OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 01-29

OKANAGAN SIMILKAMEEN HEALTH REGION & PENTICTON REGIONAL HOSPITAL

David Loukidelis, Information and Privacy Commissioner
June 27, 2001

Quicklaw Cite: [2001] B.C.I.P.C.D. No. 30
Document URL: http://www.oipcbc.org/orders/Order01-29.html
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: Applicant is entitled to portions of his own mental health records. Refusal to disclose certain portions was not justified under s. 19(2), but the vast majority of the balance was properly withheld under s. 19(1)(a). The Hospital was ordered to search again for computer records of the applicant's treatment.

Key Words: every reasonable effort – advice or recommendations – unreasonable invasion – personal privacy – medical information – employment history – functions of public body employees – harm to safety or mental or physical health – immediate and grave harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 19(1)(a), 19(2), 22(1).

Authorities Considered: B.C.: Order 01-01, [2001] B.C.I.P.C.D. No. 1; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 00-32, [2000] B.C.I.P.C.D. No. 35; Order 01-26, [2001] B.C.I.P.C.D. No. 27.

1.0 INTRODUCTION

[1] This decision disposes of the issues raised in two separate inquiries. The inquiries arise out of a single access to information request made by the applicant, under the *Freedom of Information and Protection of Privacy Act* ("Act"), on May 23, 2000. In his request, which he addressed to the "Penticton Mental Health Centre", the applicant asked for copies of "written and also computer" files compiled about him after his certification, under the *Mental Health Act*, and temporary detention in the psychiatric unit at the Penticton Regional Hospital ("Hospital") and a named residential facility. He received two responses to this request, one from the Mental Health Services Director of the

Okanagan Similkameen Health Region ("OSHR"), a regional health board designated under the *Health Authorities Act*, and one from the Hospital. Both entities are separate local public bodies under the Act.

[2] The OSHR responded, on June 20, 2000, by disclosing some records and withholding others. It withheld 13 pages under s. 19(2) of the Act and 4 pages under s. 22(1) of the Act. The Hospital responded, on June 7, 2000, by denying access to any records. The Hospital appears to have reconsidered its response, because, on September 5, 2000, it disclosed some information to the applicant (although it continued to withhold information under s. 19(2) of the Act). On August 15, 2000, the OSHR disclosed further information, but also continued to withhold other information under ss. 19(2) and 22(1) of the Act.

[3] This prompted the applicant to request, under s. 53 of the Act, two separate reviews of the decisions. Because neither matter settled during mediation by this Office, I held two separate written inquiries under s. 56 of the Act. Because the records involved in each case were created in connection with the same course of diagnosis and treatment involving the applicant, and because the evidence and arguments submitted in each case by the Hospital, the OSHR and the applicant are essentially the same, it is convenient to address the issues raised in the two inquiries in a single decision.

2.0 ISSUES

[4] In the case of the inquiry involving the Hospital, the Notice of Written Inquiry said the issues were whether the Hospital was authorized by s. 19(2) of the Act to refuse to disclose the applicant's personal information to him and whether the Hospital had fulfilled its obligations under s. 6(1) of the Act to respond accurately and completely. For convenience, I refer below to this inquiry as the "Hospital inquiry".

[5] As regards the Hospital inquiry, the Hospital's response to the applicant cited s. 19(2) of the Act in refusing to disclose information and the Notice of Written Inquiry was framed accordingly. The Hospital's argument and evidence in the inquiry, however, also clearly raised and addressed s. 19(1)(a) arguments and the applicant responded to those arguments in his reply submission. Because of the nature of the evidence in the disputed records themselves, and the fact that the mental or physical health or safety of third parties is involved here, I have decided to consider the Hospital's s. 19(1)(a) case, as well as its s. 19(2) argument, even though it failed to expressly raise s. 19(1)(a) earlier in the process, as it should have done.

[6] In the case of the inquiry involving the OSHR, the Notice of Written Inquiry specified the issues as being whether the OSHR was authorized by s. 19 of the Act to withhold information from the applicant and whether the OSHR was required by s. 22 of the Act to refuse to disclose personal information to the applicant. For convenience, I refer below to this inquiry as the "OSHR inquiry".

