NBRIOR- 2008-03

IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1)b)
OF THE *RIGHT TO INFORMATION ACT*, R.S.N.B. 1973, c. R-10.3

Between: **W.X.,**
the petitioner

And:

Mary Schryer,
Minister of Social Development
The Minister

RECOMMENDATION

FACTS:

1. This referral, dated March 12, 2008, arises out of an access to information request by the petitioner originally submitted to the Minister of Health dated April 16, 2007. The petitioner was seeking and continues to seek information related to the Long Term Care Assessment carried out in respect of her brother who died in care in December 2005, along with any other documents in the Minister's possession relating to her brother's care.

2. The Minister of Health's response, dated June 26, 2007, indicated that the Department had previously provided all information in its possession relating to the death of the petitioner's brother.

3. The matter was then referred to this office on July 18, 2007. Upon completion of its review, this office issued a recommendation to the Minister of Health on September 14, 2007 to make a more diligent search of the Department's records and to consult with other departments to locate the records requested by the petitioner.[1] This office forwarded a copy of the recommendation to the then Minister of Family and Community Services (now the Minister of Social Development).

4. The petitioner followed-up via e-mail correspondence dated November 18, 2007 with the then Minister of Family and Community Services with regards to the recommendation issued by this office.

5. The Minister responded to the petitioner's correspondence as if it were a request submitted under the *Right to Information Act*.[2] In a letter to the petitioner dated January 9, 2008, the Minister denied the request on the grounds that the requested information is protected by law under the privacy provisions of the *Family Services Act*.[3]

ISSUE:

6. Is the requested information exempted from disclosure under section 6(a) of the *Right to Information Act*?

LEGISLATION:

7. The Department relies on the following exemption under the *Right to Information Act*:

> **6** There is no right to information under this Act where its release
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> (a) would disclose information the confidentiality of which is protected by law;

8. It is the Department's position that the requested information is protected by law under the provisions of section 11 of the *Family Services Act*:

> **11(1)** All information acquired by the Minister or any other persona in relation to any person or matter under this Act, whether of a documentary nature or otherwise, is confidential to the extent that its release would tend to reveal personal information about a person identifiable from the release of the information.

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[1] *R.S. v. Minister of Health*, NBRIOR- 2007-24 [*R.S.*].
[2] *Right to Information Act*, R.S.N.B. 1978, c. R-10.3.
[3] *Family Services Act*, S.N.B. 1980, c. F-2.2.

> **11(2)** The Minister shall not permit the release of confidential information to any person without the consent of the person from whom the information was obtained and to whom the information relates.

ANALYSIS:

9. In a 2006 recommendation, this office previously considered whether the privacy provisions contained in section 11 of the *Family Services Act* fall within the scope of the 6(a) exemption as a form of confidentiality protected by law.[4] In the analysis, I considered the overarching legislative privacy and access scheme, the need to balance personal privacy rights with the right to information, and the strict interpretation of exemption provisions by the courts. It is my interpretation that the 6(a) exemption is a broad exemption directed primarily at the preservation of Cabinet secrecy, official secrets and common law privileges.[5] To invoke this exemption in conjunction with section 11 of the *Family Services Act* is to create an overly broad exclusionary process that could favour blanket refusals of requests and does not strike the proper balance between protecting personal information and facilitating disclosure.

10. While the *Right to Information Act* does not currently specify that a relative or close family member of a deceased person can bring a request for personal information of the deceased, new privacy and access legislation was recently introduced in the Legislative Assembly which includes the following provision:

> 44(1) A public body may disclose personal information only
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> (k) to a relative of a deceased individual if the head of the public body reasonably believes that disclosure is not an unreasonable invasion of the deceased's privacy,[6]

11. A number of other jurisdictions have codified similar provisions that allow public bodies discretionary powers to disclose personal information of a deceased person to relatives, close family members, and/or another person with whom the individual is believed to have had a close personal relationship.[7] The New Brunswick *Right to Information Act* was drafted long

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[4] *T.N. v. Minister of Family and Community Services*, NBRIOR- 2006-10.
[5] *Ibid*., at para. 20.
[6] Bill 82, *Access to Information and Protection of Privacy Act*, 2nd Sess., 56th Leg., New Brunswick, 2008, cl. 44(1)(k).
[7] See other provincial privacy and access legislative provisions: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 40(1)(cc); *Freedom of Information and Protection of Privacy Act*, C.C.S.M. c. F175, s. 44(1)(z); *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 30(2); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 21(4)(d); Freedom of Information and Protection of Privacy Act, R.S.P.E.I. 1988, c. F-15.01, s. 37(1)(aa). See also other provincial health information legislation provisions: *Health Information Act*, R.S.A. 2000, c. H-5, s.

before any of these more specific legislative provisions were adopted in other jurisdictions; however, in interpreting the New Brunswick statute it is instructive to look at the prevailing legislative trends *in pari materia* in other Canadian jurisdictions. An interpretation which harmonizes legislative approaches, particularly in statutes which affirm the fundamental rights of Canadians, rather than focusing on differences in wording is to be preferred.[8]

12. In my view, the proposed legislative provision in paragraph 44(1)(k) of Bill 82 has much to recommend it. It addresses the very concern to which this case gives rise, and which I canvassed in the earlier related recommendation.[9] It also provides a very flexible standard which allows the head of the public body to balance the privacy interests and accountability interests at stake. The question before me, however, is how to interpret and apply the *Right to Information Act* in the absence of the clear legislative provision proposed in Bill 82.

13. I clearly cannot interpret the Act in reference merely to what the law may be if Bill 82 is adopted. On the other hand, as the existing legislative scheme is merely silent with respect to right of a deceased person's relatives to access their personal information, I think it would be wrong to simply infer from the proposed amendment that the petitioner has no right to the information sought until such time as the proposed legislative provision is adopted. The rules of statutory interpretation require that I consider the context of the whole Act so as to give effect to its purpose. The *Interpretation Act*[10] requires also that every legislative provision be given "such fair, large and liberal construction and interpretation as best ensures the attainment of [its] object." Courts have been careful also to avoid interpretation that leads to absurdity including results that are self evidently irrational or unjust.[11]

14. The difficulty in this case is that the literal interpretation adopted by the Minister refuses disclosure of a document which may help a grieving family reach closure regarding a loved one who died in the Minister's care, thereby defeating the dominant legislative purpose of holding public authorities publicly accountable, and it does so for the ostensible reason of protecting the privacy of the deceased person. In my view this is an absurd result which the Legislature cannot have intended. It plays too well into the hand of those who may want to shield certain matters of public administration from review and it would set a precedent that could easily erode public confidence in Government administration.

35(1)(d.1); *Personal Health Information Act*, C.C.S.M. c. P33.5, s. 22(2(d); *Health Information Protection Act*, S.S. 1999, c. H-0.021, s. 27(4)(e).

[8] *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 at 373.

[9] *R.S., supra* note 1.

[10] *Interpretation Act*, R.S.N.B. 1973, c. I-13.

[11] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 251.

15. It is clear from the records disclosed in this review and in the earlier related petition that the petitioner was the sister of the deceased to whom public authorities turned whenever matters involving the management of the deceased's health care required direction and consent. When however, the petitioner raised questions regarding the quality of care her brother received, his privacy interests, both before and after his death, were raised as a shield to withhold information from the family which would allow for greater scrutiny of the services provided. In my view the Minister's reliance on the confidentiality provisions of the *Family Services Act* in this case is inequitable and inconsistent with the provisions of the *Right to Information Act*.

16. Given the need to interpret exclusionary provisions to restrict access to information in the context of the overarching legislative scheme; given the need to avoid absurd results; considering the general thrust of access and privacy laws elsewhere in Canada regarding the release of personal information about deceased persons to relatives; considering also that the proposed changes in Bill 82 if adopted would allow disclosure of the same records at a later date; and having regard in particular to my earlier recommendations dealing with the interpretation of paragraph 6(a) of the *Right to Information Act*, it is my opinion that the section 6(a) exemption has no application in this situation.

17. Full disclosure and transparency in this case, where the relatives of the deceased person in question have raised concerns with respect to the quality of care he received from agents of the province, will only inure to the benefit of public administration and the confidence the public places in the provision of Long Term Care Services in this province.

CONCLUSION:

18. **I hold in this case that the Minister cannot rely on the exemption under 6(a) of the Act and am thus recommending that the Minister disclose the Long Term Care Assessment Form requested by the petitioner.**

Dated at Fredericton, this 9th day of July, 2008.

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Bernard Richard, Ombudsman