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Order F14-09

THE MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

Ross Alexander
Adjudicator

March 19, 2014

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Summary: The applicant requested a copy of all medical information and family history about her grandfather's first cousin, who has been deceased for 42 years. The Ministry of Children and Family Development withheld the responsive records on the basis that disclosure would be an unreasonable invasion of personal privacy under s. 22 of FIPPA. The adjudicator determined that the Ministry was not required to withhold most of the responsive records.

Statutes Considered: BC: *Freedom of Information and Protection of Privacy Act*, s. 22; *Coroners Act*, s. 64. **FED:** *Privacy Act*, s. 3. **AB.:** *Freedom of Information and Protection of Privacy Act*, s. 17(2)(i). **MAN:** *Freedom of Information and Protection of Privacy Act*, s. 17(4)(h). **ON.:** *Freedom of Information and Protection of Privacy Act*, s. 2(2). **PEI:** *Freedom of Information and Protection of Privacy Act*, s. 15(2)(i). **SASK:** *Freedom of Information and Protection of Privacy Act*, s. 30.

Authorities Considered: B.C.: Order No. 96-1996, [1996] B.C.I.P.C.D No. 22; Order 02-44, 2002 CanLII 42478; Order F07-21, 2007 CanLII 52746; Order F13-09, 2013 BCIPC 10 (CanLII); Order 01-37, 2001 CanLII 21591; Order No. 200-1997, 1997 CanLII 719; Order 00-11, 2000 CanLII 10554; Order F12-08, 2012 BCIPC 12 (CanLII). **AB.:** Order F2012-24, 2012 CanLII 70616 (AB OIPC). **ON.:** Order MO-2058, [2006] O.I.P.C. No. 86.

INTRODUCTION

[1] The applicant requested a copy of any medical information and family history about her grandfather's first cousin ("deceased"). The applicant is requesting the records to learn about mental health issues in her family.

[2] The deceased lived at a residential care facility for the developmentally disabled, Woodlands School, for decades prior to her death. The records at issue are primarily personal care records from her time at Woodlands. The deceased was in her 70s when she passed away more than 42 years ago.

[3] The Ministry of Children and Family Development ("Ministry") withheld the records on the basis that disclosure would be an unreasonable invasion of the deceased's personal privacy, as well as the privacy of others mentioned in some of the records.

ISSUE

[4] The issue in dispute is whether the Ministry is required to refuse to disclose information to the applicant because disclosure would be an unreasonable invasion of personal privacy of a third party under s. 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[5] In accordance with s. 57(2) of FIPPA, the applicant has the burden of proof in this inquiry.

DISCUSSION

The Records

[6] The records primarily cover the deceased's time at Woodlands, but also include records relating to her stay at another care facility subsequent to Woodlands as well as her death.

[7] The records contain clinical charts, notes, medical certificates and tests about the medical and psychological condition of the deceased. There are also records about her placement options and movements from one care facility to another, her assets and finances, her participation in day-to-day activities, a list of people who gave gifts to the deceased, and visitor time logs of people who visited the deceased. Some of the admissions and other care records contain information about the friends and family of the deceased. There is also medical information, an autopsy report and a death certificate relating to the deceased.

[8] Some of the records also contain information about other Woodlands residents. The applicant says that she takes no issue with the Ministry severing information about the other residents at Woodlands. Therefore, those parts of the records are not at issue and will remain withheld.[1]

[1] At pp. 31, 33, 34, 38 to 41, 85, 87, 367 and 368.

The Parties' Positions

[9] The Ministry submits that disclosure of any of the records would be an invasion of the deceased's privacy because of their sensitive nature.

[10] The applicant submits that disclosure of the deceased's personal information would not be an unreasonable invasion of privacy in the circumstances because:

a) the deceased passed away 42 years ago;

b) the applicant's grandparents and mother visited the deceased during her lifetime and were kept informed of her medical status;

c) the applicant's mother is fully aware and supportive of the applicant's request for information and has told the applicant the details she remembers about the deceased, including medical diagnoses; and

d) the applicant's grandparents are deceased, but would have filled in the remaining details for the applicant if they were still alive.

[11] The applicant states that her request is similar to the one considered in Order No. 96-1996, in which the applicant received access to the medical records of her sister who had been deceased for 53 years.[2]

Section 22

[12] Section 22(1) states that 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."

[13] Previous orders have consistently stated that a person's privacy rights continue after their death.[3] However, a deceased person's privacy interests diminish over time to a degree that varies with the particular circumstances.[4]

[14] Numerous orders have considered the analytical approach to s. 22.[5] It is first necessary to determine if the information in dispute is personal information as defined by FIPPA. If so, it must be determined whether the information meets the criteria identified in s. 22(4). If s. 22(4) applies, s. 22 does not require the public body to refuse to disclose the information. If s. 22(4) does not apply, it is necessary to determine whether disclosure of the information falls within s. 22(3).

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[2] Order 96-1996, [1996] B.C.I.P.C.D No. 22.
[3] Order 96-1996, [1996] B.C.I.P.C.D No. 22; Order 02-44, 2002 CanLII 42478; Order F12-08, 2012 BCIPC 12 (CanLII).
[4] Order F07-21, 2007 CanLII 52746 at para. 28.
[5] Order F13-09, 2013 BCIPC 10 (CanLII) *et al.*

[15] If s. 22(3) applies, disclosure is presumed to be an unreasonable invasion of third party privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, it is necessary to consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.

Personal Information

[16] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information."[6]

[17] Based on my review of the records, I find that the information at issue is personal information. The records include the personal information of the deceased, and also contain information where the deceased's personal information is inextricably interwoven with that of others. For example, many of the records contain doctors' or Woodlands staff's medical opinions, evaluations or comments about the deceased.

[18] There are also visitor logs for the people who visited the deceased, and a list of the names of people who sent the deceased gifts with their addresses and what gifts they sent her.[7] The deceased's care records also contain a small amount of other personal information about the deceased's friends and family that either relates to their contact with the deceased or her medical care staff, or provides background details about the deceased's family history.[8] This is all personal information of those third parties.

[19] For the information that is both the personal information of the deceased and other third parties, s. 22 requires the Ministry to withhold the information if disclosure would be an unreasonable invasion of the personal privacy of either the deceased or another third party.

Section 22(4) – disclosure is not unreasonable

[20] Based on my review of the materials before me, I find that none of the circumstances in s. 22(4) of FIPPA apply. I also note that the applicant does not argue that any of the provisions in s. 22(4) apply.

Section 22(3) – disclosure is presumed to be unreasonable

[21] Section 22(3) provides that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if one or more

[6] Schedule 1 of FIPPA.
[7] At pp. 139, 140, 235-238, 253 and 389.
[8] At pp. 23, 138 and 139.

of the circumstances specified in s. 22(3) apply. In this case, the relevant provisions of s. 22(3) are as follows:

> 22(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,
>
> …
>
> (c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,
>
> …
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,

[22] The Ministry submits that s. 22(3)(a) applies to some of the records because the information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. Having reviewed the records, I agree that s. 22(3)(a) applies to nearly all of the information at issue with respect to the deceased.[9] Some of it, as mentioned above, is intertwined with the personal information of medical and care staff, but s. 22(3)(a) does not apply to this information with respect to them because it is not medical information about them. However, there is a small amount of information about other people that is within the meaning of s. 22(3)(a).[10]

[23] There is also information that describes the finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness of the deceased and other third parties.[11] Therefore, s. 22(3)(f) applies to this information. Section 22(3)(c) also applies to some of this information and some other information because it relates to the deceased's eligibility for income assistance or social service benefits or to the determination of benefit levels.[12]

[24] The remaining information relates to visitor sign-in logs listing who visited the deceased at Woodlands, and a list of people who sent gifts to the deceased. No s. 22(3) presumptions apply to this information.

