Order 01-27

MINISTRY OF ATTORNEY GENERAL

David Loukidelis, Information and Privacy Commissioner
June 12, 2001

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Summary: Applicant requested correction of copies of various records in the custody of the Criminal Justice Branch. Commissioner rejects CJB's argument that any copy of a record that is also in a court file is excluded from the Act by s. 3(1)(a). Copies of such records in the custody or under the control of public bodies are covered by the Act. Ministry properly refused applicant's request for correction of information. Applicant had, in some respects, not requested correction of "personal information". He also had not clearly specified any requested correction or provided any basis to support any correction.

Key Words: record in a court file — error — omission — accuracy — correction — annotation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(a), 29.

Authorities Considered: B.C.: Order No. 234-1998, [1998] B.C.I.P.C.D. No. 27; Order 00-51, [2000] B.C.I.P.C.D. No. 55; Order No. 01-23, [2001] B.C.I.P.C.D. No. 24.

1.0 INTRODUCTION

[1] In 1998, criminal charges were laid against the applicant in this case under a child pornography provision of the *Criminal Code of Canada*. Those charges were stayed in 1999. This inquiry stems from the applicant's wish to "correct" copies, held by the Criminal Justice Branch ("CJB") of the Ministry of Attorney General, of a number of records related to those charges. The applicant seeks to correct what he considers to be misinformation contained in those records.

[2] On August 9, 2000, the applicant asked the CJB, under s. 29 of the *Freedom of Information and Protection of Privacy Act* ("Act"), to correct a number of records. The applicant's request to the CJB described the "records to be corrected" and enclosed a

letter he had sent earlier to the police force responsible for the investigation that led to the criminal charges against the applicant. The CJB responded to the request, on September 7, 2000, by declining to make any corrections. It did, however, annotate the three prosecution files in its possession under s. 29(2) of the Act. It placed in each of those files copies of the material sent by the applicant with his correction request and provided notice of the annotation to the three law enforcement agencies involved in the prosecution files.

[3] By letter dated September 17, 2000, the applicant requested a review, under s. 53 of the Act, of the CJB's refusal to make any corrections. Because the matter did not settle in mediation, I held a written inquiry under s. 56 of the Act. Section 58(3)(d) of the Act provides that, where an inquiry relates to a correction request, the commissioner may "confirm a decision not to correct personal information or specify how personal information is to be corrected".

[4] I should note here that the applicant, in a series of letters to this Office, strenuously objects to my considering the CJB's initial or reply submissions. His objection rests on the fact that the CJB's initial submission arrived in this Office an hour late. I fail to see how the applicant has been prejudiced, in the least, by the fact that the Ministry inadvertently filed its initial submission one hour late. I have, therefore, accepted and considered the CJB's initial and reply submissions in this matter.

2.0 ISSUES

[5] Roughly one week before initial submissions were due in the inquiry, the CJB wrote to the applicant and told him that it would argue that the Act does not, because of s. 3(1)(a) of the Act, apply to some of the disputed records. This issue was added to the issues to be considered in this inquiry. Consistent with previous orders, the CJB bears the burden of establishing that s. 3(1)(a) excludes the relevant records from the Act.

[6] The substantive issue before me is whether the CJB properly refused to make corrections requested by the applicant. The Notice of Written Inquiry sent to the parties stipulates that the CJB bears the burden of establishing that it acted properly in refusing corrections. The CJB objects to this, saying that, in cases where an applicant has not substantiated his or her correction at the time it is requested, it is not fair to require a public body to establish that it acted appropriately in refusing to make the requested correction. I disagree that the burden of proof should differ on this basis and consider the CJB to bear the burden of proof.

3.0 DISCUSSION

[7] **3.1 Which Records Are Covered by the Correction Request?** – The CJB says that, of the several records mentioned in the applicant's correction request, only records A, D, E, F, G, H, J, K, L, M and N were in its custody or under its control before receiving the applicant's correction request. The balance came into the CJB's possession only because the applicant enclosed copies of them with his correction request. The CJB

says that only the records that were already in its files can properly be the subject of the applicant's correction request.

[8] I agree. The Act applies to records in the custody or under the control of a public body. The Legislature did not intend, in enacting s. 29, to enable someone to deliver records to a public body – in circumstances such as the present, at least – and then purport to request correction under s. 29. Section 29 exists, in conjunction with s. 28, to ensure the accuracy and completeness of personal information that a public body has used, or may use, to make decisions or take actions that affect an individual. That legislative objective is not served by forcing a public body to respond to a correction request regarding personal information that the public body did not compile or obtain and that only came into its possession because an applicant has forced it on the public body in the way the applicant did here. Accordingly, only the records lettered A, D, E, F, G, H, J, K, L, M and N by the applicant in his August 9, 2000 correction request are, in the circumstances before me, properly covered by that request.

