

NOTEBOOK ON ETHICS, STANDARDS OF PRACTICE AND LEGAL ISSUES FOR COUNSELLORS AND PSYCHOTHERAPISTS

Access to Information and Protection of Privacy Acts: Two Cases Involving Their Application to Students in Public Schools

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As most readers know, in our society our right to certain information as well as to protection of our privacy is regulated by provisions in legal statutes established by both the Federal and Provincial governments. For example, the Federal statute, enacted on July 1, 2004, has the title *Personal Information Protection and Electronic Documents Act (PIPEDA)*. It applies to all Federal government departments and agencies and to all commercial activity in Canada. This means that it applies to those counsellors and other such practitioners in private practice but not to those who work in public educational institutions such as public schools. All of these statutes provide for a commissioner or an adjudicator to adjudicate specific matters referred to them involving access and privacy rights covered by the legislation.

School counsellors and school psychologists as well as other educational personnel maybe unsure as to how such provincial statutory provisions could apply to access to information about school-age students and to their privacy protection. I believe that the following two decisions, one from British Columbia and the other from Newfoundland and Labrador, are informative in how those provisions can apply to student rights.

Case I: Victoria School District No. 61 (BC), 2012 BCIPC9

Sometime in 2012 students from a school in the Victoria School District were uncomfortable with the behaviour of a bus driver while they were travelling with him on a school trip. After the trip eight of these students, both boys and girls, met with their school counsellor to express their concerns about the driver. The counsellor then prepared a letter that described the behaviour that made them feel uncomfortable. Following this disclosure by the counsellor, the bus driver was disciplined by his employer, a local private bus company.

Subsequently the bus driver made a request to the Board of Education of the School District for copies of all the records relating to the complaint against him as well the names of all student complainants and their contact information plus the names of their parents. He alleged that the complaints were false and had damaged his reputation. The school district authorities provided him with the entire record of the complaints by the students. This included a copy of the letter prepared by the school counsellor that included information shared by the students about their concerns over the driver's behaviour and six pages of handwritten notes prepared by the counsellor during interviews with the eight students. It included the first names of six of the students.

The school district refused to disclose the students' full names and related information because it believed that such a disclosure would violate the students' privacy rights as per *Section 22* of the *BC Freedom of Information and Protection of Privacy Act (FIPPA)*. It also denied access to the requested information by invoking *Section 19* of the *FIPPA* believing that such a disclosure might endanger the personal safety of the students.

The bus driver took the refusal to disclose the requested information to Jay Fedorak, the FIPPA adjudicator. As part of his consideration of this application to him by the driver, the adjudicator outlined the following three questions he believed he needed to answer:

1. *Whether the School District must withhold the names of the students to protect personal privacy under s.22(1) of FIPPA.*
2. *Whether the School District may withhold the names of the students to protect their personal safety under s.19(1)(a) of FIPPA.*
3. *Whether the School District must withhold the names of the students to protect the business interests of a third party under s.21(1) of FIPPA.*

During his review of these matters he became aware that the school counsellor had promised to maintain the students' confidentiality. He concluded that the fact that personal information was supplied in confidence was relevant to consideration under s. 22(2)(f) of FIPPA. Having considered the whole matter the Adjudicator reached the following conclusion:

I have found that the students' names on the requested records constitute the educational history of the students. Consequently, disclosure is presumed to be an unreasonable invasion of their privacy. I find that none of the relevant circumstances rebut the presumption that disclosure would be an unreasonable invasion of privacy. I find that the fact that the students' supplied their information in confidence favours withholding the information. Therefore, I find that s.22(1) of FIPPA applies to the students' names and School District must continue to withhold them.

Mr. Fedorak also concluded that given this decision on Question 1 there was no need for him to address Questions 2 and 3.

Case 2: Newfoundland and Labrador (Education) (Re, 2006 NLIPC)

In 2006, Mr. Philip Wall, Information and Privacy Commissioner in Newfoundland and Labrador had to deal with an application made under the *Access to Information and Protection of Privacy Act (ATIPPA)* For access to private information following a denial of a request for access.

The application for access involved a 14 year old boy. This boy had been diagnosed with a number of disorders. In 2005, two consultants from the Division of Student Support Services in the Department of Education, conducted a private interview with this boy and also with his two parents. In the Commissioner's Report he states that some members of the community were interviewed as well. It is unclear in the Report who these individuals were but it is reasonable to assume that were members who knew this boy. At least one of the consultants was a psychologist with experience in conducting student assessments and both had some responsibility for recommending the allocation of resources for students with special needs.

In 2006, the boy's mother requested access to a copy of the interview notes made by the consultants during the interviews both with their son and with her and her husband. In response to this request the notes from the interview with both parents were provided to the mother. However, the Department of Education denied access to the notes of the interview with her son claiming that doing so would be an unreasonable invasion

of his privacy. Following this denial, the Department received another request for these notes but this second request came in a letter signed by the boy. In response a letter was sent to the boy's mother instead of to the boy and it said the following:

"Department is denying the request in that I am of the view that this request is not for the benefit of (name of son) and I maintain that disclosure would constitute an unreasonable invasion of his privacy. Access has again been refused in accordance with Section 65(d) of the *Access to Information and Protection of Privacy Act (the Act)* which states:"

A right or power of an individual given in this Act may be exercised by the parent or guardian of a minor where, in the opinion of the head of the public body concerned, the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy:

In considering the question of just who the actual applicant was for the requested information in the second request signed by the boy, the Commissioner concluded that the mother was the applicant for the purposes of his review. With respect to his decision regarding the mother's request of access to her son's interview information he relied on two prior decisions on similar requests. He quoted from a decision by the Ontario Privacy Commissioner when a father was denied personal information about his 14-year-old son. In that case, the Commissioner said the following:

*I have carefully reviewed the representations provided to me in conjunction with the records at issue. While the father has argued that he requires his son's personal information to determine whether the various government agencies acted with their statutory mandates, **he has failed to convince me that he is exercising such a right of access on behalf of his son. Rather, my conclusion is that the father, while acting in good faith, is seeking this information to meet his personal objectives and not those of his son. I also find, based on the sensitive nature of the materials contained in the records, that the release of the son's personal information would not serve the best interests of the child.***

Mr. Walls also quoted from another similar case dealt with by BC Privacy Commissioner in which he said:

I acknowledge that concern, but note that s. 3(a) speaks of the exercise by a parent or guardian of the right to have access to a record where that right is exercised "on behalf of" someone who is under 19 years of age. As my predecessor said in Order No. 53-1995. Where an applicant is not truly acting "on behalf" of an individual described in s. 3 of the Regulation, the access request is to be treated as an ordinary, arm's-length request under the Act, by one individual for another's personal information....

After considering the facts of the case before him and being informed by these prior decisions Mr. Walls reached the following conclusion:

After a thorough analysis of the responsive record, all material provided to me by the mother and the Department and the decisions of my counterparts in other jurisdictions, I concluded that the circumstances of this case warranted a decision in favour of the son's privacy. In my opinion, the mother was acting on her own behalf in attempting to gain access to this information. I do not

believe that her request for this information is in the best interest of the son and, as such, her request does not outweigh the son's right to have his personal information protected. I have concluded, therefore, that the entire record must not be released to the mother, as per section 65(d) and 30(1) of the ATIPPA.

Based on these two decisions and, the cases reviewed by the Commissioner we can readily conclude that parents and guardians do not have an unfettered right of access to private personal information of their children who are minors. It appears that the onus is on the parent requesting access to demonstrate that a request is in interest.” Of course, this places significant responsibility on all public bodies, including all schools, to exercise discretion when addressing the privacy rights of a minor.