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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 144-1997
January 17, 1997

****** This Order has been subject to Judicial Review ******

INQUIRY RE: An applicant and a third party's request for a review of decisions made by Greater Vancouver Mental Health Services Society with respect to access to a complaint file

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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 October 22, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose from an applicant's request for access to "a complete copy of my GVMHS file and records."

2. Documentation of the inquiry process

On January 20, 1996 the applicant submitted a request to the Greater Vancouver Mental Health Service Society (GVMHS) for a copy of her personal file and records. On February 6, 1996 the GVMHS released a portion of the applicant's personal records and withheld another portion under section 22 of the Act (disclosure harmful to personal privacy). The GVMHS also withheld all internal administrative records contained in the applicant's file on the basis of solicitor-client privilege. These records had in fact been prepared in response to a complaint that she had filed at the end of 1994 against her former psychiatrist, a staff member on contract to the GVMHS. On February 6, 1996 the applicant wrote to the Office of the Information and Privacy Commissioner (OIPC) and requested a review of GVMHS's decision to withhold access to these internal administrative records.

On February 20, 1996 my Office opened a review file to determine if we had jurisdiction to conduct the requested review. The GVMHS is a non-profit society

contracted to the Ministry of Health and Ministry Responsible for Seniors (the Ministry) to provide free clinical treatment, rehabilitation, housing, crisis intervention, and other specialized services to adults, adolescents, and children with severe mental illness. The GVMHS operates the centre through which services were provided to the applicant. Given the contractual relationship between the Ministry and the GVMHS, it was not clear initially whether the Ministry had control, by virtue of its contract with the GVMHS, over the internal administrative records that were in dispute. A review of the relevant contracts by my Office revealed that the Ministry has control of all records created pursuant to the contract. On this basis we determined, with the concurrence of the Ministry, that I have jurisdiction to review the matter.

Thus the Ministry is the public body for purposes of this inquiry. Under section 66 (delegation by the head of a public body) of the Act, the Minister for the Ministry of Health and Ministry Responsible for Seniors has delegated to the Executive Director of the GVMHS the authority to make representations on matters before me at an inquiry under section 56 of the Act. The Executive Director of the GVMHS also has delegated authority to respond to any orders made as a result of an inquiry.

As a result of mediation, the GVMHS released a severed version of the administrative file (which comprised 57 pages in total). It cited sections 13 (policy advice or recommendations), 14 (legal advice), and 22 as the reasons for withholding some information from the records. These records were released in four installments on May 2, May 10 (same records as on May 2 with the inclusion of more detailed information regarding the exceptions used), May 17, and May 24, 1996. At this time, the GVMHS also informed the applicant that the third party (the applicant's psychiatrist for a two-year period from 1991 to 1993) had objected to the release of five pages of material on the basis of sections 15 (disclosure harmful to law enforcement) and 22. Based on this new decision, the review file was closed.

On June 3, 1996 the applicant requested my Office to review the new decisions made by the GVMHS. On September 3, 1996 the GVMHS released further information to the applicant.

On September 10, 1996 the applicant narrowed and clarified the issues that were under review and requested an inquiry. On September 12, 1996 the third party wrote to my Office and requested a review of the GVMHS's decision to release portions of five documents that it had earlier withheld in total. This request was based on sections 15, 19 (disclosure harmful to individual and public safety), and 22 of the Act.

3. Issues under review at the inquiry

The three issues under review in this inquiry are:

Issue A: This concerns the application by the GVMHS of sections 13 and 22 of the Act to 16 pages of administrative records related to a complaint filed by the applicant. The contents of these disputed records are described below, when I review them in detail.

Issue B: This concerns the custody or control of a report written by the third party in response to the applicant's original complaint against him or her. The GVMHS reviewed this report and later returned it to the third party. This issue involves section 31 of the Act.

Issue C: This concerns the third party's objection to the proposed partial release of five pages of documents [the "unusual occurrence" report and related memoranda] on the basis of sections 15, 19, and 22 of the Act.

The relevant sections of the Act are as follows:

Policy advice or recommendations

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

(2) The head of a public body must not refuse to disclose under subsection (1)

...

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

....

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

...

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used in law enforcement.

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.

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(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,

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment, occupational or educational history,

...

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

...

(g.1) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal

> recommendation or evaluation, character reference or personnel evaluation,
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
> ...
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,
> ....

