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

Order 00-40

INQUIRY REGARDING SOUTHEAST KOOTENAY SCHOOL BOARD RECORDS

David Loukidelis, Information and Privacy Commissioner
August 14, 2000

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Summary: Applicant sought access to school counsellor's notes of interviews with applicant's children. School board required to refuse disclosure of student's personal information under s. 22(1) and authorized to refuse to disclose same information on the basis of s. 19 (1).

Key Words: reasonable expectation of harm – threaten – mental or physical health – mental or physical safety – personal privacy – unreasonable invasion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 19(1), 22(1), 22(2)(e) and (f), 22(3)(a), (b) and (d); Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 323/93, s. 3.

Authorities Considered: B.C.: Order No. 53-1995; Order No. 115-1996; Order 00-01. **Ontario:** Order P-673.

Cases Considered: *Rae Neilson* v. *British Columbia (Information and Privacy Commissioner)* (8 July 1998), Vancouver A962846 (B.C.S.C.).

1.0 INTRODUCTION

This order is the next installment in a story that began in 1996, when the applicant made an access to information request under the *Freedom of Information and Protection of Privacy Act* ("Act") to what was then The Board of School Trustees of School District No. 2 (Cranbrook) and is now The Board of School Trustees of School District No. 5 (Southeast Kootenay) ("Board"). The request sought copies of all notes made by a school counsellor, dating from September 1994 to the end of November 1995, relating to the applicant's two children. In 1996, the Board denied access to the notes under s. 19(1)(a) of the Act on the basis of the school counsellor's opinion. The Board relied

on her opinion because the school counsellor had refused to turn her notes over to the Board. The Board, therefore, had not actually reviewed the responsive records in order to determine whether s. 19 applied.

For that reason, my predecessor dealt with this matter, in Order No. 115-1996, only in relation to the question of whether the school counsellor's notes were in the custody or under the control of the Board for the purposes of the Act. He decided the Board had control of the records and ordered the Board to perform its duty to produce the records for his review. The school counsellor, who had been made a third party for the purposes of the inquiry, applied for judicial review of my predecessor's order, which had the effect, under s. 59(2) of the Act, of automatically staying his order. The British Columbia Supreme Court later upheld Order No. 115-1996, in *Rae Neilson* v. *British Columbia (Information and Privacy Commissioner)* (8 July 1998), Vancouver A962846 (B.C.S.C.). The school counsellor appealed that decision; the appeal was later abandoned.

The Board ultimately produced the disputed records to this Office on February 7, 2000 and, on March 8, 2000, the applicant confirmed that she wished to proceed to an inquiry on the issue of whether the Board was authorized to withhold the records under s. 19(1) of the Act.

The Board relied in this inquiry on its 1996 submission respecting s. 19(1) and also provided a further submission on the merits of the s. 19(1) issue. The Board provided this updated submission having reviewed the school counsellor's notes. The applicant filed a new submission in this inquiry, in which she affirmed her wish to see the notes. The Board did not appear to have considered the possibility that s. 22 would *require* personal information in the records to be withheld from the applicant. Because s. 22(1) *requires* a public body to withhold personal information in certain circumstances, I invited the parties to make submissions to me on whether s. 22 applies to personal information in the records.

2.0 ISSUES

The issues in this inquiry are as follows:

1. Was the Board authorized by s. 19(1) of the Act to refuse to disclose information to the applicant; and

2. Was the Board required by s. 22(1) of the Act to refuse to disclose personal information to the applicant

Under s. 57(1) of the Act, the Board bears the burden of establishing that it is authorized by s. 19(1) to refuse to disclose information. Under s. 57(2) of the Act, the applicant has the burden on the s. 22(1) issue.

3.0 DISCUSSION

3.1 Records in Dispute – The Board delivered seven pages of records to me for the purposes of this inquiry. The first page consists of explanatory notes, apparently made by the school counsellor, as to the nature of the responsive records. This record is not responsive to the applicant's request, since it appears to have been prepared in relation to that request. The Board also provided a one-page handwritten record, dated November 1, 1994, that was described in the school counsellor's explanatory notes as a "letter between" a teacher and the applicant. Strictly speaking, this record – which contains no notes by the school counsellor – is also outside the scope of the applicant's request.

The other five pages of records include two one-page forms entitled "Referral to District Elementary Counsellor", each of which has been filled in and contains some notes about the children. The records also include two pages of "Student Involvement Reports", which again have been filled in with comments and recommendations, as well as assessments of the children. The last page of records contains handwritten notes by the school counsellor of what the children told her, presumably during interviews or counselling sessions.

3.2 Does Section 19(1) Apply? – Section 19(1) of the Act reads as follows:

> 19. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
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> (a) threaten anyone else's safety or mental or physical health, or
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> (b) interfere with public safety.

I have acknowledged before that a public body is entitled to exercise deliberation and care in assessing whether a reasonable expectation of harm exists, within the meaning of s. 19(1) in relation to disclosure of information. In this case, the Board relies on s. 19(1)(a), which provides that a public body may refuse to disclose information if its disclosure could reasonably be expected to "threaten anyone else's safety or mental or physical health". As I have acknowledged before, a public body is – in light of the interests it protects – entitled to act with care and deliberation under s. 19(1). In an inquiry such as this, a public body must provide evidence the clarity and cogency of which is commensurate with a reasonable person's expectation that disclosure of the requested information could threaten the mental or physical health, or safety, of anyone else. There must be a rational connection between disclosure and the threat to s. 19(1) interests. In this case, as in others – for example Order 00-01 – such evidence may have to be submitted *in camera* (*i.e.*, submitted in confidence to me, with the applicant not being able to see the evidence). Information in the records themselves may also assist me in determining whether the s. 19(1)(a) test has been met.

The applicant, who is the mother of the children discussed in the counsellor's notes, says she wishes to know what the school counsellor asked her two children. Having said that,

the applicant also clearly wants to know what her children said to the school counsellor. She believes she is entitled to "any and all records" pertaining to her children. She says "after 5 years of having gone through this, why would I go and harm my kids"? While she has never beaten her children, she says she "will go on record" and say that she has "slapped" them. She argues it is wrong for the counsellor to have such records for her own use, without her having "a right to them". She notes that social workers have visited her home but have not taken her children away – this proves she is not a bad parent and that she has not harmed her children. She also says the following:

> When do parents get the right to say enough is enough. We have to take a stand and say just because our children are in your school does that give them the right to take over our children and play God with all of our lives, and parents have no right to what is going on in their school … [T]hey are there for an education, not to be badgered by adults. I do not want to know who called Social Services. I don't care.
>
> I want to know what she asked my children. If a stranger was talking to my kids I would want to know what they said, wouldn't you?
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> …
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> I speak for myself and for all other parents who have children in the public school system. What rights do parents have if we let counsellors get away with interrogating our children. We have to stand up and say no more.
>
> We the parents should have all access to things that are pertaining to our children in a public school.

The Board made *in camera* arguments as to why s. 19(1)(a) applies in this case. As those arguments were, in my view, properly made *in camera*, I cannot disclose them here. Nor can I readily discuss, in any detail, my reasons for deciding that the Board was authorized by s. 19(1)(a) – subject to what is said below – to withhold information in the records. Disclosure of the information described below could reasonably be expected to threaten the mental or physical health or safety of the children involved here.

As I indicated above, the Board is entitled to withhold some of the information in the records under s. 19(1)(a). Some parts of the records must, however, be disclosed to the applicant. This is because the Board is required by s. 4(2) of the Act to sever and withhold only that information that is subject to s. 19(1)(a). That section does not create a class exception for school counsellor's notes in general. It only applies to specific information the disclosure of which could reasonably be expected to threaten the mental or physical health or safety of an individual. The standard-form Board documents referred to above contain printed administrative information, such as the title of the document, the name of the student (which is known to the applicant), the school attended by the student, and the student's school grade.

The information in the records consisting of their names, school grades and the school they attend cannot be withheld by the Board. It should be emphasized that this limited

and innocuous information is already known to the applicant, since she is the parent of these children, she is aware that they received counselling and she met with the school counsellor about the children's situation. There may be cases where s. 19(1)(a) will, on the evidence – bearing in mind that each case must be considered on its merits – be found to apply to even such relatively innocuous information. There may be cases, for example, where the situation is so sensitive that all of the records can be withheld.

3.3 Can Personal Information Be Withheld? – Section 22(1) of the Act requires public bodies such as the Board to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party personal privacy. Section 22 merits full quotation in this case:

> 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.
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> (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
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
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> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
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> (c) the personal information is relevant to a fair determination of the applicant's rights,
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> (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,
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> (e) the third party will be exposed unfairly to financial or other harm,
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> (f) the personal information has been supplied in confidence,
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> (g) the personal information is likely to be inaccurate or unreliable, and
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> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that

disclosure is necessary to prosecute the violation or to continue the investigation,

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

(d) the personal information relates to employment, occupational or educational history,

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax,

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

(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,

(i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or

(j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure,

(b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,

(c) an enactment of British Columbia or Canada authorizes the disclosure,

(d) the disclosure is for a research or statistical purpose and is in accordance with section 35,

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

(g) public access to the information is provided under the Financial Information Act,

(h) the information is about expenses incurred by the third party while travelling at the expense of a public body,

(i) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit, or

(j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in subsection (3) (c).

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

(6) The head of the public body may allow the third party to prepare the summary of personal information under subsection (5).

As is noted above, the parties were invited to make submission on whether s. 22 applies to personal information in these records. The Board argues it does and relies (specifically) on ss. 22(3)(a), (b) and (d), while also arguing that ss. 22(2)(e) and (f) weigh against disclosure. Before dealing with the central s. 22 issue, however, I will deal with a matter raised by Dorgan J. in *Neilson*, above, and addressed in the Board's argument here.

In *Neilson*, Dorgan J, in passing, raised the issue of whether s. 3 of the Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 323/93 ("Regulation") adequately protects the privacy of children. Section 3 of the Regulation reads as follows:

3. The right to access a record under section 4 of the Act and the right to request correction of personal information under section 29 of the Act may be exercised as follows:

(a) on behalf of an individual under 19 years of age, by the individual's parent or guardian if the individual is incapable of exercising those rights;

(b) on behalf of an individual who has a committee, by the individual's committee;

(c) on behalf of a deceased individual, by the deceased's nearest relative or personal representative. [emphasis added]

Dorgan J.'s concern may have stemmed from her perception that a parent could, in a case such as this, purport to rely on s. 3(a) of the Regulation in order to, in effect, claim an unfettered right of access to his or her minor children's personal information.

I acknowledge that concern, but note that s. 3(a) speaks of the exercise by a parent or guardian of the right to have access to a record where that right is exercised "on behalf of" someone who is under 19 years of age. As my predecessor said in Order No. 53-1995, where an applicant is not truly acting "on behalf" of an individual described in s. 3 of the Regulation, the access request is to be treated as an ordinary, arm's-length request under the Act, by one individual for another's personal information.. A similar view has been expressed in Ontario. In Order P-673 (May 6, 1994), a father failed to convince Assistant Commissioner Irwin Glasberg that he was seeking to exercise the right of access on behalf of his son. The Commissioner concluded that the father, although acting in good faith, was seeking the information to meet his personal objectives and not those of his son. The father therefore had the burden of establishing that his son's personal information could be disclosed to him without unreasonably invading the son's privacy.

The applicant in this case has not purported to rely on s. 3 of the Regulation. Her access request is clearly at arm's-length from the interests of her children. The above-quoted passages from her submissions confirm this. If she had attempted to rely on s. 3(a) of the Regulation, however, I would find that s. 3(a) does not apply and that her request should be treated as an arm's-length request in the sense just described.

Disclosure and the Children's Personal Privacy

Viewed in this light, would disclosure of personal information of these two children, to their mother, unreasonably invade their personal privacy as contemplated by s. 22(1)? Again, the burden is on the applicant to show that the personal information can be disclosed without unreasonably invading the children's personal privacy. The applicant did not make any submissions on the s. 22 issue. Quite apart from that fact, however, I am satisfied for the following reasons that s. 22(1) applies to personal information in the records.

First, I agree with the Board that information in the records as to what the children told the counsellor, and what the counsellor said to the children, "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation" within the meaning of s. 22(3)(a) of the Act. Without in any way commenting on how the personal information does so, it is clear to me the personal information "relates to" a history or evaluation of the children's medical or psychological condition. This raises a presumption that disclosure would unreasonably invade the children's personal privacy.

Similarly, I find that the personal information "relates to" the "educational history" of the children as contemplated by s. 22(3)(d), thus raising a further presumption that disclosure would unreasonably invade the children's personal privacy. The personal information was collected by a Board employee as part of the one of the programmes operated by the

Board for its students, *i.e.*, the service of counselling children as it relates to or affects their education and wellbeing. Such records contain their personal information as it relates to their educational history.

The Board says the personal information "was compiled and is identifiable as part of an investigation into a possible violation of law" within the meaning of s. 22(3)(b) of the Act, thus raising a presumption under that section that disclosure would unreasonably invade the children's personal privacy. It appears from both parties' submissions here that child welfare authorities at one point visited the applicant's home in connection with the children's wellbeing. But there is not enough evidence before me to show that the children's personal information was, in this case, "compiled … as part of an investigation" into possible violation of any laws at the time it was compiled. Accordingly, s. 22(3)(b) does not apply to the personal information in the circumstances of this case.

The next issue is how any relevant circumstances, including those contained in s. 22(2), affect the question of whether disclosure would unreasonably invade the children's personal privacy. The Board is required to consider all relevant circumstances in deciding that. It says that ss. 22(2)(e) and (f) apply and support refusal to disclose the personal information. Those sections are quoted above.

As is noted above, the applicant has candidly admitted "slapping" her children. Section 22(2)(e) requires the Board to consider whether disclosure of the personal information will unfairly expose the children to harm. In my view, it was appropriate for the Board to consider this circumstance and I conclude that it weighs against disclosure of the children's personal information here. I am also satisfied that s. 22(2)(f) applies in this case. There is sufficient material before me to suggest that the children had a reasonable expectation of confidentiality when they spoke to the school counsellor. It is reasonable to conclude that their personal information was "supplied in confidence" in this case.

Nothing in the submissions made by the applicant persuades me that other factors favour disclosure to her of this personal information. The focus of her arguments is on her 'right' as a parent to know what is being said to her children and what they are saying to others. This is not sufficient to overcome the presumed unreasonable invasions of privacy raised by ss. 22(3)(a) and (d) of the Act. In light of the relevant circumstances, I find that the Board is required by s. 22(1) to refuse to disclose to the applicant information revealing what the children told the counsellor and what she told them. The contents of their counselling sessions, in other words, are confidential and the Board cannot disclose them to the applicant.

As an exception to this, the personal information consisting of the children's names, ages, school grades and school attended cannot be withheld under s. 22(1). As I noted above, the applicant, as the children's mother, knows all of this innocuous personal information in any case, so its disclosure to her would not unreasonably invade the children's

personal privacy. The important information – the contents of the counselling sessions – must be withheld under s. 22(1) as well as s. 19(1)(a).

4.0 CONCLUSION

For the reasons given above, the following orders are made:

1. Because I have found that the Board is only authorized by s. 19(1)(a) of the Act to refuse to disclose some of the information it withheld under that section:

   (a) under s. 58(2)(a) of the Act I require the Board to disclose to the applicant those portions of the records shown on the copy of the records delivered to the Board with its copy of this order as not being excepted under s. 19(1)(a); and

   (b) under s. 58(2)(b) of the Act, I confirm the decision of the Board to refuse to give the applicant access to those portions of the records shown on the copy of the records delivered to the Board with its copy of this order as being excepted under s. 19(1)(a); and

2. Because I have found that the Board is only authorized by s. 22(1) of the Act to refuse to disclose some of the personal information it withheld under that section:

   (a) under s. 58(2)(a) of the Act, I require the Board to disclose to the applicant the personal information in the records that is shown on the copy of the records delivered to the Board with its copy of this order as not being excepted under s. 22(1); and

   (b) under s. 58(2)(c) of the Act, I require the Board to refuse to give the applicant access to the personal information that is shown on the copy of the records delivered to the Board with its copy of this order as being excepted under s. 22(1).

August 14, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia