

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 232-1998
April 28, 1998**

INQUIRY RE: A request to the Ministry for Children and Families for access to adoption records

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.oipcbc.org>**

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on December 16, 1997 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 the response to a request for records under the custody or control of the Ministry for Children and Families (the Ministry).

2. Documentation of the inquiry process

The applicant wrote to the Ministry on February 6, 1997 to request records from the Ministry. The four items of her request relate to records previously disclosed to her by the (former) Ministry of Social Services. The records are from the Ministry's Records Management Unit and the Ministry's Adoption Section (formerly known as the Adoption Services Division). The applicant later wrote, on May 10, 1997 following a telephone conversation with Ministry staff, to amend one of the items in her original request.

The Ministry wrote to the applicant on August 1, 1997 to inform her that access was granted with some information withheld under sections 22(1) and (3) of the Act. The Ministry also provided copies of electronic correspondence to the Adoption Reunion Registry (ARR) and from the Ministry's Records Management Unit (RMU) in response to questions raised by the applicant and informed her that the ARR's response would be provided. On August 22, 1997 the Ministry wrote to the applicant to provide a copy of the ARR's August 19, 1997 reply to the Ministry's questions. The ARR explained that the various records were rearranged when folded into one record after the applicant's 1995 request and before her 1997 request. (Affidavit of Carol Alexander, paragraph 15).

The applicant wrote to the Office on August 21, 1997 to request a review of the Ministry's "failure ... to provide copies of all records contained in my file." The applicant noted four discrepancies between the records provided in the 1997 response and those provided in response to her previous 1995 request. She also indicated that it was difficult for her to determine exactly where information was removed from the records, and requested a full review of all documents in all files.

The Ministry was subsequently able to decipher some information crossed out in the original handwritten notes and provided that information to the applicant. The Ministry also subsequently disclosed to the applicant some of the information previously withheld under section 22 of the Act.

3. Issues under review and the burden of proof

The issues in this inquiry are whether the Ministry's search for the requested records was adequate, whether the Ministry complied with its duty to assist under section 6 of the Act, whether the Ministry was required to withhold information under section 22 of the Act, and whether the Ministry was required to consult a third party under section 23(2) of the Act. The sections of the Act relevant to these issues are as follows:

Duty to assist applicants

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
- (2) Moreover, the head of a public body must create a record for an applicant if
 - (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
 - (b) creating the record would not unreasonably interfere with the operations of the public body.

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

- ...
- (c) the personal information is relevant to a fair determination of the applicant's rights,

Notifying the third party

- 23(2) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 21 or 22, the head may give the third party a written notice under subsection (3).

Section 57 of the Act, which establishes the burden of proof on the parties to an inquiry, is silent with respect to a request for review about the duty to assist under section 6 of the Act. As I decided in Order No. 110-1996, June 5, 1996, the burden of proof is on the public body.

Section 57 is also silent with respect to a request for review about the issue of adequate search. As I decided in Order No. 103-1996, May 23, 1996, the burden of proof is on the public body.

Under section 57(2), if the record or part that the applicant is refused access to under section 22 contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

4. Procedural objections

The applicant asked for permission to include four letters, some with attachments, in her submissions. Counsel for the Ministry did not object to two letters written before the mediation process began, but objected to the inclusion of two other letters as communications to and from the mediator (Portfolio Officer) made for the purpose of trying to settle the matters in dispute. The Registrar of Inquiries removed those letters from the applicant's submissions, and I have not reviewed them.

The applicant expressed a concern about three paragraphs of the Portfolio Officer's Fact Report but stated that she did not object to their inclusion in the materials provided to me. Counsel for the Ministry submitted that paragraph 7 was problematic; I agree and have disregarded it.

5. The records in dispute

The records in dispute consist of pages from which a small amount of information about persons other than the applicant has been withheld.

6. The applicant's case

The applicant submits that the Ministry and my Office did not comply with its duty to assist her under section 6 of the Act. She cites in particular some considerable confusion with respect to the destruction by the Ministry of a March 1992 letter, and two pages of handwritten notes that were disclosed by the Ministry. She is also concerned about the Ministry's five-month delay in responding to her 1997 request for access to her adoption records.

I have treated below the applicant's submissions on the application of section 22 of the Act to the records in dispute. As noted further below, the applicant seeks complete access to all information about her adoptive parents, birth parents, and her sister.

The applicant received a copy of the Ministry's thorough submission and reply submission to me. I note that the applicant did not make a reply submission of her own, which would have furnished her with an opportunity to dispute the detailed facts and arguments presented by the Ministry.

7. The Ministry for Children and Families' case

I have treated below the Ministry's submissions on the application of specific sections of the Act.

8. Discussion

Section 6: duty to assist applicants

The applicant devotes more than usual attention to alleged failures to assist her on the part of a Portfolio Officer in my Office. While my Office makes every effort to assist applicants during the mediation phase of a request for review, the burden of section 6 falls not upon my Office but upon the Ministry that processed the request. (See the Reply Submission of the Ministry, paragraph 4)

The Ministry has furnished affidavit evidence and a detailed description of its efforts to search for the requested records and to assist this applicant. (See the Submission of the Ministry, paragraphs 1.03 to 1.22, 5.05 to 5.07; and the Affidavit of Carol Alexander, Information and Privacy Branch of the Ministry)

With respect to the applicant's complaints against the Ministry on this issue, as outlined above, I find that the Ministry has fully complied with its duty to assist this applicant under the Act including its duty to conduct an adequate search for the requested records. In fact, I am impressed by the diligence of the Information and Privacy Branch

of this Ministry in the face of one of the highest volume of requests for access to personal information of any public body in the province as well as a chronic shortage of staff.

The applicant also believes that the Ministry has not informed her whether she can personally examine the microfilmed records of her adoption. This issue is not properly before me in this inquiry, although I note that the Ministry has now confirmed that all of the material that appears in the microfilm record has been disclosed to the applicant. To let the applicant review the microfilm would be to run the risk of disclosing to her personal information that the Ministry must withhold on the basis of section 22 of the Act. This particular microfilm also contains personal information about other adopted persons. (Reply Submission of the Ministry, paragraph 5) Although this matter is not before me in this inquiry, I find the Ministry's position quite plausible.

I conclude that the Ministry has made every reasonable effort to assist the applicant and to respond openly, accurately and completely in accordance with section 6(1) of the Act.

Section 22: Disclosure harmful to personal privacy of third parties

The applicant contests the fact that the Ministry is refusing to disclose information about her adopting parents, one of whom is deceased. She believes that the Ministry has failed in its duty to give a section 23 notice to her adoptive mother. She also submits that disclosing personal information to her about her adopted sister would also not be an unreasonable invasion of the latter's personal privacy, because she died in 1983. The Ministry informed the applicant that none of the information withheld was about her adopted sister or her adoptive father. (Reply Submission of the Ministry, paragraph 9) The Ministry further takes note of the applicant's statement that she is not in communication with her adoptive mother, which it correctly views as a relevant circumstance under section 22(2) of the Act.

The Ministry submits that the only personal information that has been severed from the records in dispute "would disclose the name of the person who was married and divorced from the adopting mother prior to the adoption of the Applicant, and the date of this previous marriage and details surrounding the divorce." (Submission of the Ministry paragraph 4.01) The Ministry submits "that this information is of a sensitive nature and will not assist the applicant in her stated goal of obtaining further information on her birth parents." (Submission of the Ministry, paragraph 5.09)

Based on my own review of the records in dispute, I can confirm that they do not contain any information about the applicant's adopted sister other than what has already been disclosed. I also find that the disclosure of the personal information about the adoptive mother's first marriage would constitute an unreasonable invasion of the personal privacy of third parties, which is contrary to section 22 of the Act. The applicant has no right under the Act to access this category of personal information of such third parties.

In situations such as this, where a public body has determined that personal information would be excepted under section 22 and has made a decision not to disclose the information, it has the discretion under section 23(2) to decide whether or not to notify the third party. The Ministry was not required to issue a section 23 notification in this case.

9. Order

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an order under this section. I find that the search conducted by the Ministry for Children and Families in this case was a reasonable effort within the meaning of section 6(1).

Under section 58(3)(a), I require the Ministry for Children and Families to perform its duty under section 6(1) to make every reasonable effort to assist the applicant. However, since I have found that the search conducted was reasonable under section 6(1), and that the Ministry has made every reasonable effort to assist the applicant, I find that the Ministry for Children and Families has complied with this Order and discharged its duty under section 6(1) of the Act.

I also find that the Ministry for Children and Families was required to withhold personal information about third parties under section 22 of the Act. Under section 58(2)(c) of the Act, I require the Ministry for Children and Families to refuse access to personal information withheld under section 22.

David H. Flaherty
Commissioner

April 28, 1998