



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F10-29
(Additional to Order F09-21)

MINISTRY OF EDUCATION

Celia Francis, Senior Adjudicator

August 16, 2010

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Summary: Just before compliance with Order F09-21 was due, the Ministry requested “clarification” of the order, suggesting there were difficulties complying with it. The senior adjudicator re-opened the order to consider submissions from the parties on the issues the Ministry raised. The Ministry argued that disclosure of the narrowed data as ordered would unreasonably invade the privacy of students whose FSA results were the subject of the order. The applicant argued that Order F09-21 adequately protected students’ privacy and that the Ministry should comply with the order. The senior adjudicator concluded that compliance with Order F09-21 would not lead to a significantly greater risk of identifying individual student results and would not constitute an unreasonable invasion of privacy. The senior adjudicator also clarified what she intended in Order F09-21 and ordered the Ministry to comply with that order.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 22(1).

Authorities Considered: **B.C.:** Order F09-21, [2009] B.C.I.P.C.D. No. 27; Decision F10-04, [2010] B.C.I.P.C.D. No. 24; Order 01-01, [2001] B.C.I.P.C.D. No. 1; Order F08-03, [2008] B.C.I.P.C.D. No. 6; Decision F10-08, [2010] B.C.I.P.C.D. No. 42.

1.0 INTRODUCTION

[1] I issued Order F09-21¹ on November 10, 2009. That order flowed from the applicant’s request under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) for electronic copies of the Ministry of Education’s (“Ministry”) Foundation Skills Assessment (“FSA”) student summary data.

¹ [2009] B.C.I.P.C.D. No. 27.

The Ministry had previously provided the applicant with this data under the terms of a research agreement. In responding to the request, the Ministry argued that releasing the data would constitute an unreasonable invasion of third-party privacy contrary to s. 22 of FIPPA. The applicant complained to this office ("OIPC") that the Ministry had wrongfully refused to renew his research agreement. The applicant also argued that, even without a research agreement, s. 22 of FIPPA did not require the Ministry to refuse access to the data.

[2] In Order F09-21, I found that disclosure of the data, as requested, in the circumstance where the applicant was not party to an existing research agreement with the Ministry, would constitute an unreasonable invasion of third-party privacy and that s. 22(1) of FIPPA required the Ministry to refuse access to the data. I did not consider whether the Ministry had been entitled to refuse to renew the research agreement, since that issue was being considered separately.

[3] I went on to consider whether it was reasonable under s. 4(2) of FIPPA to sever excepted information from the requested records. The applicant had stated in his submissions that, if I found that the information as requested was not disclosable, he was willing to withdraw from his request all but certain data fields and the students' personal education number ("PEN") or an encrypted version of the PEN. This would eliminate information relating to sex, ESL, language spoken at home, aboriginal status, special needs and French immersion. I invited submissions from the Ministry on this proposal. The Ministry submitted that the release of this "narrowed data" would still carry an unacceptable level of risk to third-party privacy; however, it said this risk could be mitigated in one of three ways. One method the Ministry outlined ("Option One") was that the data could be disclosed "in masked form, that is, by suppressing populations of fewer than five students; this would ensure that no students would be identifiable."²

[4] The applicant's reply submissions stated that Option One would lead to masking all requested data. I did not understand the Ministry to say this would be the case. In the result, I ordered the Ministry to give the applicant access to the narrowed data "with the proviso that the Ministry must suppress data on population cells containing fewer than five students."

[5] On December 18, 2009, the Ministry wrote to me requesting "clarification" of my order and seeking authorization to delay the provision of data as ordered until clarification was provided. The letter stated that the Ministry did not believe it could release all of the required fields while effectively suppressing the populations or cells containing fewer than five students. The Ministry suggested that, if it complied with the order, the Ministry did not believe it could guarantee the protection of the privacy of individual students.

² Ministry's letter of October 30, 2009; para. 2, Morton affidavit #1.

[6] The applicant responded to the Ministry's submissions by stating, in part, that I was *functus officio*,³ that the order spoke for itself and that the Ministry had a duty to comply with it. The Ministry provided a response.

