Date: 19980708
Docket: A962846
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RAE NEILSON

PETITIONER

AND:

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

RESPONDENT

BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT No. 5
(SOUTHEAST KOOTENAY)

INTERVENOR

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE DORGAN

Counsel for the Petitioner:	Richard E. Edgar
Counsel for the Respondent:	Susan E. Ross
Counsel for the Intervenor:	Wendy Devine Harris
Place and Date of Hearing:	Vancouver, B.C. January 15, 1998

[1] This petition is brought pursuant to s.2 of the Judicial Review Procedure Act R.S.B.C. 1996, c. 241, for review of the August 23, 1996 decision of the Information and Privacy Commissioner (the "Commissioner"). In that decision, referred to as Order No. 115-1996, the Commissioner ordered production of the notes made by a school counsellor during counselling sessions with the children of the applicant parent.

[2] The petitioner before this court, the counsellor involved, seeks an order quashing the Commissioner's decision. The petitioner argues the Commissioner committed jurisdictional errors and exceeded his jurisdiction. It is agreed among counsel that this judicial review relates to a jurisdictional question, and correctness of the Commissioner's decision is the test to be applied by this court. A review of this nature is not a trial de novo.

[3] The background facts are not in dispute. The petitioner, Ms. Neilson, is employed by the Cranbrook School District as a school counsellor. In that capacity Neilson worked with the applicant mother's elementary-school-aged children from November 1994 to November 1995. As is her practice, from time to time during these counselling sessions, Neilson made what she refers to as "raw notes".

[4] Following a complaint to the Ministry of Social Services & Housing, pursuant to the then Family & Child Services Act R.S.B.C. 1979, c. 111, regarding these two children, their mother asked Neilson to provide her raw notes taken during the counselling sessions. Neilson refused to do so.

[5] Thereafter, on February 5, 1996, the mother submitted an access request to the Cranbrook School District pursuant to s.5 of the Freedom of Information and Protection of Privacy Act R.S.B.C. 1996, c. 165 ("the Act"). The request asked for the notes taken by Neilson during her counselling sessions with the applicant parent's children. The request was clarified before the Commissioner to be a request for the notes of what the counsellor said to the children, rather than what the children said to the counsellor.

[6] This review must be considered in light of the purposes and scope of the Act; the former are broadly stated, the latter is extensive. Section 2(1), the purposes of the Act, reads:

> 2 (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
> (a) giving the public a right of access to records,
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
> (c) specifying limited exceptions to the rights of access,
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
> (e) providing for an independent review of decisions made under this Act.

[7] As to the scope of the Act, s.3(1) reads: "This Act applies to all records in the custody or under the control of a public body, ...". Within that section certain records which are exempt from the scope of the Act are described.

[8] Section 4 of the Act reads:

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.

4(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[9] Section 5 of the Act reads:

5(1) To obtain access to a record, an applicant must make a written request to the public body that the applicant believes has custody or control of the record.

(2) The applicant may ask for a copy of the record or ask to examine the record.

[10] On February 22, 1996, the Cranbrook School District denied the request of the applicant parent, on the basis that s.19(1)(a) gives a public body discretion to refuse to accede to a request for disclosure.

[11] Section 19(1)(a) of the Act reads:

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

(a) threaten anyone else's safety or mental or physical health, ...

[12] On February 27, 1996, the applicant asked the Commissioner to review the decision of the Cranbrook School District which denied access to the information requested. After a mediation process pursuant to the Act proved fruitless, the Commissioner gave notice of his intention to embark upon an inquiry pursuant to s.56 of the Act. The Commissioner received written submissions from 8 intervenors, plus those of the applicant parent, the School District, and the counsellor. The decision under review is the culmination of that inquiry.

[13] The threshold issue the Commissioner grappled with was the question of whether the disputed notes were records in the custody, or under the control, of a public body, and therefore subject to the Act.

[14] The Commissioner put it this way in his decision, at p.1:

> Until the issue of custody and control is determined, I am not in a position to determine the applicability of s.19(1) to the records. The issue in this inquiry is whether or not the school counsellor's notes are in the custody or under the control of the public body within the meaning of section 4(1) of the Act.

[15] At p.6 of his decision, the Commissioner found, "The school counsellor is an employee of a public body, the School District, creating records (of whatever sort) in the course of her employment as a counsellor in two schools." At p.7, he concluded, "... that the counselling notes in dispute are records under the control of the School District as contemplated by s.4(1) of the Act." He writes, at p.7:

> I emphasize that my decision that a school counsellor's notes are subject to the Act is completely separate from the decision as to who can have access to them, whether school officials or parents, and under what circumstances.

And, further:

> Since I have determined that the counsellor's notes are records under the control of the School Board within the meaning of s.4(1) of the Act, I have jurisdiction to determine whether access to those records may be refused under s.19(1).

[16] The petitioner argues the notes in question are not "within the custody or control" of the Cranbrook School District but, rather, are her raw notes, taken for her personal use, to be used by her as an aide memoire in her counselling sessions with the children. The petitioner deposes to the fact that at the end of the school year, or earlier if a student transfers schools, she prepares a summary of her involvement with that student, which summary is included in the student's cumulative file. On occasion she uses her raw notes in the preparation of this summary. The summary becomes part of the student's record.

[17] Although the petitioner acknowledges she is an employee of the School District and that she made the raw notes during the course of her employment, she submits those facts are not determinative of the question of whether the notes are within the custody and control of the School District. She argues that the content and format of the notes, as well as the discretion to retain or destroy them are within her exclusive control and not subject to any guidelines or control imposed by her employer, the Cranbrook School District. She submits further that neither the Minister of Education, nor her employer the School District, nor the principal of any school in which she works, requires that she maintain the notes. She submits further that any notes she makes are kept in her personal notebooks, stored at home when not in use during her counselling sessions with students, and that they were not

intended to be used by, or provided to, any other person or body.

[18] It is common ground that, pursuant to the School Act and its regulations, specifically s.79 of the School Act, the School District must establish procedures regarding use and storage of student records. S.79(1) of the School Act reads:

79(1) Subject to the orders of the minister, a board must

(a) establish written procedures regarding the storage, retrieval and appropriate use of student records, and

(b) ensure confidentiality of the information contained in the student records and ensure privacy for students and their families.

The petitioner argues her raw notes are separate and distinct from student records. Using an analogy to the production of documents under the Supreme Court Rules, the petitioner submits that "custody and control" should only include documents to which the School District has a legally enforceable right. Relying on the fact that there is no requirement to maintain her raw notes, and the fact that they are not "student records" and therefore subject to s.79 of the School Act, the petitioner submits that the School District has no legally enforceable right to the raw notes. The petitioner argues further that the School District has not attempted to administer or supervise any aspect of the notes because it implicitly recognizes that the notes are not records within its control.

[19] The petitioner also argues that the nature of the work of counselling requires confidentiality and that her ethical obligations regarding confidentiality support her position that her raw notes are not in the custody and control of the School District. Further, she submits that making her raw notes available will so undermine the counsellor/student relationship as to significantly impair it.

[20] The petitioner further submits that she is not a "public body" within the meaning of the Act and the Commissioner therefore exceeded his jurisdiction by making an order in respect of her raw notes.

[21] Counsel for the Commissioner points out that the notes were made by a school counsellor while an employee of a public body, namely the Cranbrook School District, and that the notes were made while she was fulfilling her responsibilities as an employee. The Commissioner's counsel argues that, consequently, the notes are within the care, custody and control of the employer.

[22] The respondent Commissioner's position is that "custody and control" should be interpreted liberally and applied in the context of the purposes of the Act. The respondent submits

that this interpretation will result in the raw notes falling within the custody and control of the School District. The respondent points out that s.79 of the Act gives it priority over the School Act, to the extent that they are inconsistent. Section 79 of the Act reads as follows:

> 79 If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

[23] The intervenor School District's position is that the scope of the Act must be given a broad, purposive and liberal interpretation and that the courts should not read limiting words or phrases into the Act which are not apparent on the face of the legislation. The intervenor submits the fact that the notes were made by an employee during the course of her employment is sufficient to support a finding that the notes are within the custody or control of the School District, the employer. Further, the intervenor argues that it is essential for the School District to have access to such notes in order to ensure continuity of service to students and in order to properly supervise the work of the counsellors it employs.

[24] The question of what records fall within the custody or under the control of a public body has been considered federally and in Ontario, but not in British Columbia. Courts have consistently found that the definition of "records" should be liberally interpreted, although some have found that private notes of people performing quasi-judicial functions are not subject to the relevant freedom of information legislation.

[25] In reviewing the Commissioner's decision, it is important to bear in mind that the Commissioner's finding that the counsellor's notes are within the custody or control of the public body School District is not synonymous with disclosure of the notes to the applicant. The effect of the finding of the Commissioner is that the notes are subject to the provisions of the Act; that is the preliminary step on a path which may ultimately lead to access. Under the Act the Commissioner must now convene a hearing to determine whether, in all of the circumstances, the notes will be disclosed to the applicant. This is somewhat like a court's initial finding of likely relevance on an application for production of third party records in the context of a criminal trial (s.278.1 of the Criminal Code). Such a finding is not determinative of the issue of disclosure; it sets in motion an inquiry by the court as to the propriety of disclosure given a variety of factors.

[26] I have concluded that the general principles of statutory interpretation and those gleaned from the case law cited support the Commissioner's finding that the counsellor's notes are within the control of the School Board.

[27] Section 12 of the Interpretation Act mandates that legislation is to be given a fair, large and liberal

interpretation. The case of Canada Post Corporation v. Canada (Minister of Public Works) (1995), 30 Admin. L.R. (2d) 242 (Fed.C.A.) supports a broad, liberal, purposive approach to the interpretation of access to information legislation. The majority of the court stated, at p.245:

> 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. ...

[28] Section 3(1) states the Act applies to "all records in the custody or control of a public body" [emphasis added]. "Control" as a supplement to "custody" indicates that records such as those in this case, which are not in the physical possession of the public body, may be caught by the Act.

[29] Section 3(1) lists records which are excluded from the scope of the Act. That list is exhaustive and does not provide a neat fit for the notes in dispute in the case at bar. For example, records or personal notes of a judge or a person acting in a quasi-judicial capacity are specifically excluded. Records not specifically excluded are, by implication, included, supporting the argument that the scope of the Act is indeed extensive.

[30] Although the Act may expand the number of records a parent may be able to access, a broad interpretation of "record in the custody or control" of the School District does not render the exemption to "student record" in the School Act void. The application process set out in the Act determines what, if anything, will be disclosed. Even if this did result in an elimination of the exceptions to "school record" in the School Act, the Act clearly states that it has priority over any other enactment that does not have a specific 'notwithstanding' provision.

[31] The petitioner argues that she is not required by the Principal, the School District, or the Minister of Education, to maintain her raw notes. However, 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.

[32] I am mindful of, and somewhat sympathetic to, the petitioner's alternative argument that she is bound by ethical obligations, including those mandated by the B.C. School

Counsellors Association, to perform her responsibilities in an ethical manner, which includes note-taking during counselling sessions. In support of the ethical obligation argument, the petitioner relies on the case of Pamela Smith v. Kamloops & District Elizabeth Fry Society (1996), 26 B.C.L.R. (3d) 24 (B.C.C.A.). That is a wrongful dismissal case which centred on findings of ethical misconduct outside of the work place, likely to prejudice the business of the employer, which conduct led to the employee's dismissal. The passage in the case dealing with ethical obligations occurs in the context of a discussion of the trial judge's decision and is not specifically commented upon by the Court of Appeal. As well, the trial judge found that the employee's violation of her ethical obligations was not the sole fact justifying her dismissal. It also should be noted that the ethics breached in the Smith case were not breached in compliance with a legal requirement. For these reasons, that case is not particularly persuasive of this aspect of the submission by the petitioner at bar.

[33] As to the proper approach to "control", the respondent argues the court must interpret its meaning in the context of the purposes of the Act, citing in support Canada Post Corporation v. Canada (supra) as well as the decision of the Ontario Information & Privacy Commissioner in Order 120 Re: Ministry of Government Services. While these cases are helpful, they are not determinative of the issue before me given the differences as well as similarities in the legislation.

[34] The Access to Information Act considered in the Canada Post Corporation v. Canada case, supra, has a number of similarities to the British Columbia statute. Both enactments have similar definitions of records and both authorize the disclosure of records under the control of a government institution or public body. The federal Act does not specifically list exceptions to the definition of records as does the B.C. Act in s.3(1) and, consequently, it may be argued that the B.C. Act has an even broader application than does the federal Act.

[35] In my view, the facts in this case support the correctness of the Commissioner's finding that the counsellor's disputed notes are under the control of the School District as contemplated by the Act. 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.

[36] Division 2 of Part 2 of the Act provides exemptions to disclosure. Section 19 gives the head of a public body permission to refuse disclosure if it would threaten the safety or mental or physical health of a person or if disclosure would

interfere with public safety. This is the section the School District relied on when it refused to disclose the raw notes. Section 22 deals with disclosure which is harmful to personal privacy. In determining this issue, the head of the public body must consider all of the relevant circumstances. One aspect of the legislation which gives me some concern is s.23 of the Act, which provides that if the head of a public body intends to give access to information which might be covered by the provisions of s.22, notice must be given to the third party, that is, the party to whom the information relates. After notice is given, the third party may ask for a review under s.53 or s.63 of the Act.

[37] The exemption provisions are relatively extensive and arguably broad enough to prevent certain personal information from being disclosed. However, when the third party is a child it is important to note that pursuant to s.3(a) of Regulation 323/93 access to records is authorized on behalf of an individual under the age of 19 by the individual's parent or guardian, if the individual is not exercising the rights. On a cursory reading of the legislation, it would appear that a parent could apply on behalf of a young child for information about that child and notice of that application will be given to the parent or guardian who, in these circumstances, is the applicant. This raises the question of whether a child's privacy rights, if any, are protected in this legislative scheme. That question is not before me and is therefore best left to another day.

[38] In conclusion, I have determined that the approach and conclusion of the Commissioner, in his decision dated August 23, 1996, is correct. Accordingly, the petition is dismissed.

"J.L. Dorgan"
The Honourable Madam Justice Dorgan