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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 247-1998
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INQUIRY RE: A decision of School District No. 58 (Nicola-Similkameen) on the custody or control of a retired school principal's diary

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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 November 14, 1997 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 the response by School District No. 58 (Nicola-Similkameen) (the School District) that it did not have custody or control of a retired principal's records, created while he was employed by the School District, but which are now in his possession.

2. Documentation of the inquiry process

On May 9, 1997 the applicant submitted an access request to the School District for all records received or prepared by a secondary school principal relating to any investigations, complaints, and allegations concerning the complaints and/or allegations made by the applicant's wife about her working conditions in connection with a co-worker at the secondary school from September 1992 until the date of the principal's retirement. The applicant subsequently narrowed the request to those records retained by the principal upon his retirement.

On June 18, 1997 the applicant submitted a request for review to this Office concerning the School District's failure to respond to his May 9, 1997 request and two other requests within thirty days of submitting his access requests.

On July 8, 1997 the School District responded to the applicant's request:

> I regret to inform you that School District No. 58 (Nicola-Similkameen) is unable to provide access to the records you have requested. These records

> are excepted from disclosure under section 3.1 [*sic*] of the Act. That is, these records are not now, nor have they ever been, under the custody or control of the School District. I spoke to [the principal] as recently as last week to request a copy of any information he may have in regard to your request. He has advised me that any documents that he has retained are part of his personal diary. He said that these documents, if they exist, were not part of a school or district based file or record. [The principal] has declined to voluntarily turn any such records over to the School District.

During the mediation process, the issues in dispute were narrowed to whether the records responsive to the applicant's access request, but retained by the principal upon his retirement, were in the custody or under the control of the School District. Over the objections of the applicant, the inquiry initially scheduled for November 7, 1997 was extended to November 14, 1997. It was my view that on reviewing the principal's request for an extension and the responses to that request, more prejudice would result to the principal if such an extension were denied, than would result to the applicant if the request were granted.

3. Issue under review and the burden of proof

The issue in this inquiry is whether a diary kept by the principal is a record "in the custody or under the control" of the Board within the meaning of section 3(1) of the Act. Section 3 sets out the scope of the Act, and it provides in part as follows:

> ***Scope of the Act***
>
> 3(1) This Act applies to all records in the custody or under the control of a public body [with excluded categories following]....

Since the School District and the third party principal both take the position that the Act does not apply to the record in dispute because it is not in the custody or control of the School District, the onus is on them to establish that this is so. The School District and the third party are in possession of the information necessary to demonstrate whether the requested record is in the "custody or control" of the public body.

4. Procedural objections

Both the School District and the third party object to me considering the reply submission made by the applicant. They are concerned that the applicant's reply submission raises new facts and issues that should have been addressed in the applicant's initial submission and includes assertions that are not supported by affidavit evidence. I have reviewed the applicant's reply submission and the other parties' written objections and have concluded that there is no harm to the interests of the other parties in my review of this submission.

5. The record in dispute

The third-party principal has not provided a copy of the disputed record to the School District or to me for examination during this inquiry as it is his position that the record is not subject to the Act. As becomes clear below, the record in dispute is what is being called the personal diary of the school principal. The applicant seeks access to that information in the record which relates to matters involving the applicant's wife from 1992 to 1995.

6. The applicant's case

The applicant is seeking information in a record maintained by a school principal between 1992 and his retirement in 1995, dealing with investigations, complaints, and allegations concerning his wife and her working conditions as a teacher at a particular school. The applicant refers to them as "working notes." He is relying on my Order No. 106-1996, May 28, 1996, p. 4, reinforced, he claims, by my Order No. 114-1996, August 22, 1996, and Order No. 115-1996, August 23, 1996. Briefly stated, I agree with the submission of the School District to the effect that these decisions are not directly relevant to the present inquiry and/or deal with a separate record from what I have previously considered in Order No. 106-1996. (Reply Submission of the School District, pp. 1-2)

The applicant's submission is that "any record created by a public body, no matter where the record is physically located, never ceases to be in the custody and control of the public body."

7. The School District's case

The School District submits that the record in dispute constitutes a personal record of the third-party principal which he created and maintained, without the knowledge of the School Board, while he was the principal at the secondary school in question. The School Board has provided affidavit evidence that it had no part in the creation of the diary, "since there was never any Board policy or employment requirement that the record be created," and that it had no authority under any Board policy or employment requirement that - in the case of a personal record - would have required [the principal] to surrender the personal diary upon his retirement." (Submission of the School District, paragraphs 5 and 6)

The School District is of the opinion that the Board of School Trustees has no "property right or other legal right to the diary." The head of the public body "concluded that the record in question is a personal diary of certain incidents and events, recorded by the former principal as a confidential record kept for personal reasons and not for employment purposes." (Submission of the School District, paragraph 8; and Affidavit of Bruce Tisdale, paragraph 13) The diary was "not directly or essentially [created] for the

discharge of that individual's functions as a Board employee." (Submission of the School District, paragraph 16) Additionally, the Board has unsuccessfully searched for a copy of the diary and there are no references to the diary in any Board or school files. (Submission of the School District, paragraph 9)

The School District submits that the principal's diary is not a record in its custody or control for purposes of the Act. It did not require the creation of the diary for Board purposes. (Submission of the School District, paragraphs 10, 13) The affidavit evidence indicates that the principal "intended, at the time the record was created, to use the diary for personal and confidential purposes, and not for the discharge of his duties as an employee of the Board." The School District has also offered me a lengthy list of factors, following upon my Order No. 11-1994, June 16, 1994 and Ontario Order P-120, November 22, 1989, to argue that the "diary has never been - and is not at this time - under the 'control' of the Board." (Submission of the School District, paragraph 15)

8. The Third Party's Case

The third party, the former school principal, was represented by solicitors for the B.C. Principals and Vice Principals Association.

The third party submits that I have no jurisdiction to order disclosure of his diary, "which he considers to be personal property." He argues that the Act "grants no jurisdiction over private individuals, and there is no power to compel them to produce personal records." (Submission of the Third Party, paragraph 6)

9. The British Columbia School Trustees Association's (BCSTA) Case

BCSTA is an association of public school boards that currently represents 49 of 60 school boards. On my invitation, the BCSTA participated as an intervenor in this inquiry.

The BCSTA acknowledges that diaries may be created for school purposes:

> For example, administrators are generally encouraged to document meetings or incidents about which they may later be asked to provide evidence, such as employee disciplinary meetings or incidents where there may be a question of School District liability. Such records are created for protection of the district and the district should be presumed to have a right to possession of such records. (Submission of the BCSTA, p. 3)

However, in this inquiry, the BCSTA suggests that the diary was created for personal purposes:

> One obvious reason why school administrators may wish to create personal records as a protection [is] should their own personal liability for

> some incident become an issue.... The possibility of being named in a civil or criminal action is a real concern for school administrators, especially since the limitation period has been removed from claims arising from sexual misconduct. (Submission of the BCSTA, p. 3)

On the basis of its understanding of the evidence in this inquiry, the BCSTA submits that the diary is not a record in the custody or under the control of the School District.

10. Discussion

The Act applies to all records in the "custody or under the control of a public body," subject to certain exclusions enumerated in section 3(1). The issue in this inquiry is whether the record in dispute is in the custody or under the control of the School District.

(a) Custody

Custody is not a defined term under the Act. In its ordinary meaning, custody is synonymous with physical possession or keeping of a person or an object. Section 3(1) contemplates that a record must be within the physical possession of a public body in order for the record to be "in the custody of" the public body.

It is clear on the evidence that the School District does not have "custody" of the principal's diary. The third party has possession of the diary, and there are apparently no copies of, or references to, the diary in any Board or school files. (Submission of the School District, paragraph 9) The third party deposed in an affidavit that the decision to keep a diary was his alone, and it was never intended to form part of official school records.

(b) Control

The more difficult question is whether the diary is under the "control" of the School District. Even if a record is not in the custody of a public body, it may nevertheless be a record which is subject to the Act, if it is "under the control of" a public body. Control is not a defined term under the Act but indicates that a public body must be in a position to assert some right to possession of the record. (See Order No. 115-1996, August 23, 1996) It is necessary to consider both the nature of the record and the circumstances of the case.

In the context and circumstances of this particular inquiry, I agree with the submission of the School District that my powers under the *Inquiry Act* do not permit me to convert a private record to a public record under the Act. (Submission of the School District, paragraph 18) The School District stated the issue this way.

