understand the circumstances that led to the son's death or help the applicant to "bring closure to the matter." The son had been discharged from the Commission's hospital roughly a month before he died, the Commission says, and the coroner's investigation is the logical place to go to "bring closure" (paras. 56-64, initial submission).

Does a personal representative trump a nearest relative?

[23] The Commission says, at para. 46 of its initial submission, that it does not dispute that the applicant is the deceased's "nearest relative" for the purposes of s. 3(c) of the FOI Regulation. I accept that the applicant is the deceased son's nearest relative for these purposes. The issue remains, the Commission goes on to say, whether the applicant is acting "on behalf" of the son within the meaning of s. 3(c) of the FOI Regulation.

[24] The Commission also argues, at paras. 65 through 75 of its initial submission, however, that the applicant can gain access to her son's personal information, as his "nearest relative", only if she provides clear and convincing evidence that she is both acting on his behalf and that the son had not, when he died, named a personal representative. It argues that, where a deceased individual has a personal representative, only that person can act for the deceased for the purposes of s. 3(c). This argument flows from the Commission's contention – which is based, as I understand it, on Order No. 31-1995, [1995] B.C.I.P.C.D. No. 2 – that a deceased's personal representative takes precedence over the deceased's nearest relative for the purposes of s. 3(c) of the FOI Regulation. The Commission relies on Order No. 31-1995. If the deceased son has a personal representative, according to the Commission, the applicant cannot purport to act on his behalf even though she is his nearest relative.

[25] In Order No. 31-1995, my predecessor decided that, where both a "personal representative" and a "nearest relative" seek to exercise the deceased's access rights under the Act, the personal representative prevails and is solely entitled to do so. He said the following at p. 12:

> The Public Trustee argues against an interpretation of section 3(c) of the Regulation which allows either the deceased's nearest relative OR personal representative to bring an application for access:

> If that is true, then the Legislature would appear to be suggesting that a nearest relative would have equal status with a personal representative. This state of affairs would prevent a person from choosing their personal representative to the exclusion of their nearest family member to represent them. It is a frequent desire for a person to appoint an impartial party to act and thus avoid conflict through an impartial administration. The Public Trustee submits that this state could not have been intended by the Legislature because it is parallel to limiting a person's freedom of choice to choose not to allow their family members to be involved in their personal affairs. [Submission of the Public Trustee, p. 14]

I agree with the Public Trustee's position that a nearest relative is not entitled to exercise section 4 rights in circumstances where there is a personal representative, because it supports the continued exercise of personal autonomy by an adult. This reflects the principle of information self-determination that is, and should be, at the heart of all privacy protection regimes.

[26] The argument for deference to a deceased's personal choice and autonomy breaks down in light of the *Interpretation Act* definition of the term "personal representative", which is mentioned in Order No. 31-1995 and which applies under the FOI Regulation:

> **"personal representative"** includes an executor of a will and an administrator with or without will annexed of an estate, and, if a personal representative is also a trustee of part or all of the estate, includes the personal representative and trustee; … .

[27] As this definition confirms, a "personal representative" may not be chosen by an individual. Where someone has died without a will, the court appoints the administrator of the individual's estate and that administrator is the deceased's personal representative for the purposes of the FOI Regulation. The argument that personal choice should be respected by giving primacy to a personal representative therefore does not apply universally. (I also question, in passing, the notion that one's choice of executor – presumably, the person best suited to handling the financial and legal details of an estate – indicates a personal choice to give that same person access to one's most sensitive personal information.)

[28] If the deceased's personal choice is the key, one would therefore have to concede that a personal representative chosen by a deceased, through her or his will, prevails over the nearest relative, but a personal representative appointed by the court does not necessarily prevail over the nearest relative. This brings me to the question, not addressed in Order No. 31-1995, of whether the language of s. 3(c) of the FOI Regulation actually permits an interpretation that creates the hierarchy of standing adopted in Order No. 31-1995. Section 3(c) says that "the deceased's nearest relative or personal representative" can act for the deceased. The plain meaning of the word "or" is that either the personal representative or the nearest relative can claim to act on behalf of a deceased. As *Black's Law Dictionary* (6th ed., 1990) confirms, "or" is a "disjunctive particle used to express an alternative or to give a choice among two or more things." The language of s. 3(c) therefore expressly contemplates that, in those cases where both a personal representative and a nearest relative apply for access to the same information of

the deceased (for the same or different reasons) they can both claim to act on the deceased's behalf.

[29] Nothing in the statutory context in which s. 3(c) appears, or the policy underlying either s. 3(c) itself or the Act as a whole, drives one to the conclusion that s. 3(c) can be interpreted, in the face of its explicit language, as my predecessor interpreted it in Order No. 31-1995. If the Legislature had intended s. 3(c) to support my predecessor's interpretation, one would expect it to say something like this:

> (c) on behalf of a deceased individual, the individual's personal representative or, if there is no personal representative, the deceased's nearest relative.

[30] Acknowledging that a consistent interpretation of the Act is desirable, I nonetheless decline to follow Order No. 31-1995 on this point. It follows that, contrary to the Commission's submission, it does not matter if a deceased individual has a personal representative, since an applicant may still be able to show that he or she is acting on behalf of the deceased, as the nearest relative. As I have already said, where both a personal representative and a nearest relative apply for access to information (for the same or different reasons) they can both claim to act on the deceased's behalf. They may both be able to show that they are acting on the deceased's behalf; or the circumstances may dictate that only one of them can properly be said to be acting on the deceased's behalf.

[31] I will now address the issue of whether the applicant is acting on her son's behalf in seeking access to his personal health records.

Is the applicant acting on the son's behalf?

[32] I will first deal with the applicant's contention that she is acting on her son's behalf in order to get information that could lead to or assist a lawsuit on his behalf. At common law, any cause of action the son might have had for negligence or any other wrong that he allegedly suffered would have perished with him. See, for example, *Allan Estate* v. *Co-operators Life Insurance Co.*, [1999] B.C.J. No. 94, 1999 BCCA 35 (C.A.), at para. 45 (B.C.J.). The harsh common law rule was amended by statute, the relevant provision now being s. 59 of the *Estate Administration Act*. Section 59(2) is particularly relevant, and I quote it here along with s. 59(3):

> (2) Subject to subsection (3), the executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, including an action in the circumstances referred to in subsection (6).
>
> (3) Recovery in an action under subsection (2) must not extend to the following:
>
> (a) damages in respect of physical disfigurement or pain or suffering caused to the deceased;

> (b) if death results from the injuries, damages for the death, or for the loss of expectation of life, unless the death occurred before February 12, 1942;
>
> (c) damages in respect of expectancy of earnings after the death of the deceased that might have been sustained if the deceased had not died.

[33] As s. 59(2) clearly says, any lawsuit that could possibly be brought (in light of s. 59(3)) on the son's behalf would have to be brought by the son's "executor or administrator". The s. 59(2) reference to the executor or administrator "of a deceased person" refers to the executor of the deceased's will or administrator of her or his estate. There is no indication in the material before me that the applicant is either the "executor or administrator" of the son's will or estate or that she has either applied to be appointed administrator or intends to do so. Indeed, the applicant says that her son has no personal representative (para. 6, reply submission). I therefore conclude that the applicant is not, for the purposes of any litigation that might possibly be brought on behalf of the son's estate, as I stated above, acting as a "personal representative" of the son under s. 3(c) of the FOI Regulation "on behalf of" her son or his estate. Only the executor of the son's will or the administrator of his estate could do that.

[34] This is not the end of the issue, however, since the applicant also says the following at para. 6 of her reply submission:

> In this Inquiry, the Applicant has made it very clear that the stated reason for obtaining the records of the deceased is to determine the circumstances surrounding his death, and further to determine if his care was satisfactory. If his care was not satisfactory, then the applicant, or another family member, would be entitled to make an application to the Court to be named his personal representative, as he does not currently have one, in order to bring a lawsuit against the treating doctor or Forensic Hospital for medical malpractice or negligence. A lawsuit of this nature could only be brought *on behalf*, or in the name of the deceased. The rights in question are those of the deceased. If those rights were violated before his death, then he still has a remedy against the tortfeasor, but only his family can exercise it for him, *on his behalf*. The Applicant prefers to investigate the circumstances of the death of her son before taking any other action, but acts only on behalf of her son in doing so. She can have no other reason for requesting these records, but in her son's interest. [original emphasis]

[35] This raises the question of whether the applicant can, as the son's nearest relative, act on his behalf for the purposes of possible litigation, even though she would have to obtain a court appointment as his "executor or administrator", to use the language of s. 59(2) of the *Estate Administration Act*, before she could sue on his behalf.

[36] The answer to this is, in principle, yes, but I have decided this is not such a case. I have already described the evidence relating to the applicant's various motives for seeking access, many of which are understandable, but can only be described as personal. I refer here to the applicant's wish to see the deceased's medical records to understand his death and to bring closure for herself and her family. I also have noted suggestions in

the evidence that, despite the applicant's statement that she attempted to visit her son, the deceased was not close to his family at the time of his death.

