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

Order 02-26

PUBLIC GUARDIAN AND TRUSTEE OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
June 5, 2002

Quicklaw Cite: [2002] B.C.I.P.C.D. No. 26
Document URL: http://www.oipcbc.org/orders/Order02-26.pdf
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: The applicant sought access to accounts of third party's finances provided to the PGT respecting the deceased third party's estate. The PGT denied access under s. 22(3)(f). The applicant is not entitled to exercise the third party's rights under s. 3(b) or (c) of the Freedom of Information and Protection of Privacy Regulation. Disclosure is not necessary for the purpose of subjecting the PGT to public scrutiny. Because the third party's death occurred not long before the applicant made her request, death does not diminish his privacy rights in this case. The PGT withheld the information properly under s. 22.

Key Words: personal representative – nearest relative – committee – finances – financial history – unreasonable invasion of privacy – scrutiny of public body – supplied in confidence.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a) and (f), s. 22(3)(f); Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 323/93, ss. 3(b) and (c); *Patients Property Act*, ss. 19 and 24.

Authorities Considered: B.C.: Order No. 27-1994, [1994] B.C.I.P.C.D. No. 30; Order No. 31-1995, [1995] B.C.I.P.C.D. No. 2; Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 00-11, [2000] B.C.I.P.C.D. No. 12; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-03, [2002] B.C.I.P.C.D. No. 3.

1.0 INTRODUCTION

[1] On March 21, 2001, the applicant made a request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Public Guardian and Trustee of British Columbia ("PGT") for "the accounting and true inventory of the whole estate of" a named individual. I will refer to this individual as "the third party". The applicant

enclosed with the request a copy of what she described as a Notice of Attorney-in-Fact and Executrix that she said had been executed in her favour by the third party. On April 20, 2001, the PGT responded by denying access to the requested information, on the following basis:

> The Public Guardian and Trustee is not able to release the other information you have requested from the Committeeship file as we have not received the consent of the Committee, or the Administrator of the Estate, who acts as a representative of [the third party], under Section 22(3) of the *Act*. This Section provides that a public body must not release "personal information [that] describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities" without consent.

[2] This prompted the applicant to request a review, under Part 5 of the Act, of the PGT's response. Because the matter did not settle in mediation, I held a written inquiry under Part 5 of the Act.

2.0 ISSUE

[3] The only issue in this case is whether the PGT is required by s. 22 of the Act to refuse to disclose the requested information to the applicant. Under s. 57(2) of the Act, the applicant bears the burden of establishing that disclosure of the information would not unreasonably invade third-party personal privacy.

3.0 DISCUSSION

[4] **3.1 Background to the Access Request** – The applicant's request – which is driven by her perception that there has been financial mismanagement and fraud in relation to the third party's financial affairs – is somewhat involved. Some description of the background is, however, necessary in order to provide an appropriate context for this decision.

[5] As I mentioned above, in 1997 the third party executed in favour of the applicant a power of attorney. In early 2000, the British Columbia Supreme Court declared the third party incapable of managing himself or his affairs and appointed his brother committee of the person and estate of the third party. The third party died in August 2000 and, in February 2001, the Court appointed another person as administrator with will annexed of the third party's estate.

[6] **3.2 Applicant's Status** – The PGT says that, under the *Patients Property Act*, the applicant's 1997 power of attorney was voided on the appointment of the brother as committee in 2000. It pointed out that the applicant was a party to the application for committeeship and the court declined to appoint her as committee when it had the opportunity to do so. The brother's committeeship did not expire with the death of the third party, the PGT said, but continued until the appointment of the administrator. The PGT argues that the committee, as the third party's personal representative, and the administrator take precedence over any family members in this matter. It says that my predecessor made such a finding in Order No. 31-1995, [1995] B.C.I.P.C.D. No. 2.

[7] The applicant apparently bases her entitlement to the requested information of the third party on the 1997 power of attorney. I infer she considers that she is making the request on behalf of the third party. Sections 3(b) and (c) of the Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 323/93 ("Regulation"), provide that, in certain cases, one person can exercise another individual's rights respecting that other individual's personal information. Those provisions read as follows:

> **Who can act for young people and others**
>
> **3.** 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.

[8] The applicant is not, of course, the third party's "committee". That role was fulfilled by someone else until the administrator with will annexed was appointed. Nor is the applicant claiming to be the third party's "nearest relative". She is not claiming to be a member of the third party's family. She is apparently married to someone else. In any case, I agree with my predecessor's conclusion, in Order No. 31-1995, that a "nearest relative" cannot rely on s. 3(b) where a "personal representative" has been appointed.

[9] This is such a case, since the administrator with will annexed is the third party's personal representative. The applicant is not the third party's "personal representative". The PGT notes that the applicant's power of attorney, if it existed, expired under the terms of s. 19 of the *Patients Property Act* with the brother's appointment as committee. Under s. 24 of the *Patients Property Act*, the brother's appointment as committee expired with the appointment of the administrator, who the PGT says is now the deceased third party's personal representative. The *Policy and Procedures Manual* published by the Ministry of Management Services interprets the term "personal representative" as including the administrator of an estate. I therefore agree that the administrator of an estate is an individual's personal representative.

[10] Accordingly, the applicant is not the third party's nearest relative, personal representative or committee. She is therefore not entitled to exercise the third party's right of access to his personal information under s. 3(b) or (c) of the Regulation. Since the Regulation does not apply, it follows that the applicant's request must be assessed against s. 22 of the Act. It also follows, therefore, that I need not consider whether, in any case, the applicant has made the request in her own interest and not the third party's. A number of decisions, including Order No. 31-1995 and Order 00-11, [2000] B.C.I.P.C.D. No. 12, confirm that an applicant who is acting in her or his own interests, not those of an individual whose personal information is sought, cannot rely on s. 3 of the Regulation.

[11] **3.3 Nature of the Disputed Information** – Section 22 requires a public body to withhold personal information where its disclosure would be an unreasonable invasion of a third party's privacy. For convenience, I reproduce the relevant parts of s. 22 below:

> **Disclosure harmful to personal privacy**
>
> **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 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,
>
> …
>
> (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
>
> …
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, … .

[12] I have discussed the application of s. 22 a number of times – see, for example, paras. 22-24 of Order 01-53, [2001] B.C.I.P.C.D. No. 56 – and will not repeat that discussion here. I have applied those principles in this case.

[13] As the applicant described it in her initial submission, she is seeking a "complete accounting and true inventory" of the third party's assets. The PGT characterizes the information as being "clearly related to" the third party's financial history, and adds that it is "to a lesser extent" the financial history of the third party's committee.

[14] The records in dispute consist of a series of PGT records, mainly financial statements, related to the PGT's passing of the accounts of the third party's estate, together with supporting documents on various expenses incurred in administering the estate. I agree with the PGT's characterization of the information in the records. In my view, the information falls squarely within s. 22(3)(f) of the Act and its disclosure is therefore presumed to be an unreasonable invasion of the privacy of the third party and, to some extent, of his brother as committee.

Privacy rights of the deceased

[15] A few words are in order, before I turn to the relevant circumstances as required by s. 22(2), about the privacy rights of deceased individuals. It is by now very clear that the Act can protect the privacy of a deceased individual. In addition to Order 00-11, see Order No. 27-1994, [1994] B.C.I.P.C.D. No. 30, where Commissioner Flaherty said the following, at p. 8:

> Although it is not determinative of my decision, I am more persuaded by the Ministry's position with respect to privacy rights for deceased persons under the Act. In the Ministry's view, "the Act makes it quite clear that privacy rights do not automatically end when a person dies." Schedule 1 of the Act defines personal information as "recorded information about an identifiable individual...." But there is no requirement in the Act for such an identifiable individual to be alive. Moreover, the Freedom of Information and Protection of Privacy Act Regulation [B.C. Reg.] 323/93, section 3(c), establishes that the access to information and corrections [*sic*] rights of a "deceased individual" may be exercised by "the deceased's nearest relative or personal representative." The Ministry argues that "[t]his regulation would not be necessary if deceased persons had no privacy rights, as anyone could then access their personal information." Finally, section 36 of the Act "specifically allows the B.C. Archives and Records Services, or the archives of a public body, to disclose personal information for an archival or historical purpose, if the information is about someone who has been dead for twenty or more years."
>
> The Ministry concluded as follows with respect to the privacy rights of the deceased:
>
> > As these legislative provisions clearly limit the circumstances in which a deceased person's personal information can be disclosed, there is no merit in the argument that deceased persons are not entitled to privacy protection. The privacy rights of deceased individuals are protected both to preserve the deceased's privacy as well as that of family and friends who survive the deceased. (Argument for the Ministry, p. 11)
>
> I agree with the Ministry's conclusion. However, the fact of death may still be a relevant factor for a public body to consider when determining whether a potential disclosure of personal information about a deceased person is an unreasonable invasion of privacy.

[16] As the discussion below indicates, I also agree that the death of an individual can be a relevant circumstance under s. 22.

[17] **3.4 Relevant Circumstances** – The applicant and the public body did not specifically address parts of s. 22(2) in their submissions. However, it is apparent that portions of their submissions relate to whether ss. 22(2)(a) and (f) apply in this case.

Scrutiny of the public body

[18] The applicant devotes much of her submissions to her objections to the fact that the courts appointed others, instead of herself, to deal with the third party's affairs (first as committee and then as administrator of the third party's estate). She seems to have expected some kind of legal involvement in the third party's affairs, as well as a benefit or compensation from the third party or his estate, both before and after his death. She claims the inventory of assets the brother provided in his petition to be appointed committee, and which she received in a court proceeding, is not a full accounting of the third party's assets. The basis for this allegation, and for her general concerns and expectations, is not clear from the materials before me. They are, in any case, issues over which I have no jurisdiction.

[19] By contrast, the applicant's request is apparently motivated by the brother's alleged

> … committeeship and skullduggery to deny, damage, destroy, misuse and bury all probate-free assets and property of [the third party] and [the applicant's] estate under the watchful eye of the Public Trustee of British Columbia.

[20] I infer from this, and other portions of the applicant's submissions, that she believes disclosure of the disputed records would subject to scrutiny the activities of PGT and the committee in managing the third party's financial affairs.

[21] The PGT said it is responsible for scrutinizing a committee's actions when passing accounts and, if it cannot pass accounts, the courts resolve the matter. Only the PGT and the courts are able to sanction a committee in the performance of his or her duties as committee, it argues. The PGT argues there is no benefit to the third party or his family in this case for the committee to provide the accounts to the applicant, nor is it in their best interests given the applicant's litigious nature. It does not explain in what way the applicant is litigious or provide proof of this. Nor does it say how the applicant's supposedly litigious nature is relevant to her entitlement to the records. It appears, however, from the materials before me that the applicant is or has been involved in some kind of litigation with the PGT and the third party's family and estate and that the PGT fears that disclosure of the records would exacerbate this situation.

[22] I interpret the PGT's arguments to mean it considers the applicant's access request relates to the alleged desirability of subjecting the committee's actions, as opposed to the PGT's actions, to scrutiny. The applicant no longer has power of attorney and is neither a family member nor the third party's personal representative, it says. It is not her responsibility to scrutinize the committee, or the PGT for that matter, and s. 22(2)(a) does not apply as a result, it seems to say. Only the courts may review any alleged flaw in the appointment of the committee and administrator or the exercise of their duties under the *Patients Property Act*, it argues.

[23] The applicant provided no details as to what she believes the committee or the PGT may have done to mismanage the third party's affairs nor is any such impropriety

obvious on the face of the records in dispute. To the contrary, there is evidence that the Court ordered the applicant to return the third party's bone china set and to compensate the estate for the value of the third party's car, which she had transferred to herself. Section 22(2)(a) deals with subjecting the actions of a public body to scrutiny, not those of an individual who has had dealings with that public body or has acted in an official capacity other than as a representative of the public body. In any case, disclosure of the third parties' financial information in this case would not, in my view, promote scrutiny of the PGT, such that I find that s. 22(2)(a) is thus not relevant here. I made similar findings in Order 02-03, [2002] B.C.I.P.C.D. No. 3, and Order 00-02, [2000] B.C.I.P.C.D. No. 2.

Supplied in confidence

[24] The PGT says a committee has a duty to act in the best interests of the patient and maintain confidentiality of the patient's information. It says that a committee supplies accounts of the patient's finances in confidence, express or implied, to the PGT so that the PGT may pass the accounts. No one else is entitled to this information, it says, and there is no expectation that the committee will provide accounts even to family members. People would be unwilling to act as committees if their actions were subject to the scrutiny of others, the PGT argues.

[25] The PGT has not pointed me to any provision of the *Patients Property Act* or any other legislation that imposes confidentiality on a committee or the PGT. Nor could I find any support for this argument in the *Patients Property Act* or the PGT's own legislation. The PGT provided no policies or evidence of its practices in this regard. Nor was there any evidence from a PGT staff member or the committee himself on this aspect of the case. The PGT has provided me with an extract from a legal publication, "Mental Disability and the Law in Canada", by Gerald B. Robertson, which states that there is a duty of confidentiality on the property guardian, but this is of (at best) limited assistance. The applicant does not address the confidentiality circumstance at all.

[26] The PGT's submission on confidentialty is not as strong as it could be. Nonetheless, I accept that committees submit accounts, impliedly at least, to the PGT in confidence, especially given the nature of the information they are providing. I therefore find that s. 22(2)(f) is a relevant circumstance and that it favours withholding the information.

Relevance of the third party's death

[27] The disputed information relates to the third party's finances for a few months before and after his death. It is therefore appropriate to consider if his death is a relevant circumstance. As appears from the above discussion, my predecessor dealt with this issue in a number of orders and found that death is a relevant circumstance, with privacy rights diminishing over time. See, for example, Order 27-1994. I agree, as Order 00-11 indicates. In that case, I found that s. 22 did not apply to all of the information about the deceased third party, the applicant's sister. The applicant in Order 00-11 was already

aware of some of the information, which I considered to be a relevant factor favouring disclosure.

[28] The applicant in this case has not provided me with any evidence that she is familiar with the third party's financial information, much less the brother's. In addition, the third party died only a short time before the request. I do not consider that his privacy rights diminished much, if at all, in those few months. In this case, therefore, the fact that the third party's death was relatively recent favours the finding that the third party's death has not diminished his privacy rights appreciably at all. I find that the third party's death does not favour disclosing the information.

Is the applicant entitled to access?

[29] The applicant has not, in my view, met the burden of proving that the personal information in dispute can be disclosed without unreasonably invading third-party personal privacy. I find that the PGT is required by s. 22 to withhold the requested information.

4.0 CONCLUSION

[30] For the reasons given above, under s. 58(2)(c) of the Act, I order the PGT to refuse the applicant access to the requested information.

June 5, 2002

ORIGINAL SIGNED BY

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David Loukidelis
Information and Privacy Commissioner
for British Columbia