PUBLIC REPORTING OF CHILD DEATH REVIEWS

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Public Reporting of Child Death Reviews

Introduction

Mr. Ted Hughes, Q.C. was appointed to conduct an independent review of the child protection system in British Columbia in December, 2005. Part 2 of the terms of reference for the review include:

1) To examine and make recommendations to improve the public reporting of:
    a. Child death reviews to ensure that it balances the need for public accountability with the privacy interests of the families and others involved and
    b. Government's performance in protecting and providing services for children and youth in British Columbia.

The key questions addressed in this paper are:

1) What would have to change to enable more public reporting of child death reviews by MCFD?
2) What would have to change to enable more sharing of personal information between MCFD program areas?
3) Does MCFD have the authority to collect and use linked data from other public bodies for the purposes of making individual operational decisions?
4) What would have to change to enable a freer exchange of personal information between public bodies delivering services to children?
5) What would have to change to enable more public reporting of child death reviews by an external review agency?
6) What collection and use of personal information powers are required by an external review agency?

The key challenge with these issues is the need to find a balance between public accountability and privacy interests. This delicate balance is particularly difficult in an environment of heightened public interest and scrutiny where the information involved is often deeply personal. The observations throughout this paper attempt to find that balance by remaining focussed on public disclosure of information that is relevant to public accountability.

1. Current Legislative Provisions

The current legislative provisions governing access and privacy issues associated with information relating to children in care, including child death reviews, are found mainly in the *Freedom of Information and Protection of Privacy Act*[1] and the *Child, Family and Community Services Act*[2]. However, there are other provisions governing the work of the Ministry of Children and Family Development, the Coroner's Service, the Ombudsman and the Child and Youth Officer that are all relevant to this issue. Overall the provisions are complex, often inter-related and very difficult to translate into clear and concise set of rules.

Freedom of Information and Protection of Privacy Act

The *Freedom of Information and Protection of Privacy Act* (FOIPPA)applies, with some exceptions, to all of the above-noted organizations. Officers of the legislature are now subject to many of the privacy protection provisions of the FOIPPA although they remain outside the scope of the FOIPPA for the purposes of access requests.[3]

Section 33 of the FOIPPA sets out the rules for all disclosures of personal information by a public body. Section 33 of the FOIPPA provides:

> *A public body must ensure that personal information in its custody or under its control is disclosed only as permitted under section 33.1 or 33.2.*

In effect, s. 33 creates two sets of rules regarding disclosure of personal information depending on whether or not a formal FOI request has been received by a public body. If an FOI request has been received by a public body, part 2 of the Act applies[4], for all other disclosures, part 3 of the Act applies (particularly s. 33.1 and 33.2). The test for disclosure of personal information in response to an FOI request is set out in section 22 of part 2 of the FOIPPA. A public body may disclose personal information under s.22 if the disclosure would not be an unreasonable invasion of personal privacy.

If a public body wants to disclose personal information without a formal FOI request, it must find an authority for the disclosure in sections 33.1 or 33.2. Neither of these provisions include the "not an unreasonable invasion of personal privacy test" found in part 2 of the Act. The important distinction between section 33.1 and 33.2 is that if the disclosure is only authorized under s. 33.2, it can only occur in Canada (i.e. not on the internet).

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[1] *Freedom of Information and Protection of Privacy Act* [RSBC 1996] c. 165
[2] *Child, Family and Community Services Act* [RSBC 1996] c. 45
[3] Prior to October 1, 2004, s. 3(1)(c) provided, "*This Act…does not apply to the following: (c) a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act*." Effective October 1, 2004, s. 3(1)(c) was amended by adding the introduction, "subject to subsection (3)…". New subsection (3) of section 3 provides that officers of the legislature are subject to sections 30, 30.1-30.4, 33, 33.1, 33.2 and 74.1 of the FOIPPA. Text of these provisions is available at tab 1 of the materials binder.
[4] *Freedom of Information and Protection of Privacy Act*, s. 33.1(1)(a).

The authorities most frequently relied upon to permit a public disclosure of personal information under part 3 of the FOIPPA are:

- consent (s. 33.1(1)(b))
- in accordance with an enactment that authorizes or requires the disclosure (s. 33.1(1)(c))
- for the purpose for which it was obtained or compiled or for a use consistent with that purpose (s. 33.2(a) – in Canada only)
- within a public body where the information is necessary for the performance of the duties of an employee (s. 33.2(c) – in Canada only)

Ministry of Children and Family Development

The Ministry of Children and Family Development is subject to a number of access and privacy provisions contained in a variety of different statutes. Not all of the provisions directly apply to the treatment of information contained in child death reviews, but they contribute to a strong culture of privacy protection within the ministry. Individual program areas have been described as "silos" of information. It is also significant that all of the statutes that create special rules relating to collection, use and disclosure of personal information are managed by one Division of MCFD – the division responsible for director's case reviews. Case reviews are the tool currently used by the ministry to review the death of a child in care or known to the ministry.

Child, Family and Community Services Act

The *Child, Family and Community Services Act* (CFCSA) contains provisions allowing the ministry to collect certain personal information (s. 14 and s. 96), limiting disclosure of the information (s. 24, 75 and 77) and permitting disclosure of information (s. 74, 76 and 79). In so doing, the CFCSA contains three notwithstanding clauses to the FOIPPA:

- s. 24(2) (information obtained in family conference is confidential),
- section 74 (FOIPPA applies except for most of the disclosure rules) and
- s. 96(3) (power of director to collect information despite FOIPPA).

In addition, the obligation to report a child in need of protection applies even if the information "*is confidential and its disclosure is prohibited under another Act*" (s. 14(2)).

The effect of the CFCSA provisions is that most of the FOIPPA provisions apply, including part 2 and the collection and use rules in part 3 but many of the FOIPPA disclosure rules in sections 33.1 and 33.2 do not apply. The FOIPPA disclosure rules that do not apply include key rules relating to the sharing within and between public bodies and rules relating to sharing with law enforcement agencies.

(a) CFCSA Collection of information

Section 96 sets out the significant power of directors to collect personal information:

Director's right to information

96 (1) A director has the right to any information that
(a) is in the custody or control of a public body as defined in the *Freedom of Information and Protection of Privacy Act*, *and*
(b) is necessary to enable the director to exercise his or her powers or perform his or her duties or functions under this Act.
(2) A public body that has custody or control of information to which a director is entitled under subsection (1) must disclose that information to the director.
(2.1) A director may collect from a person any information that is necessary to enable the director to exercise his or her powers or perform his or her duties or functions under this Act.
(3) This section applies despite the Freedom of Information and Protection of Privacy Act or any other enactment but is subject to a claim of privilege based on a solicitor-client relationship.

Pursuant to section 65 of the CFCSA, a director may seek a court order compelling production of a record.

Section 14 of the CFCSA creates the obligation to report a child in need of protection and in so doing, authorizes the ministry to collect this personal information:

(1) A person who has reason to believe that a child needs protection under section 13 must promptly report the matter to a director or a person designated by a director.
(2) Section (1) applies even if the information on which the belief is based
a. Is privileged, except as a result of solicitor-client relationship, or
b. Is confidential and its disclosure is prohibited under another Act.

(b) CFCSA Limitations on disclosure

Section 24 of the CFCSA prohibits disclosure of information obtained in a family conference. Section 75 of the CFCSA prohibits disclosure of personal information obtained under the CFCSA except for the purposes of a family conference or in accordance with the special disclosure rules set out in section 74 of the CFCSA. Section 77 is a discretionary exception that permits the director to refuse to disclose information in a record to a person who has a right of access to the record if the disclosure could reveal the identity of an individual who has made a report of suspected child abuse (under CFCSA s. 14) or if the disclosure could reveal information about an investigation of possible abuse (under CFCSA s. 16).

(c) CFCSA Disclosure permitted

Section 74 adopts very limited portions of sections 33.1 and 33.2 of the FOIPPA. These FOIPPA provisions can be used for proactive disclosures of personal information or for sharing of personal information with other public bodies as follows:

- To respond to an FOI request
- With the consent of the individual
- For archival and historical purposes
- For research purposes

Section 76 of the CFCSA specifies who may exercise a child's rights under the FOIPPA for access to his or her personal information, i.e. who can consent on behalf of a child. Section 79 lists circumstances in which the director may disclose information obtained under the CFCSA without consent. It is a limited and focused list of permitted disclosures:

> *Disclosure without consent*
> *79 A director may, without the consent of any person, disclose information obtained under this Act if the disclosure is*
> *(a) necessary to ensure the safety or well-being of a child,*
> *(a.1) necessary to ensure the safety of a person, other than a child,*
> *(b) required by section 64 or by order of a court in Canada to be made to a party to a proceeding,*
> *(c) authorized by the Youth Criminal Justice Act (Canada),*
> *(d) required by an enactment,*
> *(e) necessary for a family conference, mediation under section 22 or other alternative dispute resolution mechanism,*
> *(f) made when giving or when validly compelled to give evidence in a proceeding,*
> *(g) [Repealed 1997-11-32.]*
> *(h) necessary to enable the Public Guardian and Trustee to perform duties and exercise powers as guardian of a child's estate under this Act,*
> *(h.1) made to another director,*
> *(i) made to a director's legal counsel,*
> *(j) made in Canada to caregivers and the information relates to children in their care, or*
> *(k) made in Canada and necessary for the administration of this Act.*
> *(l) [Repealed 2004-60-85.]*

The CFCSA also contains a variety of provisions relating to disclosures when child protection proceedings have been initiated.

MCFD staff are of the opinion that case reviews are not subject to the CFCSA privacy provisions but rather are subject to the FOIPPA.[5] The practical effect of this interpretation is that it is possible to disclose the content of case reviews pursuant to s. 33 of the FOIPPA which allows for a greater flexibility than does the CFCSA. At about the same time as this interpretation was adopted a new Case Review Procedures Policy dated June 10, 2003 was developed. It provides that the CFCSA governs client information in case reviews. It also provides,

> *In addition, review reports will not include third party names identified through the review process. The intent here is to respect the individual rights protected by labor standards vis a vis due process and administrative fairness. Individual professionals will be identified on a need to know basis only and not within the context of a review report.*

[5] As evidenced by a memorandum dated October 22, 1996. A copy of the memorandum is at tab 2 of the resource binder.

Youth Criminal Justice Act

The *Youth Criminal Justice Act (Canada)* YCJA has a process for access to records created under the YCJA. As a result, the FOIPPA does not apply to records created under the YCJA. The Act limits disclosure of information

> ***118.*** *(1) Except as authorized or required by this Act, no person shall be given access to a record kept under sections 114 to 116, and no information contained in it may be given to any person, where to do so would identify the young person to whom it relates as a young person dealt with under this Act.*

The YCJA goes on to provide that records created under the YCJA can be disclosed to a department or agency of a government in Canada "*engaged in the supervision or care of the young person, whether as a young person or an adult, or in an investigation related to the young person under an Act of the legislature of a province respecting child welfare*".[6] A former ADM of Child and Family Development advised that this provision has been used successfully to allow for the exchange of information between youth probation officers and social workers.

Adoption Act

The *Adoption Act* contains a number of provisions permitting disclosure of personal information but in limited circumstances:

- to birth parents and prospective adoptive parents (s. 6)
- to prospective adoptive parents and aboriginal organizations for the purposes related to the best interests of an aboriginal child (s. 62)
- to any person if it is necessary for the safety, health or well being of a child or to enable a child to receive a benefit (s. 61)
- to a limited list of persons where there is compelling circumstances affecting anyone's health or safety (s. 68)
- to adoption agencies if the disclosure is necessary to enable the agency to perform the duties or functions given to the agency (s. 72), the adoption agency is prohibited from further sharing the information provided, notwithstanding the FOIPPA (s. 74)
- information in the birth father's registry is restricted, notwithstanding the FOIPPA (s. 73 and 74)

A director under the *Adoption Act* is given a similar power to collect information as that given to a director under the CFCSA (s. 70). In addition, the *Adoption Act* specifies that directors under the CFCSA in particular, must comply with requests for disclosure of information by directors under the *Adoption Act.*[7]

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[6] *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 119(1)(n)(ii)

[7] Tab 3 - *Adoption Act* [RSBC 1996] c.6

B.C. Coroners Service

The B.C. Coroners Service is subject to the FOIPPA. The Coroners Service is listed as a public body in schedule 2 to the FOIPPA and the head of the Coroners Service for the purposes of the FOIPPA is the chief coroner. The Coroner is subject to three prohibitions against disclosure. The *Coroners Act* contains two of the prohibitions. Section 50 contains a notwithstanding clause as follows:

> *50. Despite the Freedom of Information and Protection of Privacy Act, before an inquiry or inquest is completed the coroner may refuse to disclose any information collected in the course of fulfilling the coroner's duties with respect to the inquiry or inquest.*

Section 60 requires that the Corner not disclose information transferred from the Children's Commission if the information could reasonably be expect to reveal the identify of a person who made a report under section 14 of the *Child, Family and Community Service Act* unless that person consents to the disclosure.

The records of the Children's Commission relating to the investigation of a child's death were transferred to the Coroner pursuant to section 15(1)(d) of the *Office for Children and Youth Act*. Section 15(1)(d) requires that the coroner must apply the confidentiality provisions that governed records under the *Children's Commission Act*. The records of the Children's Commission that related to the exercise of the commission's functions under the *Children's Commission Act* were not subject to the FOIPPA[8].

Interestingly, there is no clear statutory authority for the Coroner to disclose the reports produced at inquest or inquiry. The disclosures are always in response to formal FOI requests so the Coroner is applying the "not an unreasonable invasion of personal privacy test" when it determines that no severing should occur.[9] In so doing, the Coroner is in effect determining that the public interest outweighs the privacy interests.

The Coroner relies on an interpretation of a number of provisions to support their position that the reports should not be severed in response to access to information requests. First, section 3(2)(b) of the *Coroners Act* requires the Coroner to bring the findings and recommendations of coroners and coroner's juries to the attention of appropriate persons, agencies and ministries of government. Second, section 9 of the *Coroners Act* tasks the Coroner with reviewing all deaths that are unnatural, sudden and unexpected, unexplained or unattended deaths. Because of this the Coroner views himself as having a role in promoting public safety by making recommendations to assist in the prevention of

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[8] Section 3(1)(c.1) of the *Freedom of Information and Protection of Privacy Act* [RSBC 1996] c. 165 provided, "*The Act applies to all records in the custody or under the control of a public body, including court administration records, but does not including the following: (c.1) a record that is created by or for, or is in the custody or control of, the Children's Commissioner and that relates to the exercise of the commission's functions under the Children's Commission Act.*"

[9] The Coroners Service has on occasion severed personal information from its reports at the request of family. One recent disclosure with severing was upheld on review by the Office of the Information and Privacy Commissioner (OIPC Order 04-12).

future deaths. The *Coroners Act* requires that inquests be held in public (s. 45(1)) and section 27(1) sets out the purpose of inquests: "*the inquest must inquire into and determine who the deceased was and how, when, where and by what means he or she died*".

Public Guardian and Trustee
Pursuant to s. 79(h) of the CFCSA, the director under the CFCSA "may", without consent of any person, disclose information obtain under the CFCSA if the disclosure is necessary to enable the Public Guardian and Trustee to perform duties and exercise powers as guardian of a child's estate under the CFCSA.

Child and Youth Officer
The Child and Youth Officer is subject to the FOIPPA. However, the *Office for Children and Youth Act*[10] does protect certain documents from access requests, prohibits certain disclosures and allows certain disclosures of personal information. The Act also sets out a significant power to collect personal information.

(a) records protected from access requests
Records created by the Children's Commissioner and inherited by the CYO are subject to the same confidentiality provisions that governed the records under the *Children's Commission Act*[11] . Since the Children's Commission records could not be accessed using an FOI request, arguably those records do not have to be disclosed by the CYO in response to an access request. Likewise the records made under the *Child, Youth and Family Advocate* Act and transferred to the CYO are subject to the same confidentiality provisions that governed the records under the *Child, Youth and Family Advocate* Act. As an officer of the legislature, the Advocate was not subject to the FOIPPA.

(b) prohibited disclosures
The CYO is prohibited from disclosing information that could reveal the identity of a person who made a report of suspected child abuse under s. 14 of the *Child, Family and Community Services Act*[12]. Upon receipt of a request for access to records created by another public body including MCFD, the OCYA is required to transfer the request and the records, if necessary, to the originating public body for response. Unlike the FOIPPA where transfers are discretionary, the transfer is mandatory under the OCYA.[13]

(c) permitted disclosures
The Child and Youth Officer is specifically permitted to disclose certain information that could contain personal information pursuant to section 15 of the OCYA. The CYO may make public:

- the decision, recommendation and response to a recommendation arising from review of a complaint filed under the *Children's Commission Act* and continued by the CYO (s. 15(1)(a) OCYA)

[10] Tab 4 - Copy of the *Office for Children and Youth Act*
[11] *Office for Children and Youth Act* [SBC 2002] c. 50, s. 15(1)(e)
[12] *Office for Children and Youth Act*, s. 12(1)
[13] *Office for Children and Youth Act* s. 12(2) and 12(3)

- child death report completed but not made public under the *Children's Commission Act*

Pursuant to section 8(4), the Child and Youth Officer can also make public her special report on systemic issues. However, given the nature of the report it is unlikely that the report will contain personal information. If the report were to contain personal information section 8(4) is sufficient authority to permit disclosure pursuant to under section 33.1(1)(c) of the FOIPPA.

The Attorney General may request that the Child and Youth Officer conduct an investigation into any matter within the scope of the OCYA. Such a report is likely to contain personal information. The Attorney General is permitted to make public the confidential report of the Child and Youth Officer.[14]

(d) power to collect personal information
For the purposes of conducting an investigation, the Child and Youth Officer has the same powers that the Supreme Court has to summon and enforce attendance of witnesses and to compel production of evidence.[15] The officer also has a significant power to collect information that is in the custody or control of a public body as defined in the FOIPPA. Section 11(1) of the OCYA provides:

> *Child and youth officer's access to information*
> *11 (1) The child and youth officer has the right to any information that*
> *(a) is in the custody or control of a director or of a public body as defined in Schedule 1 of the* Freedom of Information and Protection of Privacy Act, *and*
> *(b) is necessary to enable the child and youth officer to perform duties or exercise powers or functions under this Act.*
> *(2) A director or a public body that has custody or control of information to which the child and youth officer is entitled under subsection (1) must disclose that information to the child and youth officer.*
> *(3) This section applies despite any other enactment or any claim of privilege, except a claim based on a solicitor client relationship.*

Ombudsman
The Ombudsman is an officer of the legislature and as such, is not subject to the access provisions of the FOIPPA but is subject to certain of the privacy protection provisions.[16] The *Ombudsman Act* requires that every person on the staff of the Ombudsman must, subject to the Act, "*maintain confidentiality in respect of all matters that come to their knowledge in performing their duties under [the] Act*."[17]

The Ombudsman is permitted to disclose personal information as follows:

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[14] *Office for Children and Youth Act, s.* 6(2)
[15] *Office for Children and Youth Act, s.* 7
[16] See footnote 1 above.
[17] *Ombudsman Act* [RSBC 1996] c. 340, s. 9(2)

- Investigations must be conducted in private, unless "*the Ombudsman considers that there are special circumstances in which public knowledge is essential in order to further the investigation"*(s. 9(6)).
- The Ombudsman may disclose a matter that, in the opinion of the Ombudsman, is necessary to further an investigation, prosecute an offence under the Act or establish grounds for conclusions and recommendations made in a report under the Act (s. 9(7)).
- The Ombudsman is entitled to report back to the Legislative Assembly on a matter referred by the Legislative Assembly or any of its committees to the Ombudsman. The report is as the Ombudsman sees fit and it not subject to the limitations on disclosure of personal information set out in section 25 – discussed below (s. 10(4)).
- Section 31(3) of the *Ombudsman Act* provides:

  > *If the Ombudsman considers it to be in the public interest or in the interest of a person or authority, the Ombudsman may make a special report to the Legislative Assembly or comment publicly about a matter relating generally to the exercise of the Ombudsman's duties under this Act or to a particular case investigated by the Ombudsman.*

- Where the Ombudsman determines that no suitable action has been taken in response to investigation, the Ombudsman is empowered to submit a report to the Lieutenant Governor in Council and the Legislative Assembly. The Ombudsman must attach to the report a copy of the Ombudsman's recommendation and any response but:
  "…the Ombudsman must delete from the recommendation and from the response any material that would unreasonably invade any person's privacy, and may delete material revealing the identity of a member, officer or employee of an authority."[18]

The Ombudsman also has the right to collect information that could include personal information from a person or authority (s. 15).

Hospital "Committees"

Section 51 of the *Evidence Act*[19] specifically limits the disclosure of information relating to the work of committees as defined under that section of the *Evidence Act*. Section 51(7) states that the limitations on disclosure apply despite the FOIPPA. The reviews conducted by these committees include mortality reviews of deaths that occur in hospital.

[18] *Ombudsman Act*, s. 25
[19] Tab 5 - *Evidence Act* [RSBC 1996] c. 124, s. 51

2. Background

a. What is the rationale or purpose for public reporting?
b. What has been done in the past in British Columbia?
c. What have other jurisdictions done? What are the trends in public reporting?
d. Is there a continuum of purpose to public reporting?
e. How does an agency balance the public's need to know with the right to personal privacy?

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a. What is the rationale or purpose for public reporting?

The rational or purpose for public reporting depends upon the purpose of the report and the role of the organization that prepared the report. The disclosure of the internal MCFD case review raises different policy issues than does the disclosure of a report prepared by an oversight body.

An oversight body's purposes might include child injury prevention, systemic oversight, public policy and an understanding of what happened for the sake of the child. Such purposes suggest a clear public accountability role. By contrast, the key purpose identified for MCFD's case reviews is that they are a learning tool for ministry staff.

Below I discuss the various purposes identified by MCFD, the Coroner, the Children's Commission, the Ombudsman, the Child and Youth Officer, the courts and other jurisdictions for the disclosure mainly of child death review reports but also, more generally, for disclosure of sensitive personal information. Based on this review, the key reasons for including personal information in the reporting of child death reviews are:

- Because the main purpose of the organization disclosing the report is public accountability;
- The disclosure is required for transparency, i.e. to allow the public to hold the administration accountable;
- Because the death occurred in publicly administered institutions, for which the public may hold the administration accountable.
- For transparency and readability and because individuals are readily identifiable in any event;
- Because the personal information was integral to the completeness and public interest purposes of the report.
- Historically the death of an individual is a public fact;
- The disclosure is necessary to establish the grounds for the findings and recommendations;
- The disclosure is necessary to maintain confidence in the ministry; and,
- The disclosure is necessary to enable the public to understand the decisions that were made.

MCFD Case Reviews

Although the purpose of this section is to discuss the rationale for public reporting of case reviews it is worthwhile to note that the MCFD policy governing the writing of case reviews requires that the original reports not include third party names. There is no reason under the FOIPPA or the CFCSA for this to occur. MCFD can certainly include the names in the report to the extent that it relates directly to and is necessary for an operating program or activity.[20] MCFD can use the information for the purposes it was obtained or compiled or for a use consistent with that purpose.[21] If the names are necessary to allow the report to make sense and to ensure that it can be used internally to meet the learning purposes then the names should be included.

The purpose for MCFD's internal Director's Case Reviews and Deputy Director Reviews was set out in the Case Review Procedures Policy dated June, 2003 which provides in part:

Review Objectives

- *To promote excellence in case practice as well as confirming good case practice*
- *To assess and examine case practice in relation to the fulfillment of delegated powers, duties, and functions under the CF&CS Act, specifically as they relate to practice standards.*
- *To inform case practice at an individual case level and at a systemic level.*
- *To identify those cases practices where additional services to the child or family are required.*
- *To identify barriers to providing an adequate level of service.*

In the more recent Quality Assurance Standards dated June 28, 2004 the intent of the standard is described as follows:

- *Promote excellence in case practice as well as confirming good case practice*
- *Improve service delivery to children and families*
- *Ensure that the director has complied with standards, policy and the legislative mandate under the CFCSA*

A former ADM of Child and Family Development is of the view that the case review process serves two purposes:

1. The director has to be able to oversee the practice and understand what went wrong i.e. due diligence
2. Use the information to learn from the mistakes, inform others to improve future practice.

MCFD access and privacy staff interviewed advised that the purpose for reporting out on the results of individual case reviews was to promote confidence in the Ministry to ensure that the public is willing to abide by its obligation to report children in need of care and to allow the Ministry to defend itself against allegations of failure of duty. However, a former ADM of Child and Family Development was of the view that even in the face of

[20] *Freedom of Information and Protection of Privacy Act*, s. 26(c).
[21] *Freedom of Information and Protection of Privacy Act, s*. 32(a)

a loss of confidence in the ministry, the personal information of clients contained in case reviews should not be disclosed. He was also of the opinion that such disclosures could undermine the effectiveness of the reviews because individuals would be less willing to participate if they knew their personal information could be publicly disclosed. Staff in particular would become reluctant to engage in a full and frank assessment of their practice if their personal information could be subject to public disclosure.

According to a Director in Children and Family Development, the rationale for reporting publicly was to instill confidence in the public that the ministry is meeting its standards and that no child is dying as a result of a failure by the ministry to meet those standards. There is also a concern among other MCFD staff that if the public does not have confidence in the ministry, individuals will be reluctant to report to the Ministry when they believe there is a child in need of protection.[22]

In her report to the Attorney General date February 15, 2006, the Child and Youth Officer promotes a single purpose for the case reviews – organizational learning and improvement. With that purpose in mind, recommendation #7 provides:

> *Consider whether special safeguards need to be in place respecting the use of disclosure of information gathered in case reviews, to foster and protect their primary purpose as a process for organizational self-examination and improvement.*

It appears, therefore, that the rationale for reporting out on child death reviews by MCFD include: public accountability, desire to maintain confidence in the child protection system and a desire to protect the reputation of the ministry especially when faced with inaccurate or incomplete media reports.

Children's Commission

Although the Children's Commission was not subject to the FOIPPA, it is clear from their policy documents that they attempted to rationalize public disclosure of personal information based, at least in part, on the privacy principles set out in the FOIPPA. The Commission developed three policy documents relating to the public disclosure of personal information: The Use and Reporting of Personal Information Policy (February 1998)[23], Information Sharing Policy Children's Commission[24] and Draft #3- Child Fatality and Critical Injury Investigation Policy and Procedure Manual (March 2000).[25]

The 1998 Use and Reporting of Personal Information Policy articulated the purpose for public reporting of personal information as follows:

- The overarching disclosure principle is that the work of the Commission allows for the public accountability of services provided to children and their families in a context which respects the privacy rights of children and

[22] Concerns raised by staff in the Information and Privacy Office of MCFD.
[23] Tab 6 -The Use and Reporting of Personal Information Policy, Children's Commission, February 1998
[24] Tab 7 - Information Sharing Policy Children's Commission
[25] Tab 8 - Draft #3- Child Fatality and Critical Injury Investigation Policy and Procedure Manual (March 2000)

their families…to ensure that the child-serving system open and accountable to children and their communities...

- The Commission's investigations and recommendations are to result in meaningful change in the lives of children in BC. Information disclosed as a result of the work of the Commission must have the pursuit of a remedy as its objective.
- With respect to the fatality reviews, it is crucial that our reports are viewed as opportunities to learn how we can serve children better – not opportunities to inquire into the lives and deaths of individual children and their families.
- The Commission sought a reasoned balance between public accountability and privacy rights.
- Information which other organizations should not disclose for privacy reasons, may need to be disclosed by the Children's Commission to establish grounds for findings or recommendations.
- The "foundation of the disclosure guidelines" with respect to child fatality reviews was, disclosure takes place to the extent that it is necessary to establish grounds for findings and recommendations.

The information disclosed by the Children's Commission and the manner in which the competing interests were balanced is discussed below.

Ombudsman

The *Ombudsman Act* provides some insight into the possible purposes for public reporting of personal information. In that Act the Ombudsman is entitled to make special reports or comment publicly about a matter relating generally to the Ombudsman's duties where the information is "in the public interest" (s. 31(3)). In section 9(7) the Ombudsman is empowered to disclose information relating to investigations where the Ombudsman determines that it is "*necessary to further an investigation, prosecute an offence under the Act or establish grounds for conclusions and recommendations made in a report*."

Coroners Service

The Coroners Service regularly discloses personal information in response to access requests for copies of Judgments of Inquiry and Verdicts at Inquest. The Coroners Service has a "Guide to Completing the Judgment of Inquiry" (January 1, 2003)[26]. In describing the purposes served by the written Judgment, the policy provides some of the rationale for the public disclosure of personal information:

> *Ensuring that no death is overlooked, concealed or ignored. Provide protection to special interest groups; such as a particular sector of the workplace by identifying hazardous occupational environments. Reporting to the public reasons for deaths which have occurred in publicly administered institutions, for which the public may hold the administration accountable. Historically, the death of a member of society is a public fact. The circumstances that surround*

[26] Tab 9 - B.C. Coroners Service: Guide to Completing the Judgment of Inquiry, January 1, 2003.

that death, and whether it could have been avoided, are matters that are of interest to all members of the community.

In addition, the *Coroners Act* requires that inquests be held in public. It also states the purposes for the Coroners review. Interestingly the *Coroners Act* is silent on whether or not inquiries are public.

Child and Youth Officer

The Child and Youth Officer recently prepared and delivered a report to the Attorney General pursuant to s. 6 of the OCYA. In her report, she included some personal information. Her cover letter identifies the rationale for her reporting out on certain key personal information elements:

- The names of "key officials" involved in the Director's case review were left in "for transparency and readability and because these individuals are all readily identifiable by the context in any event"
- Sensitive personal information was not included where it was "not integral to the completeness and public interest purposes of my report"

In the introduction to her report, the CYO states the issues reviewed in the report at the request of the Attorney General and notes that the issues are examined in the context of the CYO's function under section 3(1) of the OCYA "to provide independent observations and advice to government about the state of government-provided or funded services to children and youth in British Columbia."

In her interview the CYO indicated that there was a need for proportionality between the need for public transparency and the need to protect personal privacy. In her view s. 6 requires that public interest prevail to over ride both personal privacy and reputational interests.

Canadian Judicial Council

The Canadian Judicial Council recently developed a policy guideline entitled, "*Use of Personal Information in Judgments and Recommended Protocol*"[27]. The protocol was initiated because of the desire by courts to publish copies of family judgments on court websites. The protocol discusses publication bans and methods for ensuring the judgments are "de-identified" but it also discusses discretionary protection of privacy rights where no publication ban exists. In that circumstance the protocol notes, "*Protection of the innocent from unnecessary harm is a valid and important policy consideration…In these cases, the judge must balance this consideration with the open court principle by asking how much information must be included in the judgment to ensure that the public will understand the decision that has been made."* Of particular interest are the examples given for cases where it may be appropriate to exercise discretion to remove personal identifying information including those involving sexual, physical or mental abuse, abuse of children, situations where child welfare authorities have been contacted concerning abuse or lack of care or if there is any mention of child protection proceedings, foster case, or guardianship.

[27] Tab 10 - *Use of Personal Information in Judgments and Recommended Protocol*

b. What has been done in the past in British Columbia?

In the past, MCFD has proactively disclosed portions of child death review reports. There is a serious lack of clarity regarding both the authority for these disclosures and the extent to which personal information should be disclosed. The Children's Commission had a clearer statutory authority to disclose personal information but developed a policy that resulted in virtually no personally identifiable information being disclosed from child fatality review reports. The Coroners Service regularly discloses personal information in its reports. As with MCFD, there is some question as to the Coroners Service's authority to make these public disclosures. In part 3 of this report I discuss what needs to change to enable more open reporting of child death reviews.

Children's Commission

The Commission was established in September, 1996. Over the course of the next 5 years the Commission publicly released 769 child and youth fatality reports.[28] The reports were anonymized in accordance with Commission policy.

Commission policy required that names of the children, family members and ministry employees not be included in reports.[29] In addition, guidelines for writing the reports recommended not including dates or place names to reduce the possibility of individuals being identified. The Commission also released reports in batches to increase the privacy protection. The Children's Commission was not subject to the FOIPPA but had developed several policies to guide the disclosure of personal information by the Commission. These policies were consistent with portions of the FOIPPA and resulted in disclosures that attempted to carefully protect the identity of all individuals involved.[30]

The Children's Commission adopted the test in section 75(c) of the CFCSA as reflecting the proper balance between openness and privacy protection in drafting its child fatality review reports[31]. Section 75(c) of the CFCSA provided:

> *A person must not disclose information obtained under this Act except*
> *(c) in a report under section 8 or 9 of the Children's Commission Act, but only to the extent necessary to establish grounds for findings or recommendations contained in that report.*

Additional considerations in the policy are all based on the "not an unreasonable invasion of personal privacy" test. This is the test used to determine whether or not a applicant will be granted access to the personal information of a third party in response to a formal FOI request under part 2 of the FOIPPA. It is an interesting approach for the Commission to have taken given that it was not subject to part 2 of the FOIPPA. The Commission took guidance from section 22(3) which contains the list of personal

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[28] Tab 12 - Sample Children Commission Fatality Reports

[29] Tab 7 - Children's Commission Policy: Child Fatality and Critical Injury Investigation Draft #3, March 2000, p. 68

[30] Tab 6 - Children's Commission Policy: Use and Reporting of Personal Information, February 1998 p. 9

[31] See Tab 9 - Draft #3- Child Fatality and Critical Injury Investigation Policy and Procedure Manual (March 2000) at p. 10.

information the disclosure of which is a presumed unreasonable invasion of personal privacy. For example, the disclosure of information relating to medical history or diagnosis, information relating to eligibility for social service benefits, information relating to employment or educational history are all disclosures that are each a presumed unreasonable invasion of personal privacy. The Commission policy also considers factors set out in section 22(2) that are described as "relevant considerations" in that section. For example, the policy (and s. 22(2)) list as relevant considerations: whether the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny or whether the disclosure may unfairly damage the reputation of a person.

One final consideration in determining what should be disclosed was the "Core Zone of Privacy". This was a concept that arose out of former Information and Privacy Commission David Flaherty's decision in Order 27-1994.[32] This decision was in regard to a request for the personal information of a deceased individual. The former Privacy Commissioner states,

> *In my opinion, this core zone of privacy consists of the details of her behaviour, her feelings, her therapy sessions, her medical diagnosis, and her innermost thoughts that may be revealed through her diaries and other records. These details do no assist the public in scrutinizing the Ministry's actions.*[33]

Based on this concept the Children's Commission policy states that the core zone of privacy consists of:

- Details of deceased person's behaviour
- Feelings
- Therapy sessions
- Medical diagnosis
- Innermost thoughts that may be revealed through diaries and other records
- Own thoughts and opinions
- Information of a deeply personal and intimate nature

The policy provides, "*General remarks about an individual's behaviour, actions, interactions with others and about external events leading up to an individual's death may be made as they serve to subject to public scrutiny the level of care and treatment received from government bodies*."

Ministry of Children and Families

Between 1986 and 1992 reviews were conducted by the Inspections and Standards Unit of the Ministry. Superintendent reports were created but there was no public disclosure. Between 1992 and 1996 the Audit and Review Division conducted reviews. There was no public reporting of the Superintendent Reports created. Between October 1993 (effective date of the *Freedom of Information and Protection of Privacy Act)* and January 29, 1996 (effective date of Part 5 of the *Child, Family and Community Services Act*)

[32] Tab 11 - IPC Order 27-1994
[33] Tab 11 - IPC Order 27, 1994 at 11.

requests for copies of the Superintendents reports were severed under the FOIPPA. After January 1996 the reports were known as Deputy Director Reviews or Director's Case Reviews and were severed according to the *Child, Family and Community Services Act* (CFCSA) and the FOIPPA.

MCFD has proactively released personal information contained in Director Case Reviews on at least three occasions: Amanda Simpson (2000)[34], Chassidy Whitford (2003)[35] and Sherry Charlie (2005)[36]. There is no clear authority in the FOIPPA for a proactive disclosure of personal information. At best, MCFD might rely on the disclosure as a "consistent purpose" as permitted by s. 33.2(a). However, that authority only permits disclosures in Canada. A posting on the internet constitutes a disclosure outside of Canada and so requires authority under 33.1 of the FOIPPA.

Despite the fact that public disclosures have been in reference to individual children, the copies of review reports disclosed have not included the name of the child nor have they included names of employees of the ministry or names of family members. However, because the public disclosures are done in a manner that identifies the deceased child, an attentive reader could take any personal details that have been disclosed and attribute them to identifiable individuals by matching Ministry disclosures with other public disclosures. In addition, the media press releases that accompany the "sanitized" versions of the case reviews include the full name of the child and also name other individuals. The severing done by MCFD on these reports has been based on an attempt to apply the "not unreasonable invasion of personal privacy test" in part 2 of the FOIPPA. MCFD is attempting to balance public accountability with the right to access pursuant to s. 22(2)(a) of the FOIPPA both in responding to formal FOI requests and in responding to requests for proactive public disclosure. In general the ministry removes all names and as much personal information as possible leaving in the "absolute minimum" to give context to the recommendations.[37] It is important to note that public disclosures (as opposed to responses to formal FOI requests) are not subject to section 22 of the FOIPPA. Although the considerations in section 22 can be of assistance in guiding the discretion to disclose, a public body must first establish its authority to disclose. That authority must be found in s. 33 of the FOIPPA.

Disclosure of case reviews can occur in one of two ways: proactively by the ministry in response to pressure from the media, the public or opposition parties or in response to a formal access request under part 2 of the FOIPPA.

Under the FOIPPA the MCFD receives between 10 and 20 requests per year for copies of individual case reviews. The requests are from third parties, including media. MCFD severs the case reviews to remove personal information where the disclosure of the personal information would be an unreasonable invasion of personal privacy (as required

[34] Tab 13 - MCFD Public release relating to Amanda Simpson
[35] Tab 14 - MCFD Public release relating to Chassidy Whitford (Summary of Director's Case)
[36] Tab 15 - MCFD Public release relating to Sherry Charlie (Summary of Director's Case and Information Bulletin)
[37] Approach described by MCFD Information and Privacy Office staff.

by s. 22 of the FOIPPA). Where the applicant requests a review by name, the material is severed even more heavily so that no personally identifiable information is disclosed. This typically leaves a very thin factual thread and some of the recommendations at the end of the report. Where the applicant requests all reviews between a certain time period, the ministry attempts to sever identifiable personal information leaving more information to be disclosed.[38]

B.C. Coroners Service

The B.C. Coroners Service generally provides full disclosure of all Judgments of Inquiry and Verdicts at Inquest upon request including reports of child deaths. The judgment and verdict contain details of the deceased including name, birth date and a description of the circumstances of the death including a description of the actions or inactions of other individuals who are identified by name and criminal history, medical conditions and/or addictions of family members where relevant. The reports are not intended to find fault but the reports do indicate a finding for the cause of death which can include homicide. Where relevant, the information can include medical conditions including mental health issues. Verdicts at Inquest also include lists of witness names and occupations. The Coroners Service has been making these types of disclosures since the 1950's.[39] Where family members object, minor severing may occur.[40] There is no proactive release of personal information. This means in order to get a copy of the reports, individuals or media must make a formal access to information request. The disclosures by the Coroners Service are therefore all done pursuant to part 2 of the FOIPPA. The test then is always, is the disclosure an unreasonable invasion of personal privacy. In determining that personal information should be disclosed in response to these FOIPPA requests, the Coroner is finding that the public interest outweighs the privacy rights.

The only proactive public reporting done by the Coroners Service are announcements of the location and date of Coroners Inquests.[41] The reports themselves can only be obtained through an access to information request. No reports are published on the website.

Child and Youth Officer

The Child and Youth Officer has not publicly disclosed any personal information. However, the Attorney General has recently chosen to publicly disclose the CYO's section 6 report that did contain personal information. In her interview the CYO is of the view that the current OCYA does not give the CYO clear power to comment publicly on

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[38] Tab 16 - Sample Director's Review Report with severing under part 2 of the FOIPPA. This is a response to an applicant who requested information in a date range rather than by name of the child. Therefore, this example is one where more information could be disclosed as the individuals were not personally identifiable.

[39] Information provided by a policy and research analyst with the BC Coroners Service. See tabs 17 and 18 for examples of disclosures by the Coroners Service.

[40] Tab 17 - Sample Judgment of Inquiry that severed based on family objections. The applicant requested a review of the severing before the Information and Privacy Commissioner. The severing was upheld. OIPC Order 04-12 also enclosed.

[41] Tab 18 - Sample Coroner's Service Media Release

individual cases and that clarity in this area would improve the CYO's ability to ensure public accountability.

c. What have other jurisdictions done?

Canada

There are several examples across Canada of public disclosures of personal information contained in child death reviews. In Alberta reports by Provincial Court Judges are available on the internet, in Saskatchewan at least two child death review reports are publicly available, one completed by the Children's Advocate and one completed for the Minister responsible for child welfare. In New Brunswick the Minister responsible for child welfare is required to publicly disclose recommendations from child death review reports.

Alberta's death reviews are conducted under the *Fatal Inquiries Act*. Reviews similar to the B.C. Coroner's Service may be conducted by a Provincial Court Judge who reports to the Minister of Justice and Attorney General. The reports must be made public by the Minister pursuant to section 53.1 of the *Fatal Inquiries Act:*

> *The Minister shall make a written report under section 53 available to the public in a form and manner the Minister considers appropriate.*

In fact, reports are available online by year.[42] The reports disclose similar personal information to that disclosed by British Columbia's Coroners Service.

