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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 40-1995
April 28, 1995

INQUIRY RE: A request for access to a behavioural investigator's report to the Office of the Chief Coroner on the death of Patient X at the Maples Adolescent Treatment Centre

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1. Description of the review

As Information and Privacy Commissioner, I conducted an oral inquiry at the Office of the Information and Privacy Commissioner (the Office) in Victoria on April 12, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose from a request by Ann Elizabeth Rees (the applicant), a reporter with The Province, for access to a behavioural investigator's report to a coroner concerning the death of Patient X at the Maples Treatment Centre.

The Office of the Chief Coroner of the Ministry of Attorney General (the Coroner's office) responded on December 20, 1994 by denying access to the record in its entirety under section 22(3)(a) of the Act and on the grounds that much of the information contained in the report was supplied in confidence.

The Coroner's office subsequently stated that it was relying on section 19 of the Act. It further submitted that the common law principles of privilege and confidentiality allowed the Commissioner to exercise discretion as to whether or not information in the report not covered by section 22(2)(f) of the Act should be disclosed. It did not pursue this latter line of argument at the actual inquiry.

2. Documentation of the inquiry process

On January 13, 1995 the applicant submitted a request for review to this Office. On March 24, 1995 the Office issued Notice of an Oral Inquiry to take place on April 12, 1995. The Notice was amended at the request of the public body and re-issued on April 5, 1995. Included with the Notice was a one-page statement of the facts (the

Portfolio Officer's fact report), which all parties accepted for the purposes of conducting the inquiry (subject to some qualifications advanced by the applicant in her written submission). (See Outline of Submission of the Applicant, paragraph 2.1)

Roger McConchie, Barrister and Solicitor, of Ladner Downs, acted as agent for the applicant at the inquiry. Robert P. Francis, Director, Judicial Services, for the Office of the Chief Coroner represented the public body. The father of Patient X made a written submission as a third party. Bernd Walter, Superintendent of Family and Child Services, Ministry of Social Services, and June C. Laker, Deputy Public Trustee, Office of the Public Trustee also made written submissions as third parties. Charles E. Reasons, Barrister and Solicitor with the B.C. Public Interest Advocacy Centre, presented the submission of an intervenor, the B.C. Freedom of Information and Privacy Association (FIPA). John Westwood, Executive Director of the B.C. Civil Liberties Association (BCCLA), made a further written submission as an intervenor.

3. The record in dispute and the issues under review

The record in dispute is a behavioural investigator's report to Coroner Marjorie Paonessa concerning the death of Patient X at the Maples Adolescent Treatment Centre on February 22, 1994.

This inquiry examined the application of sections 19 and 22 of the Act to this report. The relevant parts of the Act read as follows:

Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or
(b) interfere with public safety ...
....

Disclosure harmful to personal privacy [of third parties]

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.

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

> (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,
> ...
> (f) the personal information has been supplied in confidence,
> ...
>
> 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, ...
> ....

For the purposes of section 22, section 57(2) of the Act places on the applicant the burden of proving that the release of the record in question would not be an unreasonable invasion of a third party's personal privacy.

For the purposes of section 19 of the Act, section 57(1) places the burden on the Coroner's office of proving that the applicant has no right of access to the records.

4. The applicant's case

On October 28, 1994 the applicant received a copy of a Coroner's "Judgment of Inquiry" dated October 27, 1994, concerning the death of Patient X. (See Exhibit 2, "Affidavit of Coroner Marjorie Paonessa," Exhibit A) The Coroner decided that the cause of death was undetermined. When the applicant learned from the Chief Coroner that this document was based in part on a report by a behaviouralist working for the Coroner's office, she requested a copy of the report. (Outline of Submission of the Applicant, paragraph 1.4)

The applicant outlined what had transpired in the media after the death of Patient X, which led to her request for access to records on the matter from the Ministry of Health. I ordered limited disclosure of these records in severed form in Order No. 27-1994, October 24, 1994. (Outline of Submission of the Applicant, paragraphs. 3.1-3.7)

