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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 139-1996
December 19, 1996

INQUIRY RE: A decision by School District No. 31 (Merritt) to refuse access to records containing information relating to the evaluation dates and academic specialties of Merritt Secondary School Teachers

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on July 9, 1996 under section 56 of the *Freedom of Information and Protection of Privacy* Act (the Act). This inquiry arose out of a request for review of a decision by the Board of School Trustees of School District No. 31 (the Merritt School Board) to refuse an applicant's request for records.

2. Documentation of the inquiry process

On February 12, 1996 the applicant requested a list of all teachers at Merritt Secondary School and the date of their most recent evaluations, up to and including January 1, 1996. On February 16, 1996 the applicant requested a listing of the academic specialty areas of the teachers at the same school. On February 21, 1996 the Merritt School Board refused the applicant's request for both records. The applicant then wrote to my Office on March 5, 1996 and requested a review of this decision.

3. Issue under review at the inquiry and the burden of proof

The issue under review in this inquiry is whether the records in dispute should be withheld under sections 22(1) and 22(3)(d) of the Act. These sections read as follows:

Disclosure harmful to personal privacy

> 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.
>
> ...
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of privacy if
>
> ...
>
> (d) the personal information relates to employment, occupational or educational history

Section 57 of the Act establishes the burden of proof

Under section 57 (2), if the record or the part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that the disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

4. The records in dispute

The records in dispute are personal information about each of about fifty teachers held in their individual personnel files.

5. The applicant's case

The applicant is concerned about the "failure" of public education in the town of Merritt. He bases this judgment on claims that the town of 7,000 has an unemployment rate in the range of 25 to 45 percent, the highest crime rate in the province, a high welfare rate, and low ratings in provincial exam marks for mathematics and overall high school rating. His conclusion is that "to be able to determine whether the [school] board actually acted fairly and reasonably in their hiring policies, or to determine whether the board has been negligent, jointly or individually, information is crucial. Otherwise it allows the boards to take refuge under the blanket of secrecy."

The applicant states that the most salient difference between elementary and secondary certification by the BC College of Teachers is that secondary teachers require double the senior credit requirements to teach in a subject area: "It is my information that a significant number of the teaching staff at Merritt Secondary School do not meet the minimum requirements to achieve secondary certification .... I am led to the conclusion that the board's hiring practices may be based on something other than selecting the best qualified candidate for the teaching position."

6. The Merritt School Board's case

The School Board essentially concluded that release of the information in dispute would constitute an unreasonable invasion of the personal privacy of the teachers and staff concerned, especially with respect to section 22(3)(d) of the Act.

With respect to the broad concerns of the applicant with the quality of education at Merritt Secondary School, the School Board states that it has, under the *School Act,* discretion in the hiring of teachers and instruction of students. The *School Act* further requires teachers to be certified. Moreover, principals have to evaluate teachers in their schools.

7. The submission of the teachers of Merritt Secondary School (third parties)

The teachers are of the view that disclosure of their personal information would be an unreasonable invasion of their personal privacy, because it concerns their teaching qualifications and is thus protected under section 22(3)(d) of the Act. In their view and that of the School Board, the applicant has failed to meet his onus of proof on this central issue.

The teachers also emphasize that the basic qualification for teaching in the public school system, a teaching certificate issued by the College of Teachers, does not differentiate between elementary or secondary teaching qualifications. Thus, in their view, the applicant's argument that "a significant number of the teaching staff at the Merritt Secondary School do not meet the minimum requirements to achieve secondary certification" is misplaced.

8. Discussion

As a preliminary matter, counsel for the School Board objected to the applicant including in his submissions information that reveals the course of mediation. Particular information included at pages 3 and 4 of the applicant's submission concerns a description of a compromise position apparently proposed by the applicant, although counsel for the Board disputes whether this was actually put forward during the mediation process. This latter information has no relevance to my decision in this inquiry. I agree with the School Board that this information should not have been included in the applicant's submissions in this inquiry. I have not considered it, and it will not form part of the record of proceedings before me.

In their collective submission, the teachers of Merritt also claim that the applicant in this case and his partner, who is a teacher at Merritt Secondary School, are engaged in a "private vendetta" against the School Board and the teachers in the District. While I am aware that this applicant has figured in other Orders involving Merritt School District, I find the allegation irrelevant to the specific issue before me in this case.

Section 22(3)(d): A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if... (d) the personal information relates to employment, occupational or educational history,

The applicant emphasizes that he is asking for the qualifications of teachers, an issue on which he claims this section of the Act is silent. He argues for release in the spirit of openness of the Act:

> I strongly believe that in a democratic society, a citizen/taxpayer, parent has a right to know the qualifications of the people that the administrators and elected boards employ to teach the children of the district, in the public school system, and exercise their right to hold the members of the board and their staffs accountable.

In my view, the most significant word in section (d) is "history." I take this to mean exactly that, a record of a person's employment, occupational or educational history over time rather than a snapshot of a one-time situation, such as I conclude the applicant is asking for in this case. I have found in other cases that the contents of a personnel file are covered by this section, (Order No. 52-1995, September 15, 1995, p. 6), the particular details in a disciplinary file (Order No. 62-1995, November 2, 1995, p. 12), and the contents of a performance appraisal (Order No. 78-1996, January 1, 1996, p. 5). I have also distinguished employment history from what must be disclosed under section 22(4)(e) about the "position, functions or remuneration" of an employee of a public body. (Order No. 97-1996, p. 8) See Order No. 28-1994, p. 4; Order No. 41-1995, p. 6; and Order No. 54-1995, p. 9: "The public has a right to know about job descriptions and job qualifications in general terms, not the private information of a public servant with respect to these topics." The insurmountable problem in this inquiry is that the personal information that the applicant seeks does not exist in a format that can be disclosed.

The creations of records for purposes of mediation

I must first dispose of a preliminary matter. I was originally presented with a three-page list containing information about the date of the last evaluation and academic specialty area(s) for each teacher at Merritt Secondary School. On November 20, 1996 I wrote to the Merritt School Board (copied to the parties) and asked a series of questions about how this record came into existence. The applicant and third parties were given an opportunity to reply to the Board's response.

The School Board advised me that this record had been created, on the basis of each teacher's file, at the request of the Portfolio Officer who mediated the case: "It is not a record that is normally kept by the district." It required a reading of each individual's file, including original job applications and interview notes, to produce information that is at least in part inexact or based on guesswork. The key point for the application of the Act is that "the record did not exist at the time of the applicant's original request to the Board," and it was not prepared on the basis of machine-readable records.

Counsel for the School Board and the third parties argue that the so-called new "record" should not be disclosed to the applicant. The latter also emphasize that the

personnel records might not necessarily include updated educational qualifications based on summer courses or correspondence courses from colleges and universities. I agree that these are persuasive considerations.

Whatever the merits of public scrutiny of the qualifications of teachers, I cannot require a public body to disclose, under the Act, a record that did not exist at the time of the original request for access and that was created solely for purposes of mediation. (See Order No. 54-1995, September 19, 1995, passim)

The records in dispute

I agree with the argument of the School Board that the applicant's request for what various high school teachers of a particular subject studied at university and when they had their last personnel evaluations are "sensitive components of an individual's personal privacy." On this basis, I did not require production of, or review, the contents of the teachers' personnel files. I conclude that the information falls under section 22(3)(d) of the Act and disclosure is presumed to be an unreasonable invasion of the third parties' personal privacy. The applicant has not provided cogent evidence and argument that there is some other relevant circumstance that rebuts that presumption. In my opinion, the applicant has not met his burden of proof in this case.

9. Order

I find that the head of School District No. 31 (Merritt) is required to refuse access to the records in dispute under section 22 of the Act. Under section 58(2)(c), I require the head of School District No. 31 to refuse access to the applicant.

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David H. Flaherty
Commissioner

December 19, 1996