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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 115-1996
August 23, 1996

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A request for access to a school counsellor's notes in School District No. 2 (Cranbrook)

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on June 3, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the decision of School District No. 2 (Cranbrook) (the public body) to deny an applicant access to certain school counsellor's notes under section 19 of the Act. The School District has not produced the counsellor's notes for my review, so this inquiry will solely determine if the notes are in its custody or control under section 4 of the Act.

2. Documentation of the inquiry process

On February 5, 1996 the applicant submitted a request to the School District for copies of all notes of a school counsellor dating from September, 1994 to the end of November, 1995 pertaining to the applicant's two children.

On February 22, 1996 the School District notified the applicant that it was denying access to the requested records under section 19(1)(a) of the Act.

On March 5, 1996 the applicant requested the Office to review the public body's decision to deny access to the counsellor's notes. For purposes of this inquiry only, the counsellor was designated a third party. Eight other public bodies or agencies and other organizations participated as intervenors in this inquiry.

3. Issues under review at the inquiry

Although the School District refused access under section 19(1) of the Act, it did not have the benefit of reviewing the records in order to determine the applicability of section 19. It relied on the opinion of the school counsellor to make its decision to refuse access. She takes the position that the records in dispute are not in the custody or control of the School District and has not disclosed the records to the School District.

Until the issue of custody and control is determined, I am not in a position to determine the applicability of section 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. This section provides:

> 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. The applicant's case

The applicant, a mother, is seeking notes made by the school counsellor about her two children. She accuses the counsellor of making false accusations against her to the Ministry of Social Services, which, she claims, "told me everything that my kids said." She wants the notes on what the counsellor said to her children, not what her children said to the counsellor. She also thinks that she should have been told that her young children were receiving counselling at school and why. The parent fears that her children are being harassed or interrogated in the public school system. She further states that she has tried unsuccessfully to obtain the information she wants directly from the principal and the counsellor.

5. The case of the Board of School Trustees of School District No. 2 (Cranbrook)

The School District states that the children in question were in kindergarten and grade 2 when they were referred to the school counsellor. At that point, a report had already been made to the Ministry of Social Services under section 7 of the *Family and Child Services Act*. (Submission of the School District, p. 2)

The School District states that the counsellor "took notes as to what she was told by the children. The notes were intended for the Counsellor's own use." The counsellor has persuaded the School District that disclosure of her notes to the applicant "could reasonably be expected to threaten the safety of the Children and would interfere with the ability of the School Board to provide for the safety of other children attending schools in the School District." (Submission of the School District, p. 3)

The School District submits that the records in dispute are under its care and control and seeks to rely on section 19 of the Act not to release them.

6. The school counsellor's case

The school counsellor was supported in her submission by the British Columbia Teachers' Federation (BCTF) and the B.C. School Counsellors' Association as intervenors. The latter represents 620 teacher-counsellors.

The school counsellor submits that she discusses a wide variety of matters in private with students, such as "very personal matters including relationships with parents." During such sessions she keeps what she calls "raw notes" of the conversation to refresh her memory as she continues to work with a student. Sometimes she takes no notes. Normally, she decides "what to note, the format of the notes, and issues of retention and destruction of the notes. There are no stated guidelines on these issues." (Affidavit of the School Counsellor, paras. 2, 4, and 5)

Normally at the end of a school year the counsellor prepares a summary of her involvement with a student that is placed in the student cumulative file (student's record). The general topics of discussion are noted from a checklist, but her raw notes do not appear there. (Affidavit of the School Counsellor, paras. 4, 6)

The school counsellor states:

> I keep my raw notes in my own notebooks which I keep myself, normally at my home. I work in two different schools in the district. On any given day I bring my raw notes relating to students I have been working with at that school to the school with me. (Affidavit of the School Counsellor, paras. 7 and 8)

She submits that her notes are not in the custody or, more particularly, under the control of the School District, and thus are not accessible under the Act. I have discussed the basis of this submission further below.

7. The intervention of the British Columbia Teachers' Federation and the B.C. School Counsellors' Association

I have discussed below, as appropriate, points made in this submission.

8. The intervention of the B.C. Confederation of Parent Advisory Councils

The Confederation is of the view that "the school board exercises control of, and has custody of all documents, including notes, produced by the counsellor in the course of carrying out their duties." I quote at length its distinction between the situation of a counsellor and a physician or other health professional:

> *Firstly*, physicians and similar professionals are trained to predetermined standards before they are allowed to practice. They then become members of a professional institute that imposes standards of practice to which they must adhere to and for which they accountable. The situation with respect to school counselors is such that there is a wide variety of practitioners, with a range of

backgrounds and training, and consequently, a range in standards of practice. We believe that the first level of accountability for school counselors is through their employer. *Secondly,* children in a school setting often have little or no choice with respect to the counselor to which they are assigned, as they (or their parents) would in choosing a health professional. A counselor has access to a student by virtue of being employed by the school board to counsel students and therefore documentation produced falls within the custody of the school board. *Thirdly*, a school counselor may make decisions and act on them as a result of notes taken in an interview and these actions may have a significant impact on a student's life. In the event of a challenge to a decision, we believe these notes should bear the scrutiny of the employer and/or the parents and students.