[7] In response to these submissions, I wrote to the parties on December 23, 2009. In that letter I suspended the time for compliance with Order F09-21, because the Ministry might have mistakenly misrepresented a material fact concerning the feasibility of Option One. I asked the Ministry to provide me with a complete and detailed explanation about what it could and could not do, and said that I would give the applicant an opportunity to respond.

Submissions of the parties

[8] The Ministry responded to my request by providing an affidavit from Gerald Morton. In that affidavit, Mr Morton stated:

At the time I swore the previous affidavit, I believed that Option One would ensure that no child would be identifiable and therefore would ensure the privacy of the students. However, since that time I have received new information that leads me to conclude that my earlier belief that Option One would effectively protect personal privacy was incorrect.⁴

[9] Mr Morton stated that the applicant's request was, in his experience, "unique" because of the volume of recorded information requested and the fact that the request was for data from a database, rather than discrete records. Mr Morton stated that compiling the requested information in order to comply with the Order took 8-10 days. Mr Morton stated:

After the Requested Information was compiled by Ministry researchers in order to comply with the Order, a data set emerged, and it became clear to me that the masking procedures referred to in the Previous Affidavit, while appropriate for the Ministry's typical method of reporting (i.e. aggregate reporting), could not guarantee that individually identifiable information would not be effectively disclosed through the release of the Requested Information. Typically, masking is applied to aggregated data so data fields and individual records cannot be linked. With aggregated data it would not be possible to know the score of the individual on each assessment. Nor, for that matter would it even be possible to know the score an individual received on any particular assessment. In the "Requested Information" an individual's score on each of FSA reading, writing and numeracy assessments is available.

We spent several days exploring this problem and realized that the Ministry's masking procedures would not sufficiently protect the privacy of

³ A Latin term meaning "having performed one's office or duty"; it refers a court's lack of authority to re-open a case after rendering a judgement. It promotes finality of judicial decisions.

⁴ Ministry's letter of January 5, 2010; para. 9, Morton affidavit #2.

students referenced in the Requested Information, given the size of the data set. It became clear to me that employing the masking procedures contemplated in Option One would not effectively prevent individually identifiable information from being disclosed if the Requested Information was released to the Applicant. This conclusion came as a surprise to me.

I therefore realized, after I swore the Previous Affidavit, that my previous assumption that Option One would adequately protect personal privacy was erroneous. I blame this mistaken assumption, at least in part, on the fact that the Ministry had never attempted to apply its masking policy to a data set as large as the one that has been ordered disclosed in this case.

Once I was in a position to review the dataset ordered released in the Order, I came to the conclusion that someone could potentially combine discrete bits of data so as to be able to identify a specific individual.

In my opinion, there is only one option available to release the data at the school level while minimizing the likelihood that the privacy of students is impacted, and that is providing it as aggregate data. Aggregating data means that data is reported on school and grade basis, but not on the basis of individual students i.e. no PEN, or similar encrypted substitute would be provided. Examples of aggregate data reports for individual schools are attached to this affidavit as Exhibit B. These reports illustrate that for schools with small populations (i.e. Bella Coola, with 15 students in a class) much of the data would be masked and unreported. For larger classrooms like Fraser Lake, only the data with respect to small subsets of the 33 students is small enough to be hidden by a “four or under” masking policy.⁵

[10] In response to the Ministry, the applicant provided submissions and new affidavit evidence. The applicant argued that the Ministry had not accurately described how it applies its masking policy and that portions of the Ministry’s evidence were misleading in that regard. The applicant pointed out that the documents which Mr Morton attached as his Exhibit “B” were not the actual reports for the two schools which the Ministry published on its website. The actual reports, which the applicant provided, contain much less masking of results than those attached as Mr Morton’s Exhibit “B”. The applicant noted that the Ministry seemed to suggest that the applicant’s work would be uniquely privacy invasive because it could lead to a member of the public identifying a result which a particular student achieved on an assessment. He pointed out that the Ministry routinely publishes reports in which a reader can ascertain the score an individual student has received on particular assessment. The applicant also submitted that the public body had exaggerated the technical difficulties involved in complying with the order as made.⁶

⁵ Ministry’s letter of January 5, 2010; paras. 16-19 & 25, Morton affidavit #2.

⁶ Applicant’s letter of January 18, 2010; Taylor affidavit #3.

[11] The applicant went on to describe his understanding of the Ministry's masking policy and provide examples of how it is applied. The applicant then set out how the masking policy and practice could be applied to the narrowed data.⁷

[12] In reply, the Ministry did not suggest that the applicant had misrepresented or misunderstood the Ministry's masking policy. The Ministry stated that it had changed its own masking policy in November 2009 and that now "subsets of populations smaller than ten will not be reported." The Ministry provided an example of how a parent of a child in classroom might be able to know the results of another child in the same class. This example assumed that the parent was familiar with all of the children in the grade level, knew which student would not have taken the assessment and knew which student was "struggling in math." The Ministry argued that, with all of this knowledge, and the data ordered to be released under Order F09-21, the parent could likely deduce the other test scores of the child who was "struggling in math". The Ministry acknowledged that there is no way to guarantee that individual results cannot be ascertained. However, it argued, the chance of this happening can be minimized by masking results from larger populations or reporting only on an aggregate basis.⁸

[13] The applicant replied to the Ministry's submissions. He again noted that the Ministry was not accurately describing its masking policy and its application. As well, the applicant argued that Order F09-21 protects students' privacy to the same degree as the Ministry's own public reports. The applicant expressed concerns about the Ministry's decision to change its own policy at this time. The applicant submitted that the order as drafted adequately protects students' privacy and that this had not changed simply because the Ministry changed its own policy.⁹

[14] The applicant also put forward a new method of masking, which he referred to as "Certainty Masking."¹⁰ He stated that under this method, no matter how the narrowed data was combined or reported, the user would not be able to determine with certainty the results of any individual student. This would have the effect of protecting students' privacy even better than the Ministry's proposal for masking all result data for populations greater than ten and would provide a much better quality of data.¹¹

[15] I invited the Ministry to make submissions on the applicant's new proposal. The Ministry stated that its position was that Certainty Masking would

⁷ Applicant's letter of January 18, 2010; Taylor affidavit #3.

⁸ Ministry's letter of January 29, 2010.

⁹ Applicant's letter of February 12, 2010; Taylor affidavit #4.

¹⁰ The applicant said this process would include "breaking the link" between two students and every year:school:grade combination and between those two students and their school district; paras. 23-25 and Exhibit "F", Taylor affidavit #4.

¹¹ Applicant's letter of February 12, 2010; Taylor affidavit #4.

meet its obligations under s. 22 only if data regarding grades with fewer than 10 students were completely masked.¹² In reply, the applicant noted that this was unnecessary and would render the data much less useful for his purposes.¹³

[16] The applicant's final submissions also asserted that the Ministry's conduct since the re-opening of Order F09-21 included a number of false statements or attempts to mislead me in the exercise of my duties, powers or functions. The applicant asked that the Commissioner investigate these allegations in separate proceedings.¹⁴

2.0 ANALYSIS

[17] **2.1 Appropriateness of Reopening the Matter**—While the applicant briefly raised the concern that I was *functus officio*, both parties made their additional submissions on the basis that I had jurisdiction to re-open my order. As I noted in Decision F10-04,¹⁵ it is clear that an administrative tribunal can re-open its decisions to consider new evidence or argument in certain circumstances. The doctrine of *functus officio* is applied to administrative tribunals in a flexible manner, at least in part because judicial review of a tribunal decision is a more limited review than a right of full appeal of a judicial decision to a higher court.

[18] In Decision F10-04, I stated:

I have no doubt that, in a proper case, a public body faced with an order that was impossible of performance because of a truly unforeseen or new circumstance could apply for the order to be re-opened and the Commissioner, following a both purposive and flexible application of the principle of finality, could reopen and amend or vacate the order. Some examples that come to mind would be where a record in issue has been accidentally or inadvertently destroyed, where it is discovered that the integrity of the inquiry and order has been undermined by fraud or where the test for the admission of new evidence is met.¹⁶

[19] In Decision F10-04, I also considered the circumstances where additional evidence might be considered after an order had been issued. I held that the test for admission of new evidence on appeal would be a relevant point of reference for re-opening the order in that case. This involves consideration of the following principles:

1. The evidence should not generally be admitted if, by due diligence, it could have been adduced at trial

¹² Ministry's letter of June 18, 2010.

¹³ Applicant's letter of June 28, 2010.

¹⁴ Applicant's letter of June 28, 2010.

¹⁵ [2010] B.C.I.P.C.D. No. 24, at para. 49.

¹⁶ Para. 123.

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial
3. The evidence must be credible in the sense that it is reasonably capable of belief
4. It must be such that, if believed it could reasonable, when taken with the other evidence adduced at trial, be expected to have affected the result¹⁷

[20] In this case, the communications I received from the Ministry initially suggested that it was not possible to comply with Order F09-21. As such, I found it appropriate to re-open the matter to consider the Ministry's arguments. From the submissions I received, it is clear that the Ministry's position is now that compliance with Order F09-21 is possible, but that the Ministry is of the view that it will not adequately protect students' privacy. The Ministry has offered new evidence and argument in support of this assertion and the applicant has offered evidence and argument in reply.

[21] Although Mr Morton claimed that he could not identify the concerns arising from Order F09-21 until the data necessary for compliance with the order had been assembled, I am not convinced that this is the case. As noted above, Mr Morton suggests that his mistaken assumptions were a result of the fact that the Ministry had never attempted to apply its masking policy to a data set as large as the one ordered in this case. However, he does not explain how the size of the data set, which presumably the Ministry was aware of prior to the order being issued, would lead to an erroneous conclusion in this regard.

[22] In his affidavit, Mr Morton states;

At the time I swore the previous affidavit, I had to make a key assumption regarding the data. The assumption was that the data was going to be reported in the same groupings that the ministry typically uses. However, now that I am able to review the Requested Information I am now able to see that this assumptions [sic] were erroneous, that anyone who had access to the data file could organize it into many small groups that contravene the masking policy and that, as such, I now believe that Option One would not adequately protect personal privacy for the reasons given in this affidavit.¹⁸

[23] The real nub of the Ministry's concern seems to arise, not from the fact that the data set is large, but that the Ministry does not know how the applicant may choose to manipulate and report on the data. These are factors which the Ministry should have been aware of at the time that the inquiry was ongoing. Indeed, paragraph 23 of the Ministry's initial submissions in the main inquiry stated:

¹⁷ Para. 46.

¹⁸ Ministry's letter of January 5, 2010; para. 10, Morton affidavit #2.

It is challenging for the ministry to convey in a paper based format both the breadth of the information requested, and the uses it could be put to. With the appropriate software, there is an infinite number of ways this data can be sorted and/or queried – and therefore there are also any number of unforeseen linkages and associations between students, their personal information (like gender, birthdate and disability) and their FSA test results.

[24] The Ministry was thus aware of the potential for the data to be combined in unexpected ways when it suggested Option One.

[25] I thus have some concern that the Ministry's evidence and accompanying submissions, which it offered after Order F09-21, would not meet the test for fresh evidence. However, in Decision F10-04, I noted that one factor to be considered in determining the appropriate approach to re-opening an order is the relevant time limit. In cases where the application is brought within the period for Ministry compliance, that is, within 30 days, it may be appropriate to consider the test for the re-opening of a trial to hear new evidence prior to entry of the formal order. That test provides for a broader discretion to admit new evidence. The fact that evidence could have been presented at trial is not determinative, although it may be an important consideration in determining whether a miscarriage of justice could occur if the matter is not re-opened.¹⁹

[26] Bearing in mind the importance of a flexible application of the *functus officio* doctrine in the administrative context, and taking into account the specific circumstances of this case, I am of the view that the appropriate approach is to consider all of the evidence and submissions the parties have offered since I released the Order. Those specific circumstances include that the Ministry raised the issue during the period for compliance and the very peculiar fact that the Ministry raised concerns about the feasibility and appropriateness of a term of the order that it had itself suggested, while the applicant, who had initially objected to the proposed term, was now suggesting that it was workable and adequate to protect the privacy of students. I also believe it will benefit the parties if I am more explicit about exactly what I intended in Order F09-21.

Findings

[27] There was significant discussion in the parties' post-inquiry submissions about the Ministry's masking policy, how it is applied in practice and how it is related to my order. I have carefully considered all of the evidence and argument the parties made about the Ministry's masking policies, without repeating them here.

[28] The Ministry's evidence and submissions about how its masking policy is applied are not entirely consistent with the evidence. I find that the Ministry's masking policy, as it existed at the time Order F09-21 was issued, required that

¹⁹ Decision F10-04, para. 43.

the Ministry not report results associated with populations of fewer than five students. Those populations were defined in terms of the number of students in a particular grade in a particular school, when this was the population which the Ministry reported on. For example, if the Ministry was reporting on the performance of grade 4 students, where there were 7 students in grade 4 at a particular school, the results of those students would be reported. This would be the case even if 4 students obtained one result and 3 obtained another. The fact that the number of students who achieved a particular result was fewer than 5 is not relevant for the application of the masking policy. The relevant population is the group of students being reported on, not the group who achieves any particular result. Thus, if there were only 4 students in grade 4 at that school, there would be no reporting of the results associated with that group of students.

[29] Thus, the term “masking” usually applies to the process by which certain results are not reported. This is why the applicant originally suggested that the application of the masking policy would mean that all of the information he had requested would be suppressed. The applicant had requested information regarding individual, albeit unidentified students, based on their encrypted PENs. Since only one student has each PEN, suppressing results associated with populations of fewer than five would lead to suppression of all of the data.

[30] This is also why the Ministry later said that masking, as that term is normally used, is, by definition, applied to aggregate data and that is why there was some confusion regarding how it should or could be applied in the context of my order. Because the Ministry did not know what populations the applicant would be reporting on, it was not possible to apply the masking policy directly, since its application depends on the number of students in the population being reported on. The applicant might choose to report on a group defined in a manner that captured only a very small number of students, but not based on grade or class size. This raises the question of why the Ministry referred to the data as being released “in masked form” in its formulation of Option One. The Ministry must have known at that time that it could not apply the masking policy directly, since it did not know what groups the applicant would be reporting on.

[31] However, the words “masking” and “masked” do not appear in the terms of my order directed to the Ministry. My intention was not that certain results would be “masked”, but rather that certain sets of data would be suppressed, that is, not provided to the applicant. The Ministry seems to suggest that it does not understand what I intended in this regard, so I will be as explicit as possible at this time. The data to be suppressed is that associated with student populations whose results would be masked under the Ministry’s own policy as it existed at the time. In other words, the Ministry is required to withhold from disclosure to the applicant all of the individual student data about those students who were part of a population of fewer than 5 students in a given grade in a given school. If there were only 4 students in a particular grade at a certain school, the data

associated with those students will not be provided to the applicant. If there were five or more students in the grade at that school, the data with respect to those students will be provided to the applicant. While not a direct application of the Ministry's masking policy, the Order was, like the masking policy itself, aimed at minimizing the risk that individual student results could be identified by withholding information associated with smaller populations.

[32] The purpose of the masking policy is to reduce the likelihood that the results as reported will allow someone to identify the specific results of any individual student. However, the masking policy cannot eliminate the possibility that individual results will be identified. For example, if there are 6 grade 4 students at one school and all of them achieve the same result, it will be clear what result each of the individual students achieved. The Ministry's submissions contain examples of where a person might have additional information about students which, when combined with reported results, might allow them to determine additional individual results. So, for example, if only one student meets expectations in a given subject and the parent of that one child knows that she or he achieved that result, that parent will be able to determine the results of every other member of the class, where they all achieved the same result. Suppressing results associated with smaller populations will reduce, but not eliminate, the instances where individual results can be ascertained.

[33] Because the PENs are encrypted and cannot be linked to specific students, the ability to identify individual results of specific students depends on some knowledge that a person might otherwise have or be able to obtain about those students. So, in the example above, where all students in grade 4 at a specific school achieve the same results, it is necessary to know that an individual student is in grade 4 at that school before his or her results can be identified. When the applicant agreed to narrow his request to eliminate all data associated with sex, ESL, language spoken at home, aboriginal status, special needs and French immersion, it became much less likely that individual student results would be identifiable. By suppressing all data associated with students in very small classes, this further reduces the instances where individual results would be identifiable. In addition, as the Ministry acknowledged, the likelihood that individuals will be identifiable diminishes with the passage of time.

[34] I agree with the Ministry that there is no "guarantee" that certain individual results will not be identifiable. That is always the case, even with Ministry's reporting. I also accept that, with the encrypted PENs, there may possibly be additional ways to combine the data such that someone who already has sufficient information about a student will be able to identify individual results. However, I do not think that the fact that there is some risk that this may occur means that there is reasonable expectation that it will occur.

[35] The Ministry's submissions rely on what is in reality an argument based on the "mosaic effect", where seemingly innocuous information is linked with other

otherwise available information to yield information which is excepted from disclosure under FIPPA. In British Columbia, it has been repeatedly held that cases in which the mosaic effect applies will be the exception.²⁰ It should only be applied where there is detailed and convincing evidence of a reasonable expectation that the release of the data will be used to identify individuals. It should not be applied on the speculative basis that it may be used by some one in some way that has negative effects.²¹ The evidence does not establish a reasonable expectation that the release of the data required by Order F09-21 will lead to the identification of individual students in a manner which constitutes an unreasonable invasion of privacy.

[36] In my view, compliance with Order F09-21 will not lead to a significantly greater risk of identifying individual student results than the policy the Ministry used at the time I issued Order F09-21. I do not consider the risk associated with either process to constitute an unreasonable invasion of privacy. While the Ministry may have decided to change its policy, that does not mean that the previous policy, or the disclosure Order F09-21 mandates, would be an unreasonable invasion of privacy under s. 22.

[37] As set out above, in the course of submissions, the applicant suggested another method of masking the data, which he referred to as “Certainty Masking.” The applicant’s proposal appears to entirely eliminate any risk of identifying individual student results. I provided the Ministry an opportunity to respond to this proposal, in the hopes that the parties could agree on a method which addresses each of their concerns. However, as noted above, the Ministry took the approach that even Certainty Masking would require suppression of all data for populations of fewer than 10. Given that I have found that compliance with Order F09-21 will not give rise to any breach of s. 22 and since the parties are not able to agree on an alternative approach, the applicant is entitled to the benefit of my previous ruling, which I made some time ago.

Investigation of the Ministry’s Conduct

[38] As set out above, the applicant has asked that the Commissioner investigate his allegations that the Ministry’s deponent provided false statements and/or attempted to mislead me in my deliberations since Order F09-21 was delivered. The applicant asked that the requested investigation be included in the investigation into the question of whether the Ministry improperly exercised its discretion in refusing to renew the applicant’s research agreement.

[39] As I point out in Decision F10-08,²² issued concurrently with this Order, Order F09-21 determined only whether s. 22 of the FIPPA required the Ministry

²⁰ Order 01-01, [2001] B.C.I.P.C.D. No. 1, para 45; Order F08-03, [2008] B.C.I.P.C.D. No. 6, para 40.

²¹ Order F08-03, [2008] B.C.I.P.C.D. No. 6, paras 40-45.

²² [2010] B.C.I.P.C.D. No. 42.

to withhold access to the data in circumstances where the applicant did not have an existing research agreement. If it is subsequently determined that the applicant is entitled to be a party to a research agreement, he may be entitled to access to additional data. As a result, the two issues are not wholly separate and it may well be appropriate to investigate the Ministry's conduct in both refusing the research agreement and proceeding with the Inquiry which led to this Order at the same time. However, that is a matter which should be decided in the discretion of whoever undertakes the investigations.

3.0 CONCLUSION

[40] For the reasons given above, under s. 58 of FIPPA, I require the Ministry to comply with Order F09-21, paras. 63(1) and 63(2), as clarified by para. 31 of these reasons, within 30 days of the date of this order, as FIPPA defines "day" and to copy me concurrently with its cover letter to the applicant.

August 16, 2010

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File Nos. F06-29952 & F06-30310