

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 10-1994
May 27, 1994**

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

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1. Description and Nature 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 to review the decision of the Ministry of Social Services (the Ministry) to deny the applicant access to his children's personal information. The issue to be decided at this stage of the inquiry is the application of a previous order (Order No. 2, February 7, 1994) to this applicant's request for review. The applicant, through his counsel, and the Ministry agreed with this process.

On January 31, 1994 the applicant's lawyer requested access to all files and records in the possession of the Ministry concerning the applicant's children. The Ministry denied access under section 4 of the Act and Regulation 3(a) issued under the Act. This decision was based on the applicant's lawyer's statement that "the mother has an interim custody order but the court has not yet made any order for final custody." On February 22, 1994 the applicant's lawyer requested that the Commissioner review the Ministry's decision under subsection 52(1) of the Act.

If a request for review is not settled, under subsection 56(1) of the Act, I must conduct an inquiry.

2. Documentation of the Review Process

The Office of the Information and Privacy Commissioner provided the applicant's lawyer and the Ministry with notice of a written hearing which described the nature of the review and a summary of the positions of each of the parties. The parties were notified that if I decided the matter was settled by Order No. 2, no further submissions would be required, and the inquiry would be complete.

Under subsections 56(3) and (4) of the Act, each party was given the opportunity to make written representations and to view each other's initial submissions. Both parties then made final submissions. In reaching my decision, I have considered carefully these submissions.

3. Issue under Review at the Inquiry

Under subsection 57(1) of the Act, in an inquiry about a decision to refuse an applicant access to a record, it is up to the head of the public body to prove that the applicant has no right of access to the record. Thus, the Ministry has the burden of proving that the circumstances in this case fall within the terms of Order No. 2.

The Ministry submits that this case cannot be distinguished from Order No. 2 for the following reasons:

- both cases involve a request by a non-custodial parent to access his incapable child(ren)'s personal records;
- the custodial parent in both cases had interim custody, and the issue of permanent custody was before the courts;
- the Act does not give parents the right of access to their child(ren)'s personal records, but it does allow certain parents to act as the child(ren)'s "agent" by allowing the parent with custody to exercise his or her incapable child(ren)'s information rights; and
- the present request mirrors the request for access that was before me in Order No. 2.

The Ministry also provided me with a comprehensive submission which essentially repeated the arguments it presented in respect of Order No. 2.

The applicant has made several arguments in response. He submits that the distinguishing factor between this case and Order No. 2 is the relationship between the parties. He states that in Order No. 2 "the man was not married to the woman and there is no mention of a pre-existing parental relationship between the applicant and the child(ren). In [the applicant's] case [the applicant] is the acknowledged father of the children who has a multi-year relationship in loco parentis with the children."

The Ministry submits that the parental relationships are not relevant. I agree. The relevant factor is the current legal status of the parents in relation to the child(ren).

The applicant further submits that he, "as the father of these children whose permanent custody is legally yet undecided...has a legally bona fide interest" in his children's records. On the other side, the Ministry submits that the Act:

...does not give a parent a right of access, because they are the parent, to their children's personal information. The consent of the child is required and, if the child is incapable of giving such consent, the consent of the incapable child's 'Agent' is required. The FOI Regulations and Government policy has directed that the custodial parent should be this agent.

I agree with the Ministry's submission. As I said in Order No. 2, at page 6:

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 accordance with Regulation 3(a) and Order No. 2, where parents are separated or divorced, the parent with legal custody may exercise a child's information rights under the Act. I do not agree with the applicant's contention that there is no "non-custodial parent" in this case. While an interim custody order often respects the status quo, it is still an order of the court which remains in effect until a permanent order is made. Order No. 2 respects the court's decision on both interim and permanent custody. The court has decided legal control whether temporarily or permanently. In respecting the court's decision, I recognize that the party with legal control is the most appropriate person to exercise the child(ren)'s rights under the Act. If an interim custody order is later changed, the person then granted legal control will be able to exercise his or her child(ren)'s rights under the Act.

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

The applicant submitted that the mother of the children should have been given notice of this inquiry. As the first issue to be determined is the applicability of Order No. 2, I decided that it was neither necessary nor appropriate to notify the mother at this time.

Also, the applicant argued that if the mother did not respond to a notice of hearing, she should be presumed to have consented to the disclosure of the information to the applicant. To the contrary, consent cannot be presumed. It must be given in writing, in accordance with subsection 33(b) of the Act, which provides that personal information may be disclosed if the individual the information is about has identified the information and consented, in the prescribed manner, to its disclosure. Regulation 6 requires that a consent be in writing and specify to whom the personal information may be disclosed and how it may be used.

The applicant stated that the information he requested was needed for custody proceedings. The reason why an applicant requests information under the Act is not relevant in a review. Therefore, it is not relevant that the applicant's request for review was made in conjunction with a Supreme Court action for custody.

The applicant is correct in saying that the "custody determination will be made by the court based on all the evidence." The court will determine what evidence is relevant and admissible in making its decision as to custody.

The applicant stated, "...the Supreme Court issued an interim custody order, pending discoveries and trial. Discoveries are being delayed pending Freedom of Information and Protection of Privacy Act...disclosure." On this point, I repeat what I said in Order No. 2, at page 4:

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.

The same solution applies in this case.

Having considered all of the submissions, I have concluded that the Ministry has met its burden of proving that the circumstances in this case fall within the terms of Order No. 2.

4. Order

Under subsection 58(2)(b) of the Act, I confirm the decision of the Ministry of Social Services not to release personal information about the minor children of the applicant to him.

David H. Flaherty
Commissioner

May 27, 1994