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

Order F10-10

MINISTRY OF ATTORNEY GENERAL

Jay Fedorak, Adjudicator

March 23, 2010

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Summary: Two applicants requested a copy of the notes that a family justice counsellor created as part of a court-ordered Custody and Access Report for a family court proceeding involving the custody of the applicants' grandchildren. The Ministry disclosed the notes of the interview with the applicants but withheld the notes of the interviews of third parties under s. 22(1). The Ministry also claimed that the records were subject to s. 3(1)(a) because, in its view, the notes related to a support service provided to the judge who ordered the report. The applicants reduced the scope of their request to exclude the personal information of third parties, except for the identities of individuals who made comments or expressed opinions about the applicants. The report and the notes do not relate to a support service provided to the judge and s. 3(1)(a) does not apply. Section 22(1) does not apply to information solely about the applicants or to the identities of individuals who made comments solely about the applicants that can be inferred from those comments. Ministry ordered to disclose this information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 3(1)(a), s. 22(1), s. 22(2)(h), s. 22(3)(a), s. 22(3)(d) and s. 22(3)(g).

Authorities Considered: B.C.: Order No. 152-1997, [1997] B.C.I.P.C.D. No. 8; Order F07-07, [2007] B.C.I.P.C.D. No. 9; Order 01-42, [2001] B.C.I.P.C.D. No. 44; Order 02-12, [2002] B.C.I.P.C.D. No. 12; Adjudication Order No. 2, June 19, 1997, Adjudication Order No. 6, Nov. 10, 1997,; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 00-18, [2000] B.C.I.P.C.D. No. 21; Order F06-11, [2006] B.C.I.P.C.D. No. 18; Order 01-07, [2007] B.C.I.P.C.D. No. 1; Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43.

Cases Considered: *M. v. O.,* [1994] B.C.J. No. 298; *Hamilton v. Hamilton*, [1983] B.C.J. No. 2496; *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

1.0 INTRODUCTION

[1] This inquiry arises from a request from grandparents involved in a contentious custody and access proceeding in the Provincial Court of British Columbia. They sought the handwritten notes that a family justice counsellor ("counsellor"), an employee of the Ministry of Attorney General ("the Ministry"), made while preparing a report that the court had ordered. The applicants received a copy of the report. The Ministry identified 147 pages of records as responsive to this request. It severed third party personal information under s. 22(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") and released the remainder of the records. The applicants were dissatisfied with this response and requested a review of that decision from the Office of the Information and Privacy Commissioner ("OIPC").

[2] During mediation, the Ministry released some additional information and provided a summary of some of the information it withheld in accordance with s. 22(5). The Ministry also applied s. 3(1)(a) to some of the information. Mediation failed to resolve the matter further and a written inquiry took place under Part 5 of FIPPA.

[3] The Ministry subsequently took the position that s. 3(1)(a) of FIPPA applied to all of the records. The Ministry requested that the inquiry include the issue of the application of s. 3(1)(a) and the OIPC agreed.

2.0 ISSUE

[4] The issues in this inquiry are:

1. Whether or not the requested records fall outside the scope of FIPPA pursuant to s. 3(1)(a).
2. If s. 3(1)(a) does not apply, whether the Ministry is required to refuse access under s. 22(1), s. 22(2)(h), s. 22(3)(a), s. 22(3)(d) and s. 22(3)(g) of FIPPA.

[5] Section 57 of FIPPA is silent about the burden of proof respecting matters related to the application of s. 3(1)(a) of FIPPA. Previous orders have stated that, in such cases, as a practical matter, it is up to each of the parties to present arguments and evidence to justify their position in the matter.

[6] In the event the requested records are within FIPPA's scope, the applicant has the burden of proving that disclosure of third-party personal information would not be an unreasonable invasion of the third parties' personal privacy.

3.0 DISCUSSION

[7] **3.1 Background**—The applicants applied to the court for custody of their granddaughter and grandson, who are currently in the custody of the applicants' daughter, the children's mother. In the course of that custody proceeding, the presiding judge made an order under s. 15 of the *Family Relations Act* requiring the Ministry to assign one of its counsellors to conduct an investigation and draft a Custody and Access Report for presentation to the court. The counsellor completed the report and provided it to the court, with the applicants receiving a copy. The applicants subsequently brought a motion in court seeking access to the counsellor's case notes in their entirety. The judge denied that motion, but the judge's reasons for this decision are not before me.[1]

[8] **3.2 Records in Dispute**—The records consist of copies of handwritten notes the counsellor took during interviews with the applicants, their daughter, the fathers of their grandchildren and physicians in preparation of the report. Most of the personal information about the applicants recorded in the notes also appears in the report, as do the identities of third parties who made comments about the applicants. In addition, as the purpose of the report is to inform a decision about the custody of the grandchildren, most of the applicants' personal information in the report, and in the notes, is about how they interact with third parties, particularly their daughter and granddaughter.

