

**FAMILY CROWN SERVICES OPERATIONAL MANUAL**

DISCLOSURE IN PROTECTION LITIGATION	New	Office of the Attorney General / Family Crown Services	Policy 22
Policy Title	New or Amended	Division / Branch / Section	Policy #

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Approved by	This policy was approved on:	This version takes effect on:	This policy will be reviewed by:

**DISCLOSURE IN PROTECTION LITIGATION**

**1. Introduction**

The majority decision in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, delivered by then Chief Justice Antonio Lamer stated at paragraph 61:

I have little doubt that the state removal of a child from parental custody pursuant to the state’s *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of a parent. The parental interest in raising and caring for a child is, as LaForest, J. held in *B.R.*, *supra*, at para. 83, “an individual interest of fundamental importance in our society.” Besides the obvious stress arising from the loss of the companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as “unfit” when relieved of custody. An individual’s status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state’s conduct.

Ultimately the Supreme Court of Canada held that state intervention to remove a child from the custody of his parent engages section 7 of the *Canadian Charter of Rights and Freedoms* (Charter) and triggers the right of the custodial parent to fundamental justice. Fundamental justice requires that the parent receive full disclosure which will permit him to understand and respond to the child protection case.

In practice, disclosure in child protection litigation is provided to all respondent parents regardless of whether the intent of the litigation is to remove the child from parental custody.

The Minister of Social Development is obligated to provide full, adequate, ongoing and timely disclosure in the context of child protection litigation. The Minister should make reasonable efforts to obtain any material that is relevant to the proceedings and of which the Minister has knowledge.

The Minister redacts the disclosure in accordance with this Policy and provides sufficient disclosure packages to Family Crown Counsel for release to the parties or their lawyers. The Minister reserves the right to serve unrepresented respondent parents by way of process server where necessary.

## **2. Statement of the policy**

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Subject to the exceptions identified in this policy, Family Crown Counsel shall disclose to the respondent parent all information in the possession of Family Crown Services that is relevant to the child protection proceedings to which the respondent parent is a party.

Information is relevant if it is related to evidence Family Crown Counsel intends to adduce at trial or if there is a reasonable possibility that it may assist the respondent parent in the exercise of his / her right to make full answer and defence to the case presented by the Minister of Social Development. Information may be relevant regardless of whether it is credible or admissible as evidence. When determining the scope of relevance, Family Crown Counsel should err on the side of inclusion rather than exclusion and disclose all information unless it is clearly irrelevant.

Information is in the Crown's possession if it is in the Crown's file or in the possession of the Minister of Social Development. Where Family Crown Counsel believes that the police, other investigative agency, or another Crown agency or department is in possession of relevant information that is not in the Crown file, Family Crown Counsel shall direct the Minister of Social Development to make all reasonable inquiries and requests to ensure that all relevant information is provided to Family Crown Counsel and subsequently disclosed to the respondent parent. Where Family Crown Counsel makes a request for information that is refused, Family Crown Counsel shall so advise the respondent parent.

## **3. Information not to be disclosed**

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In general, and in accordance with this policy, the Minister of Social Development and Family Crown Counsel shall not disclose information that

- (a) has no relevance whatsoever to the child protection case before the court;
- (b) contains Telephone numbers, electronic or physical addresses, irrelevant third-party information;
- (c) contains Information which would reveal the identity of a referral source, save and except professional referral sources;
- (d) for which a right of privilege exists, including *inter alia*, informer privilege, solicitor-client privilege, work product privilege, and information that is protected by a common law or statutory privilege, unless the privilege has been waived or the disclosure has been judicially authorized;
- (e) would jeopardize a police investigation or a child protection investigation. This privilege would normally end once the investigation has been completed;
- (f) would result in physical or emotional harm to a child, a witness or a third party. There would have to be a real danger of harm before the right of the respondent parent to fundamental justice could be compromised; or
- (g) cannot otherwise be lawfully disclosed.

The Minister must always remember that undisclosed information cannot be relied upon at the hearing of a child protection application. Additionally, it is unethical to suppress information which would prove beneficial to the respondent parent.

## **4. Timing of disclosure**

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### **4.1 Initial disclosure**

Once a child protection proceeding has been commenced, the duty to disclose is triggered by the formal request for disclosure by the respondent parent or his / her legal counsel.

Where disclosure is requested by the respondent parent or his / her legal counsel, Family Crown Counsel shall ensure that the Minister of Social Development is made aware of the need to promptly prepare the disclosure packages.

### **4.2 Ongoing disclosure**

The duty to disclose is ongoing and such disclosure should be provided in a timely fashion. Where Family Crown Counsel receives relevant information after the initial disclosure has been provided to the respondent parent or his / her legal counsel, Family Crown Counsel shall promptly disclose that information to the respondent parent or his / her legal counsel.

## **5. Manner of disclosure**

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As a general rule, the most common manner of disclosure is by the provision of physical or electronic copies of the required material at no cost to the respondent or his / her legal counsel. These copies are typically provided upon conditions that stipulate the use that can be made of the material and restrict its further dissemination. Where information has been requested by the respondent parent or his / her legal counsel, Family Crown Counsel shall ensure that the Request for Disclosure (Appendix A) has been completed.

Where relevant information cannot be disclosed in the manner mentioned above, Family Crown Counsel shall disclose the material in an appropriate manner as set out below or may exercise his / her discretion to disclose the material in any other appropriate manner.

Prior to obtaining any disclosure material, a respondent or his / her legal counsel shall sign an Acknowledgement of receipt of disclosure form (Appendix B)

### **5.1 Disclosure of witness information**

Where Family Crown Counsel withholds from the respondent parent or his / her legal counsel the name, address, email, telephone number and fax number of any person who has provided an affidavit containing relevant information and the respondent parent or his / her legal counsel requests the contact information for the purpose of conducting a pre-trial interview, the Family Crown Counsel shall

- (a) advise the respondent lawyer or his / her legal counsel that the witness will be contacted and advised of the request; and
- (b) contact the witness to advise him / her of the request.

Family Crown Counsel shall advise the witness that he / she has the right to consent to or decline such an interview. Family Crown Counsel shall also advise the witness of his / her rights and obligations as a witness and of the procedure regarding pre-trial interviews outlined in Policy 23 - Witnesses.

Where a witness elects not to consent to such an interview, Family Crown Counsel shall advise the respondent parent or his / her legal counsel.

In accordance with the Law Society Code of professional conduct, employees of the Minister of Social Development cannot be contacted or interviewed by a respondent's lawyer without the explicit consent of Family Crown Counsel.

Where a witness consents to such an interview, Family Crown Counsel shall

- (a) advise the respondent parent or his / her legal counsel; and
- (b) provide the witness with the contact information of the respondent or his / her legal counsel.

## **5.2 Disclosure by controlled access**

Where the circumstances warrant disclosure as set out below, or the respondent parent is not represented by counsel, Family Crown Counsel may provide disclosure by means of controlled access to the materials, which means providing access to the materials in a supervised but private setting.

Family Crown Counsel may also provide disclosure by means of controlled access where Family Crown Counsel is concerned that providing copies of the materials to the respondent parent would result in the harassment of any person; would jeopardize the safety, security, or privacy interests of any person.

### **5.2.1 Disclosure of sensitive audio and visual information**

The subject matter of some material engages such extreme personal privacy interests and is so vulnerable to misuse that it merits special consideration and protection in the disclosure process. For example, the risk of harm from the improper use of sensitive materials, such as videotapes or photographs that depict or describe child abuse, is so great that there is a heightened public interest in ensuring that these materials are not improperly disseminated or misused before, during or after court proceedings.

Where Family Crown Counsel has possession of such material, including a statement made by a potential witness who is a vulnerable person, a child, or a victim of a sexual assault, Family Crown Counsel shall ensure that the Undertaking and Trust Conditions on Disclosure (Appendix C) has been completed.

Where Family Crown Counsel has possession of such material and the respondent parent is not represented by counsel, Family Crown Counsel shall not provide a copy of the material to the respondent parent but shall ensure that the respondent parent has been provided with an opportunity for disclosure by controlled access.

## **6. Third party records**

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The Minister of Social Development should make reasonable efforts to obtain any material in the possession of third parties that is relevant to the proceedings and of which the Minister has knowledge.

Where the respondent parent or his / her legal counsel requests information that is not in the possession of Family Crown Counsel, Family Crown Counsel shall advise the respondent parent or his / her legal counsel in writing and in a timely manner that the information is not in the Crown's possession.

## **7. Record of disclosure**

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Family Crown Counsel shall retain any Request for Disclosure, Acknowledgement of receipt of disclosure and Undertaking and Trust Conditions on Disclosure completed by the respondent or his / her legal counsel. In addition, Family Crown Counsel shall require the respondent parent or his / her legal counsel to provide written acknowledgment of the disclosure materials provided.

## **8. Related documents**

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Policy 23 - Witnesses

Policy 17 - Language rights

Law Society of New Brunswick Code of professional conduct (January 1, 2020)



Department of Justice and Public Safety  
Ministère de la justice et de la sécurité publique

**APPENDIX A**

**REQUEST FOR DISCLOSURE**

FD \_\_\_\_\_ : Minister of Social Development v. \_\_\_\_\_

Please complete and return this form to the following address if you wish to request disclosure of the Minister's file:

Family Crown Services  
Office of the Attorney General  
P.O. Box 5001  
Assumption Place, 14<sup>th</sup> Floor  
770 Main Street, Moncton, N.B. E1C 8R3

**SECTION A: TO BE COMPLETED BY PERSON(S) REQUESTING DISCLOSURE**

NAME(S): \_\_\_\_\_

ADDRESS: \_\_\_\_\_

TELEPHONE NUMBER: \_\_\_\_\_

DATE REQUEST MADE: \_\_\_\_\_

I hereby request a copy of all relevant materials in the possession of the Minister of Social Development related to the above noted file. I have read and understand the NOTE TO PERSONS REQUESTING DISCLOSURE below.

SIGNATURE: \_\_\_\_\_

**NOTE TO PERSON(S) REQUESTING DISCLOSURE:** Documents or other materials provided to you by way of this or subsequent disclosures remain the property of the Minister of Social Development. They have been provided for the purpose of facilitating full answer to this protection application.

Any other communication or use of the material is prohibited.

**SECTION B: TO BE COMPLETED BY LAWYER REQUESTING DISCLOSURE**

I have been retained to represent \_\_\_\_\_  
who has/have authorized me to request and obtain disclosure on his/her/their behalf.

SIGNATURE: \_\_\_\_\_

**SECTION C: TO BE COMPLETED BY FAMILY CROWN SERVICES**

DATE REQUEST RECEIVED: \_\_\_\_\_

SIGNATURE: \_\_\_\_\_



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APPENDIX B

ACKNOWLEDGEMENT OF RECEIPT OF DISCLOSURE

FD \_\_\_\_ : Minister of Social Development v. \_\_\_\_\_

SECTION A: TO BE COMPLETED BY THE PERSON(S) RECEIVING DISCLOSURE

NAME(S): \_\_\_\_\_

ADDRESS: \_\_\_\_\_

TELEPHONE NUMBER: \_\_\_\_\_

I hereby acknowledge that on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, I received the following:

I have read and understand the NOTE TO PERSONS RECEIVING DISCLOSURE below.

SIGNATURE: \_\_\_\_\_

**NOTE TO PERSON(S) REQUESTING DISCLOSURE:** Documents or other materials provided to you by way of this or subsequent disclosures remain the property of the Minister of Social Development. They have been provided for the purpose of facilitating full answer to this protection application.

Any other communication or use of the material is prohibited.

SECTION B: TO BE COMPLETED BY FAMILY CROWN SERVICES OR PROCESS SERVER

DATE OF DISCLOSURE PICK-UP: \_\_\_\_\_

DETAILS OF VERIFICATION OF IDENTITY OF PERSON(S) PICKING UP DISCLOSURE:

SIGNATURE: \_\_\_\_\_





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APPENDIX C

UNDERTAKING AND TRUST CONDITIONS ON DISCLOSURE

FD \_\_\_\_\_: Minister of Social Development v. \_\_\_\_\_

I hereby acknowledge receipt of the following material

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

TAKE NOTICE THAT, by accepting these materials you are subject to the following trust conditions:

1. You may use these materials solely for the purpose of making full answer and defence to the protection application.
2. You must keep these materials secure and you will not publish, copy, or otherwise distribute them or their contents. Further you will take all reasonable steps to prevent them from being published or disseminated to any person not subject to these trust conditions. You will not copy these materials nor allow them to be copied without the written permission of Family Crown Services.
3. You will not release the materials to any respondent in this matter or to any other person.
4. If, for any reason, you cease to act for the respondent / child in this matter, you will return all disclosure material to the office of Family Crown Services from which they were obtained.
5. Within ten days following the expiration of the time allowed for an appeal of the matter's final disposition, you will return all disclosure to the office of Family Crown Services from which they were obtained.
6. These conditions of disclosure apply to all disclosure made on the file, either as initial disclosure or subsequent disclosure.
7. You may only deviate from any of these conditions of disclosure with the express written consent of Family Crown Services or with an order of the Court having jurisdiction over the matter.

I, (*print name*) \_\_\_\_\_, counsel for the respondent or counsel for a child, certify that I have read, understand and undertake to comply with the conditions hereby imposed.

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Telephone Number: \_\_\_\_\_

Witnessed by: \_\_\_\_\_