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**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 31-1995  
January 24, 1995**

**INQUIRY RE: A Request for Access to Records of the Office of the Public Trustee  
of British Columbia**

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**1. Description of the review**

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria, British Columbia on December 1, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by a mother for access to records concerning the private committee of her daughter, who died in 1992. The committee was appointed in December 1986 by order of the British Columbia Supreme Court. Under the daughter's will, the committee was appointed executor and was also the sole beneficiary of the estate.

**2. Documentation of the inquiry process**

The Office of the Information and Privacy Commissioner provided the three parties involved in the inquiry (the applicant/mother, the Public Trustee, and the committee/executor) with a two-page statement of facts (the Portfolio Officer's fact report), which was accepted by all parties.

On May 12, 1994 the applicant submitted a request for access to records in the custody or under the control of the Office of the Public Trustee. She is represented by counsel.

The records sought were described as:

Copies of all records held by the Public Trustee with respect to the Committee of [the executor] of the Person and Estate of [the deceased daughter], ... including all accountings filed as required by the *Patients*

*Property Act* and other Legislation, and the final accounting following the patients [sic] death in 1992 as required, and all actions of the Public Trustee in relation to this matter.

The applicant stated that she wanted the records for a Small Claims Court trial, where she is the plaintiff and the executor is the defendant.

On July 20, 1994 the Office of the Public Trustee (the Public Trustee) refused to provide access to the requested records under section 22(3) of the Act and under section 3(c) of the Regulation. The Public Trustee informed the applicant that the executor had not consented to the release of the information. The executor played multiple roles: she was the daughter's committee during the last six years of her life; the executor appointed under the daughter's will (i.e., her personal representative); the sole beneficiary of the daughter's estate; and she claims to have been the common-law partner of the deceased daughter.

In responding to the applicant, the Public Trustee wrote:

Section 22(3) of the Act disallows the release of personal information, including financial history, about a third party, as the release of such information may be an unreasonable invasion of that person's privacy. As [the daughter] is now dead, we understand that the information is now the property of her personal representative, the executor of her Will. The executor has not consented to the release of this information.

The Regulations to the Act, Section 3, cover disclosure of information of a deceased person. Access is allowed to the personal representative or the nearest relative. Because there is some uncertainty in the Regulations regarding the right of nearest relatives to access this information where they are not the personal representative, the interpretation of the legislation is presently under review. As a result, the Office of the Public Trustee is presently unable to disclose this information subject to the consent of the personal representative. You may wish to reapply at a later date.

The Office of the Information and Privacy Commissioner received a request for review on September 8, 1994. As the matter was not settled, on November 2, 1994, the Office gave notice to the applicant and the Public Trustee that a written inquiry would be held on December 1, 1994. On November 16, 1994, the Office also gave notice to the executor. All three parties made written submissions and replies. Each was represented by counsel.

### 3. The records in dispute

By agreement of the parties, the written inquiry concerned thirty records. These included records of the private committee that were in the custody or under the control of the Public Trustee. The records in dispute contain sensitive medical, psychological, financial, and familial information about the daughter.

### 4. Issues under review in the inquiry

In their written submissions, all three parties discussed the applicability of section 22 of the Act and section 3(c) of the Regulation to the personal information in dispute. Section 3(c) of the Regulation reads:

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:

...

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

There are four issues before me in this inquiry:

- (a) Is the applicant entitled, as a "nearest relative" under section 3(c) of the *Freedom and Information and Protection of Privacy Act Regulation* (B.C. Reg. 323/93), to exercise her deceased daughter's access rights under section 4 of the Act?
- (b) Is the executor, as the personal representative of the deceased under section 3(c) of the Regulation, the only person entitled to exercise the deceased's access rights under the Act?
- (c) Is the executor also the "nearest relative" of the deceased as her common-law, same-sex partner?
- (d) If the applicant is not entitled to exercise her deceased daughter's access rights under section 3(c) of the Regulation, is she to be treated under the Act like any other person seeking access to the personal information of others? If so, does section 22 prevent her from gaining access to all or part of the records in dispute?

### 5. The applicant's case

The applicant, as noted above, has a Small Claims Court action against the executor for, among other things, failing to disburse funds from her daughter's estate to reimburse the mother for expenses incurred in caring for her daughter while in a hospital.

The applicant argues that disclosure of the information in dispute from the Office of the Public Trustee would not be an unreasonable invasion of any third party's personal privacy under section 22 of the Act, which reads in part:

- 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
  - ....
  - (c) the personal information is relevant to a fair determination of the applicant's rights,
  - ....
  - (e) the third party will be exposed unfairly to financial or other harm,
  - (f) the personal information has been supplied in confidence,
  - ....

The applicant relies on section 22(2)(a) to assert that disclosure would assist in determining whether the Public Trustee properly fulfilled its duty to the daughter in its oversight of the committee'ship of her estate by the executor. Under section 22(2)(c), disclosure is relevant to a fair determination of the applicant's rights as claimed in the court action. Under section 22(2)(e), the daughter cannot be harmed by the disclosure of how the proceeds of her estate were used, because she is deceased and cannot be injured. Moreover, the applicant argues, the executor (as I have termed her) was also the heir of the deceased daughter, which created a conflict of interest. These three points are a fair characterization of the scope of the applicant's case.

The applicant disputes any claim that the executor has any right to be protected under the Act from being "exposed unfairly to financial or other harm" by the proposed release, since that would shield her from scrutiny by anyone, which is the very obligation of the Public Trustee.

The applicant argues that the information in dispute was not supplied in confidence under section 22(2)(f) of the Act, since Rule 4 of the *Patients Property Act*, R.S.B.C. 1979, c. 313, states that it should be supplied upon notice to the next of kin of the patient.

The applicant argues that the filing of the committee's accounts with the Public Trustee "makes these records public records" and the property of the government of British Columbia through the Office of the Public Trustee:

There is no way that the testate wishes of [the daughter] could devolve the right to these public records to the inheritor of her estate. To the extent that the information filed includes personal information about [the executor's] finances, this is not a reason for lack of disclosure, but a reason for disclosure in order to account for any misuse or commingling of funds.

The applicant made a number of relatively technical arguments, drawn from probate law, as to who has the right of access to the information of the deceased daughter as the "nearest relative." The essential argument is that the mother is the nearest relative in this case and has rights equal to that of any "personal representative."

The applicant rejects any possible claim by the executor to oppose her right of access to the requested information on the grounds that the executor falls under the definition of "spouse." The applicant presented various factual statements to refute any such claim, most of them being various references to the executor in legal documents as the "friend" of the daughter.

## **6. The Public Trustee's case**

The Public Trustee's submission first questioned why this application was brought under the Act:

The Public Trustee submits that the purpose of the application is to obtain the Committee's accounts to supplement litigation of an alleged creditor of the estate ([the mother]). How can it be argued that it is in [the daughter's] best interests or that the application is being brought on behalf of the deceased when the action is actually against the estate of the deceased? ... Therefore, the Public Trustee submits that this application is an attempt to use the FIPP Act for purposes other than those intended by this Act. [Submission of the Office of the Public Trustee, p. 1]

The Public Trustee outlined its various duties under the *Public Trustee Act*, R.S.B.C. 1979, c. 348; the common characteristic is fiduciary responsibilities toward the interests of specific individuals. As a further introductory point, the Public Trustee indicated that it is influenced by the spirit of the 1993 *Adult Guardianship Act*, S.B.C. 1993, c. 35 (not yet proclaimed) "and to that extent is willing to support the concept of same sex spouses as defined under the new legislation." Finally, the Public Trustee "has concerns about the outcome of the application of a ruling in favour of a nearest relative, when there is a personal representative, [the executor] who was not only committee but

was chosen by the deceased [the daughter] to be the personal representative of her estate.” (Submission, pp. 3-4)

The Public Trustee made the following detailed points with respect to the responsibilities of a committee, in this case the executor, to a patient, in this case the daughter. The Supreme Court of British Columbia (as happened in the present case) appoints the committee on the basis of sufficient evidence to declare a person incapable of managing his or her affairs. Under section 15(1)(b)(i) 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 age and of sound and disposing mind.” The Public Trustee further states that the committee has a fiduciary responsibility to “act in the patient’s best interests at all times and to ensure that the needs of the patient are placed before the needs of the committee.” (Submission, p. 5) There is an associated responsibility of confidentiality to the patient, which is supported by textbook authority.

Under section 10(1) of the *Patients Property Act*, a committee that is not the Public Trustee has various reporting requirements for sending accounts to the Public Trustee and, as required by the latter if the Public Trustee is dissatisfied with the performance of the committee, to the Supreme Court. Although a committee does have the discretion to release these accounts in the patient’s best interests, the Public Trustee pointed out that *Patients Property Act* “does not provide a mechanism for the Public Trustee to release the records to third parties, and indeed it would question the integrity of a committee who would divulge the accounts of an incapable person to parties other than the Public Trustee, unless there was a clear benefit to the patient.” (Submission, p. 7)

The Public Trustee’s position is that disclosure of the requested documentation would be an unreasonable invasion of the privacy of both the daughter and the executor under sections 22(3)(a) and (f) of the Act, which concern disclosures of information harmful to the personal privacy of third parties. They read 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,
  - ....
  - (f) the personal information describes the third party’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,

It is the Public Trustee’s position that:

[The daughter’s] medical condition was before the Court when she was declared incapable of managing her person and estate. This medical

information is a public document and can be accessed through the Court Registry. Whatever other medical information that may exist is an issue of doctor-patient confidentiality which should be accessed through the medical community. [Submission, p. 8]

The Public Trustee believes that section 22(3)(f) of the Act weighs against disclosure of the committee's accounts, because it would invade the privacy of the daughter and the executor, since they held many assets jointly as a matter of choice: "When the joint tenant and committee are one in the same person, this monitoring is especially important to ensure that the committee is not withholding funds that the patient may require." (Submission, p. 9)

The Public Trustee noted my concern for the surviving privacy rights of the deceased in Order No. 27-1994 (October 24, 1994) and argued that, in the present case, the daughter's "privacy rights continue and should be upheld especially because the applicant's litigation has no benefit to her." (Submission, pp. 10-11) These rights to personal privacy should take precedence over all rights claimed by other parties. (Submission. p. 16)

The Public Trustee emphasizes that it acquired the committee's file in dispute under the *Patients Property Act* for purposes of monitoring the performance of the executor as a committee. "The accounts are not prepared so that the public at large is entitled to review them... In many cases, to facilitate family harmony, the Public Trustee will request that a committee share her accounts with family members. However, if the committee refuses, the Public Trustee has no statutory authority to direct the committee to provide copies to third parties." (Submission, p. 11)

The daughter chose her executor for that post in a will dated in 1982 and accepted for probate on October 15, 1992 (the daughter and executor in fact had reciprocal wills). Even when distribution of any estate has occurred, the courts have determined that the office of executor continues for the lifetime of the executor. In the Public Trustee's view, therefore, the executor remains in that post and is thus still the personal representative of the daughter under section 3(c) of the Regulation for this Act. (Submission, pp. 12-14)

## **7. The executor's case**

Counsel for the executor stated that the daughter and the executor were "in a committed long term relationship with each other" from 1976 until the former's death in 1992. The daughter was in hospital with an organic brain disease from 1986 until her death. The executor was appointed committee of the daughter's estate by the Supreme Court of British Columbia on December 11, 1986, an appointment contested by the mother. The executor, as previously noted, was also the executor of the daughter's estate as well as her sole beneficiary.

The executor contends that after the daughter's death, the mother considered contesting the probate of the will, demanded a sum of money out of the estate, and has now filed suit against the executor in Small Claims Court.

The executor filed an affidavit concerning the nature of her relationship with the deceased which reads in part: "It is also abundantly witnessed by the affidavits filed in support of [the executor] in the Supreme Court committee application that her relationship with [the daughter] was a committed, spousal relationship."

Counsel submitted that the executor is both the personal representative of the daughter, her nearest relative, and "the person closest to" her under section 3(c) of the Regulation, both in fact and in law. Counsel further submitted that all statutes must be read in light of the section 15 guarantee against discrimination on the basis of sexual orientation, since sexual orientation is a protected ground under the *Charter of Rights and Freedoms*. Thus the executor should be considered to be the spouse of the daughter.

Recent provincial legislation, such as the *Health Care (Consent) and Care Facility (Admission) Act*, S.B.C. 1993, c. 48 and the *Representation Agreement Act*, S.B.C. 1993, c. 67, includes same sex-spouses in the definition of "spouse." This legislation has not been proclaimed.

The executor argues that she is also the personal representative of the deceased:

[A] proper reading of section 3(c) [of the Regulation] is that the person who was named as Executor under the will of a deceased is the person to whom information is to be released if there is a will; the person to whom information should be released if there is not a will is the person's nearest relative within the scheme of the *Estate Administration Act*. This resolves the apparent 'contest' in Regulation 3(c) in a manner consistent both with the provisions of the *Freedom of Information and Protection of Privacy Act*, and with other statutory provisions regarding the affairs of testate and intestate deceased.