[37] After very careful deliberation in light of all of the evidence, I have concluded that the applicant has not established that she is acting "on behalf" of her son for the purpose of gathering information for a possible lawsuit on behalf of his estate. This conclusion is also relevant to the applicant's contention, for the purposes of s. 22 of the Act, that the personal information is relevant to a fair determination of rights. I address this aspect of the matter later in this decision.

[38] In the interests of clarity, I note in passing that, if the applicant were to seek her son's personal information for the purpose of litigation that she might seek to bring on her own behalf, or that others might bring in their own interest, she would not be acting on the son's behalf. This is because a survivor's lawsuit can only be brought under the *Family Compensation Act* and then only by or on behalf of survivors, not on behalf of the son's estate. See, for example, *Ruiz* v. *Mount Saint Joseph Hospital*, [2001] B.C.J. No. 514, 2001 BCCA 207 (C.A.).

Closure for the applicant and the family

[39] As for the applicant's wish to have access to her son's sensitive medical information in order to bring closure regarding his death, this motive for her access request cannot be a basis for finding that she is acting on his behalf under s. 3(c) of the FOI Regulation. There is no doubt in my mind that the applicant is sincere in saying that she seeks closure, and she again has my sympathy in that regard, but that does not mean she is acting on her son's behalf within the meaning of s. 3(c).

[40] For the above reasons, I conclude the Commission correctly approached the applicant's access request for her son's medical records as a request at arm's length, *i.e.*, as an arm's-length request by the applicant for a third party's records. It is therefore necessary to deal with the applicant's request under s. 22 of the Act.

[41] **3.3 The Son's Personal Privacy** – I have discussed the application of s. 22 a number of times. See, for example, paras. 22-24 of Order 01-53, [2001] B.C.I.P.C.D. No. 56. I will not repeat that discussion here, but have applied the principles it sets out.

[42] The relevant parts of s. 22 read as follows:

> **Disclosure harmful to personal privacy**
>
> 22 (1) The head of a public body must 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 under 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 must consider all the relevant

> circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia 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,
>
> …
>
> (f) the personal information has been supplied in confidence, …
>
> (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, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> …
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, … .

Presumed unreasonable invasion of personal privacy

[43] The Commission's response described the disputed records as relating to the son's psychiatric history, diagnosis, treatment and evaluation. At para. 43 of its initial submission, the Commission says the records "consist of such records as psychiatric assessments, medical test reports, consultation reports and patient care notes." I have already described the records above. I agree that they contain personal information the disclosure of which is presumed, under s. 22(3)(a) of the Act, to be an unreasonable invasion of the son's personal privacy.

Confidential supply

[44] Turning to the relevant circumstances, as required by s. 22(2), the Commission argues that the only relevant circumstance in this case is that found in s. 22(2)(f). For her part, the applicant argues that, among other things, her son's rights are in issue and that the propriety of her motives is also a relevant factor.

[45] The Commission argues that patients reasonably expect that their communications with their doctor will be kept in confidence. It says, at para. 79 of its initial submission, that the son's treating psychiatrist, Dr. Wanis,

> … attests to his concern that patient confidentiality concerning [the son's] medical records be maintained, particularly in the circumstances here, where [the son] was not close to his family, the Applicant (and his family) were not involved or overtly

> interested in his care and the Applicant appears to seek access to the information for personal reasons.

[46] Beyond this, the Commission did not provide any further support for its argument that s. 22(2)(f) is a relevant circumstance. It did not, for example, provide affidavit evidence on this point from the treating psychiatrist. Nor did it point to any of the records in dispute in which one might find recorded any assurances of confidentiality that staff may have provided to the applicant as a patient. I also note that much of the disputed information is not information that the son provided to his doctors, as much of it is information generated by medical staff in the course of treatment. Still, based on the nature and origin of the information in these records, I find that s. 22(2)(f) is a relevant factor favouring withholding information supplied by the son and generated by Commission staff in the course of treating the son. In reaching this conclusion, I have also adverted to the fact that the Commission, as a public body under the Act, is statutorily obliged not to disclose the son's personal information except in limited circumstances not relevant here.

Public scrutiny of the Commission's activities

[47] Although the applicant does not explicitly rely on ss. 22(2)(a), (b) and (c) as relevant circumstances, her arguments implicitly raise the relevance of those provisions. The applicant says she believes her son's care may have been inadequate or substandard and that the Commission's activities should therefore be subjected to scrutiny, in the interests of promoting "public health and safety by remedying the possible deficiencies in the care offered at a public hospital." This raised s. 22(2)(a) and (b).

