

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 53-1995
September 18, 1995**

INQUIRY RE: A refusal by the Office of the Public Trustee to disclose information concerning the estate of an applicant's deceased mother

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) in Victoria on June 15, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review made by the applicant of a decision of the Office of the Public Trustee (the public body) not to release information relating to the estate of his mother (now deceased).

On April 10, 1995 the Office of the Public Trustee received a letter from the applicant requesting the complete documentary and electronic mail record, including notes or texts of telephone conversations between staff and management of the Office of the Public Trustee, or between those persons and other individuals outside of the Office of the Public Trustee, pertaining to the complaints of, or the requests for information made by, the applicant in the matter of his mother. On May 3, 1995 the Office of the Public Trustee cited sections 22(2)(f) and 14 of the Act as the reasons for denying access to the records.

2. Documentation of the inquiry process

The applicant requested this Office to conduct a review of the Office of the Public Trustee's decision on May 15, 1995. The Office issued a Notice of Written Inquiry and Portfolio Officer's fact report to the applicant, the public body, and the third parties. Those third parties, who, when canvassed by the Office of the Public Trustee as to whether the records should be released, indicated that they wished the records held confidential, were advised by this Office of the inquiry process and that their original submissions to the Office of the Public Trustee on the matter would be reviewed by me. I also received an *in camera* submission from a third party in the form of a recorded phone call. Submissions were exchanged between May 31 and June 12, 1995.

The applicant made a submission on May 31, 1995 and a rebuttal on June 12, 1995. The public body, represented by Alan G. Lindsay of the Office of the Public Trustee, made a submission on June 1, 1995 and a rebuttal on June 7, 1995.

3. Issue under review at the inquiry

This inquiry concerns the application of sections 22(2)(f), 22(3)(a), and 14 of the Act to the information contained in the records of the applicant's mother held by the Public Trustee. The sections read in appropriate part as follows:

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.

(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

...

(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,

Legal advice

14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

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 the privacy of the third party. The Office of the Public Trustee has the burden of proving that the applicant has no right of access to the records where section 14 applies.

4. The records in dispute

The records in dispute consist of the Office of the Public Trustee's files on the applicant and his mother that have been withheld from him. They are described below in more detail.

5. The applicant's case

Simply put, the applicant wants a lot of information from the Public Trustee that he believes is being unfairly withheld from him. He specifically wants information about himself, information about litigation initiated by the Public Trustee when it was acting as committee for his mother, and information about the alleged failure of the Public Trustee to collect certain sums due to his mother from the Government of Canada during her lifetime.

The bare outline of the facts in this case is as follows. The applicant's mother died on October 7, 1990 at an advanced age. The applicant was both the executor of her will (dated in 1984, with a codicil) and one of three beneficiaries with his two sisters. He was granted letters probate on November 5, 1993. There has been acrimony among the three siblings. The Public Trustee also became concerned about the original share transfer, allegedly rejecting various compromises offered by the applicant to settle the matter.

The applicant's mother became a patient under the terms of the *Patients Property Act* in the fall of 1984. The Public Trustee was appointed as her committee. This continued until her death. At the end of 1985 the Public Trustee began legal action concerning the transfer to the applicant by his mother of shares in a co-op apartment building. The matter was eventually settled. In the interim, the applicant's mother moved to an intermediate care facility. It is the applicant's opinion that the Public Trustee began this litigation "in a rash, needless and biased manner," contrary to the interests of both himself and his mother. (Argument of the Applicant, p. 7)

With respect to the records in dispute, the applicant is of the view that "the denied personal information of the applicant is representative and forms part of a campaign of disinformation marked by demonization and vilification of [himself] by the other beneficiaries, their family members ... and their allies The OPT [Office of the Public Trustee] was a willing participant in this sub rosa program of the other beneficiaries, and allowed themselves to be manipulated to the detriment of their client, her Estate and the applicant."

The applicant argues that, as the executor of his mother's estate, he is now the successor to all of his mother's information rights and wants access to all of the information pertaining to the litigation previously mentioned. In his view, it is immaterial that he was the subject of the litigation. (Argument of the Applicant, p. 7) The applicant argues that the Public Trustee's control over the rights of his mother ended when he received grant of probate on November 5, 1993, making him the personal representative of the estate. These matters have been the subject of ongoing correspondence between the applicant and the Public Trustee beginning as early as February 1993. (Argument, pp. 8-9)

On the basis of section 22(2)(c) of the Act, the applicant also wants to exercise his right to correct his own personal information held by the Public Trustee. In order to do this, he needs full access to the information held about him by the Trustee: "There must be a full disclosure of the circumstances of the gathering of the personal information by the OPT, the content of that information, including the identities of the providers thereof, the uses to which the information was put by the OPT, including its influence on the decisions and conduct in litigation conducted against the applicant by the OPT acting as guardian ad litem of [his mother]." (Argument, p. 8)

The applicant completely rejects the argument of the Public Trustee that the Act does not apply to actions it takes under the *Patients Property Act*: "This position finds no support in the legislation [the Act], nor is it consistent with the position nor actions of the OPT in [my] Order 31-1995."

