OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 00-43

INQUIRY REGARDING *CHILD, FAMILY AND COMMUNITY SERVICE ACT* RECORDS

David Loukidelis, Information and Privacy Commissioner
September 25, 2000

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Summary: Director found to have duty under *Child, Family and Community Service Act* to exercise such diligence in responding to an access request that it is not reasonable to believe records were omitted in a response to a request. The commissioner has jurisdiction to decide if duty met. Director found to have exercised such diligence that it is reasonable to conclude records were not omitted.

Key Words: *Child, Family and Community Service Act* – omission – diligence.

Statutes Considered: *Child, Family and Community Service Act*, s. 89(1); *Freedom of Information and Protection of Privacy Act*, s. 6(1)

Authorities Considered: Ontario: Order PO-1721.

1.0 INTRODUCTION

This order completes an inquiry that began with my decision, dated May 15, 2000, that I have the jurisdiction under the *Freedom of Information and Protection of Privacy Act* ("Act") and the *Child, Family and Community Service Act* ("CFCSA") to conduct an inquiry into the question of whether the Director ("Director") under the CFCSA has exercised such diligence that it is not reasonable to believe records were omitted in the Director's response to an information request. The issue arose because alone among all other ministries – and the over 2,000 other public bodies in British Columbia that are subject to the Act – the Ministry has its own access and privacy provisions under the CFCSA, which was enacted in 1995.

In an access request of January 7, 1999, the applicants made an access to information request for the "complete contents" of the Ministry's file pertaining to their child, including "copies of notes on file … pencil notations, telephone messages, correspondence and any and all statements from any parties involved". The response dated July 6, 1999

released the contents of the file respecting the applicants' child. Some of the information in the records was withheld under ss. 75 and 77(1) and (2) of the CFCSA. By a letter dated August 6, 1999, the applicants sought a review of this decision. They alleged the Ministry had failed to release all responsive records to them. They were convinced that the Ministry was withholding file notes of certain social workers with whom they had dealt.

Because mediation by this Office did not succeed in resolving the matter, a Notice of Written Inquiry was issued to the parties on March 9, 2000. The Ministry at that time argued that the CFCSA does not, expressly or implicitly, require the Director to respond accurately and completely to access requests under that Act. It argued that the duty to do so only arises under s. 6(1) of the Act, which does not apply under the special CFCSA scheme. My May 15, 2000 decision letter – the text of which is reproduced in the Appendix to this order – sets out my reasons for finding that the CFCSA in fact does impose certain obligations on the Director.

2.0 ISSUES

The only issue to be addressed in this inquiry is whether the Ministry, for the Director, exercised such diligence that it is not reasonable to believe that records were omitted from the response dated July 6, 1999. The applicants initially identified the records which the Director omitted as notes made by two social workers and the material filed in support of a Provincial Court application and supporting social worker notes.

The Ministry argued, citing Ontario Order PO-1721, that "where an appellant alleges that relevant records have not been provided to them, … the appellant should provide a reasonable basis for concluding that such records may, in fact, exist." I take Order PO-1721 to mean that, in the rare cases where the applicant is in the best position to provide this information, the applicant should do so. In most cases, it will be difficult for the applicant to indicate precisely which records have been omitted in a response to a request. In this case, the Ministry, as creator or custodian of the records, is the party best placed to establish whether it exercised such diligence that it is not reasonable to believe that records were omitted from the response.

My May 15 ruling sets out the principles that apply here. The Ministry maintains that, despite that earlier ruling, I have no jurisdiction to conduct this inquiry. It has participated in the inquiry; it submitted both affidavit evidence and written submissions. Its submissions proceed on the basis of the principles in my May 15 ruling.

3.0 DISCUSSION

The applicants say the Ministry is holding back two classes of records. They say that they saw Ministry social workers write notes about them, but these notes have not been produced. They also say the Ministry has failed to deliver to them the "evidence" the Ministry's lawyers presented to the Provincial Court in order to obtain an order allowing the Ministry to examine and interview the applicants' child.

The applicants contend they have provided a reasonable basis for supposing that such records exist. They argue that one of the social workers has, in her affidavit in this inquiry, admitted "placing her loose-leaf paper notes within the file", but these have "never been forwarded to us". They say that, if the Ministry relied on oral, and not affidavit, evidence in getting its court order, they wish to have access to "copies of the notes on the file which were used as reference for the verbal testimony".

The Ministry argues that its efforts in locating and retrieving responsive records are those that a fair and rational person would expect to be done or find acceptable. Affidavits filed by the Ministry attest to its general file-keeping and management practices in cases such as that involving the applicants. These are the affidavits of Janice Kennedy, David Mansell and Fern MacKay. The Ministry's affidavits establish the following facts about its file management practices generally:

1. The records relating to the applicants and their child are created or obtained by local Ministry child protection offices.

2. All such records are filed in its Management Information System ("MIS").

3. The MIS's central registry contains the name, sex and birth date of current and past clients of the Ministry. An individual's name is used as a file identifier.

4. As in all access request cases, the Ministry's practice once a request has been received is to use the MIS to determine if there are any files which may contain records that are potentially responsive to the request.

5. Ministry policy stipulates that only one Ministry file should exist for each type of service provided by the Ministry to a family or individual. For example, its policy is that there should only be one child protection file for each family or individual. The policy requires staff to merge any duplicate files.

6. The MIS is designed to allow the Ministry to quickly identify and retrieve, from any location in the province, all records respecting a family or individual.

7. If the MIS discloses that only one type of file exists for a person, it is reasonable to conclude the Ministry has no other records about the person (unless the located file itself indicates other Ministry offices may have records relevant to the requests).

8. All notes or other records created, or received, by Ministry staff while providing services are routinely and frequently placed in the one file maintained by the relevant Ministry office for that service. That file is located in the central filing room of the Ministry office. Maintenance of a single central file that is routinely updated enables quick transfer of a file, and all its contents, if the file is needed elsewhere in the Ministry's system or is needed by other agencies.

The Ministry also submitted affidavits sworn by the two social workers who were involved in the applicants' case, Leanne Harder and Kristen Catton. Another Ministry social worker, Jennifer Bailey, also swore an affidavit about her involvement with the applicants. The Ministry's affidavits, including those just described, establish the following facts about this case specifically:

1. A Ministry employee assigned to deal with the applicants' request determined, using the MIS, that family services file existed which contained records that were responsive to the request.

2. That employee e-mailed the Ministry office which the MIS indicated had the file and asked that the file be forwarded for the purpose of processing the request. The e-mail said that the request included casenotes, social worker black book notes or other notes relating to the file.

3. The Ministry's file was sent to the Ministry's Information and Records Services Branch for the processing of the request.

4. The Ministry responded to the request by disclosing records, although it withheld some information under ss. 75 and 77(1) and (2) of the CFCSA.

5. The Ministry social workers involved in the applicants' file are not aware of the existence of any records other than those in the file sent to the Ministry's Information and Record Services Branch. Consistent with the Ministry's routine practice, all of the social workers' notes would be contained in that file (which a further search of the MIS has since indicated is the only file relating to the applicants or their child).

The Ministry says in its reply submission that, contrary to the applicants' contention, it has disclosed to them 18 pages of handwritten notes made by Leanne Harder, seven pages of handwritten notes made by Kristen Catton – social workers involved in the applicants' case – and one page of notes by Farimah Shakeri, a social work student who worked on the case.

It also submits that the only record it supplied in support of the above-described court application was an 'Application for Order' dated January 7, 1999. This record was found in the Provincial Court file, which the Ministry searched in connection with the applicants' request. The Ministry says it relied on oral testimony by Leanne Harder in obtaining the court order referred to above. The Ministry also obtained records relating to the court order from the files of its lawyers, copies of which have been disclosed to the applicants. These are four letters between counsel for the applicants and counsel for the Ministry, as well as a copy of the court order itself.

I find no omission occurred here in the search for records. In fact, I have no doubt the Ministry has made more than a reasonable effort to locate and retrieve responsive records for the applicants. It has, in fact, expended considerable effort in responding fully to the applicants. As the Ministry has pointed out, it has disclosed handwritten notes to the

applicants, contrary to their claim that such notes have not been given to them. In addition, three social workers have deposed that they were not aware of any records other than those in the file sent to the Ministry's Information and Records Services Branch for the purpose of processing and responding to the applicants' request.

Given the Ministry's evidence of the type and range of its search efforts, I find that the Director exercised such diligence that it is not reasonable to believe that records were omitted from the response. Accordingly, no order is necessary.

September 25, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia

APPENDIX
TO ORDER 00-43

May 15, 2000

Request for Review between _____ ("applicants") and the Director ("Director") under the *Child, Family and Community Services Act* – Ministry for Children and Families ("Ministry") – OIPC File 9336

On March 9, 2000, this Office issued a notice of written inquiry under s. 89 of the *Child, Family and Community Service Act* ("CFCSA"). The inquiry is into whether any records were omitted from the response of the Director under the CFCSA. The response was to the applicants' request for records in the custody or control of the Director which relate to an investigation, conducted by the Ministry, of a complaint made against the applicants.

The Director objects to the jurisdiction for the inquiry and asked me to rule on that objection before considering the merits of the matter. The applicants say the Director cannot raise the objection now because he or she willingly participated in the investigation and mediation conducted by this Office. I agree with the Director that this is not a bar to the Director's jurisdictional objection. If there is no statutory authority for this inquiry, authority has not been created by the Director's cooperation with this Office to date.

The Director argues this is an inquiry into the adequacy of the search for records requested by the applicants, but says s. 6 of the *Freedom of Information and Protection of Privacy Act* ("Act") – which prescribes a duty to assist access applicants – does not apply to access requests made under the CFCSA. The Director also says that no implied reasonable search standard applies under the CFCSA. According to the Director, the right in s. 89(1) of the CFCSA to a review by the Commissioner of "any decision, act, or omission of a director that relates" to a request for access under the CFCSA does not cover the adequacy of the Director's search for a requested record.

I agree with the Director that the duty to assist found in s. 6 of the Act does not apply to records made under the CFCSA on or after January 29, 1996. The Commissioner therefore has no authority to inquire into whether the s. 6 standard has been met in relation to such records. This conclusion was also reached by my predecessor in Order No. 257-1998, where he stated as follows:

> While certain provisions of the *Freedom of Information and Protection of Privacy Act* are incorporated by reference into Part 5 [of the CFCSA] (see sections 77(3), 79(1), and 80), there is no reference to the duty to assist under section 6. Section 89(5) of the CFCS Act provides that sections 44 to 49, 54 to 57, 58(1), 58(2) and 58(3)(d), and 59 of the *Freedom of Information and Protection of Privacy Act* apply in respect of a review requested under this section. Significantly, section 89(5) does not confer jurisdiction to make an order under section 58(2)(a), which is the authority to require that a duty imposed by the Act or the Regulations be performed.

> Based on my review of the CFCS Act, I conclude that my jurisdiction to conduct a review under section 6 is limited to records which were made prior to January 29, 1996, or those records made on or after that date which are not in the custody or control of the Director and all other records not specifically encompassed under section 73 of the CFCS Act.

However, the question that Order No. 257-1998 did not decide, and that is the subject of this ruling, is whether an applicant who has requested access to records under the CFCSA on or after January 29, 1996 has a right, under s. 89(1) of the CFCSA, to a review by the Commissioner of whether the Director's response omitted records which fell under the applicant's access request. Section 89(1) of the CFCSA provides that a "person who requests access to a record … may ask the … commissioner to review any decision, act or omission of a director that relates to that request." The question is whether the applicants' allegation that the Director has failed to produce a record which falls under their right of access in s. 76 of the CFCSA a "decision, act or omission" of the Director "that relates to the request", as those words define the right of review by the Commissioner under s. 89(1) of the CFCSA.

On this point, the Director argues as follows:

> 8. The Ministry submits it is a significant consideration with respect to defining what "omission" means in section 89(1) of the CFCS Act, that section 6 of the FOIPP Act is not one the sections incorporated by reference into the CFCS Act. The Ministry submits that this is indicative of an intention on the part of the Legislature to not impose section 6 duties on the Director under the CFCS Act. As mentioned, *Black's Law Dictionary, Fifth Edition*, defines "omission" as "the neglect to perform what the law requires". As such, the Ministry submits that if a Director has not conducted an adequate search for records, that is not an "omission" for the purpose of section 89(1) of the CFCS Act, given that there is no legal obligation under the CFCS Act for a Director to conduct a reasonable search. [Footnote from Ministry's submission: The Ministry submits that a more reasonable interpretation of "omission" would be that it refers to a failure to respond to a request for "records", as that term is defined in the CFCS Act.]
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> 9. The Ministry submits that the Commissioner should not find that there is an implicit obligation in the CFCS Act to conduct a reasonable search, given that the CFCS Act provides a clear and detailed accounting of what sections of the FOIPP Act were intended to apply to requests government [*sic*] by the CFCS Act, and section 6 is not one of them. Any finding that there is an implicit obligation in the CFCS Act to conduct a reasonable search would be contrary to the clear and unambiguous wording of the CFCS Act. Clearly, the Legislature turned its mind to what sections of the FOIPP Act should apply to requests under the CFCS Act. Further, section 6 was presumably added to the FOIPP Act on the basis that the Legislature assumed that without that section there would be no positive obligations on a head of a Ministry that are contained in section 6. Had the Legislature intended to impose a similar duty on a Director under the CFCS Act it would have presumably enacted a similar provision in that Act or incorporated by

> reference section 6 of the FOIPP Act. The Legislature did neither of those things.

In my view, the Director's interpretation of the word "omission" in s. 89(1) of the CFCSA is too narrow. Section 89(1) applies to an omission of a director that "relates" to a request. In my view, this means the concept of "omission" is wider than an absence of response by the Director; it also encompasses any failure to act in relation to a response.

I also disagree that the failure to incorporate s. 6 of the Act into the CFCSA means that the Director is not obliged to exercise substantive diligence in relation to its responses to access requests under s. 76 of the CFCSA. Section 76 creates a right of access to records in the custody or control of a director. A determination of what records are in the custody or control of the Director is an essential element of a response to an access request under s. 76. The right of access in s. 76 is hollow without such a determination. The failure to assess this element is a failure to comply with the right of access. In the words of s. 89, it is an omission by a director that relates to a request for access to a record. The erroneous assessment of this element – in a "decision" or as an "act" of the Director – is also a failure to comply with the statutory right of access created by the CFCSA.

The Director supports the argument against jurisdiction by referring to limits on the remedies the Commissioner may order under s. 89 of the CFCSA. I agree there may be a gap between the scope of the right of review in s. 89(1) and the scope of the Commissioner's remedial powers in s. 89(5). However, rather than narrowing the plain meaning of the statutory language which creates the right of review in s. 89(1) in order to match the scope of the Commissioner's remedial powers in s. 89(5), I would characterize the situation as a possible legislative gap in relation to the remedial powers. I say "possible" because I am not prepared to preclude the applicability of the remedial powers in s. 58(2) of the Act – which are incorporated by s. 89(5) of the CFCSA – where an inquiry requires a determination of what records responsive to an access request are in the custody or control of the Director.

I note that if the Director's argument about absence of remedial powers were correct, the Director's interpretation of the word "omission" in s. 89(1) would also be called into question. The Director recognizes that the word "omission" in s. 89(1) must have some meaning. The Director suggests "omission" refers to a failure to respond to an access request. The Director also says that, if there is no relevant remedial power in s. 89(5), this indicates there is no intended power of review by the Commissioner respecting an "omission". But if this latter point is valid, there is no right of review in respect of either a failure to respond (the Director's interpretation of "omission") or a failure to act in relation to a response to an access request (the interpretation of "omission" that I prefer). This would give no meaning at all to the word "omission" in s. 89(1). This is not tenable.

I have also considered the Director's reliance on *Fountain* v. *Parsons* (1994), 92 B.C.L.R. (2d) 358 (C.A.). That case demonstrated the Court of Appeal's reluctance to grant a declaration to which no effect could be given because the subject matter in dispute no longer existed. In my view, the Court of Appeal's views on the discretionary

nature of a superior court's declaratory powers is not to the point here. My task here is to interpret s. 89 of the CFCSA and not decide on the exercise of a discretionary remedy.

In my view, the correct approach is to interpret the word "omission" in s. 89(1) of the CFCSA to give it the meaning that is most logical and purposive in the context in which it appears. It should, in my view, be interpreted to refer to any failure to act in relation to a response. The applicants' contention that the Director's response to their access request omitted records in the custody or control of the Director can be characterized as an alleged failure to act (an omission) in relation the access request, or as an erroneous "decision" or "act" in relation to the access request. Either way, the right of review in s. 89(1) is triggered. In terms of remedy, it may be that on an inquiry of this nature I am limited to making findings of fact and law under s. 56 of the Act. On the other hand, it may be that the powers in s. 58(2) of the Act can be applied here. The dilemma of remedy does not, however, curtail the applicants' right to a review under s. 89(1) of the CFCSA.

In light of my finding that, contrary to the arguments made for the Director, the applicants have a right of review under s. 89(1) of the CFCSA into whether any records were omitted from the Director's response to their access request, the inquiry will proceed. I ask that the parties now make written submissions to me according to the schedule in the enclosed Amended Schedule for Notice of Written Inquiry.

Yours sincerely,

Original signed by

David Loukidelis
Information and Privacy Commissioner
for British Columbia

Enclosure