> The Legislature cannot have intended the concept of 'control' to be so broad that an individual employed by a public body completely surrenders control over his or her privacy any time such an individual records a thought or a fact that in any way is occasioned by discharge of that person's employment functions. Such a record may have no relevance or rational connection to discharge of that person's duties and may have no relevance to the interests of any third party. It is implicit in the concept of 'control' under s. 3(1) that public employees will, perhaps in limited cases, create private records in respect of which their employment is in some way the **sine qua non** of the records' existence, but which are not records under the 'control' of the public employer. (Submission of the School District, paragraph 19)

While I agree that "control" cannot be interpreted so broadly and that a "personal diary" of an individual may contain information related to activities associated with his or her employment, I am concerned that the creation of such private or personal records not be used as a way to evade access to requests for records under the Act. Any "records" under the Act that the school principal produced, or had custody of, during his period of employment by the School District are still, in principle, subject to the Act. Simply put, a public servant cannot evade access to requests for records under the Act by taking home public records that technically remain under the "control" of the public body.

The determination of "control" requires an examination of the nature of the record. The applicant submits that the school principal "commenced a public record during school time, on school stationery, concerning in part, events involving members of my family." (Reply Submission of the Applicant, p. 1) He further contends that he visited the school principal during school hours in the fall of 1993 and witnessed his "passionate note taking in performing his responsibility for administering and supervising the school." Of course, it is not clear what the principal was writing at this point: a record under the Act, his diary, or a combination of the two.

The School District drew its conclusion that it "has no ability to force a retired former employee to deliver up a personal record that was not created for employment purposes," after it failed to obtain his consent voluntarily to deliver the diary to the District for its inspection. (Affidavit of Bruce Tisdale, paragraph 13)

The third party's submission stated a similar conclusion:

> The Third Party is a private individual. He is not an employee of the School Board, having retired in 1995. The Act grants no jurisdiction over private individuals, and there is no power to compel them to produce personal records. (Submission of the Third Party, paragraph 6; see also paragraph 12)

This is an accurate statement, except to the extent that a former employee still has in his possession "records" that were prepared or produced while he was an employee and that were, or should have been, covered by the Act. The Act could still be construed as applying to those records, if they were records under the custody or control of the School District. In this inquiry the School District asserts that it never had custody or control of these records. I do not regard the retired status of the principal in this inquiry as fully determinative of my ability to order production of a record in dispute.

The B.C. School Trustees Association "does not take a position on whether the district could have exercised any right of possession with respect to the diary in question during the term of the principal's employment when it might conceivably have been relevant to the conduct of his duties as principal. However, if such a right could have been exercised, the last possible time to do so would have been on the principal's retirement." (Submission of the BCSTA, p. 4) I find this proposition somewhat problematic. It implies that a public servant who leaves public office with "records" as defined in the Act has essentially evaded requests under the Act for these records for all time. That, in my view, depends on the question of whether the public body has custody or control of the records. An employee's records held at home, if they are truly "records" under the Act, are still fully subject to the Act.

While there is nothing in the Act to prevent a public servant from keeping a true diary at work, it can lead to issues such as those raised in the context of the present inquiry. The difficulty lies in determining whether the records fall within the custody or control of a public body. Obviously, if the diary is left at home, these issues do not arise.

The Government of British Columbia's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual (September 1994 edition, Section C.3.2, page 7) provides helpful, but non-binding, advice on the issue of "black books" and diaries that contain a mix of professional records and private personal notes or comments:

> Official journals or 'black books' of public employees are in the custody of the public body. Personal information not related to the duties as an employee of the public body is severed before disclosure.

The wording in the Manual anticipates situations where employees or officers of public bodies have documented work-related events in their personal diaries. The format used to store work-related information is not what determines whether the Act applies to the record. Rather, the broad definition of "record" in Schedule 1 of the Act shows that any storage medium, paper or electronic, can be a record if it stores information. Therefore, it is not possible to state categorically that personal diaries are never subject to requests under the Act. Where a record, including a personal diary, contains a mix of professional and private information, and the record is in the custody or under the control of a public body, that public body must review and sever the diary under the Act for possible disclosures.