9. The intervention of the Ministry of Education

The Ministry points out that parents now have potential means of access to records pertaining to their children under either the *School Act* or the *Freedom of Information and Protection of Privacy Act*. Further, it states:

> It has been the understanding of the Ministry that counselors' notes are in the custody and control of the school district. School counselors are employees of the school district. In their capacity as employees they provide counselling services to students and create records containing personal information.
>
> It has also been our understanding that the records of school counselors are generally kept on school property. In this way, the records are in the custody of the school district. However, even if these records were kept elsewhere, it has been our belief that control of the records remains with the school district, based on the indicators of control set out in the Freedom of Information and Protection of Privacy Policy and Procedures Manual. While the *School Act* recognizes that personal notes may be in the possession of the recorder, the fact that the recorder is an employee of the school board indicates that he/she exercises control on behalf of the school district, not for their own purposes.

The Ministry expects that requests for student records under the Act will be made only in exceptional situations, "[g]iven the desire of school districts to fully involve parents in the educational programs of their children and the generous, well established provisions for parental access to student records under the *School Act*...."

10. The intervention of the College of Psychologists of British Columbia

The submission of the College made the following point, among others:

> In any case whoever consents to treatment holds the right of disclosure of the notes recorded regarding therapy. When a psychologist is employed by a third party to provide services to a child, then the psychologist would have a duty to clarify prior to initiating therapy the relationships among the parties' interests.

> Thus, an employee of an agency has the agency as a client not the child. The agency may ask the psychologist to retain the notes at the outset and in essence return this custodial function to the psychologist. However, the client remains the agency who contracted with the psychologist to provide the service. Thus, unless the School Board specifically relinquished this right (that is to products of therapy in the form of the notes) they would still retain the right to have them released or not. This as usual poses a serious problem since the patient who is not the client has no rights in this matter and is not usually informed of that reality.

11. The intervention of the British Columbia School Trustees Association (BCSTA)

The BCSTA supports the position of School District No. 2 that the records in dispute are under its custody or control: "To determine otherwise would encourage counsellors to keep records, if any, of counselling sessions, off-site, with no formal controls over physical security or access." (Submission of the BCSTA, p. 3) I have cited below, as appropriate, other points from its submission.

12. The intervention of the Ministry of Health and Ministry Responsible for Seniors

The Ministry is of the view that the records in dispute in this inquiry are "clearly in the control of the public body" because they "were created by the school counsellor while the counsellor was in the employ of the public body." (Submission of the Ministry, p. 1) The main thrust of its submission concerns its approach to the release of information to parents of minor children, which may be relevant at a subsequent stage of this review.

13. The intervention of the B.C. Council of Administrators of Special Education (BC CASE)

BC Case argues that parents should have access to any information affecting their child, but that no record should ever be released to a parent which would lead to the endangerment of a child.

14. Discussion

The School Act and the Freedom of Information and Protection of Privacy Act

The School District made a submission to me on whether the applicant would be entitled to access the counsellor's notes under the relevant provisions of the *School Act*, which I regard as irrelevant to the issues before me in this inquiry. (Submission of the School District, pp. 4-6) I take a similar view of the discussion of the *School Act* in other submissions. (See Submission of the BCTF and the School Counsellors' Association, paras. 12 to 22)

I am required and authorized to interpret the scope and application of the Act, not the *School Act*. The *Freedom of Information and Protection of Privacy Act* provides in this case a parallel process for access to records. (Reply Submission of the School District, p. 2)

Regardless of the access provisions in the *School Act*, if there is an inconsistency, the *Freedom of Information and Protection of Privacy Act* prevails (section 78(2)). This is especially relevant to the BCTF's argument that my deciding that counsellors' records are in the custody and control of the public body will have the effect of giving parents automatic access to them under the *School Act*.

Any disclosure of personal information by a School District, or individual schools, has to occur in compliance with the provisions of the *Freedom of Information and Protection of Privacy Act.* If section 19(1) authorizes the School District to refuse access, then that prevails over any access provisions in the School Act that may arguably apply to these records.

The context for this case

The applicant states that she knows what the issues were that her children discussed with the school counsellor, because the Ministry of Social Services, by her own admission, did an investigation into her home, and she also participated in a meeting with one of her children and the school counsellor where sensitive issues arose. (Affidavit of the School Counsellor, para. 11) She states that she is only interested in what the counsellor said to her children. I will need to review the records in dispute in order to ascertain whether they contain any information responsive to the applicant's clarified request. (See Reply Submission of the School District)

The issue of my jurisdiction: custody and control of the records

I agree with the School District that this issue of jurisdiction is simple:

> The School Board submits that the Counsellor's notes are technically within the care and control of the School Board within the meaning of Section 4 of the FOIPPA because they were created by an employee of the School Board in the course of her employment. (Submission of the School District, p. 9)

The BCTF and the School Counsellors' Association advanced an argument that these notes are not in the custody or control of the public body: "The Public Body does not provide access to them, manage them, maintain them, preserve them or dispose of them." (Submission of the BCTF, paras. 4, 7 to 10) I do not accept this argument, which is contrary to the letter and spirit of the Act.

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. The definition of "record" under the Act includes "papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means...."

I reject the argument of the BCTF that "it would be an unwarranted invasion of the confidential student/counsellor relationship for a school board to attempt to regulate the raw notes of a counsellor." These records are the product of an employer-employee, or contractual, relationship. There are also exceptions in the Act that may permit School Districts to restrict parental access to counselling notes as they deem it appropriate to do so.

I find that the counselling notes in dispute are records under the control of the School District as contemplated by section 4(1) of the Act.

I think it is inappropriate for this counsellor to keep her raw notes and files in her own home. Although counsellors' notes should be maintained separately from general school records, all such counselling records should be kept in locked files in a school's counselling office, or other appropriate, secure location within a school, because of the requirement for "reasonable security" for personal information under section 30 of the Act.

I would strongly encourage the Ministry of Education and School Districts to develop appropriate policies on privacy and access matters for counselling records including record keeping, informed consent, waivers, and competency, if none indeed exist. (See the Submission of the College of Psychologists of British Columbia)

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.

The relevance of various ethical codes

The school counsellor emphasizes that she is a member of, and subscribes to, the ethical guidelines of the B.C. Teachers' Federation, the B.C. School Counsellor's Association, and the Canadian Guidance and Counselling Association. (Affidavit of the School Counsellor, paras. 14 to 16) I have read the review of these codes of ethics by the BCTF and the Counsellors' Association. (Submission of the BCTF, paras. 23 to 26) My main observation is that all of these codes with provincial application should be updated to take account of the impact of the Act and to spell out detailed guidance for teachers and counsellors.

Access to the records in dispute

Since I have determined that the counsellor's notes are records under the control of the School Board within the meaning of section 4(1) of the Act, I have jurisdiction to determine whether access to those records may be refused under section 19(1). In order to perform my statutory responsibilities under the Act, the School Board will be required to produce the records to me under section 44(2). Under section 47, there are restrictions on disclosure of information received by my Office. In particular, my staff and I are not permitted to disclose any information that a public body would be required or authorized to refuse to disclose under the exceptions of the Act.

The counsellor is very concerned about providing her notes to anyone, without the consent of the student. In fact, she has refused to turn over her notes to the School District. The following statement was made in her joint submission:

> If a school board did demand that a counselor turn over her raw notes, without consent of the student counsellee, then that request would be resisted to the full

extent of the law. Such an order would be subject to challenge through the grievance/arbitration process and perhaps through courts. (Submission of the BCTF, para.27)

This statement is based on a misunderstanding of my authority under the Act.

The rights of parents

The school counsellor states:

> My practice is that I will not give access to my raw notes to anyone else except to the student involved, and then only if asked for and if appropriate....
>
> I verily believe that children discuss matters with counsellors freely because a relationship of trust develops. Part of that trust is the confidence that what is said is confidential and will not be disclosed, to anyone else without the student's consent... (Affidavit of the School Counsellor, paras. 7 and 17)

Since section 3(a) of the Regulation under the Act establishes that parents have some control over the access rights of their own children to their own personal information, its effect will be relevant in any subsequent determination of the issues related to the School Board's refusal to disclose the notes to the applicant under section 19.

Section 19: Disclosure harmful to individual or public safety

I will address this issue when the School District has produced the records in dispute for my review. At that time, I will take full account of all of the submissions already received on the applicability of this section. (See the Submission of the BCSTA, p. 2)

15. Order

I have concluded that the records in dispute are under the control of School District No. 2 within the meaning of section 4(1) of the Act. Under section 58(3)(a), I require the head of the School District to perform its duty under sections 44(2) and (3) to produce the records in dispute for my review within 10 days of the receipt of this Order.

David H. Flaherty
Commissioner

August 23, 1996