

FILE NO. 92/011

**REPORT WITH RESPECT TO THE APPLICATION
FOR REVIEW OF [REDACTED] WITH RESPECT TO INFORMATION
REQUESTED FROM DEPARTMENT OF SOCIAL SERVICES**

[REDACTED], the Applicant, made three applications for access to information to the Department of Social Services with respect to reports prepared by and submitted to Social Services by the Ombudsman with respect to his investigation into the deaths of [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. These reports deal with entirely separate incidents. The report regarding [REDACTED] was received by Social Services on March 12, 1992. The reports with respect to [REDACTED] [REDACTED] [REDACTED] are both dated June 17, 1992.

It would appear that when the latter two reports were received by Social Services, the Department released the recommendations made by the Ombudsman in each of these two reports, but did not release the reports themselves. There were no recommendations in the [REDACTED] report.

Consequently, the Applicant requested copies of each report, and by letter dated July 17, 1992 from Social Services was advised in part:

"Your applications for access to the Ombudsman's reports on [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] were received at this office on June 17, 1992. This is to advise you that the reports you have requested cannot be released, but as you know the recommendations have been made public previously.

This information cannot be released because the reports requested contain personal information. Information of this nature is protected from access according to Section 29 of *The Freedom of Information and Protection of Privacy Act*. A copy of our legal opinion on release of these reports is attached.

It is important to note that *The Freedom of Information and Protection of Privacy Act* does not only deal with public access to government records, but has, in fact, strengthened the protection of the privacy of individuals. We should not lose sight of this aspect of the legislation."

The opinion referred to in the letter from the Department is dated June 18, 1992, a copy of which is attached as Appendix "A" hereto.

Although, as I have noted, there are three separate requests for review, the issues in each are, in the main, common to all and I am therefore dealing with all of them in this report.

By letter dated July 28, 1992, I advised the Department that I would be conducting a review as required by Section 51 of the Act. The public importance and the sensitivity of these matters is exemplified by the fact that the then Minister of Social Services wrote a letter to the Regina Leader Post which was published on July 15, 1992 expressing her views with regard to these matters and the problem of balancing the public right to

know with the right to privacy of individuals. She expressed the view that while her personal desire was to release the report, she was bound to follow the advice she had received that releasing these reports would, in all likelihood, constitute a contravention of the provisions of the Act protecting the privacy of individuals.

Each of the reports in question was prepared by the Ombudsman at the request of the then Minister of Social Services. This does not mean, however, that the Ombudsman was acting as an agent of the Department. When the Ombudsman undertakes an investigation he does so in the fulfilment of the duties of his office. He is not an agent of the Executive Government of Saskatchewan and therefore, in my view, is not subject to the provisions of *The Freedom of Information and Privacy Act* (the "Act"). However, once a report has been prepared and submitted by the Ombudsman to a "government institution" such as Social Services, the report becomes a record within the meaning of Section 2(1)(i) of the Act. It is in the possession or control of the department within the provisions of Section 5 of the Act and is therefore subject to access pursuant to the Act unless it comes within one of the many exceptions.

There are provisions in *The Ombudsman's Act* which authorize the Ombudsman to make reports public at his discretion, and accordingly early in the review I had discussions with the

Ombudsman and a meeting with the Ombudsman and representatives of the Department to determine whether, given the apparent difficulties associated with release under *The Freedom of Information and Privacy Act*, the Ombudsman would be prepared to make these reports public. This possibility was considered by the Ombudsman and in the result his decision was that he would not release the reports at that time.

Consequently, I held further discussions and meetings with the Department and received, at my request, written submissions from them on various points with a view to determining whether denial of access by the Department was justified by the Act. I paid particular attention to the concerns raised by the Applicant in his Request for Review, in which he stated in part:

"... the department failed in its duty under S. 8 of The FOI & POP Act to give access to as much of the record as possible. Nor did the department explore how much info. was already publicly available and could therefore be released under S. 29(2)(p). Finally, I would argue the record could be released under S. 29(2)(o)."

Each of the reports is replete with personal information about each of the [REDACTED] and the [REDACTED], while the report with respect to the death of [REDACTED] contains a great deal of personal information about the [REDACTED] and his mother. It is true that in each case criminal proceedings were taken and a considerable amount of the information contained in each of

these reports was disclosed and became public knowledge as a result of the trial of [REDACTED], at which she was convicted of second degree murder; the trial of [REDACTED], at which he was convicted of manslaughter with respect to the death of [REDACTED]; and the preliminary hearing of [REDACTED] with respect to the death of [REDACTED] [REDACTED], following which he pleaded guilty to manslaughter; but this information is already available to the Applicant.

While it is apparent that the Ombudsman obtained some information from these court records, it is also apparent that he obtained information from many other sources including, in each case, an examination of records in the Department of Social Services and interviews with other persons who had some involvement, some of who are not identified because the Ombudsman or his investigator obtained the information on a confidential basis, and with officers or employees of the Department.

There are stringent provisions in Section 74 of *The Child and Family Services Act* dealing with confidentiality:

"74(1) Notwithstanding section 18 of *The Department of Social Services Act*, members of the board, members of family review panels, mediators, officers and employees of the department, foster parents and all other persons who are employed in or assist with the administration of this Act:

(a) shall preserve confidentiality with respect to:

(i) the name and any other information that may identify a person that comes to their attention pursuant to this Act; and

(ii) any files, documents, papers or other records dealing with the personal history or record of a person that have come into existence through anything done pursuant to this Act; and

(b) shall not disclose or communicate the information mentioned in clause (a) to any other person except as required to carry out the intent of this Act or as otherwise provided in this section.

(2) The minister, a director or an officer may disclose or communicate information mentioned in subsection (1) relating to a child to:

(a) the guardian, parent or foster parent of that child; or

(b) the child to whom the information relates.

(3) On the request of a person, the minister or a director may:

(a) disclose; or

(b) authorize an officer to disclose;

information mentioned in subsection (1) relating to that person in any form that the minister or director considers appropriate.

(4) Notwithstanding subsection (2) or (3), no person shall, except while giving evidence in a protection hearing, disclose to anyone who is not an officer or a peace officer the name of a person who:

(a) makes a report pursuant to section 12; and

(b) requests that his or her name not be disclosed.

(5) Any information that may be disclosed to the person to whom it relates may with the written consent of the person to whom it relates, be disclosed to any other person.

(6) Any disclosure of information pursuant to this section does not constitute a waiver of Crown privilege, solicitor-client privilege or any other privilege recognized in law. 1989-90, c.C-7.2, s.74."

By virtue of Section 23(1) of the Act, the provisions of any other act or regulation restricting or prohibiting access to information is overridden, but by virtue of subsection 23(3) the provisions of a number of statutes, including under subsection (3)(c), Section 74 of *The Child and Family Services Act*, are excluded from the overriding provision and are specifically stated to prevail over the provisions of the Act.

Accordingly, information covered by Section 74 of *The Child and Family Services Act* by the Department is confidential and cannot be accessed under the Act, nor indeed can it be so much as examined by me as Commissioner:

"54(1) Notwithstanding any other act or any privilege that is available at law, the Commissioner may, in a review:

- (a) require to be produced and examine any record that is in the possession of or under the control of a government institution;..."

This provision does not, in my view, override the preservation of confidentiality provided by Section 23 (3)(c), as it only refers to "any other act". In my view, only the clearest of provisions could be relied upon to negate the confidentiality provisions in *The Child and Family Services Act*.

In reporting to me on their efforts to sever personal and confidential information, which I had requested, the Department, by letter dated April 22, 1993, advised me that they were unable to produce an intelligible result.

I have examined each of the reports in question and I can find no basis to disagree with the conclusions reached by the Department, since it appears to me that any attempt at expurgation would render the reports meaningless, except for quotations from statutes, excerpts from legal decisions and observations or opinions on questions of law.

Finally, has the Minister properly exercised her discretion with respect to the disclosure of personal information under Section 29(1)(o) which empowers the Minister to make disclosure for any purpose where, in her opinion, public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure? I am satisfied that this possibility has been carefully addressed by the Minister and responsible officials in her Department. Her decision not to make disclosure under this provision appears to have been duly exercised. In the absence of any impropriety, I have no basis for questioning her decision. As matters stand, the Ombudsman has made known his view that these reports ought not to be disclosed, either in whole or in an abridged form.

Accordingly, I have concluded, after an exhaustive and lengthy review of this whole matter, that the Department's decision not to disclose the Ombudsman's reports is in accordance with the Act.

As mentioned above, the Ombudsman may publish the reports in accordance with the provisions of *The Ombudsman Act*:

"30.(2) The Ombudsman may from time to time in the public interest or in the interest of any person, department or agency of the government publish reports relating:

- (a) generally to the exercise of his powers and the performance of his duties and functions under this Act; or
- (b) to any particular case investigated by him;

whether or not the matters to be dealt with in any such report have been the subject of a report to the Assembly. 1972, c.87, s. 30."

Furthermore, the Ombudsman is not constrained by the confidentiality provisions in *The Child and Family Services Act*. *The Ombudsman Act* provides:

- "22(4)(b) no provision of an Act requiring a person to maintain secrecy in relation to, or not to disclose information relating to, any matter shall apply in respect of an investigation by the Ombudsman and no person who is required by the Ombudsman to furnish any information or to produce any document, paper or thing or who is summoned by the Ombudsman to give

evidence, shall refuse to furnish the information, produce the document, paper or thing or to answer questions on the ground of such a provision."

It would appear that disclosure is within the competence of the Ombudsman.

Dated at Regina, Saskatchewan this day of June,
1993.

**Derril G. McLeod, Q.C.,
Commissioner of Information and
Privacy for Saskatchewan**