ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 117-1996
August 27, 1996

INQUIRY RE: A decision of the Nanaimo Regional General Hospital to refuse an applicant access to her hospital records

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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 (the Office) on May 31, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of the Nanaimo Regional General Hospital (the hospital) to refuse an applicant access to her hospital records relating to two separate periods of hospitalization.

2. Documentation of the review process

On March 1, 1995 the applicant submitted a request to the hospital "for copies of her hospital records for the periods March 12 to October 21, 1992 and May 15 to June 14, 1993." On April 21, 1995 the hospital notified the applicant of its decision to withhold the records in their entirety under section 19 of the Act. The applicant wrote to this Office on January 18, 1996 to request a review of the decision with respect to all information withheld from her under these sections. The applicant was subsequently granted time extensions in order to prepare her submission.

3. Issue under review at the inquiry and the burden of proof

The issue under review in this inquiry is whether the release of the records would be harmful to individual or public safety.

Section 19 of the Act reads*:*

Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

(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.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in a record has been refused, it is up to the public body to prove that the applicant has no right of access to the record or part of the record. In this case, it is up to the Nanaimo Regional General Hospital to prove that the applicant has no right of access to the records withheld under section 19 of the Act.

4. The records in dispute

The records in question consist of many pages of documents relating to the care that the applicant received while in the hospital for treatment. They include notes and summaries written by both hospital staff and the applicant, medication records, schedules, medical opinions, various hospital forms, and memos.

5. The Nanaimo Regional General Hospital's case

The hospital made its decision not to disclose the records in dispute under section 19 of the Act on the basis of an opinion by a medical practitioner who treated the applicant as a patient. I reviewed this opinion on an *in camera* basis.

6. The applicant's case

The applicant is of the view that the hospital is using section 19 of the Act to protect the interests of its staff members because of a violent act that she believes happened to her while she was a patient there and because of the general way in which she was treated there. She further alleges unethical and harmful staff standards and practices in that hospital.

I have also carefully reviewed a number of *in camera* submissions that the applicant made in support of her arguments.

7. Discussion

The application of section 19: Disclosure harmful to individual or public safety

The application of this section necessarily involves me, a lay person, in the evaluation of expert testimony, in this case an opinion of a psychiatrist that it is definitely not in the best interests of the applicant, other individuals, and society at large for the applicant to have access to her own hospital records. As I have stated in previous Orders, I am strongly inclined to defer to professional expertise in matters such as this one, subject to my own review of the contents of the records in dispute.

The basic thrust of my decisions to date on this section has been to require a public body to act prudently where the health and safety of others are at issue in connection with the possible release of records. (See Order No. 89-1986, March 4, 1996, pp. 4, 5; Order No. 28-1994, November 8, 1996, p. 8)

Section 19(2) sets a relatively high standard for non-disclosure: it must not occur "if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health." In addition, where an applicant is seeking access to his or her own medical records, a public body must meet the higher test established by the Supreme Court of Canada in McInerney v. MacDonald, (1992), 93 D.L.R. (4th) 415 (S.C.C.).

In order to meet its burden of proving that the applicant has no right of access to her medical records under section 19(2), a public body must thus show, in the language of the test established by the Supreme Court of Canada, that there is a "significant likelihood of a substantial adverse effect on the physical, mental, or emotional health of the patient or harm to a third party." In my view, the hospital has only met this test in part with respect to section 19(2). It has not met the section 19(1) test with respect to "public safety" on the basis of its submissions to me.

Review of the records in dispute

I wish to assure the applicant that I have carefully reviewed the *in camera* submissions made by the hospital and by herself and also looked at the records in dispute. My Order below to release certain records to her reflects this process.

My view is that this applicant should receive information from her hospital records that could not "reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health."

I have divided the hospital records of the applicant into two categories:

1. Routine matters that she should have access to, including: her admission sheet; her client data sheet; information relating to her Review Panel under the *Mental Health Act*; scheduled medications; physician's orders; and various technical clinical reports, including electrocardiogram and lab tests;

2. Matters that can be withheld on the basis of section 19, including: discharge summary; medical and psychiatric assessments of the applicant; and progress notes on the patient.

I distinguish this Order from Order No. 108-1996, May 30, 1996 by the different psychiatric status of the two applicants, based in both cases on *in camera* submissions that I am not at liberty to discuss.

8. Order

I find that the head of the Nanaimo Regional General Hospital is authorized to refuse access to part of the records in dispute under section 19(2) of the Act. Under section 58(2)(b), I confirm the decision of the hospital to refuse access to certain information in the records to the applicant.

Further, I find that the head of the Nanaimo Regional General Hospital was not authorized to refuse access to other parts of the records in dispute under sections 19(1) and 19(2) of the Act. Under section 58(2)(a), I require the hospital to give the applicant access to part of the records in dispute. For this purpose, I have marked a copy of the complete record to indicate what should be released.

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David H. Flaherty
Commissioner

August 27, 1996