The applicant believes that the public has received "incomplete, inconsistent" and conflicting information from the government about the death of Patient X, which raises questions about "the adequacy and efficacy of the Coroner's investigation into her death. The public should be in a position to judge not only the performance of the Maples but also the performance of this Coroner's office." (Outline of Submission of the Applicant,

paragraph 3.10; and oral argument) The applicant emphasized the important public role of the coroner and the significant public interest in what that office does, especially with respect to what the applicant perceives to be an "epidemic" of adolescent suicide: how can the public measure how the coroner's office is living up to its obligations? (Outline of Submission of the Applicant, paragraphs 4.1-4.4)

The applicant is concerned that the Coroner did not conduct an inquest into the death of Patient X, which would have been a public proceeding under section 29 of the *Coroners Act*, but instead proceeded by way of inquiry. The applicant argues "that the policy of the law is full and complete public access to all information relevant to the death except in the most compelling circumstances expressly defined in [section 29 of] the legislation." (Outline of Submission of the Applicant, paragraphs 4.6, 4.7, and 6.9) In the present case, disclosure of the behaviouralist's report would presumably assist in clarifying essential facts that are unknown or in dispute. (Outline of Submission of the Applicant, paragraph 4.10) The applicant is also concerned that this particular inquiry did not lead to any recommendations to prevent a recurrence of such deaths. (Outline of Submission of the Applicant, paragraph 4.14)

The applicant's position is that the disclosure of the record she seeks in this case would not be an unreasonable invasion of the privacy of Patient X, or, alternatively, that the record should be disclosed under section 25 of the Act because it is "clearly in the public interest." The activities of the Coroner's office require public scrutiny. (Outline of Submission of the Applicant, paragraphs 6.1, 6.3, and 8.2)

The applicant is of the opinion that the presumptions against disclosure in section 22 of the Act are rebuttable under section 22(2), because it is desirable to subject the activities of the Coroner's office to public scrutiny (section 22(2)(a)) and the disclosure is likely to promote public health and safety (section 22(2)(b)). (Outline of Submission of the Applicant, paragraph 6.2)

Finally, the applicant asserted that although "not every case of tragic death can result in a full scale public inquiry[,] *The Freedom of Information and Protection of Privacy Act* should offer a reasonable alternative to a public inquiry, by giving the media access to the facts. Only then is it possible or likely they will be submitted to public scrutiny." (Outline of Submission of the Applicant, paragraph 8.2)

5. The Office of the Chief Coroner's case

The Coroner's office describes itself as the "ombudsman for the dead." (Argument for the Office of the Chief Coroner, p. 3) Although it collects a great deal of personal information about the deceased and next of kin, this "information, with very few exceptions, is not collected on a basis of confidentiality because the *Coroners Act* requires the coroner to make a report or, in the case of an inquest, the jury makes findings, which determine the circumstances surrounding the death and the manner and cause of death." (Argument for the Office of the Chief Coroner, p. 4) Inquests as

opposed to Judgments of Inquiry comprise less than one percent of actual investigations undertaken by coroners.

Investigating a death, especially one that may be determined to be a suicide, requires the services of behavioural investigators: "The information collected by them is collected in confidence solely for the eyes of the coroner to be used at his or her discretion." However, the Policy and Procedures Manual for the Coroners Service simply states that "Behavioural investigation reports shall not be released without prior approval of the coroner." (Chapter 5, section 1, policy 8) Coroner Paonessa herself deposed that these reports are "confidential documents .... [C]oroners may utilize portions of such reports in their report to the Chief Coroner but, as a matter of practice do not release these reports to anyone for any other purpose." (Affidavit of Marjorie Paonessa, paragraph 7)

With respect to section 19(1) of the Act, the public body argued that release of the disputed record might threaten the mental or physical health of Patient X's family and siblings. It could interfere with public safety in the general community by affecting the conduct of those who may themselves be candidates for suicide. (Argument for the Office of Chief Coroner, pp. 5-6)

The Coroner's office argued in this connection that "very considerable information" in the behaviouralist's report has already been publicly disclosed about the death of Patient X in documents released in response to my Order No. 27-1994, October 24, 1994, and in the Judgment of Inquiry of Coroner Paonessa. The remaining information in the report "is of a very personal and sensitive nature and its publication ... is contrary to the public interest." The office itself made three unsuccessful efforts to produce a severed copy of this record. (Argument for the Office of Chief Coroner, pp. 5, 7; and oral testimony)

The content of the behavioural investigator's report is described below. The Coroner's office argues that it is in its entirety information covered by section 22(3)(a) of the Act and that "it was taken in confidence" by a practicing member of both the B.C. Association of Social Workers and the B.C. Association of Clinical Counsellors, which have codes of ethics and ethical practice standards. The Coroner's office is concerned about whether next-of-kin would speak to the behaviouralist, "if confidentiality was open to question" because of the *Freedom of Information and Protection of Privacy Act*. This would be contrary to the public interest. The sensitive personal information in the behaviouralist's report would be "of little or no value" for the kind of scrutiny at issue under section 22(2)(a) of the Act. (Argument for the Office of Chief Coroner, pp. 6-7)

6. The Superintendent of Family and Child Services' case

The Superintendent of Family and Child Services was the guardian of Patient X at the time of her death. He is opposed to the release of any information within the behaviouralist's report that would constitute personal information of Patient X, on the grounds that to do so would be an unreasonable invasion of her personal privacy. He also

urges me to uphold the decision of the Chief Coroner to refuse access: "As guardian of many children the Superintendent is concerned that an individual child's privacy should be respected and preserved not only while that individual child is living but also following the death of that child."

7. The father of Patient X's case

A letter to our Office from the father of Patient X largely dealt with matters not directly related to this inquiry, but included a wish that all information requested should be handed over to him so that he can decide what to disclose.

This inquiry also received hearsay evidence from the Freedom of Information and Privacy Association to the effect that the mother of Patient X does not wish the applicant to have access to the record in dispute. (Argument of the B.C. FIPA, paragraph 11)

8. The B.C. Civil Liberties Association's case

Like other intervenors, the BCCLA acknowledged that it had no access to the record in dispute, which limited its ability to give advice. In accordance with my Order No. 27-1994, October 24, 1994 it supported the distinction that I drew between information of an intimate nature about Patient X and personal information of a more general nature: "... the fact that Patient X died, and the pressing need for public scrutiny of her care, have created a situation where it is appropriate to make this distinction and release personal information of a general nature where that release would assist the public in scrutinizing the treatment which Patient X received."

The BCCLA also supported the view expressed in Order No. 27-1994, October 24, 1994 that "although death does not extinguish a person's privacy rights, certain personal information which might be very sensitive when the person is alive may become less so after the person's death."

9. The Freedom of Information and Privacy Association's case

FIPA does not support the release of the behaviouralist's report on the death of Patient X on the grounds that it would be a violation of the privacy rights of the deceased. If living persons thought that records about them would be immediately released upon their deaths, they might fear that (i) "release of their documents could subject their memory to public disapproval; (ii) they might believe that release of their documents could result in distress for their surviving friends and relatives; (iii) they simply value the continuation of the privacy which they enjoyed while alive." (Argument of the B.C. FIPA, paragraphs 1, 3, and 6)

However, in the present case, FIPA acknowledges that a lower degree of privacy should attach to the records concerning the deceased because of her death in the custody of a public body. Section 22(2)(a) of the Act emphasizes the need for scrutiny of the

activities of public bodies: "Weighing heavily in favour of public disclosure is the question of whether children who currently remain in custody at the Maples and other juvenile detention centres are in danger because of factors which might have contributed to the death of Patient X." (Argument of the B.C. FIPA, paragraphs 9-10; see also paragraph 12)

