Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 4-1994
March 1, 1994

INQUIRY RE: A Request for Access to Psychological Records held by the B.C. Board of Parole, Ministry of Attorney General

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1. Description of the Review

An inquiry was held at the office of the Information and Privacy Commissioner in Victoria, B.C. on Thursday, February 24, 1994 between the hours of 9 a.m. and 12 noon. It concerned a request for review, dated December 15, 1993, from a male survivor of sexual abuse (the applicant), under s.52 of *the Freedom of Information and Protection of Privacy Act* (the Act).

The original, informal request for access to certain records was made to the B.C. Board of Parole on October 6, 1993. The Acting Director of the Board denied access to certain of the records and advised the applicant to make a formal request under the Act. This request was dated October 26, 1993.

On November 25, 1993, the Director of Information and Privacy for the Ministry of the Attorney General decided to withhold access to the records requested by the applicant. This decision was subsequently reconfirmed by Maureen Maloney, Deputy Minister, Ministry of Attorney General.

The records at issue in this review are a psychological assessment prepared by a staff psychologist, a community assessment report prepared by a probation officer with a local Probation and Family Court Services, and clinical notes prepared during the incarceration of the third party. All of these records pertain to a convicted sexual offender (the third party), who is the stepfather of the applicant. They were prepared for use at early release hearings before the B.C. Board of Parole in the summer and early fall of 1993.

The Ministry of the Attorney General denied access to these records pursuant to s.22 of the Act. This concerns the requirement that the head of a public body refuse to

disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

2. Documentation of the Review Process

The applicant appeared for himself and asked that his wife act as his agent; both were sworn to give evidence at the inquiry. The Ministry of the Attorney General's case was presented by Shauna Van Dongen, a barrister and solicitor with the Legal Services Branch, Ministry of the Attorney General. She was accompanied by Dina Green, the Acting Director of Information and Privacy for the Ministry, and Bernard Kalvin, a barrister and solicitor, also with the Ministry of the Attorney General.

The third party was granted Terminal Temporary Release on February 17, 1994 and is not currently incarcerated. He appeared for himself and asked that his wife act as his agent; his adult son was also present. All three were sworn to give evidence.

Diane Lamb, a Policy and Programme Analyst with the Forensic Psychiatric Services of the Ministry of Health and Ministry Response for Seniors (the Ministry of Health) was present as an intervenor. She was accompanied by Dr. Ronald A. LaTorre, Ph.D., R. Psych., who prepared the psychological assessment of the third party. Both were sworn to give evidence.

The Office of the Information and Privacy Commissioner provided all parties with a two-page description of the "inquiry process" that would be followed at the inquiry. The applicant, the Ministry of the Attorney General, the third party, and the Ministry of Health reviewed this document at the start of the inquiry and agreed to the procedures described therein.

A Portfolio Officer in the Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a statement of facts to serve as background for the inquiry.

The agent for the applicant provided me with handwritten notes of evidence as part of her submission (Exhibit 1). She also submitted two letters on behalf of the applicant, which were reviewed by the parties at the hearing and accepted as opinion evidence (Exhibit 2). Copies were returned to me at the end of the inquiry in order to maintain the confidentiality of their contents. At the same time, the Ministry of the Attorney General also provided the Commissioner with a thirteen-page "Outline of Argument."

I have also reviewed the applicant's original request for review dated December 15, 1993 (through his agent) and a written submission from the Forensic Psychiatric Services Commission regarding this appeal, dated February 22, 1994.

3. Issues under Review at the Inquiry

The focus of the inquiry was the applicant's request to receive copies of documents concerning the third party that were briefly described above.

The government's position, supported by both the Ministry of the Attorney General and the Ministry of Health, is that the head of the public body acted correctly in denying the applicant's request to obtain these records on the basis of s.22 of the Act, which prohibits disclosure of personal information if the disclosure would be an unreasonable invasion of the third party's personal privacy.

The third party asked that the records in question not be disclosed

The applicant accepted that, under s.57(2) of the Act, he had to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. The applicant argued that disclosure of the third party's records should occur under s.22(4)(b) of the Act because of "compelling circumstances" affecting the health or safety of himself and others. This, he submitted, would not make disclosure in these circumstances an unreasonable invasion of the third party's personal privacy.

No issues of jurisdiction were raised at the inquiry.

4. The Applicant's Case for Access

The applicant is a white male aged thirty-two; the third party is his stepfather, now aged sixty-two. Physical and sexual abuse of the applicant occurred twenty to thirty years ago, while the applicant was between the ages of one-and-a-half and twelve, and only ended when he left the family home. The applicant eventually initiated an investigation against his stepfather, who was convicted for these offenses, has served time in prison, and is in the process of returning on parole to the community in which he resides with his wife.

The applicant and his wife attended two early release hearings in the summer and early fall of 1993 during which they heard excerpts from the records sought in this inquiry. The applicant has had an opportunity to prepare a victim impact statement but was not allowed to speak at the parole hearings (which denied the third party's request for early release). He was also unable to testify in the original trial of his stepfather, since it resulted in a guilty plea.

The agent for the applicant made the following summary points, among others, at the oral inquiry. The third party has no feelings of remorse for his victims; his admission of guilt was cloudy because he blamed his alcoholic blackouts; he has denied the victim impact statements; and there is evidence (from his support letters) that he only pleaded guilty to avoid a longer sentence.

While the applicant has no current fear of the third party with respect to his physical or sexual health or safety, his view is that the third party's grandchildren, the applicant's natural mother, and the applicant's own sister and her three daughters, remain at risk. The applicant is also concerned that the state of denial of the current family of the third party leaves their own children at risk from their grandfather. He has contact with approximately twenty-six children and grandchildren.

The agent for the applicant also relied on the argument that the emotional health and well-being of the applicant continues to be affected by the third party and the abuses committed against him as a child. The applicant continues to suffer from nightmares and flashbacks from this physical and sexual abuse and also the abuse of his sister.

The survivor of this abuse wants to be able to review the records requested in this request for review, because he cannot accept what various authorities (including his family and public agencies) tell him, based on his perception that they have misled him in the past. The applicant wants paper documentation of what has happened to him in order to work through the material with his counsellors over time; he has no intention of publicizing the records.

The applicant confirmed his agent's argument that the circumstances of his need for access to the records in question are indeed compelling for him, as a unique individual, who is traumatized by his past experience to such an extent that he cannot work and suffers ongoing trauma.

The past experience of the applicant's sister, a single parent with three daughters, is also relevant to certain aspects of this request for access to records, since the applicant expressly fears for her physical and emotional safety. The third party has been charged with sexual abuse of his stepdaughter and has served time in prison for this crime. It is alleged that the third party physically and emotionally traumatized his stepdaughter (and the applicant) after his return from prison in 1969, because she had incriminated him. The applicant feels that his sister is at risk of repercussions from the third party. However, he has no current contact with his sister on the advice of her counsellor.

Based on portions of the psychological assessment that were read into the hearing transcript for the early release hearing in September, 1993, the agent for the applicant is of the view that the third party cannot identify the warning flags for why he abused children, nor the impact of his crimes on his victims.

The agent for the applicant reported further discussions from the parole hearings based on the community assessment report, including the view that those adults closest to the third party (his current wife and his two natural sons from his second marriage), did not believe that he was capable of the crimes he had pleaded guilty to, or that he would abuse their children or any other child in future.

The agent for the applicant further argued that local children will be at risk when the third party returns to his habitual residence in a British Columbia community.

The applicant submitted two opinion letters as evidence in this inquiry (Exhibit 2), one of which supports his request for access to the records. The first is from a counsellor who had treated the applicant in 1979-80 and then again in 1992 for the emotional and sexual abuse he had experienced as a child. It is the counsellor's view that granting the applicant access to the records in question "will be of psychological value and further ... [his] healing process." This potential benefit was not supported in any detail beyond this simple assertion.

The second opinion letter is from an employee of a regional parole service who interviewed the applicant and his wife for purposes of completing a victim impact statement for the B.C. Parole Board's early release hearing. The letter describes in detail the significant ongoing impact of abuse on the applicant. However, it does not take a position on his need for access to the records in question in this inquiry.

5. The Ministry of Attorney General's Position

The Ministry argued, with respect to the burden of proof on the applicant, that "the gravity of the consequences of disclosure, both to the third party and to the operations of Ministry programs, should be considered in deciding what degree of probability must be shown by the applicant."

In the Ministry's view, the applicant "must show extremely strong and compelling reasons why the release of the records will protect anyone's health or safety," [s.22(4)(b)] in order to overcome the presumption of privacy contained in s.22(3) of the Act. That section says that "a disclosure of personal information is presumed to be an unreasonable invasion of a third party's privacy if (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation."

With respect to the applicant's current mental health, the Ministry pointed out that "other more appropriate options are available to help him deal with the trauma of abuse," such as the possibility of free counselling on the basis of filing a successful Criminal Injury Compensation Claim.

The Ministry further stated that: "Unfortunately, the circumstances of the applicant are not out of the ordinary. There are hundreds of sexual abuse victims in the Province, and many if not most of their abusers deny that they are guilty. Yet that does not entitle the victims to psychological evaluations of their abusers." This is an especially strong point, since such assessments are prepared mainly to evaluate the appropriateness of returning an offender to the community.

The Ministry submitted that even people with criminal records have privacy rights: "Given that submitting to a psychological evaluation and participating in a sexual offender treatment program is strictly voluntary, it could seriously harm the Province's interest in treating sexual offenders if it is known that victims may be able to obtain copies of psychological evaluations done on the offenders."

The Ministry provided a discussion of s.25 of the Act. The head of a public body may release information that is in the public interest for the protection of the health or safety of the public. The applicant argued that there is a significant risk of harm to a group of children and grandchildren of the third party.

The Ministry submitted that there was no evidence that the release of the psychological evaluation would be beneficial to the public or to family members. Conversely, it argued, disclosure would violate the third party's privacy interests. Further, s.25 cannot be justified based only on the interest of one individual; release must be in the public interest for either the general public or a group of individuals.

Finally, the Ministry made the point that while the federal *Corrections and Conditional Release Act* now provides for the release of certain information to a victim, psychological evaluations are not included in the list of releasable information (S.C., 1992, c. 20). This federal statute applies to the B.C. Parole Board by virtue of the application of a provincial Order In Council dated November 19, 1992 (O.I.C. No. 1703). Indeed, s.142(1)(b) of this Act specifies additional information that the chairperson of the B.C. Parole Board may disclose about the offender to the victim, "where in the Chairperson's opinion the interest of the victim in such disclosure outweighs any invasion of the offender's privacy that could result from the disclosure." Again the list of releasable information is largely factual in nature and does not include psychological assessments or any other of the records at issue in this inquiry.

I note as well that s.144 of the *Corrections and Conditional Release Act* prohibits the release of information from the registry of Parole Board decisions (and the reasons for each such decision) to an interested party, when such a disclosure "could reasonably be expected ... c) if released publicly, to adversely affect the reintegration of the offender into society." This condition is especially applicable to the current inquiry.

6. The Third Party's Position

The third party and his family are opposed to the release of the records in dispute.

The agent for the third party testified that all of the children of the third party know that he is guilty of the offenses for which he was convicted and do not leave their children alone with him. Furthermore, the third party and his wife do not stay at the homes of their children or baby-sit for them.

The adult son of the third party testified that while he had found it hard to believe, he now accepts the guilt of his father and takes precautions about his own stepdaughter. This son's brother and his wife are similarly aware of the situation and take appropriate precautions not to leave the third party alone with children.

In response to my direct question, the third party acknowledged that he is guilty of the sexual abuse charges for which he pleaded guilty.

I am persuaded that the family of the third party present at the hearing do not, at present, deny his responsibility for these criminal acts. This is a critical factor for me with respect to the public safety arguments as they apply to the young people normally around the third party.

7. The Ministry of Health's Position

The Forensic Psychiatric Services Commission (the Commission) of the Ministry of Health argued that the records in question in this inquiry are provided for Parole Board purposes only and that release would harm future forensic assessments. Using such records to persuade the family of an offender of his guilt would be inappropriate. Very intimate information on an offender, prepared for a Parole Board hearing on eligibility for release, should not be released in this manner, not least because this would be inconsistent with the purposes for which the information was collected and thus contrary to the Act [(s.32(a)].

With respect to the potential benefit to the applicant's mental health from the release of these records, the Commission argued that "[i]n mental health treatment no single element can be regarded as key." Furthermore, with respect to the public safety issue under s.25 of the Act, the applicant and his family in this case know about the conviction and incarceration for sex offences, so "[t]hey are already in a position of knowledge about the offender."

Finally: "The Commission is firmly of the view that the victim has a wish, but not a need, for the information requested. As a result, the privacy interests of the offender are paramount. To find otherwise could cause irreparable harm to this offender in particular, and to the forensic assessment process in general."

Dr. LaTorre, who prepared the psychological assessment of the third party, testified that the Ethical Standards of Psychologists issued by the College of Psychologists of British Columbia require non-release of the psychological assessment in question, since it would destroy the confidentiality of the relationship between psychologist and client. The third party was told (as he confirmed at the inquiry) that the psychological assessment was solely for purposes of the early release hearing.

8. The Psychological Assessment

Dr. LaTorre also testified at the hearing, as a general matter, about the normal contents of psychological assessments. For a sexual offender, they may contain a general social history, a sexual history, a criminal history, psychological tests applied and their interpretation, mental status, and diagnoses and recommendations for parole. In his professional experience, Dr. LaTorre is only aware of one assessment that he conducted which may have been released to another therapist.

I have reviewed the eighteen-page psychological assessment at issue in the present case. It is stamped in two ways: first, "Confidential," and then, on each page, as follows: "Private and Confidential. Not to be released, copied or published without the consent of Adult Outpatient Forensic Psychiatric Services of B.C."

This psychological assessment in fact contains a detailed social history, criminal history, sexual history, test results, interview observations, conclusions, and recommendations. It is intensely personal and private information that has been revealed for therapeutic purposes during an interview process. Furthermore, the information in the assessment is overwhelmingly about the life of the third party and the adults with whom he has had intimate relationships during his lifetime. The psychological assessment contains very little information about the applicant in the present inquiry; there is considerably more information (and more sensitive information) about others.

The third party has revealed the most intimate details of the most sensitive aspects of his entire life in order to cooperate with the preparation of a psychological profile for early parole purposes. Having examined the document and listened to the evidence at the inquiry, I do not accept the fact, absent very persuasive evidence to the contrary, that reading it would benefit the applicant. The essential point is that there was no clear evidence presented to me that reading the records would be of significant benefit to him.

9. An Attempt at Settlement

Towards the end of the hearing, I explored with the third party the possibility of his consenting to release the psychological assessment in particular to the applicant, under controlled conditions, in order to promote the well-being of the applicant. Under s.32(a) of the Act an individual may consent to the use of his or her information for a particular purpose. The applicant agreed to consider the matter, with the assistance of his family, and retired to a separate room with Dr. LaTorre.

Dr. LaTorre subsequently testified that the group did not discuss the actual document in question but were instead concerned about such matters as its subsequent distribution in the event of its physical release, its possible release to a therapist, and the risk that release might jeopardize the treatment of the third party.

The third party and his family decided not to consent to the release of the psychological assessment to the applicant.

10. Discussion

The third party, his wife, and an adult son attended this inquiry in order to prevent the release of the third party's personal information to the applicant.

I am of the opinion that the records at issue in this inquiry are highly personal information, disclosure of which should be presumed to be an unreasonable invasion of the third party's personal privacy under s.22(3)(a) of the Act, because it "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation."

Section 22(3) of the Act creates a strong presumption that disclosure of specified kinds of personal information is an unreasonable invasion of a third party's personal privacy. In order for that presumption to be rebutted, the party with the burden of proof must submit clear and compelling evidence that one or more of the circumstances listed in s.22(4) exist. Further, all relevant circumstances, including those listed in s. 22(2) should be considered.

In my view, the facts of this case do not present compelling circumstances affecting the health or safety of the applicant that would allow the head of a public body to determine that disclosure of the records at issue would not be an unreasonable invasion of the third party's personal privacy under s.22(4)(b) of the Act. I especially agree with this view when it is a question of potentially benefiting the health or even safety of only one person as opposed to a larger number. The public safety issue seems to be under control with respect to the third party's current family.

In the present case, the balance between s.22(3)(a) and s.22(4)(b) of the Act lies with the former, as I would normally expect it to do, since the detailed circumstances set out in s.22(4) are not specifically met. I have also considered the circumstances under which the psychological assessment was made, with particular reference to s.22 (2)(g) (that the personal information was received in confidence).

I realize that the applicant is in a "Catch-22" position with respect to his argument that disclosure of the psychological assessment would speed the recovery of his health, since he cannot review the document. However, as someone who has done so and who is sympathetic to the applicant's expressed needs, I conclude, again absent persuasive evidence to the contrary, that the applicant should not have access to the information. I regret that I cannot be more specific without revealing the contents of the psychological assessment. I am supported in this admittedly lay judgment by the fact that the psychologist who prepared the assessment also opposed its release.

I am also persuaded that access to the records at issue in this inquiry would not fill in the blanks in the applicant's life that he is currently concerned about, since so little of this recorded information is about the applicant himself as opposed to the life history of his stepfather.

It is my view that the burden of concern for the physical safety of children outside of the third party's family is a matter which properly falls under s.25 of the Act, which may require action by various public authorities, including local police, rather than by the applicant and his wife. I am also of the view that s.25 (1)(a) was not intended for the release of information for the benefit of an individual (such as the applicant in this case), except perhaps in extraordinary circumstances.

In its submission, the Ministry of the Attorney General explicitly referred to various factors that must be present for the release of personal information about sexual offenders to the general public under s.25 of the Act. These include:

> There is a clear and present risk of significant harm.
> Release of the information is likely to reduce the risk.
> There is no less intrusive way to reduce the risk of harm.
> The public interest shall outweigh the individual's right to privacy.

I would encourage the appropriate authorities to consider, in the circumstances of the third party in this case, whether any notices are required in his home community now that he has left jail.

11. Order

Under s.58(2)(b) of the Act, I confirm the decision of the Ministry of Attorney General not to release the personal information about the third party in this case to the applicant.

David H. Flaherty
Commissioner March 1, 1994