Saskatchewan's external review is done by the Children's Advocate Office (CAO). The CAO releases public summary reports of children's deaths.[43] The advocate's power to publish reports on individual cases is set out in section 30.1(3)(b) of the *Ombudsman and Children's Advocate Act:*

> *The Children's Advocate may, from time to time in the public interest or in the interest of any person, department or agency of the Government, publish reports respecting any of the following matters, whether or not those matters have been the subject of a report to the Assembly:*
>
> *(b) any particular case that he or she has investigated.*

The Children's Advocate is required to maintain the confidentiality of all matters and is prohibited from disclosing any identifying information about any child, parent, guardian or complainant "*except where, in the Children's Advocate's opinion, the interests of any of the following clearly outweigh any invasion of privacy that could result from the disclosure:*

a. the public;
b. any department or agency of the government;

[42] Tab 19 - Report to Minister of Justice and Attorney General (Alberta) Public Fatality Inquiry. Online the reports can be found at: http://www.justice.gov.ab.ca/fatality/fatality_reports.aspx
[43] Saskatchewan Children's Advocate Summaries of Child Death Reviews can be found at: http://www.saskcao.ca/adult/links_and_publications_sub10.html

c. any person

The Children's Advocate has exercised discretion to disclose personal information on the internet in at least two cases. The first is a report relating to the death of Karen Rose Quill.[44] The second occurred when the Children's Advocate participated in a multi-disciplinary review of a serious injury to a child. The published report refers to the child by first name only. There are very minimal details of the events leading up to the injury and no other individual is named. The report is a very good example of a disclosure of information that subjects the public bodies involved to public scrutiny while carefully protecting the privacy of the family. [45]

The Saskatchewan Department of Community Resources and Employment (DCRE) reviews all child deaths and makes referrals of a selection of the deaths to the Children's Advocate for a further review. The DCRE reports are generally not available publicly although the Baby Andy multidisciplinary review referred to above was a review coordinated by DCRE. In addition, the DCRE has published online, its response to the recommendations contained in the Karen Quill report from the Child Advocate.[46] The authority of the DCRE to publicly disclose personal information from its records is set out in section 74(5.1) of the *Child and Family Services Act* which provides that information obtained under the Act may be released where, "*in the opinion of the minister, the benefit of the release of information clearly outweighs any invasion of privacy that could result from the release."*

Nova Scotia does not have an external child death review process. The Department of Community Services conducts an administrative review by an internal Child Mortality Committee where a child dies as a result of child abuse or while receiving protective services. These reports are not disclosed publicly.[47]

Interestingly, Nova Scotia's *Freedom of Information and Protection of Privacy Act* has a discretionary exception to disclosure meant to protect information similar to that protected in British Columbia by section 51 of the *Evidence Act.* The Nova Scotia provisions states,

> *The head of a local public body that is a hospital may refuse to disclose to an applicant a record of any report, statement, memorandum, recommendation, document or information that is used in the course of, or arising out of, any study, research or program carried on by or for the local public boy or any committee of the local public body for the purpose of education or improvement in medical care or practice.*

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[44] Tab 20 - Children's Advocate Office (Saskatchewan) Child Death Review, June 1998
[45] Tab 20 - The "Baby Andy" Report, www.dcre.gov.sk.ca/mediaroom/pdfs/Baby%20Andy%20Report.pdf
[46] Response to the Children's Advocate's Report on the Death of Karen Quill http://www.dcre.gov.sk.ca/publications/quillreport.html
[47] Information provided by the Department of Community Services, Halifax, e-mail dated December 6, 2005.

Manitoba's Children's Advocate is appointed under the *Child and Family Services Act*, C.C.S.M. c. C80. The Children's Advocate is given authority to disclose personal information when reporting to a committee of the Legislative Assembly or to a Minister in response to a request for either for a special report. The disclosure permitted is "*any matter which the children's advocate considers necessary relating to his or her conclusions, reasons and recommendations".*[48] The Manitoba Children's Advocate does not appear to have published any material contained personal information. The focus of their publications relates to systemic issues.

The Minister of the Department of Family and Community Services in New Brunswick has appointed a multidisciplinary child death review committee. The committee is subject to terms of reference[49] that require it to provide its report to the Minister who in turn, is required to make public recommendations that relate to:

- relevant policies, procedures, standards and legislation
- linkages and coordination of services with relevant stakeholders and
- improvements to services for children

The reports of the committee are available in severed format online.[50] The first report of the committee included the names of the child and family members and the names of witnesses. Subsequent reports removed all names and some dates. The reports include some of the factual basis for the findings as well as findings. Portions of the reports are severed with the notation "text severed under terms of Family Services Act". Section 11(3)(b) of the *Family Services Act* S.N.B. 2006, c. F-2.2 specifically permits the Minister to disclose information to the committee for the purposes of the child death review. Otherwise the *Family Services Act* prohibits the disclosure of information that "*would tend to reveal personal information about a person identifiable from the release of the information*."

United States

In the United States funding for state child abuse and prevention programs can come through the federal government via the *Child Abuse Prevention and Treatment Act* (CAPTA), 42 U.S.C. 5106a(b)(2)(A). That statute sets out conditions for funding including the submission of a state plan that confirms that the state has:

viii) *methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians, including requirements ensuring that reports and records made and maintained pursuant to the purposes of this subchapter and subchapter III of this chapter shall only be made available to—*

> ***(I)*** *individuals who are the subject of the report;*
>
> ***(II)*** *Federal, State, or local government entities, or any agent of such entities, as described in clause (ix);*

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[48] *The Child and Family Services Act*, C.C.S.M., c. C80, s. 8.10(3).

[49] A copy of the New Brunswick Child Death Review Committee's terms of reference are available at http://www.gnb.ca/0017/protection/childdeath/terms-e.asp

[50] New Brunswick Child Death Review Committee reports are at: http://www.gnb.ca/0017/protection/childdeath.asp. A sample report is at tab 23 of the resource binder.

(III) *child abuse citizen review panels;*
(IV) *child fatality review panels;*
(V) *a grand jury or court, upon a finding that information in the record is necessary for the determination of an issue before the court or grand jury; and*
(VI) *other entities or classes of individuals statutorily authorized by the State to receive such information pursuant to a legitimate State purpose;*

It is of interest to note that CAPTA places a priority on the privacy of the family and that the privacy of staff is not considered. In an article for the American Bar Association, Howard Davidson, Director of the ABA Centre on Children and Law, discusses the 1996 amendments to CAPTA which altered confidentiality provisions to permit public disclosure as follows[51]:

(x) provisions which allow for public disclosure of findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality.

Mr. Davidson is of the view that the purpose for the 1996 exemption from the strict child protection record confidentiality requirements "*was to encourage (or at least permit) public dissemination of information about the Child Protection Service Agency's past involvement with and investigative actions and findings relating to a child and family in the most severe cases.*" In other words, it was an introduction of an element of public accountability into a system that had otherwise held privacy as the key priority.

According to two sources, the enabling child death review legislation in most states contain specific exemptions from public information acts (where they exist) and may also include exemptions from public meeting acts.[52] One author completed a survey of all "team protections" for all state fatality review teams. The table indicates that of the 51 states surveyed only 9 states lack confidentiality protections[53].

Of the 9 states that lack confidentiality provisions, 5 had no public reports available online and 3 states appear to have changed their legislation as available material indicated that records were now treated as confidential.[54] One state, Connecticut, publishes detailed individual child death reviews.

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[51] Howard Davidson, "Mandating Multidisciplinary Review of Serious Child Maltreatment Cases: An Overview of Law and Policy Issues", http://ican-ncfr.org/documents/Howard_Davidson_Article.pdf

[52] Gabriela Alcalade, *Child FatalityReview in the United State: A National Overview*, tab 8 of Wendy Taylor's resource material at 38 and National MCH Centre for Child Death Review, "Other's *Access to the Team's Information"* www.childdeathreview.org/confidentiality.htm

[53] Arkansas, Connecticut, Mississippi, New York, Pennsylvania, Utah, Vermont, Wisconsin and Wyoming.

[54] According to the most recent annual report of the Pennsylvania Child Death Review Team, participants were required to sign confidentiality agreements and no personal information was disclosed in the annual report: http://www.pacdrt.org/education.html . The Utah Child Fatality Review Report 1996-1998 (published in 2003) indicates that the Utah Child Fatality Review Committee receives information in confidence, confidentiality agreements are required and the information is protected by statute. In addition, review meetings are not public: http://health.utah.gov/vipp/pdf/ChildFatalityReportCFRC96.pdf. The State of Wyoming Child Major Injury/Fatality Review Team 7th Annual Report (2005) contains brief de-personalized summaries of individual deaths as examples under types of deaths: http://dfsweb.state.wy.us/CMI/7thannualreportCMIFRT.pdf.

Connecticut's reports are prepared by the Office of the Child Advocate with the specific statutory obligation to: "*conduct an in-depth investigation and review and issue a report with recommendations on the death or critical incident of a child. The report shall be submitted to the Governor, the General Assembly and the commissioner of any state agency cited in the report and shall be made available to the general public."* [55] The reports themselves describe the child by first name and last initial. Extensive personal information such as medical treatment, psychological history, treatment history, details of prior suicide attempts is included but no other names are included.[56]

Washington State has a multidisciplinary child death review team that operates out of the Department of Health (DOH). In addition, the Department of Social and Health Services Children's Administration (DSHS) conducts child fatality reviews. The Department of Health is prohibited from disclosing personal information. In sharp contrast to the DOH model, the DSHS is required to disclose certain personal information. State law RCW 74.13.500 requires disclosure of personal information. The purpose behind the disclosure is unique to that state and to the principle that, "*the people of the state do not yield their sovereignty to the agencies that serve them."*[57]

The Manager of the Child Fatality Program for DSHS advised that his department is guided by a list of personal information that must be disclosed as a result of RCW 74.13.500 including the name of the child, the parent or caretaker's name, whether abuse was founded or not, actions taken by the department and social worker's names. The guideline also lists information that cannot be disclosed including psychiatric history, clinical and medical information unless the information relates directly to the cause of the abuse. DSHS can refuse to disclose the name of the child if they determine that such disclosure would not be in the best interests of the other children in the house hold. As a matter of practice, the Manager advised that he is aware of only one occasion when the names of social workers were disclosed. A sample report containing extensive personal information is included in the resource binder.[58] These DSHS reports are publicly available on the DSHS website.[59]

The purpose of the DSHS fatality reviews is to identify issues in case work practice, the system or policy that requires review.

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[55] Connecticut Code Para. 46(c).
[56] Tab 22 – Sample Connecticut Fatality Review Report Summary
[57] The court in Progressive Animal Welfare Society v. University of Washington, 125 WN.3d 243 at 254 (1994) articulated this principle: "*The people of the state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created."*
[58] Tab 21 - Washington State: Tyler deLeon Fatality Review, January 2006 online at: http://www1.dshs.wa.gov/pdf/MR/DELEON-ECFR-Feb-2006.pdf
[59] Washington State, Department of Social and Health Services child fatality review reports are located online at: http://www1.dshs.wa.gov/ca/pubs/reports.asp

d. What are the trends in public reporting? Is there a continuum of purpose to public reporting?

The review of practices across Canada and the United States indicate that there is a continuum of reporting practices. At one end are jurisdictions such as Connecticut and Washington State where extensive personal information is disclosed. In both cases, there is a statutory requirement for this disclosure. Next on the continuum are coroner's reports such as those released by the B.C. Coroners Service or the Alberta Provincial Court. In both cases there is statutory support for the disclosure and in B.C.'s case, a long history of disclosure of this information.

Toward the middle of the continuum are provinces such as Saskatchewan and New Brunswick. Both jurisdictions have disclosed personal information including the names of the child but limited details regarding the history leading up to the death. The focus of the disclosures appears to be the recommendations. Decision makers in Saskatchewan have the statutory authority to determine that the benefit of the release outweighs the invasion of personal privacy. In New Brunswick the authority for the release appears to rest in policy requiring the Minister to publicly disclose the recommendations. In practice, more than recommendations are disclosed, presumably in an attempt to provide some context for the recommendations.

At the more privacy sensitive end of the continuum are several public bodies in British Columbia. The Children's Commission, the Ombudsman and MCFD have all disclosed minimal amounts of personal information. Factors relevant to these disclosures have been the need to establish grounds for findings or recommendations or an evaluation of the "not unreasonable invasion of personal privacy" test or both. The need to tie disclosure to establishing grounds for findings and recommendations also appears in the Canadian Judicial Council draft policy, in the rules governing disclosures by Manitoba's Children's Advocate and in New Brunswick's disclosure policy.

Finally on the most privacy sensitive end of the continuum are the aggregate data reports released by the vast majority of multidisciplinary teams working out of American states. No personal information is disclosed or identifiable. Occasionally, some reports include one paragraph anecdotes that summarize individual cases in a manner that does not disclose the identity of the individuals involved. Also at this end of the continuum are fatality review reports completed in hospitals and protected in British Columbia by the *Evidence Act* and Nova Scotia's *Freedom of Information and Protection of Privacy Act*. Both statutes limit disclosure of the reports. The grounds for the limitation appear to be that the interest in using the review as a learning tool outweighs any public accountability purpose.

It seems that where personal information is disclosed two things are usually true: the reporting agency has a statutory authority to disclose personal information and the reporting agency has public accountability as a key purpose for the organization. This has an interesting parallel with the Office of the Information and Privacy Commissioner (OIPC) case law regarding section 22 of the FOIPPA. On the rare occasion where the

OIPC has determined that the public interest outweighs privacy rights, the personal information has not been very sensitive and the document in question clearly had some public accountability purpose.[60]

There are important differences between public reporting by a ministry and public reporting by an external review agency (particularly an officer of the legislature). The balance for the Ministry would likely weigh more heavily on the protection of privacy side because the main purpose of the ministry is to provide services to children and the main purpose for the child death review by a ministry is as a learning tool. However, because there is a keen public interest in ensuring that the Ministry is accountable, it is possible to describe a set of rules mandating public reporting by the Ministry in a limited fashion. In contrast, an external review agency will have as its main purpose, subjecting the ministry to public scrutiny and ensuring that the ministry is accountable. In addition, officers of the legislature are generally given more discretion to make the decision regarding what information is in the public interest. Therefore, the disclosure by an external review agency would weigh more heavily in favour of the public accountability purpose.

e. How does an agency balance the public's need to know with the right to personal privacy?

In order to disclose personal information a public body or an officer of the legislature must first establish that it has the authority under the FOIPPA to do so. As noted earlier, part 2 of the FOIPPA contains the process by which a public body responds to an access to information request. Section 22 of part 2 sets out the test the public body uses to decide whether or not it will disclose personal information to a third party. Part 3 of the Act sets out the privacy protection rules including the rules that govern when a public body has the authority to disclose personal information without a formal access request under part 2.

Once a public body or officer of the legislature determines that it has the authority to disclose personal information under section 33 of the FOIPPA, the head must then determine whether or not he should exercise his discretion to disclose personal information. It is in the exercise of this discretion that s. 22 can provide guidance to assist agencies in balancing the public's need to know with the right to personal privacy.

Section 22(1), (2)(a) and (b) of the FOIPPA provide:

> ***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*

[60] These decisions are discussed in more detail under part (e) of this section.

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,

The "not an unreasonable invasion of personal privacy" test was not incorporated into section 33.1 and 33.2 for fear that front line public servants would be unable to properly apply the test and so would inappropriately disclose personal information. Currently, all public bodies that are ministries use some form of centralized management to process access to information requests. It is these central groups that either apply the test in s. 22 or provide consistent guidance and training to regionalized access and privacy groups. By contrast, disclosures under s. 33.1 or 33.2 happen everyday in the normal course of business for most ministries.

The Office of the Information and Privacy Commissioner has issued numerous orders considering the issue of whether or not personal information should be disclosed for the purpose of subjecting the activities of a public body to public scrutiny.[61] In evaluating the balance between these two interests, the OIPC always begins by examining the personal information in question to determine the nature of the privacy issues associated with the particular information.

If the information falls within the category of information listed in s. 22(4), then the disclosure is not an unreasonable invasion of personal privacy and it is unnecessary to evaluate the public scrutiny requirement. Information falling within s. 22(4) includes:

- Information disclosed pursuant to an enactment that authorizes or requires the disclosure
- Information about the third party's position, functions or remuneration as an officer or employee of the ministry
- Information that reveals financial or other details of a contract to supply goods or services to a public body
- Information that reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body

If the information does not fall within s. 22(4), the OIPC will then go on to consider whether or not the disclosure of the information is a presumed unreasonable invasion of personal privacy as set out in s. 22(3). Information that falls within this category includes:

- Personal information that relates to medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation
- Personal information was compiled and is identifiable as part of an investigation into possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation
- Personal information that relates to eligibility for income assistance or social service benefits or to the determination of benefit levels
- Personal information that relates to employment, occupational or education history

[61] OIPC cases are publicly available at: http://www.oipcbc.org/

- Personal information that consists of personal recommendations or evaluations, character references or personnel evaluations about the third party

What is significant about this list is that there are portions of the contents of typical child death review reports that would fall within the category of presumed unreasonable invasion of personal privacy including medical information, any comment on the quality of the work done by MCFD staff and probably even the fact that the child was in care or known to the ministry.

By determining whether or not the disclosure of personal information involved is a presumed unreasonable invasion of personal privacy, the decision maker then has a sense of the weight be given to the privacy interests involved.

Factors that reduce the weight given to the privacy interests include:

- Aggregate references to comments about groups of individuals do not generally raise the same level of concern about privacy (also described as "diluting" privacy interests).
- The character and content of some of the with held information is similar to information already disclosed.
- The personal information was previously disclosed in another forum.[62]

Once the weight of the privacy issues is established, the next step in the evaluation is to look at what the public interest in the records is. Questions decision makers consider are:

- Would the disclosure of the particular information in question assist in subjecting the public body itself to public scrutiny?
- Would the disclosure add in a meaningful way to the public's understanding of the public body's processes?
- Would the disclosure allow public scrutiny of a publicly-funded scheme.[63]
- Is other information already publicly available that allows for public scrutiny?
- Was an "overt goal" of the document related to public scrutiny?[64]
- Does the information relate broadly to the activities of the public body and is there a wider public interest in the disclosure of the information?
- Is the personal information about the organizational group ultimately responsible for the management of the public body because if so, this heightens the need for accountability and transparency.

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[62] In Order F05-30, [2005] B.C.I.P.D. No. 30 at para. 72, the adjudicator notes that the fact that the report's author read portions of the disputed document aloud and provided copies for meeting participants to follow during the meeting, diminished to some extent any unreasonable invasion of third-party privacy. Order 40-1995 also gave significant weight to the fact that portions of the information had already been disclosed and that the Judgment of Inquiry disclosed even more personal information that what was contained in the disputed report.

[63] In this case the publicly funded scheme was payments to criminal defence lawyers: Order 74-95.

[64] In Order F05-14, [2005] B.C.I.P,C.D. No. 5, the adjudicator order disclosure of personal information because the report explicitly stated that one of the aims was to ensure that citizens of West Vancouver were receiving adequate policing services.

Examples of cases where the OIPC refused to order disclosure based on the need for public scrutiny included a review of a request for information contained in: a human rights investigation[65], a work place investigation file[66], an MCFD file relating to the activities of a foster parent[67], a College of Teacher's disciplinary investigation file including witness opinions and personal evaluations of third parties[68] and an employee's file consisting of a review of a third party's employment performance.[69]

Examples of cases where the OIPC found that public interest outweighed privacy interests included a request for a copy of a consultant's report on labour relations within a work unit[70] and a request for a copy of a behavioral investigator's report to a Coroner.[71] With respect to the consultant's report, the personal information disclosed was aggregate comments and opinions about a small group (the executive). Personal information about individuals was with held. In deciding that the public interest outweighed the privacy interests the adjudicator states,

> *In my view, however, it is desirable for accountability reasons to provide a more complete picture of the executive's actions. The executive are the organizational unit responsible for running the[West Vancouver Police Department] and are accountable to the [Police Board], the WVPD's employees and the people of West Vancouver for how they carry out their duties. The selective with holding of information that the executive believe may impinge negatively on the public perceptions of them could be viewed a misleading. It certainly does not promote accountability and transparency.*[72]

The adjudicator goes on to emphasize that one of the purposes of the report was to ensure that the people of West Vancouver are receiving adequate police services.

With respect to the behavioural investigator's report, the former Commissioner ordered the disclosure of a severed version of the report. Key considerations appeared to be that portions of the report had already been made public, coroners routinely disclose information from behavioural investigator's reports in their Judgments of Inquiry and, in this particular case, the Judgment of Inquiry fully disclosed personal information that was much more sensitive than most of what was in the report in question.

Lessons learned from the OIPC case law are that in order to balance the public's need to know with the right to personal privacy organizations should first consider the sensitivity of the personal information, sensitivity declines if individuals are identified in groups

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[65] Order F05-34, [2005] B.C.I.P.C.D No. 34
[66] Order F05-32, [2005] B.C.I.P.C.D. No. 32
[67] Order 04-22, [2004] B.C.I.P.C.D. No. 22
[68] Order F05-02, [2005] B.C.I.P.C.D. No. 2 at para. 68. The adjudicator ordered the disclosure of the report in severed format to protect third-party privacy. The disclosed portion included the terms of reference, some but not all of the information gathered in the course of the investigations and several of the investigator's findings and conclusions.
[69] Order 00-53, [2003], B.C.I.P.C.D. No. 53
[70] Order F05-14, [2005] B.C.I.P.C.D. No. 14.
[71] Order 40-1995.
[72] Order F05-14, [2005] B.C.I.P.C.D. No. 14. at paragraph 33.

(even small groups) or if the individual is deceased. The public accountability significance rises if the information relates to the performance of the executive of an organization. Once the sensitivity of the personal information is assessed, organizations should then consider the purpose of the document in question to determine if it was intended to serve a public accountability purpose.

Disclosures by MCFD:
In order for MCFD to disclose personal information contained in the case review reports under current legislation MCFD must establish that the disclosure is authorized pursuant to one of the options contained in sections 33.1 or 33.2 of the FOIPPA. Under the current statutory framework, there is really only one likely authority for the disclosure: s. 33.2(a) – consistent purpose disclosure. Because this is a 33.2 provision, it only permits disclosure within Canada. Therefore, even if section 33.2(a) could be said to apply, MCFD would certainly not be permitted to disclose the personal information on the internet. Section 33.2(a) provides:

> ***Disclosure inside Canada only***
> ***33.2*** *A public body may disclose personal information referred to in section 33 inside Canada as follows:*
> *(a) for the purpose for which it was obtained or compiled or for a use consistent with that purpose (see section 34);*
> ***Definition of consistent purposes***
> ***34*** *(1) A use of personal information is consistent under section 32 or 33.2 with the purposes for which the information was obtained or compiled if the use*
> *(a) has a reasonable and direct connection to that purpose, and*
> *(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information or causes the information to be used or disclosed.*
> *(2) [Repealed 2002-13-8.]*

The challenges for MCFD in its public disclosures then are that first, it is not clear that the case reviews are intended to serve a public accountability purpose. If that is the case, how can it be said that the disclosure of the child death case reviews is for a purpose consistent with the purpose for which the information is obtained and compiled? The second key challenge for MCFD is that even if it can be said that one of the purposes for the case reviews is public accountability, how can it be said that disclosing the very sensitive personal information contained in the reports is "necessary" within the meaning of s. 34(1)(b). In all likelihood, the only necessary disclosures are the recommendations and the ministries response to them. MCFD is probably not authorized to comment on any individual case but instead is only authorized to disclose aggregate, depersonalized recommendations and responses. At best there is uncertainty regarding the authority to disclose proactively and uncertainty regarding the extent of the personal information MCFD should disclose even if it does have the authority to do so.

Disclosures by an External Review Body

External review bodies are much more likely to have statutory provisions requiring or permitting public reporting. External review bodies are also more likely to have a clearly stated public oversight and review function. As a result, both the authority to publicly disclose personal information and the exercise of discretion in determining how much, if any, personal information will be disclosed are much clearer.

Pursuant to section 33.1(1)(c) and 33.1(1)(c.1) public bodies and officers of the legislature, may disclose personal information inside or outside Canada:

> ***Disclosure inside or outside Canada***
> ***33.1*** *(1) A public body may disclose personal information referred to in section 33 inside or outside Canada as follows:*
> *(c) in accordance with an enactment of British Columbia or Canada that authorizes or requires its disclosure;*
> *(c.1) if it is made available to the public in British Columbia under an enactment, other than this Act, that authorizes or requires the information to be made public;*

Examples of statutory provisions that serve to permit public disclosures of personal information can be found in the *Office for Children and Youth Act*, the *Ombudsman Act* and the *Freedom of Information and Protection of Privacy Act*.

The CYO currently has the authority to make public a "special report" pursuant to s. 8(4) of the OCYA. To the extent the special report requires the inclusion of personal information, the CYO has the authority to disclose personal information. The CYO is not entitled to make public reports produced in response to a request from the Attorney General under s. 6. Lessons taken from the CYO suggest that any external body tasked with ensuring that MCFD is publicly accountable in the manner in which it reviews children's deaths, requires a clear authority to disclose personal information.

A limited power of disclosure would be a provision equivalent to that given to the Information and Privacy Commissioner in s. 47(2) of the FOIPPA:

> *The commissioner may disclose, or may authorize anyone acting on behalf of or under the direction of the commissioner to disclose, information that is necessary to*
> *(a) conduct an investigation, audit or inquiry under this Act, or*
> *(b) establish the grounds for findings and recommendations contained in a report under this Act.*

The test of requiring the disclosure to be necessary for establishing the grounds for findings and recommendations is the same test used by the Children's Commission even though it was not subject to the FOIPPA. It can also be found in section 9(7) of the *Ombudsman Act* which empowers the Ombudsman to disclose information relating to an investigation where the Ombudsman determines that it is "*necessary to further an*

investigation, prosecute an offence under the Act or establish grounds for conclusions and recommendations made in a report under this Act."

Section 31(3) of the *Ombudsman Act* is an example of a provision granting the external review body more significant discretion (and so flexibility) and that also clearly considers the public interest:

> *If the Ombudsman considers it to be in the public interest or in the interest of a person or authority, the Ombudsman may make a special report to the Legislative Assembly or comment publicly about a matter relating generally to the exercise of the Ombudsman's duties under this Act or to a particular case investigated by the Ombudsman.*

The Ombudsman also has the authority to make a report to the Legislative Assembly on a particular investigation where the Ombudsman determines that no suitable action has been taken in response to an investigation:

> *"…the Ombudsman must delete from the recommendation and from the response any material that would unreasonably invade any person's privacy, and may delete material revealing the identity of a member, officer or employee of an authority."*[73]

Therefore, it appears that although external review agencies give greater weight to the importance of public scrutiny than do ministries, external review agencies tend to consider two other key factors in balancing these interests: the need to establish grounds for conclusions and recommendations and whether the disclosure is an unreasonable invasion of personal privacy.

[73] *Ombudsman Act*, s. 25

3. MCFD: Collection, Use and Disclosure of Personal Information

a. Public reporting of child death review reports.
b. Sharing of personal information between MCFD program areas.
c. Sharing of personal information between child serving agencies

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a. Public reporting of child death review reports

MCFD's current authority to publicly disclose personal information from case reviews is unclear and extremely limited. As discussed earlier, the extent of that authority is unclear because the Ministry must rely on the consistent purpose test set out in s. 33.2(a) of the FOIPPA. It is very important to be clear about whether or not the FOIPPA will apply to child death review reports. If the CFCSA is amended to provide the provincial director with the power to complete or ensure completion of child death review reports, it is likely the reports will then be viewed as being subject to the CFCSA disclosure provisions. As noted above, case reviews are currently viewed by the Ministry as not being subject to the CFCSA disclosure provisions. The CFCSA disclosure provisions are more restrictive than the FOIPPA. In particular section 79(d) permits disclosure where "required" by an enactment. The equivalent FOIPPA provision permits disclosure where "authorized or required" by an enactment. Some of the recommendations below are to permit (but not require) disclosure. Therefore, s. 79(d) of the CFCSA might not permit such a disclosure. It is also true however, that s. 79 allows for disclosure without consent where it is made in Canada and necessary for the administration of the Act (s. 79(k)). Presumably this would be sufficient to allow the proposed disclosure but given MCFD's struggles with public disclosure I have also suggested below that records created under the CFCSA be subject to all of the provisions of the FOIPPA.

The following observations also attempt to be mindful that the key purpose for internal case reviews by MCFD is to serve as a learning tool for organizational self-examination and improvement. The proposed disclosure rules below raise the importance of public accountability as a purpose for these reports but, with one exception, specifically prohibit the disclosure of identifiable personal information including the names of any individuals involved. With the limitations placed around the proposed disclosures the resulting public reports will likely consist mainly of the recommendations. It is important in this scheme of public reporting that the Coroner continue to publicly report the results of his inquiries. The proposed disclosures attempt to not overlap with the information available through the Coroner's reports.

Observation #1– Reporting by MCFD
What would have to change to enable more public reporting of child death reviews?

(a) Public accountability purpose
Amend the CFCSA to give the provincial director the power to complete or ensure the completion of child death review reports. Make clear that although the main purpose of the reports is as a learning tool, public accountability is also a purpose for the reports.

(b) Annual reports
Amend the CFCSA to require MCFD to include in its annual report de-personalized aggregate data from child death reports and critical incident reports (case reviews) including recommendations, steps taken to implement recommendations and updates on progress.

(c) Regular public reporting of all child death reviews
Amend the CFCSA to require MCFD to publicly disclose de-personalized individual summaries of every child death review report completed by the Ministry (or the multidisciplinary team report co-ordinated by the Ministry). These individual de-personalized reports must be disclosed semi-annually. Disclosing in groups would assist in ensuring the anonymity of the parties. In addition, no names, dates or place names would be disclosed. As a guide to the ministry, the statutory provision should include the authority for the Ministry to disclose the contents of the child death review report to the extent that the disclosure is:

- necessary for the purposes of subjecting the activities of the ministry to public scrutiny
- necessary to establish the grounds for findings and recommendations contained in the report and
- not an unreasonable invasion of personal privacy

(d) Public reporting in response to high profile, public cases
Amend the CFCSA to permit public disclosures of personal information by MCFD where there has been a legally authorized public disclosure of the death of a child in care or known to the Ministry, by a court, the police or the Coroners Service. In this circumstance, <u>permit</u> MCFD to disclose three things:

- the name of the deceased child (but no other name)
- the fact that the child was in care or known to the ministry at the time of death and
- the contents of the child death review report to the extent that the disclosure is:
  - ♣ necessary for the purposes of subjecting the activities of the ministry to public scrutiny
  - ♣ necessary to establish the grounds for findings and recommendations contained in the report and
  - ♣ not an unreasonable invasion of personal privacy

Because the above-noted disclosure is permissive, MCFD would not have to disclose if

such a disclosure would harm a law enforcement matter.

(e) Disclosure to multidisciplinary team members
Amend the CFCSA to require the director to disclose a complete copy of the final child death review report to all agencies who participated in the multidisciplinary child death review team. Include in the provision a requirement that participants receive the report on a confidential basis.[74]

(f) Disclosure to the external review agency
Amend the CFCSA to required MCFD to disclose a complete copy of every child death review report to the external review agency.

[74] Such a confidentiality provision will not exclude the report from being subject to the FOIPPA in the hands of the other agencies. Instead, the report will be protected by the privacy provisions of the FOIPPA. The confidentiality agreement will assist in encouraging other public bodies to exercise their discretion under s. 33 to refuse to disclose the report proactively even should they have an authority to otherwise disclose it.

b. Sharing of personal information between MCFD program areas

(i) What are the rules governing sharing of personal information between program areas within MCFD?
(ii) Is there a need for freer exchange of personal information within program areas of MCFD?
(iii) What would have to change to enable more sharing of personal information between program areas?

(i) What are the rules governing sharing of personal information between program areas within MCFD?

A director under the CFCSA has specific authority to disclose information without consent in a number of key circumstances:[75]

- Where necessary to ensure the safety or well-being of a child
- In Canada where necessary for the administration of the Act
- Where required by an enactment
- To the PGT where necessary to enable the PGT to perform duties and exercise powers as guardian of a child's estate under the CFCSA

In addition a director under the CFCSA has significant power to collect information including personal information from other public bodies and from "a person".[76] Public bodies must disclose information requested by the director.

Under the *Youth Criminal Justice Act*, records created under the YCJA can be disclosed to a department or agency of a government in Canada "*engaged in the supervision or care of the young person, whether as a young person or an adult, or in an investigation related to the young person under an Act of the legislature of a province respecting child welfare*".[77]

Under the *Adoption Act* if requested by a *Adoption Act* director, a CFCSA director must disclose any information that was obtained under the CFCSA and is necessary to enable the director or an adoption agency to exercise the powers or perform the duties or functions given to them under parts of the *Adoption Act*.[78] In addition, a director under the *Adoption Act* has the right to any personal information "necessary to enable the director to locate a person for the purposes of the Act or is necessary for the health or safety of an adopted person.[79]

Program areas within MCFD are also subject to the FOIPPA. Section 33.2(c) is the section that governs sharing of personal information between program areas within a

[75] CFCSA, s. 79
[76] CFCSA, s. 96
[77] YCJA, s.119(1)(n)(ii)
[78] *Adoption Act. s* 70(4)
[79] *Adoption Act*. S. 70

public body. Pursuant to section 74(2)(e) of the CFCSA section 33.2(c) of the FOIPPA does not apply to records created under that Act. However, section 33.2(c) does apply to other areas of the ministry. Section 33.2(c) provides:

> *A public body may disclose personal information referred to in section 33 inside Canada as follows:*
> *(c) to an officer or employee of a public body, if the information is necessary for the performance of the duties of the officer, employee or minister*

(ii) Is there a need for freer exchange of personal information within program areas of MCFD?

A constant theme in child death review reports is the fact that a lack of communication contributed to the tragic events. Ministry staff confirm a cultural reluctance to disclose personal information between program areas. Possible sources for this lack of communication include:

- The confusing array of provisions limiting collection, use and disclosure of personal information have left MCFD staff uncertain as to what exactly they are or are not permitted to do.
- MCFD was created from a variety of disparate program areas who have yet to meld themselves into a single public body and continue to operate as if they are separate public bodies
- Some information regarding privacy obligations created by MCFD to guide staff including their "Privacy Charter" are out of date and so contain errors that would add to the confusion.

(iii) What would have to change to enable more sharing of personal information between MCFD program areas?

The privacy rules for MCFD are very confusing because they are located in a number of statutes and at times, appear to compete. It is very difficult to feel confident in what the rules might be. Section 79 of the CFCSA provides a list of permitted disclosures. In effect, this is the CFCSA equivalent to sections 33.1 and 33.2 of the FOIPPA. The majority of the permissions in s. 79 already exist in some form in s. 33.1 or 33.2. For example, a disclosure to a foster parent or caregiver relating to the children in their care would be authorized as a consistent purpose disclosure under s. 33.2(a). Recent direction sent out from the MCFD branch responsible for access and privacy included links to the 33 page "Confidentiality and Disclosure Policy" and the 31 page (not counting legislation) "Guide to Privacy Charter". The Privacy Charter is badly out of date having been authored in 1999.[80] It is difficult to believe that front line staff have the time or inclination to read through 5 statutes and 65 pages of guidelines to understand the rules regarding disclosure of personal information. In this environment it is not surprising that staff are hesitant to share personal information of clients even within the ministry.

[80] E-mail to all MCFD employees sent February 8, 2006 from Director, Information and Infrastructure Services Branch.

In contrast the FOIPPA is a single, clear set of rules regarding access and disclosure. It has been successfully applied for 10 years by other public bodies holding equally sensitive personal information. In addition, the FOIPPA has a much more comprehensive list of discretionary authorities to disclose than does the CFCSA.

Observation #2 – Sharing of personal information between MCFD program areas

(a) authority exists for sharing

The necessary statutory provisions are in place to allow appropriate sharing of personal information between program areas. The test for sharing whether taken from the *Adoption Act*, the CFCSA or the FOIPPA is: is the information necessary for the performance of the duties of the employee. To ensure the free flow of personal information necessary for the performance of the duties of the employees of MCFD, the Ministry should:

- review all applicable statutes to ensure that there are no statutory barriers to the sharing of personal information between ministry employees where the information is necessary for the performance of the duties of the employee
- review all of its privacy policy material with a view to updating, shortening and simplifying it.

(b) application of the FOIPPA to CFCSA records

For clarity and certainty, amend the CFCSA to adopt the FOIPPA rules in their entirety. This proposal would not keep MCFD from maintaining certain confidentiality provisions (s. 14 and s. 24) or from having specific statutory provisions permitting disclosure (s. 79(h) – disclosure to PGT).

c. Sharing of personal information between child serving agencies

(i) Sharing for the purposes of delivering services to children
(ii) Sharing for the purposes of conducting multidisciplinary child death reviews
(iii) Collection and use of linked data by MCFD

(i) Sharing for the purposes of delivering services to children.

In order to share information between public bodies, each public body needs to have the authority to collect, use and disclose the personal information involved. Pursuant to the CFCSA, directors are subject to the same collection and use rules under the FOIPPA as other public bodies. CFCSA directors are subject to different disclosure rules because section 74(2)(e) of the CFCSA states that only 4 of the subsections of 33.1 and 33.2 apply. Instead, there are special rules of disclosure under the CFCSA which, in effect, are remarkably similar to the FOIPPA disclosure rules.

The authority of a director under the CFCSA to share information includes the authority to make agreements as follows:

> 93(1)A director may do one or more of the following:
>
> (g) make agreements, including but not limited to agreements
>
> (v) with any ministry of the government or any community agency if an agreement is necessary to integrate the planning and delivery of preventive and support services to families and children

In addition, as noted above, a director under the CFCSA has specific authority to disclose information without consent in a number of key circumstances including[81]:

- Where necessary to ensure the safety or well-being of a child
- In Canada where necessary for the administration of the Act
- Where required by an enactment
- To the PGT where necessary to enable the PGT to perform duties and exercise powers as guardian of a child's estate under the CFCSA

The director's authority to collect information, including personal information is quite strong and is set out in section 96 of the CFCSA.

Other public bodies such as the Ministry of Education, Ministry of Health, Minister of Public Safety and Solicitor General and Health Authorities are subject to the FOIPPA.

With respect to collection, public bodies (including MCFD) can only collect personal information if:

> (a) the collection of that information is expressly authorized by or under an Act,
> (b) that information is collected for the purposes of law enforcement, or

[81] CFCSA, s. 79

(c) that information relates directly to and is necessary for an operating program or activity of the public body.[82]

Therefore, even without an express statutory provision, so long as the information relates directly to and is necessary for an operating program or activity of a public body, the public body may collect the personal information. MCFD can rely on the authority set out in both section (c) above and on section (a) because MCFD does have a statutory provision clearly permitting collection of personal information "necessary to enable the director to exercise his or her powers or perform his or her duties or functions" under the CFCSA.

Because sharing between the public bodies will be indirect collection (meaning the personal information is not collected directly from the individual the information is about), public bodies must also comply with section 27 of the FOIPPA. This provision should not be an issue because section 27(1)(b) of the FOIPPA allows for indirect collection if the information may be disclosed to the public body under sections 33 to 36. As noted below, there are several provisions in sections 33.1 and 33.2 that authorize the disclosure of personal information between public bodies for the purposes of integrating the planning and delivery of preventive and support services to families and children.

In order to disclose personal information, public bodies may be able to rely on a number of provisions in sections 33.1 and 33.2 including:

- in accordance with an enactment of British Columbia or Canada that authorizes or requires its disclosure (33.1(1)(c));
- in accordance with a provision of a treaty, arrangement or agreement that authorizes or requires its disclosure, and is made under an enactment of British Columbia or Canada (33.1(1)(d));
- if the head of the public body determines that compelling circumstances exist that affect anyone's health or safety, and notice of disclosure is mailed to the last known address of the individual the information is about, unless the head of the public body considers that giving this notice could harm someone's health or safety (33.1(1)(n));
- for the purpose for which it was obtained or compiled or for a use consistent with that purpose (in Canada only, s. 33.2(a))
- to an officer or employee of a public body or to a minister, if the information is necessary for the delivery of a common or integrated program or activity and for the performance of the duties of the officer, employee or minister to whom the information is disclosed (in Canada only, s. 33.2(d))

The most straightforward authority for disclosure is the existence of a relevant statutory provision that authorizes or requires the disclosure. Other public bodies do not necessarily have clear statutory authority to disclose personal information in these circumstances. However, MCFD has the statutory authority to enter into information sharing agreements and this would support a disclosure under s. 33.1(1)(d) of the FOIPPA. For other public bodies, in the absence of such a provision the most likely basis

[82] *Freedom of Information and Protection of Privacy Act,* s. 26.

upon which personal information can be disclosed in this context would be because it is necessary for the delivery of a common or integrated program or activity.

MCFD's Manager of Inter-ministry Protocols and Systems advises that MCFD does have a number of information sharing agreements with other public bodies. The agreements are based on templates developed to ensure that the sharing of personal information is privacy compliant. The agreements appear to be used mainly to facilitate child protection activities as opposed to planning activities.

The phrase "common or integrated program or activity" is not defined in the act, nor in policy. There are no cases discussing this provision. What ministries have in common is their client: the child. The common activity is the care and best interests of the child. It is certainly arguable that this provision of the FOIPPA allows for the free flow of information between service providers to the extent necessary to deliver the common program or activity.

Is there a need for a freer exchange of personal information between public bodies that deliver services to children?

In the report of the Gove Inquiry ministry staff, community agencies and the public all cited confidentiality concerns and the failure to share critical information as barriers to the comprehensive investigation of child abuse and neglect concerns.[83] Gove addressed these concerns in several recommendations including #84 (power to compel production of a record), #92 (Child Advocate should have power to report equivalent to s. 9(7) and s. 31(3) of the *Ombudsman Act*)[84], and two recommendations regarding sharing of information between the ministry and foster parents (#14) and with income assistance workers (#24).

The Child and Youth Officer identified that since no one ministry is responsible for all services provided to children there needs to be joint planning between service delivery organizations. She identified that public bodies can act as silos of information, reluctant to share information. Some MCFD staff also agreed that MCFD had some difficulty obtaining and sharing information although regionalization may have improved the situation somewhat.

The FOIPPA already permits the sharing or personal information needed to ensure the delivery of appropriate and coordinated services to children.

[83] They also cited the FOIPPA as a barrier to freer exchange of information.
[84] Discussed in section 2(e) Disclosures by an External Review Body

Observation #3 – Information sharing between public bodies for the purposes of delivering services to children

(a) authority exists for public bodies to share information
The collection, use and disclosure of information rules contained in the FOIPPA allow other public bodies who are responsible for delivering services to children to participate in the regular sharing of information for the purposes of delivering services to individual children as a common or integrated program or activity by the public bodies.

(b) authority exists for MCFD to share information with other public bodies
MCFD has the statutory authority within the CFCSA and the FOIPPA to allow it to participate in regular sharing of personal information with other public bodies delivering services to children.[85]

(c) use of information sharing agreements and protocols
MCFD should continue to use information sharing agreements and protocols to provide clarity around the exchange of personal information for this purpose.

(ii) Sharing for the purposes of conducting multidisciplinary child death reviews

The difference between the authority for sharing of personal information for the purposes of multidisciplinary child death reviews versus sharing for the purposes of delivering services to children is that it is not clear in the CFCSA that completing child death reviews is one of the powers of the director. It may also not be clear that the other agencies MCFD wishes to engage on the multidisciplinary teams have the authority to participate. That being the case, it is not clear that the CFCSA director could use the collection and disclosure powers in the CFCSA to support this process. The public bodies that participate in the multidisciplinary child death reviews might likewise have no clear authority to receive the personal information required to conduct the reviews. Amendments to the CFCSA clearly allowing the disclosure of the reports and documents necessary to conduct the review to other participating public bodies would ensure both that the CFCSA could disclose the information and consequently that the receiving public body could collect it.[86]

With respect to participation in multidisciplinary teams by individuals[87] subject to the *Personal Information Protection Act*, that Act permits the collection and disclosure of personal information without consent where the collection of disclosure is required or authorized by law.[88] Another possible participant in multidisciplinary teams is the

[85] In particular, sections 93(1)(g)(v) and s. 79(a), (a.1) and (k) of the CFCSA and s. 33.1(1)(c) and 33.1(1)(d) of the FOIPPA.
[86] This is true because the FOIPPA provides that a public body may collect personal information if such collection is authorized by or under an Act. An express authority to disclose to participating ministries constitutes an authority for them to collect the disclosed information.
[87] The *Personal Information Protection Act* applies to "organizations". In the multidisciplinary team context the most likely participant who would be subject to PIPA is doctors in private practice.
[88] *Personal Information Protection Act*, s. 12(1)(h) and s. 18(1)(o).

RCMP. The RCMP is not subject to the FOIPPA but rather, is governed by federal access and privacy laws. Pursuant to the *Privacy Act* the RCMP is entitled to collect personal information if it relates directly to an operating program or activity.[89] The RCMP is entitled to collect personal information indirectly where the personal information may be disclosed to the institution under subsection 8(2).[90] Section 8(2) of the *Privacy Act* permits disclosure of personal information under an agreement or arrangement between the institution and the government of a province for the purposes of administering or enforcing any law. The following observations would therefore allow for the participation of the RCMP by permitting the development of information sharing agreements with potential multidisciplinary team participants.

Observation #4 - Sharing between public bodies for the purposes of multidisciplinary team child death reviews

(a) authority to complete multidisciplinary team child death reviews
As per observation #1(a), amend the CFCSA to give the provincial director the power to complete or ensure the completion of child death review reports.

(b) information sharing agreements
Amend the CFCSA to allow the director to enter into information sharing agreements for the purposes of coordinating and engaging in multi-disciplinary team child death reviews.

(c) disclosure to multidisciplinary team members
As per observation #1(e) amend the CFCSA to require the director to disclose a complete copy of the final child death review report to all agencies who participated in the multidisciplinary child death review team. Include in the provision a requirement that participants receive the report on a confidential basis.[91]

(iii) Collection and Use of Linked Data by MCFD

In section 96 of the CFCSA the director has a very strong power to collect personal information both from public bodies and from a person. The authority given to the CFCSA director is identical to the power currently held by the Child and Youth Officer under section 11 of the OCYA. The CYO has effectively used her power to collect extensive electronic data, link the data, depersonalize it and send it out to research groups for evaluation.

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[89] *Privacy Act*, s. 4
[90] *Privacy Act*, s. 5(1)
[91] Such a confidentiality provision will not exclude the report from being subject to the FOIPPA in the hands of the other agencies. Instead, the report will be protected by the privacy provisions of the FOIPPA. The confidentiality agreement will assist in encouraging other public bodies to exercise their discretion under s. 33 to refuse to disclose the report proactively even should they have an authority to otherwise disclose it. For team agencies that are subject to the federal *Access to Information Act* the confidentiality clause may serve to support an argument that the report was received in confidence by the government of a province and so should not be disclosed pursuant so s. 13(1)(c) of the AIA.

The key difference between the CYO's use of linked data and the MCFD's use is that presumably, MCFD has an operational need to keep the personal identifiers on the linked data and use the linked data to make operational decisions regarding individual children. When a child is in care, MCFD acts as the parent and needs all the information a parent would need to make good decisions for the child.

The Executive Director of Child and Family Development advises that MCFD does receive data sets from data bases in the Ministry of Employment and Income Assistance, Vital Statistics, Ministry of Education and the Ministry of Health. However, all of the collection of personal information is done pursuant to section 35 research agreements. As a result, the Ministry is prohibited from using this information for the purposes of making a decision about an individual.

The only rule in the FOIPPA regarding linked data is set out in section 35. Section 35 sets up strict rules regarding disclosure of information for research purposes. It provides:

> *(b) any record linkage is not harmful to the individuals that information is about and the benefits to be derived from the record linkage are clearly in the public interest.*

Public bodies cannot use research agreements to obtain linked data for the purposes of making operational or even administrative decisions about individuals.[92] However, because MCFD has clear statutory authority to collect the personal information pursuant to s. 96, it can point to section 33.1(1)(c) of the FOIPPA as the authority supporting disclosure of the personal information by other public bodies to MCFD. By using research agreements to support the disclosure pursuant to 33.2(k) (which permits disclosure based on s. 35 research agreements) MCFD is limited by the strict record linkage rules set out in s. 35. If MCFD relies instead on its statutory authority to collect personal information, then the key rules for MCFD in linking data are the use of personal information rules set out in s. 32 of the FOIPPA not the s. 35 data linking rules.

Section 32 of the FOIPPA provides:

> *A public body must ensure that personal information in its custody or under its control is used only*
> *(a) for the purpose for which it was obtained or compiled or for a use consistent with that purpose*
> *(b) if the individual the information is about has identified the information and has consented, in the prescribed manner, to the use or*
> *(c)for the purpose for which that information may be disclosed to that public body under section 33 to 36.*

Other public bodies are entitled to disclose personal information to MCFD by virtue of section 33.1(1)(c) – in accordance with an enactment of British Columbia that authorizes

[92] Freedom of Information and Protection of Privacy Policy and Procedures Manual, Section 35, page 2 states, "record linkages for administrative purposes are not permissible under paragraph 35(b). Personal information sets cannot be matched or compared with one another to make a decision about a particular person's entitlement to or eligibility for a job benefit or service."

or requires its disclosure. The relevant enactment is s. 96 of the CFCSA. Section 96 makes clear that the purpose for the collection (and so the purpose for the disclosure) is because the information is "necessary to enable the director to exercise his or her powers or perform his or her duties or functions under this Act."

An interesting example of a statutory mandate to create an information data base in order to track concerns relating to children can be found in the British *Children Act, 2004*. This enactment arose out of the recommendations made by Lord Laming.[93] A key concern arising from that inquiry was the lack of communication between child serving agencies. Section 12 of the *Children Act, 2004* provides that the Secretary of State can require authorities in England who provide services to children to set up a data base. The provision includes a list of the type of data from a variety of sources (including schools, child care providers and social landlords) that could be included in such a data base and a regulatory power to set out rules regarding access to and disclosure from the data base. The clear intention is to provide a technological method of communicating concerns regarding children in care.

Observation #5 – Collection and Use of Linked data by MCFD

(a) authority for linking exists
MCFD has sufficient authority under the CFCSA and the FOIPPA to collect, link and use personal information from other public bodies to make operational decisions regarding individual children. MCFD must not use research agreements to obtain the information but rather must rely on its collection authority in s. 96 of the CFCSA.

(b) best privacy practices
Linked data sets for the purpose of individual decision making are highly privacy invasive. If MCFD is to engage in this practice, they should ensure that the absolute minimum necessary personal information is collected from each public body, that each linking is essential to enable the CFCSA director to deliver mandated services to the child and that there is a governance, security and accountability structure around MCFD's linked data set that meets the highest privacy standards.

[93] The Victoria Climbie Inquiry materials are located at: http://www.victoria-climbie-inquiry.org.uk/. The *Children Act 2004* can be found at http://www.opsi.gov.uk/acts/acts2004/40031--c.htm#12. The provision describing the information databases is s. 12.

4. External Review Agency: Collection, Use and Disclosure of Personal Information

a. Public reporting of child death review reports
b. Collection and use of linked data

a. Public reporting of child death review reports

Whether the proposed external review agency is an officer of the legislature or not, it will be subject to the disclosure rules contained in the FOIPPA. An officer of the legislature has more latitude with respect to collection or use of personal information. But in reality, because the sources of the information will likely be mainly other public bodies, the officer may need to have clear collection and use authorities so that other public bodies have confidence that they have the authority to disclose to the officer.

Because the over sight body's main purpose will be focused on public accountability it should be given greater latitude in its ability to determine when disclosure is appropriate.

Observation #6 – Reporting by an External Review Agency

(a) Confidentiality Provision
Given the particularly sensitive nature of the information an external review agency will be gathering, the external review agency must ensure that information collected is not disclosed except as authorized by the enabling statute. A confidentiality provision modeled after s. 9 of the *Ombudsman* Act would help to protect sensitive personal information particularly linked data.

(b) Authority to publicly report personal information
The confidentiality provision should include a specific provision allowing for public reporting of personal information in limited circumstances. The provision should make clear that the oversight body may disclose information where such disclosures is, in the opinion of the commissioner (i.e. the external reviewer)

- In the public interest
- Necessary to establish the grounds for findings and recommendations
- Not an unreasonable invasion of personal privacy

b. Collection and use of linked data

Under the *Office for Children and Youth Act,* the CYO has been granted significant collection powers. The CYO has used her power to collect personal information for the purpose of monitoring performance and for related research purposes. Her only limitations on the use of the information are whatever the limitations are placed on the purposes of the CYO as set out in the OCYA.

The Child and Youth Officer has experienced some difficulties exercising the power of collection of information contained in s. 11 of the OCYA. The problems are a reluctance on the part of some public bodies to immediately deliver up the requested records, a reluctance to deliver up records that originated from other organizations (but were in the custody and control of the public body at the time of the request), challenges to the supremacy of the OCYA and demands for fees. The Child and Youth Officer has recommended the following change to section 11 of the OCYA (bold in original):

> 11(1) (b) is necessary**, in the opinion of the child and youth officer,** to enable the child and youth officer to perform duties or exercise powers or functions under this Act.
>
> (2) A director or a public body that has custody or control of information to which the child and youth officer is entitled under subsection (1) must disclose that information to the child and youth officer **in the manner and at the times requested by the child and youth officer.**
>
> A new (4) **The child and youth officer must not be required to pay a fee for a public body to comply with this section unless the cost to the public body is an unreasonable burden to it, and in which case the child and youth officer may be required to pay a fee that is no greater than the actual direct cost to the public body.**

The Child and Youth Officer also has some concern that the Act is not sufficiently clear regarding the use of the personal information collected. Organizations including MCFD and Vital Statistics have questioned whether or not the CYO's purposes cover the collection of the types of data the CYO has been seeking. The CYO is currently linking data from numerous public bodies, stripping the personal identifiers and then using the de-personalized data to evaluate program effectiveness. Linking data can be a very privacy invasive practice. The Child and Youth Officer has recommended the following additional purpose in section 3(2):

> (f) Collect and link data to monitor and evaluate the effectiveness, responsiveness and relevance of services to children, youth and their families, and may report publicly in the manner the child and youth officer considers most appropriate.

Clyde Hertzman in his submission noted that the CYO's collection power and use of the information for research purposes has been very effective compared to similar cross ministry attempts.[94]

Observation #7 – Collection and use of personal information by an external review body

(a) ensure appropriate statutory authority to collect
The collection power given to the external body tasked with ensuring MCFD is publicly accountable should have a collection power at least equivalent to the power set out in s. 11 of the OCYA with additional requirement that public bodies must disclose "upon request" and that information must be delivered without payment of fees.

(b) clarity of purpose
The enabling statute should clearly provide for the creation, use and disclosure of linked data sets as follows:

- State that the external review agency has the authority to collect and link data to monitor and evaluate the effectiveness, responsiveness and relevance of services to children, youth and their families.
- Permit the external review agency to disclose de-personalized data to researchers to assist in monitoring and evaluating the effectiveness, responsiveness and relevance of service to children, youth and their families.
- Permit the external review agency to publicly disclose de-personalized aggregate data as the agency sees fit

(c) best privacy practices
Linked data sets can be highly privacy invasive. The purpose for the collection and linking of data sets by the external review agency is for systemic evaluation and so the external review agency should develop policies and practices to ensure that the data is properly depersonalized and that all reports are of aggregate de-personalized data. The external review body should ensure that it develops a governance, security and accountability structure around the linked data set that meets the highest privacy standards.

[94] Clyde Hertzman letter to Child and Youth Review dated January 9, 2006.

5. Access and Privacy Issues Raised by the PGT

In his reports to the Child and Youth Review Office, the Public Guardian and Trustee raised three issues:
a. Disclosure of information from MCFD to PGT
b. Public reporting by MCFD
c. Effective information sharing between monitoring bodies and MCFD

The Public Guardian and Trustee (PGT) is a public body for the purposes of the FOIPPA and so is subject to the rules in the FOIPPA.[95] With respect to special collection or disclosure rules, section 22 (service plans) and 25 (annual reports) of the *Public Guardian and Trustee Act* [RSBC 1996] c.383 set out the PGT's reporting requirements. Neither report is likely to contain personal information. Section 79(h.1) of the CFCSA permits the director, to disclose information obtained under the CFCSA , "*necessary to enable the Public Guardian and Trustee to perform duties and exercise powers as guardian of a child's estate under this Act."*

(a) Disclosure of information from MCFD to PGT

In part 1 of the submissions of the PGT, the PGT identifies a number of challenges facing the PGT. Included in those challenges is, "*insufficient communication between the Public Guardian and Trustee and the Ministry of Children and Family Development continues to plague the carrying out of co-guardianship duties."*[96] The key communication problems identified are the failure of MCFD to provide ready access to critical incident reports and the failure of MCFD to provide prompt notice to the PGT of any circumstances giving rise to a legal claim on the part of children and youth who are in temporary care or are placed under a kith and kin agreement. The PGT identifies the reasons for the communication problems as the decentralization of the Ministry, the low priority given by MCFD staff to the legal and financial affairs of a child in care and lack of knowledge of the role of PGT by MCFD staff. The PGT recommends that the CFCSA be amended to require the prompt reporting to the PGT of the circumstances giving rise to a legal claim by a child in care of the province.

The PGT is correct in its assertion that the authority for disclosure of these reports (s. 79(h.1) is discretionary. There is nothing currently in the CFCSA or the FOIPPA requiring timely disclosure of these reports by MCFD. There are no privacy concerns with this proposal.

(b) Public reporting by MCFD

In his second submission, the Public Guardian and Trustee raises the issue of whether the PGT should publicly report on cases of alleged or substantiated negligence or intentional

[95] Schedule 2 to the FOIPPA lists the Office of the Public Guardian and Trustee and names the Public Guardian and Trustee as the head.
[96] Submission of the Public Guardian and Trustee to the BC Child and Youth Review, Part 1: Advocacy and Monitoring, January 2006 at p. 10.

tort by MCFD.[97] The PGT recommends that there are significant policy considerations against the PGT providing such public reports. However, the PGT recommends that MCFD be required to report in its annual report statistical and case summaries of critical incidents and such reports be the subject of performance statement audit by the Auditor General. The recommendation for including information in the annual report is consistent with observation #1(a).

(c) Effective information sharing between monitoring bodies

In his second submission, the PGT identifies that the Coroner, the Child and Youth Officer, the Ombudsman and the Public Guardian and Trustee should meet regularly to discuss systemic issues and that they should be given the express authority to share case specific information among these monitoring bodies. Observation #7(a) suggests that any external agency tasked specifically with oversight relating to children must have a strong power to collect information. If this occurs, the external review agency would have the case specific information necessary from the PGT, the Coroner and MCFD to evaluate systemic issues arising from individual cases. If the external agency wanted to seek the advice and input from the PGT, the Ombudsman and/or the Coroner, the external agency could rely upon section 33.2(a) (consistent purpose) and s. 33.2(d) (integrated program or activity) of the FOIPPA to support disclosures to these other organizations. A statutory provision would of course, provide both certainly and clarity.

[97] Submission of the Public Guardian and Trustee to the BC Child and Youth Review, Part 2: Public Performance Reporting in Providing Services for Children and Youth at p. 8.

6. Conclusions and Observations

The reporting of child death reviews around the world has generally been restricted to the reporting of aggregate de-personalized data. It is very rare for a child serving ministry to disclose the details of its internal child death review reports. When this does occur, it is usually because there is a statutory imperative that the ministry publicly disclose its reports. External review agencies are given broader discretion to report personal information but generally exercise that discretion to disclose very little of the details of the reports focusing instead on the recommendations and responses to the recommendations.

The observations set out below create a public reporting obligation on the Ministry of Children and Families with respect to the results of child death reviews. Included in the observations are guidelines to assist the Ministry in finding the balance between the need for public accountability and the need to protect personal privacy.

As a result of this review of access and privacy provisions, it has become clear that one of the most useful methods for evaluating whether or not the public interest should prevail over privacy concerns is contained in s. 22 of the FOIPPA. However, this test has not been incorporated into s. 33 of the FOIPPA. It would be extremely helpful to MCFD and other public bodies engaged in the child death review process to be able to use the principles in s. 22 when making decisions regarding disclosures for the purposes of subjecting a public body to public scrutiny. Therefore, although this observation is outside of the terms of reference for the Child and Youth Review I have added observation #8 below.

Observation #1– Reporting by MCFD
What would have to change to enable more public reporting of child death reviews?

(a) Public accountability purpose
Amend the CFCSA to give the provincial director the power to complete or ensure the completion of child death review reports. Make clear that although the main purpose of the reports is as a learning tool, public accountability is also a purpose for the reports.

(b) Annual reports
Amend the CFCSA to require MCFD to include in its annual report de-personalized aggregate data from child death reports and critical incident reports (case reviews) including recommendations, steps taken to implement recommendations and updates on progress.

(c) Regular public reporting of all child death reviews
Amend the CFCSA to require MCFD to publicly disclose de-personalized individual summaries of every child death review report completed by the Ministry (or the

multidisciplinary team report co-ordinated by the Ministry). These individual de-personalized reports must be disclosed semi-annually. Disclosing in groups would assist in ensuring the anonymity of the parties. In addition, no names, dates or place names would be disclosed. As a guide to the ministry, the statutory provision should include the authority for the Ministry to disclose the contents of the child death review report to the extent that the disclosure is:

- necessary for the purposes of subjecting the activities of the ministry to public scrutiny
- necessary to establish the grounds for findings and recommendations contained in the report and
- not an unreasonable invasion of personal privacy

(d) Public reporting in response to high profile, public cases

Amend the CFCSA to permit public disclosures of personal information by MCFD where there has been a legally authorized public disclosure of the death of a child in care or known to the Ministry, by a court, the police or the Coroners Service. In this circumstance, permit MCFD to disclose three things:

- the name of the deceased child (but no other name)
- the fact that the child was in care or known to the ministry at the time of death and
- the contents of the child death review report to the extent that the disclosure is:
  - ♣ necessary for the purposes of subjecting the activities of the ministry to public scrutiny
  - ♣ necessary to establish the grounds for findings and recommendations contained in the report and
  - ♣ not an unreasonable invasion of personal privacy

Because the above-noted disclosure is permissive, MCFD would not have to disclose if such a disclosure would harm a law enforcement matter.

(e) Disclosure to multidisciplinary team members

Amend the CFCSA to require the director to disclose a complete copy of the final child death review report to all agencies who participated in the multidisciplinary child death review team. Include in the provision a requirement that participants receive the report on a confidential basis.[98]

(f) Disclosure to the external review agency

Amend the CFCSA to required MCFD to disclose a complete copy of every child death review report to the external review agency.

[98] Such a confidentiality provision will not exclude the report from being subject to the FOIPPA in the hands of the other agencies. Instead, the report will be protected by the privacy provisions of the FOIPPA. The confidentiality agreement will assist in encouraging other public bodies to exercise their discretion under s. 33 to refuse to disclose the report proactively even should they have an authority to otherwise disclose it.

Observation #2 – Sharing of personal information between MCFD program areas

(a) authority exists for sharing
The necessary statutory provisions are in place to allow appropriate sharing of personal information between program areas. The test for sharing whether taken from the Adoption Act, the CFCSA or the FOIPPA is: is the information necessary for the performance of the duties of the employee. To ensure the free flow of personal information necessary for the performance of the duties of the employees of MCFD, the Ministry should:

- review all applicable statutes to ensure that there are no statutory barriers to the sharing of personal information between ministry employees where the information is necessary for the performance of the duties of the employee
- review all of its privacy policy material with a view to updating, shortening and simplifying it.

(b) application of the FOIPPA to CFCSA records
For clarity and certainty, amend the CFCSA to adopt the FOIPPA rules in their entirety. This proposal would not keep MCFD from maintaining certain confidentiality provisions (s. 14 and s. 24) or from having specific statutory provisions permitting disclosure (s. 79(h) – disclosure to PGT).

Observation #3 – Information sharing between public bodies for the purposes of delivering services to children

(a) authority exists for public bodies to share information
The collection, use and disclosure of information rules contained in the FOIPPA allow other public bodies who are responsible for delivering services to children to participate in the regular sharing of information for the purposes of delivering services to individual children as a common or integrated program or activity by the public bodies.

(b) authority exists for MCFD to share information with other public bodies
MCFD has the statutory authority within the CFCSA and the FOIPPA to allow it to participate in regular sharing of personal information with other public bodies delivering services to children.

(c) use of information sharing agreements and protocols
MCFD should continue to use information sharing agreements and protocols to provide clarity around the exchange of personal information for this purpose.

Observation #4 - Sharing between public bodies for the purposes of multidisciplinary team child death reviews

(a) authority to complete multidisciplinary team child death reviews
As per observation #1(a), amend the CFCSA to give the provincial director the power to complete or ensure the completion of child death review reports.

(b) information sharing agreements
Amend the CFCSA to allow the director to enter into information sharing agreements for the purposes of coordinating and engaging in multi-disciplinary team child death reviews.

(c) disclosure to multidisciplinary team members
As per observation #1(e) amend the CFCSA to require the director to disclose a complete copy of the final child death review report to all agencies who participated in the multidisciplinary child death review team. Include in the provision a requirement that participants receive the report on a confidential basis.[99]

Observation #5 – Collection and Use of Linked data by MCFD

(a) authority for linking exists
MCFD has sufficient authority under the CFCSA and the FOIPPA to collect, link and use personal information from other public bodies to make operational decisions regarding individual children. MCFD must not use research agreements to obtain the information but rather must rely on its collection authority in s. 96 of the CFCSA.

(b) best privacy practices
Linked data sets for the purpose of individual decision making are highly privacy invasive. If MCFD is to engage in this practice, they should ensure that the absolute minimum necessary personal information is collected from each public body, that each linking is essential to enable the CFCSA director to deliver mandated services to the child and that there is a governance, security and accountability structure around MCFD's linked data set that meets the highest privacy standards.

Observation #6 – Reporting by an External Review Agency

(a) Confidentiality Provision
Given the particularly sensitive nature of the information an external review agency will be gathering, the external review agency must ensure that information collected is not disclosed except as authorized by the enabling statute. A confidentiality provision modeled after s. 9 of the Ombudsman Act would help to protect sensitive personal information particularly linked data.

(b) Authority to publicly report personal information
The confidentiality provision should include a specific provision allowing for public reporting of personal information in limited circumstances. The provision should make clear that the oversight body may disclose information where such disclosures is, in the

[99] Such a confidentiality provision will not exclude the report from being subject to the FOIPPA in the hands of the other agencies. Instead, the report will be protected by the privacy provisions of the FOIPPA. The confidentiality agreement will assist in encouraging other public bodies to exercise their discretion under s. 33 to refuse to disclose the report proactively even should they have an authority to otherwise disclose it. For team agencies that are subject to the federal *Access to Information Act* the confidentiality clause may serve to support an argument that the report was received in confidence by the government of a province and so should not be disclosed pursuant so s. 13(1)(c) of the AIA.

opinion of the commissioner (i.e. the external reviewer)

- In the public interest
- Necessary to establish the grounds for findings and recommendations
- Not an unreasonable invasion of personal privacy

Observation #7 – Collection and use of personal information by an external review body

(a) ensure appropriate statutory authority to collect

The collection power given to the external body tasked with ensuring MCFD is publicly accountable should have a collection power at least equivalent to the power set out in s. 11 of the OCYA with additional requirement that public bodies must disclose "upon request" and that information must be delivered without payment of fees.

(b) clarity of purpose

The enabling statute should clearly provide for the creation, use and disclosure of linked data sets as follows:

- State that the external review agency has the authority to collect and link data to monitor and evaluate the effectiveness, responsiveness and relevance of services to children, youth and their families.
- Permit the external review agency to disclose de-personalized data to researchers to assist in monitoring and evaluating the effectiveness, responsiveness and relevance of service to children, youth and their families.
- Permit the external review agency to publicly disclose de-personalized aggregate data as the agency sees fit

(c) best privacy practices

Linked data sets can be highly privacy invasive. The purpose for the collection and linking of data sets by the external review agency is for systemic evaluation and so the external review agency should develop policies and practices to ensure that the data is properly depersonalized and that all reports are of aggregate de-personalized data. The external review body should ensure that it develops a governance, security and accountability structure around the linked data set that meets the highest privacy standards.

Observation #8 – Amendment to the FOIPPA

Amend the FOIPPA to incorporate the "unreasonable invasion of privacy" test into s. 33.2.

7. Resource Binder Content List

Tab	
Statutes, Agreements & Policies	
1	*Freedom of Information and Protection of Privacy Act*
2	Memorandum on Access and Disclosure, Oct. 22, 1996
3	*Adoption Act*, selected provisions
4	*Office for Children and Youth Act*
5	*Evidence Act*, s. 51
6	Children's Commission Policy: Use and Reporting of Personal Information, February 1998
7	Children's Commission Policy: Child Fatality and Critical Injury Investigation Draft #3, March 2000
8	Children's Commission Policy: Information Sharing Policy Children's Commission
9	Guide to Completing a Judgment of Inquiry
10	Canadian Judicial Council: Recommended Protocol on Use of Personal Information in Judgments
11	OIPC Order 27-1994
Sample Child Death Review Reports	
12	Children's Commission: Sample Reports
13	MCFD Public Disclosure: Amanda Simpson
14	MCFD Public Disclosure: Whittford
15	MCFD Public Disclosure: Sherry Charlie
16	MCFD Disclosure in response to FOI request (Part 2 of FOIPPA)
17	Coroners Service: Judgment of Inquiry and related OIPC Order 04-12, Verdict at Inquest
18	Coroners Service: Sherry Charlie Media Release
19	Alberta: Public Fatality Inquiry
20	Saskatchewan: θ Ombudsman's Report Karen Ann Quill θ Department of Community Resources and Employment: The "Baby Andy Report"
21	Washington State: Sample DSHS Report and Statutory Provisions
22	Connecticut: Sample Child Advocate Report Summary
23	New Brunswick: Sample Child Death Review Committee Report