FIPA argued that I should ultimately be governed by the opposition of the parents to the disclosure of the record in dispute. (Argument of the B.C. FIPA, paragraphs 11 and 12)

10. The Office of the Public Trustee's case

The Public Trustee does not now have legal status to represent Patient X, since she is deceased. It supports the position of the public body in this case to the effect that disclosure of the disputed record would be an unreasonable invasion of personal privacy of Patient X and her family:

> The Public Trustee is also concerned that a decision to release this information to the Applicant could set a precedent for the release of personal information of this nature about many of the clients whose legal and financial interests are protected by the Public Trustee. The Public Trustee questions the purpose and the need to release this information to the general public.

11. Discussion

For reasons discussed below, I am essentially following my Order No. 27-1994, October 24, 1994 in deciding the present case. I am supported in this general inclination by submissions received from BCCLA and FIPA. I wish to preserve the core privacy rights of the deceased, while promoting the accountability of public bodies under the Act.

Factual disputes

As part of her case, the applicant claimed several factual discrepancies between what she learned from private sources and what the various public bodies say happened in connection with the death of Patient X and the ensuing investigation. One concerns whether the Coroner's office interviewed a particular teacher at the Maples. A second was whether Patient X had a session with her psychiatrist immediately prior to her death, or whether it was a chance encounter. A third issue concerned an apparent difference as to when Patient X had been hospitalized for an earlier suicide attempt. (Outline of Submission of the Applicant, paragraphs 3.11, 3.12, and 6.5) At a brief *in camera* session at the inquiry, the Coroner's office clarified with witness James W. Smith, the behavioural investigator, what had actually happened in these several situations. The Coroner's office subsequently gave the same answers to the applicant in an open portion of the inquiry.

The applicant also questioned why the Coroner in this case did not reach any conclusions of her own. The Coroner's office replied that she in fact adopted the recommendations previously made by other competent bodies.

Alternative modes of access

The applicant states that she is "interested in obtaining as much information as possible to write an accurate and newsworthy story, of public interest, concerning the qualifications and the quality and level of performance of the behaviouralists who worked for the Coroner's office on this investigation. I believe that there is a valid public interest in knowing the extent to which the Coroner's office delegated to the behaviouralists the responsibility for the investigation and the responsibility for formulating the Coroner's conclusion about the appropriate classification for the death of Patient 'X'." (Affidavit of Ann Rees, paragraph 17) She wants another piece of the jigsaw puzzle. The Coroner's office gave the applicant general information about the work of its behaviouralists and offered her a chance to meet James Smith. It also offered her the theoretical component of the behaviouralist's report, but she wants the specific material concerning the circumstances of the death of Patient X. (Oral testimony)

The applicant further established that her newspaper does not routinely publish reports of adolescent suicides and that only the "special circumstances" surrounding the death of Patient X motivated her to ask questions about the character and quality of care provided at the Maples for the purposes of writing a newspaper story. (Affidavit of Ann Rees, paragraph 34)

Section 19: Disclosures Harmful to Individual or Public Safety

I accept, in part, the argument of the Coroner's office that the release of personal information from the record in dispute could have a negative impact on the next-of-kin of Patient X or even of adolescent persons inclined to suicide. Thus I have severed personal information from the record that in my judgment falls into this category of being reasonably expected to "threaten anyone else's safety or mental or physical health."

The record in dispute and section 22

The Coroner's office has described the record in dispute as follows:

> Behaviouralist Jim Smith has conducted a psychological profile of Patient X. A very careful line by line review of his report demonstrates, line after line, that virtually every line contributes to that profile. It is personal and sensitive information about her and, to a much lesser extent[,] about her immediate family and how she became the person she was at the time of her death. This information is reviewed by Mr. Smith in the context of

> suicide theory and ideation. (Argument for the Office of Chief Coroner, p. 6)
> ....
> ... the focus is on collecting very personal, very sensitive information about the environment influences weighing on this young lady, on her interactions with others, on the problems she encountered and was unable to resolve. All of these are woven together to develop a psychological profile of her life and how what she became led to the thoughts she must have had and the action she took in the last hours of her life. (Argument for the Office of Chief Coroner, p. 9)

The behaviouralist in this case, James Smith, testified that his report reflects on the upbringing of Patient X and implies failure on the part of her family. He also admitted that "the why of suicide remains a mystery." But, in his view, disclosure of his report could hurt other persons, including those inclined to commit suicide who might be affected by "suicide contagion." (Oral testimony)

The Coroner's office revealed to me that the mediation process on this request for review with my own Office has demonstrated that much of the record in dispute is already available to the public: "There is no need to disclose it again; far better to honour the confidentiality of this report and support the public interest that mitigates in favour of nondisclosure." (Argument for the Office of Chief Coroner, p. 8; see also oral testimony of James Smith) With respect, I do not accept this line of argument. Any applicant has a legitimate right of access to any record of a public body, subject to the exceptions in the Act and related considerations of public policy. The fact that information in a record is already public is in my view incidental to a particular access request. But this reality also weakens arguments against non-disclosure in cases like this one.

The Coroner's office further argued under section 22(2)(a) of the Act that Coroner Paonessa in her Judgment of Inquiry "has herself scrutinized the activities of government." (Argument for the Office of Chief Coroner, p. 8) Again, with respect, the intent of the *Freedom of Information and Protection of Privacy Act* and in particular section 22(2)(a) of the Act is to allow persons or organizations which are not public bodies to receive information that would allow public scrutiny of a public body itself, a role that the media evidently feels strongly about in this province. The fact that various public bodies and even the Ombudsman's office met in September 1994 to discuss the treatment of Patient X and how to prevent similar tragedies in future is incidental to the request for access to a particular record by the applicant in the present case. The media have as much right to scrutinize the activities of the Coroner's office as they do those of any other public body, subject again to the provisions in the Act. Thus one reason for the order below is that I agree with the applicant that the activities of public bodies, in this case the Coroner's office, should be subject to public scrutiny under section 22(2)(a) of the Act.

I am more persuaded by the argument of the Coroner's office with respect to the fact that considerable portions of the record in dispute should not be disclosed under section 22(3)(a), because they relate "to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation," and as such should be "presumed to be an unreasonable invasion of a third party's personal privacy" if disclosed. (Argument for the Office of Chief Coroner, pp. 8-9) That is why I am ordering the disclosure of only a severed version of the behaviouralist's report, which I have prepared in accordance with rules of severance set forth in my previous orders, including Order No. 27-1994, October 24, 1994 and my recent adoption order, Order No. 35-1995, March 28, 1995.

I am further persuaded that release of the report in severed form is warranted by the oral testimony of the behavioural investigator at the inquiry. When asked about the necessity of severing what was not publicly known from his report, he replied that he wanted to control negative spin-off from its disclosure, but admitted that there is "nothing in his report that can't be read by anyone."

I also take note of the fact that coroners routinely disclose information from the behaviouralist's report in their Judgments of Inquiry. Coroner Paonessa deposed that:

> A coroner will often consult with a behaviouralist with respect to the inclusion of information in the Judgment of Inquiry so as to be sensitive to the needs of individuals providing personal information to the behaviouralist insofar as the coroner can do this consistent with his or her obligations to report the circumstances and manner of death. (Affidavit of Majorie Paonessa, paragraph 7)

I find it relevant that the behaviouralist already functions under a supposed "blanket of confidentiality" that in fact permits the coroner to disclose sensitive personal information collected by the behaviouralist, as happened in the case of Patient X. James Smith testified that the coroner always has the right to release information from the behaviouralist's report. He also stated that, in this case, he had gathered much of the relevant information from Patient X's records, rather than from people. In my view, this factor further weakens the argument that all of the information was collected in confidence from individuals. In future, based on my decision below, behavioural investigators will also have to be sensitive to the possible disclosure of personal information collected by them under the *Freedom of Information and Protection of Privacy Act*.

