



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

Order F17-04

MINISTRY OF CHILDREN & FAMILY DEVELOPMENT

Celia Francis
Adjudicator

January 26, 2017

CanLII Cite: 2017 BCIPC 04
Quicklaw Cite: [2017] B.C.I.P.C.D. No. 04

Summary: An applicant requested access to records, including information about his children. The Ministry was satisfied he was their guardian but said he had not shown that he was acting for or on behalf of the children in compliance with s. 5(1)(b) of FIPPA, s. (1)(a) of the FIPP Regulation and s. 76(1)(a) of the *Child, Family and Community Service Act*, in exercising their right of access to their personal information. The adjudicator confirmed the Ministry's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 5(1)(b); *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 155/2012, ss. 3(1)(a); *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93, s. 3; *Child, Family and Community Service Act*, s. 76(1)(a).

Authorities Considered: B.C.: Order F07-16, 2007 CanLII 35477 (BC IPC); Order 00-44, 2000 CanLII 8520 (BC IPC); Order F07-21, 2007 CanLII 52746 (BC IPC); Order F06-06, 2006 CanLII 17222 (BC IPC); Order 04-22, 2004 CanLII 45532 (BC IPC).

INTRODUCTION

[1] In May 2015, the applicant made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Ministry of Children and Family Development ("Ministry") for access to records related to himself, a specific incident in October 2014 and notes of interviews conducted with his two children, all for the period from 2011 to 2014. The Ministry asked the applicant to confirm that he had guardianship of his minor children and to demonstrate how he was acting "on behalf of and for the sole benefit of" his children. The applicant provided

a copy of a court order awarding him and his ex-wife joint guardianship of their children. He also said that he was concerned about the “unnecessary exposure” the children were experiencing from the Ministry and “about the psychological impact this may have in the future as a result”.

[2] The Ministry told the applicant that it would process his request for access to his own personal information. As for the applicant’s request for access to his children’s personal information, the Ministry told the applicant that it was satisfied that the applicant had joint guardianship of his children. The Ministry said that it did not, however, consider that he met the requirements of s. 3 of the *Freedom of Information and Protection of Privacy Regulation* (who may act for a minor) (“Regulation”) and s. 76 of the *Child, Family and Community Service Act* (“CFCSA”) (who can act for a child), as he had not demonstrated that he was acting on behalf of his children in making his request. The Ministry said that, consequently, it was treating his request as equivalent to a request for a third party’s personal information and that it was withholding his children’s personal information under s. 22(1) of FIPPA (harm to third-party personal privacy).

[3] The applicant requested a review by the Office of the Information and Privacy Commissioner (“OIPC”) of the Ministry’s decision to deny him access to his children’s personal information. He said the purpose of his request was to protect his children from unnecessary contact with the Ministry and the RCMP. Mediation by the OIPC did not resolve the issues in dispute and the applicant requested that the matter proceed to inquiry. In the meantime, the Ministry told the applicant that the records containing his own personal information were ready for him to pick up at the nearest district office. The applicant did not, however, pick up the records.

ISSUE

[4] The only issue before me is whether the applicant is acting for, or on behalf of, his children in accordance with s. 5(1) of FIPPA, s. 3 of the Regulation and s. 76 of the CFCSA.¹ FIPPA is silent respecting which party has the burden of proof in such a case. However, previous orders have said that each party is responsible for submitting arguments and evidence to support its position.²

¹ The original notice for this inquiry included s. 22(1) as an issue. The OIPC then told the parties that s. 22(1) had been included in error, as the applicant had not requested a review of the Ministry’s decision under s. 22(1). The OIPC issued an amended notice of inquiry removing s. 22(1) as an issue. The applicant did not object and the inquiry proceeded on the basis of the amended notice.

² See, for example, Order F07-16, 2007 CanLII 35477 (BC IPC), at para. 4.

DISCUSSION

Background

[5] The applicant and his ex-wife are joint guardians of their two children. The Ministry said that custody and access are contentious between the two parents and that litigation on these matters is ongoing. The Ministry added that a number of child protection reports have been made respecting the care of the children and that the reports include allegations of physical abuse and neglect. The most current report is under investigation.

Legislative Framework

[6] Section 5(1) of FIPPA sets out how an applicant may request records on behalf of another person. It says this:

How to make a request

- 5 (1) To obtain access to a record, the applicant must make a written request that
 - ...
 - (b) provides written proof of the authority of the applicant to make the request, if the applicant is acting on behalf of another person in accordance with the regulations, ...

[7] Section 3 of the Regulation sets out when a guardian may act for a minor in making a request under s. 5(1) of FIPPA. It says this:

Who may act for a minor

- 3 (1) A guardian of a minor may act for the minor in relation to any of the following sections of the Act if the minor is incapable of acting under that section:
 - (a) section 5;
 - ...
- (2) A guardian of a minor may exercise a power granted to the guardian under subsection (1) of this section only if the power is within the scope of the guardian's duties or powers.

[8] Section 79 of FIPPA states that, if a provision of FIPPA is inconsistent with a provision in another Act, the FIPPA provision prevails, unless the other Act expressly states that it, or a provision of it, applies despite FIPPA. The CFCSA contains such a provision, specifically s. 74(1), which says that ss. 74-79 of the CFCSA apply despite FIPPA.

[9] Section 76(1) of the CFCSA states that a person who has “legal care” of a child may exercise the child’s access rights under FIPPA. The relevant part of s. 76(1) in this case reads as follows:

Who can act for a child

76 (1) A person, other than a director, who has legal care of a child under 12 years of age may, on behalf of the child, exercise the child’s rights under the *Freedom of Information and Protection of Privacy Act*

(a) to be given access to information about the child in a record,

...

[10] Section 74(2)(f)(i) of the CFCSA says that the Information and Privacy Commissioner has the authority to review a director’s decision under s. 76 regarding who can act for a child under FIPPA.

Which Act applies?

[11] The Ministry argued that s. 76 of the CFCSA must be considered for records that fall under the CFCSA and that s. 5 of FIPPA and s. 3 of the Regulation apply to all other records related to this request. I take the Ministry to mean that, respecting records to which the CFCSA applies, the director has the authority under s. 76 of the CFCSA to decide who may act for a child³ and that FIPPA and its Regulation apply to all other records. The Ministry did not explain which Act it considers to apply to which particular records. I do not need to consider this here, however, as I find below that the respective provisions have similar purposes and should be interpreted similarly.⁴

Conditions for exercising a child’s access rights

[12] Section 5(1)(b) of FIPPA and ss. 3(1)(a) and 3(2) of the Regulation (B.C. Reg. 155/2012) should, in my view, be read together to determine the following:

1. Is the applicant the child’s “guardian”?
2. Is the applicant acting “for” the child?
3. Is the child “incapable of acting” under s. 5?

³ A director is a person designated under s. 91 of the CFCSA to exercise the director’s powers, duties and functions under that Act.

⁴ Should there be a future inquiry on whether the applicant is entitled to the withheld information in the records, it would be helpful for the Ministry to identify the precise records it believes each Act applies to.

4. Is exercising the child’s rights under FIPPA “within the scope of the guardian’s duties or powers”?

[13] Section 76(1)(a) of the CFCSA requires that where, as here, the children are under 12 years of age, two conditions be met in order for an individual to exercise a child’s access rights under FIPPA:

- the individual has “legal care” of the child and
- the individual is exercising the child’s rights under FIPPA “on behalf of” the child

Guardian and legal care of child

[14] The court order that the applicant provided shows that he and his wife are their children’s joint guardians. I am therefore satisfied that the applicant is his children’s guardian for the purposes of s. 3(1)(a) of the Regulation and that he has legal care of them for the purposes of s. 76(1) of the CFCSA.⁵

Interpretation of “for” and “on behalf of”

[15] The Ministry argued these terms ought to be interpreted in a similar manner, to insure that their purposes are consistently achieved.⁶ In my view, the terms “for” in s. 3(1)(a) of the Regulation, “on behalf of” in s. 5(1)(b) of FIPPA and “on behalf of” in s. 76(1) of the CFCSA share the purpose of circumscribing who may properly exercise a child’s access rights under FIPPA. In my view, those terms have a similar meaning and should be interpreted consistently to ensure that the shared intent of those provisions is achieved.

[16] Dictionary definitions of “for” and “on behalf of” are somewhat circular. For example, definitions of “for” include: “in the interest of”; “to the benefit of”; “on behalf of”; “in place of”; and “representing”. Definitions of “on behalf of” include: “in the interests of”; “as representative of”; “in the best interests”; “for”; “in aid of”; and “in support of”.⁷

[17] I take from this that the two terms mean similar things. In my view, therefore, acting “for” or “on behalf of” a minor child in exercising the child’s access

⁵ Past OIPC orders have said that “legal care” of a child means custody or legal guardianship of the child. See Order F06-06, 2006 CanLII 17222 (BC IPC), and Order 04-22, 2004 CanLII 45532 (BC IPC). The wording of the relevant access provision in the CFCSA in effect at the time of these orders was slightly different from the current version. In my view, however, the current wording is not materially different from the previous version and the interpretation of “legal care” in the earlier cases applies equally here.

⁶ Ministry’s initial submission, paras. 4.18-4.33; Ministry’s reply submission.

⁷ Oxford English Dictionary 1991; online definitions.

rights, under both FIPPA and the CFCSA, means acting to benefit the child, to further the child's own goals or objectives and in the child's best interests.⁸

Is the applicant acting “for” or “on behalf of” his children?

[18] The Ministry said that the applicant's reasons for seeking access to his children's information are not, in its view, sufficient to show that the applicant is acting for or on behalf of his two children. The Ministry said it is concerned that the applicant's request for his children's information is in his own self-interest, not theirs. The Ministry believes he will use the information in his “particularly adversarial dispute” with his ex-wife and to undermine the children's relationship with her. The Ministry added that, “to the extent possible”, it has kept the applicant “well apprised” of the circumstances surrounding the reports and Ministry investigations, “such that he can understand and make informed decisions with respect to his children”.⁹

[19] The applicant said that his ex-wife has complained “over two dozen times” to the Ministry and the RCMP that he has physically abused his children. He said that the Ministry and the RCMP have both investigated the various allegations of abuse and, after the children did not disclose any abuse, the Ministry and the RCMP closed their files. He also said his ex-wife manipulates their children and that she tells them to lie to school officials, the Ministry and the RCMP that he physically abuses them. He said that both the RCMP and child psychologists who have interviewed his children confirm they have been told to lie. He also described an incident in October 2014 in which he noticed a bruise on his younger child's face. He said he took a photograph of the bruise and emailed it to his ex-wife, to “protect” himself from further allegations of abuse by her.¹⁰ The applicant did not, however, explain how making his request would further his children's interests.

[20] The applicant's statements suggest that, rather than wanting access to his children's information for their benefit, the applicant is interested in information that he can use to further his own interests in the ongoing custody and access disputes with his ex-wife over their children. Information in the *in camera* evidence and in the records themselves also supports this conclusion. I am therefore not persuaded that the applicant is acting “for” or “on behalf of” his children in making his request.

⁸ Orders on the previous Regulation (B.C. Reg. 323/93) said that acting “on behalf of” of a child meant acting in the child's best interests. These orders also noted that, where a parent was entitled to exercise his or her children's access rights, that right was not unfettered. Rather, the goal of the Regulation was to provide a limited mechanism for exercising the right of access to an incapable individual's personal information. See, for example, Order F07-16, Order 00-44, 2000 CanLII 8520 (BC IPC). See also Order F07-21, 2007 CanLII 52746 (BC IPC), which dealt with access to a deceased individual's personal information. In my view, the adjudicator's reasoning on the goal of the regulation in that order applies equally to access to children's personal information

⁹ Ministry's initial submission, paras. 4.34-4.58; Affidavit of Ministry Team Leader, paras. 12-19. Some of the Ministry's argument and evidence on this issue was received *in camera*.

¹⁰ The applicant's request included records of the investigation of this incident.

CONCLUSION

[21] Although I accept that the applicant is his children’s guardian for the purposes of s. 3(1)(a) of the Regulation and that he has legal care of them for the purposes of s. 76(1) of the CFCSA, I am not persuaded that he is acting “for” or “on behalf of” his children in making his request. I need not therefore consider whether the children are incapable of exercising their own access rights or whether making this request is within the applicant’s duties and powers as a guardian under s. 3(2) of the Regulation.

[22] For reasons given above, therefore, under s. 58(3)(a), I confirm that the Ministry has performed its duty under FIPPA in finding that the applicant has not met the requirements for exercising his children’s rights of access to their information under s. 3(1)(a) of the Regulation, s. 5(1)(b) of FIPPA and s. 76(1)(a) of the CFCSA. His request must therefore be treated as an arm’s length request for access to a third party’s personal information. The Ministry has already made a decision on the applicant’s right of access to the records in that regard and the applicant is free to request a review of that decision, if he wishes.

January 26, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F15-61518