ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 108-1996
May 30, 1996

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A decision of the Ministry of Health and the Ministry Responsible for Seniors to refuse an applicant access to adult forensic psychiatric records

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 on March 22, 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 Health and Ministry Responsible for Seniors (the Ministry) to refuse an applicant access to his medical records held by the Adult Forensic Psychiatric Institute.

2. Documentation of the review and inquiry processes

On August 15, 1995 the applicant submitted a request for documents to the Ministry. His request included "a compleat undoctored set of three (3) charts of record at the Adult Forensic Psychiatric Institute during three separate time frames under court order that I was held in custody therein. These are to include all medical and psychiatric tests, including psychological tests and the Cat Scan results in report form and the photo graphic imagery taken at that time."

On September 14, 1996 the Ministry refused access, stating that "this information is excepted from disclosure in accordance with sections 19(1)(a) and 19(2) of the Act, because disclosure of this information could reasonably be expected to threaten another person's safety or mental or physical health, or cause immediate and grave harm to your own safety or mental or physical health." The applicant requested a review by my Office on December 19, 1996.

The Notice of Written Inquiry of February 21, 1996 invited the following as intervenors: The Community Legal Assistance Society; The Canadian Mental Health Association; The British Columbia Civil Liberties Association; and The Freedom of Information and Privacy Association. Since the Community Legal Assistance Society acted as legal counsel for the applicant for the

inquiry, it did not participate as an intervenor. The other three potential intervenors did not make any submissions.

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

The issue under review in this inquiry is whether the release of the requested records would be harmful to individual or public safety under section 19 of the Act. This section reads 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.

(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under that section, where access to information in the record has been refused, it is up to the public body to prove that release of the records would be harmful to individual or public safety. Thus the burden of proof is on the Ministry in this inquiry.

4. The records in dispute

The records in dispute are the applicant's charting records held by the Adult Forensic Psychiatric Institute. They consist of the following types of documents:

1. Hospital operative report information
2. Court ordered fitness assessment documents
3. Forensic Psychiatric Institute Medical Summary Reports
4. Forensic Psychiatric Institute daily medical charts
5. Riverview Hospital chemistry and hematology reports
6. Forensic Psychiatric Institute Patient Care Plan forms: ...
7. Forensic Psychiatric Institute Physician Progress Notes
8. Riverview Hospital Physician's Order Charts

5. The Ministry of Health's case

The Ministry made an open submission concentrating on the applicable law and an *in camera* submission on the evidence of harm. It believes that releasing the records in dispute "will reasonably be expected to threaten the safety of people who have had contact with or contact the Applicant." (Open submission, paragraph 5.2) Its *in camera* submission contains a detailed

discussion of the applicant's medical condition and diagnosis, based on the evidence of those who have had contact with the applicant and on his past behaviour. The Ministry further argues that release of the records to the applicant "could also reasonably be expected to result in immediate and grave harm to the Applicant's own mental or physical health." (Open Submission, paragraph 5.5) The Ministry also filed *in camera* affidavit evidence.

6. The applicant's case

As noted further below, the applicant believes that he has been treated unfairly by the Ministry of the Health and the Forensic Psychiatric Institute. He denies that he has made any threats to harm any staff of the latter and, indeed, has no intention of harming them. Furthermore, the applicant indicates that he was formally discharged from care under the *Mental Health Act* on July 12, 1995.

The applicant concludes that denying him access to his complete medical file is unreasonable in all the circumstances. He further submits that "there is no evidence of significant likelihood of harm to a third party from release of the specific information for which denial is sought." (Submission of the Applicant, p. 6)

7. Discussion

The Ministry emphasizes that it has not turned down the applicant's request permanently. Once the risk of harm has diminished, he will be able to directly access his records through his continual contact with the Adult Forensic Psychiatric Institute. (Open Submission, paragraph 5.4) Based on the evidence that I have reviewed in this case, that possible avenue for disclosure is credible. However, it is difficult to determine from the material submitted if or when the perceived risk of harm may be diminished.

The applicant seeks access to the records in dispute "because he is of the view that he has been treated unfairly and poorly by the staff at FPI [Forensic Psychiatric Institute] and the Ministry of Health and he is contemplating taking legal action to correct the perceived injustice." He has concerns about a social worker and a psychiatrist, who are named in his submission. The applicant also claims that he has an appeal in the B.C. Court of Appeal in which he is unrepresented, and he wants some of the records in dispute to assist him in the matter. (Submission of the Applicant, p. 1) I reiterate the point clearly made in previous orders that applicants contemplating litigation have standard judicial means of discovery for such purposes, especially when such records prove not to be available under the Act. The fact that someone wants records for purposes of litigation does not override the exceptions set out in the Act, including section 19.

The applicant objects to the fact that he cannot review the evidence in the *in camera* submission of the Ministry. He has already, he claims, heard what must be some of the same information in a B.C. Review Board and a Mental Health Act Review Panel in 1994 and 1995 respectively. (Submission of the Applicant, pp. 2, 3) There is an important distinction between what might be disclosed as oral or written evidence in the latter type of inquiry and what the Ministry may choose not to disclose to an applicant under an exception in the Act, including section 19. I reject

the applicant's request to review the *in camera* submissions, because to do so would be to reveal some of the same information that the Ministry seeks to withhold from him. I have carefully considered all of the *in camera* submissions and affidavits of the Ministry.

Section 19: Disclosure harmful to individual or public safety

The Ministry correctly argues that the basic thrust of my decisions on this section is to require a public body to act prudently where the health and safety of others are at issue in connection with the possible release of records. (Open submission, paragraphs 5.6 to 5.13) (See Order No. 89-1986, March 4, 1996, pp. 4, 5; Order No. 28-1994, November 8, 1996, p. 8) The Ministry's fundamental position is as follows:

The burden the Public Body has to show on the balance of probabilities is that there is the potential for a threat to anyone else's safety or mental or physical health. The evidence that is contained in the in-camera submission meets this burden. There are very serious concerns from those who had contact with the Applicant. Diagnosis and behaviour descriptions have alerted those people to the possibility of harm.... The sole concern in the mind of the Public Body is the safety and health of other persons..... The Public Body submits that it has provided clear and convincing evidence of harm. (Paragraphs 5.10 and 5.13)

None of my previous Orders addressing the section 19 exception have dealt with an applicant's request for his or her own medical records.

The applicant relied on the Supreme Court of Canada's decision in McInerney v. MacDonald (1992), 93 D.L.R. (4th) 415 (S.C.C.) to uphold his right of access to the records in dispute. In my view, the most relevant portion of the Court's judgment is the following:

Non-disclosure may be warranted if there is a real potential for harm either to the patient or to a third party. This is the most persuasive ground for refusing access to medical records. However, even here, the discretion to withhold information should not be exercised readily.... In short, patients should have access to their medical records in all but a small number of circumstances. In the ordinary case, these records should be disclosed upon the request of the patient unless there is a significant likelihood of a substantial adverse effect on the physical, mental or emotional health of the patient or harm to a third party. (Submission of the applicant, pp. 5, 6)

I have said in other Orders that a public body should act prudently where the health and safety of others are at issue. But where an applicant is seeking access to his or her own medical records, a public body must meet the test established by the Supreme Court of Canada in McInerey v. MacDonald. In order to meet its burden of proving that the applicant has no right of access to his medical records under section 19, a public body must show that there is a "significant likelihood of a substantial adverse effect on the physical, mental, or emotional health of the patient or harm to a third party."
In my view, the Ministry has failed to meet this test in respect of section 19(2). I am satisfied, however, that it has proven that portions of the records should be withheld under section 19(1) on the basis that there is a significant likelihood of harm to third parties.

Review of the records in dispute

I have read the records in dispute in their entirety. They fall into two distinct categories. The purely medical records of an operation or medication are completely innocuous with respect to section 19 of the Act and should be disclosed to the applicant. Perhaps one-half of the several hundred pages of records fall into this latter category. The second component of the records is the notes made by physicians and other health care professionals with respect to the mental health of the applicant. Information in these records should be withheld from the applicant to the extent that they reveal the names and specific information identifying health professionals involved in the case. In addition, information revealing threatening behaviour toward others should be withheld except where this information relates to threats of legal action.

Based on the Supreme Court of Canada decision and my related interpretation of section 19(1), the applicant should receive information about the diagnosis, treatment, and care of both his physical and psychiatric conditions.

From a review of the numbering on the case notes, it appears that some pages may be missing from this file. Based on this observation, I recommend that the Ministry conduct a further search to confirm that all relevant records have been located.

8. Order

I find that the head of the Ministry of Health and the Ministry Responsible for Seniors is authorized to refuse access to part of the records in dispute under section 19(1) of the Act. Under section 58(2)(b), I confirm the decision of the Ministry to refuse
access to this information in the records to the applicant.

Further, I find that the head of the Ministry of Health and the Ministry Responsible for Seniors was not authorized to refuse access to other parts of the records in dispute under section 19(2) of the Act. Under section 58(2)(a), I require the Ministry to give the applicant access to part of the records in dispute. For this purpose, I have marked a copy of the complete record to indicate what should be released.

May 30, 1996

David H. Flaherty
Commissioner