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[9] See Order 96-1996, [1996] B.C.I.P.C.D No. 22 in which s. 22(3)(a) applied to similar patient care records.
[10] At p. 139.
[11] At pp. 43, 69, 78, 81, 83, 95, 99, 100, 102, 103, 138, 139, 141, 327 to 331, 334, 336, 344, 345, 378, 348, 355, 373, 374, 380, and 382 to 387.
[12] At pp. 42, 43, 137, 325, 331 to 350 and 353.

[25] In summary, except for the information listing who visited or gave gifts to the deceased, I find that there is a rebuttable presumption that disclosure of the records would be an unreasonable invasion of privacy of the deceased, as well as for a small amount of the information of other third parties. There is no presumption that disclosure would be unreasonable for the personal information about medical and care staff in this case, although this information is intertwined with medical information about the deceased.

Section 22(2) – other relevant factors

[26] Section 22(2) of FIPPA lists factors that public bodies must consider when determining whether disclosure of personal information would be an unreasonable invasion of a third party's personal privacy. The Ministry submits that ss. 22(2)(f) and (i) are relevant factors for the information in the records. Sections 22(2)(f) and (i) state:

> 22(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
>
> …
>
> (f) the personal information has been supplied in confidence,
>
> …
>
> (i) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

Supplied in Confidence – s. 22(2)(f)

[27] I am satisfied that s. 22(2)(f) applies to the records. Nearly all of the information was either supplied by the deceased or was generated by Woodlands staff in the course of caring for the deceased. The information supplied by the deceased was clearly supplied in confidence. I am also satisfied that the information generated by medical staff observing the deceased was inherently supplied in confidence with respect to the deceased.[13] The records also contain information that was supplied by other third parties in the context of providing information to the deceased's care providers. In my view, this information was supplied in confidence because these other third parties would have reasonably expected that this information would not be used or disclosed for any purpose other than providing care for the deceased.[14]

[13] See Order 02-44, 2002 CanLII 42478 at para. 46 regarding information generated by medical staff in the course of treatment.
[14] See, Ontario Order MO-2058, [2006] O.I.P.C. No. 86 where the information from a community meeting sign-in page was determined to be supplied in confidence.

Information about a Deceased Person – s. 22(2)(i)

[28] Section 22(2)(i) requires public bodies to consider whether the length of time a person has been deceased indicates that disclosure of his or her personal information would not be an unreasonable invasion of privacy. This is a relatively new provision of FIPPA,[15] although this issue was considered in orders before s. 22(2)(i) was enacted.

[29] The Ministry submits that it has taken account of this circumstance, and in its view a deceased's privacy rights persist for at least 20 years, probably for 50 years, and perhaps for as many as 100 years. It makes this submission based on the following statutory authority and case law:

- Section 36(1)(c) of FIPPA states that public bodies may disclose personal information about someone who had been dead for 20 or more years for archival or historical purposes.
- Order No. 96-1996 and Order No. 200-1997 involve personal information about individuals who had been deceased for about 50 years.[16] The requested information was released to the applicants in those cases.
- Section 64 of the *Coroners Act*, which states that FIPPA does not apply to certain records containing personal information until the information has been in existence for at least 100 years.

[30] Section 36(1)(c) of FIPPA states that public bodies are authorized—but not required—to disclose personal information for archival or historical purposes after a person has been dead for 20 years. This provision balances personal privacy rights with the societal interest of retaining and accessing information for archival and historical purposes. In my view, this provision means that it is at least possible for privacy rights to continue for 20 years or more after a person dies, since s. 36(1)(c) would otherwise be unnecessary.

[31] Order No. 96-1996 and Order No. 200-1997 predate s. 22(2)(i), but they address the issue of how privacy rights are impacted by a person being deceased. In Order No. 96-1996, s. 22 did not apply to the disclosure of medical records to the deceased's sister 53 years after the deceased had passed away. Similarly, in Order No 200-1997, the public body was not required to refuse to disclose the applicant's adoption records containing the name of the applicant's birth father who had been deceased for 46 years. The length of time the third parties had been deceased was a relevant factor in each of those orders.

[15] Section 22(2)(i) came into force on November 14, 2011.
[16] Order No. 96-1996, [1996] B.C.I.P.C.D No. 22; Order No. 200-1997, 1997 CanLII 719.

[32] As for the 100-year timeframe in s. 64 of the *Coroners Act*, this provision refers to a narrow class of records, such as draft coroner reports and coroner inquest information.[17] There are special public policy considerations for the records captured by this narrow exception, which is reflected by the Legislature excluding these records from FIPPA. For this reason, the *Coroners Act* provision is not particularly helpful in giving guidance with respect to the application of s. 22(2)(i).

[33] I have also considered the approach of other Canadian jurisdictions to this issue. Most jurisdictions in Canada take the view that disclosing information of a person that has been dead for 20 to 30 years is not an unreasonable invasion of their privacy.[18] While these timeframes are not determinative for the purposes of FIPPA in British Columbia, they are instructive.

[34] I find that s. 22(2)(i) is a relevant factor in this case significantly favouring disclosure because the length of time that has passed since the deceased died, 42 years, is considerable.

Other Relevant Factors

[35] In determining whether s. 22 applies to personal information of a deceased person, previous orders have also considered the applicant's motive or purpose for wanting the information, and the applicant's pre-existing knowledge of the personal information at issue. As former Commissioner Loukidelis stated in Order 00-11:

> Having considered the circumstances of this case, including those found in s. 22(2) of the Act, I find, for two reasons, that disclosure of the deceased's personal information would not unreasonably invade the deceased's personal privacy under s. 22(1). First, the applicant has sought access for a legitimate purpose connected with the circumstances surrounding her

[17] Section 64 of the *Coroners Act* excludes these records from most, but not all, FIPPA provisions.

[18] For example: Disclosure of a third party's personal information is not an unreasonable invasion of a third party's privacy after: 25 years under s. 17(2)(i) of the Alberta *Freedom of Information and Protection of Privacy Act*; 25 years under s. 15(2)(i) of the PEI *Freedom of Information and Protection of Privacy Act*; 10 years under s. 17(4)(h) of the Manitoba *Freedom of Information and Protection of Privacy Act*. Information about a person who has been dead for more than 30 years stops being "personal information" under s. 2(2) of the Ontario *Freedom of Information and Protection of Privacy Act*. The same occurs after 20 years under s. 3 of the Canada *Privacy Act*. Section 30 of Saskatchewan's *Freedom of Information and Protection of Privacy Act* states that the personal information of a deceased person cannot be disclosed until 25 years after death, except where the head of a public body's opinion is that disclosure would not be an unreasonable invasion of privacy or as provided in other legislation.

> sister's death. Second, much of the deceased's personal information has already been disclosed to the applicant or is known to her. This latter factor will not always favour subsequent disclosure through an access request under the Act, but it does so in the circumstances of this case.[19]

[36] The relevance of the applicant's motives, and knowledge of another person's personal information, are not usually factors when considering provisions under FIPPA. However, considering these factors in the context of these kinds of cases recognizes the fact that a deceased person cannot consent to disclosure. It also attempts to meet the needs of family members to deal with the death and its consequences, balanced against the risk of an unreasonable invasion of the deceased's privacy.[20]

[37] In Order No. 96-1996, the applicant wanted to learn about her family history by obtaining information about her sister who had died 53 years earlier at age 7 while living in a provincial care institution. In deciding that s. 22 did not apply to the records at issue, former Commissioner Flaherty considered both that the applicant was a close living relative of the deceased with a direct interest in the information, and also that the record answered specific questions about family medical history.[21] Further, in Order 00-11 the applicant sought information about her sister's death because she was concerned about the medical treatment her sister received prior to her death. In that case, former Commissioner Loukidelis determined that the applicant's legitimate purpose for wanting the information, and existing knowledge of much of the information, were reasons in favour of disclosure.[22]

[38] The motive for wanting the information at issue was also considered in a different context in Order F12-08, in which a UBC Faculty of Law student program requested autopsy and forensic laboratory reports relating to a person who had been dead for 18 years so it could investigate a claim of wrongful conviction by the person convicted of murdering the deceased.[23] In that order, Adjudicator Fedorak considered how the victim's family members would be affected by the release of the information, and the mental distress disclosure would likely cause them, before concluding that s. 22 applied in that case.

[39] The applicant's motives for requesting information about the deceased are much closer to the circumstances in Order 00-11 and Order No. 96-1996 than those in Order F12-08. However, the applicant's connection to the deceased is

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[19] Order 00-11, 2000 CanLII 10554 at para. 48.
[20] This issue is addressed in the legislation of some other provinces. Section 40(i)(cc) of Alberta's *Freedom of Information and Protection of Privacy Act*, for example, authorizes public bodies to disclose a deceased's personal information to a relative if the disclosure is not unreasonable. See Alberta Order F2012-24, 2012 CanLII 70616 (AB OIPC).
[21] Order No. 96-1996, [1996] B.C.I.P.C.D. No. 22.
[22] Order 00-11, 2000 CanLII 10554.
[23] Order F12-08, 2012 BCIPC 12 (CanLII).

not nearly as strong as the applicants' connections to the deceased persons were in Order 00-11 or Order No. 96-1996. The deceased is related to the applicant by virtue of the fact that she is the applicant's grandfather's cousin. The applicant states that her grandparents and mother visited and were kept informed of the deceased's medical status. However, the applicant never met the deceased and she does not explain how information about the deceased will materially assist with her family's medical health history. In my view, the applicant's motive of requesting this information due to mental health issues in her family favours disclosure, but this factor has less weight than if she was a close familial relation to the deceased.

[40] The applicant also submits that disclosure of the information would not be an unreasonable invasion of the deceased's privacy because the applicant's mother has given her as many details as she remembers about the deceased including some medical diagnoses and she believes her grandparents would be able to fill in the missing details for her if they were still alive. The applicant does not provide many specific details about what she was told about the deceased, other than who admitted her into Woodlands and that she lived there for a lengthy period of time. The evidence suggests the applicant has some general awareness of the deceased's life circumstances, but the records likely contain medical information of the deceased that the applicant does not know.

[41] An individual may not want family, friends or others to know certain details about them, some of which may change people's view or perceptions about them, or have other repercussions. These details frequently relate to medical information. The continuation of privacy rights after death recognizes the impact that disclosure of this information may have on others, and that the deceased may not want the information disclosed. However, this kind of impact often diminishes over time. Former Commissioner Flaherty addressed this point in Order No. 200-1997 with respect to an applicant seeking adoption records containing the name of her birth father who had been deceased for 46 years, stating that:

> Given that, in this case, the named individual was relatively young when he died, has likely been dead for forty-six years, there are no living siblings, the parents would be in their nineties (and therefore may not be alive) and the identities of former friends are unknown, I find that the prospects for unreasonable invasion of the privacy of the named father are extremely remote.[24]

[42] In the current case, the deceased was in her 70s when she passed away. At that time, the applicant's grandmother—the deceased's cousin by marriage—was the deceased's closest known relative, and the deceased had been living in a provincial residential care facility setting for decades. Forty-two years have

[24] 1997 CanLII 719 at para. 22.

elapsed since then, the applicant's grandmother is deceased, and the deceased's friends have likely passed away. Given this and my review of the records, I find that it is unlikely that the deceased has any identifiable close friends or family who are still alive. In my view, this is a significant factor in this case.

Conclusions

Personal Information of Deceased

[43] The Ministry has demonstrated that, except for the visitor sign-in logs and a list of people who gave the deceased gifts, there is a presumption under s. 22(3) that disclosing the records would be an unreasonable invasion of the personal privacy of the deceased.

[44] However, having considered all of the relevant circumstances, I find that the presumption that disclosure of the records would be an unreasonable invasion of the deceased's personal privacy has been rebutted. In my view, the fact that 42 years has elapsed since the deceased passed away is a significant factor in this case. Based on the materials before me, there is no person who was a close friend or family of the deceased known to be still living. Further, the general nature of the deceased's primary medical issues were observable and known to the applicant's family, and there is no evidence that suggests that the deceased would not want the applicant to have this information. I also consider it to be relevant that the applicant's purpose for requesting the information is her familial connection to the deceased to learn about her family history, although I give this factor less weight than if she was a close familial relation to the deceased.

[45] I find that disclosing the records would not be an unreasonable invasion of the privacy of the deceased under s. 22. The Ministry is therefore required to disclose the records to the applicant, except for the information described below.

Personal Information of Other Third Parties

[46] Portions of the records contain personal information of third parties, in addition to the personal information about the applicant.[25]

[47] There is personal information about doctors and care staff who provided care for the deceased. For example, there are medical opinions and evaluations of day-to-day activities about the deceased. This information was generated

[25] In addition to the personal information about other care patients, which the applicant is no longer seeking.

over 40 years ago by these third parties in the normal course of their work-related activities while providing care to the deceased, and it is about the deceased. There is also communication between another third party and care staff about the deceased's medical and financial information.[26] In my view, disclosure of this information would not be an unreasonable invasion of the personal privacy of these third parties.

[48] There is also personal information containing medical and financial information about other third parties.[27] For some of this information there is a presumption that disclosure would be an unreasonable invasion of personal privacy because it contains medical and financial information about one or more third parties within the meaning ss. 22(3)(a) and (f). This information was also supplied in confidence under s. 22(2)(f), which is a factor in favour of withholding the information. Given the date and content of the records, it is likely these third parties are deceased. However, there is no evidence about when at least one of the third parties passed away, and I am not satisfied on the materials before me that there are any factors sufficient to rebut the presumption that disclosure of this information would be an unreasonable invasion of personal privacy. Therefore, I find that the Ministry is required to withhold this information under s. 22.[28]

[49] The remaining information is visitor sign-in logs and a list of people who sent the deceased gifts. While there is no presumption that disclosure of this information would be unreasonable, the burden of proof in this inquiry remains with the applicant to demonstrate that this is not the case. The information was supplied in confidence and I do not have details about the identities of the people listed in the visitor logs or who provided gifts. It is unclear how this information would shed light on the applicant's family history, and there are no apparent circumstances in favour of disclosure. Given the context in which the information was supplied, and in the absence of evidence in favour of disclosure, I find that the Ministry is required to refuse to disclose the visitor sign-in logs and the list of people who sent gifts to the deceased under s. 22 of FIPPA.[29]

CONCLUSION

[50] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. The Ministry must refuse to disclose the records, subject to para. 2 below.

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[26] At pp. 23 and 138.
[27] At p. 139.
[28] At p. 139.
[29] At pp. 139, 140, 235-238, 253 and 389.

2. The Ministry is required to refuse to disclose the portions of the record I have highlighted in yellow, which accompany the Ministry's copy of this order, by **May 2, 2014** pursuant to s. 59 of FIPPA. The Ministry must concurrently copy me on its cover letter to the applicant, together with a copy of the records.

March 19, 2014

ORIGINAL SIGNED BY

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Ross Alexander
Adjudicator

OIPC File No.: F12-50431