[7] Under s. 57 of the Act, the burden of proof lies on the public bodies respecting the s. 19 issues, while the burden of proof lies on the applicant in relation to s. 22 issue. The Hospital bears the burden of proof on the s. 6(1) issue.

3.0 DISCUSSION

[8] **3.1 Description of the Records** – The records in both inquiries consist of records generated in connection with the psychiatric diagnosis and involuntary detention of the applicant under the *Mental Health Act*.

[9] The records in the Hospital inquiry – only portions of which are still in dispute – consist of a three-page discharge summary, a one-page request for consultation, three pages from a consultation report, a one-page physician's history, a two-page progress report, one page of progress notes, a four-page second opinion given by a consulting psychiatrist, six pages of "focus charting" records from the Hospital and seven further pages of miscellaneous treatment-related records.

[10] The records in the OSHR inquiry consist of the psychiatric second opinion referred to above, portions of a progress report, a two-page physician's history and a one page Hospital report relating to a course of medical treatment the applicant had received earlier for an injury. This last record is one of the miscellaneous treatment-related records that is also covered in the Hospital inquiry.

[11] **3.2 Completeness of the Hospital's Response** – As is noted above, one of the issues in the Hospital inquiry is whether the Hospital has fulfilled its obligation under s. 6(1) of the Act to respond accurately and completely to the applicant's access request. Section 6 of the Act reads as follows:

> **Duty to assist applicants**
>
> **6**(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
>
> (2) Moreover, the head of a public body must create a record for an applicant if
>
> (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
>
> (b) creating the record would not unreasonably interfere with the operations of the public body.

[12] Previous orders have established that, in order to discharge its s. 6(1) duty to search adequately for records, a public body such as the Hospital must make such efforts as a fair and rational person would find acceptable or expect to be undertaken. This does not imply a standard of perfection, but search efforts must be thorough and

comprehensive. See, for example Order 00-32, [2000] B.C.I.P.C.D. No. 35. At p. 5 of Order 00-32, I said the following about the kinds of evidence a public body will wish to provide to support its s. 6(1) case:

> In an inquiry such as this, the public body's evidence should candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also indicate how the searches were done and how much time its staff spent searching for the records.

[13] The submissions of the Hospital, on this and the other issues, can only be described as minimal. On the s. 6(1) issue, the Hospital's submission reads as follows:

> … The applicant believes there is a computer record on him at Penticton Regional Hospital. On October 19, 2000 I sent the applicant 3 pages of demographic and visit history which is kept on computer. This is not part of the paper record and consists of information obtained from the patient on admission and a listing of the visits. I informed the applicant that this is the complete computer record that Penticton Regional Hospital has on his visits.

[14] In his request for review, the applicant said that he had, on "several occasions", seen nurses "typing notes directly into computers and on that basis [I] believe a computer–electronic file exists." In his initial submission, the applicant repeated his assertions about computer notes. He gave specific dates on which, during his *Mental Health Act* detention, he had made comments to two different nurses and said that, in each instance, "shortly thereafter" he had seen the nurse "typing a note into the computer" on the ward.

[15] The Hospital did not respond to this. The Hospital says only that it gave the applicant copies of the computer forms generated on his admission and a "listing of the visits." It does not say whether it searched any computer records in its psychiatric unit or other treatment units of the Hospital. Whether or not the applicant's memory is accurate, there is no evidence before me to counter his specific claims about computer notes being made about him. In the absence of any evidence from the Hospital to rebut the applicant's very specific recollections about record-creation, I find the Hospital has not established that it fulfilled its s. 6(1) obligation to respond accurately and completely to the applicant's request by searching adequately for computer records of the kind described by the applicant. The appropriate order is made below.

[16] **3.3 Harm to the Applicant's Health or Safety** – Both public bodies rely on s. 19(2) of the Act as a basis for withholding the applicant's own personal information from him. It is convenient to reproduce here all of s. 19:

> **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.

[17] As I have said before, the reasonable expectation of harm test requires evidence the quality and cogency of which is commensurate with a reasonable person's expectation that disclosure of the disputed information could cause the harm specified in the relevant section of the Act. Although it is not necessary to establish a certainty of the harm being caused, evidence of speculative harm will not suffice. There must be a rational connection between the disclosure and occurrence of the feared harm. See, for example, Order 01-26, [2001] B.C.I.P.C.D. No. 27, at para. 32.

[18] Here, the public bodies must establish that disclosure of the disputed information could reasonably be expected to result in "immediate and grave harm" to the applicant's safety or his "mental or physical health". The same letter, which was sworn by the psychiatrist before a commissioner for affidavits, was submitted in both inquiries in support of the refusal to disclose information under ss. 19(2) and 19(1). The relevant paragraph of the letter reads as follows:

> I, … [name and position of the psychiatrist], Okanagan Similkameen Health Region, refuse release of the attached information from the Penticton Mental Health Centre and Penticton Regional Hospital files for … [name of the applicant].

[19] At the end of the letter, the psychiatrist sets out, in point form, handwritten notes giving reasons why ss. 19(1) and (2) apply.

[20] First, this letter proceeds from a fundamental misunderstanding of how the Act works. It is not open to a public body – much less an individual physician – to "refuse release" of someone else's personal information and expect that, in an inquiry under s. 56, the commissioner is bound to yield to that refusal. The whole point of the inquiry process under Part 5 of the Act is to provide an independent review of a public body's decision to refuse access. As part of that review, the commissioner must make all necessary findings of fact and law and – where he or she considers that a public body was not authorized or required to refuse access – order the public body to disclose information it has incorrectly withheld. The writing of a letter – sworn or otherwise – that purports to "refuse release" of information is not by any means binding on the commissioner.

[21] As regards the s. 19(2) issue in both inquiries, the evidence before me (including the disputed records themselves) does not cross the evidentiary threshold required under s. 19(2). In the Hospital inquiry, the Hospital's initial submission says, in passing, without supporting evidence, that disclosure of the applicant's own personal information was "felt to be detrimental to his mental health and a concern to public safety." Similarly, the OSHR's submissions simply say that the psychiatrist "continues to feel it would be detrimental to both the client and the public to release this information."

[22] The psychiatrist's letter quotes s. 19(2), but offers no evidence for a reasonable expectation that disclosure could result in the immediate and grave harm to the applicant, as required by s. 19(2). The point form notes at the bottom of the letter speak to third party harm issues, not harm to the applicant. Further, almost all of the withheld material does not relate to the diagnosis or treatment of the applicant's psychiatric illness, but to the interests of third parties. The evidence before me – including the contents of the disputed material – does not establish a reasonable expectation of harm, within the meaning of s. 19(2), in either inquiry.

[23] I find that the Hospital and the OSHR are not authorized by s. 19(2) of the Act to refuse the applicant access to his own personal information.

[24] **3.4 Third-Party Health or Safety** – It is argued in both inquiries that disclosure of the disputed information could reasonably be expected to threaten the safety, or mental or physical health, of various third parties. I affirmed above the standard of proof required under the Act's reasonable expectation of harm tests, including s. 19(1)(a). Further, as I have said in other cases, deliberation and care are necessary when assessing risk of harm under s. 19(1)(a) or (b).

[25] The disputed records indicate that the applicant suffers a serious mental illness. It is evident from the material before me that his behaviour towards others has caused them, in the recent past, to be seriously concerned for their safety. There are also indications in the material that his behaviour has caused serious, ongoing mental stress for others. I have already referred to the psychiatrist's letter submitted in support of the s. 19(1)(a) and s. 19(2) arguments. Portions of that letter were submitted to me *in camera*. Despite their brevity, they buttress the evidence found in the records themselves – both the portions released to the applicant and the severed portions – respecting the threat to third-party safety that could reasonably be expected to flow from disclosure of the disputed information.

[26] As was the case in Order 01-01, [2001] B.C.I.P.C.D. No. 1, it is difficult to give more detailed reasons for my decision other than to say that I am satisfied – on the basis of the psychiatrist's letter and the evidence internal to the disputed records – that disclosure of most of the material still in dispute could reasonably be expected to threaten the safety or mental or physical health of a number of third parties. With a few minor exceptions, I find that the Hospital is authorized by s. 19(1)(a) of the Act to refuse to disclose the information it withheld under that section. The minor exceptions to this finding consist of the applicant's own medical information, *i.e.*, information describing his diagnosis and treatment. This information is not third-party personal information and in no way refers to or otherwise involves third parties. The Hospital has not shown that this information can be withheld under s. 19(1)(a). I have indicated the portions of the records that can be withheld under s. 19(1)(a) in pink on the copy of the records sent to the Hospital with its copy of this order.

[27] In the second inquiry, I find – again on the basis of the psychiatrist's letter and the evidence internal to the disputed records – that disclosure of most of the material still in

dispute could reasonably be expected to threaten the safety or mental or physical health of a number of third parties. There are some very minor exceptions to this finding, again consisting of the applicant's own medical information, and I find the OSHR is not authorized to refuse to disclose that information under s. 19(1)(a). I have indicated the portions of the records that can be withheld under s. 19(1)(a) in pink on the copy of the records sent to the OSHR with its copy of this order.

[28] **3.5 Third-Party Privacy** – One of the issues raised in the OSHR inquiry is whether the OSHR is required, by s. 22(1) of the Act, to refuse to disclose third-party personal information to the applicant. Section 22(1) was mentioned in the OSHR's response to the applicant's access request but was not mentioned in its submissions here. In light of my s. 19(1)(a) finding, I need not consider the s. 22(1) issue as it relates to third-party personal information. The relatively small amount of information that must be disclosed to the applicant consists of his own personal information and in no way engages the privacy interests of third parties. Section 22(1) need not be considered in relation to that information.

4.0 CONCLUSION

[29] For the reasons above, I make the following orders:

1. Under s. 58(3)(a) of the Act, I order the Hospital to perform its duty under s. 6(1) of the Act to respond accurately and completely to the applicant's access request by completing all of the following within 30 days after the date of this order:

   (a) the Hospital must undertake and complete a search for computer-based notes, or other records, responsive to the applicant's access request that exist in any computer or electronic information system maintained in any unit, ward or other diagnosis or treatment facility in the Hospital;

   (b) the Hospital must deliver to the applicant a response to his access request after completion of the search described in paragraph 1(a) and in doing so must comply with s. 8(1) of the Act;

   (c) the Hospital must deliver to me a copy of its response to the applicant under paragraph 1(b), with that copy being sent to me concurrently with its delivery to the applicant; and

   (d) the Hospital must deliver to me (with a copy being sent to the applicant directly and concurrently), within 10 days after its response is sent under paragraph 1(b), an affidavit sworn by a knowledgeable person which describes the Hospital's search for records and the results of the search, including by describing the various possible sources of records checked, how the search was conducted and by whom, and how much staff time was expended in the search;

2. Subject to paragraphs 3 and 4, below, under s. 58(2)(b) of the Act, I confirm the decisions of the Hospital and of the OSHR that they are authorized by s. 19(1)(a) of the Act to refuse to give the applicant access to information withheld under that section;

3. Under s. 58(2)(a) of the Act, I require the Hospital to give the applicant access to the information withheld under s. 19(1)(a) that is shown on the copy of the disputed records delivered to the Hospital with its copy of this order;

4. Under s. 58(2)(a) of the Act, I require the OSHR to give the applicant access to the information withheld under s. 19(1)(a) that is shown on the copy of the disputed records delivered to the OSHR with its copy of this order; and

5. Subject to paragraph 2, above, under s. 58(2)(a) of the Act, I find that the Hospital and the OSHR are not authorized by s. 19(2) of the Act to refuse to give the applicant access to the information withheld under that section.

June 27, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia