



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F10-31

MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

Mary Carlson, Adjudicator

September 7, 2010

Quicklaw Cite: [2010] B.C.I.P.C.D. No. 44

CanLII Cite: 2010 BCIPC 44

Document URL: <http://www.oipc.bc.ca/orders/2010/OrderF10-31.pdf>

Summary: The complainant consented to the Ministry conducting a “prior contact check” for the benefit of the complainant’s new employer, a social service agency providing services to troubled youth. In the process of conducting the check, a Ministry social worker came across a decade-old and uninvestigated allegation of sexual abuse against the applicant. The social worker recommended to the employer that the complainant be barred from unsupervised contact with youth, which resulted in his termination. The Ministry was found not to have taken any steps to assess the accuracy of the information before it used that information in the decision to recommend the applicant be supervised in the workplace, failing to comply with s. 28 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 28 and 29.

1.0 INTRODUCTION

[1] This matter is one aspect of a complicated dispute that has wound its way through the internal dispute mechanisms at the Ministry of Children and Family Development (“Ministry”), three investigations by the Office of the Information and Privacy Commissioner (“OIPC”) and three court hearings, including an unsuccessful application to the Supreme Court of Canada.

[2] The issues in this case arise from the firing of the complainant, Mr. Harrison, by his employer, a youth group home. The termination followed discussions between the employer and the Ministry, which occurred after the applicant authorized the Ministry to disclose information to the employer.

[3] Mr. Harrison, amongst other things, complained that the personal information the Ministry disclosed about him was inaccurate and resulted in his termination. He subsequently filed a complaint with the OIPC leading to a finding by the Commissioner that *Freedom of Information and Protection of Privacy Act* (“FIPPA”) authorized the disclosures in issue.

[4] Mr. Harrison petitioned the Supreme Court of BC for judicial review of the Commissioner’s finding. The Honourable Mr. Justice Pitfield overturned the Commissioner’s decision, finding that the Ministry had breached both its enabling statute, the *Child, Family and Community Service Act*, and FIPPA. The Court remitted the matter to the Commissioner for further consideration in light of Justice Pitfield’s conclusions.

[5] The Commissioner and the Attorney General of British Columbia appealed Justice Pitfield’s decision. In *Harrison v. British Columbia (Information and Privacy Commissioner)*,¹ the BC Court of Appeal set aside Justice Pitfield’s decision, except for his finding that the Ministry had conveyed inaccurate personal information about the complainant and, in doing so, breached s. 28 of FIPPA.

[6] The BC Court of Appeal ordered the applicant’s complaint against the Ministry regarding s. 28 of FIPPA and any remedies arising be remitted to the Commissioner. The Commissioner has delegated to me the authority to consider the matters at issue that follow from the Court of Appeal order.

Factual Background To The Issue Under Review

[7] The chambers judge set out the factual background to this matter in considerable detail in the judicial review decision and the Court of Appeal decision noted above. I summarize below the facts germane to this proceeding.

[8] In 1996, Mr. Harrison lived in Sechelt, British Columbia with his then-wife. Mr. Harrison’s wife operated a licensed day care where he was employed as a child-care worker.

[9] On August 27 1996, someone called in a report to what was then the Ministry of Social Services in Sechelt. The caller claimed that Mr. Harrison, some five years earlier, had sexually abused his own daughter. An “Assessment Only” (“AO File”) was opened.

¹ 2009 BCCA 203.

[10] The Ministry social worker assigned to the file disclosed information about the alleged sexual abuse to the Chief Licensing Officer for day care operations. The Chief Licensing Officer indicated he had received no complaints, similar or otherwise, about Mr. Harrison. The Chief Licensing Officer declined to conduct a review of the day care employing Mr. Harrison.

[11] A few days later, on September 4, 1996, the Chief Licensing Officer informed Mr. Harrison of the allegation against him.

[12] Mr. Harrison contacted the Ministry on September 5, 1996. He expressed serious concerns about the nature of the allegations, particularly since he and his wife operated the day care. He invited the social worker to interview his daughter. The social worker advised Mr. Harrison that no assessment would be done, due to the “unsubstantiated nature of the report” and that no further action would be taken.

[13] Thirteen days later, after the social worker assessed the information and consulted with her supervisor, it was determined that the allegation fell outside of the statutory definition of a child in need of protection. The Assessment Only file was closed as “no case made”.

[14] In 2001, the Ministry opened a “Resource File” when Mr. Harrison and his wife were subject to a Ministry home study, the purpose of which was to determine their potential suitability for foster parenting. Mr. Harrison and his wife subsequently became foster parents of two girls and fostered them for the next three years.

[15] Mr. Harrison also ran a Ministry-approved out-of-school childcare program between September 2001 and 2004.

[16] In 2005, Mr. Harrison, now separated from his wife, moved to the Lower Mainland.

Access House Application And Employment

[17] On April 28, 2006, Mr. Harrison applied for a position with a group home providing services on behalf of the Ministry for troubled adolescents.

[18] After an interview, the Executive Director of the group home hired Mr. Harrison and he began work on May 1, 2006. Mr. Harrison’s responsibilities were to work one-on-one with a certain youth living at the group home.

[19] A condition of employment was his consent for the group home to obtain from the Ministry a “Prior Contact Check” (“PCC”), the purpose of which was to assist in determining his suitability for employment with children.

Prior Contact Check By The Ministry

[20] The signed consent form was transmitted to the resource social worker from the Ministry responsible for the group home.

[21] Sometime between May 10 and May 12, 2006, the social worker contacted the group home Program Director indicating “something had come up” during the PCC process and asked the Program Director to obtain a second, more specific consent from Mr. Harrison.

[22] During the process of obtaining the second consent, Mr. Harrison was told that the reason for the second consent was that “something had come up.” The Program Director asked him if he knew what the information might be. Mr. Harrison then told the Program Director and the Executive Director about the uninvestigated allegation of sexual abuse made against him in 1996.

[23] After receiving the second consent for disclosure, the social worker provided details to the Executive Director about the nature of the Assessment Only file, stating that she did not believe the allegation had been “properly” investigated. The social worker said she intended to conduct a more in-depth review.

[24] The social worker recommended, pending the completion of her review, that Mr. Harrison be prohibited from one-on-one contact with youth and that he engage only in activities with the residents of the group home in which he could be supervised.

[25] On May 22, 2006, the employer terminated Mr. Harrison’s contract to provide one-on-one services.

[26] The social worker contacted the group home on June 5, 2006, to provide the results of her investigation and was told that Mr. Harrison no longer was in their employ.²

2.0 ISSUES

Issues Under Review And The Burden Of Proof

[27] The Court of Appeal has directed that I consider Mr. Harrison’s complaint in relation to s. 28 of FIPPA. That section reads as follows:

² The Director of Child Welfare, Fraser Region, wrote to the group home on June 22, 2006, stating “the contents of this Assessment Only File do not, in my opinion, constitute a barrier to Mr. Harrison’s employment in a position of trust involving children”.

Accuracy of personal information

28 If

- (a) an individual's personal information is in the custody or under the control of a public body, and
- (b) the personal information will be used by or on behalf of the public body to make a decision that directly affects the individual,

the public body must make every reasonable effort to ensure that the personal information is accurate and complete.

[28] The issues under review therefore are:

1. Did the Ministry, or someone on behalf of the Ministry, use Mr. Harrison's personal information to make a decision that directly affected him and, if so,
2. Did the Ministry make every reasonable effort to ensure that the information was accurate and complete prior to using the information in the decision that directly affected Mr. Harrison?

[29] Section 57 is silent on the burden of proof for s. 28 in hearings such as this. Past orders of the OIPC have said that, in such cases, as a practical matter, the parties should provide argument and evidence to justify their positions.³

[30] In considering this matter, I consulted the evidentiary foundation already gathered in Mr. Harrison's civil action against the Ministry and others, and specifically the material the parties filed in their respective applications under Rule 18A of the Supreme Court *Rules of Court*. I also invited the parties to make further submissions and received submissions from the Ministry and the applicant.

Is The Information The Applicant's Personal Information?

[31] Under FIPPA, "personal information" means "recorded information about an identifiable individual".

[32] The Ministry concedes that any information about Mr. Harrison contained in its records is his personal information.

[33] However, the Ministry argues that the verbal recommendation of the social worker that Mr. Harrison not be left unsupervised with clients at the group home is not Mr. Harrison's personal information, because it is not "recorded" information.

³ Order 02-38, [2002] B.C.I.P.C.D. No. 38, para. 39.

[34] In my view, the Ministry's submission misses the point because the verbal opinion of the social worker provided to the group home is not the matter under consideration here.

[35] What is the subject of this review is the information that the social worker reviewed and considered during the prior contact check process. That information, in the custody and control of the Ministry, is clearly Mr. Harrison's personal information.

Did the Ministry Use The Applicant's Personal Information?

[36] FIPPA does not define the term "use" in relation to personal information in s. 28. However, various dictionary definitions explain the word to mean, "to employ for a purpose; utilize".⁴ It also been defined as "take, hold, or deploy as a means of achieving something".⁵

[37] Although not binding on me, I also find the definition of "use" in the BC Ministry of Citizens' Services policy and procedures manual on access and privacy to be helpful and consistent with the above definitions in this matter. The manual defines "use" as "employing it [personal information] to accomplish the public body's objectives; for example, to administer a program or activity, to provide a service or to determine someone's eligibility for a benefit or suitability for a job".⁶

[38] The Ministry says it did not use the information in a decision regarding Mr. Harrison.

[39] The applicant states that the social worker's opinion was "derived" from the information in Ministry files.⁷ I agree for reasons that follow.

[40] The social worker deposed that "she requested the (Assessment Only) file so (she) could review it and determine if it raised any concerns in relation to (Mr. Harrison's) ability to safely care for the youth at [the group home]".⁸

[41] She further deposed that:⁹

PCC's are always performed on prospective foster and adoptive parents. It has been the practice of the Surrey MCFD office to also perform a PCC check for a third party agency such as [the group home] where a prospective employee consents to the disclosure of information in our files. The purpose of carrying out such a background check is to assist either MCFD (in the case of prospective foster parents) or an agency such as [the group home] (in the case of

⁴ Dictionary.com.

⁵ Oxford Online Dictionary.

⁶ http://www.cio.gov.bc.ca/cio/priv_leg/manual/definitions/def.page?#use.

⁷ Applicant's reply submission, para. 6.

⁸ Affidavit of the social worker, July 18, 2008, para. 16.

⁹ Affidavit of the social worker, July 18, 2008, para. 8.

prospective employees) to assess the suitability of an applicant to care for children in care.

[42] Section 3.2(r) in the contract between the Ministry and Marion Haden Enterprises Inc. (the operator of the group home) states a “Director must agree with the placement of a child with any caregiver”. The social worker swears that, with respect to the group home, she “exercises delegated powers from the Director in the area of resource and voluntary services”.

[43] Taking all of this evidence together with the definitions of “use,” I conclude that the social worker “employed the information in a manner to accomplish the public body’s objectives”. In short, she “used” the information in making her recommendation, pending the outcome of her review, that Mr. Harrison be prohibited from one-on-one contact with youth and that he engage only in activities with the residents of the group home in which he could be supervised.

Was The Personal Information Used In A Decision That Directly Affected Mr. Harrison?

[44] Did the Ministry use the personal information in a “decision” that directly affected Mr. Harrison?

[45] FIPPA does not define the term “decision”. However, s. 8 of the *Interpretation Act* compels me to interpret FIPPA in a “remedial” manner and to give it “such fair, large and liberal construction and interpretation as best insures the attainment of its objects”. In addition, and as has been noted in many OIPC orders,¹⁰ the Supreme Court of Canada has said that the words of a statute must be interpreted in their entire context and in their grammatical and ordinary sense, in harmony with the scheme of the legislation, the purposes of the legislation and the intention of the Legislature. See, for example, *Lavigne v. Canada (Office of the Commissioner of Official Languages)*.¹¹

[46] There is little question that FIPPA’s purposes, as stated in s. 2 of the legislation, put strong emphasis on the protection of a citizen’s personal information in the hands of government. Those purposes include a right of a person to correct personal information about herself or himself. The implication is that government’s use of personal information can have profound consequences for individual citizens. This is, in part, the context in which I have to consider whether a public body has used personal information to make a “decision” that directly affects an individual.

[47] The Ministry argues that “decisions” within the meaning of s. 28 ought to possess “formality and processes” and that the impact on the individual of those decisions be “obvious and clear”.

¹⁰ See for example Order F10-13, para. 9.

¹¹ 2002 S.C.C. 53; [2002] S.C.J. No. 55.

[48] The Ministry further submits:¹²

The work of child protection social workers, including their actions to investigate a report or to alert an employer or the like, does not involve decisions that directly affect individuals, within the meaning of [s. 28 of FIPPA]. Rather, these are simply the functions of social workers doing their jobs.

[49] The Ministry suggests that s. 28 only applies to “formal” decisions and not to “routine” decisions or actions of social workers. I do not agree. There is nothing in FIPPA that warrants drawing such a distinction. The only distinction made under FIPPA concerning “decisions” are those that “directly affect” individuals from those that do not.

[50] A dictionary definition of the term “decision” makes clear decisions can be of both formal and less formal nature. For example a decision is:¹³

...the act or process of deciding; determination, as of a question or doubt, by making a judgment; the act of or need for making up one's mind; something that is decided; resolution; a judgment, as one formally pronounced by a court.

[51] The social worker deposed that:¹⁴

...what the PCC does is to assess the suitability of the applicant to care for children. That's for in foster homes, and with [the group home]. That is their routine procedure when they are hiring staff is to have their potential staff sign [a consent for the Ministry to conduct a PCC] so that the ministry can then review our files to assess the suitability of their potential employees.

[52] The Ministry further submits ¹⁵ that a “decision to terminate someone's employment would be a decision that directly affects the individual. In this case, no such decision was made by or on behalf of the public body”.

[53] The Ministry takes the position that the information was not used by anyone in a “decision of the Ministry” and, in any event, not in any decision of the Ministry that directly affected Mr. Harrison, as the decision to fire Mr. Harrison was made by the management of the group home.

[54] I do not agree. The Ministry correctly states that the group home and not the Ministry decided to fire Mr. Harrison. However, this does not change the fact the Ministry also made a decision in this instance. The decision in question was the social worker's decision to recommend the suspension of Mr. Harrison's unsupervised access to youth at the group home until she completed her review. It is not within my mandate to determine whether her recommendation was correct or not. However, there can be

¹² Ministry's initial submission, para. 5.18.

¹³ Dictionary.com.

¹⁴ Examination for discovery of the social worker, November 28, 2008, para. 74.

¹⁵ Ministry's initial submission, para. 5.17.

no doubt the decision to make this recommendation had profound consequences for Mr. Harrison.

[55] The Ministry's attempt to deny there was a direct link between the recommendation of the social worker and the subsequent firing of Mr. Harrison is not believable. Mr. Harrison was hired specifically to provide one-on-one supervision for a youth receiving services through the group home. The Ministry was the overseer of the contractor and appeared to have the power in the contract to approve all caregivers. Mr. Harrison fell squarely under the definition of caregiver.

[56] It is not believable to suggest the group home management would disregard the social worker's decision to recommend that Mr. Harrison be removed from unsupervised access to clients of the group home. This recommendation had the direct impact of frustrating the purpose for which Mr. Harrison was hired. Mr. Harrison's employment was promptly terminated.

[57] I find that the personal information was used in a decision that directly affected Mr. Harrison.

Did The Ministry Make Every Reasonable Effort To Ensure Accuracy And Completeness Of Mr. Harrison's Personal Information?

[58] Whether the information contained in Ministry files about Mr. Harrison was accurate and complete is not within the scope of this hearing. The question is whether the Ministry made every reasonable effort to ensure the accuracy and completeness of Mr. Harrison's personal information before it used that information to recommend Mr. Harrison be prohibited from unattended contact with the youth at the group home.

[59] The Ministry states that:¹⁶

...in the context of child protection social work, social workers are required to accurately record what is reported to them, and to completely record what is reported to them. They are not required to ascertain the veracity of what is reported to them at the time of the report. Attempts to do that may occur during the report investigation state, not at the report receipt stage.

[60] In its initial submission, the Ministry correctly states that the Freedom of Information and Protection of Privacy Policy and Procedure Manual published by the sponsoring Ministry of Citizens' Services does not define the terms "accuracy" and "completeness". Neither does FIPPA. The Ministry states that the term "accuracy" cannot be read as "true" or "proven" but rather should be read as "careful, precise, lacking errors—in other words, recorded carefully, precisely and without errors".¹⁷ If this were not the case, the Ministry argues, then social workers would be prohibited from deciding to investigate a child protection report unless the investigator was "already

¹⁶ Ministry's initial submission, para. 5.28, page 12.

¹⁷ Ministry's initial submission, page 13.

satisfied as to the veracity of the report”, which would frustrate the “very nature and purpose of child protection work”.

[61] The Ministry’s reasoning does not persuade me because it ignores what is plain and obvious: the terms “accurate and complete” in s. 28 directly relate to the veracity of the individual’s personal information, not to the preciseness of the transcription. The Ministry’s act of investigating a child protection report *is* the process the Ministry follows to determine the accuracy of the information in the report.

[62] The Ministry’s argument implies that s. 28 requires only that a public body ensure that information it uses in a decision is carefully transcribed and completely recorded, without any regard to its veracity. Such an interpretation could have dramatic adverse consequences for individuals, where the use of inaccurate or incomplete information to make decisions could result in improper health care treatment, discrimination, loss of employment, loss of driving privileges, loss of child custody and/or financial loss.

[63] I note that these dramatic consequences could be amplified in linked electronic networks, where disparate bits of unverified information about individuals are pulled from various databases to create a new picture or digital persona about someone, without that person even knowing the digital persona had been created or was being used in decisions about them.

[64] This interpretation also makes no sense if one reads s. 28 in conjunction with s. 29 of FIPPA. The latter section gives individuals the right to request “correction” of their personal information. It further provides that someone who “believes there is an error or omission in their personal information” may request a correction of that information. The common definition of the word “error” includes “an act, assertion, or belief that unintentionally deviates from what is correct, right, or true; the condition of having incorrect or false knowledge; the act or an instance of deviating from an accepted code of behaviour; a mistake”.¹⁸

[65] The term “accurate”, therefore, directly relates to the veracity of the personal information. In other words, public bodies, before they make a decision that affects an individual, based in whole or in part on that person’s personal information, must make every reasonable effort ensure that the information they intend to rely on is truthful.

[66] The Ministry made no submissions concerning the efforts it made to assess the accuracy of the information pertaining to Mr. Harrison before it used that information to recommend Mr. Harrison’s barring from unsupervised contact with the clients of the group home until a more in-depth review was completed.

[67] Part of the evidence before me is a November 25, 2008, examination for discovery in which the social worker deposed that she did not conduct a “comprehensive review” of the file. She stated “it was a review and it’s a few steps that

¹⁸ The Free Dictionary.

are taken to call the information up on the system, request the files, read the files, and that's it".¹⁹

[68] She further deposed that "MCFD does not have a written policy dealing with PCC checks for individuals working for third party childcare agencies".²⁰

[69] The Director of Integrated Practice for the Ministry's Fraser Region office confirmed that "practice standards" exist for the conduct of PCCs in assessing child protection reports. He also confirmed that the social worker that reviewed the 1996 allegation against Mr. Harrison would have been obliged to apply these standards. He also stated that these standards would not apply to a social worker who came across a child protection report in conducting the PCC on behalf of a third party agency (such as the group home).²¹

[70] At the examination for discovery, the social worker was asked to explain why she disclosed the 1996 allegation concerning Mr. Harrison to Access House before she had completed a full review. She responded "Well, the AO file has a very serious allegation and as my role is to protect children, there was that worry in mind". She further testified that when she read the AO file, she wondered "how they came to their conclusion" and "would have preferred to have seen a lot more documentation recorded on file as to how they came to that conclusion".²²

[71] She further deposed that, had she been conducting a child protection investigation, she would have interviewed "all the relevant parties...the people involved in that report". However, in this instance, despite her stated concerns that the documentation in the 1996 AO file was inadequate and her stated role of child protection, she did not attempt to contact a single person involved in that matter. Neither did she contact any staff involved in the decisions to approve Mr. Harrison as a foster parent and out-of-school caregiver, both of which post-dated the abuse allegation. She also never contacted Mr. Harrison.

3.0 DISCUSSION

[72] What is the standard by which one can conclude a public body has made "every reasonable effort" to ensure that personal information is accurate and complete, before it makes a decision affecting someone, based on that information?

[73] In this matter, the evidence is clear that the social worker made no effort, let alone every reasonable effort, to ensure the accuracy and completeness of the information she relied upon to come to her interim decision recommending Mr. Harrison not be left alone with youth in his workplace. Her opinion was based in part on her belief that the matter had not been "properly" investigated. Yet she did not make a

¹⁹ Examination for discovery of the social worker, November 28, 2008, para. 153.

²⁰ Affidavit of the social worker, July 4, 2009, page 3.

²¹ Examination for discovery of the Director of Integrated Practices, December 5, 2008, para. 112-11.

²² Examination for discovery of the social worker, November 28, 2008, paras. 203 and 208.

single inquiry of any one of the several Ministry employees who had had dealings with Mr. Harrison over the previous decade. To compound matters, she admitted that, when she made her recommendation concerning Mr. Harrison, it had been more than twenty-four years since she had worked in the field of child protection.²³ This decision, based on allegations determined at the time to be without substance and warranting no further investigation, has led to consequences that cannot be remedied.

[74] In determining that not every reasonable effort was made to ensure Mr. Harrison's personal information was accurate and complete, I also take into account the Ministry's failure to develop policies that could have guided the social worker in conducting the PCC. The evidence in this case is that how and when a PCC is conducted varies across the province, and that the purposes for which PCCs are conducted have been described inconsistently.

[75] This highlights the risks of using personal information for a secondary purpose. A basic privacy rule is that personal information should only be used for the purpose for which it was originally collected—the "primary purpose". Secondary uses of personal information are not normally permitted unless they are consistent with, or reasonably connected to, the purpose for which the personal information was originally collected.

[76] In addition, it is not clear to me whether the Ministry has a strategy, policy or process dealing with the management of files concerning unsubstantiated or worse, uninvestigated, allegations of sexual (or other) abuse. It is however clear that those who have been subjected to the latter are in an unenviable situation in which there can be no successful outcome. Since no investigation ever takes place, the veracity of the allegation is not conclusively resolved. Yet no further investigation will ever take place, frustrating closure to the matter and leading to the possible loss of reputation or other harm.

[77] What is "reasonable" with respect to s. 28 will be contextual, but the evidence in this case leads me to conclude that the standard of reasonability with respect to prior contact checks will generally be higher in the presence of any of the following factors:

- The decision may have a serious impact on the individual's health, safety, finances, employment or reputation;
- The personal information was not collected directly from the person concerned and the person concerned has not reviewed the information;
- The personal information is outdated or archived;
- The personal information is being used for purposes secondary to the original purpose for which it was originally collected;
- The personal information was supplied anonymously.

[78] The presence of any one of these factors increases both the risk that use of the personal information could have an adverse effect on the person concerned and the

²³ Examination for discovery of the social worker, November 28, 2008, para. 121.

obligations on the part of the public body to ensure the accuracy of personal information before it is used in a decision that affects someone.

[79] In this case, *all* of these factors were present and combined to produce a deleterious outcome for Mr. Harrison.

4.0 CONCLUSION

[80] For the reasons given above, under s. 58(3)(a) of FIPPA, I find that the Ministry breached its duty under s. 28 to make every reasonable effort to ensure that Mr. Harrison's personal information in its custody and control was accurate and complete before it was used in a decision that directly affected Mr. Harrison.

[81] Under s. 58(3)(a), I require the Ministry to perform its duty under s. 28 and to take all appropriate steps to ensure this duty is met in the future.

[82] I recommend that the Ministry:

1. Clarify in writing for all relevant Ministry staff the purposes for which personal information is collected, used and disclosed in the prior contact check process; and
2. With regard to the criteria outlined in paragraph [77] of this decision, develop and implement policies and procedures pertaining to the accuracy, completeness, use, disclosure and retention of personal information relating to allegations of sexual or other abuse determined to be unsubstantiated and/or uninvestigated on the grounds that no case has been made to justify an investigation.
3. I ask the Ministry to provide the Information and Privacy Commissioner with an update on the progress of these recommendations on or before December 7, 2010.

September 7, 2010

ORIGINAL SIGNED BY

Mary Carlson
Adjudicator