It would be easier to conclusively characterize a document as a personal diary if the writer kept the book, paper, or computer disk at home and did the writing there. Would it be plausible if an employee used a subdirectory, or file, of his office computer for his personal diary and defended it from disclosure in response to an access request, on that basis? That is possible and plausible. He submits that the diary has always been in his personal possession, but what does that mean? (Submission of the Third Party, paragraph 40) Did he keep it in his desk drawer at the office, or on his computer at the office? His submission states that he made a "deliberate effort" to "keep the Diary separate from official School Board records," which suggests that the record was kept at his office. (Submission of the Third Party, paragraph 61(g)) This "effort" is a persuasive point.

I agree with the third party's submission that "his right to privacy would be compromised by a declaration that his Diary is in the control of a public body." (Submission of the Third Party, paragraph 7) However, I must be satisfied that the record in dispute is a personal diary and not something else such as a collection of papers accumulated during years of public service as an employee, or, more likely, a series of notes concerning events in the work environment that the school principal saw the need to write about which would fall under the control of the public body. For example, I would not be satisfied if a public servant made copies of "records" under the Act to take home and claimed that they constituted a personal diary. Similarly, a desk diary used by an employee at work listing scheduled meetings would probably not constitute a personal diary.

The affidavit of the third party makes the following relevant points about his record keeping, all of which I quote directly here with accompanying annotations by me in square brackets:

- In or about February, 1993, I began keeping a personal record of some events that occurred at work. This record gradually evolved into a personal diary. [This is the personal notes, personal diary dichotomy. Can a school principal truly create a "personal record" of events at school while he is at school? The answer is yes]
- The Diary includes private and confidential information recorded or compiled by me. It includes my own personal notes which I have always considered to be private and which were written with an expectation that they would remain private. [a persuasive point]
- The Diary was created for my personal use, as an aid to my memory, and as part of the process of assessing and reflecting upon matters. The Diary contains my personal views, thoughts and observations. [If done appropriately, this practice can create a truly private and personal record not covered by the Act]
- The Diary was compiled by me and was never intended to form part of the official school records.... [another persuasive point]

- The decision to keep the Diary was mine and mine alone.... I doubt that it was common knowledge that I kept a diary.

The School District argued in reply that the personal diary, "a personal private and confidential record created for [the principal's] personal use and for other personal purposes," is not a record for purposes of the Act. (Reply Submission of the School District, pages 2 and 3)

The evidence in the present inquiry ultimately reveals that the diary was not under the control of the School District. Significantly, the third party's diary was never "utilized for an official purpose, rather it exists only as a memory aide and as a tool for personal reflection." (Submission of the Third Party, paragraph 48) The third party acknowledges that he voluntarily released three pages from the diary in 1995, after his retirement, in response to a request for records under the Act: "I did so only because the selected pages were non-contentious and contained information which was in the common knowledge of all parties involved." (Submission of the Third Party, paragraph 62(b); Affidavit of the Third Party, paragraph 4) The third party subsequently refused access to the entire diary in response to a further request. Voluntary disclosure does not establish control on the part of the public body.

I have considered a decision of the Information and Privacy Commissioner of Ontario (Order P-1532, February 20, 1998), which deals with the custody and control of a diary that a district manager of an institution ("public body" in British Columbia) kept at home and had maintained for a significant number of years. This decision involves a record that is clearly outside the custody and control of the public body and that constitutes a true daily journal that the individual has maintained since 1972. This remains the case, even if the writer describes activities that he has been involved in during his working day.

The employment relationship between the third party and School District in the present inquiry, has long since ceased. The School District did not require the record to be created, nor could it have required the record to have been created. Indeed, the diary was created by the third party without the knowledge or consent of the School District. The School District does not appear to have any legal right to possession of the diary. Based on the evidence before me, I accept that the diary was a personal record within the custody and control of the third party rather than the School District. I accept the School District's submission that it "has no ability to force a retired former employee to deliver up a personal record that was not created for employment purposes," after it failed to obtain his consent voluntarily to deliver the diary to the District for its inspection. (Affidavit of Bruce Tisdale, paragraph 13)

As I have concluded that the diary is not in the custody or under the control of the School District, it does not fall within the scope of the Act.

11. Order

I find that the record requested by the applicant is not in the custody or under the control of School District No. 58 (Nicola-Similkameen) under section 3(1) of the Act. Under section 58(2)(b) of the Act, I confirm the decision of School District No. 58 to refuse access to the applicant.

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David H. Flaherty
Commissioner

July 13, 1998