The applicant rejects the Public Trustee's attempt to use solicitor-client privilege as a reason not to give him access to the records in dispute, not least because he believes the Trustee is responsible for failing to collect certain sums due to his mother during her lifetime. (Argument, p. 9)

The applicant characterizes the Public Trustee's reliance on section 22(2)(f) of the Act as "an improper and unintended use of the section ... in an attempt to deny information rights generally." (Argument, p. 10) He also asserts a form of public interest in the scrutiny of the public body's behaviour with respect to its "incompetent" handling of his mother's affairs.

The applicant argues that the Public Trustee wishes to curtail his rights to information generally because of the malfeasance he has uncovered in its handling of his mother's affairs: "The inescapable conclusion drawn from the OPT's tactics of stonewalling, deception and interminable delay is that they are being practiced in support of the denial of information rights that, when exercised, will reveal further negligence, improper influence, partiality and malfeasance." (Argument, p. 11)

6. The Public Trustee's case

The Public Trustee states that it has severed information sought by the applicant in the following categories:

- 1) Documents protected by section 14, solicitor-client privilege;
- 2) Third party information protected by section 22(2)(f), which the third parties have asked the Public Trustee not to release; and
- 3) Medical information relating to the applicant's mother, which is protected by section 22(3)(a). (Submission, p. 2)

With respect to solicitor-client privilege, the Public Trustee's position is that these documents "relate to matters in which the applicant himself was in an adversarial position to that taken by the Public Trustee. One of the matters proceeded to litigation. During the conduct of those matters he was entitled to avail himself of those provisions of the law concerning production of documents by opposition parties." (Submission, p. 2)

With respect to third party information, the Public Trustee wrote to each of six parties, two of whom agreed to disclosure. Those who refused include the two sisters of the applicant. There were generalized expressions of concern from those who responded about not encouraging further hostility in the family.

In its reply submission, the Public Trustee recategorized the records in dispute. First, with respect to personal information about the applicant, it claims that "such information was provided to the Public Trustee in confidence," and some third parties object to its disclosure. This pertains to section 22(2)(f) of the Act. Secondly, with respect to information relating to litigation undertaken by the Public Trustee on behalf of the applicant's mother, it invokes solicitor-client privilege (section 14 of the Act), since the applicant was the defendant: "He is not entitled to access to that information even though he now is Executor of the Will of [the deceased mother.]" Thirdly, with respect to information relating to the alleged failure of the Public Trustee to collect the full amount of payments due to the mother as Guaranteed Income Supplement, it argues again that section 14 applies:

In generating such material, in-house counsel for the Public Trustee was acting on behalf of the Public Trustee with respect to a claim brought against the Public Trustee by [the applicant] as personal representative of [the mother]. He entered into negotiations with the Public Trustee and agreed to settle the matter. The matter was resolved and a release was provided by [the applicant] as Executor. The material in the file is that of the Public Trustee and not the [mother's] estate and, as such, should not be available to her Executor.

7. Discussion

The jurisdictional issue

The Office of the Public Trustee is of the opinion that as the personal representative of the applicant's mother, and as her committee under the provisions of the *Patients Property Act*, "we held information on [her] behalf and not as a public body. It is our view that the *Freedom of Information and Protection of Privacy Act* has no application to this situation." (Submission of the Public Trustee, p. 1) Having reviewed the records in dispute in this case, I find this argument without merit. The Public Trustee is a public body under the Act (Schedule 2) and its records are in its custody and control (section 3(1)).

As I stated in my Order No. 31-1995, January 24, 1995 at p. 10:

The Office of the Public Trustee is a public body under Schedule 2 of the Act. Thus the records of this office are not exempt from access under section 3 of the Act Thus an applicant can legitimately seek access to records of the Public Trustee, subject to the exceptions from disclosure under Part 2 of the Act.

Having read the Public Trustee's more recent arguments, I have not changed my views as expressed in Order No. 31-1995. If a public body holds records as defined in Schedule 1 of the Act, then they are subject to the access to information regime created under the legislation.

I accept the argument of the applicant, repeated at several points in his submission, that the Public Trustee should be open to as much public scrutiny as any other public body. I note the view of the applicant "that there is a conflict of interest evident in allowing the OPT [the Public Trustee] to control the flow of information which may reflect negatively on the machinations of

that office." (Reply Submission, p. 3) In reality, the flow of information is controlled by the requirements of the Act.

Controlling access to the mother's records

The applicant makes a relevant argument about the period of time during which the Public Trustee controlled information about his mother:

That period began when she became a patient within the meaning of the *Patients Property Act* [November 8, 1984] and it ended upon the issuance of the grant of probate to the applicant in the Estate of [his deceased mother] [Nov. 5, 1993]. At that time, the applicant succeeded to the information rights of [the mother], and as a component of this succession acquired the right to examine all matters administrative, financial, legal and otherwise conducted by [the mother] personally, or representatives acting in her name or on her behalf. (Reply Submission, p. 3)

In terms of establishing the access to information rights of an executor acting for a deceased person, I rely on section 3(c) of the Regulation under the Act, B.C. Reg. 323/93, which reads:

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:

...

(b) on behalf of an individual who has a committee, by the individual's committee;

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

This provision clearly establishes the primacy of the Public Trustee's control of the access rights of the deceased mother from 1984 to November 5, 1993, but they are now controlled by the applicant.

The fly in the ointment, so to speak, for the applicant is that the regulation refers to acting for young people and others. This presumes, in my view, that the applicant is "acting" in the best interests of his mother. To the extent that his request for access is in pursuit of his own self interest, then it is an ordinary request under the Act and the Regulation and section 3(c) does not apply. See Order No. 31-1995, p. 11. The problem with the applicant's current access request is that he melds his interests and that of his mother together: thus, he argues, "a patent need exists for a thorough examination of all matters within the files held by the OPT for, in the name of or concerning [his mother] and the applicant alike." (Reply submission. p. 3) I find that subject to the exceptions in the Act, the applicant has a right of access to information about him and a qualified right of access to obtain information about his mother in her interests (subject in particular to section 22(3)(a)).

Section 14: Solicitor-Client Privilege

The Public Trustee is painting with too broad a brush in its attempt to protect certain documents from disclosure under this section. Records that have already been disclosed in litigation should be released to the applicant, even if he was the adversary in the case. Certain other documents/records withheld under this section should be released as well. I noted in a previous order that the public policy rationale behind solicitor-client privilege is to maximize candid communications between clients and legal advisors (Order No. 29-1994, November 30, 1994, p. 7). I am withholding from disclosure material in the records in dispute that concern the provision of legal advice to the Office of the Public Trustee, since they are subject to solicitor-client privilege. In the package of severed material that I have prepared for release, I have indicated what should be released to the applicant on a page-by-page basis.

Section 22(2)(f): Information Supplied in Confidence

The Public Trustee asserts that personal information about the applicant was supplied in confidence, but it offers absolutely no evidence on this point. The third parties requesting non-disclosure do so on a variety of grounds, including a history of acrimony. I find for the third parties under section 22(2)(f) on the basis of their written and oral submissions to me and the Office of the Public Trustee.

The records in dispute

The records in the binder are subdivided as follows:

A. Medical file from Dr. X (the mother's physician):

This section contains letters to and from Dr. X's office and the applicant's solicitor; clinical notes relating to the mother; an affidavit sworn by the applicant; various letters relating to placing the mother in particular facilities; clinical reports and laboratory reports provided to Dr. X; letters to and from the Office of the Public Trustee and Dr. X; letters from the Office of the Public Trustee to the applicant and another family member; a court order dealing with the committee-ship of the mother along with correspondence relating to that court order; letters from the mother and the applicant to Dr. X requesting records be transferred to Dr. Y.

The Office of the Public Trustee has withheld these medical records from the applicant. On the basis of a careful examination of his submission to me, I conclude that he is not asking for his mother's medical records. However, I am ordering the release of a number of pages from this category of "medical files" on the grounds that they are not medical records of the mother as such.

B. Legal file

This section contains handwritten notes; unsigned release forms; letters to and from the Office of the Public Trustee's counsel and the applicant. I am only ordering the withholding of the handwritten notes of the Public Trustee that were used in preparing its legal arguments with respect to the applicant. I find that the remaining material is not subject to solicitor-client privilege.

C. Severed material

This section contains memos circulated among various members of the Office of the Public Trustee and handwritten notes and various spreadsheets concerning its administration of the applicant's mother's affairs. I am ordering disclosure of all of this material to the applicant in his capacity as executor of her estate.

D. Legal file regarding property and previous legal action

This section contains letters to and from various legal counsel and the Office of the Public Trustee, various court orders; various affidavits; letters and memos to and from the applicant and the Office of the Public Trustee; a market appraisal of property complete with offers to list property; letters from other family members regarding the sale of the property; various other letters dealing with wills, property transfers and solicitor's accounts. I am not ordering disclosure of records of third parties and material covered by solicitor-client privilege.

E. Miscellaneous

A final set of records concerns the Public Trustee's efforts to investigate the subject matter of the litigation involving it and the applicant. I am withholding most of the material, since I find that it concerns third parties and/or solicitor-client privilege.

8. Order

Under section 58(2)(b) of the Act, I confirm the decision of the Office of the Public Trustee to refuse access to some of the records in dispute to the applicant under sections 14, 22(2)(f), and 22(3)(a) of the Act.

Under section 58(2)(a) of the Act, I find that the Office of the Public Trustee, under sections 14, 22(2)(f), and 22(3)(a) of the Act, was not authorized or required to refuse access to certain information in the records in dispute. Therefore, I order the Office to give to the applicant access to additional records that have been withheld from him. To assist the Office of the Public Trustee, I have prepared a new version of the severed records showing what should now be disclosed to the applicant.

September 18, 1995

David H. Flaherty
Commissioner