
Order 02-59

**MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT**

Michael T. Skinner, Adjudicator
December 17, 2002

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**Summary**: The applicant requested records relating both to herself and to her child, of whom she no longer has legal care following apprehension of the child and subsequent court orders. Records had previously been disclosed to the applicant's various legal counsel three times. The public body is ordered to make additional disclosure to applicant, based on uncertainty of evidence regarding previous disclosures. Sections 76 and 77 of the *Child, Family and Community Service Act* found to have been properly applied to the information severed or withheld by the public body.

**Key Words:** previous disclosure – repetitive requests – substantive diligence – child not in legal care.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 22(2)(e) and (f), 22(3)(b). *Child, Family and Community Service Act*, ss. 73 to 77, 89.

**Authorities Considered: B.C.:** Order No. 160-1997, [1997] B.C.I.P.C.D. No. 18, Order No. 274-1998, [1998] B.C.I.P.C.D. No. 69; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

## INTRODUCTION

[1] The applicant seeks records under the *Freedom of Information and Protection of Privacy Act* ("Act") from the Ministry of Children and Family Development ("public body") relating to her and her child. The child was apprehended under the *Child, Family and Community Services Act* ("CFCSA") and for some time has not been in the custody of the applicant.

[2] The applicant has sought records relating to the child's apprehension and continuing custody, as well as records about the applicant or the child, from the public body and particular staff of the public body with whom the applicant has had dealings, or who have been otherwise involved in decisions made by the public body which impact the applicant or the child. The applicant made her request in July of 2001. The public body replied on December 13, 2001, saying that the records sought by the applicant had previously been provided to the applicant's legal counsel and that the public body would not be making further disclosures of the same records.

[3] The public body also refused to disclose certain records from its child in care files, pursuant to ss. 75(a) and 76(2)(a) of the CFCSA. Information has also been withheld under s. 77, which permits the public body to withhold information if disclosure would be an unreasonable invasion of a third party's personal privacy; other grounds (exceptions) for refusing to disclose information were also provided. The applicant subsequently filed a request for review with this Office. While the mediation process was unsuccessful, the public body nonetheless was able to locate additional responsive records during the initial stage of the inquiry process, which it provided to the applicant.

[4] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

## 2.0 ISSUES

[5] The first issue (as originally pursued by the applicant) is whether s. 6 of the Act applies to the facts of this case, and if so, whether the public body has met its s. 6 duty to the applicant to respond "openly, accurately and completely."

[6] The second issue is whether the Director (the decision-maker for access to information matters as designated under Part 5 of the CFCSA) is required under s. 76 of the CFCSA to disclose to the applicant records previously disclosed during child protection litigation involving the applicant and the public body.

[7] The third issue is the application of particular exceptions to disclosure – that is, whether the Director was required to withhold information from the applicant under ss. 77(1)(a) and (b), or authorized to withhold information from the applicant under ss. 77(2)(a) and (c), of the CFCSA.

[8] Section 89(5) of the CFCSA imports s. 57 of the Act in respect of a review by the Information and Privacy Commissioner of a Director's decision; s. 57, in the circumstances of this case, states that the burden of proof is on the public body to "prove that the applicant has no right of access to the record or part." This places the burden on the Director to prove that the withholding of information is required or authorized under the CFCSA. Conversely, the applicant bears the burden to prove that disclosure of a third party's personal information would not unreasonably invade the privacy of that person.

[9] Both the public body and the applicant have supplied certain portions of their submissions to this inquiry on an *in camera* basis. I have reviewed these portions, and the reasons given by the parties for doing so, and am persuaded that such evidence is properly before me in this inquiry on an *in camera* basis.

[10] I also note that, during the course of this inquiry and following receipt of initial submissions, the issues were substantially narrowed, by agreement between the parties, as they relate to disclosure of records. The issues, both of which are to be decided under the provisions of the CFCSA, are:

1. Whether or not the public body is obligated to produce records already provided to the applicant's legal counsel, and

2. Whether the public body is entitled to withhold information from the notes of a social worker.

## 3.0 DISCUSSION

[11] **3.1 Application of Section 6 of the Act** – This section was included in error in the Notice of Inquiry originally issued by this Office. The public body correctly argues that s. 6 does not apply, in that the CFCSA incorporates its own scheme for access to records and protection of privacy. Sections 73 and 74 of the CFCSA set out and delimit the scope of the scheme established for access to records within the context of that legislation. Those sections read as follows:

> ***Definition***
>
> **73** In this Part, **"record"** means a record as defined in the *Freedom of Information and Protection of Privacy Act* that
>
> (a) is made under this Act on or after January 29, 1996, and
>
> (b) is in the custody or control of a director.
>
> ***Freedom of Information and Protection of Privacy Act***
>
> **74** Except as provided in this Part, the *Freedom of Information and Protection of Privacy Act* does not apply to a record made under this Act or to information in that record.

[12] What these sections make clear is that the CFCSA establishes the terms on which access requests are to be made and reviewed. The public body asserts that the records in question were created after January 29, 1996, and "relate to, and arose out of, child protection matters involving [the child]." Due to the clear application of CFCSA s. 74, s. 6 does not apply per se; however, s. 89 of the CFCSA is relevant to delineation of the Director's duties:

***Review by Information and Privacy Commissioner***

**89** (1) A person who requests access to a record or correction of a record may ask the Information and Privacy Commissioner to review any decision, act or omission of a director that relates to the request.

(2) A person may ask the Information and Privacy Commissioner to review a complaint that information relating to the person has been disclosed in contravention of section 75.

(3) To ask for a review, a written request must be delivered to the Information and Privacy Commissioner.

(4) If the request is for review of a director's decision, the request must be delivered within 30 days after the person asking for the review is notified of the decision…

[13] In the context of the asserted duty under s. 76 of the CFCSA to produce records to the applicant – which the public body alleges it previously provided to the applicant's various legal counsel – I agree that the issue as framed by the public body is whether the failure to make additional disclosure, as requested, directly to the applicant constitutes an "omission" under s. 89 of the CFCSA. It is that issue to which I now turn.

[14] **3.2 Obligation to Produce Records Previously Disclosed** – The public body asserts that it has fully met the duty set out in s. 89 of the CFCSA, by virtue of having provided to the applicant on several previous occasions the records which the applicant seeks in this inquiry. The public body argues that Order No. 160-1997, [1997] B.C.I.P.C.D. No. 18, and Order No. 274-1998, [1998] B.C.I.P.C.D. No. 69, set out the principle that repetitive disclosure can be an undue burden on the taxpayers of the province. I agree that those cases articulate that position. Order No. 160-1997 also establishes that records can be treated as having been previously provided to the applicant if they have been disclosed "through another process" – for example, litigation, in which, traditionally, records will be disclosed to counsel rather than the client. The difficulty with adopting the public body's argument as a general principle is that "another process" might not produce a result equivalent to that afforded by way of disclosure under the Act. Assuming, for the purposes of this case, that the principle stated in Order No. 160-1997 is correct, I am not persuaded that the principle applies on the facts of this case. The reasons for this conclusion follow.

[15] The public body argues at para. 4.21 of its initial submission that "previous disclosure of records to the Applicant's legal counsel during the child protection court proceedings (pursuant to section 64 if [*sic*] the CFCSA) satisfies the Director's obligation to provide those records under the CFCSA." The public body's Information and Privacy Analyst's affidavit ("analyst's affidavit") addresses the issue of previous disclosure of records. At para. 10 of the analyst's affidavit, she deposes that Robin Stewart, Ministry legal counsel, "…on three occasions, disclosed records under section 64 of the *Child, Family and Community Service Act* to the Applicant's legal counsel. Mr. Stewart advised

me, and I believe it to be true, that such disclosures were made each time the Applicant retained new legal counsel."

[16] While I do not question the fact that previous disclosures occurred, the affidavit does not provide details of the previous disclosures. It is simply said that legal counsel told the analyst that counsel had "disclosed records", without identifying what records were disclosed. This lack of detail is important, since s. 64 of the CFCSA simply requires the disclosure of a party's "intended evidence" where that party is requesting an order from a court in a proceeding brought under the CFCSA. The records thus produced may or may not be fully equivalent to what the applicant is now seeking – down to the level of severing of information within records – but without further evidence of what was produced, I am not prepared to treat such disclosures as effectively satisfying the request for access that is in issue here.

[17] The further disclosure by the public body's legal counsel of a nine-volume set of records to the applicant's legal counsel is also problematic. Appendix "B" to the analyst's affidavit is a letter from public body's counsel to the applicant's counsel that accompanied the disclosure of records in September of 2001. The letter describes in detail the efforts that went into preparing the records:

> Further to your previous request for further disclosure, and your advice that the file material you received from Mr. Van Twest was disorganized, I am sending to you a reproduction of the entire Family Service file kept by the Ministry for Children and Family Development regarding [the applicant]…
>
> There are nine bound volumes which replicate the nine volumes of Family Services File kept by the ministry… Due to your concerns that disclosure be thorough and complete, we have not edited the volumes for duplication nor for dated and useless material. As a result, the production is voluminous and the material took weeks to prepare.

[18] Further in the letter, Mr. Stewart introduces some significant conditions:

> The enclosed documents are records kept by the Ministry for Children and Family Development with respect to this case and distribution of this information is governed by the confidentiality provisions of the *Act* [the CFCSA]. Any subsequent disposition of the material by you is also covered by these provisions of the *Act*.
>
> We are providing you with this information to assist you in instructing your client [*sic*] and in preparation for the various proceedings brought with respect to this case, and for no other purpose or use. These documents remain the property of the Ministry for Children and Family Development.

[19] The records disclosed to the applicant's counsel had been edited, the public body says, to remove material that was subject to solicitor-client privilege and material subject to exceptions found in the CFCSA, so that the resulting records would reflect primarily the applicant's personal information.

[20] I will not comment on whether it was appropriate for the public body's counsel, outside the access regime under the CFCSA, to purport to impose such conditions on the release of records. The only issue here is whether these conditions further undercut the public body's contention that it need not disclose records to the applicant pursuant to her access request.

[21] The conditions laid down by the public body's counsel in disclosing records to the applicant's lawyer were clearly and forcefully stated and raise the question, not addressed by the public body, as to whether disclosure to the applicant's counsel could, being subject to such conditions, properly be considered as disclosure to the applicant as argued by the public body.

[22] In a December, 2001 letter from the analyst to the applicant, appended as exhibit "C" to the analyst's affidavit, the analyst attempted to clarify the outstanding issues relating to the applicant's requests for records. That letter told the applicant that the public body's lawyer had not told the applicant's lawyer

> … to not allow you to remove the records from her [the applicant's lawyer's] office. This is an issue between yourself and your counsel, and I urge you to address it with her. As I suggested to you previously when we spoke, perhaps you could ask an advocate familiar with your case to assist you in this regard.

[23] The public body did not tender any evidence as to whether this information was also communicated to both the applicant's counsel and the public body's lawyer. I note that the analyst's letter bears no indication of having been copied to either counsel.

[24] The public body asserts that the argument by the applicant that her various legal counsel did not provide her with the records is undermined by evidence that the applicant, in her dealings with the public body, submitted copies of records bearing identification numbers inscribed by the public body as part of the process of preparing a disclosure package of records for applicant's counsel (analyst's affidavit, para. 17 and exhibit "F"). It does appear that some of the records provided to the applicant's legal counsel made their way into the hands of the applicant. The problem, again, is that the public body has not established that the records disclosed to counsel are the same as the records sought here. Nor, in light of the conditions placed on disclosure to counsel, has the public body established that disclosure to her counsel can properly be treated as disclosure to the applicant.

[25] I am not persuaded, based on the evidence the public body submitted – some of which is circumstantial, some hearsay – that the applicant has in fact received records equivalent to that which she would be entitled in a request made under Part 5 of the CFCSA. While I have considerable sympathy for the public body's situation in light of the records disclosure efforts to which it has been put in the various proceedings involving the applicant, I find that the applicant is entitled to a discrete disclosure of records in response to her request under the CFCSA. I note that para. 9 of the analyst's affidavit deposes that the public body's lawyer kept a duplicate set of the nine-volume set of records at the time they were disclosed to the applicant's legal counsel. If the nine

volumes of records are indeed the same records as those that respond to the applicant's access request, or include those records as part of a larger set, making a copy for the purpose of responding to the applicant's request under the CFCSA should be relatively easy. It would then remain for the public body to review those records and sever them as appropriate before disclosing them. The analyst in her affidavit deposes that the remaining records at issue were subject to severing under s. 77 of the CFCSA. I now turn to that section to review the various exceptions that the public body applied.

[26] **3.2 Application of CFCSA Section 77 -** Section 77 of the CFCSA sets out the exceptions to disclosure which the Director may apply. It is noteworthy that s. 77(3) imports ss. 22(2) to (4) of the Act as a comprehensive set of principles for the determination of what constitutes an unreasonable invasion of personal privacy:

> **Exceptions to access rights**
>
> **77** (1) A director must refuse to disclose information to a person who has a right of access under section 76 if the disclosure
>
> (a) would be an unreasonable invasion of a third party's personal privacy, or
>
> (b) could reasonably be expected to reveal the identity of a person who has made a report under section 14 and who has not consented to the disclosure.
>
> (2) A director may refuse to disclose information to a person who has a right of access under section 76 if
>
> (a) there are reasonable grounds to believe that the disclosure might result in physical or emotional harm to that person or to another person,
>
> (b) the disclosure could reasonably be expected to jeopardize an investigation under section 16 or a criminal investigation that is under way or contemplated,
>
> (c) the information was supplied in confidence, during an investigation under section 16, by a person who was not acting on behalf of or under the direction of a director, or
>
> (d) the information is subject to solicitor-client privilege.
>
> (3) Section 22 (2) to (4) of the *Freedom of Information and Protection of Privacy Act* applies for the purpose of determining whether a disclosure of information is an unreasonable invasion of a third party's personal privacy.

***Application of CFCSA, ss. 77(1)(a) and (b)***

[27] Section 77(1)(a) and (3) of the CFCSA import the privacy protection principles expressed in ss. 22(2) to (4) of the *Freedom of Information and Protection of Privacy Act*. Section 77(1)(a) requires a Director to refuse to disclose information the disclosure of which would unreasonably invade a third party's personal privacy. The Commissioner has discussed the approach to s. 22 analysis in a number of cases, *e.g.*, Order 01-53,

[2001] B.C.I.P.C.D No. 56. I will not repeat that approach here but have applied it in this case. The relevant parts of s. 22 of the Act read as follows:

> **Disclosure harmful to 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,
>
> …
>
> (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
>
> …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation, …

[28] Section 77(1)(b) protects the identity of a person who has made a report to the Director under s. 14 of the CFCSA. (Section 14 of the CFCSA sets out the duty imposed on all individuals to report to the Director the fact and circumstances relating to a child's need for protection. Section 13 of the CFCSA sets out a list of circumstances in which a child is deemed to be in need of protection.) The records at issue consist of notes made, and information received by, a social worker responsible for placement and monitoring of the applicant's child. The public body has provided in its submission a summary identifying the records at issue and the basis for the application of s. 77(1)(a) and (b) to the records.

[29] I have reviewed the records and the table in detail and, applying ss. 22(2) through (4) of the Act, find that the public body's application of s. 77(1)(a) and (b) is correct. In particular, I find that the evidence establishes that the applicant has a proven history of confronting and harassing individuals who do not agree with her or who oppose her in any way. As evidence of this, I refer to a recent judgment of the Provincial Court of British Columbia involving the applicant and her child, in which the judge said the following about this applicant:

> I'm satisfied that these [financial assistance or social] workers always attempted to treat her with courtesy and respect. But her response with depressing regularity was screaming, swearing, and physical aggression including spitting and kicking – actions, which often led to the police or security guards having to intervene. One particularly outrageous incident has resulted in criminal charges being laid.

[30] The judge also referred to the applicant's minimal likelihood of acceptance for therapy in an appropriate publicly-funded program:

> Two of the exclusion criteria [for the therapy program] are 'extreme antisocial behaviour' and 'extreme chaotic behaviour', both of which were amply demonstrated by [the applicant] during the course of this hearing.

[31] In light of this evidence, and the public body's open and *in camera* material, I find that the disclosure of the information withheld under s. 77(1)(a) would unreasonably invade the privacy of the third parties. These individuals have supplied or compiled information the public body has used in making decisions concerning appropriate actions to take regarding the applicant or the child. In making this finding I consider that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law (the CFCSA), as contemplated by s. 22(3)(b) of the Act. This raises a presumed unreasonable invasion of personal privacy.

[32] Turning to relevant circumstances, as required by s. 22(2), I find that the information was supplied in confidence prior to and during the course of the child protection proceedings. This raises the relevant circumstance set out in s. 22(2)(f). This circumstance favours withholding the disputed information. As for s. 22(2)(e), I consider that, if the information were disclosed, the third parties would be unfairly exposed to "other harm" in the form of emotional trauma and perhaps physical harm, the threat of which has been described in the provincial court judgment which was appended to the public body's submission and in other material before me.

[33] As for s. 77(1)(b) of the CFCSA, I find that this provision applies here to protect "the identity of a person who has made a report under section 14 [of the CFCSA] and who has not consented to the disclosure."

[34] I find that the Director is required to withhold the information covered by ss. 77(1)(a) and (b) and that the public body has acted correctly with respect to the records in its custody or control.

***Application of CFCSA, ss. 77(2)(a) and (c)***

[35] Section 77(2) is a discretionary section empowering the Director to withhold, on specified grounds, information from a person who has a right of access. Section 77(2)(a) refers to a disclosure which "might result in physical or emotional harm". For the reasons given above in connection with s. 77(1)(a), I find that this basis for withholding information has been established by the public body and that the Director is thus authorized to withhold the information at issue.

[36] I also find that s. 77(2)(c) is satisfied, in that the Director is authorized to withhold information supplied in confidence by third parties to the Director during an investigation under s. 16 of the CFCSA. Section 16 requires the Director to assess information received and, where appropriate, conduct an investigation to determine if a child is in need of protection. That is the background context for the information that forms the bulk of the records the applicant seeks.

## 4.0 CONCLUSION

[37] For the reasons given above, I find that disclosure of records to the applicant under the access to records provisions of the CFCSA has not in fact occurred, and I therefore order the public body to provide the applicant with a complete copy of the requested records, subject to appropriate severing of material subject to solicitor-client privilege, or as required by the CFCSA.

[38] For the reasons given above, I confirm the decision of the public body to withhold the personal information of third parties in the notes of the social worker assigned to monitor the placement of the applicant's child.

December 17, 2002

**ORIGINAL SIGNED BY**

Michael T. Skinner
Adjudicator