In an affidavit submitted to me, the executor states, and adequately documents, that the mother objected on many occasions to her role in the daughter's life. During the course of her committee, she passed accounts with the Office of the Public Trustee twice, as was required. She believes that the mother's "sole motivation in making this application is to invade my privacy for the purpose of furthering allegations that I behaved improperly in the administration of the Committee with respect to [the daughter.]" (Affidavit of the Executor)

## **8. Discussion**

*The appropriate venue for these claims to be reviewed*



The applicant and the executor are currently adversaries in Small Claims Court. Whatever the merits of their respective cases at law, they are irrelevant to how I am required to proceed under this Act.

Too much of the mother's factual presentation and written argument before me has little relevance to a request under this Act and belongs before a judge, who can properly adjudicate the competing claims on the basis of substantive knowledge of the relevant law. That is not my role under the Act. I agree with the Public Trustee that, if the applicant requires documents to support her litigation, she can proceed under the Rules of Court as they apply to obtaining documents at trial. (Submission of the Public Trustee, p. 17)

While the Small Claims Rules do not adopt the discovery rules of the Supreme Court of British Columbia (Rules 26 and 27), Rule 7(5) provides that every party to a claim must bring to a settlement conference all documents and reports that a party will rely on at trial. A litigant can also obtain information from another person at trial. The process is to serve a summons to a witness, who must bring to court any records required by the summons.

Most of the points made by the mother in her reply brief can, similarly, be more appropriately addressed in litigation in civil court, since they have little relevance to a request for access to information under the Act and lie well beyond my jurisdiction as Commissioner. I refer in particular to evaluating claims that the mother has been treated unfairly by the Committee, and that the Office of the Public Trustee has failed in its duties. I do not accept the view of the applicant that she "has no other route to take to scrutinize the actions of the Public Trustee, or of" the executor. The courts are the preferred route to settle contested claims of accountability in such specific cases as the present one.

While counsel may well use the Act in anticipation and support of contemplated litigation, their only recourse is to the Rules of Court when, as in the present case, personal records cannot be disclosed under the Act. One of the reasons to uphold privacy claims in the present case is that the accountability of both the committee and the Public Trustee can be tested in another, more appropriate venue. For example, counsel for the mother noted in his reply brief that the committee has already furnished the applicant with the medical records of the deceased daughter for purposes of current litigation.

### ***The records in dispute***

As part of this inquiry, my office prepared a detailed list of thirty records in dispute with a brief description of the subject matter of each record. Thus the applicant now at least knows what records exist, and she is now capable of seeking access to specific items in another venue.

I have carefully reviewed these records. They do contain some sensitive personal information about many aspects of the lives of the executor and the daughter. It seems perfectly understandable that both the daughter, while she was alive and fully functioning, and thereafter her committee and executor would want to be very careful about controlling access to this personal information. The contents of certain records suggest why the executor prefers not to release them to the applicant.

I am further impressed by the evidence in the records in dispute that the committee worked cooperatively with the father and brother of the daughter during the period of her committee ship.

***The records of the Public Trustee and the Act***

The Public Trustee argues that this application attempts to use the Act for unintended purposes. Section 4 of the Act establishes the following “information rights:”

- 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.
- (2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

The Office of the Public Trustee is a public body under Schedule 2 of the Act. Thus the records of this office are not exempt from access under section 3 of the Act, which reads in part:

- 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
  - (a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts;

Thus an applicant can legitimately seek access to records of the Public Trustee, subject to the exceptions from disclosure under Part 2 of the Act.

***Rights of access to the personal information of a deceased person (Issues a) and b))***

One problem in this case derives from the definition of “nearest relative” under section 3 of the Regulation in the government’s own *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual* (1994) (the Manual), which was prepared by the Information and Privacy Branch in the Ministry of Government Services. It reads in part:

***Nearest Relative***

The “**nearest relative**” is:

- 1) the deceased’s spouse of any age;
- 2) if none, any of the deceased’s children who has attained the age of majority;
- 3) if none, either of the deceased’s parents; ....

The nearest relative is authorized to exercise access rights and rights to request correction of personal information on behalf of a deceased individual only if the deceased has not named a personal representative.

The selection of a personal representative is a clear indication of the deceased individual’s wishes with respect to who should act on their [sic] behalf. (Manual, Appendix 6.2.3, pp. 5-6)

In determining who has rights of access to the personal information of a deceased person under section 3 of the Regulation, the Manual includes the following discussion of “Deceased Individuals” at Appendix 6.2.3, p. 5:

A deceased individual’s right of access and right to request correction of personal information may be exercised on behalf of the deceased individual by the deceased’s nearest relative or personal representative.

In deciding whether a nearest relative or personal representative is authorized to exercise these rights under Section 3 of the Regulation, a public body must determine whether the applicant is seeking the information in the interests of, or as a representative of the deceased individual, or whether they are seeking the information in their own interests. In most cases, a relative or personal representative will be acting on behalf of a deceased individual only where there is unfinished business such as the execution of a will. If the applicant is not acting on behalf of the deceased[,] he or she is treated as a third party for purposes of the request. (Manual, Appendix 6.2.3, p. 5)

The Manual is describing exactly the scenario of the present case. The mother is asking for access to the daughter’s records at least in part for her own stated interests, which means that she should be treated as a regular applicant under the Act. I recognize

that she is also seeking access because of her claimed concern for the interests of her deceased daughter. However, because the deceased made her own choice, I conclude that the “personal representative” should prevail over the interests of the mother.

The records in dispute contain sensitive medical, psychological, financial, and familial information about the daughter, and I am persuaded that the executor alone has the right to make the decision about access to these records under section 22 of the Act. In my view, she is both the personal representative and nearest relative of the deceased (see the discussion below).

### ***Section 3(c) of the Regulation***

The Manual notes that “personal representative” as defined in the *Interpretation Act*, R.S.B.C. 1979, c. 206 includes “an executor of a will.” (Manual, Appendix 6.2.3, p. 7) It effectively settles the current matter on this point.

The Public Trustee argues against an interpretation of section 3(c) of the Regulation which allows either the deceased’s nearest relative OR personal representative to bring an application for access:

If that is true, then the legislature would appear to be suggesting that a nearest relative would have equal status with a personal representative. This state of affairs would prevent a person from choosing their personal representative to the exclusion of their nearest family member to represent them. It is a frequent desire for a person to appoint an impartial party to act and thus avoid conflict through an impartial administration. The Public Trustee submits that this state could not have been intended by the legislature because it is parallel to limiting a person’s freedom of choice to choose not to allow their family members to be involved in their personal affairs. [Submission of the Public Trustee, p. 14]

I agree with the Public Trustee’s position that a nearest relative is not entitled to exercise section 4 rights in circumstances where there is a personal representative, because it supports the continued exercise of personal autonomy by an adult. This reflects the principle of information self-determination that is, and should be, at the heart of all privacy protection regimes.

### ***Issue c) Is the executor also the “nearest relative” of the deceased as her common-law, same-sex spouse?***

The elucidation of the meaning of “nearest relative” contained in the Manual, which I adopt, strikes me as quite reasonable.

With the Public Trustee, I choose to be guided by the spirit of the new *Adult Guardianship Act*, under which a “spouse” means a person who “is living with another

person in a marriage-like relationship and, for the purposes of the Act, the marriage or marriage-like relationship may be between members of the same sex.” Similar recognition has occurred in the May 11, 1994 master agreement between the Government of British Columbia and the B.C. Government and Service Employees’ Union. (Submission of the Public Trustee, p. 16)

I also accept the argument of the counsel for the executor that, in this case, I should recognize the standing in the community of the daughter and the executor as partners. This fact is amply and movingly documented in affidavits submitted both by the executor and on behalf of the executor (including affidavits from friends of the daughter and the executor who knew them as a couple). These affidavits were prepared in connection with the contested application for committeeship before the Supreme Court in 1986 and for the present inquiry. The applicant’s point that the executor did not claim to be the daughter’s spouse or partner (as opposed to being her “friend”) on several occasions in the 1980s, such as at the time of the making of the will and of the application for committeeship, fails to acknowledge the increased acceptance by the community of same-sex relationships in recent years. These occurrences were also in connection with official documents.

I conclude that in this inquiry the executor is both the “personal representative” and the “nearest relative” of the deceased and thus has complete control over access to her records under the Act.

***Issue d) The applicability of section 22***

Under section 57(2) of the Act, where an applicant is refused access to all or part of a record containing personal information about a third party, it is up to the applicant to prove that disclosure of the personal information would not be an unreasonable invasion of the third party’s personal privacy. In the present case, the applicant has failed to overcome the barrier to disclosure posed by section 22(3) of the Act. In my judgment, disclosure of the personal information sought by the applicant would be “an unreasonable invasion” of the personal privacy of the deceased and of the executor under section 22 of the Act.

**9. Order**

Under section 58(2)(b) of the Act, I confirm the decision of the Office of Public Trustee not to release the records in dispute to the applicant.

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David H. Flaherty  
Commissioner

January 24, 1995