Retention of personal information

> 31. If a public body uses an individual's personal information to make a decision that directly affects the individual, the public body must retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

Burden of proof

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Where access to information in a record has been refused, it is up to the GVMHS, in this case, to prove that the applicant has no right of access to the record or part of the record. However, if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

In addition, with respect to Issue C, if a public body has decided to give an applicant access to a record or part which contains information that relates to a third party:

a) in the case of personal information, it is up to the applicant to prove that the disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and/or;

b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part.

The Act is silent as to the burden of proof with respect to a request for review about issues of custody or control of records. However, as a public body is in a better position to prove such matters, I have determined that the Ministry has the burden of proof with respect to Issue B in the current case.

4. The applicant's case

Because the text of the applicant's initial submission is more than forty pages long, single-spaced, (plus substantial documentation and an *in camera* submission), I present here only her summary paragraphs (further details appear below in the discussion section):

> I am not asking for any personal information on any of the GVMHS employees, their lawyers, their contract therapists or their consultants. I am simply asking for access to their professional explanations and statements about the standard of care I received. I am also asking for any personal statements they made regarding me as a person because I believe I have a right to know what statements were made about me.
>
> Since the conclusions [released to her] do not contain the material which explains how GVMHS reached its conclusions, I believe the reports and letters, memos I am requesting access to may explain to me why and how the conclusions were reached and how they were substantiated. I believe I should have access to the reports so that I can determine if GVMHS properly and adequately assessed my complaints and standard of care and whether or not they failed to consider and evaluate certain items. In other words, GVMHS must be accountable for its conclusions by clearly stating its rationale, for detailing what items were considered in the investigation, for detailing what items were not considered including the rationale for their conclusions, if any. The public has a right to know how the public body assesses standard of care, complaints and how the public body rationalizes their own conclusions, especially when they differ from the Canadian ethical norms. (Submission of the Applicant, p. 41)

5. The Greater Vancouver Mental Health Society's case

The GVMHS's initial submission concerned the five section 13 severances in the records in dispute. Its reply submission addressed section 22 considerations. I have used this material below in greater detail as I deemed it appropriate to do so.

6. The Third Party's case

The third party is the psychiatrist who was the subject of the complaint made by the applicant to the GVMHS. With respect to Issue C, the third party seeks to rely on sections 15, 19, and 22 of the Act. I have discussed these detailed submissions below under Issue C.

7. Discussion

The context for this inquiry

This inquiry concerns an adult patient seeking access to the complete records of the handling of her complaint to the GVMHS about her former psychiatrist's treatment of her. The psychiatrist does not want certain records disclosed. In what follows I have attempted to mask the gender of the psychiatrist because of the relatively small number of psychiatrists in Vancouver. Obviously, the applicant, whose language I have made gender neutral, is well aware of the sex of her former psychiatrist.

As is so often the case in such highly emotional matters, complex issues are involved, which range far beyond my responsibilities and jurisdiction under the Act. The applicant, in particular, wishes me to make determinations on matters that can only be resolved in other arenas, such as a proceeding of the College of Physicians and Surgeons (to which the applicant has complained) or litigation in the courts. (See affidavit of John Russell, Executive Director, GVMHS, paragraph 7) There is evidence that the applicant has been in contact with the College itself and may now have indeed filed a complaint with it. (See Submission of the Applicant, pp. 10, 34, 36; a document entitled "Summary of Information Provided by Other Psychiatrists Regarding [the applicant's] Condition," sent to the applicant by the College of Physicians and Surgeons, August 13, 1996; Affidavit of John Russell, GVMHS, paragraph 7; Reply Submission of the Applicant, p. 6; and Reply Submission of the GVMHS, paragraph 30) In what follows I have focused solely on the issue of access to specific records in dispute under the Act.

I also need to emphasize, for the applicant in particular, that she is contesting matters, such as inaccurate personal information, that may be in the GVMHS administrative file on her complaint, which are more properly addressed in her clinical file, which I understand her now to have requested and received. That comment applies particularly to questions about the quality of the diagnosis of the applicant by her former psychiatrist and the adequacy of his or her clinical record keeping. (Submission of the Applicant, pp. 11-14) I find myself as a lay person in this inquiry in the world of competing diagnoses among several psychiatrists about the applicant and her treatment by her former psychiatrist. Some of this evidence is in the form of a letter and is not sworn. It is not a matter that I am qualified to settle, or required to settle, under the Act. The applicant has avenues open to her with the College of Physicians and Surgeons with respect to such matters. (See Submission of the Applicant, pp. 25-38)

