Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1380

Appeal P_9600409

Ministry of Community and Social Services

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NATURE OF THE APPEAL:

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Community and Social Services (the Ministry). The request was for two specific letters written by an adoption practitioner to the Ministry's adoption unit, concerning the proposed adoption of two children from outside Canada by the appellant and his wife. The adoption practitioner conducted a home study to assess the suitability of the appellant and his wife as adoptive parents.

The Ministry responded to the request by denying access to the two letters. This denial was based on the confidentiality provision in section 165 of the Child and Family Services Act (CFSA), which prevails over the Act by virtue of section 67(2) of the Act. In particular, the Ministry relies on section 165(5) of the CFSA, which relates to the application of the Act to information about an adoption.

The appellant appealed this decision. The appellant already has a copy of one of the letters, and the appeal pertains only to the second letter which is not in his possession. The second letter provides details of a negative reference which formed the basis of the adoption practitioner's recommendation against the adoption. As a result of this recommendation, the adoption did not take place.

This office sent a Notice of Inquiry to the appellant and the Ministry. Both parties submitted representations in response to this notice.

One of the questions raised in the Notice of Inquiry was whether the parties would consent to an exchange of representations. This had been requested by the appellant, and because the issue of section 165(5) of the CFSA was more related to the general fact situation and its legal ramifications than to the contents of the record, this was raised as an issue in the Notice of Inquiry. In its representations, the Ministry consented to disclosure of its representations to the appellant. The appellant subsequently provided his own consent to an exchange, and each party's representations were then forwarded to the other party. Once this had occurred, both parties submitted further representations, which I have considered in reaching my decision in this order.

The only issue to be decided in this order is whether, as a result of section 165(5) of the CFSA and section 67(2) of the Act, the record falls outside the scope of the Act.

DISCUSSION:

JURISDICTION

Sections 67(1) and (2) of the Act state, in part, as follows:

> (1) This Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise.
>
> (2) The following confidentiality provisions prevail over this Act:
> ...
>
> 2. Subsections 45(8), (9) and (10), 54(4) and (5), 74(5), 75(6), 76(11) and 116(6) and **section 165** of the Child and Family Services Act. [emphasis added]

Section 165(5) of the CFSA states as follows:

> The Freedom of Information and Protection of Privacy Act does not apply to information that relates to an adoption.

The appellant submits that because the adoption was not approved, and no adoption ever took place, the record is not "information that relates to an adoption" within the meaning of section 165(5) of the CFSA.

The Ministry disagrees with this view. It submits as follows:

> The intent and reach of [section 165(5) of the CFSA] is to apply to all information gathered throughout the adoption process, from the initial home study of the adoptive applicant(s) to the legal finalization of the adoption.
>
> Adoption is a process rather than just the granting of an adoption order by a court. Applicants enter the process for the sole purpose of successfully adopting a child. The information collected throughout the process is gathered and used exclusively for the purposes of pursuing an adoption and for no other purpose. This includes the home study, which establishes whether the applicant(s) are assessed as suitable candidates for adoption. The provision of references is part of the home study process and they are specific for the purposes of an adoption.
>
> The Ministry of Community and Social Services has issued policy guidelines to adoption practitioners regarding the assessment of adoptive applicants. The guidelines state "any negative indications...should be discussed with the informant to assess the validity of the concern." The Ministry expects its approved practitioners to carefully assess whether the negative information is from a credible source and is based on direct knowledge before using such information for assessment purposes. The policy also states that the consent of the informant is required before the negative information and/or identity of the informant can be shared with the applicants. It is intended that this information remain confidential even if an adoption is finalized at a later date.
>
> The paramount goal of adoption is to meet the best interests and needs of a child. The purpose of the reference policy is to ensure that the best interests of the child are protected by enabling the adoption practitioner to obtain full and complete

> information on prospective adoptive parents. It would be very difficult, if not impossible, for persons giving references to communicate candidly about the applicants if there was no confidentiality in situations where negative information may be provided. This would ultimately jeopardize the ability to ensure that an adoption placement would be in the best interests of a child.

The arguments presented by the parties raise a significant issue of statutory interpretation. In such a case, it is often useful to begin by analysing the ordinary meaning of the words used by the Legislature.

I will begin this exercise by considering several definitions of the word "adoption".

Black's Law Dictionary, 5th edition, defines the word in the following way:

> Legal process pursuant to state statute in which a child's legal rights and duties toward his natural parents are terminated and similar rights and duties toward his adoptive parents are substituted. To take into one's family the child of another and give him or her the rights, privileges, and duties of a child and heir. The procedure is entirely statutory and has no historical basis in common law. Most adoptions are through agency placements.

While this definition does refer to adoption as a "process", similar to the approach advocated by the Ministry, the overall impact of the definition suggests that "adoption" actually refers to the completed process, in which the attendant "rights, privileges and duties" are conferred. In my view, therefore, this definition favours the interpretation advanced by the appellant.

Another definition is found in The Dictionary of Canadian Law (Deluxe Edition):

> **An act** which creates a familial relationship in which the adopted child is in law and fact, treated as the adoptive family's natural child. [emphasis added]

This wording again favours the appellant's argument, which looks at "an adoption" as a succinct event that either takes place or does not.

In my view, therefore, these definitions support the view that the ordinary meaning of the phrase "relates to an adoption" requires that an adoption has taken place or, at the very least, will take place.

Moreover, in my view, even if adoption is seen as a "process", this particular use of the process did not culminate in an adoption, and as a result, the information in issue cannot relate to **"an** adoption", which is the phraseology used in section 165(5).

In considering "ordinary meaning", I also note that the drafters of section 165(5) could have used other language if they intended the interpretation argued by the Ministry. For instance, they could have drafted the section to read:

> The Freedom of Information and Privacy Act does not apply to information that relates to an application for adoption, whether or not an adoption takes place.

Moreover, in many other places in the CFSA, other phraseology is used. For example, section 151(2) of the CFSA states that, "No person shall have access to the court file concerning an **application for an adoption order**, except..." (emphasis added). Another example of wording that could have been used to ensure a broader application for section 165(5) can be found in section 162(2), as follows:

> Subject to subsections (3) and 167(6), the **documents used upon an application for an adoption order** under this Part or a predecessor of this Part shall be sealed up together with a certified copy of the original order and filed in the office of the court by the proper officer of the court, and shall not be open for inspection except upon an order of the court or the written direction of the Registrar of Adoption Information appointed under subsection 163(1). [emphasis added]

Clearly, other ways of phrasing section 165(5) could have been used by the drafters of the legislation. Accordingly, although the Ministry's argument about adoption being a process, rather than simply the granting of an adoption order, has some logical appeal, I have concluded that the "ordinary meaning" principle of statutory interpretation works against the Ministry's interpretation of section 165(5).

In my view, the "ordinary meaning" analysis supports the appellant's interpretation. However, as evidenced by the differing interpretations of the parties to this appeal, the words chosen by the Legislature for inclusion in section 165(5) are subject to differences of opinion as to their meaning, and in such a case, it is also helpful to consider other possible sources of statutory meaning, such as comments made in debate prior to passage by the Legislature.

In this regard, the following remarks by the Honourable John Sweeney, then Minister of Community and Social Services, in the context of the introduction of the Bill which added this section to the CFSA, are highly relevant (Hansard, Dec. 1, 1986 at page 3769):

> Later today, I shall present the Adoption Disclosure Statute Law Amendment Act, 1986, to this House for the first reading. This bill amends the relevant sections of the Child and Family Services Act, 1984, and certain related legislation. Its introduction today is the result of several years of consultation.
>
> The extensive consultations were required because of the sensitive and controversial issues involved. It was necessary to strike the best possible balance between the right of the individual to privacy and the right of adoptees to know about their past. The wishes of birth parents who expressed a need to know what became of their child were considered as well.
>
> Early in 1985, my ministry commissioned Dr. Ralph Garber to review the whole matter of adoption disclosure. Dr. Garber's comprehensive and thoughtful report was completed and released late in 1985. It advocated easier access to both nonidentifying and identifying information for all those affected. Dr. Garber

> believes the facts surrounding an individual adoption belong to that person regardless of where and how they are safeguarded.
>
> While my ministry, like Dr. Garber, favours a more open approach to disclosure, we also recognize the right of privacy of all those involved in the adoption process. For example, we were not prepared to accept his recommendation that adult adoptees be given identifying information without the consent of the parties to be disclosed. As well, the government concluded that disclosure of identifying information about adoptees or birth relatives should be restricted until the adopted child becomes an adult. In that way, the integrity and confidentiality of the adoptive family and the best interests of the adopted child are protected while the child is growing up.
>
> Similarly, birth parents are protected against disclosure or contact until the adoptee is an adult and old enough to understand the implications of disclosure for all those who may be affected by it. Until the adoptee is 18 years of age, nonidentifying information is given to adoptive parents to share at their discretion.
>
> Many of Dr. Garber's recommendations were incorporated into the new policy, and careful consideration was given to the comments and concerns expressed by adoption agencies and others involved in the adoption process.
>
> In June 1986, I announced the government's response to the Garber report and released Ontario's new adoption disclosure policy. The bill I shall present today is the legislative embodiment of that policy, the Adoption Disclosure Statute Law Amendment Act, 1986.

In my view, these comments reflect the fact that the main focus of these amendments (including, in my view, section 165(5) of the CFSA) was to protect the confidentiality and privacy of both the adoptee and the birth relative whose identity is sought. Access to information by birth parents about children given up for adoption, and vice versa, is provided for in the CFSA and in my view, section 165(5) is intended to make those provisions a complete code for such situations, and to exclude access to such information from the scope of the Act.

However, this is very different from a case where no adoption has occurred, and in my view, by negative inference, these extracts from Hansard support the view that it was **not** the intention of the Legislature to exclude information about would-be adoptive parents from the scope of the Act where no adoption has occurred. At the very least, they do not support the interpretation advanced by the Ministry.

In contrast to the statements in Hansard, the Ministry argues that the policy behind section 165(5) was to ensure that the adoption practitioner is able to "... obtain full and complete information on prospective adoptive parents", and in particular, negative information. The Ministry explains that its reasons for seeking complete information about prospective adoptive parents is to protect the best interests of children who are to be adopted.

Although I do not agree with the Ministry that the objective of obtaining complete information about prospective adoptive parents is embodied in section 165(5) (whose purposes are, in my view, those outlined in the above extract from Hansard in relation to protecting the "integrity and confidentiality of the adoptive family and the best interests of the adopted child ... while the child is growing up"), it is a legitimate policy objective. It is also the case that being able to provide reasonable assurances of confidentiality to those in a position to provide such information may be an important component in obtaining it.

However, inclusion within the scope of the Act of information about proposed adoptions which are not going to occur is not, in my view, antithetical to providing reasonable assurances of confidentiality. Information about adoptions which do occur would not be subject to the Act in any event. For those applications which are not successful, it is important to note that information which falls within the scope of the Act will not automatically be disclosed to anyone who requests it. In particular, the protection of personal privacy is the focus of the "invasion of privacy" exemptions in section 21 and 49(b) of the Act.

One of the factors listed in section 21(2) which advocates against disclosure is section 21(2)(f), which is relevant where "the personal information is highly sensitive". Section 21 includes other presumptions and guidelines intended to assist in assessing whether personal information should be disclosed in a given situation. These also apply where the exemption under consideration is section 49(b), which would be considered in cases where an individual is requesting a record containing his or her own personal information, as well as that of others.

In my view, although they do not provide a guarantee of confidentiality, sections 21 and 49(b) of the Act represent a significant opportunity for the Ministry to achieve its objective of collecting sensitive information, while also allowing access to information relating to unsuccessful adoptions in appropriate cases.

Having considered the ordinary meaning of the words of section 165(5) of the CFSA, the remarks of the Minister when the Bill inserting them into the CFSA was introduced, and the Ministry's policy objectives for advancing its interpretation, my conclusion is that the appellant's interpretation is the correct one. Since the appellant's application did not result in "an adoption" in this case, I find that section 165(5) of the CFSA does not apply to records relating to the application, which are therefore subject to the Act.

Accordingly, I will order the Ministry to make an access decision under the Act concerning the record at issue. If the appellant does not agree with the access decision, once issued, he will be entitled to appeal that decision to this office, in accordance with section 50(1) of the Act.

ORDER:

1. I order the Ministry to issue an access decision to the appellant under the Act, in connection with the record at issue, treating the date of this order as the date of the request, in accordance with the provisions of sections 26, 28 and 29 of the Act.

2. I further order the Ministry to send me a copy of the access decision referred to in Provision 1, in care of this office, when it sends the decision to the appellant.

Original signed by: April 25, 1997
John Higgins
Inquiry Officer