ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 300-1999
March 10, 1999

INQUIRY RE: A non-custodial parent's request for access to records of his children held by the Ministry for Children and Families

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 23, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by the applicant of the decision by the Ministry for Children and Families (the Ministry) to deny the applicant access to records of his children concerning mental health counselling services provided by the Ministry to his children.

2. Documentation of the inquiry process

On July 2, 1998 the applicant submitted a request to the Ministry for access to "copies of notes, reports, concerns, allegations, and counselling submissions regarding the health and welfare concerning my three children, in therapy…" On July 6, 1998 the Ministry issued an acknowledgment letter to the applicant stating that it required a copy of the most recent child custody order to confirm that the applicant was the custodial parent of the three children, who are under the age of twelve.

On July 8, 1998 the applicant provided copies of two Custody Court Orders issued by the Supreme Court of British Columbia and indicated in his correspondence that he was entitled to have access to the requested documents in accordance with the *Divorce Act*, sections 16(2) and (5). On July 8, 1998 the Ministry informed the applicant, in writing, that it was unable to provide access to the requested documents on the basis of sections 75(a) and 76(2) of the *Child, Family and Community Service Act,* since he was not, in their determination, the custodial parent.

On July 12, 1998 the applicant wrote to the Office of the Information and Privacy Commissioner and requested a review of the Ministry's decision to deny access to the requested records. In a facsimile dated October 3, 1998 the applicant indicated that he would like to proceed to an inquiry before the Information and Privacy Commissioner. On October 5, 1998 all parties were given written notification that the Commissioner would consider the Ministry's decision to deny access to the requested records on the basis of sections 75(a) and 76(2) of the *Child, Family and Community Service Act* at a written inquiry on October 27, 1998. On October 9, 1998 the applicant requested a two-week extension of the October 27, 1998 inquiry date. The Ministry agreed to this extension, and a new inquiry date was set for November 10, 1998.

On October 29, 1998 the Ministry informed the Office of the Information and Privacy Commissioner that the requested records were not governed by the *Child, Family and Community Service Act*, as originally thought, and requested an adjournment of the inquiry until December 23, 1998, in order to conduct a review of the records and issue a new decision under the *Freedom of Information and Protection of Privacy Act.* The applicant consented to a one-week adjournment, but objected to an adjournment to December 23, 1998. On November 2, 1998 the Director of the Office of the Information and Privacy Commissioner's Office informed all parties in writing that fairness required the adjournment of the inquiry to December 23, 1998.

On November 29, 1998 the applicant indicated that he had not received a new response from the Ministry and that he still wished to proceed to an inquiry. On November 30, 1998 the Ministry issued a new decision letter to the applicant denying him access to the requested records under sections 19 and 22 of the *Freedom of Information and Protection of Privacy Act* (the Act). On December 1, 1998 an amended Notice of Inquiry and an amended Fact Report were issued to the parties with the new inquiry set for December 23, 1998. At this point, at my discretion, a third party was included in the inquiry.

3. Issue under review and the burden of proof

The issue under review at this inquiry is the Ministry's decision to apply sections 19(1)(a) and 22 of the Act to the records in dispute. These sections read as follows:

Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

....

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

…

(e) the third party will be exposed unfairly to financial or other harm,

(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

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

….

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the records has been refused under section 19(1), it is up to the public body to prove that the applicant has no right of access to the record or part of the record. Under section 57(2), if the record or part that the applicant is refused access to 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

In a letter dated November 29, 1998 the applicant objected to the length of the time that this inquiry was adjourned. The adjournment was necessitated by the fact that the Ministry had originally considered the applicant's request only in relation to the *Child, Family and Community Service Act* (CFCSA). Once the inquiry was underway, the Ministry discovered that, in fact, the records had not been created under the CFCSA and, therefore, must be reviewed under the *Freedom of Information and Protection of Privacy Act*. In order to permit staff of the Ministry sufficient time to review the records in dispute, to issue a new decision to the applicant, and to allow time for the applicant to consider this new decision, an adjournment was proposed. The applicant agreed to an adjournment of one week. To afford the Ministry sufficient time, the new inquiry was

adjourned to December 23, 1998. After reviewing all the facts in this matter, I agree with the decision to grant the forty-six-day adjournment period.

On January 19, 1999 the applicant submitted a written objection to the fact that his reply response was exchanged with the third party. The Notice of Inquiry that is sent to all parties to an inquiry clearly indicates that submissions will be exchanged between all of the parties, unless a party specifically states that a submission is being provided *in camera*. In this case, the applicant's initial submission was clearly marked "*in camera*." However, there is no such indication on the reply submission. Staff from my Office contacted the applicant to confirm that the reply was not submitted *in camera*, a point that he confirmed. Given these facts, I find that the reply submission was appropriately provided to the Ministry and the third party.

On February 3 and February 16, 1999 the applicant submitted various procedural objections, mainly related to the fact that the reply submission had been provided to the third party. Under section 54(b) of the Act, a copy of the request for review may be given to any other persons that I, as Commissioner, consider appropriate. Section 56(3) then states that any person who is given a copy of the request for review must be given an opportunity to make representations to me during an inquiry. In this case, the third party was notified of the inquiry, since the issue under consideration is the Ministry's denial of the applicant's request for access to third parties' personal information. Based on the nature of the request, the third party's interest in the information in dispute, and the clear instructions in the Notice of Inquiry concerning the involvement of the third party, I find that the applicant's arguments regarding this issue are not persuasive.

5. The records in dispute

The records in dispute "comprise referral information, psychological assessment material, therapy assessment reports and treatment plans, therapy progress notes, and notes prepared for a meeting with the Family Advocate appointed under the *Family Relations Act*." (Submission of the Ministry, paragraph 4.01) The Ministry's description accurately reflect the contents of the records that I reviewed.

6. The applicant's case

The applicant made his initial submission on an *in camera* basis, which is, to say the least, surprising. He also makes various allegations against the Ministry, which, as the Ministry has pointed out, are not relevant to the decision on access to records that I have to make under the Act.

The applicant's reply submission was not on an *in camera* basis. It raises arguments under the *Charter of Rights and Freedoms* and the *Divorce Act*, which are not matters over which I have any jurisdiction.

The applicant is aware that I decided in a previous Order that "parent" with respect to the application of section 3 of the *Freedom of Information and Protection of Privacy Regulation* means custodial parent, but he wishes to challenge the validity of my finding with respect to his specific case. His arguments are based on what he asserts is in the best interests of his own children, again, an issue that I am not in a position to decide under the Act.

7. The Ministry for Children and Families' case

The Ministry has denied the applicant access to the records of his children on the basis of sections 19 and 22 of the Act. I have discussed its specific submissions below.

8. Discussion

Regulation, Section 3: Who can act for young people and others

At the time of writing this decision, the three children involved in this dispute are under the age of ten. The child whose mental health records are specifically at issue is under the age of eight. There is an ongoing custody and access dispute, which is currently before the Supreme Court of British Columbia. The Court has granted interim custody of the children to the mother and ordered supervised access to the applicant.

The applicant seeks access to the records of his children. Section 3(a) of the *Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 323/93*, addresses the right of access to records on behalf of children:

> 3. The right to access a record under section 4 of the Act and the right to request correction of personal information under section 29 of the Act may be exercised as follows:
>
> (a) on behalf of an individual under 19 years of age, the individual's parent or guardian if the individual is incapable of exercising those rights;
>
> ….

I have decided in previous Orders dealing with the interpretation of section 3 of the Regulation that the interim custodial parent controls access under the Act to the personal information of his or her children. (See Order No. 2-1994, February 7, 1994; and Order No. 10-1994, May 27, 1994; and the Submission of the Ministry, paragraphs 5.01 to 5.06) I agree with the following statement by the Ministry:

> The Public Body submits that the FIPPA [the Act] respects the privacy rights of minors, and the disclosure of an incapable child's personal information to his or her non-custodial parent, against the wishes of the custodial parent, will almost always constitute an unreasonable invasion of

the child's personal privacy under the FIPPA. (Submission of the Ministry, paragraph 5.05)

I also agree with the Ministry's submission, which is consistent with my reasoning in earlier Orders, that the Supreme Court of British Columbia is the appropriate forum for determining who obtains access to personal records in custody disputes on the basis of the best interests of the child test. (Submission of the Ministry, paragraph 5.06) I also agree with the Ministry that most of the issues raised by the applicant concerning the conduct of various parties in the context of the custody and access dispute are beyond my jurisdiction and fall within the domain of the civil courts.

Therefore, as the applicant is not a custodial parent, he may not exercise the access rights of a parent or guardian under section 3 of the Regulation. His standing is that of a third party requesting access to the personal information of an identifiable individual, his child.

Section 19: Disclosure harmful to individual or public safety

The Ministry submits that disclosure of the information in dispute could reasonably be expected to create a risk of harm within the meaning of section 19(1)(a) of the Act. The Ministry emphasizes that the threshold which it must meet under this section is the possibility of a reasonable risk of harm to a third party, not a reasonable expectation of harm: "A reasonable expectation that disclosure could create the possibility of risk of harm is much different than a reasonable expectation that disclosure could harm." (Submission of the Ministry, paragraph 5.09) (See Order No. 28-1994, November 8, 1994, p. 8; Order No. 60-1995, October 31, 1995, pp. 4, 5; and Order No. 80-1995, January 23, 1996, p. 6)

In support of this submission, the Ministry has submitted information on an *in camera* basis that it is required or authorized to refuse to disclose under the Act. (Submission of the Ministry, paragraph 5.10, and accompanying note) I have read this material and the accompanying affidavits carefully.

On the basis of this material, I find that the Ministry has met its burden of proof for section 19(1)(a) and is authorized to withhold all of the personal information in dispute from the applicant.

Section 22: Disclosure harmful to personal privacy

Although it is not necessary to consider section 22 in light of my finding under section 19(1)(a), I propose to do so, given the importance of this issue to all of the parties concerned.

The Ministry submits that it was required to refuse to disclose the information on the basis of sections 22(2)(e), 22(2)(f), and 22(3)(a) of the Act. Although all of these

sections are relevant, I rely primarily on section 22(3)(a). Section 22(3)(a) provides that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy, if the personal information relates to a medical, psychiatric, or psychological history, diagnosis, condition, treatment or evaluation. Based on my review of the records in dispute, I agree with the Ministry that "all the records requested by the Applicant clearly contain the type of information which is described in section 22(3)(a)." (Submission of the Ministry, paragraph 5.14) This personal information relates to a child of the applicant. I find that the applicant has failed to rebut the presumption against disclosure set out in section 22(3)(a) of the Act.

9. Order

I find that the Ministry for Children and Families is authorized to refuse access to the records in dispute under section 19(1)(a) of the Act. Under section 58(2)(b), I confirm the decision of the head of the Ministry for Children and Families to refuse access to these records.

I find that the Ministry for Children and Families is required to refuse access to the records in dispute under section 22 of the Act. Under section 58(2)(c), I require the head of the Ministry for Children and Families to refuse access to these records.

_____

David H. Flaherty
Commissioner

March 10, 1999