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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 108A-1996
July 10, 1998

INQUIRY RE: Reconsideration of Order No. 108-1996, May 30, 1996

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1. Description of the reconsideration

As Information and Privacy Commissioner, I conducted a written inquiry on March 22, 1996, under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). The inquiry arose out of a request for review of a decision of the Ministry of Health and Ministry Responsible for Seniors (the Ministry) to refuse an applicant access to his medical records held by the Adult Forensic Psychiatric Institute. The exceptions relied on were sections 19(1)(a) and 19(2) of the Act.

The inquiry resulted in Order No. 108-1996, May 30, 1996, in which I found that the head of the Ministry was authorized to refuse access to part of the records in dispute under section 19(1) of the Act, but was not authorized to refuse access to the records in dispute under section 19(2) of the Act. As a result, I required the Ministry to give the applicant access to part of the records previously withheld by the Ministry and marked a copy of the complete record to indicate what should be disclosed.

Order No. 108-1996 was judicially reviewed at the insistence of the Ministry and the Attorney General for British Columbia on the ground that I applied the wrong test under section 19 of the Act. In reasons for judgment issued on August 5, 1997, Mr. Justice Curtis found in favour of the Ministry and the Attorney General and remitted the matter back to me for reconsideration. Curtis J. found that I had erred by applying the common law test in McInerney v. MacDonald, [1992] 2 S.C.R. 138, which dealt with a patient's request for medical records in the absence of legislation dealing with that issue. In McInerney v. MacDonald, the Supreme Court established a test which requires proof of a significant likelihood of substantial adverse effect. Curtis J. considered that the common law test requires a higher probability of harm occurring than the test in section 19(2), which requires that the disclosure could reasonably be expected to result in immediate and grave harm. Curtis J. directed me to reconsider the section 19(2) issue between the applicant and the Ministry on the basis of the statutory test.

Curtis J. did not consider the application of section 19(1) to be in issue on the judicial review. The parties have agreed, however, that I should also reconsider this aspect of the case. In this way, my finding in Order No. 108-1996 that only part of the records in dispute could be withheld under section 19(1) will also be revisited on the basis of the statutory test without reliance on the common law test in McInerney v. MacDonald.

2. Discussion

The relevant provisions of section 19 of the Act are as follows:

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...

(2) The head of a public body may refuse to disclose to an applicant 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.

The records in dispute are described in Order No. 108-1996. They are the applicant's charting records held by the Adult Forensic Institute. Approximately one-half of the records consist of purely medical records of an operation or medication. In Order No. 108-1996, I found that these records were innocuous with respect to section 19 of the Act and should be disclosed to the applicant. The other half of the records are notes made by physicians and other health care professionals with respect to the mental health of the applicant. In Order No. 108-1996, I found that information in these records should be withheld to the extent that they reveal the names and specific information identifying health professionals involved in the case. I also found that information revealing threatening behaviour toward others should be withheld except where it relates to threats of legal action.

The parties' original arguments with respect to disclosure of the records in dispute are described in Order No. 108-1996. Because of the interests protected by section 19, following the decision of Curtis J., I also requested the parties to inform me whether there were any new and material facts relevant to the applicability of this exception since Order No. 108-1996 was made. The applicant did not provide any new information. The Ministry made a further submission informing me that the applicant, who was previously incarcerated in a federal correctional institution, has now been released from custody. The Ministry submits that the fact that the applicant is now back in the community heightens concern for the safety of third parties and the applicant if the records in dispute are disclosed. The Ministry's further submission also notes a passage in Order No. 108-1996 where I recommended that the Ministry conduct a further search to confirm that all records have been located. I am satisfied that my previous concern on this point has been resolved.

3. Reconsideration - Section 19

I have carefully reconsidered the parties' original submissions (which included an *in camera* submission from the Ministry) and the further more recent submission from the Ministry, against

the standards in section 19 of the Act and without regard to the common law test in McInerney v. MacDonald.

My basic approach to section 19 is to require the Ministry to act prudently where the health and safety of others or the applicant are at issue in connection with the possible disclosure of records. The Act intends that public bodies should take very seriously the prospect of disclosure harmful to individuals or to public safety. Having said that, under section 19 the burden of proof is upon the Ministry, and evidence is required to meet the statutory thresholds. The threshold in subsection (1) is a reasonable expectation that disclosure could threaten another person's safety or mental or physical health or interfere with public safety. The threshold in subsection (2) is a reasonable expectation that disclosure could result in immediate and grave harm to the applicant's safety or mental or physical health.

