Order F07-21

PUBLIC GUARDIAN AND TRUSTEE OF BRITISH COLUMBIA

Justine Austin-Olsen, Adjudicator

November 6, 2007

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Summary: The applicant may not make a request for access to her deceased's mother's records held by the PGT because the PGT is still the committee. As long as an individual has a committee, then, deceased or not, s. 3(b) of the Regulation applies, and only the PGT may exercise the personal information rights accorded under FIPPA on behalf of the individual. The PGT is required to refuse the applicant access to the records except for those portions which contain the personal information of the applicant and the disclosure of which would not unreasonably invade the personal privacy of a third party.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22, 79; *Freedom of Information and Protection of Privacy Regulation*, ss. 3(b) and (c); *Interpretation Act*, s. 1; *Patients Property Act*, ss. 15, 18, 21, 22, 24(1).

Authorities Considered: B.C.: Order No. 31-1995, [1995] B.C.I.P.C.D. No. 2; Order No. 96-1996, [1996] B.C.I.P.C.D. No. 22; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-26, [2002] B.C.I.P.C.D. No. 26; Order 02-44, [2002] B.C.I.P.C.D. No. 44; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order 03-07, [2003] B.C.I.P.C.D. No. 7; Order 04-12, [2004] B.C.I.P.C.D. No. 12; Order F05-18, [2005] B.C.I.P.C.D. No. 26.

Cases Considered: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, [1992] 1 S.C.J. No. 1; *Re Langford*, [2000] B.C.J. No. 900, 2000 BCSC 721.

Authors Considered: R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994).

1.0 INTRODUCTION

[1] This inquiry relates to a decision by the Public Guardian and Trustee for British Columbia (the "PGT") to refuse the applicant access to records it holds that relate to the applicant's deceased mother ("R.W.").

[2] The PGT began acting as committee of the estate of R.W. after she was certified incompetent in January 2000. R.W. died on February 24, 2005. On July 11, 2005, the applicant through her counsel requested access under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the PGT's file as it related to R.W. (the "records in dispute"). The applicant advised the PGT that she was making this request under the authority of s. 3(c) of the *Freedom of Information and Protection of Privacy Regulation* ("Regulation"), which permits the "nearest relative or personal representative" to access records "on behalf of" a deceased person.

[3] R.W. had two children, the applicant and H.W. The applicant told the PGT that, in her view, previous orders of this Office had interpreted the term "nearest relative" to include any of the deceased's children who had reached the age of majority and gave siblings an independent and equal right to request access to records of the deceased person.[1] The applicant advised the PGT that the reason she was seeking access to her mother's records was: [2]

> …to determine whether [R.W.] possessed testamentary capacity and was not subject to undue influence at the time at which the Will dated December 23, 2000 was executed. A reading of the Public Guardian's file will aid in determining the validity of the Will…

[4] The will executed on December 23, 2000 (the "2000 Will"), to which the applicant refers in her letter, names H.W. as the executor and H.W. and his children as beneficiaries; it also includes a statement by R.W. explaining her wish that the applicant receive no part of her estate.[3] In her letter to the PGT, the applicant included a copy of a previous will executed by R.W. on May 14, 1999 (the "1999 Will"). The 1999 Will appoints CIBC as the executor of R.W.'s estate and names the applicant, H.W. and H.W.'s two children as beneficiaries.

[5] In her letter to the PGT, the applicant said that since there was a dispute over the validity of the 2000 Will, she was acting on behalf of the deceased in

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[1] Letter from the applicant to the PGT dated July 11, 2005, at p.1.
[2] Letter from the applicant to the PGT dated July 11, 2005, at p. 2.
[3] In her initial submission, the applicant also refers to a third Will, executed September 17, 1993, which names R.W.'s husband P.W. as executor and trustee, with H.W. to act in P.W.'s place in the event P.W. predeceased her (which he did); para. 6, applicant's initial submission and Exhibit A attached to the affidavit of Alison Carson.

requesting access to the records, as required by s. 3(c) of the Regulation. According to the applicant:[4]

> …[i]t is in [R.W.]'s interest that her estate be probated in accordance with a valid Will, thereby respecting her intentions as to the disposal of her property upon her death.

[6] The PGT denied the applicant access to the records she requested. In the letter outlining its decision, the PGT indicated:[5]

> As you know, neither Will has been granted Letters Probate, and therefore the personal representative (executor) has not been confirmed by the court.
>
> The second Will provides nothing for [the applicant]. The Public Guardian and Trustee does not accept that [the applicant] is acting on behalf of her deceased mother, but rather is acting in her own interests. The records in question contain personal, medical and financial information about [R.W.] and disclosure of these records is presumed to be an unreasonable invasion of personal privacy under section 22 of the Act.

[7] The PGT went on to advise the applicant that it was not prepared to release the records without the consent of the "other possible executor," H.W., or an order from the Court.[6]

[8] The applicant asked this Office to review the PGT's decision. Attempts to settle the matter through mediation were unsuccessful and so a written inquiry was held under Part 5 of FIPPA. Both the applicant and the PGT made submissions addressing the issues in dispute. H.W. was notified of the inquiry and invited to make submissions, but declined to do so.

2.0 ISSUES

[9] The Notice of Inquiry described the issues as follows:

> …[W]hether the applicant may exercise the access rights of her deceased mother in accordance with Regulation 3(c) of the Act with respect to the deceased's records held by the public body and, if not, whether the public body is required to refuse access under s. 22 of the Act.

[10] In the course of making its submissions in this inquiry, the PGT referred to s. 24(1)(a) of the *Patients Property Act*,[7] which provides:

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[4] Letter from the applicant to the PGT dated July 11, 2005, at p. 2.
[5] Letter from the PGT to the applicant dated August 23, 2005, at p.1.
[6] Letter from the PGT to the applicant dated August 23, 2005, at p. 2.
[7] PGT's initial submission, p. 3.

> 24(1) Subject to subsection (2), on the death of a patient and until letters probate of the will or letters of administration of the estate of the patient are granted and notice in writing of the grant is served on the committee, the committee of the patient
>
> (a) continues to have the rights, powers, duties and privileges that the committee would have had if the patient had not died, and
>
> (b) has the powers of an executor of the last will and testament of the administrator of the estate of the patient.

[11] Given this provision of the *Patients Property Act*, I requested further submissions from the parties in this inquiry in the following terms:[8]

> Specifically, I would like the parties to provide argument on how sections 3(b) and (c) of the [Regulation] should be interpreted in light of the continuing powers conferred on a committee by s. 24(1)(a) of the *Patients Property Act*.

[12] The PGT and the applicant both provided further submissions as requested. The third party, H.W., was again notified and given the opportunity to participate, but declined to do so.

[13] The issues to be decided in this inquiry are therefore as follows:

1. Is the applicant entitled by s. 3 of the Regulation to exercise the right to access records held by the PGT that contain the personal information of R.W.?

2. If not, is the PGT required by s. 22 of FIPPA to refuse the applicant access to the records?

3.0 DISCUSSION

[14] **3.1 Who can act for the deceased under s. 3 of the Regulation**—The relevant portions of s. 3 of the Regulation read as follows:

> ***Who can act for young people and others***
>
> 3 The right to access a record under section 4 of the Act, the right to request correction of personal information under section 29 of the Act or the right to consent to disclosure of personal information under section 33 of the Act may be exercised as follows:
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> …
>
> (b) on behalf of an individual who has a committee, by the individual's committee;

[8] Adjudicator's letter to the parties dated April 25, 2007.

> (c) on behalf of a deceased individual, by the deceased's nearest relative or personal representative.

[15] One of the key phrases in both ss. 3(b) and (c) of the Regulation is that the request for access to records must be made "on behalf of" the other individual. If the request is not made on behalf of that individual, then the applicant's request under FIPPA is treated as if it were a request for access to the personal information of a third party. That is precisely what occurred in this case when the PGT, after rejecting the applicant's request purportedly made under the authority of s. 3(c), denied her access to the records containing R.W.'s personal information under s. 22 of FIPPA.

The applicant's position

[16] The thrust of the applicant's argument in this inquiry is that the PGT erred in its determination that she was acting in her own interest, rather than her mother's interest, in making the access request.[9] The applicant admits that she stands to benefit under the 1999 Will as opposed to the 2000 Will. However, she says the PGT is wrong to assume that this in itself precludes her from acting under s. 3(c).[10] The applicant cites two orders in support of her contention, Order 03-07[11] and Order No. 31-1995.[12]

[17] The applicant's position is that she and H.W. each qualify as R.W.'s "nearest relative" for the purpose of s. 3(c) and so each has equal standing to make an access request "on behalf of" R.W.[13] The applicant submits that there is evidence that raises concerns about her mother's mental capacity at the time she executed the 2000 Will and so, while the applicant "may have an unavoidable economic interest in this matter," her purpose in seeking access to the records "is to ensure that her mother's true testamentary wishes are given effect."[14] As such, in making the request, she is properly acting on behalf of her mother.

The PGT's position

[18] The PGT's position is that the applicant does not meet the requirements of s. 3 of the Regulation. The essence of the PGT's argument in this case is that its decision to deny the applicant access to R.W.'s records was made in accordance with its duty as committee to make decisions in the best interests of its client.

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[9] Applicant's initial submission, at para. 15.
[10] Applicant's initial submission, at para. 20.
[11] Order 03-07, [2003] B.C.I.P.C.D. No. 7.
[12] Order 31-1995, [1995] B.C.I.P.C.D. No. 2.
[13] Applicant's initial submission, at paras. 24-31; the applicant at para. 30 quotes from Commissioner Flaherty's decision in Order No. 96-1996 in support.
[14] Applicant's initial submission, at para. 20.

[19] The PGT was appointed committee of the estate for R.W. pursuant to a Certificate of Incapability signed by a Director of Mental Health Services, which was issued in January, 2000.[15] The powers accorded to the PGT as committee are set out in the *Patients Property Act* and in the common law. These are usefully summarized by the PGT as follows:[16]

> Under Section 15 of the [*Patients Property Act*], the committee of a patient has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full and of sound and disposing mind. Section 18 requires that the committee exercise its powers for the benefit of the patient and the patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family.
>
> Under Section 21, everything done by the committee in the exercise of its powers under the [*Patients Property Act*] has the same effect with respect to all other persons as if done by the patient and the patient's family.
>
> Section 22 provides that a person other than the committee must not bring an action on behalf of the patient.
>
> Section 24(1) provides that on the death of a patient and until letters probate of the will or letters of administration of the patient's estate are granted, the committee continues to have the rights, powers, duties and privileges that the committee would have had if the patient had not died. The committee also has the powers of an executor or administrator. In other words, the committee can continue to act on behalf of the deceased and her estate until such time as a personal representative is recognized through the grant of letters probate or letters of administration.
>
> There are some limitations on these powers, as recognized in [*Re*] *Langford*. Smith J. held at para. 14 that the focus of the PPA is on the administration of the patient's estate while he or she is alive. However, Smith J. also recognized as follows at para. 17:
>
> > When a person whose estate is being administered by a committee dies, there will inevitably be a hiatus before a personal representative can be appointed. In my opinion, s. 24 of the Act was intended to fill that hiatus by authorizing the committee to continue to administer the estate in the interests of the patient's family until that time.

[20] The PGT submits that, in its view, the effect of *Langford*[17] is that, upon the death of a client, a committee is constrained to use the powers which are continued by s. 24(1) of the *Patients Property Act* to maintain the status quo pending appointment of a personal representative.[18]

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[15] PGT's initial submission, p. 4; affidavit of Kimberly Azyan, para. 2 and Exhibit "A".
[16] PGT's further submission (May 16, 2007), at pp. 1-2.
[17] *Re Langford*, [2000] B.C.J. No. 900, 2000 BCSC 721.
[18] PGT's initial submission at p. 3; further submission (May 16, 2007), at p. 2.

[21] Since the PGT is a public body, FIPPA applies to it and so it is bound to consider requests for access to information about its clients in accordance with that legislation. However, when acting as committee, the primary concern for the PGT is always to act in the best interests of the client, which may mean releasing records or information in some cases and refusing access in others: [19]

> When acting as committee of the estate for a client, the PGT staff is trained to protect the confidentiality and privacy of the client's information. Information is only released to third parties on a need to know basis and in the best interests of the client. Examples of where information would be released include the purchasing of services and goods for our client and in discussion with health care providers.
>
> If the client requests that our staff release information or discuss their personal affairs with their family or friends *and staff believe it is in the client's best interests to do so*, information may be released to family members. [emphasis added]

[22] As indicated above, the fact that a client has asked that certain information be shared with family members will not be conclusive; the PGT will still assess whether releasing the information would in fact be in the client's best interest. Among other things, the PGT will consider what the client's past practice in this regard has been.[20] This is consistent with the role of the PGT, that is, to manage the interests of the client in circumstances where the client is not capable of reliably exercising proper judgement.

