Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 2-1994
February 7, 1994

INQUIRY RE: A Request for Access to Ministry of Social Services Records

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1. Description of the Review

As the Information and Privacy Commissioner, I conducted a written inquiry under section 56 of the Freedom of Information and Protection of Privacy Act (the Act) concerning a request for review received on January 11, 1994 under section 52. The applicant, a non-custodial parent, was denied access to the records of his infant son (the infant), held or controlled by the Ministry of Social Services (the Ministry), involving investigations conducted by the Ministry.

The applicant indicated in his request that he wanted the information to prepare for a forthcoming trial in the Supreme Court of British Columbia, wherein the infant's mother is the plaintiff and the applicant is the defendant.

In denying a request for access to information under section 4 of the Act, the Ministry relied on Regulation 3(a) issued under the Act, as interpreted by the Information and Privacy Branch of the Ministry of Government Services in its Freedom of Information and Protection of Privacy Act Policy and Procedures Manual (1993) [the Manual]. The Manual states in part that:

> In cases where the parents are separated or divorced and only one parent has custody of the minor, only that parent may exercise the minor's rights of access and correction.
>
> and
>
> Where only one parent has custody of the minor, the custodial parent should provide documentary proof that she or he has custody.

The applicant did not provide such documentary proof to the Ministry upon formal request.

2. Documentation of the Review Process

Under sections 56(3) and (4) of the Act, each party, and those persons given notice of the request for review by the Commissioner under section 54(b), were given an opportunity to make written representations to me. I also decided, under section 56(4), that all such parties would have a further opportunity to reply to all representations made to the Commissioner during the week following the initial submissions. A number of such replies were in fact received and considered.

In researching my decision, I have carefully considered all of the representations and replies that I received.

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a two-page statement of facts. These facts, the most essential of which are included in this order, are not in dispute.

I received written submissions from the Ministry of Social Services and the applicant; from the mother of the infant child as a third party; and from the Ministry of Education, the Ministry of Health and Ministry Responsible for Seniors, and the Ombudsman as intervenors. In the early days of monitoring the administration of this Act, I am especially pleased to have the benefit of such submissions.

3. Issues under Review at the Inquiry

Status of the Child

A central issue in cases of this kind is whether individuals under nineteen years of age are capable of exercising their rights of controlling access to their own personal information. In this instance, the infant was born in 1988 and is obviously incapable of exercising his rights at present on an application of this nature.

The definition of "parent" or "guardian" is also at issue in this review. Copies of court documents submitted by the applicant state that he is the natural father of the infant but has never cohabited with his child's mother, nor been married to her. The mother has interim custody of the child; the father has "reasonable and generous access to the child," and is under a court order to pay support and maintenance for the child.

The Act and its Regulations

Section 4(1) of the Act says that

> A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

Regulation 3 under the Act, approved by the provincial Cabinet on September 22, 1993, determines, in part, that

> The right to access a record under section 4 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.

The Regulations were developed by the Legal Services Division of the Ministry of Attorney General in consultation with the Directors or Managers of Information and Privacy for the various ministries and crown corporations subject to the Act. (See Freedom of Information and Protection of Privacy Act Regulation, B.C. Reg. 323/93, Order in Council No. 1281.)

As noted above, the Manual prepared by the Information and Privacy Branch in the Ministry of Government Services discusses Regulation 3 as follows:

> In cases where the parents are separated or divorced and only one parent has custody of the minor, only that parent may exercise the minor's rights of access and correction (Appendix 6.2.3, page 3).
>
> and
>
> Where only one parent has custody of the minor, the custodial parent should provide documentary proof that she or he has custody (e.g., a copy of the official custody order). In the case of separated or divorced parents with joint custody of the minor, the parent making the request should provide proof of joint custody.

On the basis of the narrower language of the Manual, on October 25, 1993, the Ministry of Social Services denied the applicant's request for access to information.

The Ministry's submission to this inquiry advanced some additional considerations for this action being the correct approach, such as the risk of a non-custodial parent using information obtained under the Act to harm or continue to harm a child. The Ministry also argued that, under the Regulation, it could deny both parents access to personal information about their child, if neither were its legal guardian.

The Ministry of Social Services asserted that "[s]ince the Regulation appears to provide the authority to exclude parents in favour of access by a guardian, it would be inconsistent to interpret the Regulation as of necessity including both parents, where only one is legally responsible for the children."

As Commissioner, I want to promote a "plain language" interpretation of the Act, the Regulations, and the policies surrounding their implementation. I think that this follows from the explicit drafting approach taken in the Act.

It seems to me that these several sources of guidance for this review are consistent and logical in identifying the need for a parent to act for an incapable child, and then identifying the legal custodian of such a child as the one to obtain or control access to personal information *on that child's behalf*.

The direction of the expression, "the best interests of the child," further suggests that the parent with legal custody should normally control access to information about the child in the hands of other public bodies under this Act. This outcome has the virtue, in terms of interpreting and applying the Act and the Regulations, of achieving a pragmatic solution that may help to promote a focus on the best interests of the child.

In the present case, the infant's mother, who is the interim legal custodian, made representations in opposition to the applicant's request for access, arguing that "his intentions are not in [the infant's] best interest." She also offered a specific example of an action by the applicant that she believes was not in the best interests of the child.

The submission of the Ombudsman also urged me to consider what is the best way to inform myself about the best interests of the child. In my judgment, the custodial parent is usually in the best position to act in the interests of an infant child in exercising its rights to access information under the Act, because a court exercises jurisdiction over the issue of custody. Under both the Divorce Act (federal) and the Family Relations Act (B.C.), the primary test for determining issues related to custody is "what is the best interest of the child?" In my view, this fact reinforces my conclusion in this case.

Custody Disputes and the Act

Representations received by me for this inquiry indicate that the infant is the subject of a custody dispute that is pending in the civil courts of this province, and that the applicant seeks the records in question for that purpose (and other purposes as well). Although the purpose for making a request is not relevant to rendering a decision in an inquiry, common sense suggests that consideration of the effective functioning of the Act requires brief attention to this matter.

Records in a court file and court proceedings generally are exempt from the Act under section 3(1), not least because the courts have long-established procedures for litigants to obtain access to relevant information. The applicant in this case may be able to use standard discovery procedures to gain access to records that he deems relevant to a court proceeding.

If the ongoing custody dispute was decided in his favour, the applicant may also become the custodial parent.

The Nature of the Records in Dispute

The representations in this inquiry do not indicate the specific nature of the records requested by the applicant, except that it is all records held by the Ministry of Social Services about his child. However, the Ministry informed me that the records concern results of investigations that it undertook after receiving allegations of harm to the child. Further, the infant's mother did suggest that serious allegations are involved, which further reinforces the weight of her opinion as custodial parent that access should not be granted to the child's records in this instance.

I am also sensitive to the view, expressed by the applicant, that a non-custodial parent with access to a child (as opposed to a non-custodial parent without access) has need for basic personal information about a child's current health, for example, in order to be a responsible parent. But that is not the issue I have been asked to rule on in this case.

I note as well that the Divorce Act, a federal statute, provides in section 16(5) that 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.

A non-custodial parent with access, as the Ministry of Health pointed out in its submission, could ask the custodial parent to request access to the child's records and ask that the information be shared with him or her. However, the Divorce Act would not provide a means of access in this present case, since the parents were never married.

4. Additional Representations on the Issues at Stake

The Ministry of Health took the position in its representation that Regulation 3(a) permits releasing personal information only to a parent who has legal custody of the child in question. This Ministry advanced a definition of "parent" found in Black's Law Dictionary (6th edition, 1990) as

> any individual or agency whose status as guardian of the person of the child has been established by judicial decree.

The Ministry of Health further argued that a restrictive interpretation of "parent" under Regulation 3(a) would advance one of the central goals of the Act, to protect the personal privacy of an individual, "by keeping to a minimum the number of people who have access to that information".

The Ministry of Health reported that the consensus among program areas within the Ministry, including Mental Health, Alcohol and Drug Programs, Community and Family Health, and Public Health Nursing, "is that only the custodial parent should be able to exercise a child's information rights pursuant to section 3 of the Regulation.... For example, in cases where the non-custodial parent has shown a history of abusive conduct or harassment

towards the child or the other parent, to give that parent uninhibited access to the child's health file could create an unsafe situation for the custodial parent and/or the child."

Finally, the Ministry of Health argued that "[t]o always allow the non-custodial parent access to their child's health files could create an unreasonable risk to the other parent and the child. Such access by the non-custodial parent could also hinder the willingness of the custodial parent or the child to share information with Ministry staff when such information could be necessary to their treatment."

The Ministry of Education pointed out its current practice on access to student records under the School Act, wherein "parent" is defined as:

a) the guardian of the person of the student or child,
b) the person legally entitled to custody of the student or child, or
c) the person who usually has the care and control of the student and child.

As a consequence, the Ministry of Education submitted, non-custodial parents "currently do not have access to their children's school records, without the permission of the child and/or the custodial parent or legal guardian."

I fully agree with the Ministry of Education's view that Regulation 3(a) is concerned with providing an agent for a minor child where "the individual is incapable of exercising those rights," rather than with the rights of parents to their children's information. The latter choice creates "a significant potential for an unacceptable invasion of the personal privacy of children in school, as well as a potential threat to their safety in some circumstances."

Finally, I note that section 66 of the Ontario Freedom of Information and Protection of Privacy Act deals specifically with the issue of access rights as follows:

> Any right or power conferred on an individual by this Act may be exercised, ...
> (c) where the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

While I would have preferred that the B.C. Act was as fully explicit on this point, I feel confident that my order reflects the intent of the Legislature.

5. Interpretation of Regulation 3(a)

I agree with the submission made by the Ministry of Health that one of the principles of the Act is to protect personal privacy. This can be achieved in this instance by keeping to a minimum the number of people who have access to an infant's personal information. It must be emphasized, however, that the issue in this case is not a parent's right of access to

information about his or her infant. It is about who is the best person to exercise the infant's right of access under the Act.

In my view, the word "parent" in Regulation 3(a) should be read as including only those parents who have legal custody. The only other person listed in Regulation 3(a) is a "guardian." I agree with the submission by the Ministry of Health that the term "guardian" should be taken to qualify the term "parent." To quote the Ministry: "As a guardian is the person who exercises the full 'bundle of rights' that a parent has in relation to a child, ... only the custodial parent should be able to exercise the rights of a 'parent' under the Regulation."

While the intention of the person who makes an access request is not relevant under the Act, a parent who makes a request on behalf of an infant child must be presumed to do so in the infant's best interest. The person who has legal control is, in my view, the one most likely to do that.

Other statutes and regulations referred to in the representations have been of limited assistance in interpreting Regulation 3. However, they have provided me with a broad policy framework that I have considered in reaching my conclusion in this matter.

The present case involves access to the records of a child of the age of five. I am persuaded that an older child should be able to exercise more control over access to his or her personal records, especially if a dispute exists between a custodial and non-custodial parent. I fully agree with the Ombudsman's contention that a minor has privacy rights.

6. Order

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry of Social Services not to release personal information about this infant child to the applicant.

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David H. Flaherty
Commissioner

February 7, 1994