Order F06-06

MINISTRY OF CHILDREN & FAMILY DEVELOPMENT

Celia Francis, Adjudicator

May 10, 2006

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Summary: Applicants requested access to information about themselves in Ministry records. The Ministry withheld some information under s. 77 of the CFCSA. Some information in the only record remaining in dispute falls under s. 77 and must be withheld.

Key Words: personal privacy—unreasonable invasion—supplied in confidence—employment history—fair determination of rights—unfair exposure to harm—unfair damage to reputation.

Statutes Considered: *Child, Family and Community Service Act*, ss. 73-77; *Freedom of Information and Protection of Privacy Act*, ss. 22(2)(c), (e), (f) & (h), 22(3)(a), (b) & (d).

Authorities Considered: B.C.: Order 04-22, [2004] B.C.I.P.C.D. No. 22; Order 00-30, [2000] B.C.I.P.C.D. No. 33.

1.0 INTRODUCTION

[1] The applicants in this case are the former caregivers, or foster parents, of a child, the "third party", whom the Ministry removed from the applicants' care after an investigation into allegations regarding the applicants' care of the third party. The applicants requested access to their personal information under the *Child, Family and Community Service Act* ("CFCSA"), including reports, complaints and allegations, from the Ministry of Children and Family Development ("Ministry"). The Ministry responded by disclosing approximately 2,500 pages of records and by withholding some information and records, citing

ss. 15 and 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") and ss. 77(1)(a) and (b), and 77(2)(c) and (d) of the CFCSA as authority for denying access.

[2] The applicants requested a review by this office of the Ministry's decision to deny access. Mediation resulted in the disclosure of approximately 43 more pages of records. The applicants were not satisfied with the additional disclosures and, because the matter did not settle in mediation, a written inquiry took place under Part 5 of the Act. The office invited representations from the applicants, the Ministry and the authors of the three reports. All except the author of the remaining report in dispute made submissions.

2.0 ISSUE

[3] The notice for this inquiry states that the issue before me is whether the Ministry is required to withhold information under s. 77(1)(a) of the CFCSA. The Ministry said in its initial submission[1] that a second issue is whether s. 77(2)(c) applies to some information. As it argued the application of this section to records which are no longer in issue, however, I do not consider it here.

[4] Although the CFCSA has since been amended, the decision in issue was made prior to those amendments coming into effect. I have therefore considered the wording of the CFCSA, and its access scheme, as they were at the time of the decision.

[5] Under s. 57(2) of FIPPA, the applicant has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[6] **3.1 Preliminary Matters**—Two procedural matters arose during this inquiry. The Ministry objected to the applicants' submission of a further reply, after the close of this inquiry, on the grounds that further replies are not normally permitted under this office's inquiry procedures. The Ministry also objected to the contents of the applicants' reply submission and of the further reply, on the basis that these submissions contained issues the applicants could have raised in their initial submission.

[7] I agree with the Ministry on these points and have not considered the applicants' reply submissions where they deal, as they do in large part, with matters that are irrelevant to the issues before me, such as the applicants' concerns with the Ministry's actions and decisions surrounding the third party, or where they repeat points the applicants made in their initial submission. For the

[1] At para. 4.19.

same reasons, I have not considered their further reply at all and, as well, because it was submitted after the close of the inquiry.

[8] **3.2 Record in Dispute**—The portfolio officer's fact report that accompanied the notice for this inquiry stated that the records in dispute were three reports and five other pages of records, which the Ministry described as emails and a "ministry document".[2]

[9] In their initial submission, the applicants said that they now only want one of the three reports, by an individual whom they named, and no longer want access to the other records.[3] I will therefore consider only this one report.

[10] The report in question, which the Ministry described as "a report by a psychologist", dated February 20, 2004,[4] is eight pages long. Approximately two-thirds of the report consists of information about a particular process. I discuss this information more below. The remaining third of the report contains information about individuals other than the applicants. The applicants are only mentioned in passing in this latter part, on p. 7 of the report.

[11] **3.3 The Access Scheme under the CFCSA**—At the time of the request and this inquiry, the CFCSA—which came into effect on January 29, 1996—had its own access scheme. The relevant provisions read as follows:

> ***Definition***
>
> 73 In this Part, **"record"** means a record as defined in the *Freedom of Information and Protection of Privacy Act* that
>
> (a) is made under this Act on or after January 29, 1996, and
>
> (b) is in the custody or control of a director.
>
> ***Freedom of Information and Protection of Privacy Act***
>
> 74 Except as provided in this Part, the *Freedom of Information and Protection of Privacy Act* does not apply to a record made under this Act or to information in that record.
>
> ***Confidentiality of information***
>
> 75 A person must not disclose information obtained under this Act except
>
> (a) in accordance with section 76 to a person who has a right of access to a record, or
>
> (b) in accordance with section 78 or 79.

[2] Para. 4.18, initial submission.
[3] Page 1, initial submission.
[4] At para. 4.18, initial submission.

Right of access and right to consent to disclosure

76(1) A person has the right

(a) to be given access to a record containing information about the person, …

(2) A person has the right

(a) to be given access to a record containing information about a child who is under 12 years of age and is in the person's legal care, …

(3) The right to be given access to a record … does not extend to information excepted from disclosure under section 77.

(4) If information excepted under section 77 can reasonably be severed from a record, a person referred to in subsection (1) or (2) has the right of access to … information in the remainder of the record.

77(1) A director must refuse to disclose information to a person who has a right of access under section 76 if the disclosure

(a) would be an unreasonable invasion of a third party's personal privacy, …

…

(3) Section 22 (2) to (4) of the *Freedom of Information and Protection of Privacy Act* applies for the purpose of determining whether a disclosure of information is an unreasonable invasion of a third party's personal privacy.

[12] **3.4 What Rights of Access do the Applicants Have?**—The Ministry said that the record in question was made under the CFCSA after January 29, 1996, was in the custody or under the control of a "director" under the CFCSA and that the CFCSA therefore applies to it. The Ministry then said that, unlike FIPPA, the CFCSA does not give everyone a right of access to records. Rather, it gives an individual a right of access only to records that contain information about the individual, subject to exceptions. It also said that the third party was a "child in care", meaning she was in the custody, care and guardianship of a director under the CFCSA.[5] The third party is not in the "legal care" of the applicants, it continued, and they are therefore not entitled to have access to the third party's information under s. 76 of the CFCSA.[6] The Ministry also referred to Order 04-22[7] where I said the following:

[5] In the CFCSA provisions in effect at this time, **"child in care"** was "a child who is in the custody, care or guardianship of a director or the director of adoption" and a **"director"** was "a person designated by the minister under section 91".

[6] Paras. 4.12-4.17, initial submission; para. 11, Kennedy affidavit.

[7] [2004] B.C.I.P.C.D. No. 22.

> [26] I agree with the Ministry that, under s. 76(1)(a) of the CFCSA, the applicant in this case is entitled to have access to records which contain information about himself, with the exception of information in those records that may or must be withheld under s. 77 of the CFCSA. The material before me indicates that he does not have custody or "legal care" of his two younger children. As such, he does not have a right of access under s. 76(2)(a) of the CFCSA to records containing only their personal information. He also does not, under s. 76 of the CFCSA, have a right of access to records that contain only information about his ex-wife. I therefore agree with the Ministry's position that the applicant does not have a right to request access to records which contain only third-party personal information and that it was not necessary for the Ministry to retrieve and consider these records when processing his request.

[13] The material before me shows that the report was made after January 29, 1996 and was in the custody and control of a director under the CFCSA. I therefore find that it is a "record" for CFCSA purposes.

[14] The inquiry material also shows that the applicants were caregivers under contract to the Ministry and that the third party is not, and never has been, in their legal care.[8] I therefore agree with the Ministry that they are not entitled under s. 76(2)(a) of the CFCSA to have access to the third party's information in the report.

[15] The applicants are of course entitled, under s. 76(1)(a) of the CFCSA, to have access to a record that contains information about themselves. As noted above, a careful reading of the report revealed only one brief mention of the applicants—part of a sentence on p. 7 of the report—comprising fewer than a dozen words.

[16] The information about the applicants on p. 7 is embedded in third-party information. The issue is whether s. 77 of the CFCSA applies to this third-party information and, if it does, whether, under s. 76(4) of the CFCSA, the information about the applicants can reasonably be severed from that third-party information. I discuss this issue below.

[17] The information in the first two-thirds of the report[9] is what I consider to be general information. It relates to a particular process and to associated techniques and methods of analysis. It is not "information about" the applicants. Nor is it "about" any other individual.