Correction of alleged errors in the applicant's clinical file, which she asked for and obtained early in 1996, is also a separate matter from the issues in this inquiry. The applicant should deal directly with the GVMHS on this matter. (See Submission of the Applicant, pp. 4, 5)

Disclosure of the applicant's status as a psychiatric patient

A sub-issue in this inquiry is the apparent fact that the psychiatrist disclosed the status of his or her former patient and the outcome of their professional relationship to the religious leader of a place of worship that both attend. The applicant asserts that this is such a breach of the Code of Ethics of the Canadian Medical Association that it is an

additional reason for her to have access to anything that the psychiatrist has written to justify what he or she did. In particular, this breach of confidentiality means that the third party/psychiatrist has lost his or her privacy rights under section 22 of the Act. (Submission of the Applicant, pp. 16-23, 38) I do not accept this formulation of the consequences of what occurred.

The GVMHS has decided that the third party's disclosure to the religious leader was not a breach of confidentiality such that it would result in a decision to terminate the third party. (Affidavit of N. Sladen-Dew, paragraph 5) I am not in a position to express an opinion on the matter. I certainly take seriously the applicant's candid statement that she "considers myself being a psychiatric patient to be the highest of my priorities for material I desire to be kept confidential." (Submission of the Applicant, p. 19) I also realize that the behaviour of the psychiatrist in this matter is an issue of professional ethics and obligations, which is squarely within the jurisdiction and authority of the College of Physicians and Surgeons.

Issue A: Access to complaint files

It is clear that the records at issue here fit into a series of decisions that I have made on access to complaint files. While I have considerable sympathy with the applicant's wish to view exactly what her former psychiatrist has argued or reported with respect to this specific complaint, an important principle is at stake. The GVMHS has the basic responsibility for processing this complaint and is entitled to a considerable amount of discretion and confidentiality in the process. (Submission of the GVMHS, paragraphs 13, 15, 25; Affidavit of John Russell, paragraph 13; Reply Submission of the GVMHS, paragraphs 14, 16, 28)

The Delta School Board acted similarly in processing a complaint in Order No. 62-1995, November 2, 1995. As in the present inquiry, the School Board released a considerable amount of information to the applicants, but I determined that it did not have to disclose everything, in spite of the arguments about the public interest that were advanced:

> I agree with the Delta School Board that the public interest in this matter has already been served by the disclosures that have taken place: "There is no compelling public interest requiring the release of the information requested." (Outline of Argument of the Public Body, paragraphs 12-40) Such a release could further stigmatize the teacher involved and perhaps hinder his rehabilitation, if such is needed.

I find that there are considerable parallels between the Delta School Board matter and the current inquiry. In both instances, the public bodies have made considerable disclosures of records to the applicants. In both cases, I am satisfied that the public bodies took the complaint seriously and acted upon it. In both cases, there are privacy considerations affecting the interests of a third party that I must take account of under the

Act (which I do below). Finally, the decisions are parallel in that there is a supervisory body that is ultimately responsible for "public" discipline, were that to occur. In the present inquiry, it is the College of Physicians and Surgeons that has the ultimate responsibility and professional capacity to decide the merits of the applicant's detailed and wide-ranging concerns. It is for the College to determine whether the psychiatrist, as a member of the College, provided proper treatment to the applicant and behaved ethically according to the established standards of the medical profession. (See Submission of the Applicant, pp. 2, 3)

Section 22: Disclosure harmful to personal privacy of third parties

The applicant argues, in vivid detail, that her psychiatrist disclosed so much of his or her own personal information to her during therapy sessions that he or she has lost his or her "right to claim that the information is personal information of the therapist's only." (Submission of the Applicant, pp. 14, 15) For present purposes, there is a clear distinction between what the psychiatrist may have told the applicant in person and what he or she has subsequently chosen to disclose to the GVMHS and its consultant in the process of handling the applicant's complaint.

The applicant makes a related argument to the effect that the professionals who participated in the handling of her complaint at GVMHS did so in a professional capacity, so what they have had to say about the quality of care she received should be disclosed to her. (Submission of the Applicant, pp. 23, 24) For reasons noted above, I think that it is essential to the effective conduct of complaint investigations, especially for sensitive matters, that staff of public bodies charged with such responsibilities should have a cloak of confidentiality to do their work. Section 22(2)(f) of the Act recognizes this.

In order to justify its section 22 severances of personal information from the records in dispute, the GVMHS has invoked sections 22(2)(f), (g), and (h), 22(3)(g), and 22(3)(g.1). (Reply Submission of the GVMHS, paragraphs 6-30) It argues that none of this severed personal information involves the applicant as such but affects "the privacy interests of the Third Party and the consultant." (Reply Submission of the GVMHS, paragraph 9)

> Reduced to its essence, the Applicant's interest is to discover what others have said, not about her, but about the work performance and character of the Third Party and who made those comments. (Reply Submission of the GVMHS, paragraph 10)

I think that this characterization does a disservice to the motivations of the applicant. She has been presented with bold conclusions about herself and her accusations against the psychiatrist; she now wants to know what, if any, basis existed for these judgments and who made them. She has a right to information about herself; she does not have a right of access to the psychiatrist's personal information. I attempt to draw such a distinction in my review of the records in dispute below.

The GVMHS also resists the application of section 22(2)(a) in this case, rejecting the notion that the disclosure sought by the applicant is desirable for the purpose of subjecting its activities to public scrutiny. (Reply Submission of the GVMHS, paragraph 13) I note, however, that the GVMHS did not have a complaint handling process in place when this applicant complained, suggesting that complaints of this type are unusual.

> When the whole of the Applicant's submissions are considered, it is apparent that the Applicant is not wanting GVMHS to be subject to public scrutiny but rather, she wants the information gathered about the Third Party to dispute the decision made by GVMHS regarding her complaint. The Applicant's submissions show that she is seeking a different decision from GVMHS, including a different decision on the matters which the GVMHS has stated it cannot decide under its processes. (Reply Submission of the GVMHS, paragraph 13)

Again, my reading of the applicant's position is that she wants to know if the severed material conceals the basis upon which the GVMHS made its decisions concerning her complaint. That is a separate matter from wanting the "personal information" of the third party.

I am not persuaded, in the abstract, by the GVMHS's attempted reliance on sections 22(2)(g) and (h) to prevent disclosure of additional information about the third party, because his or her interests need to be balanced against the interests of the applicant. If the GVMHS made decisions about the applicant on the basis of information that it now does not want to release because it "may be inaccurate or unreliable," that is an additional reason, in my view, for the applicant to see it. (See Reply Submission of the GVMHS, paragraph 17)

In the detailed review of the records in dispute that follows, I have accepted a number of severances made by the GVMHS under section 22 on the basis of section 22(2)(f), as noted, and also section 22(3)(g). I do not find that section 22(3)(g.1) is relevant to this severed material. See Order No. 34-1995, February 3, 1995, p. 5; Order No. 71-1995, December 15, 1995, p. 11; Order No. 78-1996, January 18, 1996, p. 8. (See Reply Submission of the Applicant, paragraphs 22-24)

Review of the records in dispute

The documents that are in dispute under Issue A are:

1. E-mail dated 5/8/95 (1:42 PM), sent by the Medical Director at the GVMHS to the Executive Director of the GVMHS (section 22 severance); [one line severed]

The GVMHS has severed part of a sentence that explains why the third party wishes access to the applicant's file. Since it has released the rest of the message to the applicant, I fail to find any reason under section 22 why this information should not be released as well.

2. E-mail dated 8/28/95, sent by the Director of Family and Children's Services at the GVMHS to the Executive Director (sections 13 and 22 severances); [contents of 12 lines fully severed]

The two sentences severed under section 13 should be disclosed to the applicant, because they do not contain "information that would reveal advice or recommendations developed by or for a public body." They simply report on an exchange between the writer and the third party about a procedural matter. I find that the remaining material was appropriately severed under section 22(2)(f), because the information reported was clearly intended to be supplied in confidence as part of GVMHS investigation of the applicant's complaint. (Reply Submission of the GVMHS, paragraph 19)

3. Two-page memorandum dated 8/9/95, sent by the Director, Family and Children's Services, GVMHS to the Executive Director and Medical Director, GVMHS (section 22 severances, page 1 - sections 13 and 22 severances, page 2); [14 lines severed]

The applicant is not disputing the severances under sections 13 and 14 on the first page. (Submission of the Applicant, p. 2)

I find that the remaining material was appropriately severed under sections 22(1) and 22(2)(f), because the information reported was clearly intended to be supplied in confidence as part of the GVMHS investigation of the applicant's complaint. (Reply Submission of the GVMHS, paragraph 19) Two sentences were appropriately withheld under section 13(1), because they do contain "information that would reveal advice or recommendation developed by or for a public body ...."

