Order F07-16

PROVINCIAL HEALTH SERVICES AUTHORTIY

Michael McEvoy, Adjudicator

July 30, 2007

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Summary: The applicant sought the hospital records of his infant child. The PHSA properly denied access to the records on the basis that the applicant was a non-custodial parent.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 4; Freedom of Information and Protection of Privacy Regulation, s. 3(a); *Divorce Act*, s. 16(5); *Family Relations Act,* s. 34(1).

Authorities Considered: B.C.: Order No. 2-1994, [1994] B.C.I.P.C.D. No. 2; Order No. 10-1994, [1994] B.C.I.P.C.D. No. 13; Order No. 300-1999, [1999] B.C.I.P.C.D. No. 13; Order 00-40, [2000] B.C.I.P.C.D No. 43.

1.0 INTRODUCTION

[1] This inquiry concerns a request made under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") by a parent ("applicant") for access to hospital records of his infant child. The Provincial Health Services Authority ("PHSA") refused the request on the basis that the applicant was not the custodial parent of the child and therefore not entitled under s. 3(a) of the Freedom of Information and Protection of Privacy Regulation ("FOI Regulation"), made under FIPPA, to make the access request on behalf of the child.

[2] The applicant sought a review of this decision. When the matter was not resolved through mediation, an inquiry was held under Part 5 of FIPPA.

2.0 ISSUE

[3] The issue in this inquiry is whether the applicant is authorized under s. 3(a) to access records under s. 4 of FIPPA on behalf of his infant child.

[4] FIPPA is silent with regard to which party has the burden of proof in such a case, leaving each party responsible for submitting arguments and evidence to support their positions.

3.0 DISCUSSION

[5] **3.1 Procedural Matter**—In its reply submission, the PHSA states that the hospital records the applicant requested contain information about the infant child's mother, the disclosure of which would be an unreasonable invasion of her privacy within the meaning of s. 22 of FIPPA. The PHSA asked that I receive *in camera* submissions on this point. The PHSA did not rely on s. 22 in refusing access and s. 22 was not mentioned as an issue in the notice of inquiry issued to the parties. However, because I have decided that the applicant is not entitled to make the access request on behalf of the child, it is not necessary for me to address s. 22.

[6] **3.2 Right of Access to Records Under the Regulation**—The relevant parts of s. 3 of the FOI Regulation read as follows:

> ***Who can act for young people and others***
>
> 3 The right to access a record under section 4 of the Act, the right to request correction of personal information under section 29 of the Act or the right to consent to disclosure of personal information under section 33 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; …

[7] Previous orders have interpreted "parent" to mean a "custodial" parent.[1] The focus of this inquiry is therefore whether the applicant is a custodial parent for the purposes of the FOI Regulation.

Who is the custodial parent?

[8] The applicant submits that he is a custodial parent. He argues that he was granted access to his child pursuant to a court order and this is proof of his status as a custodial parent.[2] In general terms he contends that the actions of the PHSA demonstrate a bias against men involved in custody matters. He says

[1] See for example Order No. 2-1994, [1994] B.C.I.P.C.D. No. 2; Order No. 10-1994, [1994] B.C.I.P.C.D. No. 13; Order No. 300-1999, [1999] B.C.I.P.C.D. No. 13.
[2] Page 3, applicant's initial submission.

that his request for information is made for the sole benefit of the health and well-being of his child.[3]

[9] The PHSA argues the applicant is not a custodial parent and refers to s. 34 (1) of the *Family Relations Act* ("FRA") which defines persons who may exercise legal custody over a child.[4] Section 34 (1) states:

> 34(1) Subject to subsection (2), the persons who may exercise custody over a child are as follows:
>
> (a) if the father and mother live together, the father and mother jointly;
>
> (b) if the father and mother live separate and apart, the parent with whom the child usually resides;
>
> (c) if custody rights exist under a court order, the person who has those rights;
>
> (d) if custody rights exist under a written agreement, the person to whom those rights are given.

[10] The PHSA submits that the applicant is not a custodial parent because, according to the relevant court order, the infant child usually resides with the applicant's ex-spouse. The order reads in part:

> The primary residence of the child of the marriage shall be with the Defendant [the applicant's ex-spouse] until further order of this Honourable Court…

[11] The court order also provides specified weekend access rights to the applicant.[5]

[12] Given the nature of the court order, the PHSA argues that the applicant is not a custodial parent because the infant child usually resides with his spouse.[6]

[13] The applicant states that, when he requested his child's records, he was asked by the hospital to provide proof of his access to the child. In response he gave the hospital the full court order referred to above. The applicant says that, because he turned over the court order only to verify his access rights, the PHSA was not authorized by him to use any other information contained in the order, specifically those parts relating to the usual residency of the child. In any event, he also questions how the residency status of the child can be relevant.[7]

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[3] Page 1, applicant's initial submission.
[4] Para 12, PHSA's initial submission.
[5] Para.13, PHSA's initial submission. The full text of the court order is found in the applicant's initial submission at pages 10 – 13.
[6] Paras. 13 & 17, PHSA's initial submission.
[7] Page 3, applicant's initial submission.

