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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 302-1999
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INQUIRY RE: A request by a teachers' union for access to complaint letters about a teacher

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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 March 5, 1999 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 School District No. 20 (Kootenay-Columbia) (the School District) to deny the Kootenay Columbia Teachers' Union (the union) access to correspondence between parents and the School District Superintendent. This correspondence included information about a teacher who is a member of the union; he was represented by the union in this inquiry.

2. Documentation of the inquiry process

On September 22, 1998 the union submitted a request under the Act for all correspondence, relating to a teacher, which was sent to the School District Superintendent's office in June, July, August, or September of 1998 and all responses to these letters. The union did not provide the teacher's written consent for it to make the request on the teacher's behalf until October 13, 1998. The School District began to process the request on the latter date.

In a November 12, 1998 letter, the School District confirmed that, after considering all relevant factors, including representations received from the third party, it was refusing access to the requested records under sections 22(2)(e) and (f) and 22(3)(h) of the Act.

The applicant's request for review of the School District's decision was received by my Office on November 30, 1998.

During the mediation process no further information was disclosed to the applicant. It was determined, however, that on September 18, 1998 the School District had disclosed to the applicant a June 23, 1998 letter written by the Superintendent to a third party, but without information that could identify the third party. This letter is one of the four records covered by this request.

On February 9, 1999 the applicant confirmed that it wished to proceed to a formal inquiry. The parties agreed to extend the inquiry deadline to March 5, 1999.

3. Issue under review and the burden of proof

The issue in this inquiry is whether the School District was required by section 22 of the Act to refuse the applicant access to all correspondence relating to a teacher which was sent to the School District Superintendent's office in June, July, August or September of 1998 and all responses to these letters. Section 22 requires a public body not to disclose a third party's personal information where disclosure would be an unreasonable invasion of the third party's personal privacy.

In this case, the School District has relied on sections 22(2)(e) and (f) and 22(3)(h) of the Act. The applicant also raised sections 22(2)(c) and (g). The relevant provisions are:

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.

(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

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

…

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

....

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,

....

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(2), if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. Therefore, in this inquiry, the burden of proof is on the applicant.

4. Procedural Objections

The applicant has argued that the burden of proof should be on the public body, as the applicant has modified its original request to restrict it to those records which contain personal information about the applicant. Schedule 1, in the definition of "personal information," says that personal information includes "the individual's personal views or opinions, except if they are about someone else." Therefore, the applicant reasons that although the names of the complainants are properly third party information, the contents of the letters themselves are the personal information of the applicant.

Under section 57(2), if the record or part that the applicant is refused access to under section 22 contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. Although I appreciate the logic of the applicant's argument, the fact remains that a portion of the records contains third party information and so must be subject to the burden of proof prescribed by the Act.

The applicant objects to my receiving and considering the School District's reply submission in this inquiry, because that submission was a day late in reaching my office. The deadline for receiving submissions was 12:00 noon on Thursday, March 4, 1999. The School District had difficulty sending its submission by fax, and so the document was received at my office the following day. The applicant objected to my consideration of this submission, as it alleged the public body had the opportunity of reading its reply submission, while the applicant did not have the opportunity of reading the reply submission of the public body or third party before it made its final submission.

However, according to our procedures, the submissions are exchanged after the deadline, and none of the parties has the opportunity to read any other party's reply submissions before replying. In the circumstances of this case, it appears that the public body would not have had an opportunity to read the reply submission before making its

reply. I have considered the applicant's preliminary objections but, based on the facts of this case, I believe there is no prejudice to the applicant if I receive the School District's reply submission. Accordingly, I have decided to consider the School District's reply submission.

5. The records in dispute

The records in dispute consist of all correspondence relating to a teacher which was sent to the School District Superintendent's office in June, July, August or September of 1998 and all responses to these letters.

In fact, there are four letters in dispute totalling six pages. Four pages are from the third parties to the School Superintendent; two pages are from the latter to the third parties. The longer of these two responses has been fully disclosed to the teacher, except for the identities of the complainants.

6. The Kootenay-Columbia Teachers' Union's case as the applicant

The union is acting on behalf of the school teacher who was the subject of correspondence between parents and the School Superintendent of School District No. 20. The teacher has authorized the union to act on his behalf. He had transferred to a school in the District, where he was informed by the principal that he was "under a cloud" because of a letter of complaint written about him. The School District refused to give him access to the correspondence (with one exception of a letter sent by the District in response to the initial letter of complaint).

The applicant's submission is that the teacher "had never had any disciplinary action taken against him nor had he been previously advised of any criticism of him." Furthermore, the teacher has now learned the identity of the parent(s) of a child in the school who complained about him, "because of other events which occurred."

> At the time the letter or letters were written, the third party's child had never been a student of [the teacher]. The third party had never had any contact or interaction with [the teacher], and in fact, the third party had never met [the teacher] at that time.

The applicant wants the information in the records in dispute that concern the teacher. It does not want personal information about the third party.

The following statement is generally indicative of the nature of the applicant's case in this inquiry:

> We can surmise that the information in the requested records includes statements concerning [the teacher's] competence or conduct as a teacher. As such his professional reputation is at stake. When employment and

> professional reputation are concerned, the accuracy of information which is conveyed is of the utmost importance. [The teacher] must have the right to know what personal information is being conveyed about him, thus giving him the right to correct any inaccurate information.
>
> On any balancing of rights, the rights of [the teacher] to be able to correct erroneous information (which requires that he knows what that information is) must outweigh the rights of a Third Party to convey information about [the teacher] which is not accurate.

7. School District No. 20 (Kootenay-Columbia)'s case

The School Superintendent indicates that she received correspondence from two parents about the teacher in this case, one of which was anonymous:

> The letters raised concerns about this individual and his reputation as a teacher... The letters were not shared with the teacher, and my response encouraged the parents to work with the teacher in order to ensure that their son had a successful school year. My letter also encouraged the parents to give the teacher a chance and reflects the importance of one's professional reputation.

The School Superintendent had received previous complaints about the teacher and had held a meeting with him.

The School Superintendent submits that the complaining parents in this case acted "in a sensitive and non-public manner. Their concerns were shared in confidence with me and with the principal.... As Superintendent of Schools, I consider it to be important for parents to be able to raise issues in a risk-free environment within certain parameters."

8. The third parties' case

The third parties, whom I am referring to in the plural for purposes of convenience, support the decision of the School District not to disclose the records in dispute. They believe that they have the right to communicate in confidence with school authorities "without jeopardizing the privacy of the children involved."

In the present instance, the parents received "alarming" information that made them concerned about jeopardy to the learning environment of their children:

> In our correspondence with the superintendent, it was never our intention to harm the reputation of the teacher involved, and we stated this clearly in each of two letters written. Our communication was intended to be kept in confidence within the school as well as the community so as not to affect

> the reputation of this teacher and so that our children would not experience any negative ramifications of our having expressed concern.

The parents subsequently met with the Superintendent and the school principal and brought specific issues to their attention. According to the parents, the principal claimed that the parents had breached protocol by going directly to him rather than to the teacher:

> ...he [the principal] informed us that he had revealed to the teacher not only that we had been a source of complaint but also that we had written letters to the superintendent ... [deleted for reasons of confidentiality] information that we specifically requested be withheld to protect our children and to allow for a fair assessment of our concerns.

The parents did meet, unsuccessfully in their view, with the teacher. The parents submit as follows:

> We feel our rights to privacy must be protected in order for us as parents to be able to communicate with our school board and have issues dealt with confidentially.... The fact that this teacher knows who we are is already a violation of our rights as concerned parents, to disclose our communications with the school board would be a further violation of our rights and enables the teacher to try and pursue legal action against us which we feel is unjust.

9. Discussion

Section 22: Disclosure harmful to personal privacy of third parties

The issue I must consider is whether section 22 of the Act requires the School District to refuse to disclose the records in dispute to the applicant. Section 22(1) requires a public body to refuse to disclose personal information to an applicant, "if the disclosure would be an unreasonable invasion of a third party's personal privacy."

Section 22(2) requires the public body to consider all of the relevant circumstances when determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy. Under this provision, the "relevant circumstances" which must be considered (and the list is not exhaustive) are those provided for in sections 22(2)(a) to (h).

The applicant submits, and I agree, that a review of the Act and my decisions under it establish two basic principles:

1. An applicant is entitled to information about himself or herself which is contained in records held by a public body.

2. An applicant is not entitled to information about a third party where the release of such information would constitute an invasion of the third party's personal privacy.

While generally section 22 is applied to a third party's personal information, in this case there are two types of information: information identifying the third parties (such as name and address), which constitutes the third parties' own personal information, and information which consists of the third parties' opinions of the applicant which, by the operation of the definition of "personal information," are the applicant's personal information. Generally, the disclosure of an applicant's own personal information to the applicant is not prevented by section 22.

In Order No. 17-1994, July 11, 1994, pp. 3-4, I concluded that disclosure of most of a letter to an applicant teacher would not result in an unreasonable invasion of the privacy of the third parties. I agree with the current applicant that the same result should apply in the present case. (See also Order No. 114-1996, p. 3, where I concluded that personal information in a school dispute, that was about specific applicants, should be disclosed to them.)

I further agree with the applicant that under the definition of "personal information" in Schedule 1 of the Act, an individual is entitled to receive information that concerns himself or herself. In the present case, the teacher wants to know what the third parties said about him, which strikes me as perfectly legitimate.

In the line of complaint decisions, I have generally supported disclosure of the content of the complaint to the person being complained about (see Order No. 34-1995, February 3, 1995; Order No. 43-1995, June 9, 1995), but not the personal information of the complainant (see Order No. 17-1994, July 11, 1994).

It is regrettable that the submission and reply submission of the School District, discussed above, made only one reference to the application of general or specific sections of the Act to the records in dispute. Its decision on disclosure was ultimately made under the Act, whatever other public policy considerations it took into account.

Section 22(2)(c): personal information is relevant to a fair determination of the applicant's rights

In this inquiry, the applicant union makes the strong point that the School District and the complaining parents have placed the teacher "in the untenable situation of knowing he is the victim of negative allegations -- but being unable to respond because he is denied the right to know what those allegations are.... The right to know allegations made against one is just as important when one's employment is placed 'under a cloud' as when formal discipline is taken."

In *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner),* [1999] B.C.J. No. 198, Madam Justice Smith restricted the word "rights" in section 22(2)(c) to "legal rights." The applicant, other than asserting the "right to know allegations made against one … when one is placed under a cloud," outside of any disciplinary process, has not demonstrated that this amounts to a "legal right."

Section 22(2)(e): Unfairly exposing third parties to financial or other harm

The School District in its final submission states that as the applicant has "indicated his intention to pursue this matter through legal channels … it is certainly the feeling of the third party and myself as Superintendent that the disclosure of these documents may indeed expose them to financial or other harm (Section 22(2)(e))."

The applicant seeks to argue that, since it is not asking for the personal information of the third party, this section, and thus this "circumstance," does not apply. Moreover, the Legislature "restricted the situation to one where the third party would be unfairly exposed to financial or other harm:"

> By using this wording, the Legislature was making clear that a third party could not avoid the consequences of his words simply because they have been expressed in a communication which becomes the subject of an application pursuant to the *Freedom of Information and Protection of Privacy Act.* The Act was never intended as a shield to protect statements which a court may subsequently determine are false and/or defamatory.

The applicant elaborated on the application of this section in its reply submission by stating:

> If they [the letter writers] have said nothing defamatory, then there would be no reason for [the teacher] to pursue any action against them…. If a person has committed a wrongful act, then there is nothing unfair in bringing the matter before a court and having a court determine responsibility….
>
> Parents need have no fear of raising legitimate concerns. The only things which parents may wish to hide is correspondence which is not factual, which is based on innuendo and unsubstantiated rumour. There is nothing unfair in disclosing such correspondence. The only unfairness arises in not disclosing it to the person who is the subject of such correspondence.

Although fairness to the third parties may be a relevant circumstance for the School Superintendent to consider in making a decision on whether or not to release the records, on the facts of this case, I find that the third parties would not experience an

"unfair" exposure to harm as contemplated by section 22(2)(e), if the records in question were released.

Section 22(2)(f): Personal information of third parties has been supplied in confidence

The School Superintendent states that it was her decision not to share the records in dispute with the applicant (even though one severed letter was in fact given to the teacher on the basis of "an error in judgement" by the school principal). Her position is that the parents approached her and her staff with concerns in a privileged and confidential manner: "This third party information is privileged information and should not be shared with the applicant."

The applicant questions whether in the present case there is any indication of understanding about confidentiality or information being supplied in confidence, given the contents of the severed letter from the School Superintendent to the third party already released to the applicant.

The question of intended confidentiality depends on my analysis of the records in dispute. See Order No. 114-1996, p. 4, where I concluded that the test was whether personal information was *supplied* in confidence, "and that disclosure of the personal information about each individual to him or her would not be an unreasonable invasion of the personal privacy of the third parties. These applicants are not seeking information about each other."

It is reasonable to conclude in the present case that the third parties did submit their complaint in confidence, making it a "relevant circumstance" for the School Superintendent to consider in reaching her decision on disclosure. It is not, however, a determining factor with respect to the application of section 22(1) of the Act.

Section 22(2)(g): personal information is likely to be inaccurate or unreliable

The applicant submits that section 22(2)(g) was a relevant circumstance for the School District to consider:

> One of the purposes of the Act is to give individuals a right of access to, and a right to request correction of, personal information about themselves. In the instant case, even the Public Body concedes that there is information which is simply not true in the requested records … On any balancing of rights, the rights of [the teacher] to be able to correct erroneous information (which requires that he knows what that information is) must outweigh the rights of a Third Party to convey information about [the teacher] which is not accurate.

However, as the possibly inaccurate and unreliable information is about the applicant, not the third parties, then section 22(2)(g) is not engaged (see Order No. 194-

1997, October 14, 1997 at p. 11). Section 22(2)(g) is intended to prevent disclosure of potentially inaccurate and unreliable information about third parties, not about applicants. Thus the section is not a relevant consideration in this case.

Section 22(3)(h): the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,

The applicant submits, and I agree completely, that this section has no application to the circumstances of this inquiry, since it was clearly not intended to cover "the passing on of rumours and misstatements."

In my view, the contents of the letters in question do not include personal recommendations, character references, or personnel evaluations within the meaning of the Act. As I stated in Order No. 34-1995, February 3, 1995, p. 6, "it would require a stretch for me to conclude that the contents of the letter in dispute fall under the normal understanding of personal recommendations or evaluations, character references or personnel evaluations. It seems clear to me that these clauses were intended to cover what are often referred to as letters of recommendation." I therefore find that section 22(3)(h) has no general application to the records in dispute.

Furthermore, it should be noted that the intention of section 22(3)(h) is to protect the source of the information in question rather than the contents of the letters.

Summary

Although it is reasonable to conclude that sections 22(2)(e) and 22(2)(f) were relevant considerations for the School Superintendent, on balance these are not the determinative factors with respect to the application of section 22(1) of the Act.

With respect to the application of section 22(1) to the records in dispute, I conclude, without hesitation, that the personal information about the teacher in the four letters must be disclosed to him. It is important to underscore that, in this case, the opinions about the applicant which are contained in the requested records are in fact his personal information as per the definition of "personal information" found in Schedule 1 of the Act. As I have previously discussed, section 22(2)(g) is not a relevant consideration in this case. In addition, I have found that section 22(2)(c) and 22(3)(h) do not apply in these circumstances. The School Superintendent's first letter of response to the parents has already been disclosed to the teacher by his school principal. The second response has no information in it about the teacher, so he has no right of access to it. My own view is that the entire contents of the letters of complaint, less the specific identities of the writer(s), should be disclosed to the applicant and thus to the teacher.

The facts of this particular case make the second part of this finding problematic. The School District points out that while the one record it released to the applicant was

severed, so as not to identify the complainants, the school principal had, in fact, disclosed "the identity of the individuals who wrote the letter." In addition, during the written inquiry process conducted by my Office, two of the third parties to this matter were identified. This occurred when my Office exchanged, with the applicant, the written initial submissions from two of the third parties. The latter had been notified of the inquiry and told in the same letter: "I wish to assure you that your identity has not been revealed by the Office of the Information and Privacy Commissioner to the applicant…. You may request that your identity and the content of your submission be kept in strict confidence. If you do not request this, a copy of your submission with your name will be distributed to the applicant and the public body." Submission(s) were received by my Office. However, the third parties did not request that their identities and the contents of their submissions be received "in private," as contemplated by section 56(2) of the Act.

Therefore, my Office, in effect, re-disclosed the identities of two of the third parties to the applicant during the exchange of submissions. I regret that this inadvertent disclosure occurred. My Office is changing its procedures to ensure that, in cases such as this one, identities in dispute are not disclosed under any circumstances.

Despite the above facts, I wish to apply a principled approach to the application of the Act. Section 22(1) protects the identity of the complainants from disclosure. The release of the identities occurred without the express consent of the third parties (see section 22(4)(a)). Therefore, I find that these circumstances are such that the identities should not be released.

10. Order

I find that School District No. 20 (Kootenay-Columbia) was not required to refuse access to all of the information in the records at issue in this inquiry under section 22 of the Act. However, I also find that disclosure of certain portions of specific records at issue would be an unreasonable invasion of personal privacy for the third parties to this inquiry, and that School District No. 20 (Kootenay-Columbia) was required to withhold this information under section 22 of the Act.

Under section 58(2)(a) of the Act, I require School District No. 20 (Kootenay-Columbia) to give the applicant access to those parts of records which it is not required to withhold under section 22 of the Act. I have prepared a severed copy of the records to indicate which parts must be disclosed.

Under section 58(2)(c) of the Act, I require School District No. 20 (Kootenay-Columbia) to refuse access to some information in the records that I have indicated in the prepared severed copy of the records.

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David H. Flaherty
Commissioner

April 13, 1999