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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 27-1994
October 24, 1994

INQUIRY RE: A Request by The Province for Access to Suicide Records held by the Ministry of Health and the Ministry Responsible for Seniors

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1. Description of the review

As Information and Privacy Commissioner, I conducted an oral inquiry at the Office of the Information and Privacy Commissioner in Victoria, British Columbia on Thursday, September 29, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by the applicant, Ann Rees, a reporter for The Province.

The request for review concerns a number of records about the investigation into the suicide of a female adolescent who was a resident under treatment at the Maples Adolescent Treatment Centre (the Maples).

On April 11, 1994 the applicant submitted a request to the Ministry of Health and the Ministry Responsible for Seniors (the Ministry) for a copy of an internal report on the death of a named resident (Patient X, the third party) at the Maples. On May 2, 1994 the Ministry responded by releasing portions of an investigation report on Patient X's suicide and attachments to that report (an admission conference report, an initial assessment report, and an extract from the third party's diary for the days 20-22 February 1994). The Ministry severed or withheld the majority of the report and its attachments under section 22 of the Act. On May 30, 1994 the applicant wrote to the Information and Privacy Commissioner (the Commissioner) to request a review of the Ministry's decision to withhold or sever most of the records.

On May 31, 1994 the applicant made a second request to the Ministry for a number of other records related to the suicide investigation. On June 29, 1994 the Ministry refused under section 80 of the Act to provide the records, principally because

the Coroner was investigating Patient X's suicide. The applicant did not request the Commissioner to review this decision.

On July 13, 1994 the applicant made a third request to the Ministry for Patient X's entire diary. On August 10, 1994 the Ministry refused access to the diary, principally because the Ministry no longer had control of it. The applicant requested a review of this decision by the Commissioner on September 6, 1994.

On August 12, 1994 the applicant withdrew her request for a review of the Ministry's decision on her first request. On the same day, she submitted a new request to the Ministry for all records related to the investigation of Patient X's suicide, including her entire diary. These records are described below.

In a letter dated August 30, 1994 (but sent September 7, 1994), the Ministry replied to the applicant's new consolidated request by providing portions of the records requested, but refusing access to the majority. With regard to Patient X's diary, the Ministry once again informed the applicant that it did not have control of this record and was therefore unable to respond to this part of the request. On September 12, 1994 the applicant requested a review of the Ministry decision on the consolidated request.

On September 14, 1994 the Ministry discovered that it had a copy of Patient X's entire diary and indicated its intention of issuing a new decision letter to the applicant refusing access to the diary under section 22 of the Act.

On September 16, 1994 the Office of the Information and Privacy Commissioner issued a notice of oral inquiry to take place at 9:00 a.m. on September 29, 1994.

On September 27, 1994 the Ministry issued a new refusal of access to the diary to the applicant, based on section 22 of the Act. The applicant requested a review of this decision the same day and, at her request, this record was added to those under consideration at this inquiry.

2. Documentation of the inquiry process

Under sections 56(3) and (4) of the Act, the Office invited representations from the applicant, the Ministry of Health and the Ministry Responsible for Seniors (the Ministry) as the public body, and the following intervenors: the Ministry of Social Services as guardian of Patient X and therefore a representative of the third party; the Public Trustee in the same capacity; the Ombudsman for the Province of British Columbia; the British Columbia Civil Liberties Association (BCCLA); and the Freedom of Information and Privacy Association (FIPA).

The applicant was represented by Roger McConchie and Candace Pinter, barristers and solicitors with the law firm of Ladner Downs of Vancouver. The Ministry was represented by Shauna Van Dongen, barrister and solicitor with the Legal Services

Branch, Ministry of Attorney General. She also made representations on behalf of the Ministry of Social Services. The Ombudsman and the Public Trustee submitted written representations, which were circulated among the other parties a few days before the inquiry. FIPA and BCCLA did not make representations at the inquiry.

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a three-page statement of facts (the Portfolio Officer's fact report), which, after minor clarifications, was accepted by the parties as accurate for purposes of conducting the inquiry.

3. Issue under review at the inquiry

The issue under review was the applicability of section 22 of the Act to the records in dispute, that is, would the release of the records, in whole or in part, constitute an unreasonable invasion of Patient X's privacy?

Under section 57(2) of the Act, the burden of proof at this inquiry was on the applicant to demonstrate that disclosure of the personal information of the third party would not be an unreasonable invasion of her privacy.

4. The records in dispute

The records in dispute are:

A. A suicide investigation report, with attachments (the Admission Conference Report, the Initial Assessment Conference Report, and copies of excerpts from Patient X's diary for February 20-22, 1994);
B. An Internal Audit of Suicide;
C. An External Suicide Audit;
D. A letter reporting on a review of the medical records from the perspective of child care practices;
E. Minutes of a meeting of May 18, 1994 at which the reports were discussed;
F. A letter summarizing the findings and recommendations given in the external and internal audits;
G. Patient X's entire diary written while she was at the Maples.

5. The applicant's case

The applicant, a journalist who specializes in feature writing, submitted an affidavit and numerous exhibits, which included copies of stories about the death of Patient X in the Vancouver print media; information from a relative about a prior suicide attempt by Patient X; extracts from books relating to suicide and community mental health services; and a 1992 newspaper account about the suicide of a fifteen-year old female resident of the Maples (which was evidently the second such tragedy in the

institution's twenty-five year history). Full extracts from all of these materials appeared in the outline submission of the applicant (paragraphs 3.1 to 3.5).

The applicant seeks "as much relevant information as possible about the circumstances surrounding the unfortunate death" of Patient X: "My plan is to obtain enough information to write a newsworthy story, of public interest, concerning among other things the quality and level of care received by [Patient X] while at the Maples and more generally, the quality and level of care provided to potentially suicidal inmates at that institution." In her view, the information she has received to date from the Ministry is "inadequate" for these purposes.

Further, the applicant asserted "a constitutional right of access to the records sought and relied upon her guaranteed right of freedom of expression pursuant to section 2(b) of the Canadian *Charter of Rights and Freedoms* with reference to the burden of proof described in section 57(2) of the *Freedom of Information and Protection of Privacy Act*."

The applicant is of the view that the Ministry does not want to release any information about Patient X that does not make it look good. Thus much of the material released has been exculpatory statements of one sort or another. She illustrated this point, and the lack of meaningful information in the severed material, by a document by document discussion of what she has received. (Outline Submission of the Applicant, paragraphs 1.4 to 1.5) She submitted that various conclusions in the material released are not supported by any facts. With respect to the external audit, she claims that "the Ministry has seen fit to conceal every fact revealed in the course of the audit." The "[r]ecommendations [in the external audit] are impossible to grasp without an understanding of the facts...."

Counsel for the applicant described the severing practices of the Ministry in this case as "obtuse" and "overly broad." Despite the existence of the Act, the applicant argues that the Ministry is trying to keep information from the public: "In short, taken together, what has been disclosed and what has been deleted can fairly be characterized as a whitewash of the Maples facility and staff, devoid of facts." (Outline of Submission, paragraph 1.6)

The applicant concluded that "[t]he public interest is clearly paramount. The public cannot have confidence in the Ministry of Health or the Maples Adolescent Treatment Facility unless it knows what went wrong and exactly how Maples proposed to correct problems. This public concern is particularly compelling because of the increasing rate of youth suicide." (Outline of Submission, paragraph 3.8)

Thus the applicant argues either that the disclosure of the severed information would not be an unreasonable invasion of Patient X's privacy under section 22 of the Act, or that the Ministry should disclose the information under section 25(1) of the Act, because it is clearly in the public interest to do so. (Outline of Submission, paragraph

3.10) In particular, section 22(2)(a) of the Act lists as factors for consideration by a public body whether or not disclosure is desirable for the purposes of subjecting the activities of a public body to public scrutiny and, under section 22(2)(b), whether the requested disclosure is likely to promote public health and safety.

The applicant concluded that "*[t]he Freedom of Information and Protection of Privacy Act* should offer a reasonable alternative to a public inquiry, by giving the media access to the facts. Only then is it possible or likely they will be submitted to public scrutiny." (Outline of Submission, paragraph 4.5)

6. The public body's case

The Ministry denied access to the records in dispute on the basis of sections 22(1) and 22(3)(a) of the Act. It characterizes the contents of these records as follows:

> Generally speaking, the requested information consists largely of Patient X's medical information as well as her personal views and opinions. It also contains other people's opinions about Patient X. (Argument for the Ministry, paragraph 1)
>
> The information sought in this case consists primarily of records evaluating Patient X's medical conditions, and Patient X's diary, which is filled with her own thoughts and opinions. All information pertaining to the action of staff at the treatment centre has already been released to the applicant. (Argument for the Ministry, paragraph 7)
>
> In the Ministry's opinion, the severed information is of a deeply personal and intimate nature. (Argument for the Ministry, paragraph 9)

The Ministry believes that disclosure of such information would be especially contrary to section 22(3)(a) of the Act, which reads:

> (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,
>
> ....

With respect to possible reliance on section 22(2)(a) of the Act to release the severed information to the applicant, the Ministry responds that it is not withholding damaging information about the actions of staff that should be released in the public interest. Further, "[t]he Ministry submits that specific mechanisms already exist to ensure that public bodies are accountable in these circumstances." For example, the Coroner's

Office "has had access to all of the records at issue in this appeal, and they will be issuing a written judgment of inquiry when their investigation is complete....[I]t is the policy of the Coroner's Office that Judgments of Inquiry are made available to the general public." The Ministry claims that the Office of the Ombudsman may also be involved in examining the issues surrounding the death of Patient X. Referring to my Order No. 23-1994, September 16, 1994, (p. 7), the Ministry "submits that participation of both the Coroner and the Ombudsman in the death of Patient X should also weigh heavily in the balance of whether or not disclosure of the personal information is necessary to subject the activities of a public body to public scrutiny." (Argument for the Ministry, paragraphs 12 to 16.)

The Ministry relied on a recent decision of the British Columbia Court of Appeal in K.L.V. v. D.G.R. [1994] B.C.J. No. 1978, Vancouver Registry No. CA017886, as an additional argument against the disclosure of Patient X's diary. In a civil suit arising out of sexual abuse the court determined that the defendant was not entitled to have access to the diaries of the plaintiff for the purpose of assessing damages.

Dr. Derek Eaves, Executive Commissioner, Clinical Services, Forensic Psychiatric Services Commission testified that the Maples (for which he is ultimately responsible) deals with the most seriously disordered adolescents under the *Mental Health Act*. The residents have expectations of confidentiality in the doctor-patient relationship and are innately suspicious of authority figures in a government-run facility. Thus disclosure of the severed information might have a negative impact on current and future patients. Activities like diary writing are encouraged as part of the healing process. After a major incident like the death of Patient X, the Forensic Psychiatric Services Commission, which has wide representation (including outsiders), conducts a process of internal and external inquiry that is reflected in the documents at issue in this inquiry.

Mrs. Sydney Baird, Deputy Director, Maples Adolescent Treatment Centre, testified that it would be unusual for Maples' staff to ever read the diary of a resident. If this were to occur, staff would not do so without the resident's permission. Release of such a diary to the media would have especially negative results, particularly with respect to building trust in a therapeutic environment. The Ministry is particularly concerned with the possibility of harm to present and future residents of Maples and comparable institutions. Thus it rejects any argument for a disclosure in the public interest under section 25 of the Act.

7. The intervenors' case: the Ombudsman and the Office of the Public Trustee

The Ombudsman made a written submission to this inquiry because the case raised general issues about the privacy rights of children and deceased persons. She emphasized that a "diary is a record which potentially contains the most intimate and private thoughts of an individual." Like any other person, a child is entitled to privacy. The Ombudsman further noted that the definition of "personal information" in Schedule 1 of the Act does not exclude deceased persons; the Act thus "preserves respect for the dead

just as it does for the living of all ages." The Ombudsman had little sympathy with the applicant's argument that Patient X is now dead and no harm can come to her: "The dead have reputations. The survivors and estates of the dead can potentially be harmed by release of information regarding the deceased. It is too simple and simply disrespectful to say that no harm shall come because Patient X is dead."

With respect to the applicant's argument that release of the diary itself would subject the activities of the Ministry of Health to public scrutiny, the Ombudsman was of the opinion that this argument "is speculative at best and release of the diary in its entirety seems inappropriate given the potentially intimate and personal nature of a diary."

The Office of the Public Trustee informed this inquiry that it did not have any active involvement in the management of the affairs of Patient X during her lifetime. In fact, the Office did not receive any notification of her permanent wardship status until notified of this inquiry. It no longer has legal status to represent her following her death. However, "[a]s personal representative of many clients in various capacities, the Public Trustee is concerned that an individual's privacy should be respected and preserved, particularly in circumstances such as these."

8. Discussion

First, some preliminary points. The Ministry has an admittedly strong argument against disclosure of the disputed records under section 22(3)(a) of the Act, since the severed material is clearly personal information that "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation." The principles for severance set forth below seek to take account of these concerns for the confidentiality of sensitive information. I have also considered the Ministry's view that "all of Patient X's 'medical information' was provided on the understanding that it would not be disclosed to outside parties." (Argument for the Ministry, pp. 7, 12)

I do not completely accept the Ministry's argument that the possible involvement of the Coroner and the Ombudsman in separate investigations of the death of Patient X should weigh heavily against more disclosure of records in the present case. Order No. 23-1994, September 16, 1994, p. 7, is distinguished from the current case by the fact that section 15(4) of the Act includes a specific mechanism for disclosure of the "reasons" for a decision not to prosecute to interested persons or parties, if the fact of the investigation was made public. The right of access to information from public bodies under the *Freedom of Information and Protection of Privacy Act* exists independently of the statutory work of other public bodies in ensuring other forms of accountability to the public. However, because section 22(2)(a) does involve public scrutiny, I have taken these other statutory mechanisms into consideration in reaching my conclusions.

Section 22(2)(a) - The desirability of public scrutiny

This section of the Act reads:

> 22(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,

With respect to this section, I am of the opinion that the applicant made a number of valid points about how the release of more factual information about the conditions and events surrounding the stay of Patient X in the Maples might shed additional light on her suicide and, indeed, on the general problem of suicide among adolescents. This problem is a matter of public concern, and the print media has an ongoing contribution to make to public education and public debate on the matter.

The applicant made a number of other sound points about the role of the media in evaluating governmental actions in considerable detail in order to evaluate their adequacy. Thus I need to consider the basic goals of the Act in promoting greater openness and accountability of public bodies to society at large.

Those responsible for the Maples undertook a number of reviews in the immediate aftermath of the death of Patient X. These included an internal suicide investigation report, an internal audit of suicide, an external suicide audit of what had occurred, and a summary report to the Forensic Psychiatric Services Commission, which discussed the results of these investigations and their findings. The internal reports were prepared by a team of professionals from the Maples; the external report was prepared by a psychiatrist selected on the basis of outside advice. Thus the government has scrutinized its own behavior and response, and the Ministry has already released much more information to the applicant than it has ever disclosed previously to the general public about a major incident at the Maples. But does this suffice for public scrutiny? I have decided that it does not.

As part of her argument for disclosure, the applicant noted how much information about the death of Patient X has already been disclosed to the print media. Newspaper stories included the name, the age, and the existence of a diary with its "heartbreaking" contents (according to an RCMP officer who had read it); a statement attributed to the Director of Youth Forensic Psychiatric Services, which runs the Maples, that there was no indication that Patient X was suicidal; and a second statement attributed to him that "[t]here was no indication in her behavior record that we needed to monitor her closely." Echoing the assertions of the applicant, he was reported to have stated that "suicides of young people are of great concern to mental-health professionals because 'they seem to

be more successful in killing themselves.'" The same press stories included a relative's reporting of a previous suicide attempt by Patient X.

Privacy rights of the deceased

The issue of privacy rights for the deceased remains a vexing one for privacy advocates in most countries, because of its unsettled character. The applicant viewed the fact of death in the present case as "tipping the balance in favour of disclosure, and eliminating or reducing the privacy factors...." Patient X cannot be hurt by the disclosure; "[o]n the other hand, her death might donate life to someone still alive if disclosure results in necessary reforms or better public understanding of the problem." In the applicant's view, reading the Act as a whole, there is no reason "to conclude that 'privacy' is to be given any weight with respect to a deceased person." Counsel for the applicant further adopted what he described as the weight of U.S. authorities to the effect that death diminishes the privacy interests of a person. (Outline of Submission, paragraphs 3.12 to 3.20)

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* 323/93, section 3(c), establishes that the access to information and corrections rights of a "deceased individual" may be exercised by "the deceased's nearest relative or personal representatives." 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.

Review of the records in dispute

My decision outlined below depends heavily on my own review of the severances imposed by the Ministry on the records and on a reading of the diary of Patient X. I would describe the severed material as pertaining to Patient X's behaviour, actions, experiences, symptoms, diagnosis, and treatment while at the Maples.

It is my judgment that the diary of Patient X must remain confidential, because of its intimate nature and Patient X's expectation of confidentiality in writing it. I find support in K.L.V. v. D.G.R., the recent decision of the B.C. Court of Appeal referred to by the Ministry. I am primarily concerned with Patient X's privacy rights, which in my view, survive her death substantially intact. I am also concerned with the privacy rights of her surviving family, relatives, and other caregivers, which I deem worthy of recognition. I reject any notion, such as that advanced by counsel for the applicant, that Patient X should "donate her privacy interests" out of concern for future potential victims of suicide.

I will describe the contents of the diary kept by Patient X during her last full month of life in general enough terms so as not to reveal its contents, but at the same time to create a partial rationale for disclosure of more of the other records to the applicant by the Ministry than have previously been released. Although I obviously have no firm idea of what Patient X discussed with her therapists and caregivers, there are indications that she began the diary for therapeutic purposes, and she does mention a desire to discuss certain sensitive matters with her psychiatrist. The critical point is that the diary reveals dramatic evidence of her past and current suicidal tendencies.

The actual contents of Patient X's diary persuade me that the public has a right to know, in more detail than previously disclosed, about the treatment and handling of her case and the quality and level of care provided to her. In addition, a close examination of the records which were disclosed, with the severances made by the Ministry, appears to create a misleading impression about the quality and level of care received by Patient X at the Maples. Thus I intend to release more of this information. I make this determination to disclose more of the other records in dispute under section 22(2)(a) of the Act. In my judgment the names of professional and house staff who treated Patient X and interacted with her can be released. In particular, the choices made by the treatment teams should be disclosed, including the differences of opinion and strategy identified in the external suicide audit. Some of the severances made in the 'comments' section of the latter document might satisfy the applicant's allegation of an attempted whitewash of the Ministry's actions. The letter by Dr. Eaves to the Forensic Psychiatric Services Commission, as severed, excludes a few items of information that can be construed as critical of the Maples' handling of Patient X's case.

Principles for severing these records

I first considered the balance of Patient X's privacy rights that survived her death against the factors in section 22(2), particularly section 22(2)(a), the desirability of subjecting the activities of the Ministry to public scrutiny. I determined that these factors did not entirely override Patient X's privacy rights but encroached on them to a certain extent in order to meet the requirements of public scrutiny. Patient X thus retains a core of privacy interests after her untimely death.

In my opinion, this core zone of privacy consists of the details of her behaviour, her feelings, her therapy sessions, her medical diagnosis, and her innermost thoughts that may be revealed through her diaries and other records. These details do not assist the public in scrutinizing the Ministry's actions. Similarly, Patient X's family retains its full rights to privacy in the wake of Patient X's death; information about them does not assist in the public's scrutiny of the public body.

General remarks about Patient X's behaviour, actions, interactions with staff, and external events leading up to her death serve to subject to public scrutiny the level of care and treatment that Patient X received from the Ministry, which is the goal of the applicant. Part of the test of public scrutiny lies in the extent of the knowledge of the Maples' staff of Patient X's suicidal tendencies.

I also considered the extent to which readers could be misled by selectively disclosing certain phrases and words and endeavoured to ensure, as much as possible, that the essence of the information remained intact. However, where I have severed a page in the middle of a sentence or paragraph, I have left enough information to provide the reader with a sense of the meaning of what was removed.

The burden of proof and section 2(b) of the Charter of Rights and Freedoms

Section 57(2) of the Act places the onus on the applicant to prove that disclosure of the personal information would not be an unreasonable invasion of the third parties' personal privacy. The Ministry argued that the applicant "must show an extremely strong and compelling reason to overrule the presumption of privacy contained in section 22(3) of the Act." I note, however, that I specifically modified that Ontario standard in Order No. 4-1994, March 1, 1994, p. 9; and Order 24-1994, September 27, 1994, pp. 7-8, by referring to "clear and compelling evidence." Order 24 further established the requirement of the applicant making at least "a measured argument for the public interest requiring disclosure." The applicant has done so in the present case. As the decision-maker, I then review the records in dispute and draw an appropriate balance between accountability to the public and the personal privacy of third parties, as I have done in the present case.

The applicant advanced an interesting constitutional argument with respect to meeting the burden of proof under section 57(2) of the Act. She submitted that this

section creates a burden on an applicant to prove a negative and, in such a situation, the burden must be slight. In her view, section 2(b) of the *Charter* (rights of freedom of expression and freedom of the press) gives a right of access to government information , and the assertion of this *Charter* right is sufficient to meet the burden required. In support of this position she cited *Pacific Press Ltd. v. Minister of Employment and Immigration (No. 3)* (1991), 127 N.R. 325 (F.C.A.), and *International Fund for Animal Welfare Inc. v. Canada* (1988), 35 C.R.R. 359 (F.C.A.).

In *Pacific Press*, one of the issues was whether section 29(3) of the *Immigration Act* infringed the rights under section 2(b) of the *Charter*. Section 29(3) provided that an immigration inquiry should be held in camera, unless a member of the public established a public inquiry would not impede the inquiry and the alien or his family would not be adversely affected. The Federal Court of Appeal held that section 29(3) infringed section 2(b) of the Charter and, further, that it could not be justified under section 1. In the course of discussing the issues, MacGuigan, J.A. referred to the judgment of Mahoney J.A. in *Pacific Press Ltd. v. Minister of Employment and Immigration (No. 1)*, [1990] 1 F.C. 419 (C.A.). Mr. Justice Mahoney had made the following comments, which were emphasized by the applicant in her argument:

> It may be arguable that the onus is misplaced. Again, I think it best, in the circumstances, not to express a concluded opinion on that aspect of the provision..... It seems to me that the assertion of a right to access to a judicial or quasi-judicial proceeding founded on paragraph 2(b) of the *Charter* must, of itself, inferentially satisfy that slight burden and shift the onus to the person seeking to exclude the press. (p. 334)

MacGuigan, J.A. did not view these comments as having represented a concluded opinion that section 29(3) should be "read down" - i.e. "..of transforming the statutory language by discharging the burden of proof and relocating it on the claimant." (p.334)

In *Pacific Press*, the public had to prove why an inquiry should be open to the public. The precise issue of proof was directly related to the section 2(b) *Charter* right. In this case, the applicants must prove why access to admittedly personal information is not an unreasonable invasion of privacy. There is no issue as to the openness of the inquiry process under the *Freedom of Information and Protection of Privacy Act* to decide that issue.

The second case cited by the applicant, *International Fund for Animal Welfare*, involved limitations on access to seal hunts contained in federal regulations. The appellants sought access to the sites of seal hunts in order to obtain information which was pertinent to their beliefs. MacGuigan, J.A. concluded that one of the Regulations violated the *Charter*. He supported the views of the trial judge, quoted at p. 368 of the judgment:

> An expansive and purposive scrutiny of paragraph 2(b) leads inevitably, in my judgment, to the conclusion that freedom of expression must include freedom of access to all information pertinent to the ideas or beliefs sought to be expressed, *subject to such reasonable limitations as are necessary* to national security, public order, public health or morals, *or the fundamental rights and freedoms of others*. [emphasis added]

I agree with the above statements. However, in this case, the applicant is seeking access - not to government information - but to personal information about an individual. That individual has some fundamental rights of privacy, as supported clearly in the British Columbia *Freedom of Information and Protection of Privacy Act.*

On October 12, 1994 the applicant's counsel forwarded to my office a copy of a recent decision by the Ontario Divisional Court: *Re Attorney General and Fineberg* (1994), 19 O.R. (3d) 197. There it was argued that "...freedom of the press, provided by section 2(b) of the Charter entails a constitutional right of access to any and all government information in possession and under the control of government, subject to whatever limitations might be justified pursuant to section 1 of the Charter."

The Court held that it was not possible to proclaim that section 2(b) entails a general constitutional right of access to all information under the control of government. It recognized that:

> [t]he information government has at its disposal, if looked at generally, potentially affects many interests, *including privacy concerns* of a constitutional dimension....
>
> ... several mechanisms have been enacted to enhance the disclosure of such information in response to public interest in this area *while, at the same time, protecting the public interest in matters of privacy*. The statute in question is one example and the Ombudsman Act is another. There are many others. The difficult accommodation of such profoundly conflicting interests is therefore evolving in a manner consistent with political traditions and discourages sweeping Charter pronouncements of the type requested... In this case, we need not consider whether positive government support in obtaining information, in contrast with government's opposition as in *International Fund for Animal Welfare Inc. v. Canada*... could ever be constitutionally required. [emphasis added, pp. 204-5]

The applicant in this case did not challenge the constitutional validity of any of the provisions of the *Freedom of Information and Protect of Privacy Act*. Counsel for the applicant submitted that *Re Attorney General and Fineberg* can be distinguished on the basis that it involved such a constitutional challenge, and that the Court did not decide

whether "positive government support in obtaining information ...could ever be constitutionally required."

However, it is my opinion that this case supports the following conclusions:

1. The courts have not held that section 2(b) of the *Charter* provides a general right of access to government information.

2. The general right of access to government information in British Columbia is limited by the provisions of the *Freedom of Information and Protection of Privacy Act*.

3. Rights to personal privacy are just as much in the public interest as rights of access to information.

I have considered all of these arguments carefully because I recognize the difficulties that applicants may have with the requirements of section 57(2). However, I have concluded that the test as set down in Order No, 24-1994 effectively meets the concerns expressed by the applicant. My ability to review all the records and strike a balance between openness and privacy protects the rights of the applicant under the Act.

9. Order

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry of Health to refuse access to the entire diary of Patient X to the applicant.

Under section 58(2)(a) of the Act, I order the Ministry of Health to give the applicant access to part of the remaining records in accordance with the severances that I have made. My office will deliver to the Ministry a copy of the newly-severed records for the purpose of complying with this Order.

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David H. Flaherty
Commissioner

October 24, 1994