[14] The applicant also argues, in reference to the fact the court order does not mention the word custody, that "no document exists showing any custody whatsoever".[8]

[15] I have concluded the applicant is not a custodial parent and is therefore not entitled under the FOI Regulation to exercise his child's right to request access to the child's records.

[16] While I appreciate the applicant's belief that he is acting in his child's best interests, this does not, in light of the FOI Regulation, give him the right to act for the child.

[17] It is true the court order between the applicant and his spouse does not mention the word "custody", but it clearly states that the usual residence of the child is with the applicant's spouse. There is no evidence before me that either s. 34(1)(c) or (d) of the FRA applies. Because of the order, s. 34 (1)(b) of the FRA makes the mother the person "who may exercise custody over" the child. The applicant has no such right under the provisions of the court order.

[18] While the applicant states the PHSA was not authorized to use certain information in the court order to deny him the records he sought, I find the PHSA acted properly to ensure that the applicant met the requirements of the FOI Regulation. The PHSA was aware that previous rulings under FIPPA interpreted "parent" in the FOI Regulation to mean "custodial" parent. While the applicant believes the PHSA should have only considered one part of the court order relating to access, the PHSA had an obligation to consider the entire order to satisfy itself that the criteria under the FOI Regulation were met.

If the applicant were a custodial parent?

[19] Even if I assume for discussion purposes only that the applicant is a custodial parent for the purposes of s. 3(a), I would find he has still not satisfied all of the requirements of the FOI Regulation. The applicant must also establish that he is truly acting on the child's behalf in seeking to exercise access rights. Commissioner Loukidelis has summarized the matter in this way:

> As my predecessor said in Order No. 53-1995, where an applicant is not truly acting "on behalf" of an individual described in s. 3 of the Regulation, the access request is to be treated as an ordinary, arm's-length request under the Act, by one individual for another's personal information. A similar view has been expressed in Ontario. In Order P-673 (May 6, 1994), a father failed to convince Assistant Commissioner Irwin Glasberg that he was seeking to exercise the right of access on behalf of his son. The Commissioner concluded that the father, although acting in good faith, was seeking the information to meet his personal objectives and not those

[8] Page 2, applicant's initial submission.

> of his son. The father therefore had the burden of establishing that his son's personal information could be disclosed to him without unreasonably invading the son's privacy.[9]

[20] While the applicant states he seeks the information for the "well being"[10] of his child, this falls well short of establishing that he is in fact doing so for the purpose of acting on the child's behalf and the applicant has not established his right to act for the child under s. 3(a).

Access under the Divorce Act

[21] The applicant also argues that I should order the release of the records pursuant to s. 16(5) of the *Divorce Act*, which reads as follows:

> Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

[22] The applicant contends that this provision allows a clear right of access to the hospital records he seeks. He queries why the federal law is different from the provincial law and asks whether the federal does not overrule the provincial statute.[11]

[23] The PHSA argues that s. 16(5) of the *Divorce Act* does not create an obligation on the part of the PHSA to release a child's personal medical records to a non-custodial parent who has been granted access to the child. The PHSA submits that the proper procedure for obtaining a child's personal information was summarized in Order 10-1994:[12]

> [I]f a non-custodial parent requests information about his or her child, the custodial parent may give consent, on behalf of the child, for the release of the child's personal information. The avenue is open to the applicant in this case, as he has stated that the mother of the children has not applied for this information or refused to agree with [the applicant] receiving it.

[24] In applying this to the present circumstances, the PHSA says the applicant can request copies of the records in question directly from his ex-spouse and if he is refused, he may then apply to the Supreme Court of BC for an order compelling his ex-spouse to release the records to him.

[25] I agree that the Supreme Court of British Columbia is the appropriate forum to determine the applicant's access rights to information under the *Divorce*

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[9] Order No. 00-40, [2000] B.C.I.P.C.D No. 43.
[10] Page 4, applicant's initial submission.
[11] Page 1 & 2, applicant's reply submission.
[12] Order No. 10-1994, [1994] B.C.I.P.C.D. No. 13.

Act.[13] My authority under FIPPA does not extend to granting the applicant a remedy under or in respect of that legislation.

4.0 CONCLUSION

[26] Pursuant to s.58(2)(b) of FIPPA, I confirm the decision of the PHSA to find the applicant to be a non-custodial parent and therefore not entitled under s. 3(a) of the Freedom of Information and Protection of Privacy Regulation, made under FIPPA, to make the access request on behalf of the individual under 19 years of age.

July 30, 2007

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File No. F06-28010

[13] See Order No. 300-1999, [1999] B.C.I.P.C.D. No. 13 wherein Commissioner Flaherty ruled that the "Supreme Court of British Columbia was the appropriate forum for determining who obtains access to personal records in custody disputes."