OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 04-19

THE BOARD OF SCHOOL TRUSTEES
OF SCHOOL DISTRICT NO. 63 (SAANICH)

Celia Francis, Adjudicator
August 27, 2004

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Summary: The applicant is an employee of the public body and was the target of a harassment complaint by a co-worker. The applicant made an access request for a contract investigator's notes of investigation of the complaint. The notes are under the control of the public body, which is required to comply with the Act by processing the access request.

Key Words: custody or control.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 4(1); *School Act*, ss. 15, 22, 30, 74, 85; *Public Education Labour Relations Act*; *Labour Relations Act*, s. 84.

Authorities Considered: **B.C.:** Order 02-29, [2002] B.C.I.P.C.D. No. 29; Order 03-19, [2003] B.C.I.P.C.D. No. 19; Order 00-47, [2000] B.C.I.P.C.D. No. 51; Order 01-52, [2001] B.C.I.P.C.D. No. 55.

Cases Considered: *Ontario (Criminal Code Review Board)* v. *Doe* (1999), 180 D.L.R. (4th) 657, 47 O.R. (3d) 201, [1999] O.J. No. 4072 (C.A.); *Canada Post Corp.* v. *Canada (Minister of Public Works)*, [1995] 2 F.C. 110, [1995] F.C.J. No. 241 (C.A.); *Neilson* v. *British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640 (S.C.); *Canada (Information Commissioner)* v. *Canada (Minister of Citizenship and Immigration)*, [2003] 1 F.C. 219 (C.A.); *Canada (Information Commissioner)* v. *Canada (Immigration and Refugee Board)*, (1997), 4 Admin L.R. (3d) 96 (T.D.); *Canada (Information Commissioner)* v. *Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66; *Lavigne* v. *Canada (Commissioner of Official Languages)* (1998), 157 F.T.R. 15, (T.D.), affirmed (2000), 261 N.R. 19 (F.C.A.) and [2002] 2 S.C.R. 773; *Walmsley* v. *Ontario (Attorney General)* (1997) 34 O.R. (3d) 611, [1997] O. J. No. 2485 (C.A.); *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.); *Nova Scotia (Attorney General) and Sun Alliance Insurance Co. of Canada*, [2003] N.S.J. No. 423 (S.C.).

1.0 INTRODUCTION

[1] In this decision, the public body under the *Freedom of Information and Protection of Privacy Act* ("Act") is The Board of School Trustees of School District No. 63 (Saanich) and the applicant is an employee of the public body. The inquiry concerns a request for access to notes prepared by a contract investigator during the investigation of a harassment complaint ("Notes") that a teacher, also employed by the public body, made against the applicant.

[2] While I refer to the public body as the "School District", it is the board of school trustees of a school district, and not its territory, that constitutes a public body under the Act and bears responsibilities under the *School Act*. The definition of "educational body" in Schedule 1 of the Act thus refers to "a board as defined in the *School Act*" and s. 1 of the *School Act* defines "board", "school" and "school district" as follows:

> "board" means a board of school trustees constituted under this Act or a former Act;
>
> "school" means
>
> (a) a body of students that is organized as a unit for educational purposes under the supervision of a principal, vice principal or director of instruction,
> (b) the teachers and other staff members associated with the unit, and
> (c) the facilities associated with the unit,
>
> and includes a Provincial resource program and a distance education school;
>
> "school district" means an area created or constituted as a school district by or under this Act or a former Act;

[3] The teacher's, but not the applicant's, employment is governed by a collective agreement which prescribes a procedure for the employer, the School District, to investigate harassment complaints. The School District contracted with an individual to investigate the complaint. The investigator did so and generated a report. The School District accepted the investigator's conclusions in the report that certain events had occurred but did not agree with his conclusion that they constituted harassment.

[4] The applicant's access request of January 2002 specified the investigator's notes of interviews with the applicant, the teacher and several named people who the applicant believed had been interviewed as witnesses. The School District responded first that it was not in possession of the Notes and could not comply with the access request. It later said that it was not "compelled to comply" with the request. The applicant asked the Information and Privacy Commissioner to review the School District's response to the access request.

[5] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the Commissioner's delegate under s. 49(1) of the Act. The School District and the applicant participated in the inquiry. I also invited representations from the investigator

on the issue of whether the Notes are under the control of the public body within the meaning of ss. 3(1) and 4(1) of the Act. The investigator responded by providing a submission to which the applicant replied.

2.0 ISSUES

[6] The main issue is whether the Notes, though not in the physical possession of the School District, are under its "control" within the meaning of the Act.

[7] A subsidiary issue is whether the School District breached its duty to assist under s. 6(1) of the Act by failing to obtain the Notes from the investigator in response to the applicant's access request.

[8] The applicant also argued that, if I found the School District has custody or control of the Notes, then I should consider whether the School District is required to give access to the applicant. I agree with the School District that this would not be appropriate. The material before me indicates the School District has not seen the Notes nor made a decision about the application of exceptions in the Act to the Notes. The applicability of exceptions to the Notes is not in the notice of inquiry and the parties made no submissions on the issue.

3.0 DISCUSSION

[9] **3.1 Facts** – As I mentioned, the applicant is an employee of the School District against whom a harassment complaint was lodged by a co-worker, a teacher, resulting in an investigation and report. The text of the School District's August 12, 2001 letter engaging the investigator, who is also a lawyer, arbitrator and mediator, is reproduced below:

> Thank you for agreeing to investigate the above matter [the harassment complaint].
>
> As a follow-up to our telephone conversations, I want to provide you with the following frame of reference with regards to the conduct of the investigation:
>
> 1. The investigation will be done in a timely and strictly confidential manner.
> 2. The process of the investigation will follow the procedures outlined in Article 14 of the Teachers' Collective Agreement and in Policy 5530 of the School District Policies and Procedures Manual.
> 3. The investigation will be restricted to the matters and issues raised in [the complainant's] letter of complaint.
> 4. The report of your findings is to be submitted to me.
>
> From our telephone conversation, it is my understanding that you will be able to begin your investigation on August 15, 16 and 17. I have made arrangements for you to use the Board Room in the School District Office for those days.
>
> If you need any further logistical assistance, please contact me.

[10] The investigator interviewed the applicant and apparently others as well. An advisor of the applicant, has deposed as follows in an affidavit tendered in this inquiry:

> 12. As part of his investigation, on September 17, 2001, [the investigator] interviewed [the applicant]. I attended that interview as [the applicant's] professional advisor. [The applicant's] legal counsel also attended.
>
> 13. [The investigator] questioned [the applicant] about [the teacher's] allegations for approximately nine hours that day. Both I and [the applicant's] legal counsel made detailed notes of the interview.
>
> 14. [The investigator] did not provide [the applicant] with an opportunity, prior to completing his investigation report, to confirm that [the investigator's] summary of his evidence accurately reflected the responses [the applicant] gave during the interview.

[11] In the month following delivery of the investigation report to the School District, a representative of the School District wrote to the applicant on December 2, 2001, in part:

> As you are aware, [the investigator] filed his report with me on November 12, 2001. I subsequently forwarded the report to BCPSEA [British Columbia School Public School Employers' Association] and to our legal counsel, Judith Anderson. The delay in releasing the report to counsel has been caused by the need to deal with severing issues pursuant to the protocol established by the Dorsey award.
>
> Upon advice from legal counsel and BCSPEA, it is my view that the facts as determined by [the investigator] are sustainable but his conclusion that these facts constitute harassment is not sustainable. I accept the facts as outlined in [the investigator's] report and believe that through his investigation he has determined an accurate summary of events and communications. I do not accept his finding that some of the behaviours constitute harassment as defined in the Collective Agreement.

[12] The applicant received a copy of the School District's letter engaging the investigator and an edited version of the investigation report. The affidavit of the applicant's advisor describes what triggered the access request:

> 17. … While [the applicant] and I agreed with the ultimate disposition of the complaint, we were both concerned that certain findings of fact made by the investigation called into question [the applicant's] truthfulness during the investigation. [The applicant] and I were also concerned that certain facts reproduced in the report did not accord with our notes or recollection of what was said during the interview. In addition, upon reviewing the report, it was clear that [the investigator] relied on the evidence of witnesses that had never been disclosed to [the applicant].
>
> 18. The investigation report did not include a copy of [the investigator's] original notes of his interviews of any of the witnesses.

[13] The applicant's access request sought the following:

> … disclosure of all notes prepared by [the investigator] during an investigation of an allegation of harassment made by [the teacher] against [the applicant]. Please ensure that the notes of [the investigator's] interview with [the applicant] are disclosed in their entirety. If any portion of the notes of interviews of any of the other witnesses are not disclosed, please ensure that summaries of them are provided to us.

[14] The request continued as follows:

> … [The applicant], therefore, is entitled, at minimum, to summaries of [the investigator's] interviews of [the teacher] and all other witnesses. In that regard, we note that in his report, [the investigator] refers to interviews of several witnesses for whom we were not provided summaries. These include some or all of [the investigator's] interviews of [five named individuals]. We also note that [the investigator] did not disclose to us summaries of second interviews of [the teacher] or [one named individual] or any of his interviews of [another named individual]. We request production of all of these notes, or in the alternative, summaries of [the investigator's] interviews.
>
> We recognize that you may have to create these summaries to comply with our request. There would be no reason, however, to delay disclosure of [the investigator's] notes of his interview of [the applicant], since he presumably will simply be making a photocopy of them. We therefore request that we be provided with the latter immediately and the former as soon as they are available.

[15] The School District responded by e-mail as follows:

> … [The investigator] has not given the District his notes, so the District is unable to meet your request for disclosure. The only document we have is the report itself.

[16] The applicant followed up soon after as follows:

> … I am not certain I understand the difficulty the District is having in producing [the investigator's] notes. Is the problem that you have not requested that [the investigator] provide his notes or has he refused to comply with your request?

[17] The School District then replied as follows:

> The District has not requested [the investigator's] notes. The District practice is not to request the notes of outside investigators.

[18] The School District replied further:

> … the District does not have the record you have requested in its possession. … it is not the District's practice to ask for or receive the notes from any external investigator. Because the School District is not in possession of the record you requested, it cannot comply with your request.

[19] Dissatisfied, the applicant maintained that the Act applies to documents in the School District's control through agents and contractors and that the School District was breaching s. 6 of the Act by neglecting to even request copies of the Notes. He added:

> A public body cannot avoid its responsibilities under the *Act* by simply taking the position that, because a third party with whom it contracts has actual physical possession of a document, it is under no obligation.

[20] The applicant invited the School District to reconsider its position and reminded it that, presumably referring to s. 31 of the Act, the School District was obliged to keep records a minimum of 12 months to provide individuals a reasonable opportunity to obtain access to them. The applicant also said he had written to the investigator advising him of his obligation to maintain his records.

[21] The School District reiterated that it was not in possession of the Notes and could not comply with the applicant's request and later added that it was not compelled to comply with the applicant's request in these circumstances.