4. Portion of meeting notes related to the responsibilities and opinions of the medical Director at the GVMHS, marked page 29, in the May 17, 1996 release package (section 22 severance); [4 lines severed]

The applicant is not seeking the three lines severed under section 14. I can find no rationale under section 22 for withholding the remaining sentence.

5. Two-page memorandum dated 11/03/95 sent by the Medical Director of the GVMHS to a consultant (sections 13 and 22 severances); [13 lines severed]

The applicant is not contesting the section 14 severances. The one section 13(1) severance is inappropriate, because it simply poses a question to the consultant and does not contain "information that would reveal advice or recommendations developed by or for a public body ...."

I have accepted four specific severances under section 22(1). The severance of paragraph 4 under section 22(1) is inappropriate, because it asks a question about what the third party said in therapy sessions with the applicant herself. She already knows that information.

6. Three-page letter dated November 14, 1995 from a consultant to the Medical Director of the GVMHS (sections 13 and 22 severances); [63 lines severed]

I find that the seven severances on the basis of section 13(1) are appropriate, because they contain "information that would reveal advice or recommendations developed by or for a public body ...." (Submission of the GVMHS, paragraphs 13-16, 20) Although the applicant seeks disclosure under section 13(2)(k) of the Act, this record does not fall within the category of reports contemplated by this section.

The GVMHS used a consultant during the complaint handling process and has chosen to keep his or her name confidential. The applicant states that she and her support person (another psychiatrist) were asked for advice about an "independent psychiatrist" and expected to be given a copy of the report, a point that the GVMHS denies (Affidavit of N. Sladen-Dew, paragraph 13). The applicant also argues that such a report, and the identity of its author, should be disclosed under section 13(2)(k) of the Act. (Submission of the Applicant, pp. 3, 4) But this record does not fall within the category of reports contemplated by section 13(2)(k).

The applicant makes a relevant point when she states that:

> GVMHS failed to state that I would not have access to the report nor did they get my permission to have my identity released to the consultant. If I had known that I was not going to know the consultant's identity and be given a full copy of the report, I would not have given permission to have my identity disclosed to him. (Submission of the Applicant, pp. 24. 25)

I find it disturbing, in terms of fairness, that the applicant was not represented by counsel during the complaint process, whereas the psychiatrist/third party and the GVMHS have had legal representation throughout, ultimately supported by the public purse. There has not been a level playing field for this applicant.

The applicant has received segments of this report by the consultant which contains what she describes as "extremely damaging" remarks about her. She wonders about the basis for such negative judgments about, in particular, her credibility. (Submission of the Applicant. p. 39)

The authorities at the GVMHS state that they asked for the consultant's participation on the basis of an expectation of confidentiality. (Affidavit of John Russell, paragraph 14)

In the present inquiry, I am persuaded that section 22(2)(c) of the Act is a "relevant circumstance" militating in favour of disclosure of the identity of the consultant, because "the personal information is relevant to a fair determination of the applicant's rights." (section 22(2)(f)) I state this particularly in light of the statement of the medical director of the GVMHS that "[t]he reason I had for obtaining the consultant's advice and recommendations was to ensure that our review process was being carried out fairly to both parties." (Affidavit of N. Sladen-Dew, paragraph 11) I regret that the necessity of maintaining confidentiality about certain personal matters in my Orders makes it impossible for me to spell out this point more completely.

With respect to the application of section 22(1), I find that most of the information in dispute can be withheld because it concerns the psychiatrist. However, I find that the GVMHS cannot withhold the name of the consultant, his or her address, and the information in paragraph 3, because of section 22(2)(c).

7. Undated five-page report by the medical director of the GVMHS titled, GVMHS Complaint Appeal Process (sections 13 and 22 severances); [79 lines severed]

This report by the Medical Director deals specifically, and in detail, with the complaint by the applicant against the third party. The last three pages discuss specific concerns about the role of the former psychiatrist and specific recommendations for action by the GVMHS with respect to the complaint, and thus are appropriately withheld under section 13(1). (Submission of GVMHS, paragraph 21) Based on my decision in Order No. 62-1995, I am of the view that the applicant has no right to know the details of what the GVMHS decided to do in this case. She did receive a summary letter about the GVMHS's decisions. If the findings and determinations of the GVMHS need to be reviewed further, it would be most appropriate for this to be done by the College of Physicians and Surgeons and/or the Ministry of Health rather than by the applicant.

The first three pages contain severances made on the basis of section 22(1). I am satisfied that most of this severed material is personal information about the third party that should not be disclosed on the grounds that it would be an unreasonable invasion of his or her privacy. Certain information about other third parties can also be protected from disclosure under this section. However, the name of the consultant should be disclosed because of section 22(2)(c).

8. One-page memorandum dated 04/08/95, sent by the Medical Director, GVMHS to the Executive Director, GVMHS (section 22 severances). [7 lines severed]

On the basis of my review of the severed material, I am satisfied that it should be withheld on the basis of section 22(1) of the Act, because it is personal information about the psychiatrist.

Issue B: The missing record

The third party evidently prepared a twelve-page report on the subject matter of this inquiry on or about October 27, 1995. The applicant asserts that he or she prepared this report for the GVMHS. (Submission of the Applicant, pp. 8, 11) His or her lawyer permitted the GVMHS to "review" this report on the condition that it be returned to the lawyer: "If GVMHS were to refuse the condition on which the document review was offered, the third party would not have provided the document to GVMHS at all." The GVMHS argues, supported by the third party, that this record is not under its custody and control and that I have, therefore, no jurisdiction over the matter. (Submission of the GVMHS, paragraphs 5, 22-24; Affidavit of John Russell, paragraph 16, 17; Reply Submission of the Third Party, paragraph 7)

It appears self-evident that the GVMHS used this report as part of its decision-making with respect to the applicant's complaint. Thus under section 31 of the Act it was under an obligation to retain a copy of this "personal information" about the applicant for possible access by the applicant. (Submission of the Applicant, p. 15) The applicant states that she and her support person were given information from this report by officials of the GVMHS and that it was clearly used to make a decision that affected her. (Reply Submission of the Applicant, pp. 3, 4)

Schedule 1 of the Act defines personal information to include:

(f) information about the individual's health care history, including a physical or mental disability,

(g) information about the individual's educational, financial, criminal or employment history,

(h) anyone else's opinions about the individual, and

(i) the individual's personal views or opinions, except if they are about someone else,

Although this particular record has not been submitted to me, it seems highly likely, based on other records that I have reviewed in this inquiry, that the previous definition would apply to a significant portion of this disputed record.

I intend to order production of the record to me for review, despite the fact that the GVMHS argues that I "can make no order in relation to a record not in the possession of a public body." (Submission of the GVMHS, paragraph 27) I note in this connection the GVMHS's statement that its relationship with the third party can best be described as that of "employer." (Affidavit of J. Russell, paragraph 9)

The GVMHS questions its authority to act in response to a complaint such as occurred in the present inquiry. According to its Executive Director:

> To the best of my understanding, GVMHS has no statutory or other authority which permits it to discipline or impose any penalties or sanctions upon a medical practitioner who provides services to GVMHS or to require the medical practitioner to take any actions in answer to a complaint. The only remedy the GVMHS has when one of its service providers is the subject of a complaint is to affect the contractual relationship between the parties, such as termination of the agreement. However, it is always within the right of the contracting party to resign and thereby, to fall outside of any jurisdiction of GVMHS. (Affidavit of John Russell, paragraph 10)

The Executive Director's point is exactly correct, which is the reason that I raise this matter here. Absent criminal sanctions in the Act itself, the remedy for any public body for breach of the privacy provisions of the Act is to discipline the culpable individual. Such is a very powerful sanction in an era of government cutbacks. I note, as well, that the GVMHS's own submission stated that it used the severed information in the records in dispute "to consider whether the Third Party's contractual relationship with GVMHS should be altered or terminated." (Reply Submission of the GVMHS, paragraph 30l and Affidavit of Nicholas Sladen-Dew, Medical Director, GVMHS, paragraphs 5, 8) It is this contractual relationship that persuaded me, with respect to Issue B, that the missing record is in the control of the GVMHS. To decide otherwise would be to allow public bodies to flout the clear intent of section 31 of the Act.

The GVMHS agreed to a process whereby the third party retained the only copy. This does not necessarily mean that as an employer it has no control, because it had enough control to make an agreement about returning it. I invite the GVMHS to submit arguments about the application of the exceptions in the Act to this record.