[9] **3.2 Does the Act Apply to All of the Records?** – As I noted above, CJB advances an objection based on s. 3(1)(a) of the Act. The CJB contends that the Act does not apply to the 'information' that initiated criminal charges against the applicant, because it is a copy of a court record. (An 'information' is a document sworn by a person, usually a peace officer, who believes that someone has committed an indictable offence under the *Criminal Code*. An information formally begins a criminal prosecution.) Section 3(1)(a) of the Act reads as follows:

> **3**(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> > (a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts;
> >
> > …

[10] In his affidavit sworn on behalf of the CJB in this inquiry, Randy Street deposed that the information that initiated the 1998 charges against the applicant is found in a court file. The significance of this, the CJB says, is that the copy of the information in its hands is excluded from the Act's operation by virtue of s. 3(1)(a), such that it cannot be the subject of a correction request.

[11] In Order No. 234-1998, [1998] B.C.I.P.C.D. No. 27, my predecessor ruled that s. 3(1)(a) applies only to any record that is actually located in a court file. He held that s. 3(1)(a) does not apply to copies of such records in the hands of a public body. The CJB argues that this finding is wrong and that s. 3(1)(a) extends to all copies of any "record in a court file", regardless of where those copies are located. At paras. 4.02 and 4.03 of its initial submission, the CJB says the following:

> The Public Body [CJB] submits that the legislative intent of excluding "a record in a court file" from the Act was to firstly recognize an already established means of

> access to records, and secondly, and most importantly, to respect the need of the Court to supervise the integrity and disclosure of these records. The Public Body submits that section 3(1)(a) must be given a purposive interpretation so that regardless of whether an applicant is seeking access to or requests correction of a record directly from a court or from a public body which happens to have a copy "a record in a court file", the record will not be subject to the Act. Access to court records, other than court administration records must be subject to the supervision of the Court.
>
> The Public Body submits that the purpose in excluding a "record in a court file" from the application of the Act will only be recognized and promoted if it is interpreted to include both a copy of the record in the court file and any other copy held by a public body. If the Court is to maintain the integrity of, and supervise access to, court records then the copy of the record held by the Court Registry and a copy of the record held by another public body should be treated the same way. Both copies must be excluded from the Act.

[12] I agree with my predecessor. The meaning of the phrase "a record in a court file" in s. 3(1)(a) is plain – it applies only to records that are actually located in a court file. The Legislature did not intend, in my view, to circumscribe the Act's application in the way suggested by the CJB.

[13] The plain reading of the section does not lead to the mischief claimed by the CJB in the above-quoted paragraphs. Subjecting copies of such records to the rights of access under the Act in no way affects the ability of the courts to "supervise access to" records actually located in court files. Although there may be points of divergence between the two processes for access to records, the ability to request, under the Act, access to copies of records works in parallel to any procedures for access to original records afforded under the jurisdiction of the courts. Section 2(2) of the Act provides that the Act does not replace other procedures for access to information. By the same token, the existence of other procedures for access to information does not oust, or circumscribe, the rights of access afforded under the Act unless the Act is explicitly overridden or ousted, including through s. 3(1).

[14] Similarly, the fact that an individual can request correction of alleged errors or omissions in a copy of a record, the original of which is found in a court file, does not impinge on the ability of the courts to, as the CJB puts it, "maintain the integrity" of court records. The fact that it is possible to request a correction in relation to copies in the custody or under the control of a public body – which may have used, or intended to use, personal information in those copies to make decisions or take actions affecting an individual – in no way touches on the authenticity or integrity of the originals in the court files. The courts retain full control over the authenticity and integrity of records found in their files. Further, it is open to a public body to correct a copy of such a record in a way that permits users of the copy to clearly identify what corrections were made.

[15] I find that s. 3(1)(a) does not apply to the copy of the information which is in the custody of the CJB. The Act therefore applies to that copy.

[16] **3.3 Did the CJB Properly Refuse Correction?** – As I observed above, ss. 28 and 29 of the Act are intended to ensure, as far as is reasonable, that public bodies do not have inaccurate or incomplete personal information in their files, since use of such information can have serious adverse consequences for individuals. Section 29 reads as follows:

Right to request correction of personal information

> **29** (1) An applicant who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.
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> (2) If no correction is made in response to a request under subsection (1), the head of the public body must annotate the information with the correction that was requested but not made.
>
> (3) On correcting or annotating personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year period before the correction was requested.
>
> (4) On being notified under subsection (3) of a correction or annotation of personal information, a public body must make the correction or annotation on any record of that information in its custody or under its control.

[17] As I said in Order 00-51, [2000] B.C.I.P.C.D. No. 55, s. 29 does not force a public body, like an automaton, to make every unsubstantiated correction that is demanded by an applicant. As I noted in Order 01-23, [2001] B.C.I.P.C.D. No. 24, however, s. 58(3)(d) makes it clear that a public body cannot refuse to correct an error or omission that an applicant has established, on material supplied to the public body by the applicant, is warranted. As I also said in Order 01-23, s. 29 does not require public bodies to correct assessments, judgements or opinions. Bearing these principles in mind, I have decided, for the reasons given below, that the CJB acted properly in this case.

[18] The first difficulty I have with the applicant's correction request is that he failed to actually specify any corrections that he wanted. Again, with his August 9, 2001 letter to the CJB, the applicant enclosed a lengthy letter that he had sent, a short time before, to the law enforcement agency that had been responsible for the laying of criminal charges against him. In his letter to the CJB, the applicant simply said that he was making an "official request to correct records" and that "the records to be corrected" were "spelled out" in his letter to the law enforcement agency. That letter contains the applicant's chronology of events leading to his being arrested and charged. The thrust of the applicant's allegations in that letter is that various records – including newspaper articles published about his case – "represent the facts in a twisted manner" or contain "misinformation". The letter also refers to various unspecified records being "incorrect" and says they "contain faults and damning misinformation."

[19] None of this amounts to a request to correct "an error or omission" in the applicant's personal information. It really comes down to the applicant saying that the

contents of the various records listed in the letter are either lies or are inaccurate in some way. He says, in effect, that 'It's a bunch of lies or incorrect information and I demand that you correct it all somehow.' The applicant did not point the CJB to any specific factual errors or omissions in any records. On this basis alone, it would have been open to the CJB to refuse to make any correction. There being no proper s. 29 request before it, the CJB was entitled to decline to make any correction.

[20] It would also have been open to the CJB, for the same reason, to refuse to annotate any records with materials submitted by the applicant. Because the applicant failed to specify any correction of an error or omission in his personal information, there was no requested correction that the CJB was obliged to annotate under s. 29(2). This is not to say the CJB erred in annotating its relevant files with the applicant's materials. Rather, the CJB – commendably – simply went beyond its strict legal obligations in doing so.

[21] Even if one assumes for the purpose of argument that the applicant requested a specific correction under s. 29, another difficulty is that he did not provide the CJB with any evidence that, on a reasonable analysis, could be said to support a correction. In the absence of evidence to substantiate a requested correction, a public body is within its rights to refuse the correction. On this basis, therefore, the CJB properly refused to do what the applicant asked.

[22] None of the above discussion suggests that a public body must – where specific corrections are sought and some supporting material is offered – engage in a costly and time-consuming process of fact-finding. Where an applicant attempts to 'correct', for example, alleged errors or omissions in records of court testimony, a public body will almost certainly be within its rights to decline to engage in the process of determining the truth of the testimony. Most testimony, for example, consists of assessments, judgements or opinions as to facts and is not susceptible to correction under s. 29. This reasoning would apply, for example, to the two transcripts of Provincial Court proceedings involving the applicant. (These records are not covered by the applicant's request because they were only delivered into the custody of the CJB as part of his request, as discussed above.)

[23] There is one last point. The CJB argues that, in seeking correction of the information sworn against him, the applicant is not seeking correction of personal information. This refers to the applicant's somewhat curious request for correction of the information by providing further particulars of the child pornography websites he was alleged to have visited. This request is unusual because the information laid against him is a dead letter, the charges having been stayed. It appears, however, that the applicant believes "abuse of process" has been visited upon him, because the charges against him did not comply with legal requirements. This seems to be the reason he sought 'correction' of the information.

[24] At all events, the CJB argues that s. 29(1) of the Act only concerns corrections of errors or omissions in "personal information". It says the applicant's correction of the information document is not a correction of personal information and is therefore not a

proper s. 29 request. I disagree. The Act's definition of "personal information" covers all recorded information "about" an identifiable individual. The particulars of criminal conduct in which someone has allegedly engaged qualify, in my view, as information "about" that individual as contemplated by the Act. This view is supported by paragraph (g) of the definition of "personal information", which provides that personal information includes "information about the individual's … criminal history". I consider the Act's definition to include information about an individual's alleged criminal history or acts. In the end, however, the applicant did not request correction of specific errors or omissions in the information, with the result that the CJB was entitled to refuse the correction on the basis discussed earlier. Even if specific corrections had been requested, the CJB would have been entitled to refuse them, on the basis that the information – as sworn and filed in court – accurately reflected the facts alleged by the informant.

4.0 CONCLUSION

[25] For the reasons given above, I find that the CJB properly declined to make any corrections in response to the applicant's request for correction. No order is called for under s. 58(3)(d) of the Act.

June 12, 2001

ORIGINAL SIGNED BY

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David Loukidelis
Information and Privacy Commissioner
for British Columbia