

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-007

May 6, 1998

ALBERTA FAMILY AND SOCIAL SERVICES

Review Number 1354

I. BACKGROUND

[1.] The Applicant's mother was born in 1931 and was subsequently placed in the care of child welfare authorities. She was adopted in 1934. In a letter dated September 20, 1997, the Applicant, acting as agent for the mother, applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Department of Family and Social Services (the "Public Body") for any records held by the Public Body regarding the Applicant's mother.

[2.] The Public Body located one piece of information, a one page in-take sheet recording the particulars of the Applicant's mother's birth, which had been prepared by an institution that served, in those days, as a "home for unwed mothers" (the "institution"). The in-take sheet is a form document which lists categories of information on the left-hand side of the document and information specific to a particular birth adjacent to each category on the right. The Public Body provided a severed copy of this document to the Applicant. The Public Body gave the Applicant access to several lines of information, but denied the Applicant access to the bulk of the information listed on the in-take sheet under section 5(2) of the Act (the provisions of another enactment prevail over the Act) and section 16(1) of the Act (disclosure would be an unreasonable invasion of a third party's personal privacy).

[3.] In a letter dated October 17, 1997, the Applicant requested that I review the Public Body's decision. Mediation was authorized but was not successful. An inquiry was held on March 19, 1998, in which representations were made in writing by the Applicant and the Public Body.

II. RECORD AT ISSUE

[4.] The record at issue in this case consists of 12 lines of information severed from the one page in-take sheet prepared by the institution. Five of the 12 lines of information severed from the record provide the following information relating to the birth mother: name, occupation, age, nationality, religion and place of birth. The Public Body also severed four lines of information about the birth father - name, age, occupation and nationality - as well as information listed adjacent to the category "Parents' Add." (parents' address), the name of an additional third party listed next to the father's name and information listed adjacent to the category "Cause". Though it is difficult to make out the precise significance of this latter piece of information, it appears, given the context in which it was recorded, that it refers either to the circumstances surrounding the child's conception or the circumstances precipitating the relinquishment of the child to child welfare authorities.

[5.] Access to the names of the birth parents, the birth place of the birth mother and the information listed adjacent to "Parents' Add." was denied under section 5(2) of the Act. The Public Body also claims that this information, and the rest of the information it severed from the record is not releasable under section 16(1) of the Act.

III. ISSUES

[6.] There are two issues in this inquiry:

1. Did the Public Body correctly apply section 5(2) when it refused to disclose to the Applicant the names of the birth parents, the information listed adjacent to "Parents' Add." and the birth place of the birth mother?
2. Did the Public Body correctly apply section 16 of the Act when it refused to disclose to the Applicant the names of the birth parents, the information listed adjacent to "Parents' Add." and "Cause", the birth mother's place of birth and religion, the birth parents' occupations, ages and nationalities and the name of a third party listed adjacent to the name of the birth father?

IV. DISCUSSION OF THE ISSUES

Issue 1: Did the Public Body correctly apply section 5(2)?

a) Relevant Legislation

Freedom of Information and Protection of Privacy Act

[7.] Section 5(2) of the Act states:

5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

- (a) another Act, or*
- (b) a regulation under this Act*

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

Freedom of Information and Protection of Privacy Regulation

[8.] Section 15(1) of the regulation states:

15(1) The following provisions prevail despite the Freedom of Information and Protection of Privacy Act:

...

- (b) Child Welfare Act, sections 66(6) and (8), 91(4);*

Child Welfare Act

[9.] Section 66(6) and section 66(8) state:

66(6) The Minister shall seal all documents in his hands that relate to an adoption and those documents are not available for inspection by any person except on order of the Court, with the consent of the Minister or pursuant to 66.1 or 67.

...

66(8) The Minister may disclose the identity of a person referred to in section 66.1 only in accordance with 66.1 unless, in the opinion of the Minister, the disclosure is necessary to the health of the adopted person.

b) Positions of the Parties

(i) Applicant's Position

[10.] The Applicant made no submissions regarding the Public Body's interpretation and application of section 5(2).

(ii) Public Body' Position

[11.] The Public Body takes the position that the information in question can not be released under the Act because, under section 5(2) of the Act, sections 66(6) and 66(8) of the Child Welfare Act, provisions dealing with the disclosure of adoption information, prevail over the access provisions of the Act. The Public Body argues that the information in question is identifying information about the birth parents and, as such, is part of the sealed adoption record and thus beyond the scope of the Act. It argues that "any information which would identify the natural parents, no matter in which departmental file it is contained, becomes part of the 'sealed adoption information'."

c) Analysis

(i) Burden of Proof

[12.] Section 67 sets out the burden of proof in cases where a request for access to information has been made under the Act. In this case, the Public Body is arguing that the access request can not be considered because the provisions of another enactment prevail over the access provisions of the Act. The Act is silent as to which party bears the burden of proof in such a case. In Order 97-004, I determined that when the Act is silent, I may determine who bears the burden of proof. In that case I considered the following criteria in determining the issue:

(i) Who raised the issue?

(ii) Who is in the best position to meet the burden of proof?

[13.] I intend to consider the same criteria here in order to determine who bears the burden of proving this issue. The Public Body is the party who is invoking section 5(2) of the Act. It has raised the issue. Moreover, the issue it raises involves a complex matter of statutory interpretation involving legislation under its purview. The Public Body is therefore in the best position to meet the burden of proof. For these reasons I conclude that the burden of proof should be on the Public Body with regard to establishing that section 5(2) is indeed applicable in this case.

(ii) Does Section 5(2) Apply?

[14.] Section 5(2) of the Act and section 15(1)(b) of the regulations to the Act (Alta. Reg. 200/95) make it clear that when the access provisions of the Act are inconsistent or in conflict with the provisions of sections 66(6) and 66(8) of the *Child Welfare Act*, the latter provisions prevail. The question I have to determine here is whether the information requested by the Applicant is information within the meaning of section 66(6) or 66(8) of the *Child Welfare Act*. If it is, then these provisions prevail over the access provisions of the Act. To put it another way, if the information the Applicant is seeking can be characterized as a document that relates to an adoption under section 66(6) or information within the meaning of section 66(8), then the Applicant's access request cannot be considered under the Act.

[15.] I find that the information in question is not a document that relates to an adoption under section 66(6). I don't agree with the position taken by the Public Body that any information it holds which would identify the birth parents is, by definition, part of the sealed adoption record. This definition is too broad, as it would encompass any identifying information regardless of where it was located and the context in which it was collected.

[16.] Section 66(6) of the *Child Welfare Act* directs the Minister to seal "all documents in his hands that relate to an adoption". The section goes on to specify how these documents and both the identifying and non-identifying adoption information they contain can be accessed. The way I read it, section 66(6) and the sections to which it refers, sections 66.1 and 67, establish a complete code for dealing with requests for documents and the information they contain that relate to an adoption. A document that relates to an adoption is, in my view, a document which has been prepared in the processing of an adoption or the making of an adoption order. The in-take sheet prepared by the institution does not fit this description. It was prepared to record the particulars of the Applicant's mother's birth three years prior to her adoption. It bears no direct relation to the adoption which subsequently took place and is therefore not a document that relates to an adoption under section 66(6) of the *Child Welfare Act*.

[17.] For these reasons I find that the record in question is not a document that relates to an adoption within the meaning of section 66(6) of the *Child Welfare Act*, and that this section is therefore not applicable in this case.

[18.] I must now consider whether section 66(8) prevails over the access provisions of the Act with regard to the release of any of the information in question. Under section 66(8), the identities of birth parents and other individuals listed in section 66.1, who are intimately involved in an adoption, can only be released by the Minister in accordance with the voluntary disclosure process outlined in that section or, if in the opinion of the Minister, the disclosure is necessary to the health of the adopted individual.

[19.] In order to correctly interpret this section and, specifically, the kind of information it refers to, I must read the section within its legislative context. Section 66(8) is located in Part 6 of the Child Welfare Act, the part of this Act which deals with adoptions. Section 66, as a whole, addresses various issues concerning the distribution and management of adoption orders and information once an adoption order has been made. Given this context, and the fact that section 66(8) refers to section 66.1, the provision outlining a voluntary process for disclosing identifying adoption information, I find that section 66(8) is concerned with the release of information concerning the identities of those involved in an adoption, from documents relating to an adoption. For the reasons noted above, I find that the document in question is not one that relates to an adoption. I therefore find that section 66(8) is not applicable in this case.

[20.] I find that neither section 66(6) nor section 66(8) of the Child Welfare Act is applicable here, and that section 5(2) of the Act therefore does not operate to remove the Applicant's request from the purview of the Act.

d) Conclusion With Regard to Section 5(2)

[21.] For the reasons noted above, I find that the Public Body incorrectly applied section 5(2) of the Act. All of the information in question is subject to the access provisions of the Act. I must now consider whether the Public Body correctly applied section 16 of the Act when it refused the Applicant access to the information in question.

Issue 2: Did the Public Body correctly apply section 16 of the Act?

a) Positions of the Parties

(i) Applicant's Position

[22.] The Applicant has been able to obtain most of the information at issue in this case from other sources. The Applicant does not, however, have the information listed adjacent to "Parents' Add." on the in-take sheet and is

particularly anxious to gain access to this information. The Applicant submits that the Applicant and a sibling are suffering from debilitating illnesses which cannot be explained. The Applicant believes that these illnesses have genetic roots and that finding information about the Applicant's mother's medical history will help to resolve the medical problems in the family. The Applicant recognizes that the possibility of the mother's birth parents still being alive is very slim. The Applicant believes, however, that the address listed adjacent to "Parents' Add." may provide the small lead required to locate friends and members of the mother's birth family who can provide the medical background information they are seeking.

(ii) Public Body's Position

[23.] The Public Body takes the position that the information in question is personal information within the meaning of section 1(1)(n) of the Act. It argues that releasing this information would be an unreasonable invasion of a third party's personal privacy under section 16(1). The Public Body relies upon the presumptions against disclosure outlined in sections 16(2)(g)(i) and 16(2)(g)(ii) to make its case. It also states that it considered the circumstances outlined in section 16(3)(e) and section 16(3)(f) of the Act in determining whether the disclosure constitutes an unreasonable invasion of a third party's personal privacy.

b) Is The Information In Question Personal Information?

[24.] Personal information is defined in section 1(1)(n) of the Act as "recorded information about an identifiable individual". The section goes on to provide a non-exhaustive list of the kinds of information which qualify as personal information. The parts of section 1(1)(n) which are relevant to this case read:

[25.] *1(1)(n) "personal information" means recorded information about an identifiable individual, including*

(i) the individual's name, home or business address or home or business telephone number,

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

...
(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

[26.] I find that all of the information the Applicant is seeking is personal information within the meaning of section 1(1)(n), for the following reasons. All of the information is recorded information about identifiable individuals. The information in question, in fact, concerns four identifiable individuals: the birth parents, a third party listed adjacent to "Parents' Add." and an additional third party listed next to the birth father's name. The names of the birth parents, the name and address of the third party listed adjacent to "Parents' Add." and the name of an additional third party listed next to the birth father's name qualify as personal information under section 1(1)(n)(i). Information concerning the birth parents' ages qualifies as personal information under section 1(1)(n)(iii), and information concerning their nationalities, the birth mother's place of birth and religion is personal information within the meaning of section 1(1)(n)(ii). Information concerning their occupations is also personal information under section 1(n)(vii). The information listed adjacent to "Cause", though not specifically listed in section 1(1)(n), is highly sensitive and personal in nature. I find that it is also personal information within the meaning of the section because it is recorded information about an identifiable individual.

b) Would the disclosure of the personal information be an unreasonable invasion of a third party's personal privacy under section 16(1) and section 16(2)?

[27.] The Public Body submits that section 16(1) and section 16(2)(g) are applicable in this case. These sections read as follows:

[28.] *16(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.*

16(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...
(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party.

[29.] Having reviewed the record, I find that the presumption in section 16(2)(g) applies to all of the personal information in question. Consequently, disclosure of the personal information is presumed to be an unreasonable invasion of the personal privacy of all of the third parties concerned within the meaning of section 16(1).

c) Relevant Circumstances Considered by the Public Body under section 16(3)

[30.] Under section 16(3) of the Act, a Public Body must consider all relevant circumstances when deciding whether the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy. Section 16(3) is a non-exhaustive list.

[31.] The Public Body states that it considered section 16(3)(e) (unfair exposure to financial or other harm) and section 16(3)(f) (personal information supplied in confidence) in making this determination.

i. Section 16(3)(e) as a relevant circumstance

[32.] Section 16(3)(e) reads as follows:

16(3) In determining under subsection (1) or (2) 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

...

(e) the third party will be exposed unfairly to financial or other harm,

[33.] If considered to be relevant circumstance, this factor weighs in favour of not disclosing the personal information in question.

[34.] The Public Body argues that disclosing the names of the birth parents could conceivably harm their relationships with other family members who may be unaware of their past history. The "harm" in this case concerns the potential damage to familial relationships should this information come to light.

[35.] This record documents events which took place approximately 67 years ago. There is no doubt that those who were intimately involved in these events were deeply affected by what occurred. Those persons, and most particularly the birth mother, would have been subject to social stigma and censor as a consequence of these events. I think it is therefore possible that the birth parents kept this part of their life histories from family members and that disclosing their names could conceivably disrupt their present-day familial relationships. It is, however, highly possible that the birth parents are no longer living. If this is the case, the disclosure of this information could conceivably still be harmful to them in the sense that it could damage their reputations. I find that both kinds of harm constitute "harm" within the meaning of section 16(3)(e).

[36.] The focus of section 16(3)(e), however, is whether there is unfair exposure to harm. It is up to the Public Body to decide that issue, based on a consideration of the circumstances. In these circumstances, I find that the birth parents would be exposed unfairly to harm if their personal information was disclosed.

[37.] I therefore agree with the Public Body that section 16(3)(e) is a relevant circumstance to consider in making a determination under section 16(1) and section 16(2) with regard to the personal information of the birth parents.

[38.] I cannot come to the same conclusion with regard to the disclosure of the personal information relating to the other third parties concerned. These individuals were not directly involved in the events which occurred. I can not see, therefore, how they would be exposed unfairly to harm, within the meaning of section 16(3)(e), if the personal information recorded about them in this context was disclosed.

ii. Section 16(3)(f) as a relevant circumstance

[39.] Section 16(3)(f) reads as follows:

16(3) In determining under subsection (1) or (2) 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

...

(f) the personal information has been supplied in confidence,

[40.] If considered to be relevant circumstance, this factor weighs in favour of not disclosing the personal information in question.

[41.] The Public Body submits that information of this kind is supplied in confidence by birth parents who are surrendering their children for adoption with the assurance that their identities will not be disclosed without their consent. The Public Body contends that if this promise of confidentiality is not kept, its officials will experience difficulty collecting accurate information from birth parents who desire anonymity and fear that information about them will be disclosed without their consent.

[42.] I agree with the Public Body that section 16(3)(f) is a relevant circumstance to consider when determining whether the disclosure of the third parties' personal information would be an unreasonable invasion of their privacy, but for reasons which differ from those raised by the Public Body. The primary concern under section 16(3)(f) is to honour promises of confidentiality made to individuals providing personal information, and to protect their privacy and the privacy of others to whom the information relates. I will assume, given the context in which this information was recorded and the sensitivity of the events recorded, that the information in question was supplied in confidence. Therefore, I find that the information in question was supplied in confidence and that the promise of confidentiality made to those concerned is a relevant consideration in making a determination under section 16(1).

d) Did the Applicant Meet the Burden of Proof Under section 67(2)?

[43.] Section 67(2) of the Act provides that if a Public Body refuses access to a record, and the record in question contains personal information about a third party, it is up to the Applicant to prove that disclosure of the information would not be an unreasonable invasion of a third party's personal privacy.

[44.] Because all of the information in question is personal information, the Applicant bears the burden of proving that the disclosure of the information would not be an unreasonable invasion of a third party's personal privacy.

[45.] An Applicant may meet the burden of proof under section 67(2) by showing that one of the circumstances listed in section 16(4) of the Act applies. Section 16(4) lists a number of circumstances where the disclosure would not be an unreasonable invasion of a third party's personal privacy even if the criteria in section 16(1) of section 16(2) have been satisfied.

[46.] The Applicant has stated that the Applicant and a sibling are suffering from serious illnesses which appear to have genetic roots. The Applicant is seeking access to the information in question, and specifically the information listed adjacent to "Parents' Add.", in the hopes that it will lead the family to information

about the Applicant's birth grandparents' medical histories which may help the Applicant's family understand and diagnose these medical problems. I understand the Applicant to be saying that section 16(4)(b) of the Act is applicable to this case. Section 16(4)(b) states the following:

16(4)(b) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(b) there are compelling circumstances affecting anyone's health or safety and notice of the disclosure is mailed to the last known address of the third party,

[47.] In order to establish that the disclosure of the record at issue is not an unreasonable invasion of a third party's personal privacy under section 16(4)(b), an Applicant must prove two things: (i) that there are, indeed, compelling circumstances affecting anyone's health or safety; and (ii) that there is a causal connection between disclosing the personal information and the compelling circumstances affecting anyone's health or safety. In order to fall within the parameters of section 16(4)(b), then, the Applicant in this case must establish that the release of the information requested is likely to have a direct bearing on a compelling health or safety matter.

[48.] I find that the Applicant has not established that there are compelling circumstances affecting anyone's health or safety. I make this finding for the following reasons. The Applicant has stated that there are compelling health concerns affecting the Applicant and the Applicant's sibling. Yet, the Applicant has not provided me with a letter from a doctor or any other evidence documenting the nature and severity of the medical problems experienced by the Applicant and others in the Applicant's family. An Applicant in this situation must do more than simply say that compelling health problems exist. An Applicant must provide evidence which documents the fact that there are compelling health concerns. Because the Applicant has not provided that evidence, the Applicant has not met the first criterion. Consequently, I find that section 16(4)(b) is not applicable. I therefore do not need to consider whether the second criterion - whether the disclosure of the information in question is likely to have a direct bearing on the problem - has been met.

[49.] I sympathize with the Applicant's desire, and that of the Applicant's mother and family for information about their family's history. However, I find that the Applicant has not met the burden of proof under section 67(2) of the Act, and that the personal information in question is therefore not releasable.

[50.] I would like to make an additional comment about this request for information. Given the age of this record and the events which it documents, it is highly likely that all of the third parties listed on the record are dead. If the Applicant could establish that the birth parents have been dead for 25 years or more, the information the Applicant is seeking may well be releasable under section 16(4)(i). This section states:

[51.] *16(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*

(i) the personal information is about an individual who has been dead for 25 years or more.

f) Conclusions under section 16

[52.] I find that the Public Body correctly applied section 16(1) and section 16(2)(g) of the Act.

V. ORDER

[53.] Under section 68 of the Act, I make the following order:

1. The Public Body incorrectly applied section 5(2) of the Act. I hold that the Applicant's access request is subject to the provisions of the Act.
2. The Public Body correctly applied section 16 of the Act (personal information). I therefore uphold the head's decision to refuse access to the personal information requested.

Robert C. Clark
Information and Privacy Commissioner