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

Order 02-32

FRASER HEALTH AUTHORITY

David Loukidelis, Information and Privacy Commissioner
July 10, 2002

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Summary: The applicant requested a copy of her own medical file with a mental health facility now operated by the public body. It had withheld all of the applicant's file under s. 19(2) of the Act. The public body is not authorized to refuse disclosure under that section and must review the requested records to determine if third-party personal information must be severed and withheld under s. 22 of the Act.

Key Words: harm to safety or mental or physical health – immediate and grave harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 19(2), 22(1).

Authorities Considered: B.C.: Order No. 108-1996, [1996] B.C.I.P.C.D. No. 34; Order 01-29, [2001] B.C.I.P.C.D. No. 30.

Cases Considered: *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] S.C.J. No. 55.

1.0 INTRODUCTION

[1] In August of last year the applicant made a request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for access to her file with a mental health centre operated by what was then the South Fraser Health Region (which is now part of the Fraser Health Authority, to which I will refer as the "public body"). The public body responded to this request outside the mandatory 30-day timeline stipulated under the Act. By a letter dated October 18, 2001, it responded as follows:

> After reviewing your records and in consultation with clinical staff, we are withholding your records under Section 19 of the Freedom of Information and

> Protection of Privacy legislation. It is the belief of the clinical staff that information in your record could cause you harm, at the time [*sic*].

[2] The public body's response indicates that it gave the applicant copies of a "May 1996 termination summary report and April 2, 2001 psychiatric consult report."

[3] The applicant promptly requested a review of this response, under Part 5 of the Act. Because the matter did not settle in mediation, I held a written inquiry under Part 5 of the Act.

2.0 ISSUE

[4] The only issue in this case is whether the public body is authorized by s. 19(2) of the Act to refuse to disclose the applicant's own personal information to her. Section 57(1) of the Act provides that the public body has the burden of establishing that s. 19(2) applies.

3.0 DISCUSSION

[5] **3.1 Background Regarding Court Proceedings** – The evidence indicates that, before the public body refused to disclose the applicant's file to her, the Director of Child, Family and Community Service of what is now the Ministry of Children and Family Development ("Director") applied in the Provincial Court of British Columbia for disclosure to the Director of the same records as are in issue here. The applicant appeared in that proceeding, at the end of which a judge ordered the mental health centre to disclose the applicant's records to the Director. The Court also ordered the Director not to release the applicant's records to her. On January 21, 2002, another judge of the Provincial Court ordered the Director to disclose to the applicant those parts of her records that the Director intended to rely on at a child custody hearing involving the applicant.

[6] It appears from the material before me that, as a result of this court order, the public body took the position that this inquiry is moot. The applicant, on the other hand, believed that the inquiry should proceed. I note that the public body's evidence and submissions establish that the court ordered records to be disclosed, but it is not clear if the court order covered all of the records that are in dispute here. Further, there is no evidence before me that any records were actually disclosed to the applicant as the court had ordered. Accordingly, I do not consider the issue raised in this inquiry to be moot.

[7] I will also deal here with the public body's arguments relating to disclosure of records through court processes. Noting its belief that the applicant has asked for a copy of her files for the purposes of litigation, the public body cites Order No. 108-1996, [1996] B.C.I.P.C.D. No. 34, for the proposition that anyone contemplating litigation has other means of obtaining records. This contention is not relevant – as the public body elsewhere concedes – to the s. 19(2) issue before me. The public body also contends that, because the applicant has "received an Order that relevant portions of these records be provided" to the applicant by the Director, the applicant does not require these records

under her access request "in order to represent her interests at the child custody hearing" (para. 24, initial submission). Quite apart from the fact that it is not clear whether the applicant has actually received these records in accordance with any court order, the availability of other means of access to the same records is not relevant in this case.

[8] **3.2 Harm to the Applicant's Health or Safety** – Although the public body's response to the applicant's request did not specify which part of s. 19 it considered applicable, it is clear that it relies on s. 19(2). It is also clear that, although it at some point thought some parts of the file could perhaps be disclosed, it ultimately chose to withhold all of the applicant's personal information. Section 19(2) of the Act reads as follows:

> (2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

[9] As I indicated in Order 01-29, [2001] B.C.I.P.C.D. No. 30, at para 17:

> … the reasonable expectation of harm test requires evidence the quality and cogency of which is commensurate with a reasonable person's expectation that disclosure of the disputed information could cause the harm specified in the relevant section of the Act. Although it is not necessary to establish a certainty of the harm being caused, evidence of speculative harm will not suffice. There must be a rational connection between the disclosure and occurrence of the feared harm.

[10] I note that the Supreme Court of Canada has very recently said, in a case involving access to information under the federal *Privacy Act*, that the phrase "could reasonably be expected" requires evidence of "a clear and direct connection between the disclosure of specific information and the injury that is alleged." See *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] S.C.J. No. 55, at para. 58 (Q.L.). This formulation is consistent with the above passage from Order 01-29.

[11] Under s. 19(2), a public body must establish that disclosure of an applicant's own personal information could reasonably be expected to result in "immediate and grave harm" to the applicant's "safety or mental or physical health". This case is similar to Order 01-29 insofar as the evidence in this case establishes only that a psychiatric medical professional who has, in the past, treated the applicant is of the opinion that disclosure of the applicant's personal information could be detrimental to her mental health. As I indicated in Order 01-29, at para. 21, even where a medical professional expresses his or her opinion, there is an evidentiary threshold that must be crossed before a public body is entitled to withhold from an individual her or his own personal information.

