

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 257-1998
August 14, 1998**

INQUIRY RE: The adequacy of a search for records by the Ministry for Children and Families.

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on April 15, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of whether the Ministry for Children and Families (the Ministry) complied with section 6 of the Act in its search for records.

2. Documentation of the inquiry process

On August 15, 1996 the applicant requested copies of all the records in the Ministry for Children and Families' custody that the Superintendent of Children and Families relied on in a matter relating to his daughter. On October 21, 1996 the Ministry responded by indicating that it had disclosed all records in its custody or control.

The applicant requested a review of this decision on December 2, 1996. As a result of the involvement of this Office, the applicant was provided with another shipment of records. Over the next year, the applicant requested three more reviews and was provided with more records as a result. The inquiry was set for April 1, 1998, but the applicant asked that this date be moved to March 30, 1998. The Ministry did not object to the change in dates. On February 23, 1998 I amended the schedule, and my Office issued revised Notices of Inquiry. On March 23, 1998 I granted an adjournment of two weeks upon the agreement of the parties, rescheduling the inquiry to April 15, 1998.

3. Issue under review and the burden of proof

The issue under review is the Ministry's duty to assist the applicant under section 6 of the Act. Section 57 of the Act, which establishes the burden of proof in an inquiry, is silent with respect to a request for review about the issue of adequate search. As I decided in Order No. 103-1996, May 23, 1996, the burden of proof is on the public body in these circumstances.

The relevant sections of the Act are as follows:

Duty to assist applicants

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
- (2) Moreover, the head of a public body must create a record for an applicant if
- (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
 - (b) creating the record would not unreasonably interfere with the operations of the public body.

4. The records in dispute

The records in dispute consist of all records relied upon by the Superintendent that relate to the applicant and his minor daughter.

5. The applicant's case

The applicant believes that he has not received all of the records that relate to the Ministry's apparent apprehension of his daughter some years ago.

6. The Ministry's case

I have discussed below the Ministry's description of its efforts to assist the applicant.

7. Discussion

The scope of my jurisdiction

In conducting a review under section 6, I must first address the scope of my jurisdiction. The *Child, Family and Community Service Act* (CFCS Act), which came into effect on January 29, 1996, provides that the *Freedom of Information and Protection of Privacy Act* does not apply to certain records, except to the extent provided for in Part 5. Sections 73 and 74 of the CFCS Act provide as follows:

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.
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.

While certain provisions of the *Freedom of Information and Protection of Privacy Act* are incorporated by reference into Part 5 (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.

Some of the records provided by the Ministry to the applicant were made under the CFCS Act on or after January 29, 1996 and are in the custody or control of a director. (Affidavit of Gladys Michael, paragraph 24) My review of the duty to assist under section 6 of the Act does not encompass these records.

Based on my review of the CFCS Act, I conclude that my jurisdiction to conduct a review under section 6 is limited to records made on or after January 29, 1996, 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. It is regrettable that the duty to assist under section 6 of the *Freedom of Information and Protection of Privacy Act* does not extend to all records in the custody or control of the director regardless of the date on which they were made.

Section 6: Duty to assist applicants

The Ministry has provided both myself and the applicant with an eight-page accounting of its efforts to assist him in response to his requests for access to records. (Submission of the Ministry, paragraphs 4.09 to 4.34, and the Affidavit of Gladys Michael, paragraphs 1 to 33) He was also provided with a seven-page affidavit from the Information and Privacy Coordinator for the Ministry that provides additional detail.

Anyone reading the above narrative would quickly conclude that the applicant, as a lay person, may have reason to have a somewhat jaundiced view of the series of responses that he has received from the Ministry, since it kept providing him with more and more records over the last several years. The Ministry's response is that it was doing so as the applicant provided it with more information about persons and public bodies that he had had discussions with over time. But it is also true that the Ministry's staff made certain assumptions about the scope of searches that did not prove, in the end, to be valid, since further searches uncovered more responsive records, which have now been disclosed, subject to standard severances.

I find it unsatisfactory that a Ministry with a distinguished record of assisting applicants with requests for access to their own personal information should have proved to be somewhat deficient in finding records in response to this series of requests. This particular Ministry, with its range of clients, cannot always depend on the clients themselves to ask the right questions, or even supply full information, about what records should exist about themselves. Nor is it sufficient for the Ministry to always rely on its electronic tracking system as the only aid for locating records, since it is evident from the Ministry's own submission, that not all client information is recorded on the system. Where indicators exist either from the nature of the request or a review of the records, that an applicant may have had connections with the Ministry other than those recorded on the electronic system, the Ministry should make additional efforts to clarify the existence of records in these areas.

However, I do find at the end of the day that the Ministry has met its duty to the applicant under section 6 of the Act with respect to those records which are not excluded from the application of the Act.

8. Order

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an Order under this section. I find that the search for records conducted by the Ministry for Children and Families in respect of records not excluded from coverage under the Act by the *Child, Family and Community Service Act* (CFCS Act) was a reasonable effort within the meaning of section 6(1) of the Act.

Under section 58(3)(a) of the Act, I require the Ministry for Children and Families to perform its duty under section 6(1) to make every reasonable effort to assist the

applicant. However, since I have found that the search for records not excluded from coverage under the Act by the CFCS Act was reasonable, I find that the Ministry has complied with this Order and has discharged its duty under section 6(1) of the Act.

David H. Flaherty
Commissioner

August 14, 1998