OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 04-05

THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 68 (NANAIMO-LADYSMITH)

Celia Francis, Adjudicator
February 16, 2004

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Summary: Parents requested access to two investigation reports regarding a third-party teacher. Teacher requested a review of the School District's decision to disclose reports in severed form. School District found to have correctly decided to disclose severed reports.

Key Words: developed by or for a public body or a minister – personal privacy – unreasonable invasion – supplied in confidence – employment history – labour relations information – unfair exposure to harm – inaccurate or unreliable personal information – unfair damage to reputation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a)(ii), (b) and (c)(ii) and (iv) and 22(1), 22(2)(e), (f), (g), (h), and 22(3)(b), (d), (g).

Authorities Considered: **B.C.:** Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 04-04, [2004] B.C.I.P.C.D. No. 4.

1.0 INTRODUCTION

[1] The applicants in this case are two sets of parents of students in School District No. 68 ("School District") who made requests for access under the *Freedom of Information and Protection of Privacy Act* ("Act") to certain records. The first set of parents, to whom I refer collectively as the "First Applicants", requested a copy of a report by a named investigator in connection with an investigation and hearing regarding a named teacher in the School District, who is the same third-party teacher as

in the companion order to this decision, Order 04-04, [2004] B.C.I.P.C.D. No. 4. They also requested copies of "any discussion from the Hearing" pertaining to themselves and their son.

[2] The second set of parents, referred to below as the "Second Applicants", referred to two separate investigations by named investigators and two separate hearings related to those investigations, all regarding the same named teacher as in the First Applicants' case. They requested access under the Act to a copy of the report from the first investigation and "any discussion from the first Hearing" pertaining to themselves and their daughter. They also requested a copy of the report from the second investigation (the same report that the First Applicants requested) and a copy of "any discussion from the second Hearing" pertaining to themselves and their child.

[3] The School District responded to the First Applicants by informing them that it would provide a severed copy of the report in which they would receive information on the methodology of the investigation and their own and their son's personal information. They would not receive any personal information of the teacher. The School District then told the First Applicants that the only record from the hearing that related to them or their son was an e-mail message they had sent to the School District, a copy of which the School District said it enclosed with its response letter.

[4] The School District told the Second Applicants that it was denying access, in full, to the report from the first investigation, as most of it related to the teacher. The School District said that it was not possible to identify comments made by the Second Applicants and their child, as the various comments by parents and students had been summarized. The School District also said there were no records from the first hearing that related to the Second Applicants and their child. With regard to the request related to the second investigation and hearing, the School District said it had decided to disclose a severed copy of the report, in which the Second Applicants would receive their own and their daughter's personal information, as well as information on the investigator's methodology. The School District said the only record from the second hearing that related to the Second Applicants and their child was a letter the Second Applicants had sent, a copy of which the School District said it enclosed with its response.

[5] The School District notified the third-party teacher's union, the Nanaimo District Teachers' Association ("NDTA"), of its decision to disclose some of the records in severed form. The British Columbia Teachers' Federation ("BCTF"), on behalf of itself, the NDTA and the teacher, requested a review of the School District's decision by this office. According to the portfolio officer's fact report which accompanied the notice for this inquiry, mediation resulted in a decision by the School District to disclose more information in the reports. The third party continued to object to the School District's decision to disclose any information at all.

[6] 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 delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

[7] The Office invited and received representations from the applicants, the School District and the NDTA and the BCTF, on behalf of the third-party teacher. Legal counsel for the teacher, the NDTA and the BCTF made submissions on behalf of all three. In addition to the issues in the notice for this inquiry, the lawyer for the third party argued that ss. 12(3), 13(1) and 21(1) apply to the records in dispute. As I discuss below, I decided to consider the third party's arguments on s. 21(1) but not those on ss. 12(3) and 13(1).

2.0 ISSUE

[8] The issues before me in this case are:

1. Whether the School District is required by s. 22 of the Act to withhold personal information.

2. Whether the School District is required by s. 21 to refuse to disclose certain information.

[9] Under s. 57(3)(a), the applicants have the burden of proof regarding third-party personal information. Under s. 57(3)(b), the third party has the burden of proof respecting other information, that is, of showing that s. 21 applies.

3.0 DISCUSSION

[10] **3.1 Preliminary Issues** – I will first deal with two preliminary issues.

Third Party's arguments on additional exceptions

[11] The third party argued in his initial submission that ss. 12(3) and 13(1) apply to the requested records. Although he said he had raised these sections during mediation, they were not listed in the notice for this inquiry. The School District and the applicants made no comment on the third party's addition of these sections.

[12] In Order 04-04, the third party made arguments that ss. 12(3)(b) and 13(1) applied to certain records to which the School District had not applied them. I declined to consider them in that case and, for the same reasons that I gave in that order, I decline to consider them in this decision as well.

Notes of Interview with the First Applicants' Child

[13] In July 2003, the School District sent this office a letter stating that it had located notes of an interview with the First Applicants' child which related to the first investigation. It included copies of the notes. It did not appear that the notes were responsive to the First Applicants' request, but I sought the parties' views on this issue. If the parties did consider the notes responsive to the request, I also asked for the parties'

views on the disclosure of the notes to the First Applicants. Only the third party responded in writing, arguing that the notes are not responsive to the request and should not be disclosed.

[14] The First Applicants requested two investigation reports and related hearing records. On reflection, I do not consider the interview notes to be responsive to the First Applicants' request, as they did not request ancillary records from the first investigation. I have therefore not considered the notes in this decision. I have also not considered whether their disclosure would make a difference to the School District's proposed severing of the first investigation report.

[15] **3.2 Personal Privacy** – The School District made separate submissions respecting the two applicants' requests. Because there is considerable overlap in the issues and records, however, I have considered them all together. I refer below to the report from the first investigation as Report 1 and the report from the second investigation as Report 2. Report 2 is the "investigator's report" that I considered in Order 04-04.

[16] The Information and Privacy Commissioner has discussed the application of s. 22 in a number of orders, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56. I will not repeat that discussion but have applied the same principles here.

[17] I reproduce below the relevant parts of s. 22:

> **Disclosure harmful to personal privacy**
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (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
>
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (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
>
> …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

> …
>
> (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,
>
> … .

[18] The parties did not address whether the applicants were acting on their children's behalf, for the purposes of s. 3 of the *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93 ("FOI Regulation"). Given that the material before me indicates that the children are in elementary school, I am satisfied that s. 3 of the FOI Regulation applies, and that the applicants are acting on their own and their children's behalf in this case.

[19] The First and Second Applicants made brief initial submissions and no replies. In essence, they argue that they are entitled to the reports in full and that there is no invasion of privacy of the third-party teacher, in part as information in the reports was disclosed in a public setting. Failing that, they feel they should have access to their children's personal information.

[20] As an aside, I note that, in its initial submission, the School District discussed an e-mail message which the First Applicants sent to the School District. The School District said in its submission that this was the only hearing record that related to the First Applicants and that it proposed to disclose this record to them. The record appears to be the same e-mail message that the School District said it was enclosing with its response letter to the First Applicants, although this is not clear. In any case, I agree with the School District that it should disclose this record to the First Applicants, if it has not already done so.

Presumed unreasonable invasion of privacy

[21] The School District said it concluded that it could disclose a severed copy of Report 1 to the Second Applicants. (I note that the School District denied access to this report in its entirety in its original response to the Second Applicants. It thus appears that, during mediation, the School District changed its mind.) The School District said that s. 22(3)(d) applies to the rest of the record.

[22] The School District said it had concluded that it could disclose differently-severed copies of Report 2 to each of the First and Second Applicants. Each set of parents would receive a severed copy containing their own and their child's personal information, the School District said, as well as information that was no one's personal information.

[23] The School District applied s. 22(3)(d) to the majority of Reports 1 and 2, arguing that it was the teacher's employment history information or the personal information of others. Referring to Order 01-53, the School District argued that:

> Information created in the course of an investigation and disciplinary matter in the workplace that consists of evidence or statements by witnesses or a complainant about an individual's workplace behaviour or actions is information that relates to the third party's employment history. An investigator's observations or findings in the investigator's report about an individual's workplace behaviour or actions are part of the third party's employment history, and are subject to the presumption created by Section 22(3)(d) [citation omitted].
>
> ...
>
> … [Report 2] is an investigator's report about the Teacher's workplace behaviour or actions. The report contains recorded information about the Teacher and his performance as a teacher in the School District. The Report also records other third parties' opinions about the Teacher and his performance at work.
>
> …
>
> … [Report 2] is the personal information of the Teacher relating to his employment history and/or personal information of third party witnesses who were interviewed by the investigator in relation to their experiences of the Teacher.
>
> …
>
> Similarly, [Report 1] is an investigator's report about the Teacher's workplace behaviour or actions… .
>
> [Report 1] is about the Teacher. It includes summary comments about the Teacher which were made to the investigator by students and parents, as well and [*sic*] information relating to the Teacher's employment history and comments made by the Teacher. As such it contains personal information of the Teacher relating to his employment history and/or personal information of third party witnesses who were interviewed by the investigator in relation to their experiences of the Teacher.

[24] The School District argued that s. 22(4) does not apply to either report. I agree.

[25] The third party argued that the information in Reports 1 and 2 is the third party's personal information and falls under ss. 22(3)(b), (d) and (g). With respect to ss. 22(3)(d) and (g), the third party said, without elaborating, that these sections apply to the reports, as they consist of information on the third party's employment history and personal evaluations.

[26] The third party also said s. 22 even applies to the personal information of the applicants and their children, although he did not explain why he thinks so. I rejected the third party's argument on this issue in Order 04-04 and do so here as well. This is not a case where the applicants are not entitled to their own personal information.

[27] I have reviewed the reports and agree that some of the information they contain is no one's personal information, for example, general information about the terms of reference for the investigations, the investigators' methodologies and, in the case of Report 2, documentation the investigator reviewed. In addition, some of the information in the methodology section of Report 2 is aggregate references to students, staff or parents being interviewed. I agree with the School District that these types of information should be disclosed.

[28] A fair proportion of the rest of Report 2 falls under s. 22(3)(d) in that it consists of the educational history information of individual students who were interviewed. I described this information in Order 04-04. Although the students are not named in the report, references to them are linked to specific incidents and I am satisfied this means the students are identifiable to other students, staff and parents.

[29] Where it relates to identifiable students other than the applicants' own children, disclosure of the students' s. 22(3)(d) information in Report 2 to the applicants is presumed to be an unreasonable invasion of third-party privacy. However, a few portions in Report 2 evidently relate to the First and Second Applicants' children, as these portions are marked for release to them in their individually-severed copies of Report 2. As I discuss further below, as the First and Second Applicants are acting for their children in this case, they are entitled to have access to their children's personal information.

[30] Similar information in Report 1 is provided in summarized form and is therefore not linked to identifiable students. Thus, the severed copy of this report prepared for disclosure to the Second Applicants contains no information about their daughter in identifiable form.

[31] The rest of the two reports consist of the teacher's employment history information as I described it in Order 04-04. In the case of Report 1, the parents' and students' comments about the teacher are summarized in aggregate (non-identifying) form. Thus, the Second Applicants' copy contains no information about them. As for Report 2, given the nature of the incidents with the teacher which the parents and students relate, the information could be linked to identifiable students and parents. As in Order 04-04, in my view, all of this information in the two reports is the teacher's employment history information and is of the type that the Information and Privacy Commissioner has found to fall under s. 22(3)(d) in past orders. Disclosure of this information is therefore presumed to be an unreasonable invasion of third-party privacy.

[32] Some of the s. 22(3)(d) information about the teacher in Report 2, however, relates to the First and Second Applicants' own allegations and complaints against the teacher regarding his treatment of their children. I consider that this is also personal information about their children. The School District evidently concluded it could disclose this information to the First and Second Applicants, as it is marked for release to them in their copies of Report 2. Perhaps it viewed this as the children's personal information. In any case, as I discuss further below, the First and Second Applicants'

knowledge of these allegations and complaints is a relevant circumstance favouring disclosure of this s. 22(3)(d) information to them.

[33] Some personal information in the two reports consists of evaluations of the teacher's past and current work performance which in my opinion falls under s. 22(3)(g). Disclosure of this information is also presumed to be an unreasonable invasion of third-party privacy.

[34] As for s. 22(3)(b), the third party and the School District made the same arguments as they did in Order 04-04. For reasons which I gave in that order, I do not need to consider whether s. 22(3)(b) applies to the s. 22(3)(d) and (g) information in this case.

Relevant circumstances

[35] Turning to a consideration of the relevant circumstances, the third party asserted that ss. 22(2)(e)-(h) are all relevant here. The School District made the same arguments about s. 22(2)(f) as it did in Order 04-04, but again supplied no evidence to support its position on this issue. The School District also said, again without expanding, that it did not consider that there are any relevant factors rebutting the presumption of privacy. The third party made the same arguments about s. 22(2)(f) as he did in Order 04-04.

[36] I noted in Order 04-04 that Report 2 itself casts no light one way or the other on the confidentiality issue. The same applies here to both reports, although Report 1 has been stamped "confidential". The investigators do not, for example, state whether or not they conducted their interviews on a confidential basis. There is also no mention in the reports that students, parents and others agreed to be interviewed under conditions of confidentiality.

[37] There is no basis in the material before me on which I can conclude that the personal information in Reports 1 and 2 was supplied in confidence. I find that s. 22(2)(f) is not a relevant circumstance here.

[38] The third party made the same arguments regarding ss. 22(2)(e), (g) and (h) and other circumstances he believes are relevant as he did in Order 04-04, but, as in that case, did not explain how these s. 22(2) circumstances might apply here. For the same reasons as in Order 04-04, I am unable to conclude from the material before me that the other circumstances the third party raises, principally, ss. 22(2)(e), (g) and (h), apply here.

[39] One of the applicants argued that the information in the reports was disclosed in a public hearing but provided no evidence to support this assertion. The School District and third party dispute this argument in their replies. The School District goes on to say that the two reports were considered at *in camera* meetings of the school board. It also said its normal practice is to consider personnel matters at *in camera* meetings to protect third-party privacy. I accept the School District's arguments here. This circumstance does not apply.

[40] As I discussed in Order 04-04, there is, however, a relevant circumstance which I believe applies in the case of Report 2: an applicant's awareness of a third party's personal information. In this case, Report 2 reveals that the First and Second Applicants are aware of their own complaints and allegations against the teacher, where the complaints and allegations involve them and their children, their own interactions with the teacher and comments about the teacher's behaviour as regards their children, because they provided this information to the investigator or the School District. While this part of the teacher's information falls under s. 22(3)(d), its disclosure to the First and Second Applicants would not, in my view, unreasonably invade the teacher's personal privacy. I therefore agree with the School District's decision to release this information to the applicants.

[41] In addition, s. 3 of the FOI Regulation means that the First and Second Applicants are entitled to their children's personal information. Thus, the First and Second Applicants may receive their own children's personal information in their copies of Report 2. Again, the School District correctly marked such information for release.

[42] For the reasons I gave in Order 04-04, I also find that both applicants are entitled to receive the teacher's name in Reports 1 and 2, which the School District proposed withholding, along with the name of the school, references to the grade of the teacher's class and related information and one or two references to staff, all of which the School District had marked for withholding in both reports.

[43] I am not aware of any relevant circumstances favouring disclosure of the other personal information of the teacher in the two reports which falls under s. 22(3)(d), however, nor of any s. 22(3)(g) information. The School District was correct to withhold this remaining information from the First and Second Applicants. I have added one or two items which, in my view, fall under s. 22(3)(d) but which the School District did not mark for withholding, perhaps through an oversight.

[44] **3.3 Section 21** – Legal counsel for the third party said in his initial submission that, on behalf of the teacher, the NDTA and the BCTF, he would address whether s. 21(1) applies to the records in dispute. He acknowledged that the notice for this inquiry did not say that s. 21(1) would be an issue in this inquiry but said it had been raised earlier with the public body and with this office. The School District does not object in its reply to the third party raising s. 21(1) in his initial submission and, indeed, does not mention this issue at all.

[45] The purpose of s. 21 is to protect the business interests of third parties. I see no application of s. 21(1) to the teacher in this case. His role in this situation was purely personal. However, as the NDTA and the BCTF, as corporate entities, could potentially have s. 21(1) interests at stake in an inquiry and s. 21 is a mandatory exception, I have decided to consider the third party's arguments on this exception. I note that the third party has the burden of proof regarding this issue.

[46] The third party argues that ss. 21(1)(a)(ii), (b) and (c)(ii) and (iv) apply. They read as follows:

> **Disclosure harmful to business interests of a third party**
>
> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party, … .
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> …
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> …
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[47] The third party made the same arguments regarding s. 21 in Order 04-04 as in this inquiry. For the reasons that I gave in that order, I find that s. 21 does not apply to the records in dispute in this case.

4.0 CONCLUSION

[48] For the reasons given above, I make the following orders under s. 58:

1. Subject to para. 2 below, I confirm that the School District is required to withhold the personal information in Reports 1 and 2 that it withheld under s. 22 of the Act.

2. I require the School District to give the First Applicants access to information in Report 2, including their own and their child's personal information, as marked in the copy of that record provided to the School District with its copy of this order, and to give the Second Applicants access to information in Report 1, as marked in the copy of that record provided to the School District with its copy of this order, and to information, including their own and their child's personal information, in Report 2, as marked on the copy of that record provided to the School District with its copy of this order.

[49] For reasons given above, it is not necessary to make an order respecting s. 21.

February 16, 2004

Celia Francis
Adjudicator