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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 44-1995
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INQUIRY RE: A request for review of a decision by the Ministry of Social Services to sever certain information from Family Services records about a child protection matter

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry under the *Freedom of information and Protection of Privacy Act* (the Act) on April 18, 1995. This inquiry arose from a request by the applicant to the Ministry of Social Services (the Ministry), dated November 29, 1994, for access to all information concerning him from 1992 to 1994 and all information concerning himself, his separation and divorce, and his daughter for the same period. On December 28, 1994, the public body released certain information to the applicant, severing other information on the basis of sections 15 and 22(1) of the Act. It refused to release most of the information concerning the applicant's daughter under Regulation 3 of the Act.

The legislated ninety-day time limit for the review of this matter began on January 16, 1995 and ended on April 18, 1995.

2. Documentation of the inquiry process

On March 24, 1995, the Office issued a Notice of Written Inquiry to be held on April 18, 1995 to the applicant, the Ministry, and the custodial parent as representative of the applicant's daughter. The Notice informed the parties that initial submissions were due by April 11, 1995 and final submissions by April 18, 1995. Included with this Notice was a statement of the facts (the Portfolio Officer's fact report), which was accepted as accurate by all parties for the purposes of conducting this inquiry.

3. The records in dispute

The records in dispute are the severed portions of the applicant's family services files held by the public body. They concern the applicant, his separation and divorce, and his daughter and related family matters for the period from 1992 to 1994.

4. Issue under review at the inquiry

The issue under review is the applicability of sections 15 and 22(1) of the Act and Regulation 3 of the Act to the records in dispute. The relevant portions of sections 15 and 22(1) read:

Section 15: 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

...

(d) reveal the identity of a confidential source of law enforcement information

Section 22: 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

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(f) the personal information has been supplied in confidence,

...

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

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or continue the investigation,

...

(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,

....

The relevant portion of Regulation 3 under the Act reads:

Who can act for young people and others

3. The right to access a record under section 4 of the Act and the right to request correction of personal information under section 29 of the Act may be exercised as follows:

(a) on behalf of an individual under 19 years of age, by the individual's parent or guardian if the individual is incapable of exercising those rights;

...

Under section 57(1), it is up to the public body to demonstrate that section 15(1)(d) applies to the records.

Under section 57(2) of the Act, the applicant must demonstrate that the release of the severed third-party personal information would not constitute an unreasonable invasion of the third party's personal privacy. The applicant must also demonstrate how Regulation 3 applies to his case.

5. The applicant's case

The applicant informed me that the information he requested from the Ministry pertained to allegations that he sexually abused his daughter. He states that the finding of the investigation was that no sexual abuse had occurred. He has evidently had to respond to several allegations of this sort made against him by his former wife. He also subsequently learned that his daughter was seeing a social worker.

The applicant also states that he received mostly blank pages from the Ministry. His own letters to the Ministry were themselves severed before release back to him, as was a copy of a letter addressed to him.

The applicant has a 1993 court order that gives him joint guardianship of his children and allows him to receive certain information concerning the educational and health progress of his children. His former wife has refused to disclose information to him that he has sought. Final custody of his children has yet to be determined (but the court order, which he supplied to me, indicates that his former wife has sole interim custody). He states that he needs information from the Ministry records to ensure appropriate care for his daughter.

6. The Ministry of Social Services's case

The Ministry of Social Services states that the information not disclosed to the applicant concerns allegations that he had sexually and physically abused his daughter. The grounds for refusal are that the requested records would reveal the identity of a confidential source of law enforcement information (section 15(1)(d)) and that disclosure of them would be an unreasonable invasion of the personal privacy of various third parties (section 22). (Argument for the Ministry of Social Services, pp. 3, 5)

The Ministry's "overriding concerns in this case are that the identities of those who report suspected instances of child abuse be protected from disclosure." It does so on the basis of explicit assurances of confidentiality to informants and the traditional practice of not revealing their identities. The Superintendent of Family and Child Services of the Ministry of Social Services is charged with the responsibility for investigating these matters. (Argument for the Ministry of Social Services, pp. 6, 7, 8, 13) Thus the Ministry has severed information from the investigative report on this case because "release of names and the release of knowledge could identify who was interviewed."

The Ministry emphasized that section 22 of the Act is a mandatory provision against disclosures of personal information (as defined in Schedule 1 of the Act) that would be an unreasonable invasion of a third party's personal privacy. With respect to the burden of proof on an applicant under section 57(2) of the Act, the Ministry argues that this section "recognizes that it will be very rare for one person to obtain access to another person's personal information without the consent of the person to whom the information relates." (Argument for the Ministry of Social Services, pp. 9, 10)

The Ministry generally argues that the kind of personal information it has kept from disclosure falls under the provisions of section 22(3)(a), (b), (g), and (g.1). (Argument for the Ministry of Social Services, pp. 11, 12) In particular, the Ministry argues as follows with respect to section 22(3)(g.1):

Much of the information severed by the Ministry pertains to the third parties' personal evaluation of the child's condition and the allegations of abuse. This information was supplied in confidence by the third parties and reveals the third parties' personal evaluations of the behavior of those involved. The Ministry submits that the social worker's and therapist's evaluations severed from the investigation report are within the parameters of subsection (g.1) as they are formal and objective conclusions made by persons situated in a position to provide such an assessment. (Argument for the Ministry of Social Services, p. 12)

The Ministry also pointed out that the personal information at issue was supplied in confidence, a precondition that arises under section 22(2)(f) of the Act.

With respect to section 22(2)(c), the Ministry has taken into consideration whether release of the disputed information is relevant to a fair determination of the applicant's rights and has provided him with "relevant portions of the records in order to help him understand the nature of the complaint against him." (Argument for the Ministry of Social Services, p. 13)

7. The third party's case

I reviewed a submission and a resubmission from the custodial parent of the third party, which I have fully considered but will not describe here. I received the submission on an *in camera* basis, and it was not provided to the applicant.

8. Discussion

As is so often the case in inquiries of this sort, the applicant and his former wife have presented me with considerable amounts of written material that are not directly relevant to the determination of his rights to access the Ministry's records under the Act. While some of the background information has helped me to understand what is going on in this case, I remind the parties that my Office is not a forum in which custodial and matrimonial disputes can be settled, whatever the merits of the respective positions. Nor am I in a position to determine whether the applicant has been the subject of false allegations.

Section 15(1)(d): Confidential source of law enforcement information

I accept the argument of the Ministry that an investigation of physical and sexual abuse of a child falls under the definition of "law enforcement" in Schedule 1 of the Act. (Argument for the Ministry of Social Services, pp. 6, 7) Not least of the reasons for this is that the *Criminal Code of Canada* now contains sixteen offences that can apply to child sexual abuse. (Federal *ad hoc* Interdepartmental Working Group on Information Systems on Child Sex Offenders, Information Systems on Child Sex offenders: A Discussion Paper (Health Canada, Justice Canada, and the Ministry of the Solicitor General, May 16, 1994), p. 3) My decision in the present case is fully distinguishable, in my view, from Order No. 34-1995, February 3, 1995, pp. 5, 6.

I fully accept the argument of the Ministry that the release of information in child abuse investigation files to the person who has been accused would have a "chilling effect ... on encouraging children and others to reveal their knowledge of the abuse ...." (Argument for the Ministry of Social Services, p. 8) I am satisfied that the Ministry "has attempted to provide the applicant with portions of the records that will help the applicant to understand the nature of the complaint against him." However, it does not wish to release so many details that the identities of those who provided the information might be revealed. (Argument for the Ministry of Social Services, p. 8)

I also note that under section 7 of the *Family and Child Service Act*, there is a duty to report relevant information to the authorities:

7(1) A person who has reasonable grounds to believe that a child is in need of protection shall forthwith report the circumstances to the superintendent or a person designated by the superintendent to receive such reports.

(2) The duty under subsection (1) overrides a claim of confidentiality or privilege by a person following any occupation or profession, except a claim founded on a solicitor and client relationship.

...

(4) A person who contravenes subsection (1) commits an offence.

The confidentiality rules in child abuse cases

I note that section 22 of the Family and Child Services Act establishes general rules for the confidentiality of information obtained under the Act, except in limited circumstances, which reinforce the provisions in sections 15 and 22 of the Freedom of Information and Protection of Privacy Act. The former section reads as follows:

22(1) No person shall disclose information obtained under this Act respecting an individual except

> (a) to his own counsel in a proceeding,
>
> (b) when giving evidence in a proceeding, or
>
> (c) where disclosure is necessary for the administration of this Act or is required by another Act.

Furthermore, it is the written policy of the Ministry that the "identity of the person reporting [a child in need of protection] is confidential and not to be divulged." Without the reporter's consent, the identity of the reporter may only be disclosed to appropriate Ministry staff, the police, or a Ministry lawyer. See Ministry of Social Services, Protective Family Services, Receiving Reports of Child Protection, section 6.3.1, "Policy," and sections 6.3.3 and 6.3.4. The policies on confidentiality are also stated in the Inter-Ministry Child Abuse Handbook: An Integrated Approach to Child Abuse and Neglect, 1988 edition, Province of British Columbia, pp. 8, 9, 18, 30.

Regulation 3

I have established in previous Orders that the custodial parent controls the rights of access to the personal information of a young minor child on the child's behalf. Thus I find that the Ministry was correct in refusing to disclose information to the applicant about his daughter, since he is the non-custodial parent. His former wife has custody of the child at present and she has not consented to the disclosure of the information. (See Orders No. 2-1994, February 7, 1994 and No. 10-1994, May 27, 1994, p. 3; and Argument for the Ministry of Social Services, p. 14)

Section 22: Disclosures harmful to the personal privacy of third parties

I also find that, under section 57(2) of the Act, the applicant has not met the burden of proof that disclosure of the personal information he has requested would not be an unreasonable invasion of the third party's personal privacy. However, the applicant has met the burden of proof with respect to the personal information that he supplied to the Ministry in the first place. See the discussion below.

A detailed review of the records in dispute

As the applicant already knows, most of the information in the disputed records is on printed forms of the Ministry that are used for intake and to record completed interviews. There are three separate episodes over a three-year period dealing, in this order, with one allegation of physical abuse, one allegation of sexual abuse, and one general inquiry. The type of information that the Ministry has severed includes: the names, addresses, telephone numbers, and birthdates of informants, and the topic of the detailed reports, especially interviews. The Ministry has also severed many of the details from the written record of interviews and examinations involving the third parties. Subject to my comments in the next section, it is my finding that these severances are appropriate under section 15(1)(d) of the Act.

The severing practices of the Ministry

I note, for the record, that certain severing practices of the Ministry are inappropriate. Even though certain information is known to the applicant, "the Ministry will not release this information as the Ministry has no control over what an applicant will do with that information. While an applicant may be able to 'fill in the blanks,' any other person coming into possession of the records would not be able to identify the people involved. By way of this policy, the Ministry believes that it is protecting individuals from an unreasonable invasion of their personal privacy." The Ministry "hopes to prevent the use of documents by the press and other parties that are not directly involved in a particular matter." (Argument for the Ministry of Social Services, pp. 6, 10, 11)

In terms of the severances applied to the disputed records in the present inquiry, this means that the applicant has not received: 1) the name of his daughter, after a reference that reads "his daughter, ..."; 2) his wife's maiden name when attached to her married name on the heading of a printed form; 3) the name of his wife and daughter from notes of an interview with him; 4) his wife's and daughter's names from a therapist's notes of an interview with both husband and wife; and 5) his wife's and daughter's names from a letter written by a therapist to the applicant.

I find this practice to be an inappropriate application of the Act, since, under section 4(1), an applicant has a right of access to records including certain personal information concerning himself. In addition, under section 22 of the Act, it is not an unreasonable invasion of the personal privacy of third parties to release to an applicant personal information that he or she originally supplied to government. Moreover, just as the applicant's reasons for wanting access are officially irrelevant to the processing of a request for access, so what an applicant may do with the product of his or her access request is beyond the responsibility and control of a public body. It is an improper application of the Act, in my judgment, to sever information about a person from a record about himself or herself that he or she has a right of access to under the Act, particularly where the person is already aware of the severed information.

I am supported in my general critique of these particular severing practices of the Ministry by Order M-444, Appeal M-9400406 (January 17, 1995, John Higgins, Inquiry Officer), p. 3, involving the Metropolitan Toronto Police Services Board. It reads in part:

... However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation

of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.

My second major concern about the Ministry's severing practices is its method, at least in this inquiry, of marking records for exception. It does not do so specifically, on a paragraph by paragraph, or line by line, basis. Thus, in the present case, it asks me to accept that section 15(1)(d) and parts of section 22 apply to its severance of all of the records in dispute, but it has not given me explicit directions as to where they apply.

Section 8(1)(c)(i) of the Act requires all public bodies to explain to applicants (who have been refused access to records), the reasons for the refusal and the provision of this Act on which the refusal is based." I intend to enforce this statutory requirement.

For purposes of this particular inquiry, I have been willing to accept the section 15(1)(d) and section 22 exceptions as being of general application. However, in future cases, I will return a record in dispute to a public body for clarification of its application of exceptions, unless this has been clearly marked on the records in dispute. It is my understanding that most public bodies follow such explicit practices.

Allegations of child abuse

In the present inquiry, the applicant intimates that the charges against him are false, because he has not been prosecuted. The Ministry replies as follows:

The investigation into the applicant's behaviour resulted in a finding of 'no case made,' which means that the allegations were not substantiated. This means that there was not *sufficient* evidence or indicators of abuse to proceed further. This is quite different from a finding that there was no evidence or indicators of abuse. (Reply for the Ministry of Social Services, April 18, 1995, p. 1)

I accept the Ministry's characterization of what happened in the present case, which allows me to distinguish the situation of the applicant from my finding in Order No. 36-1995 about the right of individuals to know who accused them falsely.

With regard to fears of false accusations being made by third parties with respect to children in need of protection, I note that section 7(3) of the Family and *Child Service Act* does provide one remedy under the statutory "duty to report:"

(3) No action lies against a person making a report under this section unless he makes it maliciously or without reasonable grounds for his belief.

9. Order

Under section 58(2)(b) of the Act, I confirm that the Ministry of Social Services was authorized to refuse access to information to the respondent that would reveal a confidential source of law enforcement information under section 15(1)(d) of the Act.

I also find that the Ministry's severances of this information are authorized under section 22 of the Act.

Under section 58(2)(a) of the Act, I find the Ministry of Social Services was not authorized or required to refuse access to certain information in the records in dispute. Therefore, I order the Ministry to give to the applicant access to the records that were originally sent to him, records of interviews with him and his wife, and references in severed records that contain the names of his wife and daughter adjoined to a reference, such as "his wife" or "his daughter." To assist the Ministry, I have prepared a new version of the severed records showing what should now be disclosed.

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David H. Flaherty
Commissioner

June 13, 1995