[18] It is clear from s. 74 of the CFCSA that there is no right of access under FIPPA to the report itself, nor to portions of the report containing this general information. However, the question arises of whether the applicants' right of access under s. 76(1)(a) of the CFCSA to a record containing information about

[8] By "legal care", I mean legal guardianship of the third party.
[9] Beginning with the last paragraph on p. 1 and ending with the second full paragraph on p. 6.

themselves extends to portions of the record that are not information "about" themselves or "about" any other individual, but are simply general information?

[19] The Ministry did not deal with this issue but argued that s. 77(1)(a) applies to the entire report. The Ministry's policies[10] address this issue only indirectly, at p. 5.2-7 of the CFCSA disclosure policy, which sets out guidance for preventing harm from disclosure where the requested information does not relate to a third party and does not reveal the identity of a "reporter". The harms noted there concern physical or emotional harm to a person, harm to an investigation and harm to confidential sources. The policy then says the Ministry may disclose requested information where disclosure would not: be an invasion of a third party's privacy; reveal the identity of a reporter; or result in one of the three harms just named. The thrust of the disclosure policy appears to be aimed at information about identifiable individuals—what would be "personal information" under FIPPA—however, and not with information that is not personal information but is rather, as here, general information. Thus, while I have considered this policy, it was not helpful to me in this instance.

[20] Section 76(1)(a) of the CFCSA says that an applicant has a right of access to a record containing information about the applicant. It does not say an applicant has access only to information about her or himself in a record (although the Ministry's disclosure policy appears to take this view). Section 76(3) of the CFCSA says that a right of access does not extend to information that falls under s. 77. Section 76(4) of the CFCSA says that if information excepted under s. 77 can reasonably be severed, a person with a right of access under s. 76 has a right of access to information in the remainder of the report.

[21] The CFCSA does not define "information in the remainder of the report" but I conclude from the wording of ss. 76(3) and (4) that the CFCSA does not require the severing of information in a record where that information does not fall under s. 77. I also conclude that, under s. 76(1)(a) of the CFCSA, an applicant is entitled to have access, not just to information about her or himself in a record that contains information about her or himself, but to *any* information in that record, except for information that falls under s. 77 and can reasonably be severed. I discuss below whether s. 77 applies to the process information in the report.

[22] **3.5 Does Section 77(1)(a) of the CFCSA Apply?**—The Ministry argued that s. 77(1)(a) of the CFCSA applies to the entire report in dispute, requiring the Ministry to withhold it. It then noted that s. 77(3) of the CFCSA states that ss. 22(2) to 22(4) of FIPPA apply, for the purposes of deciding whether s. 77(1)(a) of the CFCSA applies to information in a record. The Ministry

[10] The Ministry provided a copy of its policy entitled "Confidentiality and Disclosure of Information", Chapter 5, from its Child, Family and Community Service Policy Manual, as Exhibit "G" to the Kennedy affidavit. It made no submissions on this policy however.

referred to Order 00-30[11] for a discussion of how these sections of the two Acts work together. I have applied the same approach here without repeating it.

[23] The relevant parts of s. 22 of FIPPA read as follows:

> **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, …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence, …
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (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 to continue the investigation, …
>
> (d) the personal information relates to employment, occupational or educational history, …

[24] **3.6 Presumed Unreasonable Invasion of Privacy**—The applicants did not, as far as I could tell, explicitly or implicitly address any of the presumed invasions of privacy in s. 22(3) of FIPPA.

Compiled as part of an investigation

[25] The Ministry argued that s. 22(3)(b) applies to the report, as the information in it was gathered for child protection purposes and child abuse or

[11] [2000] B.C.I.P.C.D. No. 33.

neglect is a violation of law. It referred for support to my finding on a similar matter in Order 04-22, where I said the following:

> [36] The Ministry stated, at para. 4.34, initial submission, with respect to s. 22(3)(b):
>
> > Child abuse or neglect is a violation of law. The information at issue was gathered for child protection purposes.
>
> [37] The Ministry also referred to Order 00-03, in which the Information and Privacy Commissioner agreed that s. 22(3)(b) applies to information related to child protection investigations. As in Order 00-03, the withheld information in this case relates to allegations regarding child protection matters that could result in the imposition of penalties or sanctions. With a handful of minor exceptions, which I discuss below, I agree with the Ministry that s. 22(3)(b) applies to it, with the concomitant presumption.

[26] Although the Ministry argued that s. 22(3)(b) applies to the entire report, in my view, only the last two pages of the report contain this type of information (along with one or two other brief mentions earlier in the report). I find that, for the reasons the Ministry argues, s. 22(3)(b) applies to the third-party information on pp. 7-8 of the report.

Medical information

[27] The Ministry also argued that s. 22(3)(a) applied to the report, as the information constitutes the third party's medical and psychological information. Again, only the last two pages of the report contain third-party information of this type and I find that s. 22(3)(a) applies to it (along with one or two other brief mentions earlier in the report).

Employment history

[28] The Ministry did not discuss s. 22(3)(d) in its submission. In my view, however, the last three full paragraphs of p. 6, which describe an individual's work experience and qualifications, are the employment history of that individual, as are mentions of individuals' work history in other parts of the report, including pp. 7 and 8. I find that s. 22(3)(d) applies to this information.

Other information

[29] As for the first two-thirds of the report, I observed above that this information relates to a particular process. It includes techniques and methods of analysis associated with that process. It is not "personal information" for the purposes of s. 22(1) of FIPPA, nor is it "information about" an individual, either the applicants or any one else. Nor, in my view, does it fall into any of the presumed invasions of privacy listed in s. 22(3) of FIPPA. I fail to see how

disclosure of this general process information could result in an unreasonable invasion of third-party privacy. It follows that I do not accept the Ministry's argument that s. 77(1)(a) applies to this portion of the report. It is readily disclosable, with some minor severing of third-party information that I found above to fall under ss. 22(3)(a), (b) and (d).

Conclusion on s. 22(3)

[30] Disclosure of the information I find falls under ss. 22(3)(a), (b) and (d) is presumed to be an unreasonable invasion of third-party privacy. I will now consider whether any of the relevant circumstances favour disclosure or non-disclosure of this information.

[31] **3.7 Relevant Circumstances**–-A number of these factors came up in the submissions.

Supplied in confidence

[32] The Ministry argued that the information in the report was supplied in the expectation that it would be kept confidential. It pointed to s. 75 of the CFCSA which prohibits disclosure of information obtained under the CFCSA except in accordance with s. 76, 78 or 79.[12] It also argued that the "more restrictive access scheme" in the CFCSA is an indication that people dealing with the Ministry will presume that the information they provide will be protected in accordance with the CFCSA. Moreover, given the sensitivity and seriousness of child protection investigations, the Ministry said, "anyone providing child protection information to the Ministry would therefore reasonably presume that any information they supplied would be treated in a confidential manner". For all these reasons, the factor in s. 22(2)(f) applies, in the Ministry's view.[13]

[33] The Ministry made similar arguments in Order 04-22. I noted there that it did not provide any evidence in support of its argument on confidentiality of supply, in the form of policies or affidavit evidence from knowledgeable employees. In that case, however, I was able to consider evidence on the applicability of s. 77(2)(c) of the CFCSA. I added that it would have been preferable to have direct affidavit evidence on the confidentiality issue from the social workers or other Ministry employees involved.

[34] The Ministry did not provide any evidentiary support for its arguments on confidentiality of supply in this case, either. The report itself is also not helpful on this point. As the author of this report did not make any submissions to this inquiry, I do not know what if any conditions of confidentiality he understood were in play when he was engaged to do the report.

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[12] Sections 78 and 79 set out the conditions for disclosure of information obtained under the CFCSA with and without consent.

[13] Paras. 4.33-4.39, initial submission.

[35] I accept that child protection matters are sensitive and that Ministry staff endeavour to protect the privacy of children in care. I do not, however, think the Ministry's arguments on the CFCSA's "restrictive access scheme" assist it in establishing confidentiality of supply in this case. The access scheme merely limits disclosure of information obtained under the CFCSA. It does not mean the information was supplied in confidence in the first place. There is no basis in the material before me on which to conclude that the information in this report was supplied in confidence and I find that s. 22(2)(f) is not relevant here. That is not the end of the matter of course. I must still consider other relevant circumstances.

Unfair exposure to harm and harm to reputation

[36] The Ministry also argued that ss. 22(2)(e) and (h) apply. It provided open and *in camera* argument and evidence on these points. In its open evidence regarding s. 22(2)(e), the Ministry said that the applicants had aired their views on this case with the media and that there had been television coverage of the matter on several occasions. It attached copies of relevant media articles and a "pamphlet" which the Ministry said the applicants had circulated. It said that, based on their past behaviour, the applicants are likely to attempt to contact the third party, which would be "frightening and emotionally harmful to the third party". The Ministry also suggested that the applicants might attempt to use information they receive "in a manner that may be emotionally traumatic for the third party, as well as an invasion of the privacy of the third party's current caregivers".[14] In the Ministry's view, it is relevant to consider what the applicants might do with the report if they received it, as the Ministry believes the applicants are likely to disclose the report or the information in it to the media, unfairly exposing third parties to harm.[15]

[37] Judging by the material before me, the applicants could disclose the third party's information to the media without the report. I do not therefore consider this argument to have much merit. The material before me also indicates that the applicants have communicated with the third party since her removal from their care. I do not see how disclosure of the report might assist them to do so again nor, given the previous contact, how renewed contact might harm the third party in some way beyond any harm that may have been caused by the applicants' contact with the third party to date. Nor is it clear how such contact might invade the current caregivers' privacy. I am also not persuaded by the submissions regarding s. 22(2)(h). I find that ss. 22(2)(e) and (h) are not relevant here.

[14] Paras. 11-12 & 14-16, first McNeill affidavit; a third party's submission.
[15] Paras. 10-11, reply submission.

Fair determination of applicants' rights

[38] The applicants made a number of arguments that appear to relate to the factor in s. 22(2)(c). Among other things, they said the following: that they were found innocent of any wrong-doing in their care of the third party and that allegations against them were unfounded; the report they wish access to shows that its author did not support the findings of the Ministry and others; the Ministry ignored this report in making its decisions surrounding the third party; and they are entitled to a copy of the report to understand what happened and to defend themselves.[16] A letter to the applicants from a supporter, which the applicant attached to their initial submission, suggests that the RCMP and the author of the report in question found that the Ministry's position regarding the allegations against the applicants was "fatally flawed" and that the Ministry had used improper processes in obtaining information.

[39] In response, the Ministry said that the applicants provided nothing to show that any legal rights they may have are at stake here. The Ministry also argued that the applicants' arguments regarding its handling of the child protection matter in question are not relevant to the issues in this inquiry. It said that in any case it did not ignore the report in question. Rather it was one of a number of records the Ministry considered. The Ministry provided *in camera* evidence on these points as well. There are also indications that the Ministry explained its decisions and actions to the applicants on a number of occasions.[17]

[40] I understand that the applicants continue to be upset and aggrieved by the Ministry's actions and decisions regarding the third party. They have not however shown what if any legal rights they may have are at stake in this matter. Nor have they shown how the report is relevant to a fair determination of any such legal rights. The other material before me, including the report in dispute, does not shed any light on this issue either. I find that s. 22(2)(c) does not apply here.

Conclusion on s. 22(1)

[41] None of the relevant circumstances I have considered here applies. I am aware of no relevant circumstances that favour disclosure of the third-party information in the report. The applicants have not discharged their burden under s. 57(2) and I find that s. 22(1) of FIPPA and thus s. 77(1)(a) of the CFCSA require the Ministry to withhold the third-party information in the report.

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[16] Pages 1-2, initial submission; reply submission.
[17] Paras. 6-9, reply; second McNeill affidavit.

Is severing reasonable?

[42] I have already said that the process information in the first two-thirds of the report is readily disclosable with some minor severing of third-party information. The remaining third of the report is virtually all third-party information which falls under s. 77(1)(a) of the CFCSA, with one brief mention of the applicants on p. 7. It is certainly possible to sever the surrounding information and to disclose this one phrase. The question is, however, is it reasonable under s. 77(4) of the CFCSA to do so? Will disclosing these few words lead to a meaningless result, a phrase floating in isolation on a page?

[43] This phrase is the only information about the applicants in this record and, after some reflection, I have concluded that, although the phrase will have little meaning out of context, it is reasonable to sever the surrounding third-party information and disclose the phrase to the applicants. I have prepared a severed copy of the report for the Ministry to disclose to the applicants.

4.0 CONCLUSION

[44] For the reasons given above, under s. 58 of the Act, I make the following orders:

1. Subject to para. 2 below, I require the Ministry to give the applicants access to the information in the record in dispute (that is, the report dated February 20, 2004) that it withheld under s. 77 of the CFCSA.

2. I require the Ministry to refuse access to the information it withheld under s. 77 of the CFCSA, as highlighted in pink on the copy of the record in dispute provided to the Ministry with its copy of this order.

May 10, 2006

ORIGINAL SIGNED BY

Celia Francis
Adjudicator