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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 96-1996
April 8, 1996

INQUIRY RE: A decision by the Ministry of Social Services to refuse an applicant access to the institutional records of her deceased sister

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 604-387-5629
Facsimile: 604-387-1696
Web Site: http://www.cafe.net/gvc/foi

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on March 11, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of the Ministry of Social Services (the Ministry) to refuse an applicant access to the records of her deceased sister.

2. Documentation of the inquiry process

On August 17, 1995 the applicant requested from the Ministry of Social Services copies of all "medical records, admission records, ward notes and any other information" relating to her deceased mother and deceased sister. The Ministry transferred the request concerning the mother to the hospital where she died. On November 3, 1995 the Ministry denied the applicant access to the sister's records. The applicant then wrote to my Office on December 1, 1995 and requested a review of the Ministry's decision.

3. Issue under review at the inquiry and the burden of proof

The issue under review in this inquiry is whether the records in dispute should be withheld under section 22 of the Act. This section reads in part 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.
...

(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,
> ....

Section 57(2) of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(2), if the record or part of the record to which the applicant is refused access contains any personal information of a third party, it is up to the applicant to prove that disclosure of this information would not be an unreasonable invasion of the third party's personal privacy. In this case, the applicant must prove that the release of the medical records would not be an unreasonable invasion of the privacy of her deceased sister.

4. The records in dispute

The records in dispute consist of about sixty pages of records concerning the applicant's deceased sister. Among other documents, these records include clinical charts, medical certificates, correspondence between medical staff and the mother of the child, and ward notes.

5. The applicant's case

The applicant is seeking the Ministry's records of her sister, who was born in 1936 and died in 1943. She was in a provincial institution, Woodlands, for most of her brief life. The applicant stated in her request for review that she wants access to these records "as part of my family history. I cannot understand any reason why, after such a very long period of time, this request cannot be granted."

The applicant has further stated that both of her parents are deceased and that her only brother, who is younger, supports her access request. In her view, granting her access to her sister's records is not "in any way an invasion of privacy as my sister died ... some fifty three years ago." Her stated reason for access "is to build a family history."

6. The Ministry's case

The applicant's sister was a patient in Woodlands, which is still run by the Ministry. It refers to the records in dispute as her "clinical file." It includes personal information of other third parties. (Submission of the Ministry, paragraphs 4.01 and 4.02)

The Ministry generally argues that disclosure of the records in dispute would be an unreasonable invasion of the privacy of the deceased sister under section 22 of the Act, especially since sections 22(3)(a) and (c) are mandatory exceptions from disclosure. (Submission of the Ministry, paragraphs 5.04 and 5.05)

7. Discussion

Section 22(3)(a): 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,

The Ministry submits that the records in dispute clearly fall into this category of "information that is highly private and personal to the individual." (Submission of the Ministry, paragraphs 5.09) I will return to this issue below.

Section 22(3)(c): A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if ... (c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

The Ministry wishes to apply this subsection, because the records relate to the third party's stay in an institution operated by the Ministry. (Submission of the Ministry, paragraph 5.11) I find that the records in dispute do not concern actual "eligibility for ... social service benefits." This exception cannot be used if records in dispute simply indicate that a third party was in fact the beneficiary of social service benefits by being a resident of a publicly-supported institution.

Privacy rights of the deceased

I indicated in previous Orders my belief that the deceased have privacy rights, but I have not had an opportunity to expand further on this concept, such as the pace at which these privacy rights diminish over time. See Order No. 27-1994, October 24, 1994; Order No. 31-1995, January 24, 1995; and Order No. 53-1995, September 18, 1995.

In this present case, the records in dispute concern the brief life of an institutionalized child who died more than fifty years ago. The applicant's intentions appear to be motivated by a genuine interest in the history of members of her family, including her mother. It is not adequate for such purposes, as the Ministry argues, to say that she already knows the places and dates of the birth and death of her sister: that is a rather limited conception of the meaning of family history in today's world. (Submission of the Ministry, paragraph 5.20) As well, such applicants may have a legitimate interest in their family's medical history, a matter of increasing concern to many individuals in the late twentieth century.

It is important for my decision in this case that the third party was a person with very limited personal information. There can be nothing stigmatizing to her memory by the release of these poignant records to a member of her family after this span of time has elapsed. Moreover, the applicant already knows that her sister lived in an institution.

The Ministry submitted that the practice of the institution in question is "to hold clinical records in the strictest confidence, and third party persons (e.g. relatives of a resident) do not have the right to review files or have copies made. The confidentiality of a resident's file should not be

compromised." (Submission of the Ministry, paragraph 5.13; see also the Affidavit of Gillian Chetty and Exhibit A) I am sympathetic with this point with respect to files on current patients. But the overall argument has less force for records that are much older, concern deceased persons, and where the applicant is a close relative.

Regulation 3(c): 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.

This section of the Regulation states that the right of access to a record under the Act, with respect to a deceased individual, can be exercised "by the deceased's nearest relative or personal representative." I have discussed this matter in Order No. 31-1995, January 24, 1995, pp. 11 and 12 and in Order No. 53-1995, September 18, 1995, p. 6, where I accepted a distinction between an applicant acting in the interests of the deceased person and one acting in his or her own self-interest.

The Ministry is concerned that the applicant has not claimed or furnished evidence that she is the nearest relative of the third party and also submits that "she is acting in pursuit of her own interests, and not the interests of the third party." (Submission of the Ministry, paragraph 5.19) In fact, the applicant is the older of two surviving siblings of the deceased. The British Columbia Information and Privacy Office's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, section 6.2.3, p. 5, states that when a spouse, children or parents of the deceased are not alive, then any one of the deceased's brothers or sisters, who has attained the age of majority, has the right of access. The brother and sister are of equal weight and either can request access without the consent of the other.

However, in this case, the applicant is requesting the records for her own personal reasons. While these reasons are acceptable, they do not serve the needs of the deceased and therefore do not meet the criteria for "acting on behalf of" or "in the best interests of" the deceased. As such Regulation 3(c) is not a relevant consideration in this case, and the applicant should be treated as a third party for the purpose of this particular request. This means that the factors outlined in section 22 must be taken into consideration in evaluating whether disclosure of the information about the sister would constitute an unreasonable invasion of personal privacy.

Section 22

The records in dispute in this inquiry contain personal and medical information about the third party, and therefore disclosure of these records is presumed to be an unreasonable invasion of personal privacy under section 22(3)(a). However, section 22(3)(a) is not a prohibition against disclosure of records; rather it is a rebuttable presumption that the release of personal information relating to medical history may be an unreasonable invasion of privacy.

Section 22 calls for a careful balancing of factors. Under section 22(2), I am to consider all relevant matters, including but not limited to those listed in section 22(2). In this case, the relevant factors (not listed in order of importance) that I have considered are:

a) the limited personal and medical information contained in this particular record;
b) the rich nature of the record as it reveals the relationship between the family and the family member;
c) the fact that it is 53 years since the death of the family member;
d) the record answers specific questions about the family's medical history; and
e) the applicant is a close living relative and has a direct interest in the information.

Based on a careful consideration of these factors, I find that disclosure of the personal information requested in this case would not be an unreasonable invasion of privacy under section 22(3)(a) of the Act.

Section 36: Disclosure for archival or historical purposes

In this case, I am of the opinion that the case for disclosure to the applicant from the "archives" of the public body can also rest on the basis of section 36 of the Act, which reads:

36 The British Columbia Archives and Record Service, or the archives of a public body, may disclose personal information for archival or historical purposes if

> (a) the disclosure would not be an unreasonable invasion of personal privacy under section 22,
> ...
> (c) the information is about someone who has been dead for 20 or more years, or
> ....

Although my decision may have the effect of opening up access by relatives to some currently closed records, I emphasize that public bodies still have to make separate decisions in each case about the applicability of section 22 of the Act. This Order does not declare "open season" on access to such sensitive personal records.

The burden of proof

The Ministry submits that the applicant has failed to meet her burden of proof in this case under section 22 of the Act. (Submission of the Ministry, paragraph 5.03) I respectfully disagree in the circumstances of this specific case. I find that disclosure of the personal information in these records in dispute would not be an unreasonable invasion of the privacy of the third parties who appear in the records.

8. Order

I find that the head of the Ministry of Social Services is not required to refuse access to the records requested by the applicant under section 22 of the Act. Under section 58(2)(a), I require the head of the Ministry of Social Services to give the applicant access to the records in dispute, severing only the name of one third party as indicated on the record that I have prepared for release.

April 8, 1996

David H. Flaherty Commissioner