[22] The applicant's request of March 2002 to this Office for a review stated the following grounds:

> [The investigator] is not an employee of the School District, but rather, is a private contractor specifically retained for the purposes of carrying out this investigation.
>
> …
>
> The Report concludes that certain events occurred which constituted harassment under the relevant provisions of the collective agreement. The School District rejected the conclusion that those facts could amount to harassment, but accepted the events occurred. [The applicant] denies the events occurred at all and challenges [the investigator's] factual and legal conclusions.
>
> …
>
> The School District is not at liberty to hide behind a refusal to request production of the documents, or an assertion that because [the investigator] was a contractor retained to prepare a report, rather than an employee of the School District, the notes are somehow outside the "control" of the District.
>
> What constitutes "control" includes not only documents in the physical possession of a public body's employees, but also in the possession of its agents and contractors. The requested documents here relate solely to a service provided by [the investigator] to the School District, relating to the public functions of the School District, and relating specifically to the rights and interests of [the applicant]. The School District clearly has the ability to compel [the investigator] to deliver up the notes taken by him to record interviews with employees of the School District for the School District's purposes, and [the investigator] has no ability to deal with them except as directed by the School District.

[23] **3.2 Framework of Harassment Complaint Investigation** – The *School Act* establishes the School District and requires it to appoint a Superintendent of Schools (s. 30). The School District may employ and is responsible for the management of persons it considers

necessary for the conduct of its operations (s. 15). The Superintendent, under the general direction of the School District, has general supervision and direction over educational staff employed by the School District and is responsible for the operation of schools in the district (s. 22). The School District is responsible for the management of the schools in its district and for the custody, maintenance and safekeeping of all property owned or leased by it (s. 74(1)). For the purposes of carrying out its powers, functions and duties under the *School Act*, the School District has the power and capacity of a natural person, including, subject to the statute and regulations made under it, authority to determine local policy for the effective and efficient operation of schools (s. 85).

[24] The *Public Education Labour Relations Act* applies to the School District and establishes two tiers—provincial and local—of collective bargaining for school boards and trade unions representing teachers. A collective agreement entered into under the *Public Education Labour Relations Act* respecting teachers must include all matters agreed-to by the parties on both tiers. There are also provisions about collective bargaining in the *School Act* and the School District is affected by other labour relations statutes such as the *Public Sector Employers Act*, which established the employers' association for school boards that is deemed to be the exclusive employer bargaining under the *Public Education Labour Relations Act*. The *Labour Relations Code* applies for the most part to the School District unless it conflicts or is inconsistent with the *Public Education Labour Relations Act*. Section 84(2) of the *Labour Relations Code*, to which the applicant referred and on which he relied in the inquiry, provides as follows:

> 84(2) Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.

[25] The School District's letter of engagement required the investigator to follow the procedures for the investigation of harassment complaints in the Teachers' Collective Agreement, which governed the teacher's employment, and the School District's Policy 5530.

[26] Article E.14 of the Teachers' Collective Agreement is entitled "Harassment/Sexual Harassment". It sets out the School District's recognition that employees have a right to a harassment-free workplace, confirms that any form of harassment is unacceptable and makes other general statements, defines harassment and sexual harassment for the purposes of the article and establishes a resolution procedure in the event of a complaint. The harassment complaint resolution procedure begins with Step 1, informal attempts to resolve the issues. Step 2 involves the filing of a written complaint, written notification to the respondent of the complaint and notice of an investigation. Article E.14.3 c) i) sets out Step 3, the investigation, as follows:

> i) The employer shall investigate the complaint. The investigation shall be conducted by a person who shall have training and/or experience in investigating complaints of harassment. …

[27] Article E.14 also sets out time limits for an investigation, remedies and the employer's training responsibilities. If the complainant is not satisfied with the remedy, a grievance may be initiated at Step 3 of Article A.6 (Grievance Procedure). The preamble to the three steps in the grievance and arbitration procedure in Article A.6 reads as follows:

> The parties agree that this article constitutes the method and procedure for a final and conclusive settlement of any dispute (hereinafter referred to as "the grievance") respecting the interpretation, application, operation or alleged violation of this Collective Agreement, including a question as to whether a matter is arbitrable.

[28] School District Policy 5530 concerns workplace harassment. It acknowledges that employees are entitled to be free of workplace harassment and promotes that objective. It defines personal and sexual harassment and describes the School District's guiding principles for ensuring that no employee experiences harassment, which confirm that harassment complaints will follow the procedures outlined in the appropriate collective agreement or employment contract. Policy 5530 concludes with procedures for raising awareness of harassment issues and on how to deal with harassment complaints. Respecting the latter, the Director of Instruction of the School District conducts a preliminary investigation on receipt of a complaint and then, if warranted, proceeds to a complaint investigation. The investigation report is shared with the Superintendent and appropriate parties. The Superintendent may refer the matter to the School District, which in turn decides the disposition of the complaint and any discipline that may follow.

[29] **3.3 Positions of the Parties**

School District

[30] The School District maintains that control under the Act requires control pursuant to statute or contract. According to the School District, its statutory mandate is to provide educational programs to school age children in the area it serves, not to conduct harassment investigations, and the Notes did not come under its control through any term of the contract with the investigator. The School District says it is not required to investigate harassment complaints or create records relating to investigations, and the fact that public employers are under a duty to keep their workplaces free of harassment does not make investigation and disclosure respecting harassment complaints part of the School District's mandate or functions. In answer to the applicant's assertion that Article E.14 of the Teachers' Collective Agreement flows from s. 84(2) of the *Labour Relations Code*, the School District says the collective agreement was negotiated under the *Public Education Labour Relations Act* and an investigation under Article E.14 is not performed pursuant to a statutory obligation.

