OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 01-23

MINISTRY FOR CHILDREN AND FAMILIES

David Loukidelis, Information and Privacy Commissioner
June 1, 2001

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Summary: Applicants sought removal from Ministry files of professional reports or opinions with which they disagreed. Request is outside scope of corrections of errors or omissions under s. 23 of the Child, Family and Community Service Regulation. Applicants failed to back up claims of error in factual information in files and did not make submissions in this inquiry. No basis to interfere with Ministry's refusal to make corrections. No basis for intervention in manner of annotation, though commissioner finds Ministry's annotation of files, and not "records", did not meet s. 23.

Key Words: error – omission – accuracy – correction – annotation.

Statutes Considered: *Child, Family and Community Service Act*, s. 89(1), (5); Child, Family and Community Service Regulation, B.C. Reg. 527/95, s. 23.

Authorities Considered: B.C.: Order No. 20-1994, [1994] B.C.I.P.C.D. No. 23; Order 124-1996, [1996] B.C.I.P.C.D. No. 51; Order No. 126-1996, [1996] B.C.I.P.C.D. No. 53; Order No. 192-1997 [1997] B.C.I.P.C.D. No. 53; Order No. 00 –51, [2000] B.C.I.P.C.D. No. 55. **Alberta:** Order 2000-001, [2000] A.I.P.C.D. No. 16; Order 2000-007, [2000] A.I.P.C.D. No. 18. **Ontario:** Order 186, [1990] O.I.P.C. No. 48; Order P-1478, [1997] O.I.P.C. No. 306.

1.0 INTRODUCTION

[1] The applicants in this case sent the Ministry for Children and Families ("Ministry") a series of five letters requesting the correction or removal from Ministry files of a number of reports about their three children. The provision relevant to this request is s. 23 of the Child, Family and Community Service Regulation, B.C. Reg. 527/95 ("CFCSA Regulation"), made under the *Child, Family and Community Service Act* ("CFCSA").

[2] The Ministry replied to these requests by refusing to remove the reports in question. The supervisor of the Ministry's Information and Records Services Branch provided the following reasons for this refusal in a letter dated April 17, 2000:

> I have been advised by [the Acting Child Protection Manager] that as a result of concerns related to the care of your children, they were removed from your legal care by the ministry. These documents contain medical diagnostic opinions and other information regarding your three children which we believe is accurate, and which have influenced the ministry's actions in relation to your family. Some of the documents have, in fact, been entered in Court during the child protection hearings in relation to the removal of the children.

[3] The Ministry went on to say that it would annotate the relevant files under s. 23(3) of the CFCSA Regulation, to reflect the fact that the applicants had requested correction of the records by removal of the reports. It said it would create a separate annotation section in each file and would place the applicants' letters in each annotation section, along with a copy of the supervisor's April 17, 2000 letter. The Ministry also told the applicants it would place in the files any medical documents the applicants wished to submit. The applicants received a follow-up letter of June 9, 2000 from the Ministry confirming that staff had annotated the files as described.

[4] The applicants requested a review of the Ministry's response to the correction request. Mediation did not resolve the issues in dispute and I held an inquiry under s. 56 of the Act. The parties agreed to extend the timelines for the inquiry until all involved were available.

[5] My jurisdiction in this case is found in the CFCSA and, to the extent it is incorporated by the CFCSA, the *Freedom of Information and Protection of Privacy Act* ("Act"). Section 74 of the CFCSA says that, except as provided in Part 5 of the CFCSA, the Act does not apply to a "record made under" the CFCSA or to information in it. The term "record" is defined in s. 73 of the CFCSA as a record that is made under the CFCSA on or after January 29, 1996 and is in the custody or control of a director (the head of the public body for the purposes of the CFCSA) under the CFCSA. The records here are all subject to the CFCSA.

[6] Section 76(5) of the CFCSA gives a person who has had access to a record under s. 76 the right to request that the records be corrected. Under s. 89 of the CFCSA, a person who has requested a correction under s. 76(5) can ask for a review, under the Act, of any decision, act or omission that relates to the request. Section 89(5) of the CFCSA provides that the Act's sections that apply to requests for review and to inquiries apply to a request for review under the CFCSA. These are ss. 44-49, 54-57, 58(1), (2) and (3)(d) and 59 of the Act.

[7] Section 23 of the CFCSA Regulation sets out further directions on dealing with correction requests under s. 89 and reads as follows:

> 23(1) If an applicant who is given access to a record in the custody or control of a director requests that the record be corrected, the director must

> (a) review the request, and
> (b) determine whether there is an error in the record or whether information has been omitted.
>
> (2) On complying with subsection (1), the director may correct the record by doing either or both of the following:
>
> (a) removing any error;
> (b) adding any information that is new or has not previously been included in the record.
>
> (3) If no correction is made in response to the applicant's request, the director must annotate the record with the correction that was requested but not made.

[8] I note here that, after this Office issued the Notice of Written Inquiry in this case, the applicants filed a petition for judicial review in the Supreme Court of British Columbia, in an attempt to forestall the inquiry. They did this because, among other things, they did not agree with the Office's decision not to invite the participation of certain "witnesses". They also did not agree with the allocation of the burden of proof in the inquiry.

[9] The Executive Director of this Office wrote to the applicants and said that, in the absence of a court order stopping the inquiry from proceeding or some other justifiable reason to suspend the inquiry, their petition did not suspend the inquiry process and that the inquiry would proceed. The applicants were told they could withdraw their request for review or proceed with the inquiry. The applicants did not withdraw their request for review and also failed to make any initial or reply submissions in the inquiry. The Ministry made an initial submission. On the basis of that submission – which presented what I consider to be balanced and fair legal arguments, as well as relevant factual material – I dealt with the issues in this inquiry.

2.0 ISSUE

The issue in this case is the Ministry's application of s. 23 of the CFCSA Regulation to the applicants' requests for correction. Section 57 of the Act establishes the burden of proof on the parties in an inquiry and, as noted above, it applies to an inquiry under the CFCSA. Section 57 of the Act is silent with respect to the burden of proof regarding requests for correction of personal information. Consistent with Order No. 126-1996, [1996] B.C.I.P.C.D. No. 53, the burden of proof lies with the Ministry on this issue.

3.0 DISCUSSION

[10] **3.1 Procedural Issue** – I will first address a preliminary issue.

[11] The Ministry argues, at para. 4.21 of its initial submission, that I have no jurisdiction to conduct this inquiry. It says the applicants requested the correction *and* removal of the reports in question, while my power to order a remedy is limited by

s. 58(3) of the Act, through s. 89 of the CFCSA, to confirming a decision not to correct personal information or to specifying how it may be corrected. It says I have no jurisdiction to make an order requiring destruction of the records – which it says would be a violation of the *Document Disposal Act* – and that I should therefore decline to conduct the inquiry "on the basis that the remedy sought by the Applicants cannot be granted".

[12] I reject the Ministry's contention. Section 89 of the CFCSA expressly contemplates my hearing such a matter and in fact *requires* me to conduct an inquiry. The fact that someone has requested what might be an illegal remedy – removal, or even destruction, of records contrary to the *Document Disposal Act* – does not mean I have no jurisdiction to hear this matter nor that I should decline to enter into the inquiry in the first place. Applicants sometimes seek a remedy that is outside my jurisdiction under the Act, sometimes to redress grievances that have nothing to do with the Act. My authority to conduct an inquiry under the CFCSA or the Act cannot be ousted because an applicant seeks a remedy that is not available or that entails illegality of some kind.

[13] **3.2 Applicable Standards** – My predecessor set out the following standards for dealing with correction requests under s. 29 of the Act at p. 5 of Order No. 124-1996, [1996] B.C.I.P.C.D. No. 51.

- There is no requirement in section 29 that a public body must correct personal information. However, it should do so where facts are clearly incorrect.

- The statutory obligation on a public body is to annotate the information with the correction that was requested and not made.

- A public body cannot correct someone's opinion; it can only correct facts upon which an opinion is based. (See Order No. 20-1994, [1994] B.C.I.P.C.D. No. 23, August 2, 1994, p. 11)

- Annotations and corrections should be apparent in the file, but public bodies have discretion to make administrative decisions about how they will annotate. In general, the annotation should be as visible and accessible as the information under challenge by the applicant. Any annotations or corrections should also be retrieved with the original file.

[14] In Order 00-51, [2000] B.C.I.P.C.D. No. 55, I cited Order No. 124-1996 with approval. It is true that s. 29 does not – as I noted in Order 00-51 – say that a public body "must" make a requested correction. That would be absurd. It is equally true, however, that s. 58(3)(d) of the Act provides that the commissioner may "confirm a decision not to correct personal information or specify how personal information is to be corrected". If a public body declines to correct an actual error or omission in someone's personal information, the commissioner may order that error or omission to be corrected. This is also the case under the CFCSA Regulation, since s. 89(5) of the CFCSA provides that s. 58(3)(d) of the Act applies to correction requests under the CFCSA scheme.

[15] **3.3 Correction of Opinions** – The Ministry argues that the applicants' real complaint is about assessments made by various professionals who saw their children. It

says that the applicants are really asking the Ministry to edit the reports of those professionals so they read the way the applicants would like them to read. The Ministry says it is not appropriate to correct the professional opinions, judgements and assessments of the health professionals who interviewed the children and reviewed the relevant records. It says that, in any case, it has no reason to think the reports are inaccurate.

[16] I have reviewed copies of the reports in question. They contain assessments, diagnostic information, evaluations, professional opinions, observations, recommendations and other subjective information about the applicants' three children. There is, not surprisingly, some factual information in the various reports, but the bulk of the reports consists of professional opinions, assessments or judgements.

[17] I agree with the Ministry that the tenor of the applicant's letters, both to the Ministry and to my Office, indicates that they do not accept – indeed, are incensed by – the various health professionals' reports about their children. It is clear, however, that the applicants' wishes go beyond mere correction or annotation. Only actual removal of the reports from the files will satisfy them and this is something the Ministry refuses to do.

[18] The Ministry also says it would be inappropriate to change the reports because they have been entered into evidence in court in child protection proceedings involving the Ministry and the applicants' children. At para. 4.37 of its initial submission, it says that

> … for accountability reasons, the Director [under the CFCSA] must be able to maintain an accurate record of records relied upon in child protection matters and/or records relied upon by it in court. … [I]t would be prejudicial to require the alteration of Ministry records where such records remain in a court file. The Director should be able to retain an accurate record of documents relied upon by the Director in a court matter.

[19] Section 23(3) of the CFCSA Regulation does not, in my view, contemplate "correction" of an opinion by its removal. It says the director may correct a record by "removing an error" or "adding any information that is new or has not previously been included in the record". I interpret use of the words "error" and "omission" to mean that the director may remove a factual error from a record – *e.g.*, by deleting an incorrect date of birth or address from a computerized record – and may add new information to correct an error or omission. I do not believe that s. 23 of the CFCSA Regulation was intended to enable an applicant to require a public body to redefine the contents of records so that they read as the applicant would wish. Public bodies are not obliged to correct opinions, assessments or expressions of judgement based on facts and the application of knowledge, skill and experience. Section 23 certainly does not, in my view, encompass removal of entire records containing opinions, assessment or judgements – particularly where, as in this case, a public body has relied on those records in making decisions about an applicant and must retain them for accountability reasons.

[20] Numerous orders confirm this way of thinking. For example, in Order No. 124-1996 and Order No. 192-1997, [1997] B.C.I.P.C.D. No. 53, my predecessor accepted the public bodies' arguments that, in requesting correction of opinions,

conclusions and other subjective information, the applicants essentially wanted the public bodies to re-write records to read as the applicants wished. He agreed that the appropriate, indeed only practical, method of dealing with such correction requests was to annotate the files by attaching the correction correspondence and even annotating the records themselves to indicate the requested corrections.

[21] I note that Alberta Order 2000-001, [2000] A.I.P.C.D. No. 16, and Order 2000-007, [2000] A.I.P.C.D. No. 18, are to the same effect, although I note that, effective in May of 1999, Alberta's legislation was amended to expressly prohibit the correction of opinion information, including expert or professional opinions. Like s. 23 of the CFCSA Regulation and s. 29 of the Act, s. 47(2) of Ontario's *Freedom of Information and Protection of Privacy Act* speaks to "correction" of an "error" or "omission" in personal information. In Order 186, [1990] O.I.P.C. No. 48, Commissioner Tom Wright interpreted s. 47(2) to exclude corrections that amount to substitutions of opinion. For a more recent Ontario decision to the same effect, see Order P-1478, [1997] O.I.P.C. No. 306.

[22] To the extent the applicants seek to 'correct' the Ministry's files by removing the professional reports found in them, their request falls outside the scope of s. 23 of the CFCSA Regulation. The Ministry was correct to refuse to remove records from its files. I decline to make any order respecting the Ministry's decision in that respect.

[23] **3.4 Correction of Factual Information** – Where the applicants request correction of factual errors, the Ministry says they should provide proof that the factual information is incorrect. The applicants have not done so, it says, but have merely asserted their case. It appears from the material before me that the only time the applicants provided documentary support for their assertions was when they attached letters containing medical diagnostic information to their request for review by this Office. I am not aware of any evidence they provided to support their requests to the Ministry to correct factual information. This is perhaps not surprising, since their main objective was removal of the reports, not their correction.

[24] The Ministry nonetheless listed for me a series of factual corrections that the applicants sought – *e.g.*, the dates on which certain events took place or the ages of the children when certain things happened – and said that, in any case, these factual statements appear in reports prepared by third-party agencies. It says they are so intertwined with the opinions and judgements in the reports that altering or deleting the factual parts "would destroy or diminish the integrity of the document as a whole." The Ministry says, at paras 4.35-4.37 of its initial submission, that it should not have to correct reports prepared by others.

[25] I disagree with the Ministry's argument that it should not have to correct factual errors or omissions in reports prepared by others. To take an important example, a public body may contract with the private sector for a variety of services, including services similar to those provided by the Ministry. Nothing in the CFCSA Regulation or the Act supports the Ministry's contention that reports prepared by contractors to the Ministry and in the Ministry's custody or control are somehow outside the ambit of s. 23 of the CFCSA Regulation. The plain language of those provisions in fact extends their reach to

personal information in records prepared by others, but in the custody or under the control of the public body. This ensures that incorrect personal information on which a public body may base a decision is open to a correction request.

[26] Further, the Ministry's argument apparently assumes that a correction must be made by physically changing a record produced by someone else or by the Ministry, *i.e.*, by deleting or altering incorrect personal information in a way that impairs or destroys the integrity or accuracy of the record. Correction does not by definition require the physical alteration of an existing record. It is easy to conjure a number of ways in which the Ministry could correct an error or omission as contemplated by s. 23(2) of the CFCSA Regulation or under s. 29 of the Act. Handwritten corrections could, for example, be made on a copy of the original record, with a note being attached to the original to alert readers to the existence of the corrections on the copy. An attached note to the original could, alternatively, contain (or merely repeat) the actual corrections. Such approaches preserve the integrity of original records while ensuring that the incorrect personal information is actually corrected.

[27] The Ministry also argues that it is not appropriate to correct information provided by others – such as telephone callers – where that information has been accurately recorded, even if the information so provided turns out not to be true. Nothing in s. 23 of the CFCSA Regulation supports this. In my view, consistent with what I have said about records prepared by third parties, the source of personal information found in records of a public body does not dictate whether s. 23 of the CFCSA Regulation (or s. 29 of the Act) is available. Public bodies are not omniscient. They routinely rely on outsiders for personal information about others. If a caller to the Ministry, for example, has provided personal information about someone else and the information turns out to be patently false, it cannot be correct that the right to request correction is not available because the public body is not the source of the information.

[28] In this case, however, I am satisfied that the applicants failed to provide the director with any basis on which the director could decide whether the alleged errors were, in fact, errors. There is no basis on which I can or should interfere with the director's refusal to correct.

[29] **3.5 Ministry's Annotation of the File** – In its initial submission, the Ministry said that, in response to the applicants' correction requests, it had created an annotation section in each relevant file – it did not say how many or what kind – and had placed in each annotation section copies of the applicants' letters and its decision letter of April 17, 2000. It does not appear to have annotated the affected reports themselves with the "correction that was requested but not made".

[30] The Ministry has undoubtedly been accommodating to the applicants in this process by placing their correction correspondence in the files. I also agree that it should neither remove nor correct the reports in question. Section 23(3) of the CFCSA Regulation says, however, that the annotation must be made to the "record", not the file in which the record is found. Section 29 of the Act is to the same effect. The reason for this is obvious. A 'file' may be voluminous. It may physically occupy several file folders, boxes or other containers. The Ministry's creation of an annotation section in the

file makes sense, but someone using the file may not notice the existence of the section and may miss the annotations. This is especially a concern where a file occupies several file folders or other containers. In Order 00-51, I ordered the public body to annotate the affected record with the location of the actual requested correction, thus cross-referencing the two records. In cases where the annotation cannot practicably be made on the affected records themselves, the Ministry should, using such a cross-reference, ensure that a link exists between the records themselves and the actual annotation.

[31] Again, s. 89(5) of the CFCSA incorporates the powers given to me under s. 58(3)(d) of the Act. It does not, for some reason, incorporate the remedial authority given to me under s. 58(3)(a) of the Act. At all events, the question of my authority aside, the applicants in this case failed to provide any back-up to the Ministry, at the time of their request, for the requested corrections. In this light, I would not, in any case, be prepared to intervene and order the Ministry to properly annotate the corrections on the records. This is because I would hesitate to order a public body to annotate every asserted correction, no matter how unsubstantiated it may be. No remedy is called for here.

4.0 CONCLUSION

[32] Because I have found the applicant's requests to remove records from Ministry files fall outside s. 23 of the CFCSA Regulation, I decline to make any order respecting those parts of their requests. No order is called for respecting the applicants' requested factual corrections, since they did not provide any basis to the Ministry for deciding whether to make the corrections. No order is available or appropriate as regards the Ministry's annotation of the requested, but not substantiated, factual corrections sought by the applicants.

June 1, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia