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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 286-1998
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INQUIRY RE: A decision by School District No. 73 (Kamloops/Thompson) to withhold information relating to harassment complaints against the applicant

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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 February 17, 1998 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 a decision by School District No. 73 (Kamloops/Thompson) (the School District) to withhold information from records in its custody and control pertaining to a harassment investigation. The applicant also seeks a review of the adequacy of the School District's search for specific records related to the investigations.

2. Documentation of the inquiry process

On June 23, 1997 the applicant, a former teacher with the School District, submitted two access requests to the School District for records related to two complaints of workplace harassment (the complaints) which had been filed against her while she was employed by the School District. These complaints had been filed by other School District employees pursuant to provisions in the Transitional Collective Agreement, which agreement governs the terms and conditions of employment of all B.C. teachers.

On July 18, 1997 the School District disclosed a number of records responsive to the requests but, relying on section 22 of the Act, refused to disclose two investigation reports which had been prepared and submitted to the Superintendent of Schools following an investigation into the complaints against the applicant.

Two different investigators prepared the two investigation reports for the Superintendent. One interviewed the complainant and three other individuals, including the parent of a student. The other interviewed the complainant and two individuals, including the parent of a student. These interviewees (and other persons described by them during the investigation, other than the applicant) are the third parties for purposes of this inquiry.

On August 22, 1997 the applicant asked me to review the School District's decision to refuse access to both the investigation reports and the original notes taken during the meetings and interviews. During the mediation process the applicant accepted that the original notes taken by an executive secretary during August 23 and September 6, 1996 meetings no longer existed, and that she had already received the information contained in the original notes taken by a recording secretary during October 29 and November 7, 1996 meetings.

3. Issues under review and the burden of proof

The two issues in this inquiry are whether the School District is required to refuse to disclose the records in dispute under section 22 of the Act, and whether the School District discharged its duty to assist the applicant under section 6(1) of the Act.

The relevant sections of the Act are as follows:

Duty to assist applicants

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.

Disclosure harmful to personal privacy

22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

…

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable, and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

…

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

…

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

(h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,

….

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

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(2), if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

The onus is on the applicant to prove that the disclosure of the withheld information would not be an unreasonable invasion of the third party's personal privacy (section 57(2)). The onus is on the School District to prove that it has discharged its duty under section 6(1) of the Act. (See Order 110-1996, June 5, 1996)

4. The records in dispute

The records in dispute consist of two investigation reports. Each report includes a summary of the process followed, a review of the evidence obtained, findings, recommendations, and exhibits. The exhibits include interview notes and various correspondence between the applicant and both the complainants and third parties.

5. The applicant's case

The applicant taught in the School District for a considerable number of years. She was the subject of harassment investigations, the result of which was her forced retirement. The allegations of harassment came from other teachers.

The applicant believes that she is being unjustly and unlawfully deprived of access to records created in relation to the harassment investigation against her. In particular, she wants to know more about the case against her.

The applicant does not believe the records in dispute are properly withheld under section 22 of the Act. She submits that:

> … the information or disclosure she seeks is directly related to her personally and professionally. It has affected decision making resulting in serious, adverse, consequences on her career which the Applicant has a right of access to, in order to defend her position in the matter… the Applicant was forced to retire, but the matter is far from over, in spite of the fact the submission by the BCPSEA is that it is. Other matters, which I cannot reveal at this time, will be evolving. In any case, the information sought by the Applicant should not be about third parties in relation to their personal reputations, employment status or educational history. The information sought has been submitted voluntarily by the employees and/or witnesses whoever they are. It has been used to affect decision making and therefore needs to be produced to meet the tests for fact, truth, untruth, accuracy, inaccuracy, opinion, hearsay and exaggeration. If parties involved have been truthful there is nothing to be concerned about or protection to seek under the guise or promise of confidentiality or invasion of privacy. They participated voluntarily so should be held accountable for their participation. If, on the other hand the submissions have been motivated by continued malice and are in fact not true or accurate, they still should not be protected by the promise of confidentiality or protected under the guise of third party confidentiality. If they have acted in bad faith, they should not be protected under a cloak of 'secrecy,' for that defies the principles of natural justice. (Reply Submission of the Applicant, p. 11)

In support of her submissions, the applicant provided me with the submissions of lawyer Shawn Swail, who believes himself to have status as an intervenor in this inquiry. I did not invite him to participate as such. Nevertheless, I have reviewed the submissions he has made in support of the applicant. They focus on requirements of natural justice and procedural fairness as a basis for disclosure of the records in dispute to the applicant.

I have discussed below the applicant's submissions on the application of specific sections of the Act.

6. The School District's case

The School District states that it received two complaints of workplace harassment against the applicant from two teachers in 1996. Each of its two appointed investigators prepared an investigation report for the Superintendent of Schools in the School District. They interviewed a total of seven persons.

The School District's formulation of the issue in this inquiry is as follows:

> The Applicant is only entitled to access to the Investigation Reports if the Act allows it. In the present case the School Board properly applied the Act and refused to disclose the requested information. (Reply Submission of the School District, p. 4)

The application of the Act to the records in dispute will depend upon my detailed review of them.

The School District has refused access to the records in dispute on the basis of section 22 of the Act. I have discussed below its submissions on the application of specific sections. In addition to its own submission, the School District relies on the submissions of the B.C. Public School Employers' Association in this regard.

7. The B.C. Public School Employers' Association's Intervention (BCPSEA)

The BCPSEA is the bargaining agent for all school boards in the province. The British Columbia Teachers' Federation (BCTF) is the bargaining agent for all teacher associations. They are parties to a Transitional Collective Agreement (TCA), which governs the terms and conditions of employment for all teachers. The BCPSEA's view is that it is vital to protect the integrity of its harassment investigation procedure by enforcing confidentiality for the proceedings: "... the information provided to the Investigators was supplied in confidence and the disclosure of the Investigation Reports to the Applicant would be an unreasonable invasion of their [the third parties] personal privacy." (Submission of the BCPSEA, p. 5)

The BCPSEA makes the point that the article in the Transitional Collective Agreement, which governs workplace and sexual harassment complaints, has been the subject of many complaints, investigations, and arbitrations across the province:

> … Disclosure of reports prepared pursuant to investigations under Article A.5 is consistently denied by school boards in B.C. in order to protect the process established under that article. A decision requiring disclosure in the present case has the potential for province wide implications which may include detriment to the harassment investigation process established by the TCA. (Submission of the BCPSEA, p. 2)

The BCPSEA also makes the point that the Transitional Collective Agreement does not contain an express provision granting the complainant, the union, or an alleged harasser access to a copy of an investigation report. The Transitional Collective Agreement does provide that "[a]ll parties involved in a complaint agree to deal with the complaint expeditiously and to respect confidentiality."

I have discussed below the BCPSEA's submissions on the application of specific sections of the Act to the records in dispute.

8. The B.C. Teachers' Federation's (BCTF) Intervention

This intervention largely recounts how the BCTF itself is having trouble obtaining access to investigative reports in harassment proceedings under appropriate conditions of confidentiality: "At a minimum, persons in the position of the applicant in the present review should have access to the reports and supporting documentation, for the sole purpose of seeking advice from their statutory and contractual representatives as to their rights and obligations under the collective agreement."

9. Discussion

The applicant has advanced a considerable amount of background information about the harassment investigation against her. Although I have reviewed this material, much of it is not relevant to the decision on access to records that I have to make under the Act. My obligation is to apply the Act to the records in dispute, not intervene on behalf of principles of natural justice, however sympathetic I may be to the situation of any applicant. It is also important to note that the applicant does have other procedures available to her to contest the merits of how the School District has treated her. (Reply Submission of the School District, p. 2)

The BCPSEA has described to me how the Transitional Collective Agreement's articles govern such matters as workplace harassment. It has further explained to me that a "decision requiring disclosure in the present case has the potential for province-wide implications, which may include detriment to the harassment investigation process established by the TCA." (Submission of the BCPSEA, p. 2) Although I understand this point, my role is limited to deciding whether records created by public bodies under the Act are subject to disclosure under the Act. In fact, the burden should be on the parties to the Transitional Collective Agreement to ensure that it is in compliance with the governing legislation - the Act - concerning the creation and disclosure of records by public bodies subject to the Act, which would include school boards and districts but not associations of teachers. However, the Act does cover the College of Teachers itself.

The applicant questions the propriety of having the same law firm represent both the School District and the intervenor, B.C. Public School Employers' Association

(BCPSEA), because, under my inquiry procedures, intervenors are not provided with the submissions of the main parties by my Office. The matter raised is one which is outside the scope of this inquiry and, thus, beyond my control. Although I acknowledge the applicant's concern, I cannot prevent any party to an inquiry from sharing materials with any other party.

Section 22: Disclosure harmful to personal privacy of third parties

The applicant submits that the information she is seeking pertains to her and not to the third parties and therefore should be disclosed. (Submission of the Applicant, paragraph 27) The School District and the intervenors believe that disclosure of the information in dispute would be an unreasonable invasion of the privacy of the third parties who are involved.

Having considered the many various sub-sections of section 22 relevant to this inquiry, I am mindful that, in the final analysis, my determination of whether the records at issue must be fully or partially disclosed depends on a balancing of "all the relevant circumstances," to borrow the language of section 22(2). In the relevant circumstances of the applicant's request, I find that partial disclosure is appropriate. I will return to this issue below.

Section 22(2)(c): The personal information is relevant to a fair determination of the applicant's rights

The applicant submits that disclosure of the records in dispute is directly relevant to a fair determination of her rights, relying in particular on similar circumstances in Order No. 194-1997, October 14, 1997, p. 10.

The School District holds the view that the applicant has resigned from her position and that all outstanding grievances were settled, with the assistance of an arbitrator, and with the consent of her union and the School Board. The Consent award states "that all present grievances are resolved and that no potential future grievances will be proceed [*sic*] with." Therefore, the School District submits that "the information requested by the Applicant will have no relevance to a determination of her rights that may have been affected by the Investigation Reports." (Reply Submission of the School District, p. 2) The School District relies on my decision in Order No. 138-1996, December 18, 1996.

I find that disclosure of some of the information in dispute is relevant to a fair determination of the applicant's rights.

Section 22(2)(f): The personal information has been supplied in confidence

The School District emphasizes that the investigators in this proceeding gave promises of confidentiality to each of those interviewed, except for the fact that

information provided to them would be included in a report to the Superintendent. I have determined in previous orders that this is an important factor for a public body to consider when deciding whether or not to grant access to personal information held by the public body. See Order No. 204-1997, December 15, 1997, p. 6. I continue to hold the view that this is a "relevant circumstance" to consider, but it is not necessarily determinative of the issue.

The BCPSEA made similar points about the relevance of promises of confidentiality. It relies in particular on the principles and findings set out in Order No. 70-1995, December 14, 1995, pp. 7-8; and Order No. 138-1996, p. 5, namely, that matters of this importance should not be presumed and that solid evidence of the promising of confidentiality should be recorded at the time the promise is made. It is clear from affidavit evidence in the present inquiry that promises of confidentiality were made to those interviewed by the investigators in accordance with the terms of the Transitional Collective Agreement. This meets the requirements of this subsection.

Section 22(2)(h): The disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant

The applicant submits that her request for access to records of the harassment investigator, principals, and decision-makers should not unfairly damage any third party. (Submission of the Applicant, paragraph 29)

The School District relies in part on this subsection as a reason not to disclose the information in dispute. The BCPSEA relies in particular upon my interpretation of this subsection in Orders No. 70-1995 and 138-1996. (Submission of the BCSPEA, p. 6) I emphasize that this is a relevant circumstance only for the head of the public body to consider, and it has appropriately done so.

Section 22(3)(a): The personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation

Included among the records sought by the applicant is medial information pertaining to a third party. In my view, the disclosure of this type of record would be, in this case, an unreasonable invasion of the third party's personal privacy – which is as the Act presumes it to be. The applicant has not overcome this presumption by raising any relevant circumstances.

Section 22(3)(d): The personal information relates to employment, occupational or educational history

The applicant submits that the information in dispute does not relate to any third party's employment, occupational, or educational history. (Submission of the Applicant, paragraph 28) The School District is relying on this section to seek to prevent disclosure

of the information in dispute, which includes employment history of staff members, and educational history of students. (See Submission of the BCPSEA, pp. 6-7)

Having reviewed the records in dispute, I am satisfied that some of the information in them relates to the employment, occupational, or educational history of third parties for purposes of section 22(3)(d) of the Act. Disclosure of that information is therefore presumed to constitute an unreasonable invasion of the personal privacy of the third parties. In this case, I find that the applicant has not overcome this presumption by raising any relevant circumstances.

Section 22(3)(h): The disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation

The School District argues that the disclosure of the records in dispute "could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation" and would thus be presumed appropriately withheld under section 22(3)(h) of the Act. In my view, the contents of the investigative reports into workplace harassment at issue do not include personal recommendations, character references, or personnel evaluations within the meaning of the Act. See Order No. 34-1995, February 3, 1995; Order No. 71-1995, December 15, 1995; Order No. 78-1996, January 18, 1996; and Order No. 138-1996, December 18, 1996. I therefore find that section 22(3)(h) has no general application to the records in dispute.

Section 22(5): Providing information from records about an applicant, in summary form

I find that the applicant is entitled to access to some of the investigation records containing information about her. Unfortunately, certain of the information contained in the investigative reports, witness interviews, or witnesses' notes pertaining to the applicant is inextricably bound up with information the disclosure of which would be an unreasonable invasion of a third party's personal privacy. In cases where an applicant's request for information about him or her has been refused by a public body, because it was supplied in confidence by a third party, section 22(5) requires that the public body produce a summary of the information. The intent of this provision is to convey the information about the applicant to the applicant, without compromising legitimate privacy expectations of third parties who provided the personal information in confidence to the public body.

The only exception to this requirement is where the summary cannot be produced without disclosing the identity of the third party who supplied the personal information. In my view, there are a number of records in this case to which section 22(5) is applicable. I have identified these records for the public body and direct that summaries of these records be created.

Review of the Records in Dispute

I have carefully reviewed each of the two investigative reports at issue in this inquiry. The reports themselves are only a half dozen pages in length, but the documentation accompanying each of them is up to fifty pages in length.

It is my belief that the principles established by the Act for the severing or withholding of records can and should be applied consistently in sensitive matters such as harassment investigations, by all public bodies subject to the Act. I also believe that these principles can be articulated in summary fashion, and I seek to do so below. I present this effort at clarification for the guidance of public bodies in the handling of records in future harassment cases.

Where investigative information provided by a third party is vital to an applicant's understanding of the allegations against her, but the disclosure of this information would be an unreasonable invasion of that third party's personal privacy, a summary of the record, produced under section 22(5) of the Act, may be an appropriate vehicle for disclosure.

The results of my review of the records in dispute are as follows:

Information to be disclosed to the applicant

1. Records, or portions of records, that disclose the process of investigation. The names of the two complainants should also be disclosed to the applicant, since those were revealed to the applicant by way of letters to the applicant notifying her of the commencement of separate harassment investigations. However, other third party identities should be severed.

2. The conclusions, that is, the finding of facts, and recommendations of the investigative reports.

3. The questionnaires used by the investigators, except for the names of third parties other than the complainants interviewed by the investigator.

4. Letters written to the applicant by an investigator

5. Letters copied to the applicant that are about her

Information not to be disclosed to the applicant

1. Notes of specific investigative interviews

2. The school's learning assessment about a particular student and letters to the parent of a student, and the student's schedule and timetable.

3. Minutes of a meeting of teachers about a student, even if the applicant participated in the meeting

4. Primary documents that initiate the complaint or are in support of the report of a complaint investigator

Records for which a summary should be produced

The public body should note that the summary should focus on providing the applicant with information from the record which is about her, without revealing the source or otherwise indirectly invading the privacy of third parties mentioned in the records. The public body may summarize all the interviews into one document, so as to ensure the sources of information are not identified. (See Order No. 83-1996, February 16, 1996 for a discussion on the preparation of a summary.)

1. Investigative interviews of the complainants.

2. Investigative interviews of third party witnesses.

3. Witness notes prepared by a third party regarding interactions with or observations of the applicant.

4. The "facts and chronology of events" portion of the investigator's report of the complaint filed April 21, 1997.

Section 6: Duty to assist applicants

The applicant has made a variety of allegations as to unlawful or unauthorized destruction of notes about meetings by the School District. (Submission of the Applicant, paragraphs 34 to 42) She also asserts that the School District has not followed the requirements of section 28 of the Act to use accurate information in the proceedings against her.

I have reviewed an affidavit of the Assistant Superintendent of this School District, which indicates that the handwritten statements and notes that he prepared as part of an investigation of the applicant were destroyed once a typewritten statement was signed or approved by the staff member that he had interviewed. This included revisions to each statement until the person interviewed thought that it accurately reflected what he or she said. That is an acceptable practice under section 31 of the Act in the circumstances of this inquiry. However, harassment investigations, in particular, are momentous events for those involved and it is inappropriate to destroy anything but

truly transient records that have been produced during an investigative process. I wish to put public bodies on notice in this regard.

I am satisfied with the School District's treatment of records in this case. I also recognize that even if I were not, these particular circumstances could not be remedied by a Commissioner's order, since there is nothing more the School District can search for and produce for my review.

10. Order

I find that School District No. 73 (Kamloops/Thompson) was not required to refuse access to all of the information in the records at issue in this inquiry under section 22 of the Act. However, I also find that disclosure of certain portions of specific records at issue would be an unreasonable invasion of personal privacy for the third parties to this inquiry, and that School District No. 73 (Kamloops/Thompson) was required to withhold this information under section 22 of the Act.

Under section 58(2)(a) of the Act, I require School District No. 73 (Kamloops/Thompson) to give the applicant access to those parts of the records which it is not required to withhold under section 22 of the Act. I have prepared a severed copy of the records to indicate which parts must be disclosed, and which parts must be summarized for disclosure under section 22(5) of the Act.

Under section 58(2)(c) of the Act, I require School District No. 73 (Kamloops/Thompson) to refuse access to the remainder of the information in the records.

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an Order under this section. I find that School District No. 73 (Kamloops/Thompson) has complied with section 6(1) of the Act in this inquiry.

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David H. Flaherty
Commissioner

December 22, 1998