[31] The School District also says the following circumstances indicate that the Notes are not under its control under the Act:

- The Notes were created by an "outside" investigator, not by a staff member.
- The investigator was "used to perform a fact-finding function as part of the School District's investigation" and was not an agent of the School District.

- The investigator conducted the investigation independent of School District control, determining who was interviewed or how, whether notes were taken or how they were used in the preparation of the investigator's report.
- The agreement with the investigator did not specify School District control of the Notes, permit the School District to inspect, review, possess or copy records, or require or necessarily entail the generation of notes.
- The Notes are the property of the investigator, not the School District.
- It is not the normal practice of the School District to request an investigator's interview notes and it did not do so in this case.
- The School District's primary record-keeping function is to keep records relating to students. While it also keeps harassment investigation reports, any notes the investigator prepares do not form part of the investigator's report and are not integrated with School District records. In making a decision about this harassment complaint, the School District relied on the investigator's report, not on the Notes.
- The value of having an outside investigator make independent findings would be seriously undermined if his notes were subject to disclosure.

(Paras. 19-26, initial submission; Paras. 1-54 reply.)

Investigator

[32] The investigator, in his letter of June 20, 2003, says that the School District has no power over any notes he may have made in the course of the harassment complaint investigation and, in any event, that the time for retention under the Act has passed. He also characterizes the applicant's access request as a frivolous, vexatious and abusive tactic. His submission is quoted below:

> The simple answer is that the District has no control over my personal records. I am not a public body subject to the *Act*. I am not a delegate of the District as no powers were delegated to me. I am a lawyer in private practice and was contracted by the District to perform an independent fact finding investigation. The only requirements of that retainer are contained in the letter of appointment. I understand that you have received a copy of that letter from the parties. There is no requirement in the appointment that I keep records or notes and there is no requirement that I deliver any notes to the District.
>
> The role of the investigator under the Teachers' collective agreement was recently analyzed by Arbitrator, James Dorsey, Q.C. following some 10 days of submissions in a matter between the British Columbia Principals' and Vice-Principals' Association and the B.C.T.F. and the British Columbia Public School Employers' Association (June 24, 2003). He concluded that:
>
> > An investigator appointed in accordance with the collective agreement is the master of the investigation procedure. The investigator is not a statutory body. The investigator does not exercise a statutory power.

> There is no legally compelled requirement that the investigator apply a certain standard of natural justice and procedural fairness or adhere to ascertain degree of formality. The investigator does not make a decision on behalf of the employer. The investigator's findings and conclusions are not binding on the employer, the complainant or respondent or other decision maker. The investigator is not exercising administrative action or making a decision that approaches the judicial end of the spectrum subject to a legally enforceable duty of fairness (*Nicholson* v. *Halimond-Norfolk (Regional Municipality) Commissioner of Police* [1979] 1 SCR 311; *Knight* v. *Indian Head School Division No. 19* (1990) 68 DLR (4th) 489 (SCC); *Chambly (Commission scolaire regionale)* v. *Bergevin* (1994) Ont Ct (Gen Div), [1994] O.J. No. 1135.

I would adopt the above-noted conclusion but would add that there is no requirement that I even take notes let alone retain them. Even if there were notes taken, there is no contractual or statutory authority that would allow the District to require me to produce them to the District. Any order made by the Commissioner against the District would be unenforceable by the District against me.

I also submit that even if there were any legal authority to access my notes, which is not conceded, such access would be an invasion of my personal privacy. Therefore the onus would be on the applicant to prove that it would not be an unreasonable invasion of privacy.

In addition to my privacy, it is important to note that in accordance with the intent of the collective agreement all interviews were conducted and treated as confidential. People interviewed were given such assurances and their names do not appear in the report. All material and relevant information is provided in the report. Access to the notes is not in the public interest as it would be contrary to the intent of the collective agreement. It would be an invasion of the privacy of those individuals and could leave employees vulnerable.

I further submit that outside of the contractual terms of my retainer there is no statutory authority requiring me to take notes or retain them. Even if such notes existed and were required to be retained the time for such retention has expired.

I submit that the application [for a review of the School District's response to the access request] should be dismissed as frivolous and vexatious as no action was taken by the District against [the applicant] on account of the investigator's finding that he had harassed [the teacher]. The application is simply a tactic taken by counsel on behalf of the applicant and his professional association to restrict the investigation process and to intimidate or unduly influence the work of the investigators. Access to the notes would result in no remedy for [the applicant] as no action was taken against him.

Applicant

[33] The applicant says the Notes are under the control of the School District because they were produced pursuant to its statutory and contractual mandates and functions. The only purpose for creating the Notes was to investigate the teacher's allegations of harassment in accordance with the School District's responsibilities under s. 84(2) of the *Labour Relations Code* and the Teachers' Collective Agreement. Nothing required the School District to choose a contract investigator—many school districts use internal staff. The School District cannot

escape the application of the Act by contracting out its mandate or functions, including its exclusive investigation and discipline responsibilities relating to harassment complaints. The applicant submits that the investigator was simply an agent of the School District, carrying out its responsibilities under labour relations legislation and the collective agreement.

[34] The applicant relies on *Ontario (Criminal Code Review Board)* v. *Doe* (1999), 180 D.L.R. (4th) 657, 47 O.R. (3d) 201, [1999] O.J. No. 4072 (C.A.). His submission states:

> 39. Where a public body has a statutory or contractual mandate to control or produce a document, it should not be permitted to avoid the application of the *Act* by contracting with an external party to perform that mandate.
>
> 40. In *Ontario* v. *Doe*, *[Criminal Review Board],* for example, the Ontario Court of Appeal concluded that the Ontario Criminal Code Review Board could not refuse to disclose tapes of their proceedings simply because they were created by a court reporter to assist in the preparation of transcripts. In reaching this conclusion, the Court relied, in part, on the existence of a provision in the *Criminal Code of Canada* which required the Board to maintain a record of its proceedings. The fact that any document was prepared pursuant to that statutory mandate was sufficient to bring it within the "control" of the Board, notwithstanding the fact that it was created by an outside contractor.
>
> 41. The same analysis applies to the within proceedings. The School District is under a contractual duty to perform a harassment investigation. There is no question that all proceedings taken pursuant to the harassment provisions in the collective agreement are the responsibility of and are controlled by the School District. Indeed, the collective agreement contemplates an investigation which is the Employer's exclusive responsibility. …
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> …
>
> 44. There is, however, no language in the collective agreement which requires the School District to appoint an external investigator. Indeed, in many districts employers utilize internal district staff for these purposes. In such cases, there would be no question that the records fall within the purview of the *Act*, and the School District ought not to be entitled to avoid the application of the *Act* simply by retaining an outside consultant to perform its contractual obligations under the collective agreement.
>
> …
>
> 47. Even in the absence of the collective agreement, where concerns are raised about the conduct of a member of the College of Teachers, such as [named individual], the School District has certain statutory reporting obligations under section 16 of the *School Act*. In particular, any misconduct giving rise to discipline must not only be reported to the College of Teachers, but all documents in relation to the misconduct must be retained by the School District and provided to the College. It is implicit in section 16 that the School District is not only responsible for investigating complaints of such misconduct, but that it exercises control over any documents produced in the course of that investigation and relating to any discipline that flows from it. …
>
> 48. Whether pursuant to contract or statute, the functions performed by the investigator fall within the mandate and responsibilities of the School District. The investigator acts simply as agent on behalf of the District, and, as such, any records produced by him must be considered to be within the "control" of the School District.

> 49. As in *Ontario* v. *Doe*, the School District ought not to be permitted to avoid the application of the *Act* by claiming that the work was performed by an outside contractor. Indeed, that result would give rise to inconsistency between different school districts based simply on whether the investigation was performed by an employee or an independent contractor, despite the fact that all school districts are under the same obligation to investigate complaints of harassment.

[35] The applicant says that, even in the absence of a School District statutory or contractual mandate respecting possession of the Notes, they are still under the School District's control within the meaning of the Act. One reason for this is that the collective agreement requires the parties to respect confidentiality and the only way the School District can fulfill that obligation is to maintain control of the investigation, including the Notes. Another reason is that, by receiving, retaining and relying on the investigation report, the School District relied on the Notes on which the report was based and integrated them into its own records. (Paras. 32-67, initial submission; pp. 1-5, reply.)

[36] **3.4 Provisions of the Act** – Section 3(1) defines the scope of the Act with reference to records that are in the custody or under the control of a public body. It reads, in part, as follows:

> **Scope of this Act**
>
> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, …

[37] "Record" and "public body" are defined in Schedule 1 of the Act. "Custody" and "control" are not.

[38] The meaning of control in s. 3(1) is informed by the Act as a whole. This includes the express purposes of the Act to give the public a right of access to records (s. 2(1)(a)), to give individuals a right of access to and to correct personal information about themselves (s. 2(1)(b)) and to prevent the unauthorized collection, use or disclosure of personal information by public bodies (s. 2(1)(d)). It also includes the references to control (and custody) in other provisions of the Act, such as elsewhere in Part 2—which governs the right of access and repeatedly in Part 3, which governs public body collection, use and disclosure of personal information.

[39] Section 4(1) of the Act incorporates the requirement for public body custody or control into the right of access to records:

> **Information rights**
>
> 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[40] The right of access is a public right that is subject to the disclosure exceptions in ss. 12 to 22.1, the payment of required fees and restraint under s. 43 against frivolous, vexatious or unreasonably repetitious or systematic requests. It is also an individual's right to obtain access to records containing information personal to the applicant, subject to the exceptions and restraint

under s. 43. Fees do not apply to a request for an applicant's own personal information (s. 75(3)).

[41] Part 3 regulates a public body's acquisition of personal information and the treatment of that information. Sections 26 and 27 address the purposes for which and how a public body can collect personal information. Section 26 prohibits collection of personal information "by or for a public body" except for listed purposes. This wording covers direct and indirect collection and prevents a public body from collecting personal information through a third party, such as a contractor or agent, without complying with s. 27. Sections 28 to 32 of the Act address the accuracy, correction, security, retention and use of personal information in the custody or under the control of a public body. Section 33 requires a public body to ensure that personal information in its custody or under its control is disclosed only for listed purposes. Section 34 deals with the use of personal information in the custody or under the control of a public body that is consistent with the purposes for which it was obtained or compiled. Sections 35 and 36 deal with the conditions under which personal information in the custody or under the control of a public body may be disclosed for archival, historical, research and statistical purposes.

[42] The Act contemplates outsourcing by public bodies by defining "employee" in Schedule 1 to include "a person retained under contract to perform services for the public body" and, under s. 33(f), by permitting disclosure to an "employee" of personal information in the custody or control of a public body:

> 33 A public body must ensure that personal information in its custody or under its control is disclosed only …
>
> (f) to an officer or employee of the public body or to a minister, if the information is necessary for the performance of the duties of, or for the protection of the health or safety of, the officer, employee or minister, … .

[43] **3.5 Meaning of "Control"** – The School District and the applicant both refer to Order 02-29, [2002] B.C.I.P.C.D. No. 29. In that case, Commissioner Loukidelis concluded that the Workers' Compensation Board did not control records related to certain activities of a society that the Board had assisted in incorporating and funded to work cooperatively with employers and workers in combatting musculo-skeletal injuries. The Commissioner referred to various control factors identified in previous decisions and other materials. The School District compiled those factors as follows for purposes of this inquiry:

- Was the record created by a staff member, an officer or a member of the public body in the course of his or her duties?
- Was the record created by an outside consultant for the public body and, if so, what use did the creator intend to make of the record?
- Does the public body have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Is the record specified in a contract as being under the control of a public body?

- Does the content of the record relate to the public body's mandate?
- Does the public body have a right of possession of the record?
- Does the public body have the authority to regulate the record's use and disposition?
- Has the public body relied upon the record to a substantial extent?
- Is the record integrated with other records held by the public body?
- Does the contract permit the public body to inspect, review, possess or copy records produced received or acquired by the contractor as a result of the contract?

[44] These factors are useful but they are not exhaustive. As the Commissioner stated in Order 02-29, para. 17:

> … I agree with my predecessor, in Order No. 11-1994, that the following comments of Commissioner Linden (as he then was) in Ontario Order 120, [1989] O.I.P.C. No. 84, at p. 7 (Q.L.), are relevant in addition to the *Policy and Procedures Manual* factors mentioned in *Greater Vancouver*:
>
> > In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

[45] In *Canada Post Corp.* v. *Canada (Minister of Public Works)*, [1995] 2 F.C. 110, [1995] F.C.J. No 241 (C.A.), paras. 32-33, the court held that the broad meaning of "control" in the *Access to Information Act* (Canada) was not limited to *de jure* (legal) control:

> The notion of control referred to in subsection 4(1) of the Access to Information Act (the Act) is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting, or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.
>
> It is, in my view, as much the duty of the courts to give subsection 4(1) of the Access to Information Act a liberal and purposive construction, without reading in limiting words not found in the Act or otherwise circumventing the intention of the legislature … It is not in the power of this Court to cut down the broad meaning of the word "control" as there is nothing in the Act which indicates that the word should not be given its broad meaning. On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the Act to government information. … [footnotes omitted]

[46] Control is to be given a liberal and purposive meaning that promotes the objectives of British Columbia's access and privacy legislation. The nature of requested records and all aspects of their generation and use must be assessed in relation to the public body's mandate and functions. Records that are created or acquired by or for a public body as part of its mandate and functions will be under the public body's control. That control need not be exclusive. For example, a preliminary ruling respecting Order 03-19, [2003] B.C.I.P.C.D. No. 19, concluded

that both the College of Pharmacists of British Columbia and the Ministry of Health had control of records in PharmaNet. The duty to provide access to records under the Act is not defined by the willingness of the public body or its staff, contractors or agents. It also prevails over outsourcing of the public body's functions and contractual silence or wording that would negate rights or obligations under the Act.

[47] A statutory provision that imposes express obligations on a public body with respect to a particular record or type of record is obviously relevant to determining control under the Act. However, in addition to or in the absence of explicit statutory provisions for information gathering and management, control may be established by reference to express or implied functions of a public body that necessarily entail obtaining or compiling records.

[48] In *Neilson* v. *British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640 (S.C.), a public school counsellor argued that her employer, the school district, did not require her to maintain notes of student counselling sessions and did not have control of the "raw notes" she had made. There was no statutory provision or term of employment specific to record-keeping or the requested notes. The court nonetheless found that the counsellor had implied obligations respecting the taking and retention of notes which, when taken, were under the control of the school district:

> [31] … as a counsellor and as a teacher within the School District, she is required to write reports in respect of the children she counsels. Presumably, such reports are prepared in part by relying on the notes she keeps and therefore the notes are implicitly required to be taken and retained.
>
> …
>
> [35] …The petitioner counsellor is not an independent contractor; she is an employee of the School District. During the course of her employment she makes notes. These notes are relied upon in the preparation of school records, which preparation is a requirement of her employment. The notes are created by an employee of a public body and used to make periodic reports, possession of which is held by the public body.

[49] In *Criminal Review Board*, above, the Board had a statutory obligation to maintain a record of its proceedings yet the court reporter who created and physically possessed the backup tapes of those proceedings was an independent contractor and the contract for services did not address control of backup tapes. Referring to *Neilson* and acknowledging that it concerned records kept by an employee as opposed to an independent contractor, the Ontario Court of Appeal found the Board's obligation to maintain a record of its proceedings related to all forms of records and transcripts, including backup tapes that might have to be referred to in the event of a dispute over the accuracy of a record or transcript. The Board's duty to maintain a record of its proceedings and provide access to records under its control was not, and could not be, avoided by contracting out court reporting services, however silent or deficient the contractual terms respecting control of backup tapes might be. Styling the role of the court reporter as an "independent" one was meaningless when the function the court reporter fulfilled was part of the public body's functions:

> [35] The Board has argued throughout this proceeding that if it is ordered to make access to the backup tapes available to the John Does, it will be unable to comply because it is not able to compel the court reporter to deliver the backup tapes to it. I must say I find

> this a rather surprising proposition. We were told that at some time in the past the Board had used employees to do what independent court reporters now do. If the Board had continued to use employees there would be no issue; the backup tapes would be in the Board's custody and under its control. However, the Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfill its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the Act by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act.
>
> [36] In argument, the Board placed a great deal of reliance on this court's decision in *Walmsley*. In my view, *Walmsley* is distinguishable. In that case, the request was made to the Ministry of Attorney General to provide documents in the personal possession of individual members of the Judicial Appointments Committee. In holding that the documents were not under the control of the Ministry, this court pointed out that the Advisory Committee was set up to provide recommendations for judicial appointments that were to be arrived at independently and at arm's length from the Ministry. Further, in *Walmsley*, there was no statutory control or contractual basis upon which the Ministry could assert the right to possess or dispose of the documents. The situation in this appeal is very different. The court reporter is specifically hired to fulfill the statutory duty of the Board to keep a record and to make transcripts available, if requested. Although the court reporter is an independent contractor, she plays an integral part in fulfilling the mandate of the Board under the *Criminal Code*. Unlike the situation in *Walmsley*, the court reporter's function is part of the Board's function. The court reporter has no independent role. She does not operate "independently or at arms length" from the Board.

[50] In short, contractual provisions may be relevant to control, but the School District cannot contract out of the Act directly (Order 00-47, [2000] B.C.I.P.C.D. No. 51, paras. 10-45; *Canada (Information Commissioner)* v. *Canada (Minister of Citizenship and Immigration)*, [2003] 1 F.C. 219 (C.A.), para. 11; *Canada (Information Commissioner)* v. *Canada (Immigration and Refugee Board)*, (1997), 4 Admin L.R. (3d) 96 (T.D.), para. 26) or by outsourcing its functions (*Criminal Review Board)*.

[51] **3.6 Impact of Disclosure and Motive for Access Request** – The School District and the investigator say disclosure of the Notes would harm the harassment complaint investigation process and that this is a relevant factor in determining whether the Notes are under School District control and thus subject to an access request under the Act. The investigator also suggests that the applicant's motive in making the access request, which the investigator says is not *bona fide*, is a relevant factor to consider in his inquiry. I do not consider any of these to be relevant considerations in this inquiry.

[52] Whether a record is in the custody or under the control of a public body within the meaning of the Act is a separate question from whether the Act permits, prohibits or requires disclosure of information in a record that is in a public body's custody or control. Whether disclosure is permitted, prohibited or required is determined by the application of ss. 3(1)(a) - (i) (which are not in issue in this inquiry) and by the exceptions to disclosure found in Part 2 of the Act. The applicability of exceptions to information in the Notes has not been decided by the

School District and is not part of this inquiry. Indeed, the School District opposed, correctly, the expansion of the inquiry to the application of disclosure exceptions to the Notes.

[53] The issue in this inquiry is whether the Notes are under the control of the School District, not the applicant's intentions in making the access request or whether disclosure exceptions in the Act would permit or require the School District to refuse to disclose information in the Notes. The applicant is not obliged to explain or justify his reasons for making the access request and the right of access under the Act is not measured by the School District's or the investigator's perceptions of the worthiness of the applicant or his access request: *Canada (Information Commissioner)* v. *Canada (Commissioner of the Royal Canadian Mounted Police*), [2003] 1 S.C.R. 66, para. 32; *Canada (Information Commissioner)* v. *Canada (Minister of Citizenship and Immigration)*, para. 9; Order 01-52, [2001] B.C.I.P.C.D. No. 55, para. 83; *Lavigne* v. *Canada (Commissioner of Official Languages)* (1998), 157 F.T.R. 15, (T.D.), para. 28, affirmed (2000), 261 N.R. 19 (F.C.A.) and [2002] 2 S.C.R. 773.

[54] **3.7 Relationship of the Investigation to the School District** – I am also unable to accept that, as the School District contends, the harassment complaint investigation was outside the mandate and functions of the School District. An operation or activity can be part of a public body's mandate or functions without being a stand-alone purpose for its existence or without being specifically mandated by law. The education of children is no doubt the purpose of the *School Act* and the School District. That objective is accomplished, however, by the School District operating schools, employing and managing staff and entering into collective bargaining relationships in that regard. These functions are provided for by statute and they call for the School District to address applicable educational and workplace laws, standards and practices, as it did for workplace harassment in School District Policy 5530 and the Teachers' Collective Agreement.

[55] Considering the provisions of the *School Act*, *Public Education Labour Relations Act* and *Labour Relations Code* affecting the School District, its harassment policy, the workplace harassment provisions in the collective agreement and the School District's letter of engagement to the investigator, which required him to follow the procedures in the harassment policy and collective agreement, I conclude that harassment complaint investigations are clearly part of the School District's mandate and functions.

[56] Nothing in the statutes, harassment policy or collective agreement suggests that the use of an employee or a contractor as investigator has bearing on the School District's responsibility for harassment complaint investigations. On the contrary, the School District has legislated responsibility for operating and managing schools in its area and, under the harassment policy and collective agreement, it is the School District that maintains responsibility and control over harassment complaint investigations, regardless of the investigator's status as an employee or contractor.

[57] The engagement letter itself indicates that the investigator acted for the School District, under controls established by the School District. The investigator was instructed to follow the procedures in the collective agreement and harassment policy and to act confidentially, to look into the issues set out in the complaint and to submit a report to the School District. The investigator may well have determined whom he interviewed and the questions he asked, but this

does not detract from the investigation of the harassment complaint being a School District function that the investigator was contracted to perform.

[58] In concluding that the harassment complaint investigation was part of the School District's mandate and functions, I am aware of the case of *Walmsley* v. *Ontario (Attorney General)* (1997) 34 O.R. (3d) 611, [1997] O. J. No. 2485 (C.A.), on which the School District relies to deny control under the Act. *Walmsley* concerned records held by individual members of a committee that nominated candidates for judicial appointment to the Ontario Court (Provincial Division). It was essentially an informal external advisory committee. Although the Ministry of Attorney General provided some administrative support to the committee and paid travel expenses and *per diem* honorariums to committee members, the mandate of the committee had no statutory or regulatory foundation, the relationship between the committee and the ministry was not codified, and committee members were not officials of the ministry or employed, appointed or contracted by it. Examining all aspects of the relationship between committee members and the ministry, the court concluded that the committee was not part of the ministry and that records held by individual members were not under ministry control within the meaning of Ontario's *Freedom of Information and Protection of Privacy Act*.

[59] Considering all aspects of the relationship between the School District and the investigator, there is simply little or no parallel with the relationship between members of the nominating committee and the Ontario Ministry of Attorney General that was considered in *Walmsley*.

[60] **3.8 Relationship of the Investigation to the Act** – Considering the harassment complaint investigation in the context of the Act as a whole, I conclude that the School District contracted with the investigator to perform the investigation and prepare the required report for the School District. The investigator was an "employee" under the extended definition in Schedule 1 of the Act and the School District, directly and through its staff as witnesses, was thereby authorized by s. 33(f) to disclose personal information in and about the complaint to the investigator to enable him to carry out his contracted assignment. In conducting the investigation, the investigator was collecting personal and non-personal information on behalf of, and performing services for, the School District under a contract that set out terms of reference for the investigation, including setting certain limits. The investigator was authorized to conduct investigative interviews, on school premises, of School District personnel such as the teacher and others. It may also be reasonably inferred, in my view, that the School District bore the cost of the investigation and report.

[61] The School District says that an outside investigator may be used where use of available internal investigators would raise issues of bias or an appearance of bias. The investigator intimates that School District control of the Notes would be inconsistent with the independence of his role as an investigator.

[62] There could be a variety of reasons—relating to expertise, experience, actual or perceived neutrality, speed and efficiency or resource allocation—for the School District to use an inside or outside investigator for any given harassment complaint investigation. There is, however, no indication that different standards of independence, impartiality or fairness are expected of internal and external investigators. Indeed, the harassment policy and collective agreement make no distinction between investigations conducted by internal and external investigators.

[63] Public body control of files and other records of harassment complaint investigations and the conduct of independent, impartial and fair investigations are not mutually exclusive. It is common for an individual appointed as an independent investigator to be an agent of the appointing client or government body, whose files and records of the investigation are in the control of the principal (*Nova Scotia (Attorney General) and Sun Alliance Insurance Co. of Canada*, [2003] N.S.J. No. 423 (S.C.)) and for a public body to control files and other records of workplace investigations conducted by external contractors (*Canada (Information Commissioner)* v. *Canada (Minister of Citizenship and Immigration)*; *Canada (Information Commissioner)* v. *Canada (Immigration and Refugee Board)*.

[64] I conclude that there is no meaningful difference between School District control under the Act of records created by an employee who is assigned to conduct a harassment complaint investigation and records created by an external investigator who is contracted to perform that task.

[65] **3.9 Relationship of the Notes to the Investigation** – I am also not persuaded that there is a principled reason to differentiate between control of the report, a record the investigator was explicitly required to create, and control of records of interviews or other investigative work that the investigator was implicitly required, or at the very least authorized, to create in conducting the investigation. The collection, compilation and analysis of information is, after all, the essence of investigation and these records all relate to, and flow from, the investigation that the investigator was engaged to do for the School District as part of its functions.

[66] The investigator's alternative submission that, if the Notes are under the control of the School District then it is significant to this inquiry that the retention period in the Act has passed, is in my view misplaced. The reference to a retention period must be to s. 31 of the Act, which provides as follows:

> 31 If an individual's personal information
>
> (a) is in the custody or under the control of a public body, and
>
> (b) is used by or on behalf of the public body to make a decision that directly affects the individual,
>
> the public body must ensure that the personal information is retained for at least one year after being used so that the affected individual has a reasonable opportunity to obtain access to that personal information.

[67] The investigator conducted the investigation and prepared the report between August and November 2001. The access request was made in January 2002. If s. 31 applied to personal information of the applicant in the Notes, there is no question that the access request was made well within the s. 31 minimum retention period. The very purpose of s. 31 is to give individuals a reasonable opportunity to obtain access to their personal information. The passage of the retention period as the applicant pursued his access request, then a review and inquiry to challenge the School District's denial of control, could not give the School District licence to destroy or fail to retain information that it, and the investigator, well knew was the subject matter of those statutory processes.

[68] In any case, I have also kept in mind *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.), at paras. 33-35, where the Court considered the issue of whether a record was under the control of a public body and the issue of alleged abuse of s. 31 by a public body permitting parties affected by an investigation to make submissions on a "read and return" basis to be separate issues.

[69] **3.10 Section 6(1) of the Act** – Section 6(1) of the Act provides as follows:

> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[70] The applicant says the duty to assist in s. 6(1) required the School District to obtain the Notes from the investigator in response to the access request. The School District says that this question is premature and can only be entertained if the Notes are found to be in its custody or under its control.

[71] I do not find it necessary to resolve the point at which the duty in s. 6(1) engages, as I find that the Notes are under the control of the School District and in my view the appropriate remedy, as it was in *Criminal Review Board*, is to require the School District to comply with the Act by proceeding with the processing of the access request.

4.0 Conclusion

[72] Under s. 58(3)(a) of the Act, I require the School District to comply with Part 2 of the Act by, without delay, and in accordance with the Act (including as to the time for response), obtaining the Notes from the investigator, determining whether to apply one or more exceptions to all or part of the Notes, and providing a response to the applicant that meets requirements of s. 8 of the Act. As a condition under s. 58(4), I require the School District to provide me with a copy of that response.

August 27, 2004

ORIGINAL SIGNED BY

Celia Francis
Adjudicator