Issue C: The Unusual Occurrence Report and related memoranda (5 pages)

The GVMHS wishes to release some of this material to the applicant, but the third party objects. (I have not been given a copy of what was intended for release.) The first two pages are a form that the third party filled out after he or she received the applicant's complaint at the end of 1994. It includes comments by a unit manager for the GVMHS. There are two accompanying memoranda about the complaint prepared by the psychiatrist only in the first two months of 1995.

This material is clearly part of the complaint handling process of the GVMHS for which there are legitimate expectations of confidentiality, especially for the third party, under section 22 of the Act. I find that the third party's objections to the release of this information under section 22 of the Act are legitimate and should be upheld. I note, however, that a number of matters discussed in these materials have been disclosed to the applicant in records already released to her.

However, I am not persuaded by the third party's attempt to use sections 15 and 19 of the Act to prevent disclosure. (Submission of the Third Party, paragraphs 5-20; and the Reply Submission of the Applicant, pp. 4-7) I cannot accept that the two-page memorandum about an unusual occurrence was part of a law enforcement activity or that its disclosure would threaten the mental health and physical safety of the third party or the general public. The "threatening and intrusive behaviour" feared by the third party does not rise to a threshold required for protection under section 19, especially given the actual history of the relationship between the third party and his or her former patient. In this connection, I have read the third party's *in camera* affidavit and the detailed reply submission of the applicant on the same points (pp. 5-7).

In this connection, I especially disagree with the applicant's assertion that anything that the third party "has written about his or her rationale for his or her stated conclusions, explanations of his or her therapeutic reasonings for his or her statements and behaviours and/or response to my complaints can only be construed to be further minutes of the therapy sessions, which as the patient, I am entitled to see." (Submission of the Applicant, pp. 2, 11, edited for purposes of confidentiality) The clinical process and the complaint process are two entirely separate matters in terms of access to records under the Act.

I also disagree with the applicant's submission that anything written about her by the psychiatrist concerns his or her professional and not his or her private life. (Submission of the Applicant, p. 4) She knows all too well that this is not the case in the tangled circumstances of this failed therapeutic relationship.

In camera submissions

The GVMHS objected to the applicant making *in camera* submissions for release of the identity of the consultant and argued that it should have an opportunity to respond. (Reply Submission of the GVMHS, paragraph 26) I accept the *in camera* submission of the applicant in this case as appropriate, given its sensitive contents, just as I accepted an *in camera* submission from the GVMHS from its consultant.

8. Orders

Issue A:

I find that the Greater Vancouver Mental Health Services Society as delegated head of the Ministry of Health and Ministry Responsible for Seniors is authorized under section 13(1) of the Act to refuse access to parts of the records in dispute noted in this Order as documents numbered 3, 6, and 7. Under section 58(2)(b), I confirm the decision of the Greater Vancouver Mental Health Services Society to refuse access to parts of documents numbered 3, 6, and 7.

I find that the Greater Vancouver Mental Health Services Society as delegated head of the Ministry of Health and Ministry Responsible for Seniors is required under section 22 of the Act to refuse access to parts of the records in dispute numbered as documents 2, 3, 5, 6, 7, and 8. Under section 58(2)(c), I require the Greater Vancouver Mental Health Services Society to refuse access to parts of documents 2, 3, 5, 6, 7, and 8.

I also find that the Greater Vancouver Mental Health Services Society as delegated head of the Ministry of Health and Ministry Responsible for Seniors is not authorized under section 13(1) to refuse access to parts of documents 2 and 5, and is not required under section 22 to refuse access to parts of documents 1, 4, 5, 6, and 7. Under section 58(2)(a), I require the Greater Vancouver Mental Health Services Society to give the applicant access to those parts of documents 1, 2, 4, 5, 6, and 7 that I have marked for release.

Issue B:

I find that the Greater Vancouver Mental Health Services Society as delegated head of the Ministry of Health and Ministry Responsible for Seniors does not have custody but does have control of the third party report within the meaning contemplated in section 3(1) of the Act.

Issue C:

I find that the Greater Vancouver Mental Health Services Society as delegated head of the Ministry of Health and Ministry Responsible for Seniors is required under section 22 of the Act to refuse access to the Unusual Occurrence Report and related memoranda. Under section 58(2)(c), I require the Greater Vancouver Mental Health Services Society to refuse access to this record.

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David H. Flaherty January 17, 1997
Commissioner