[9] **3.3 Application of s. 3(1)(a) of FIPPA—**The relevant provision of FIPPA is as follows:

> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> (a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts.

[10] The relevant provisions of the *Family Relations Act* ("FRA") are as follows:

> 15(1) In a proceeding under this Act, the court may, on application, including an application made without notice to any other person, direct an investigation into a family matter by a person who
>
> (a) has had no previous connection with the parties to the proceeding or to whom each party consents, and

[1] According to the Ministry, the judge declined the application on the grounds that the applicants would have sufficient opportunity to cross examine the counsellor at trial, but I have not seen any evidence from the court to be able to determine if the Ministry is correct. Ministry's initial submission, para. 47; Affidavit of D.S. para. 7.

> (b) is a family counsellor, social worker or other person approved by the court for the purpose.
>
> (2) a person directed to carry out an investigation under subsection (1) must report the results of the investigation in the manner that the court directs.

[11] The Ministry asserts that the records are outside the scope of FIPPA because they are records "relating to support services provided to a judge" in the custody and access proceeding. It noted that FIPPA does not define "support services provided to the judges" and said the term has not yet been considered judicially. The Ministry submits that I should rely on the plain meaning of the words as defined in the Oxford English Dictionary ("OED"). The OED defines "support" as "the provision or availability of services that enable something to fulfill its function or help keep it operational." It defines "services" as "help, benefit, advantage, use; conduct tending to the welfare or advantage of another; friendly or professional assistance".[2]

[12] The Ministry says these definitions capture the records for two reasons. The first is that they were created in compliance with an order of the court pursuant to s. 15 of the FRA. The Ministry asserts that its counsellors do not create Custody and Access Reports unless compelled by court order. Therefore, it considers that it only creates these records as a service to the judge. The second reason is that previous court decisions have held that family justice counsellors are "agents" of the court or have a "unique status", because they are carrying out the court's direction.[3] The Ministry claims it possesses copies of the records as a "custodian" only, in its capacity as "administrator to the courts", though it does not explain what it means by these terms.[4]

[13] The applicants disagree, arguing that the cases the Ministry relied upon do not support its contention that the records are outside of FIPPA's scope. They assert:

> The actual intention of section 3(1)(a) is to protect the autonomy and integrity of judges, court officers, and court personnel, in respect to their duties, and does not extend to agents of the courts.[5]

[14] In Order No. 152-1997,[6] Commissioner Flaherty held that s. 3(1)(a) excludes the following three main categories of records from FIPPA, as follows:

1. records in court files,

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[2] Ministry's Initial Submissions, para. 22.
[3] The Ministry refers here to *M. v. O.*, [1994] B.C.J. No. 298; *Hamilton v. Hamilton*, [1983] B.C.J. No. 2496, as examples.
[4] Ministry's initial submissions, para. 23.
[5] Applicant's reply submission, para. 18.
[6] [1997] B.C.I.P.C.D. No.8.

2. records of judges at all three court levels, masters and justices of the peace, and
3. judicial administration records and records relating to support services to judges.[7]

[15] The third category clearly includes records relating to administrative support that is provided to judges. Previous cases have described "administrative functions" generally as personnel and office management functions.[8] In any particular context, this could include any or all of the following: clerical support, correspondence management, appointments and calendar management, filing and records management, communications and information technology support, office budget management, payments and accounts management, facilities management, human resources and personnel support, and contract management.

[16] The term "support services" in s. 3(1)(a) may also refer to services which are provided to judges that are not purely administrative, such as research support provided by law clerks. Like the administrative support, these are services provided directly to judges in the course carrying out their functions.

[17] In contrast, the report the counsellor produced was not for the judge's own use, but rather for the court generally. It was drafted at the direction of the judge, but was shared with the parties for consideration and was intended for use in the court proceedings. The counsellor provided expert analysis to the court for the administration of justice. This is not a "support service" provided to a particular judge of the court.

[18] The function that the counsellor performed in this case was to collect evidence to present to the court, in a way that is analogous to someone commissioned to provide an expert opinion or a psychiatrist providing a court-ordered psychiatric assessment. These are not support services to the judge. It does not follow that the interview notes are outside the scope of FIPPA simply because the court made an order for the report.

[19] Accordingly, I find that "a record relating to support services provided to a judge" does not include records created by a family court counsellor in the course of completing an investigation and report under s. 15 of the FRA and, therefore, the records are not subject to s. 3(1)(a) of FIPPA. For all these reasons, I find that FIPPA applies to the Records.

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[7] Order No.152-1997.

[8] For example, see Order F07-07, [2007] B.C.I.P.C.D. No. 9; Order 01-42, [2001]. B.C.I.P.C.D. No. 44; Order 02-12, [2002], B.C.I.P.C.D. No. 12; Adjudication Order No. 2, June 19, 1997, www.oipc.bc.ca/orders/adjudications/Adj2a.html; Adjudication Order No. 6, November 10, 1997, www.oipc.bc.ca/orders/adjudications/Adj6a.html.

[20] As I have determined that the records are subject to FIPPA, I will now turn to the application of s. 22 to the records.

[21] **3.3 Harm to Personal Privacy**—The relevant provisions of s. 22 are as follows:

> **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 ...
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (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 ...
>
> (d) the personal information relates to employment, occupational or educational history ...
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party...
>
> (5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

[22] Numerous orders have considered the application of s. 22 and the principles for its application are well established.[9] I have applied those principles here without repeating them.

[9] See for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56, and Order 00-18, [2000] B.C.I.P.C.D. No. 21.

Scope of personal information in issue

[23] In their submissions, the applicants agreed to exclude from the scope of their request any personal information about third parties. They seek only their own personal information, but they believe that should include any comments or opinions that third parties have expressed about them. The third parties expressed such comments and opinions in the course of interviews between those third parties and the counsellor.

[24] In some cases, the comments or opinions by one of the third parties concern how the applicants interact with other third parties, particularly their daughter and granddaughter. These comments, in addition to being the joint personal information of the applicants and the person making the comment, are also the personal information of the other third parties being discussed. As such, I have considered these comments to be outside the scope of the applicants' request, where it is not possible to segregate the information about the applicants from the personal information about the other third parties being discussed. The applicants have also excluded from the scope of their request any comments about them made by two identified third parties. Therefore, the only information that is in scope is the remaining comments of third parties where they are about the applicants alone. This has narrowed the scope of responsive information to about twenty perfunctory passages sprinkled over the course of fifteen pages.

[25] These passages appear in the midst of information about third parties, leaving them isolated on the page, once the third parties' information is removed. Without the surrounding context, it is not possible to identify most of the individuals who made the comments. Therefore, this is not personal information of third parties because it is not identifiable and s. 22(1) does not apply to it. The applicants are entitled to this information. In addition, some of the passages are illegible. This leaves only a few comments where it might be possible for some readers to identify the speaker. I will now consider the application of s. 22(1) to these isolated passages where the speaker might be identifiable.

[26] Order F06-11[10] established that opinions and comments about an individual are the personal information of the individual. It also established that the identity of the opinion-giver is also part of the personal information of the individual about whom the opinions are expressed. In that order, Adjudicator Francis (as she then was) wrote:

> [41] I disagree, however, with the Council's argument that the identity of a person who holds an opinion about an applicant is not part of that personal information. While that identifying information is the personal information of the third party, it is also, in my view, an integral part of the opinions about the applicant. The comments and opinions in this case are

[10] [2006] B.C.I.P.C.D. No. 18.

> only "about" the applicant and, aside from the fact that the third parties hold those opinions about her, the information consisting of their comments and opinions is not "about" those third parties**.**
>
> …
>
> [43] The fact that the third parties are identifiable as having expressed opinions or made comments about the applicant means they have a privacy interest in relation to possible disclosure of the fact that, as identifiable individuals, they hold opinions about the applicant. I therefore consider below whether disclosure to the applicant of the third parties' opinions and comments about the applicant, associated with them as identifiable individuals, would be an unreasonable invasion of their privacy.

[27] I take the same approach in this inquiry.

[28] Therefore, it is necessary to determine whether disclosure of the third parties' opinions or comments about the applicants, where disclosure would reveal the identities of the third parties, would be an unreasonable invasion of the third parties who expressed the comments or opinions.

[29] As none of the factors in s. 22(4) of FIPPA applies in this case, I will turn to s. 22(3) to determine whether disclosure is presumed to be an unreasonable invasion of privacy.

Presumed Unreasonable Invasion of Privacy

[30] At the time of writing its initial submission, the Ministry believed that the entire notes were at issue, including a substantial body of information exclusively about third parties. Accordingly, it argued the application of a number of provisions of s. 22(3) of FIPPA that are no longer at issue. The Ministry's arguments do not apply to the third party personal information remaining in scope, which is the identifying information of the third parties as opinion holders. Previous orders have stated that identifying information that does not fall squarely into s. 22(3) sometimes falls into s. 22(1). I will now determine whether s. 22(1) applies by considering the relevant circumstances.

Relevant Circumstances

[31] The applicants seek their personal information because they believe that it is necessary to a fair determination of their rights with respect to custody of, and access to, their grandchildren, in accordance with s. 22(2)(c). The decision of the court with respect to their access was that it was to be supervised. This decision was set to be reviewed at a later date. The applicants argue:

> In the interim, our information within the Report has been denied us, which we disagree reflects natural justice or procedural fairness, since it is highly relevant to the eventual access review and necessary to enable the court to

> determine if the Report was in fact carried out in an accurate, fair, and objective manner.[11]

[32] The Ministry contends that s. 22(2)(c) is not relevant. Its reasons are that the hearing process provides sufficient opportunity for the applicants to pursue their custody rights and to hold the counsellor accountable for the contents of her report. The Ministry notes that the applicants applied to the court for an order requiring the counsellor to disclose her notes and the judge declined.[12]

[33] For s. 22(2)(c) to apply, it is first necessary to show that the applicants have a legal right at issue. In this case, the applicants are pursuing their legal custody and access rights. Next, it is necessary to determine whether there is a proceeding under way. According to the records before me, at the time of the request, there was a further hearing pending. The decision of the court was to issue an interim custody order. Therefore, the process for determining the applicants' custody and access rights was still ongoing. The third step is to determine whether disclosure of the personal information at issue would have some bearing on or significance for, determination of the right in question be necessary to a fair determination of those rights. I have reviewed the notes and a copy of the report. In my opinion, there is very little information about the applicants in the notes that has not already been disclosed in the report. The report reveals frank comments, opinions, and facts about all of the parties, including detailed information that is extremely sensitive. There are allegations and admissions on the part of many individuals of alcohol, drug and physical abuse. Individuals are clearly identified in the report as having provided factual information and opinions about other individuals, including the applicants. In this case, the applicants received a copy of the report disclosing intimate details that could be considered damaging to the reputation of many individuals mentioned in the report. Comparing the contents of the report and the notes, I believe the report has already provided the applicants with all of the substantive information about the matters at issue in the court proceeding, including the substance of comments and opinions that third parties expressed about them. Even were they to receive the notes in their entirety, they would not receive any additional information that would have a bearing on the determination of the legal rights in question and is necessary to a fair determination of their rights. The final step is to determine whether disclosing the personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing. As the report provides all of the relevant details from the notes, the disclosure of notes separately to the applicants is not necessary for them to prepare for the hearing or to ensure a fair hearing.

[34] The applicants claim that they require access to the notes to determine whether the contents of the report are accurate and reliable. The applicants have failed, however, to offer any evidence to suggest that the contents of the

[11] Applicant's initial submission, paras. 15-18.
[12] Ministry's initial submissions, para. 47; Affidavit of D.S. para. 7.

report did not accurately reflect the evidence the counsellor obtained during her investigation. It is not sufficient to justify access to the notes with an unsupported allegation or to take the position that access to the notes is necessary, just in case the report is not accurate. Moreover, in Order 01-07, Commissioner Loukidelis, following Lynn Smith J. in *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, held that a complainant's "fairness" concerns, related to the conduct of a complaint investigation, are insufficient grounds for the application of s. 22(2)(c).[13] Therefore, the applicants have failed to persuade me that s. 22(2)(c) is a relevant consideration.

[35] The Ministry has raised the application of s. 22(2)(h) on the grounds that disclosure might unfairly damage the reputation of a person referred to in the record.[14] It is important to note that the information at issue is the applicants' own personal information. In Order F06-11, Adjudicator Francis found that disclosure to the applicant of her own personal information in the form of other people's opinions about her could not cause harm to the reputation of any third party.[15] I find the same applies in this case.

[36] The applicants cite Order F06-11 in support of their position that disclosure of third party comments about them would not be an unreasonable invasion of privacy.[16] Most of their submission consists of direct quotes from selected passages in that order. Their submission concludes with the following:

> To summarize our view, we see no distinction between the comments, concerns, and opinions already disclosed to us thru [*sic*] and for the purpose of the Report, with the identities of the reporters disclosed, and the remainder of the identified third parties' opinions about us, which have been denied us.[17]

[37] I agree with the Adjudicator's position in Order F06-11 that it would only be in rare circumstances where disclosure to applicants of their own personal information would be an unreasonable invasion of a third party's personal privacy. I also agree with her statement that the public body has the burden of proof with respect to denying an applicant access to her own personal information.[18] As mentioned above, the only issue here is with respect to the identities of third parties who have expressed comments or opinions about the applicants. In this case, the substance of such comments and opinions has

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[13] Order 01-07, [2007] B.C.I.P.C.D. No. 1, para. 32; *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.), at paras. 85-89.
[14] Ministry initial submission, para. 44.
[15] Order F06-11, [2006] B.C.I.P.C.D. No. 18, para. 62.
[16] Applicant's initial submission, paras. 19-23.
[17] Applicant's initial submission, para. 24.
[18] Order F06-11, [2006] B.C.I.P.C.D. No. 18 , paras. 77-79; Order No. 330-1999, [1999] B.C.I.P.C.D. No. 43.

already been disclosed to the court through the report. I consider this to be a relevant circumstance favouring disclosure.

[38] There is a small amount of information about the applicants in the notes that the counsellor did not reference directly in the report. The comments of third parties that form part of this information are consistent in character with comments the counsellor describes in the report. I consider this to be a relevant circumstance favouring disclosure.

[39] Furthermore, the counsellor obtained the consent of the third parties for the disclosure of their personal information in the report and notified them that their personal information could be disclosed in response to a request under FIPPA. Therefore, they did not supply their information in confidence. I consider this to be a relevant circumstance favouring disclosure.

Would disclosure be an unreasonable invasion of privacy?

[40] I have stated above that it is only in rare circumstances where disclosure of an applicant's personal information would be an unreasonable invasion of a third party's personal privacy. This is not one of those circumstances. Given that the information at issue is a few brief comments about the applicants alone, the content of which is identical to, or consistent with, comments that the counsellor disclosed in the report, and also given that the third parties have consented to the disclosure of their information in the report, I find that it is not an unreasonable invasion of a third party's personal privacy to disclose to the applicants comments about them alone. Therefore, I find that s. 22(1) of FIPPA does not require the Ministry to withhold the information at issue.

Would providing a summary in accordance with s. 22(5) be appropriate in this case?

[41] The Ministry submits that, as a result of the narrowing of the request, the only issue at stake with respect to s. 22 of FIPPA is the "sufficiency of the Ministry's summaries" that were provided to the applicants.[19] I have reviewed the summary the Ministry provided.[20] The summary does disclose some, but not all of the comments at issue in this inquiry. Moreover, as I have determined that the disclosure of some brief passages from the records would not be an unreasonable invasion of the third parties' personal privacy, and that the third parties did not supply the information in confidence, I find that s. 22(5) of FIPPA does not apply.

[19] Ministry's reply submission, para. 4.
[20] Ministry's initial submission, Affidavit of A.M. Exhibit E.

Can the records be reasonably severed?

[42] The only remaining issue is the severability of the record. It is possible to remove the information about third parties that the applicants excluded from the scope of their request. This will leave the information that is solely about the applicants (and has no links to the personal information of third parties) and comments and opinions about the applicant's where the identity of the speaker can be inferred. The result is a number of mostly blank pages with a few words on them, but the applicants were adamant that they wanted to receive their personal information. Therefore, I have prepared these pages for the Ministry to disclose to the applicant by highlighting the information to be disclosed.

4.0 CONCLUSION

[43] For the reasons discussed above, I make the following orders under s. 58 of FIPPA:

1. I require the Ministry to give the applicants access to the passages highlighted in yellow on pages 33, 38, 40, 41, 53, 58, 61-3, 70, 72, 79, 80, 92 and 93, as indicated in the copies of these pages that I have supplied to the Ministry with a copy of this Order.

2. I require the Ministry to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before May 6, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

March 23, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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