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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 83-1996
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INQUIRY RE: A Decision by the Ministry of Health to withhold from a parent a series of interviews concerning a child's daycare

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner on December 13, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the Ministry of Health (the public body) to refuse access to the notes of interviews concerning the quality of care provided to the applicant's child at a Vancouver daycare centre.

The records in dispute are 62 handwritten pages of notes of ten separate interviews between five staff (in fact, the entire staff) of the daycare centre and two investigators regarding the care of the applicant's child. The handwritten notes are on the "Facility Report Forms" of the Community Care Facilities Licensing Office, Vancouver Health Department, and the "Supplementary Report Forms" of the Environmental Health Division, Vancouver Health Department. The Ministry provided a four-page typed summary of this information to the applicant during the mediation stage of this inquiry.

2. Issue

The issue to be resolved in this case is whether the record in dispute should be withheld under sections 15 and 22 of the Act. These sections read in appropriate part as follows:

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
...

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,

(d) reveal the identity of a confidential source of law enforcement information,

....

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

...

(f) the personal information has been supplied in confidence,

....

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(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,

....

3. Burden of proof

At an inquiry concerning a refusal to grant an applicant access to all or part of a record under section 15 of the Act, the head of the public body must prove that the applicant has no right of access (section 57(1)). In this case, the Ministry has to prove that the applicant has no right of access to the information she is seeking.

However, under section 57(2), if the record or part to which the applicant is refused access under section 22 of the Act contains personal information about a third party, it is up to the applicant to prove that disclosure of the personal information would not be an unreasonable invasion of the third party's personal privacy. In this case, then, the applicant has to prove that disclosure of the records in dispute will not unreasonably invade the privacy of those interviewed.

4. The applicant's case

The applicant is concerned about the quality of care offered to her child and other children by the daycare, especially in the form of verbal abuse and negative reinforcement. She prompted an investigation of her complaints "against certain workers" at the daycare by Community Care Facilities Licensing of the Ministry of Health and the Vancouver Health Department. One of the two investigators was, it is alleged, head of another daycare centre and also head of a union of daycare workers that represented some of this daycare's workers. The applicant alleges that this investigator was thus in a conflict of interest. The applicant believes that full disclosure of the records in dispute are required in the public interest in order to protect her child and other children.

The applicant generally argues that the Ministry is preventing disclosure of the records in dispute under section 22 in order to evade responsibility for "any situations that occurred." The applicant believes that in this case concern for the welfare of children takes precedence over the privacy rights of the daycare staff.

5. The Ministry of Health's case

The Ministry states that the applicant's complaints concerned inadequate care of the child, feedback about the child, and the treatment the parent received. (Submission of the Ministry, p. 5) I discuss below the detailed submissions of the Ministry on specific sections of the Act.

6. Discussion

The applicant is concerned about the rights of her child and of children in general in connection with the records in dispute. Having read the records, I can assure her that the rights of children are being appropriately represented by the Ministry in this case. I also conclude, contrary to the claims of the applicant, that the information provided during the interviews is in fact personal information under the Act primarily concerning herself, her child, and the daycare workers.

Section 15: The definition of law enforcement

The Ministry has established that the *Community Care Facility Act* authorizes the investigation of complaints against a licensed daycare facility and the levying of penalties and sanctions. Thus, it argues, "investigations pursuant to the Community Care Facility Act are law enforcement matters." (Submission of the Ministry, pp. 6-8) I am satisfied that such an investigation falls under the definition (part b) of law enforcement in Schedule 1 of the Act. The applicant's arguments to the contrary are not persuasive on this point. (Reply Submission of the Applicant, p. 2) The investigation launched by the applicant could have led to the closure of this daycare facility under the *Community Care Facility Act*. This investigation did not lead to sanctions of this sort. But given the investigators' need for honest responses, and the promises of confidentiality made to the daycare workers, disclosure of the full text may have a chilling effect on future law enforcement investigations.

Section 15(1)(c): harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement

The applicant rejects the Ministry's effort to use this section to prevent full disclosure. The Ministry, contrary to my findings in Order No. 50-1995, September 13, 1995, pp. 6-7 and Order No. 71-1995, December 15, 1995, p. 7, seeks to argue that confidential interviews are in fact an investigative technique or procedure in this particular inquiry, "due to the nature of the investigation."

> When complaints are made under the Community Care Facility Act, it is only through such confidential interviews that information is gathered. It is the only 'technique' available to those investigating this or any other complaint ....
>
> Complainants or those interviewed would not reveal their opinions or knowledge knowing that they can be linked with the information. It is this information that is the investigation and it is the collection of the information that is the law enforcement technique or procedure. (Submission of the Ministry, p. 9)

While I appreciate the Ministry's effort to draw such a distinction in this particular case, I remain of the view that a confidential interview is not a "technique" that can or should be protected from disclosure under this section. Nor would revealing reliance on confidential interviews harm their "effectiveness" in future cases. But that does not mean, given other sections of the Act, that the transcript of a confidential interview must be disclosed. It is hardly a threat to law enforcement in any context to know that investigators customarily rely on confidential interviews as a method of work, especially if the substance of the interviews remains truly confidential, which depends on meeting standards set out in exceptions set out in other parts of the Act.

Section 15(1)(d): reveal the identity of a confidential source of law enforcement information

The applicant rejects the Ministry's effort to use this section to prevent full disclosure. The Ministry, for its part, is endeavouring not to reveal the names of confidential sources of law enforcement information. As discussed further below, I accept the evidence of the Ministry that the interviews were indeed of a confidential nature, especially, as it states, because child abuse is often an issue in investigations of daycare facilities. (Submission of the Ministry, pp. 10-12, and Affidavit of Evon Soong, Exhibit A).

I find that it is reasonable for the Ministry to withhold the records in dispute under this particular section. The number of those interviewed is so small (five) that it would be impossible otherwise to protect the confidentiality of those interviewed with respect to what specific workers said. Severing in this case is impractical, if not impossible.

Section 22: Disclosure harmful to personal privacy of third parties

The applicant claims that she should receive the records in dispute in their unsevered form, because she knows "the subject of the material as well as the persons connected with this incident ..." I mention this argument simply to reject it. There is a difference between knowing

the subject matter or the names of all of those interviewed and having a right under the Act to obtain access to full notes of what they actually said during the course of an investigation. Even if the applicant had been shown the interview records at some point in time, that does not establish a right of access under the Act, given the existence of section 22.

The Ministry emphasizes that the privacy rights being protected under this section are the opinions associated with specific daycare workers. (Reply Submission of the Ministry, p. 3)

Section 22(2)(f): the personal information has been supplied in confidence

This section creates a circumstance that the Ministry must consider in deciding whether disclosure would be an unreasonable invasion of privacy. The applicant argues that:

> [T]here is no indication that the workers gave the information contained on the transcripts in confidence, nor does the Ministry have any right to protect those individuals in their investigations into any complaint or wrong doing on the actions of the daycare workers. Any attempt to state that the information was given in confidence would suggest a possible cover up by Child Care Licensing and the Ministry of Health.

The Ministry states that "[t]he interviews were conducted in confidence. Confidential interviews are an integral part of the investigation procedure." (Submission of the Ministry, p. 5) More specifically:

> Prior to the commencement of each of the five interviews, the investigators told the staff members that the interviews were part of an investigation. They further told the staff members that the records of the interviews would be confidential unless a licensing hearing took place. Co-operation was received from the staff due to the confidential nature of the investigation and the assurance that the records would be confidential. (Submission of the Ministry, p. 6; see also p. 11 and Affidavit of Evon Soong, Exhibit A)

The *Community Care Facility Act* does not compel any worker at a licensed facility to cooperate with an investigation, which highlights the importance of upholding promises of confidentiality in these circumstances. In this particular case, the persons interviewed also subsequently refused to allow the disclosure of the notes of their interviews. (Affidavit of Evon Soong, Exhibit A, paragraphs 13-15)

Although the Ministry has established in this case that promises of confidentiality were provided to the daycare workers, there was no evidence before me of an existing written policy on confidentiality for such investigative interviews. As I have done in previous Orders covering other Ministries, I encourage the Ministry, or the appropriate agency, to develop such a policy.

I find that the personal information in the records in dispute were supplied in confidence and that it was appropriate for the Ministry to take this circumstance into account in deciding not to disclose these notes.

Section 22(3)(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

This section creates a presumption against disclosure of personal information to a third party, except in the circumstances specified. The applicant has attempted to misapply the plain language of the section by asserting that she needs this information to "open another investigation into the conduct of the daycare workers by an independent investigator to investigate the facts ...." My reading of this section is that disclosure in such cases can only be to a body normally charged with the conduct of such an investigation, not a private citizen who may wish to launch a further investigation herself.

The Ministry has appropriately applied this section to prevent disclosure of information about a "possible" violation of law. (Submission of the Ministry, p. 12)

In all of these circumstances, I find that the applicant has not met her burden of proof under section 22 of the Act with respect to an unreasonable invasion of the privacy of third parties.

Section 25: Information must be disclosed if in the public interest

The applicant has attempted to rely on this section to force full disclosure upon the Ministry of Health, since the case involves both the public's and the applicant's interest in the administration of Child Care Services licensing. Public confidence, she argues, requires public scrutiny.

The Ministry is of the view that this section has no relevance to this inquiry: "Section 25 is more properly applied to matters affecting the general public or a group of persons. It is for matters of a very broad-reaching effect. There is no imminent harm in this inquiry that justifies the use of section 25 of the Act." (Reply Submission of the Ministry, p. 3) The Ministry's decision on section 25 is determinative on that point in the circumstances of this inquiry.

The summary released to the applicant

The applicant was given a summary of the interview notes during the mediation process. The Ministry states that it is impossible to sever these records without revealing the identities of individuals. (Submission of the Ministry, p. 11; and Affidavit of Evon Soong, paragraphs 18-20) It is the Ministry's view that "[n]ot receiving the original interview sheets or the names of those interviewed does not hinder in any way the rights of the Applicant or of her child." (Reply Submission of the Ministry, p. 4)

The Community Care Facilities Licencing Office also provided the applicant with the recommendations resulting from the investigation that were relevant to her concerns. (Affidavit of Evon Soong, Exhibit A)

The Ministry states that it prepared the summary already released on short notice, and that it would be prepared to prepare a further summary if I required it to do so. (Submission of the Ministry, p. 12) I would like the Ministry to make the effort to improve the current summary. There should be, in particular, two added sections: one dealing with staff interviews with the applicant, and a second about the policies of the daycare on various issues and practices. The section of the summary on the applicant's child should mention staff perceptions of him more specifically.

Conflict of interest?

The applicant raised a conflict of interest issue, because one of the investigators in this case was allegedly not independent. The Ministry now states that this "independent investigator" did know the persons she was to interview and for that reason a second investigator joined the investigation. (Reply Submission of the Ministry, p. 2) The Ministry further claims that the applicant was aware of and consented to the specific investigator. (Reply of the Ministry, December 12, 1995)

I agree with the Ministry that this issue has no direct bearing on the application of the Act. If the applicant remains concerned about this matter, there are other avenues of redress open to her outside the scope of this Act.

7. Order

I find that the Ministry of Health was authorized to refuse access to the records requested under sections 15 and 22 of the Act. Under section 58(2)(b), I confirm the decision of the Ministry of Health to refuse access to the records requested by the applicant, subject to the condition specified below.

Under section 58(4), I require the Ministry of Health to expand the summary of information already disclosed to the applicant in accordance with the directions given in this Order and to provide me with a copy of the improved summary.

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David H. Flaherty
Commissioner

February 16, 1996