In light of the existence and scope of the *Freedom of Information and Protection of Privacy Act*, I would urge the Office of the Chief Coroner to review its policies and procedures with respect to the collection, disclosure, and retention of personal information in the conduct of Judgments of Inquiry. Similarly, while I appreciate that the B.C. Board of Registration for Social Workers (which will soon be subject to the Act) and the B.C. Association of Clinical Counsellors have codes of ethics, it might be productive to review the contents of these codes for possible conflicts with this Act.

While I am prepared to defer to the considered practices of skilled professionals with respect to access to information and data protection matters, these must be in compliance with this Act when the records of public bodies, as very broadly defined in the legislation, are at issue.

Thus although I accept that the behaviouralist in question collected some personal information in confidence in accordance with section 22(2)(f) of the Act, that fact is not finally determinative of what may be disclosed in severed form under the Act. I find that the disclosure of a severed version of the record in dispute will not constitute an unreasonable invasion of Patient X's privacy under section 22(2) of the Act. Of the seven pages in the original record, more than five are being released.

I further note that the Judgment of Inquiry for Patient X has fully disclosed personal information that is much more sensitive than most of what is in the report of the behavioural investigator.

While I remain strongly committed to maintaining the privacy rights of the deceased, (See Order No. 27-1994, October 24, 1994) I believe that the substance of the behaviouralist's report can indeed be disclosed without infringing unnecessarily or unreasonably on the privacy interests of Patient X and her surviving family.

The incidence of adolescent suicide

The Coroner's office provided me with its own suicide statistics for the ten years 1984 to 1993 inclusive. They are somewhat relevant to the applicant's allegations of an epidemic of teenage suicide. The data exclude cases, like those of Patient X, where there is a finding of an undetermined death. For those under the age of 13, there were 12 suicides in 10 years for an average of 1.2 per year. For those aged 13 to 19, there were 289 suicides for an average of 2.9 per year. The rates of death by suicide for all groups between 20 and 80 years of age are much higher than for those aged under 20. Females appear to comprise about 20 to 25 percent of all suicides. None of the Coroner's figures support an argument that the incidence of suicide is increasing for this time period.

Reporting by the media

The Coroner's office took exception to allegedly inaccurate and "somewhat sensational" reporting by The Province and referred specifically to an article of October 30, 1994, written by Ann Rees, which was headlined: "Scared to Death: .... Coroner." (See Affidavit of Majorie Paonessa, Exhibit E) The applicant responded that she does not prepare headlines and that the substance of her article and the coroner's Judgment of Inquiry are relatively similar.

While I have sympathy with the concerns expressed by a public body about how the media, or any other user of the Act, will use records disclosed by it, it is worth remembering that one of the Act's primary intention is promoting openness and

accountability of public bodies by the disclosure of records. All requesters have rights of access to information, but the media have the fundamental "freedom of the press" under section 2(b) of the *Charter of Rights and Freedoms*.

11. Order

It is my determination that disclosure of the severed record would not be an unreasonable invasion of the third party's personal privacy under section 22(1) of the Act, nor would section 19 prohibit its disclosure on the grounds of threats to personal health or safety. Therefore, I find that the head of the public body is not authorized or required to refuse access to the entire record in dispute. Accordingly, under section 58(2)(a) of the Act, I order the Office of the Chief Coroner of the Ministry of Attorney General to disclose the record in dispute to the applicant in a severed form. I have prepared a severed copy of the record for release by the public body.

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David H. Flaherty
Commissioner

April 28, 1995