[23] With respect to how the PGT handles the death of a client, Bruce Foster, Manager of the Estate Liaison Department for the PGT, gave evidence in this inquiry about the policy of the PGT with regard to a deceased client's will. According to Mr. Foster, the PGT's policy is to accept the most current will on the basis that it revokes all previous wills: [21]

> …The will is checked to ensure it meets the requirements set out in Sections 3-7 of the *Wills Act*. Provided the will meets these requirements, Estate Liaison treats the will as valid and the named executor in the will as the personal representative.
>
> The staff does not pass judgment or make decisions on the validity of a will in a matter that is possibly contested. Rather the staff provides the personal representative with the basic information required to apply for Letters Probate.

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[19] Affidavit of Kimberly Azyan, at paras. 3-4.
[20] PGT's initial submission, at p. 4.
[21] Affidavit of Bruce Foster, at paras. 3-4.

Discussion

[24] As noted above, I requested that the parties provide additional submissions on the effect s. 24(1) of the *Patients Property Act* has, if any, on the interpretation of ss. 3(b) and (c) of the Regulation. The thrust of the PGT's argument on this issue is that after a client's death, the committee fulfills the role of the personal representative, within the limits established in *Langford*, until letters probate or letters of administration are granted.[22] The PGT says that, contrary to the decision in Order 02-44, the word "or" in s. 3(c) should be interpreted disjunctively, as it was in Order No. 31-1995.[23] This interpretation, says the PGT, is consistent with the presumption of legislative coherence and construes the legislation so as to eliminate inconsistencies: [24]

> …To allow the "nearest relative" to act on behalf of the deceased where there is already a personal representative authorized to act on the deceased's behalf is contrary to the general legislative scheme governing administration of estates. The legislative scheme for administration of estates gives exclusive authority to the personal representative to act on behalf of the deceased. We would also argue that the right of the nearest relative to obtain access should be narrowly construed, given the potential for access to be used to advance personal interests regarding the estate assets rather than acting in the interests of the deceased.

[25] The applicant submits that nothing in s. 24(1) of the *Patients Property Act* detracts from, or conflicts with, the applicant's right to make a request on behalf of R.W. under s. 3(c) of the Regulation. The applicant says that R.W.'s death gave her "new standing" under s. 3(c) of the Regulation and "imposed an additional, corresponding obligation" on the PGT. The applicant says that, before R.W.'s death, the records would have been subject to s. 22 of FIPPA and suggests that "the obligations of the [PGT] would likely be different than they are in the instant matter, and the [PGT's] ability to refuse disclosure may have been greater."[25] According to the applicant:[26]

> In particular, nothing in s. 3(b) of the Regulation nor s. 24(1)(a) of the [*Patients Property Act*] operates to deny or qualify the standing granted to the Applicant by s. 3(c) of the Regulation. [Section] 3 of the Regulation as a whole is permissive and provides that certain parties may be able to access records, or consent to the disclosure of records, on behalf of an infant, an individual who has a committee, or a deceased individual. [Section] 3 does not provide the [PGT] with the authority to deny access to a party who otherwise meets the requirements set out in that section.

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[22] PGT's further submission (May 16, 2007), at p. 4.
[23] PGT's further submission (May 16, 2007), at pp. 6 and 8.
[24] PGT's further submission (May 16, 2007), at p. 9.
[25] Applicant's further submission (May 17, 2007), at paras. 7-8.
[26] Applicant's further submission (May 17, 2007), at para. 4.

[26] In essence, the applicant is saying that, since R.W. died, she now has the right to request access to records that she admits she would not have been able to get unrestricted access to when R.W. was alive. This is presumably because, prior to R.W.'s death, s. 3(b) of the Regulation would clearly have given that right to the committee, in this case the PGT.

[27] I must say that I have some difficulty accepting the applicant's suggestion that such a loss of control over the privacy of an individual's records is the intended effect of the Regulation. In my view, the intent of s. 3 of the Regulation is to ensure that the privacy of individuals is protected, and, to that end, when an individual's right to access her or his personal information is exercised by another person in circumstances where the individual is incapable of doing so, it is exercised in a manner consistent with the individual's best interests. If an individual has a committee, then s. 3(b) specifically permits the committee to act on the individual's behalf. The purpose of the Regulation and, more specifically, the overall aim of FIPPA's privacy provisions, are to provide some measure of control to individuals over how, when and to whom their personal information is disclosed. That aim is not enhanced by widening the circle of people who may claim "standing" once an individual is deceased; it simply erodes the privacy protection afforded to personal information under FIPPA.

[28] It is also not the purpose or intention of FIPPA to derogate from other legislation which is specifically intended to protect the rights and interests of vulnerable individuals. The applicant's interpretation of s. 3 of the Regulation as creating a widening sphere of individuals with "standing" places far too much emphasis on the access rights accorded under FIPPA, with no regard to the privacy protection provisions that are equally important. While there is indeed an argument to be made that a deceased person's privacy interests are somewhat lessened, the degree to which this is so will vary with the particular circumstances. In my view, however, this is a factor which has relevance in the context of assessing a matter under s. 22(2), not in establishing who may exercise personal rights on behalf of another individual under s. 3 of the Regulation.

[29] The PGT has correctly identified a conflict between Order 02-44 and Order No. 31-1995. However, in my view, it is unnecessary to revisit these previous decisions in order to resolve the interpretive issue in this case. I do not agree with the applicant's suggestion that the wording of s. 3(c) of the Regulation in effect deprives the committee of the right to act on behalf of a deceased person.[27] In my view s. 3(b) and (c) must be read together, and with s. 24(1)(a) of the *Patients Property Act* taken into account. These are reproduced below for ease of reference:

[27] PGT's further submission (May 16, 2007), at p. 7.

> 3 The right to access a record under section 4 of the Act, the right to request correction of personal information under section 29 of the Act or the right to consent to disclosure of personal information under section 33 of the Act may be exercised as follows:
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> …
>
> (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.
>
> 24(1) Subject to subsection (2), on the death of a patient and until letters probate of the will or letters of administration of the estate of the patient are granted and notice in writing of the grant is served on the committee, the committee of the patient
>
> (a) continues to have the rights, powers, duties and privileges that the committee would have had if the patient had not died, …

[30] The interpretive presumption of coherence in legislation presumes that all pieces of legislation, and their constituent parts, are intended to work together as a coherent whole.[28] The question here is how to interpret the legislative provisions set out above so they form a coherent and consistent whole. The appropriate approach was referred to by Justice La Forest in *Friends of the Oldman River Society v. Canada (Minister of Transport)*: [29]

> The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation (*Belanger v. The King* (1916), 54 S.C.R. 265), so too it cannot conflict with other Acts of Parliament (*R. & W. Paul, Ltd. v. Wheat Commission*, [1937] A.C. 139 (H.L.)), unless a statute so authorizes (*Re George Edwin Gray* (1918), 57 S.C.R. 150). *Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two*. "Inconsistency" in this context refers to a situation where two legislative enactments cannot stand together; see *Daniels v. White*, [1968] S.C.R. 517. The rule in that case was stated in respect of two inconsistent statutes where one was deemed to repeal the other by virtue of the inconsistency. *However, the underlying rationale is the same as where subordinate legislation is said to be inconsistent with another Act of Parliament – there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments.* There is also some doctrinal similarity to the principle of paramountcy in constitutional division of powers cases where inconsistency has also been defined in

[28] See, R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at pp. 176-77.

[29] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, [1992] 1 S.C.J. No. 1 at para. 42.

> terms of contradiction – *i.e.*, "compliance with one law involves breach of the other"; see *Smith v. The Queen*, [1960] S.C.R. 776, at p. 800. [Emphasis added]

[31] Accordingly, the preferred course is to interpret legislation that "permits reconciliation" or logical coherence. However, if that is not possible, then it may be necessary to resort to the principle that subordinate legislation cannot override an Act of the Legislature absent express authority to do so. Consistent with this approach, Professor Sullivan notes that apparently "overlapping" provisions are presumed to apply on their own terms:

> Where two provisions are applicable without conflict to the same facts, it is presumed that each is meant to operate fully according to its terms. So long as overlapping provisions *can* apply, it is presumed that both are meant to apply. The only issue for the court is whether the presumption is rebutted by evidence that one of the provisions was meant to provide an exhaustive declaration of the applicable law.[30]

[32] In this case, s. 3(c) of the Regulation clearly applies only to deceased persons and s. 3(b) clearly applies only to persons who have a committee. In my view, the operative difference between s. 3(b) and 3(c) is not simply whether the individual is deceased, but also whether the individual has a committee. There are therefore two possible interpretations here:

1. Section 3(b) takes precedence over s. 3(c) if an individual has a committee; that is, it applies whether the individual is deceased or not; or

2. If a person is deceased, both ss. 3(b) and 3(c) apply; that is, a committee, a personal representative or a nearest relative may exercise the rights accorded by Regulation 3.

[33] In my view, taking into account both s. 24(1) of the *Patients Property Act*, and considering which interpretation would be most consistent with the principles of privacy protection embodied by FIPPA, the first of these is the proper interpretation.

[34] The PGT acting as committee is duty bound by statute and the common law to make decisions in the best interests of its clients and this duty continues after the client is deceased. Section 24(1) of the *Patients Property Act* accords the committee the statutory power it requires to fulfill this duty in the interim period between the death of the client and the appointment of the personal representative of the estate. In my view, the presumption of coherence requires

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[30] R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at p. 177.

the Regulation to be interpreted in such a way that it does not interfere with the committee's execution of its duty. That is, if an individual has a committee, then s. 3(b) of the Regulation applies. If a client dies, then as long as the committeeship is still in place, s. 3(b) continues to apply as if the patient had not died. As s. 24(1) of the *Patients Property Act* says, the committee "continues to have the rights, powers, duties and privileges that the committee would have had if the patient had not died." The result is that s. 3(c) of the Regulation, which clearly applies only to deceased persons, will not come into effect until the committeeship is terminated by the appointment of a personal representative.

[35] In terms of interpreting the interaction of these two pieces of legislation in a way that takes into account the privacy protection purposes of FIPPA, as I noted earlier, this requires, where possible, minimizing the number of persons who have "standing" to exercise rights to access the personal information of the deceased person. In my view, it is not enough to say that the requirement of s. 3 of the Regulation is that the rights must be exercised "on behalf of" the deceased person; the scope of individuals granted the ability to exercise that right must be interpreted in the most restrictive way possible. To do otherwise is to ignore both the explicit legislative objective of FIPPA stated in s. 2(1), which is "to protect personal privacy", and the goal of the Regulation, which is to provide a limited mechanism for the personal information rights of an incapable person to be exercised on her or his own behalf by another person.

Conclusion on this issue

[36] Applying what I have said above to this case, I find that the applicant is not entitled under s. 3(c) of the Regulation to exercise R.W.'s personal information rights under FIPPA. As long as R.W. continues to have a committee, under s. 3(b) of the Regulation only the committee may exercise personal information rights under FIPPA on behalf of R.W.

[37] Since I have found that the applicant is not entitled to exercise a right of access under s. 3(c) of the Regulation, it is necessary for me to consider whether the PGT is required by s. 22 of FIPPA to deny the applicant access to the records in dispute.

[38] **3.2 Application of Section 22 of FIPPA**—The portions of s. 22 that are relevant in this case 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 the relevant circumstances, including whether
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> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
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> …
>
> (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,
>
> ...
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,

[39] Previous orders have dealt with the application and interpretation of s. 22, including Order 01-53[31] and Order 02-56.[32] There have been several orders which have specifically considered s. 22 with respect to deceased individuals and their privacy rights.[33] Without repeating what those orders said, in reaching my decision I have applied the principles they set out.

Personal information

[40] The first step is to confirm that the records in dispute do in fact contain the personal information of R.W. I have reviewed copies of the records the PGT provided for the purpose of this inquiry. Without revealing the precise content of the records, it is fair to say that they contain information relating to R.W.'s health, her family and her finances. The records in dispute all relate to the PGT's interaction with R.W. and clearly contain her personal information and also, to a lesser extent, the personal information of other third parties and of the applicant.

[41] None of the circumstances in s. 22(4) apply to the records in this case, and so it is necessary to go on to consider first, whether the presumption in s. 22(3)(a) applies, and second, whether any relevant circumstances, including s. 22(2)(c), weigh in favour of or against disclosure of the records to the applicant.

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[31] Order 01-53, [2001] B.C.I.P.C.D. No. 56.
[32] Order 02-56, [2002] B.C.I.P.C.D. No. 58.
[33] See, for example, Order 02-44, [2002] B.C.I.P.C.D. No. 44, Order 04-12, [2004] B.C.I.P.C.D. No. 12, and Order 02-26, [2002] B.C.I.P.C.D. No. 26.

Presumed unreasonable invasion of third-party personal privacy

[42] The PGT submits that the presumption in s. 22(3)(a) applies to the records in dispute and then goes on to state: "There are no medical decisions to be made for our client, now deceased."[34] I assume from this submission that the PGT considers this to be one of the circumstances in which disclosure of R.W.'s personal information might be justified, but it is clearly no longer material here.

[43] The applicant does not dispute the PGT's characterization of the records, but refers to a comment former Commissioner Flaherty made in Order No. 96-1996,[35] confirming that s. 22(3)(a) is not a bar to disclosure of records. Rather, it creates a rebuttable presumption that disclosure of personal medical information will unreasonably invade third-party personal privacy.[36]

[44] Having reviewed the records in dispute, I agree that, for the most part, the presumption in s. 22(3)(a) applies. However, the records also contain information about R.W.'s finances and financial activity and so I am bound to consider whether the presumption in s. 22(3)(f) applies to that information.[37] It is clear to me from reviewing the records that it does.

[45] I will now consider whether there are any relevant circumstances which carry enough weight in the circumstances to rebut the presumption that disclosure of the records to the applicant would unreasonably invade R.W.'s privacy.

Relevant circumstances

[46] What constitutes a relevant circumstance in terms of assessing whether records containing third-party personal privacy ought to be disclosed is not limited to those set out in s. 22(2). Any circumstances shown to be relevant will be considered.

[47] In her reply submission, the applicant again refers to Order No. 96-1996, admonishing the PGT for not considering the order "in its arguments under section 22."[38] While I agree that s. 22(3) creates a rebuttable presumption, not a bar to disclosure, the applicant's reliance on this order is misplaced. The circumstances in Order No. 96-1996 that led to Commissioner Flaherty's

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[34] PGT's initial submission, at p. 8.
[35] Order No. 96-1996, [1996] B.C.I.P.C.D. No. 22, at para. 19.
[36] Applicant's initial submission, at para. 35.
[37] See, Order F05-18, [2005] B.C.I.P.C.D. No. 26, at para. 43:

> … this section creates a presumption which, if applicable and not rebutted by any other circumstances, would require the College to withhold the records. If the Act requires that records be withheld, then I am required to ensure compliance with this requirement regardless of any position on the matter taken by the College.

[38] Applicant's reply submission, at para. 25.

decision that s. 22 did not require the records to be withheld are substantially different than those in this case. Order No. 96-1996 involved a request for clinical records held by Woodlands for the applicant's deceased sister, who was born in 1936 and died in 1943. The relevant circumstances Commissioner Flaherty considered were:[39]

> a) the limited personal and medical information contained in this particular record;
>
> b) the rich nature of the record as it reveals the relationship between the family and the family member;
>
> c) the fact that it is 53 years since the death of the family member;
>
> d) the record answers specific questions about the family's medical history; and
>
> e) the applicant is a close living relative and has a direct interest in the information.

[48] The only material similarities between the circumstances in Order No. 96-1996 and those at hand are that the requested records contain personal information of a deceased person and the request was made by a close living relative with a direct interest in the information.

[49] The applicant goes on to submit that s. 22(2)(c) is a relevant circumstance that must be considered:

> In this case, as above, the Applicant's purpose in requesting disclosure of the Information is to ensure that the true testamentary intent of [R.W.] is carried out. However, the determination of R.W.'s testamentary intent will unavoidably affect the Applicant's rights and, as a result, the Applicant says that this must also be a consideration under Section 22.[40]

[50] The applicant refers to Order 01-07, where Commissioner Loukidelis confirmed the circumstances that must exist in order for s. 22(2)(c) to be triggered as a relevant circumstance weighing in favour of disclosure:[41]

> As the Ministry correctly points out, s. 22(2)(c) does not provide for release of personal information if it is relevant to a fair determination of an applicant's rights. Section 22(2)(c) merely constitutes one circumstance that may be relevant in determining whether or not personal information can be released without unreasonably invading a third party's personal privacy. Assuming, for the purposes of argument only, that the applicant's arguments accurately state the law, I am not persuaded they trigger s. 22(2)(c). The alleged deficiencies in the Ministry's investigations – about

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[39] Order No. 96-1996, [1996] B.C.I.P.C.D. No. 22, at para. 20.
[40] Applicant's initial submission, at para. 38.
[41] Order 01-07, [2001] B.C.I.P.C.D. No. 7, at paras. 30-32.

> which I express no opinion – are not relevant. The reasons for this conclusion follow.
>
> In Ontario Order P-651, [1994] O.I.P.C. No. 104, the equivalent of s. 22(2)(c) was held to apply only where *all* of the following circumstances exist:
>
> 1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
> 2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
> 3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
> 4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.
>
> I agree with this formulation. I also note that, in *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.), at paras. 85-89, Lynn Smith J. concluded that a complainant's "fairness" concerns, related to the conduct of a complaint investigation, did not activate s. 22(2)(c).

[51] The difficulty I have with the applicant's submission is that, while she says that the criteria set out above have all been met, she does not provide any further argument or evidence about how this is so. I accept that, as required under the first criterion, the legal right of the applicant as a beneficiary under the 1999 Will is affected by the validity of the 2000 Will. In her submission, the applicant explains why, as required by the third criterion, she believes that the records held by the PGT have some bearing on that issue. However, it is not clear to me what the applicant's intentions in this case actually are. If she actually intends to contest the validity of the 2000 Will in court, she has not said so in her submissions. Rather, it appears that the applicant to some extent is attempting to assess the case in advance of actually initiating any "proceeding".

[52] While there is nothing wrong with this and, in fact, it is likely a prudent course of action, the criteria set out in Order 01-07 make it clear that the applicant must demonstrate that disclosure of the personal information of the third party which is being sought relates to "a proceeding which is either under way or is contemplated" and is "necessary in order to prepare for the proceeding or to ensure a fair hearing." In my view, the applicant has not demonstrated this to be the case and, as such, I find this to be a neutral factor which neither weighs in favour of nor against disclosure.

Conclusion on this issue

[53] I have said earlier that the presumptions in ss. 22(3)(a) and (f) apply for the most part to the records in dispute. Those presumptions have not been rebutted either by the evidence and argument of the applicant or by the records themselves. Therefore, I find that the PGT is required by s. 22(1) to refuse the applicant access to those parts of the records in dispute that relate to R.W.'s health, finances or financial activity.

[54] As I have noted above, the records also contain some personal information of other third parties and of the applicant. That information mostly relates to conversations between the PGT and those individuals and the applicant about R.W., or their reported interactions with R.W. Although neither party specifically dealt with this in their submissions, I find that this information, with the exception of that relating to the applicant, is subject to s. 22(1) and the PGT is required to refuse her access to it.

4.0 CONCLUSION

[55] At the same time that I requested further submissions from the parties in this inquiry, I also requested the PGT to provide me with copies of the records in dispute. The normal practice in an inquiry such as this, particularly when s. 22 of FIPPA is in issue, is for the public body to provide copies of the relevant records with its initial submissions. For some reason, the PGT did not do this, possibly because the most substantially argued issue in this case was the application of s. 3 of the Regulation.

[56] In response to my request, the PGT wrote to me asking that I clarify which records those would be. I requested that the PGT contact the applicant directly, which it did, to clarify the scope of the records in dispute. Ultimately the PGT provided this Office with copies of some 101 pages of records. I relate the history of this correspondence because it affects the order I am making in this case. Given that the PGT only confirmed the scope of the records in dispute at the inquiry, it seems clear to me that it has not really considered how the records should be severed. As I have said, there is some information in the records that is the personal information of the applicant.

[57] I find it troubling that the PGT even asked me for direction on this point, given that it had already issued a decision to the applicant denying her access to the records, not only on the basis that she did not qualify to make the request under s. 3 of the Regulation, but also on the basis of s. 22 of FIPPA. One would think that the PGT would have already identified a particular set of records in order to make that decision. However, as I noted in my letter to the PGT, I can appreciate that by the time a matter proceeds to inquiry, the scope of records in dispute may have changed or been clarified through subsequent events.

[58] For the reasons I have given above, I make the following order under s. 58 of FIPPA:

1. I find that the PGT is required by s. 22(1) of FIPPA to refuse the applicant access to the records which contain the personal information of R.W., her health and finances, and interactions with other third parties and I require the PGT to refuse the applicant access.

2. I find that the PGT is not required by s. 22(1) of FIPPA to refuse the applicant access to those parts of the records which contain the applicant's own personal information, and disclosure of which would not unreasonably invade the personal privacy of a third party, and I require the PGT to give the applicant access.

3. I order the PGT to provide the applicant, with a copy to this Office, the records referred to in paragraph 2, severed in accordance with paragraph 1, within 10 days of the issuance of this Order.

4. If there is any dispute over the appropriate severing (if required) of the records to be provided to the applicant under paragraph 3, the parties may refer the matter back to me within 10 days of the PGT complying with this Order.

[59] The parties are at liberty to apply to me through the Registrar of Inquiries should they require any clarification of the terms of this Order.

November 6, 2007

ORIGINAL SIGNED BY

Justine Austin-Olsen
Adjudicator

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