The Ministry's *in camera* submission is extensive. It gives detailed consideration to the applicant's medical condition and diagnosis. The reason given in the Ministry open submission for so extensive an *in camera* submission is its strong concern that even making the section 19 argument, let alone addressing the specific records in dispute in this inquiry, "could create problems." This illustrates the stringency of the Ministry's approach to the application of section 19 to the medical records of persons with serious records of criminally anti-social behaviour and related psychiatric illness. This approach places a significant strain on access rights and procedures under the Act. It suggests that in some circumstances risk of the harms intended to be protected against by section 19 could be increased by merely notifying an applicant of the application of that exception, let alone giving him reasons for refusal, as a public body is required to do by section 8(1)(c)(i) of the Act. I respect the concern which underlies the Ministry's position, but that concern must be balanced with the requirements of the Act, and the need for the applicant to receive as fair an opportunity to be heard as can reasonably be extended. With the balancing of these constraints in mind, I will explain the reasoning and evidence which underlie this order.

From medical evidence and other secondary and supporting evidence, the Ministry submits that the threshold in section 19(1) of the Act has been met with respect to all information in the disputed records. With respect to section 19(2) of the Act, the Ministry submits that by harming others in the past, the applicant has also harmed his own safety, mental, and physical health and, following this rationale, if the risk of harm threshold to others or the public is met under section 19(1), so is the risk of harm threshold to the applicant himself met under section 19(2). The argument appears to be that the applicant's causing of harm to others in the past both constitutes and could result in harm to the applicant.

I agree with the Ministry that the section 19(1) threshold of reasonable expectation of harm to third parties' safety or mental or physical health has been met for information which reveals the names or otherwise identifies health care professionals involved in the applicant's case. I also agree that the section 19 threshold has been met for information revealing threatening behaviour by the applicant towards others, except where this information relates to threats of legal action.

I have more difficulty finding that the section 19(1) test has been met in relation to non-identifying or non-threatening information in the notes or in relation to the purely medical

records of an operation and medication. The applicant has been judged by our criminal and mental health laws (which are preoccupied in a variety of ways with risks of harm to individuals and public safety) to be free and fit to return to the community and enjoy the public rights that other members of the community enjoy. The implications of the Ministry's argument, if accepted at large, are that an individual in the applicant's position, though no longer detained under criminal or mental health laws, will be denied access to medical information of any kind about himself from this Ministry. I disagree categorically with any suggestion that individuals who have been patients at the Adult Forensic Psychiatric Institute should or will be automatically disentitled under section 19 of the Act to access to its health records concerning them. The section 19 test must be applied fairly to each case on the basis of evidence and without pre-conceived prejudices.

Before sustaining the severe result being sought by the Ministry, I must carefully weigh the evidence before me against the tests in section 19 of the Act. The section 19(1) test requires evidence establishing a reasonable expectation that disclosure could threaten another person's safety or mental or physical health or interfere with public safety. I interpret the phrase "could reasonably be expected to" to require a sufficient and rational basis for a reasonable expectation of threat of harm or interference with public safety. I conclude that in the very serious circumstances of this case the reasonable expectation threshold has been met for the balance of the information in the notes and in relation to the purely medical records of an operation and medication. It is not open to me to offer more detailed reasons without revealing the substance of the Ministry's *in camera* evidence.

With respect to section 19(2) of the Act, there must be a reasonable expectation that immediate and grave harm to the applicant's safety or mental or physical health could result, if the information were to be disclosed. Let me first say that I am not persuaded that a reasonable expectation of harm to others under section 19(1) of the Act must also mean that an applicant is in reasonable danger of immediately and gravely harming his own safety or mental or physical health. The test in section 19(2) must be independently applied. Though some risk of harm to the applicant's mental health is present here, the evidence is not sufficient to support a conclusion that disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health. For this reason, I find that section 19(2) does not apply to refuse the applicant access to the disputed records.

4. Order

I find that the head of the Ministry of Health and Ministry Responsible for Seniors is authorized to refuse access to the records in dispute under section 19(1) of the Act, but not under section 19(2) of the Act. Under section 58(2)(b), I therefore confirm the decision of the Ministry to refuse access to those records.

July 10, 1998

David H. Flaherty
Commissioner