[12] At para. 19 of its initial submission, the public body

> … acknowledges that individuals have a significant interest in their own medical records and that decisions to deny an Applicant access should be based on evidence which meets a relatively high standard.

[13] The public body also acknowledges that "evidence of speculative harm will not suffice", although it notes that it need not establish a certainty of harm (para. 20, initial submission).

[14] In support of its case, the public body relies on an *in camera* affidavit provided by a psychiatric medical professional (portions of the public body's initial and reply submissions were also submitted *in camera*). The public body's evidence is that the applicant suffers from either of two kinds of clinical psychiatric disorders. It says the applicant is "prone to hallucinations and paranoid ideation". The public body has consented to my disclosing the following summary of the opinions expressed by the psychiatric medical professional:

- The applicant has a history of psychiatric disorder.

- If the applicant reads her records, she will not be able to rationally interpret or accept the entries in her medical chart that note the consequences of her mental illness.

- If the applicant reads her file, she will be induced to anger and paranoid delusion.

- The medical professional "understands" that the applicant's access request is not being made on a competent and reasoned need to use the material for the betterment of her medical and psychiatric condition. (No basis for the "understanding", including recent examination of the applicant, is cited. Nor, I will note here, is this relevant to the applicant's request to see her own personal information.)

- The applicant's request is being made on the basis of underlying paranoid thought processes to do with a conspiracy that the applicant believes is being organized against her.

[15] The applicant acknowledges that she has had mental health problems. She claims to have had only one dealing with a psychiatrist, because she was required to be diagnosed for the purposes of a court proceeding, but acknowledges that she has been treated by psychiatrists and other mental health professionals. She also indicates that she has, at some point, sought other means for dealing with her mental health – including naturopathic therapies, increased exercise and personal development – in place of therapy sessions and medications.

[16] The bottom line of the public body's evidence is a medical professional's opinion that, if the applicant is given access to her own personal health information, it will be 'detrimental' to her psychiatric condition. The medical professional expresses the opinion that the applicant is finely balanced and could "decompensate" – a term the public body does not explain – such that she is 'certifiable' under the *Mental Health Act*.

[17] Regardless of the public body's concession that the s. 19(2) standard is "relatively high", it is clear that there must be evidence that disclosure could reasonably be expected to result in "immediate and grave" harm to the applicant's safety or mental or physical health. Here, the public body's evidence establishes, at best, that a medical professional is of the opinion that, if the applicant has access to her own personal health information, her psychiatric condition will be detrimentally affected, with the result that her mental health could (not necessarily would) deteriorate to the point that she might be certifiable under the *Mental Health Act*. This speaks to possible detriment to the applicant's mental health, not "immediate and grave harm" of a kind contemplated by s. 19(2). Nor does the public body expressly argue that involuntary detention for treatment under the *Mental Health Act* amounts, in this case or more generally, to "immediate and grave harm" for the purposes of s. 19(2). (It would not, in any case, be appropriate to make such a finding about *Mental Health Act* detention, for the purposes of s. 19(2), on the basis of the material before me.)

[18] I cannot conclude that the kind of harm described in the evidence reaches the "immediate and grave harm" standard in s. 19(2). Further, the evidence, which describes harm that could result, is not particularly persuasive in light of the above-described test for reasonable expectation of harm under s. 19(2).

[19] In assessing the evidence before me, I have, among other things, kept it in mind that the public body's evidence and argument are directed to the entirety of the applicant's file. As I noted above, the public body acknowledges that it did consider, at some point, whether additional parts of the applicant's records could safely be disclosed by severing descriptive notes, but ultimately determined that the most prudent course would be not to release any further information to her. The public body does not point to specific information in the withheld records that it contends raises the necessary reasonable expectation of harm under s. 19(2). It refers only, in passing, to "clinical information" as the apparent focus of its concern. It does not elaborate in any meaningful way on what it means by "clinical information" in the records.

[20] Having considered this case with care, I am not persuaded the public body has established a reasonable expectation of "immediate and grave" harm to the applicant's safety or mental or physical health if she receives her own personal health information.

[21] **3.3 Third-Party Personal Privacy** – As I indicated above, the public body has withheld the entirety of the applicant's own personal information. My review of the records indicates that portions of it contain third-party personal information that may be protected from disclosure under s. 22(1) of the Act. There is no indication in the material before me that the public body has considered the third-party personal privacy issue. I do not propose to deal with it here and instead have attached conditions to my order under s. 58.

4.0 CONCLUSION

[22] For the reasons given above, under s. 58(2)(a) of the Act, I require the public body, subject to the conditions set out below, to give the applicant access to the disputed records. As a condition under s. 58(4) of the Act, I require the public body to, within 35 days (as the term "days" is defined in the Act) after the date of this order:

1. review the disputed records and determine whether any third-party personal information must be withheld in accordance with s. 22 of the Act;

2. disclose to the applicant those portions of the disputed records that the public body has determined it is not required to withhold under s. 22 of the Act; and

3. deliver to me, concurrently with its disclosure to the applicant under para. 2, copies of the records disclosed to the applicant.

July 10, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia