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**Office of the Information and Privacy Commissioner**
**Province of British Columbia**
**Order No. 20-1994**
**August 2, 1994**

# INQUIRY RE: A Request for Access to Records of The Ministry of Attorney General

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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 in Victoria, British Columbia on July 8, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act) concerning a request for records in the custody or under the control of the Ministry of Attorney General (the Ministry). The request was made by an accredited family therapist (the applicant), who is also described as a child counsellor.

In late 1992 the applicant reported a case of suspected child abuse involving a child of his client to the Ministry of Social Services. The abuse was alleged to have occurred at a day care center attended by the child.

Following an RCMP investigation, the Criminal Justice Branch of the Ministry of Attorney General commenced a review to determine whether charges should be laid against the alleged perpetrator, the owner of the day care center. During the course of that review, information was gathered from a number of sources on a variety of related topics, including a report which contained an assessment of the applicant's professional handling of the matter. The Ministry of Social Services also conducted an investigation.

The applicant requested copies of all documents held by the Ministry relating to himself and the issue at hand. He also requested the return of all copies of his resume and the return of an audio tape recording made by the child's mother of a therapy session between the child and the applicant in which the allegations were explored. The Ministry turned down the request.

The applicant requested a review of this decision by the Office of the Information and Privacy Commissioner (the Office). The ninety-day investigation period began on April 12, 1994, and the Office issued a notice of inquiry on June 21, 1994.

## 2. Documentation of the Inquiry Process

Under sections 56(3) and 56(4) of the Act, the Office invited written representations from the applicant and the Ministry of Attorney General. Both parties made representations. Intervenor status was requested by the parents of the child, and an affidavit was received from the parents.

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a statement of facts (the fact report), which was accepted by the Attorney General but not accepted by the applicant. The applicant submitted his own statement of facts.

In reaching my decision, I have carefully considered all of the written submissions and affidavits that I received.

## 3. The Records in Dispute

The applicant was initially refused access to the following records: a copy of an initial forensic report prepared by a forensic psychologist under retainer to the government (the psychologist); copies of two subsequent forensic reports prepared by the psychologist; copies of all future forensic reports that make reference to the applicant's work; copies of records having personal information about the applicant that the RCMP sent to the psychologist; copies of RCMP notes, Crown Counsel notes, and Attorney General notes that refer to the applicant; the opportunity to correct any personal misinformation on his file; and the return of all copies of the tapes of the child's therapy session.

## 4. Issues under Review

A major issue to be decided in this inquiry is whether the applicant's right of access to personal information outweighs the Ministry's refusal to grant access under section 15(1)(f) of the Act, pertaining to the exercise of prosecutorial discretion. The Ministry has also questioned the Commissioner's jurisdiction in this matter on the basis of section 3(1)(g).

In the spring of this year, the applicant was undergoing a review as a result of a complaint by the alleged perpetrator to the Ethics Committee of his accrediting body. The Ministry released the three forensic reports to the applicant in order for him to prepare his defense. He successfully defeated that action. However, his use of them is subject to restrictions.

The applicant now seeks the following:

1. The destruction of the three reports that were released to him, or correction, or the right to append a statement to those reports.

2. Access to the remaining records held by the public body in order to correct those records or to have the applicant's version of the facts appended to those records. The applicant believes that section 58(3)(f) of the Act may apply to some of the records held by the Ministry, and that an order should be given to destroy those records.

3. All copies of an audio tape-recording of a therapy session the applicant had with the child (subsequently turned over to the RCMP by the mother of the child) to be either destroyed or returned to him or the child's mother. This request is supported by the parents of the child.

4. All copies of his personal résumé to be returned to him.

5. Removal of the restrictions on the applicant's use of the forensic reports.

Under section 57(1) of the Act, at an inquiry into a decision not to give an applicant access to all or part of a record containing his own (personal) information, it is up to the head of the public body to prove that disclosure of the information was withheld correctly. Thus the burden of proof in this case rests with the Ministry of Attorney General.

## 5. The Ministry of Attorney General's Case

At several points in the mediation process with my Office, the Ministry has argued that the Act has no application since a charging decision has not been made. Section 3(1)(g) of the Act reads as follows:

> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
> ...
> (g) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

The Ministry advised that its Criminal Justice Branch has the responsibility to approve and conduct prosecutions. The Ministry is aware of its obligation, under section 15(4) of the Act, to inform the applicant about "the reasons not to prosecute" after a decision on the matter has been made.

The Ministry submits that section 3(1)(g) of the Act "can be interpreted as applying to the records which are the subject of these proceedings:"

> It is submitted that the purpose of this provision is to ensure that the criminal justice process, starting with the gathering of criminal investigation information and intelligence, through to the completion of a prosecution, including any appeals, can operate in an efficient manner which serves not only the public interest, but also the interests of an accused or prospective accused without any interruptions resulting from requests under the Act.

The Ministry submits that this interpretation is supported by the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual (1993) (the Manual), which was prepared by the Information and Privacy Branch of the Ministry of Government Services (C.4.6, page 21).

The Ministry rejects the applicant's request for future forensic reports, since the Act only covers records that are in existence (section 4(1)).

The Ministry also argues that the copies of the records which the RCMP sent to the psychologist are exempt from disclosure under section 15(1)(f) of the Act. This section reads as follows:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
> ....
> (f) reveal any information relating to or used in the exercise of prosecutorial discretion,
> ....

The Ministry believes "that all that is necessary to establish that the exception in paragraph 15(1)(f) applies is some evidence that a prosecutor used the requested record during the course of the charge approval process." Schedule 1 of the Act defines the 'exercise of prosecutorial discretion' by Crown Counsel as including the duty or power "to approve or not approve a prosecution."

The Ministry's view is that the copies of RCMP notes, Crown Counsel notes, and Attorney General notes that refer to the applicant are also exempted from disclosure under both sections 15(1)(f) and (g) of the Act. The latter section reads:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
> ...
> (g) deprive a person of the right to a fair trial or impartial adjudication,
> ....

The Ministry argues that disclosure of any of these contested records to the applicant might compromise the accused's trial should charges be approved, in addition to revealing information relating or used in the exercise of prosecutorial discretion.

With respect to this same group of records, it is the Ministry's stated view that "severance is not possible in this case, as reference to the applicant is so inextricably intertwined with excepted information that severance would be impractical."

The applicant is also seeking to correct personal information about himself under section 29 of the Act, which reads as follows in its relevant portions:

> 29(1) An applicant who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.
>
> (2) If no correction is made in response to a request under subsection (1), the head of the public body must annotate the information with the correction that was requested but not made.
> ....

The Ministry states it is willing to either correct or annotate the relevant records, if the applicant "could identify and clarify the records containing errors or omissions." It is prepared to correct factual inaccuracies but regards the treatment of opinions as more problematic.

With respect to the forensic reports, the Ministry is willing to mark prominently on the files that the applicant does not accept their contents as accurate, and attach copies of detailed reports by the applicant and his consultant, dated April 28, 1994.

The Ministry has received material from a number of people identifying inaccuracies in the reports after they were released to the applicant: "It is expected that a decision will be made on either correcting the record or annotating it after the records containing the misinformation have been identified and the submissions fully and properly reviewed."

## 6. The Applicant's Case

The applicant prepared a 57 page submission to me, several binders of supporting documentation that totaled 900 pages (including legal submissions, a chronology, copies of many letters, and various affidavits and reports) and a 48 page response to the Ministry's case. Essentially, he seeks access to the records described above. He also wants me to order the correction or destruction of the three above reports prepared in this case, including all copies thereof. One of his many problems is that the Ministry will not grant him access to the additional records that he wants corrected.

I will begin with the applicant's response to the Ministry's case. Its focus is to "point out and rectify key errors, misjudgments, and misleading statements in the Ministry's written submission (including the affidavits and letters)." I see no purpose in reciting these assertions and claims in detail; their focus is "numerous factual, clinical, and forensic errors and factual omissions...." Most of it concerns disputed facts, opinions, actions (and failures to act) by various parties in the events of the last two years.

The applicant suggests that there is no likelihood of conviction in this case, "specifically because of the exceedingly incompetent and biased way in which the investigation was conducted and because of the irrevocably damaging efforts of the error-laden forensic reports, which would create a reasonable doubt even if they were retracted in the future by the evaluator." In his view, the Ministry "has no intention of prosecuting and that any statements regarding reviewing that decision are for the sake of delaying and covering up the failings of the RCMP, the Ministry, the Crown Counsel, the forensic evaluator, ...."

With respect to the central issue of correcting records, the applicant states that "[i]t is simply not true that the only remedy available may be annotation. Unsubstantiated or factually impossible opinions could be deleted, or deleted and revised."

With respect to the problem of severing intertwined records, the applicant has provided sets of consents from both parents involved in this case: "These consents and the applicant's exclusion of any other third party information [such as about the alleged perpetrator and spouse] render the need to sever minimal or virtually nil."

The applicant argues that the Ministry has not met its burden of proof of harm under either sections 15(1)(f) or (g) of the Act. "The Ministry has presented no objective grounds to support the assertion that the disclosure would reasonably result in harm, nor has the Ministry presented any detailed or convincing evidence of the facts that led to the expectation that harm could occur if the information were disclosed." In his view, the real harm is coming from continued non-release of the additional information to the applicant, so that its accuracy and completeness can be ensured.

The applicant argues that he should have access to all of the records that he has requested so that he can correct the errors in them, whether it is an error of fact, opinion, or omission. He rejects the Ministry's view that he has to identify them first: "The applicant's right to request corrections is meaningless if the Ministry refuses to release the records which the applicant believes contain errors or omissions in his personal information."

## 7. The Intervenor's Case

The parents of the child involved in this case filed an affidavit with me as intervenors. They note that they have recently asked the Ministry for access to certain records (which is not a matter before me at this point). They also asked that certain

records be corrected in line with the request of the applicant. They have specialized knowledge of what happened in the therapy sessions with their child. They also mentioned a number of other matters, many quite tragic, that are well beyond the scope of my jurisdiction under the Freedom of Information and Protection of Privacy Act.

## 8. Discussion

The first observation that I wish to make is that this case involves an enormous range of emotions and conflicting views on very sensitive subjects, including allegations of ritualistic sexual abuse of children, pending decisions on criminal prosecutions, the exercise of prosecutorial discretion, the conduct of investigations into allegations of sexual abuse, claims of aggrieved parents, and claimed harm to the reputation of a professional counsellor.

To say that the applicant is unhappy with the Ministry is a dramatic understatement, as evidenced not least by the scope of his submissions. His "statement of facts" runs to nineteen single-spaced pages, plus eleven pages of appendices. His submissions are repetitive, extensively argued, and intermixed with so many issues that it requires an effort to remember that the focus of this inquiry is his request for access to information about himself and for the correction of personal information.

My role is to apply the *Freedom of Information and Protection of Privacy Act* to this specific request. This is not a general court of law, nor a tribunal which dispenses equitable justice on any and all issues. The applicant in particular may have to seek additional recourse in more appropriate venues. Even if his facts are correct, for example, I cannot remedy the fact that the alleged perpetrator (and spouse) were permitted to read the first forensic report, which led to threats against the applicant. I do not have the authority to evaluate the applicant's allegations that the Ministry, Crown Counsel, and the RCMP have acted incompetently in this entire matter.

Although I now understand the passions that underlie a statement such as that "the RCMP and the Ministry of Attorney General do not have license to mishandle investigations and to violate the privacy rights of alleged victims and therapists, only to be unaccountable for their errors and omissions," these are not problems that I can fix in handling a request for review of a denial of access to personal information under the *Freedom of Information and Protection of Privacy Act*.

### *Section 3(1)(g)*

I must consider the application of section 3(1)(g) of the Act to the present case. The language refers to a "prosecution" with respect to which proceedings have not been completed. The current request deals with a specific series of alleged events and might thus be included within the scope section 3(1)(g), even if a decision has not yet been made on whether to prosecute.

But I need to interpret section 3(1)(g) of the Act in the context in which it appears, that is, a general exemption for records that pertain to the administration of justice through the courts. Given the careful shaping of section 15 of the Act to cover law enforcement matters, it would be difficult to conclude that the legislature intended to cover anything to do with a potential prosecution under section 3(1)(g). It is my view that this section only applies to records directly associated with a prosecution that is officially underway, which normally means that a charge has been laid. At that point the legislature intended to insulate Crown Counsel from requests for access under this Act until a prosecution is completed.

With respect to the Ministry's argument against my jurisdiction based on section 3(1)(g) of the Act, the applicant also pointed to section 15, which would not be necessary if the Ministry's broad interpretation of "prosecution" were adopted: "If the legislative purpose of section 3(1)(g) were to exempt from the Act cases in which no charges are ever laid or in which there is an existing bar to charges being laid in the future, then there would have been a more explicit description of that exemption, rather than the use of the term 'prosecution.'" I accept this in principle.

***Section 15(1)(f)***

In my view, the key section of the Act for the present case is section 15(1)(f), which permits the head of a public body not to disclose information to an applicant that could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion. I accept the Ministry's general use of this exception. My concern about its possible misuse is somewhat reduced by the requirements of section 15(4):

> 15(4) The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute
>
> (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or
>
> (b) to any other member of the public, if the fact of the investigation was made public.

The applicant would receive the reasons for declining to prosecute under this section. The plain language of sections 15(1)(f) and 15(4) do not permit me to order release of records not already received by the applicant because prosecutorial discretion is clearly in play; the discretion to release lies with the Ministry.

My role is to determine whether there are any grounds for me to require the Ministry to reconsider its decision to deny access to all or part of the records. Any

grounds must be substantial, because Crown Counsel has the expertise with respect to the exercise of prosecutorial discretion. Whether or not they are able to disclose personal information to an applicant will depend largely on the possible effect disclosure may have on a future prosecution.

In general, I accept the Ministry's argument that the records sent to the psychologist may be excepted from disclosure under section 15(1)(f) of the Act. They relate to or are being used in the exercise of prosecutorial discretion. While there is no specific harms test required in this subsection, the exception is not mandatory, but discretionary. Therefore the Ministry may disclose records in circumstances it determines would be appropriate.

The Ministry has argued that it is not appropriate to make corrections to opinions. It is prepared to annotate in the sense of appending to the applicant's file, copies of reports prepared by the applicant and his consultant, which take issue with the supporting facts and conclusions in the forensic reports. However, the applicant has never been given access to all of the records reviewed by the psychologist, and he submits that his comments about accuracy have limitations.

This case is unusual, at least because the contents of the forensic reports were in fact released to others, including the applicant and the alleged perpetrator. The applicant states that he is not seeking access to information about himself in order to publicize it or to interfere with a possible future prosecution. He is concerned about his professional reputation. He has provided information to the police and other authorities in order to assist an investigation into a very serious matter.

In the unusual circumstances of this case, my view is that the Ministry should reconsider its decision to deny access to those records prepared by the parents of the alleged victims that were relied upon by the psychologist. The applicant has obtained consents from the parents. Due to the problems of applying severance in this case (see my comments below), I have declined to require a reconsideration of the Ministry's decision on the remaining records in dispute. After reviewing the records, I have concluded that the applicant has received sufficient information in order to provide him with an opportunity to make a full annotation or submission on correction of facts.

Prosecuting officials have certainly been put on notice by the applicant's submissions that errors, omissions, and wrong opinions may be problems in this case. Similarly, the applicant's argument that the prosecution will remain impossible unless corrections are made falls by the wayside, since the Ministry has now received 900 pages of "correct" information, which it may be unwise to ignore in further decision making.

The applicant's desire to see information about himself that he has not already received becomes more problematic if the Criminal Justice Branch does not make a decision on whether to prosecute. He may never be able to see the records he wishes to

see in any case. Since there is no statute of limitations with respect to the type of offense alleged in this case, a prosecution could occur in ten or twenty years' time.

***Severance of Personal Information***

The Ministry has argued that it cannot sever the personal information concerning the applicant from the disputed information in this case because the elements are so intertwined that it would be impractical. I acknowledge the burdens associated with severance of any records, but it is an obligation imposed on heads of public bodies by section 4(2) of the Act. Moreover, the applicant has stated that he does not seek access to information about third parties, such as the alleged perpetrator (and spouse). Other third parties, such as the parents involved in the case, have provided their consent for the applicant to receive information about them in the contested records. These two preconditions may further reduce the burden of severance.

The records held by the Ministry essentially consist of a report with attached appendices providing an assessment of the investigation into sexual abuse allegations, as well as various memoranda (some in draft form), reports, and correspondence about various investigations. All of this material forms part of that which is being considered by Crown Counsel in the context of the charge approval process.

I have reviewed these records. They contain very little personal information about the applicant. The Ministry has already disclosed (conditionally) to the applicant copies of three reports which refer to the applicant's professional work. Other records not disclosed make reference to the applicant only in his role in connection with the investigation. No other personal information is contained in the records. The information is primarily about the alleged perpetrator, the victims and their families, and assessments at various times of ongoing investigations.

The records which were reviewed by the psychologist consist of an overview of the investigation prepared by an RCMP officer, the applicant's resume, copies of personal notes by the parents of the alleged victims, copies of notes made by the alleged perpetrator and a statement, letters from local residents and letters written in support of the alleged perpetrator, a previous report about one of the alleged victims, the audio tape of the applicant's session with the child of his client, video tapes of police interviews and additional documentation provided by the parents of the alleged victims, as well as a report prepared by another consultant and further material provided by the applicant.

With the exception of the documents prepared by the parents, it would be extremely difficult to sever the applicant's personal information in these records. I agree with the Ministry's submission on this issue. However, with the parent's consents, the Ministry should be able to release copies of their documents to the applicant.

I wish to address the general issue of whether public bodies must apply section 4(2) of the Act to information contained in records subject to section 15 exceptions. In

my view, the duty under section 4(2) applies to all records covered by the Act. Public bodies must normally undertake a line-by-line analysis of an entire record to see if severance is possible.

I can appreciate the frustration of the applicant who is not aware of what is contained in those records. However, the rights of an applicant to correct or append information are dealt with in section 29 of the Act. I can find nothing in section 29 that presupposes an applicant has had access to the information. Section 29 reads:

> 29(1) An applicant who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.
>
> (2) If no correction is made in response to a request under subsection (1), the head of the public body must annotate the information with the correction that was requested but not made.

The applicant certainly believes there are errors in the information in question that pertains to him. Upon review, the information appears to consist primarily of opinion. While one can correct factual information on which an opinion is based, one cannot "correct" an opinion. Therefore, section 29(2) would come into play. As discussed above, section 15(1)(f) does not provide a shield from the obligations to sever or from the obligations to append contained in section 29(2).

The applicant has also requested that I order the "offending" records be destroyed in accordance with section 58(3)(f) "because they were collected in contravention of the Act....." However, I concur with the Ministry's position that section 27(1)(c) which provides for the collection of information for law enforcement matters is adequate authority in this particular case.

The Ministry also responded to the request for destruction with the following statement:

> A remedy which orders the destruction of documents should be reserved for those very rare cases in which the error is blatant, the harm to the affected party is truly significant and the errors are clearly factual, not opinion or mixed opinion and fact. It is submitted that with respect to the record at issue in this case, they are at the very least mixed opinion and fact.

Although I do not consider this opinion to be the final word on this matter, it does raise some valid considerations to be taken into account prior to ordering the destruction of records.

***Other Issues***

I accept the Ministry's argument that the applicant cannot use the Act to demand access to future records. If a record has not yet been created, then it is excluded from the purview of the Act under section 4(1). It is not a record "in the custody or under the control of a public body...." The applicant agreed with this point in his response to the Ministry's arguments.

I accept that the Ministry acted correctly in exercising its discretion to release the three reports to the applicant and to place restrictions on his use of them.

The applicant submitted that this inquiry should be conducted in private, due to the sensitive nature of the allegations underlying this dispute. I agree with those submissions, and have written these reasons with those privacy interests in mind. I have included only those facts which I consider essential for a fair understanding of the issues involved in interpreting the relevant sections of the Act.

## 9. Order

Under section 58(2)(b)of the Act, I require the Ministry to reconsider its decision to deny access to those records which were produced and provided by the parents of the alleged victims, assuming that they have consented to disclosure to the applicant.

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry of Attorney General not to release the remaining records in dispute to the applicant.

Under section 58(3)(d) of the Act, I order the Ministry of Attorney General to attach the applicant's versions of or annotations to the reports and records released to him to the originals maintained by the Ministry.

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David H. Flaherty
Commissioner August 2, 1994