[48] At para. 5 of its reply submission, the Commission vigorously rejects the applicant's allegations about the son's care as "vague and wholly unsubstantiated assertions." As I have already noted, the applicant has not provided evidence to support her allegations about her son's care or the claim that it was a contributing factor in his death a month after his discharge. Nor has she provided any argument as to how her son's highly sensitive medical information will subject the Commission's activities to public scrutiny.

[49] Even if one assumes, for argument's sake only, that review of the son's records might lead another medical professional to disagree with some or all aspects of his treatment, or to say it was improper or deficient, I do not consider that the son's medical information would disclose anything about the Commission's activities that would materially contribute to or further public scrutiny of the Commission. Even if the son's personal information disclosed negligence on the part of Commission staff, I do not agree that evidence of negligence in this one case would fit within s. 22(2)(a) or s. 22(2)(b).

Fair determination of rights

[50] The applicant acknowledges that her own rights are not in issue, but she says – without giving particulars or evidence – that her son's rights may have been violated through "negligent care or possibly even criminal activity." She says that she wishes to

investigate this possibility to ensure her son's "rights" were "respected" (paras. 17 and 18, initial submission).

[51] The obvious difficulty with this position is that s. 22(2)(c) refers to the rights of an applicant, not a third party such as the applicant's son, and I have found that the applicant is not acting on behalf of her son. On this basis alone, s. 22(2)(c) is not a relevant circumstance favouring disclosure.

[52] I find that s. 22(2)(c) is not relevant here.

Relevance of the son's death

[53] My predecessor and I have acknowledged in previous orders that an individual's death may be a relevant factor under s. 22(2). We have accepted, however, that the dead do have privacy rights. See, for example, Order 00-11, at p. 9, and Order 02-26, [2002] B.C.I.P.C.D. No. 26, at paras. 15, 16, 27 and 28. While the applicant has not touched on her son's death as a factor here, the Commission argues, at para. 81 of its initial submission, that the short passage of time between his death and the access request had not diminished the son's privacy interests. Particularly in light of the highly sensitive nature of the personal information in issue here, I do not consider that the son's privacy rights requesting that information have diminished at all or appreciably since his death and I find that his death does not favour disclosing his personal information.

Applicant's motives

[54] Again, the applicant says, in a number of places in her submissions, that her motives are proper and relevant and that her access to medical records for "a legitimate purpose" would not unreasonably invade her deceased son's privacy (see, for example, paras. 20-22, initial submission). She draws on the following comments from p. 10 of Order 00-11 as support for her position:

> The material before me amply demonstrates that the applicant sincerely wishes to find out what happened to her sister and why she died. There is no question the applicant's motives are proper.

[55] These comments must be understood in their context. In that case, the applicant sought access to records that contained personal information of her deceased sister, but the bulk of the information had to do with an investigation into the actions of the sister's doctor. The sister's personal information appeared only incidentally in the records. Although I acknowledged in that case that the applicant's motives were proper, I also considered the fact that the applicant was already aware of much of the personal information in the records. I also found that most of the sister's information was so intertwined with another individual's personal information that it could not reasonably be severed and disclosed to the applicant.

[56] The situation here is very different. Here, the deceased's personal information is voluminous and detailed. It is highly sensitive information about the son's medical and

psychiatric history, diagnosis and treatment. It records his opinions, thoughts and feelings. Acknowledging the conflicting accounts presented to me about the closeness or distance of the relationship between the son and his family, nothing before me indicates that the applicant is familiar with the contents of the records.

[57] Again, I do not question the sincerity of the applicant's motives in seeking the disputed information, but these motives do not overcome the presumed unreasonable invasion of her son's personal privacy through disclosure of his personal medical information.

Is the applicant entitled to access?

[58] The presumed unreasonable invasion of privacy arising under s. 22(3)(a) applies and the relevant circumstance in s. 22(2)(f) favours withholding the disputed information. I find that the applicant has not established, as required by s. 57(2) of the Act, that disclosure of her son's personal information to her would not unreasonably invade his personal privacy. The applicant is not entitled to have access to her deceased son's medical records. There is very little information in the records that is not covered by s. 22(1). In light of how that information is combined with the son's protected information, I do not consider that, in this case, the information can reasonably be severed under s. 4(2).

4.0 CONCLUSION

[59] For the reasons given above, under s. 58(2)(c) of the Act, I require the Forensic Psychiatric Services Commission to refuse access to the records that it withheld under s. 22(1) and s. 22(3)(a) of the Act.

September 10, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia