



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

Order 03-12

PUBLIC GUARDIAN AND TRUSTEE OF BRITISH COLUMBIA

Charmaine Lowe, Adjudicator
March 31, 2003

Quicklaw Cite: [2003] B.C.I.P.C.D. No. 12
Document URL: <http://www.oipc.bc.ca/orders/Order03-12.pdf>
Office URL: <http://www.oipc.bc.ca>
ISSN 1198-6182

Summary: Applicant requested a copy of any information in the custody or control of the PGT concerning herself, including allegations made against her with respect to her mother. The PGT provided some information to the applicant but denied access to a letter and other information it received in confidence from a third party. The PGT was required to withhold the records, as disclosure would reveal the identity of the third party. However, because some of the information supplied in confidence was personal information about the applicant, the PGT is ordered to comply with its s. 22(5) duty to provide the applicant with a summary of her own personal information.

Key Words: personal information – unreasonable invasion of privacy – supplied in confidence – summary.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(2)(f), 22(3)(a), 22(5), s. 79; *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93, s. 3; *Public Guardian and Trustee Act*, ss. 17-19; *Adult Guardianship Act*, ss. 46-48 and 62.

Authorities Considered: B.C.: Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

1.0 INTRODUCTION

[1] This case stems from a referral made to the Public Guardian and Trustee of British Columbia (“PGT”) by a third party concerning the possible abuse or mismanagement of an adult woman’s financial affairs by her daughter (the “applicant” in this case). The applicant apparently has power of attorney over her mother’s affairs.

(Although no direct evidence of this was presented in this inquiry, the submissions of all parties seem to accept this claim).

[2] As a result of the third party's referral, the PGT apparently initiated an investigation into the applicant's management of her mother's affairs. To say that the applicant is unhappy about the referral and the manner in which the PGT investigated the referral would be a gross understatement. Most of her submission is consumed with how the investigation has affected her and her family's lives and their desire for "closure".

[3] On January 15, 2002, the applicant requested access to any information the PGT had in its custody or control concerning her, including allegations against her with respect to her mother. On February 15, 2002, the PGT responded by providing the applicant with some information from her mother's file but withholding a specific letter, dated August 23, 2001, under s. 22(2)(f) of the *Freedom of Information and Protection of Privacy Act* ("Act"), on the grounds that the letter contained the personal information of third parties and had been supplied in confidence to the PGT. Initially, the PGT also relied on s. 22(2)(g) to withhold the letter but, during mediation, abandoned its reliance on this section.

[4] On March 15, 2002, the applicant requested a review of the PGT's decision. Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[5] The only issue before me in this inquiry 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), the applicant bears the burden of establishing that disclosure of the information would not unreasonably invade third-party personal privacy. Where personal information of the applicant is involved, however, the PGT has the burden of proof under s. 57(1). See, for example, Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43.

3.0 DISCUSSION

[6] **3.1 Records in Dispute** – The records in dispute consist of a PGT Services to Adults Referral Form and attachments. One of the attachments is the August 23, 2001 letter referred to in the PGT's decision letter of February 15, 2002.

[7] The referral form, a blank copy of which the PGT included with its initial submission, contains the following introduction:

It is appropriate to refer an individual (over the age of 19 years) to the Public Guardian and Trustee of British Columbia if there is:

- (a) concern about the individual's mental capability to manage financial and legal affairs,

- (b) if there is a specific, urgent or immediate need, and
- (c) if no other suitable person (family or friend) has the authority or is willing and able to act on the individual's behalf.

[8] In this case, a third party (to whom I will refer as the “reporter”) referred a concern about the applicant's mother to the PGT. As such, the information contained on the three-page form is mostly about the applicant's mother. As the applicant's mother was living with the applicant at the time of the referral, however, the form also includes references to the applicant. Finally, the form contains information about the reporter as the person making the referral, as well as contact information about other third parties.

[9] Attached to the referral form is the August 23, 2001 letter, mentioned above. This letter contains more detailed information of the reporter's concerns about the welfare of the applicant's mother and, like the referral form, contains a mixture of the mother's information, the reporter's information and the applicant's information.

[10] There is another attachment to the referral form as well as three attachments to the letter itself (seven pages in total). To describe the specific content of these attachments might allow the applicant to identify the source of the referral so I will say only that none of the attachments to the letter refers to the applicant in any way. The second attachment to the referral form does, however, contain personal information about the applicant.

[11] The final record that the PGT identifies as being in dispute is another form, also three pages in length, which contains personal information about the applicant's mother only. The form does not appear to have been submitted by the reporter nor does it contain any information about, or allegations against, the applicant. It is, therefore, unclear how this form is responsive to the applicant's request for “any and all information, allegations or otherwise that you may have in your custody or control regarding myself [...], either allegations against me personally or in respect to my mother [...]”. Certainly, the applicant's submissions, which focus only on the allegations made against her and the source of those allegations, do not refer to such information as being of interest to her. However, as the PGT has identified the record as being in dispute in this inquiry, I include it here and address it below.

[12] **3.2 Whose Personal Information Is This?** – As stated above, the information in dispute is a mixture of the reporter's personal information, the mother's personal information and the applicant's personal information. While the reporter supplied the information, the concerns raised were about the applicant's mother and, by extension, the applicant, since the applicant's mother was at the time living with, and under the care of, the applicant.

[13] In stating “that *some* of the information in question is not the information of the applicant” [emphasis added] (p. 2, initial submission), the PGT appears to acknowledge that other information *is* the applicant's. The PGT argues – without explaining why – that s. 22 applies to all of the information, even the applicant's. It also submits “that a summary of the information as contemplated by section 22(5) of the Act is not possible

to prepare without disclosing third party information” (p. 2, initial submission), but again the PGT does not explain why.

[14] With respect to the reporter’s personal information, the PGT argues that this information was supplied in confidence and, as such, s. 22(2)(f) supports its decision to withhold the information.

[15] With respect to the information about the applicant’s mother, the PGT argues the following:

Regulation [*sic*] 3 of FOIPPA states that information belonging to an incapable adult can be accessed by their committee. There is no authority for an attorney, appointed under a power of attorney to access the donor’s information. (p. 2, initial submission)

Application of s. 3 of the FOI Regulation

[16] From the preceding quote, it appears that the PGT is arguing that s. 3 of the *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93 (“FOI Regulation”) prevents the applicant from accessing her mother’s information, as only a committee has this right and the applicant is not her mother’s committee. This, however, mis-states the section somewhat, since it does not state who can access another individual’s information, but rather who can act on behalf of another individual, including an individual who has a committee, for the purposes of exercising that individual’s access rights. Section 3 of the FOI Regulation reads 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:
 - (a) on behalf of an individual under 19 years of age, by the individual’s parent or guardian if the individual is incapable of exercising those rights;
 - (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.

[17] In this case, I agree with the PGT that the applicant has not produced evidence that she has the right to act on behalf of her mother for the purposes of exercising her mother’s access to information rights under the Act. I do not agree, however, that this means that the applicant automatically has no right of access to any of her mother’s personal information. The applicant may still be entitled to receive her mother’s personal information if s. 22 does not prevent its disclosure to her.

[18] **3.3 Application of Section 22** – The Commissioner has discussed the application of s. 22 in a number of orders (see, for example, Order 01-53 [2001] B.C.I.P.C.D. No. 55). While I will not repeat that discussion here, I have followed the same approach for applying s. 22 in this case.

[19] The PGT says that s. 22 applies to the disputed records in their entirety. In making this argument, it relies entirely on the relevant circumstance set out in s. 22(2)(f). It also says that it is not possible to create a summary of the records under s. 22(5) without disclosing third-party information. The relevant parts of s. 22 read as follows:

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 relevant circumstances, including whether
- ...
- (f) the personal information has been supplied in confidence, ...
- ...
- (5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.
-

[20] Neither of the parties argues that s. 22(3) or 22(4) applies and for the most part I agree. However, with respect to the three-page form (which I described above as containing the personal information of the applicant's mother only and which, in my opinion, is of questionable relevance to the applicant's request), I find that s. 22(3)(a) applies.

[21] Section 22(3)(a) reads as follows:

- 22(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,
- ...

[22] Even though the PGT did not apply s. 22(3)(a) to the information on this form and, in fact, did not directly address this form at all in its submission, including the circumstances under which the information on this form was collected, I find that the

information on this form (health information about the mother) speaks for itself and that it clearly falls under s. 22(3)(a).

[23] Having found that s. 22(4) applies to none of the records in dispute and that s. 22(3) applies to only one of the records in dispute, I will now consider whether any relevant circumstances apply. I will, in particular, consider s. 22(2)(f), which the PGT claims applies to all of the information in dispute.

PGT's submissions on confidential supply

[24] The PGT argues that s. 22(2)(f) of the Act applies to, and precludes the disclosure of, all the information in dispute. I can summarize its submissions on confidential supply as follows:

1. The PGT argues that, while “not conclusive of the issue of release...it is relevant to the determination of release that the material in question expressly stated that it was being submitted in confidence” (p. 3, initial submission).
2. On June 19, 2002, Monica Uribe, Regional Consultant with the PGT, spoke to the reporter who confirmed that all information was submitted on a strictly confidential basis (para. 3, Uribe affidavit).
3. The PGT is mandated to receive reports of abuse and it is in the best interests of allegedly incapable adults that the public be encouraged to report abuse or neglect. To foster communication, the PGT provides an atmosphere of confidentiality, which is developed through staff training and is reflected in its various policies and documents. (p. 4, initial submission). According to the affidavit of Kimberley Azyan, Director of Services to Adults, all Adult Services staff are trained to treat any personal information received by the office in a confidential manner and to ensure that personal information of allegedly incapable adults and callers reporting suspected abuse or neglect is not released to persons not entitled to receive this information (para. 3, Azyan affidavit). Attached to her affidavit are copies of the policies and copies of forms and letter templates used by the PGT both to collect and provide personal information related to its investigations.
4. Section 46(2) of the *Adult Guardianship Act* (“AGA”) provides that the identity of a person who reports abuse is protected. The relevant parts of s. 46 of the AGA are produced below:

- 46 (1) Anyone who has information indicating that an adult
- (a) is abused or neglected, and
- (b) is unable, for any of the reasons mentioned in section 44,
to seek support and assistance,
- may report the circumstances to a designated agency

- (2) A person must not disclose or be compelled to disclose the identity of a person who makes a report under this section.

The PGT acknowledges that the report in this case was not made to a designated agency under the AGA but submits that “reports of abuse or neglect may be reported to a designated agency under the *Adult Guardianship Act* or the PGT. If the matter is primarily financial in nature, the Public Guardian and Trustee assumes the investigation” (para. 6, Azyan affidavit). The PGT argues that it should make no difference to the privacy rights of the reporter that the complaint in this case was made directly to the PGT instead of to a designated agency and then transferred to the PGT on the basis that it has greater expertise or statutory authority to investigate. The PGT submits “that by implication, the same protection of identity applies to the reports received directly by the PGT” (p. 5, initial submission).

5. Non-disclosure is supported by s. 62(4) of the AGA which reads as follows:

62 (4) The Public Guardian and Trustee must not disclose information obtained under this Act except for the purposes of performing the duties, powers or functions of the Public Guardian and Trustee.

The PGT argues that, once it is in receipt of information regarding reports of abuse or neglect, either directly from the reporter or by referral from a designated agency, s. 62 of the AGA guides the release of information and it can only release information to those individuals who are assisting the PGT in performing its duties (p. 5, initial submission). It further submits that disclosure of such information “would hinder reporting of abuse or neglect of allegedly incapable adults and hamper the PGT’s ability to investigate such reports to insure the adult receives the least intrusive form of support”. (p. 6, initial submission)

The applicant’s submissions and burden of proof

[25] As previously stated, the applicant has the burden of proof in this case with respect to the personal information of a third party, which would include personal information about her mother. Unfortunately, the applicant’s initial submission dealt more with her feelings of being “persecuted” by the PGT and other agencies involved in the investigation than with the merits of this case, which addresses only access to information issues under the Act. In fact, the applicant’s only submissions on the issue of whether or not the information was supplied in confidence seem to support the PGT’s position. She states, for example, that she “fully understands the PGT’s position regarding confidentiality of their sources” and “would also expect the same assurance if I was making a complaint”. She then goes on to suggest that it should not apply in this case because of how badly, in her opinion, the PGT handled the investigation. In the applicant’s opinion, the PGT should “wholly and thoroughly investigate where the concern originated” before “jumping to conclusions”.

[26] However, as the PGT states in its reply submission, this inquiry is not about the manner in which the PGT conducts its investigations. While the applicant is clearly upset by the investigation, this is not the forum for such a complaint and it has no bearing on whether or not the personal information in dispute in this case was submitted in confidence. Furthermore, with respect to the argument and evidence put forth by the PGT on this issue, the applicant chose to make no reply submission, a decision that does not assist the applicant in meeting her burden of proof.

Application of s. 22(2)(f) to records in dispute

[27] Based on my review of the PGT's submissions, the records in dispute and the absence of any rebuttal from the applicant on these points, I find that the PGT has shown that s. 22(2)(f) applies to at least some of the information in dispute and in particular to any information that would identify the reporter.

[28] While none of the factors raised by the PGT was determinative of the issue on its own, I find, that taken as whole, they indicate an intention on the reporter's part to submit the personal information in confidence and, on the PGT's part, to accept at least part of the information in confidence. The August 23, 2001 letter contains an explicit request for confidentiality and, since this letter was attached to the PGT Services to Adults Referral form, I agree that it is reasonable to assume that the reporter intended this request for confidentiality to apply to all the information the reporter submitted to the PGT. I also accept that, given the PGT's mandate to investigate reports of abuse, the legislation it acts under and the policies and practices it follows, the PGT does accept referrals and other personal information related to its investigations in confidence where necessary.

[29] However, it is not clear to me that the applicability of s. 22(2)(f) precludes the disclosure of any information to the applicant. The PGT bears the burden of proving that the applicant is not entitled to receive her own personal information and nothing in its submissions adequately addresses this issue.

[30] With respect to the PGT's reliance on ss. 46(2) and 62(4) of the AGA, even if I were to put aside the fact that the report in this case was not made to a designated agency under the AGA, s. 46(2) only applies to the "identity of a person who makes a report" – which, as stated above, I have already found can be protected. Moreover, neither section contains a "notwithstanding clause" that expressly provides that it applies despite the access provisions of the Act. In the absence of any such clause, s. 79 of the Act, which reads as follows, ensures that the Act's provisions prevail:

Relationship of Act to other Acts

79 If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

[31] Furthermore, with respect to s. 62(4) specifically, it might be argued that there is no inconsistency or conflict, as one of the PGT's duties is to respond to access requests in compliance with the Act. One of the purposes of the Act is to give individuals a right of access to personal information about themselves, subject to specific and limited exceptions. As Kimberley Azyan states in her affidavit: "If callers request that their information be kept confidential, staff advise the caller that the PGT will protect privacy under the provisions of the *Freedom of Information and Protection of Privacy Act*" (para. 8, Azyan affidavit). In other words, the privacy rights of a reporter must be balanced against the access rights of other individuals.

[32] The PGT's own policies and procedures appear to reflect this balance. As an example, the PGT's policy on Case File Documentation states that, "under the *Freedom of Information and Protection of Privacy Act*, clients can access their own information". I would assume, given the PGT's arguments on the need to provide an atmosphere of confidentiality in order to encourage reports of suspected abuse or neglect, that at least some personal information about clients is submitted in confidence by other parties, yet the PGT does not qualify its access to information policy by adding "unless that information is submitted in confidence". Furthermore, the PGT's policy on General Investigations states, and the affidavit of Kimberley Azyan confirms, that upon receiving a report that warrants an investigation, the PGT notifies the allegedly incapable adult and "significant persons involved with the adult" about the complaint and that the PGT is making inquiries. The PGT attaches to its submissions a template of the letter it normally sends to an individual who has power of attorney over an adult's affairs when it has received a complaint. The PGT does not say that it sent such a letter to the applicant, who allegedly has power of attorney over her mother's affairs. However, it would appear that this is the normal procedure and the applicant's submissions state that she was notified by the PGT that concerns, mostly of a financial nature, had been raised about her management of her mother's affairs. When an investigation is complete, the PGT's policy states that it notifies the referring party, the adult and other involved parties of the outcome of the investigation, "following FOI guidelines" (p. 8, exhibit B, Azyan affidavit).

[33] It would seem, therefore, that the "atmosphere of confidentiality" that the PGT operates under does not, in practice, prohibit the disclosure of any information which is submitted in confidence by a reporter but exists rather to protect the identities of confidential sources of information who may, otherwise, be unwilling to report suspected abuse or neglect and to ensure that disclosure of information does not put allegedly incapable adults at risk. While there may be cases where disclosure of any information would reveal the confidential source of the information and/or unreasonably invade the personal privacy of the allegedly incapable adult (including by exposing the adult to some risk), the PGT has not proven that that is the case here. The PGT has not explained why it cannot sever or summarize the information in a manner that protects the privacy of the reporter and the mother but provides the applicant with the substance of the allegations against her.

Unreasonable invasion of third party privacy

[34] As stated above, I find that s. 22(3)(a) applies to the three-page form which contains the personal information of the applicant's mother only, and which does not appear to be responsive to the applicant's request in any event. The applicant has not rebutted the presumed unreasonable invasion of privacy found in s. 22(3)(a) as it relates to her mother's personal information on this form, possibly because she was not aware that this record was in dispute in this inquiry. Certainly, the PGT made no argument on this record. It is also possible that the applicant made no argument on this record because accessing her mother's personal information does not appear to be her main objective in making the access request. Nothing in the applicant's initial access request or subsequent submission in this inquiry has indicated a desire to access her mother's personal information, either as her mother's agent or as a third party for her own purposes. Rather, her stated objective is to access the allegations made against her. Her mother's personal information would only be involved to the extent that it related to allegations made against the applicant. As I stated previously, the aforementioned form does not contain allegations against the applicant and, in my opinion, is not responsive to the applicant's request. However, even if it was responsive and of interest to the applicant, I find that the applicant has not overcome the presumed unreasonable invasion of privacy afforded by s. 22 (3)(a) with respect to this form.

[35] With respect to the records that do contain information submitted by the reporter, I find that s. 22(2)(f) is a relevant circumstance in this case. As the applicant and the PGT raised no other relevant circumstances and indeed I find that no other relevant circumstances apply, I find that the applicant has not established that disclosure of the reporter's information would not be an unreasonable invasion of the reporter's personal privacy.

[36] Much of the information in the Services to Adult Referral Form and attachments, including the August 23, 2001 letter, is either the personal information of the reporter or information that could reasonably identify the reporter and is intertwined with the allegations against the applicant. I do not, therefore, think it is practicable to sever the records under s. 4(2) of the Act. With respect to the referral form, specifically, it is handwritten and, although the PGT does not say so, I assume that it is the reporter's handwriting. Because the handwriting may reveal the identity of the reporter, I cannot order release of information which I might otherwise find the applicant was entitled to and could be severed (on pp. 1 and 3 of the form specifically). With respect to the first attachment to the form – the August 23, 2001 letter – although it is typewritten, I find that the reporter's own information is so intertwined with the statements about the applicant, that severing the letter would not be practicable. With respect to the second attachment to the form, I find that release of any part of it would identify the reporter, as would release of any of the three attachments to the August 23, 2001 letter.

[37] As it is not possible to release any part of the records in dispute without identifying, and therefore unreasonably invading the privacy of, the reporter, I find that the PGT is required to withhold the applicant's own personal information in these records.

Preparing a summary

[38] However, s. 22(5) of the Act, which I quote above, requires that, where an applicant is denied access to her personal information because it was supplied in confidence, the public body give the applicant a summary of the information, unless the summary cannot be prepared without disclosing the identity of the third party who supplied the personal information. The PGT argues that it is not possible to prepare a summary without disclosing third-party information but it does not explain why this is the case.

[39] While I agree that the three attachments to the August 23, 2001 letter and the second attachment to the Referral Form cannot be summarized without identifying the source of the information, I believe it is possible to create a short and general summary of some of the information about the applicant contained on pages 1 and 3 of the referral form and in the body of the August 23, 2001 letter without revealing the identity of the reporter.

[40] There may be statements made about the applicant or about the applicant's relationship to, and care of, her mother which could only have been provided by the reporter, and in these cases, it would be impossible to include these statements in the summary, even in an anonymized form, without revealing the reporter's identity. Still other portions of the withheld information relate entirely to the reporter and other third parties and the applicant is not entitled to this information, either directly or through a summary under s. 22(5). Such a summary will necessarily include references to the applicant's mother, where the statements about the applicant refer to her relationship to, and care of, her mother. Where such information is known to the applicant or attributable to the applicant, there is no unreasonable invasion of the mother's privacy in disclosure.

[41] Given these qualifications, the summary will, out of necessity, not be a complete accounting of all allegations and statements made against the applicant. The summary I envision will likely be short, probably four or five lines in length, and general in nature. It may, in fact, not provide the applicant with much more information than she has already received through the investigation process. However, absent any evidence on what information the applicant has already received about the referral and the allegations, I cannot find that PGT has met its duty to provide a summary.

[42] Subject to the above qualifications about the summary, I find that s. 22(5) requires the PGT to provide the applicant with a summary of her personal information in the withheld records.

4.0 CONCLUSION

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

1. Under s. 58(2)(c) of the Act, I find that the PGT is required by s. 22 of the Act to withhold the information in dispute; and

2. Under s. 58(3)(a) of the Act, I require the PGT to perform its duty under s. 22(5) to, as provided in that section, provide the applicant with a summary of the applicant's personal information in the disputed records.

March 31, 2003

ORIGINAL SIGNED BY

Charmaine Lowe
Adjudicator