

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-036

April 11, 2000

**BOARD OF TRUSTEES OF THE FOOTHILLS SCHOOL
DIVISION NO. 38**

Review Number 1529

I. BACKGROUND

[para. 1.] On April 2, 1998, a parent of two school students had a conversation with the school principal. On April 3, 1998, the principal drafted a memorandum (the "memo") to the associate superintendent regarding this conversation.

[para. 2.] On April 9, 1998, a meeting was held involving the parents (the "Applicants"), the principal and the associate superintendent. During the meeting, the principal gave the associate superintendent the above memo as well as notes written by two teachers. The principal did not provide a copy of these documents to the Applicants.

[para. 3.] On September 15, 1998, the Applicants applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Board of Trustees of the Foothills School Division No. 38 (the "Public Body"), for copies of the notes prepared by the two teachers and the memo prepared by the principal. The notes written by the two teachers were disclosed to the Applicants.

[para. 4.] On November 19, 1998, the Public Body disclosed a severed copy of the memo. The Public Body did not disclose certain information that it felt was not responsive to the Applicant's access request. The Public Body claimed that it withheld some information under section 16(2)(d) and section 16(2)(g) (presumed unreasonable invasion of a third party's personal privacy) of the Act. The Public Body claimed that it withheld other information under section 23(1)(a) (advice) and section 23(1)(b) (consultations or deliberations) of the Act.

[para. 5.] On December 22, 1998, I received a request from the Applicants to review the Public Body's decision to sever parts of the memo. On January 4, 1999, mediation was authorized, but was unsuccessful. The matter was set down for written inquiry. The Alberta Teachers' Association was granted intervenor status.

[para. 6.] I received written submissions from the Applicants, the Public Body, two of the third parties and the intervenor. Evidence was provided for the Public Body by the affidavits of the secretary treasurer of the school board, the associate superintendent and the school principal. I received rebuttal submissions from the Applicants, the Public Body and one third party.

[para. 7.] This Order proceeds on the basis of the Act as it existed before the amendments to the Act came into force on May 19, 1999.

II. RECORDS AT ISSUE

[para. 8.] The sole record at issue is the April 3, 1998 memo (MCS FAX Memo) from the school principal to the associate superintendent. The record is two pages in length.

[para. 9.] In this Order, I will refer to the line numbers as identified by the Public Body for either page one or page two of the memo. I will refer to both pages of the memo as the "Record". The Public Body numbered the lines on page one from top to bottom as lines 1 to 30. The lines on page two were numbered as lines 1 to 21.

[para. 10.] On page one, the Public Body did not disclose non-responsive information in the first line of the subject heading and lines number 3 to 9. I agree that that information is not responsive to the Applicant's access request and is therefore not at issue.

[para. 11.] The Public Body also severed all information in lines number 11 to 13, except for the first two words in line 11 and the last two words in line 13. The Public Body also severed the last three words of line 28

and all of lines 29 and 30. On page two, the last word in line two and all of lines 3 to 20 were severed.

III. ISSUES

[para. 12.] The two issues in this inquiry are as follows:

- A. Did the Public Body properly apply section 16 (unreasonable invasion of a third party's personal privacy) to the Record?
- B. Did the Public Body properly apply section 23(1)(a) (advice) and section 23(1)(b) (consultations or deliberations) to the Record?

IV. DISCUSSION

Issue A: Did the Public Body properly apply section 16 (unreasonable invasion of a third party's personal privacy) to the Record?

1. Personal information and unreasonable invasion of personal privacy, as provided in sections 1 and 16

[para. 13.] The Public Body says that section 16(2)(d) and section 16(2)(g) apply to the severed parts of lines 11 to 13 and lines 28 to 30 on page one of the Record. The Public Body also claims that section 16(2)(d) and section 16(2)(g) apply to portions of lines 4 to 7, 13 and 14, and 16 and 17 of page two of the Record.

[para. 14.] For section 16 to apply, there must be "personal information", as set out in section 1(1)(n) of the Act. In addition, the disclosure of the personal information must be or must be presumed to be an unreasonable invasion of a third party's personal privacy, as provided by section 16(1) or section 16(2) of the Act, respectively. When applicable, section 16 is a mandatory ("must") provision and personal information must be withheld.

2. Do the records contain personal information, as provided in section 1(1)(n)?

[para. 15.] Section 1(1)(n) says:

1(1) In this Act,

(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

...

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

[para. 16.] The Public Body says that the severed portions of lines 11 to 13 and lines 28 to 30 of page one of the Record and the three portions severed pursuant to section 16(2)(d) and section 16(2)(g) on page two of the Record, contain personal information consisting of names and employment history of individual third parties. The Public Body also says that these parts of the record contain personal views and opinions of an individual as well as opinions of others about individuals, which is the personal information of those individuals.

[para. 17.] After carefully reviewing the submissions, affidavits and the records, I find that the severed portions of lines 11 to 13 and lines 28 to 30 of page one of the Record and the three portions severed pursuant to section 16(2)(d) and section 16(2)(g) on page two of the Record, contain personal information of the kinds identified by the Public Body, as set out under section 1(1)(n).

3. Did the Public Body correctly decide that none of the criteria listed in section 16(4) apply to the Record?

[para. 18.] The relevant part of section 16(4) says:

16(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,

[para. 19.] Section 16(4) describes circumstances where disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. Section 16(4)(e) states that disclosure of personal information is not an unreasonable invasion of a third party's privacy when the information is about the third party's classification or employment responsibilities as an officer or employee of a public body.

[para. 20.] The affidavit of the secretary treasurer of the Public Body describes the circumstances considered pursuant to the provisions in section 16(4). I agree with the Public Body that none of the provisions in section 16(4) apply to these parts of the Record.

4. Would disclosure of the personal information be an unreasonable invasion of a third party's personal privacy, as provided in section 16(1) or section 16(2)?

a. General

[para. 21.] The relevant parts of section 16(1) and section 16(2) of the Act say:

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

...

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

...

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party,

[para. 22.] The Public Body must refuse to disclose the personal information when the disclosure would be an unreasonable invasion of a third person's personal privacy pursuant to section 16(1) of the Act. Disclosure is presumed to be an unreasonable invasion of a third party's personal privacy in the situations described in section 16(2). The Public Body says that section 16(2)(d) and section 16(2)(g) apply to the severed portions of page one and page two of the Record.

b. Would disclosure of personal information be presumed to be an unreasonable invasion of a third party's privacy, as provided in section 16(2)(d) or section 16(2)(g)?

[para. 23.] The Public Body says that disclosure of this information would be presumed to be an unreasonable invasion of a third parties' personal privacy pursuant to section 16(2)(d) and section 16(2)(g). The Public Body says that in these circumstances the job titles of third parties are employment history and that disclosure of this information is presumed to be an unreasonable invasion of personal privacy pursuant to section 16(2)(d).

[para. 24.] The Public Body says that the names of third parties appear with other personal information about the third party such as events, circumstances and facts, and that disclosure of the name itself would reveal personal information about the third party. The Public Body says that this information is interwoven with other personal information and that disclosure of identifying characteristics such as opinions could result in identification of the third party so this is the third parties' personal information.

[para. 25.] I have carefully reviewed these portions of the Record and I agree with the Public Body that this personal information meets the criteria for section 16(2)(g). As I have found that these portions of the Record fall within section 16(2)(g), it is not necessary for me to decide whether section 16(2)(d) also applies. Nonetheless, the personal information contained in this record must be considered under section 16(3).

c. What relevant circumstances did the Public Body consider under section 16(3), in determining whether the disclosure of personal information would be presumed to be an unreasonable invasion of a third party's personal privacy pursuant to section 16(1) or section 16(2)?

[para. 26.] When deciding whether a disclosure of personal information constitutes an unreasonable invasion of a third person's personal privacy under section 16(1) or section 16(2), the Public Body must consider all relevant circumstances as described in section 16(3).

[para. 27.] The relevant parts of section 16(3) of the Act say:

16(3) In determining under subsection (1) or (2) 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

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(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.

[para. 28.] In refusing to disclose the personal information, the Public Body says that it considered whether disclosure was relevant to a fair determination of the Applicant's rights pursuant to section 16(3)(c), and concluded that this was not the case. I agree that section 16(3)(c) is not a relevant circumstance and does not weigh in favour of disclosing the personal information.

[para. 29.] In its affidavit evidence, the Public Body says that it also considered whether a third party would be exposed unfairly to financial or other harm pursuant to section 16(3)(e), and concluded that this would be the case. The words could raise questions that could unfairly expose a third party to harm because the words may not accurately reflect the beliefs of a third party. I agree that section 16(3)(e) is a relevant circumstance and weighs in favour of refusing to disclose the personal information.

[para. 30.] In its affidavit evidence, the Public Body considered whether the personal information was likely to be inaccurate or unreliable pursuant to section 16(3)(g), and concluded that this was the case. I agree with the Public Body that section 16(3)(g) is a relevant circumstance and weighs in favour of refusing to disclose the personal information.

[para. 31.] The Public Body considered whether, pursuant to section 16(3)(h), the disclosure might unfairly damage the reputation of any person referred to in the record requested by the Applicants and concluded that this would be the case. The words could unfairly damage the reputation of a third party because it could unfairly stigmatize a third party. I agree that section 16(3)(h) is a relevant circumstance and weighs in favour of refusing to disclose the personal information.

[para. 32.] The list of relevant circumstances under section 16(3) is not exhaustive. Therefore, there may be other relevant circumstances that a public body must consider.

[para. 33.] In previous Orders, I have said that a third party's refusal to consent to disclosure is a relevant circumstance to consider in determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy under section

16(3). The third parties refused consent to disclosure in this situation. I agree with the Public Body that this is a relevant circumstance that weighs in favour of not disclosing the personal information contained in the Record.

[para. 34.] I have reviewed the Public Body's process under section 16(3). With respect to these severed portions of the Record, I find that the Public Body considered all the relevant circumstances under section 16(3). After considering all the relevant circumstances in section 16(3), I find that the Public Body properly came to the conclusion that the disclosure of the third party's personal information would be presumed to be an unreasonable invasion of personal privacy.

[para. 35.] The Applicant has the burden of proof under section 67(2) to prove that disclosure of the third parties' personal information would not be an unreasonable invasion of the third parties' personal privacy. I find that the Applicant has not met this burden of proof and that these portions of the Record should not be disclosed.

c. Conclusion under section 16

[para. 36.] I find that the Record contains personal information within the meaning of section 1(1)(n) of the Act. I find that section 16(4) does not apply to these severed portions of the Record. I find that section 16(2)(g) applies to these severed portions of the Record and that disclosure of this personal information would be presumed to be an unreasonable invasion of a third party's personal privacy. The Public Body has properly considered the relevant circumstances in section 16(3).

[para. 37.] The Applicant has not met the burden of proving that disclosure of the third parties' personal information would not be an unreasonable invasion of the third parties' personal privacy. Therefore, I uphold the Public Body's decision to withhold the personal information severed from the Record. The Public Body must not disclose that personal information.

[para. 38.] In summary, pursuant to section 16(2)(g), the Public Body must not disclose the following parts of the Record:

- (i) The severed parts of lines 11 to 13 and lines 28 to 30 on page one of the Record;
- (ii) The second and third sentences of the second paragraph on lines 4 to 7 on page two of the Record;

- (iii) The last sentence of the third paragraph on part of line 13 and all of line 14 on page two of the Record; and
- (iv) The last sentence of the fourth paragraph on part of line 16 and all of line 17 on page two of the Record.

Issue B: Did the Public Body properly apply section 23(1)(a) (advice) and section 23(1)(b) (consultations or deliberations) to the Record?

1. General

[para. 39.] In responding to the Applicants' access request, the Public Body withheld the severed portions of lines 2 to 20 of page two of the Record pursuant to section 23(1)(a) and section 23(1)(b).

[para. 40.] Since I have already found that the Public Body correctly applied section 16(2)(g) to the parts of the information that was severed from page two pursuant to section 16, I do not find it necessary to decide whether section 23 also applies to that information.

[para. 41.] I will now consider whether section 23 applies to the remaining parts of the Record that have not been dealt with so far. Specifically, I will now consider the following parts of page two of the Record:

- (a) The second and the last sentence in the second paragraph (part of line 2, line 3, and part of line 4);
- (b) The first four sentences in the third paragraph (lines 10-12 and part of line 13);
- (c) The first sentence in the fourth paragraph (line 15 and part of line 16); and
- (d) The entire fifth paragraph (lines 18-20).

These parts of the Record are the balance of the severed portion of page two of the Record.

[para. 42.] In order for a public body to withhold information under section 23(1), the Public Body must ensure that the information fulfills the criteria applicable in one of the provisions of section 23(1). In addition, the Public Body must ensure that the disclosure of information could reasonably be expected to "reveal" information described in this section. That is, the Public Body must not have previously disclosed the information in the public domain.

[para. 43.] I will first deal with the application of section 23(1)(a), followed by the application of section 23(1)(b).

2. Application of section 23(1)(a) (advice, proposals, recommendations, analyses or policy options)

[para. 44.] Section 23(1)(a) says:

23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

[para. 45.] In Order 96-006, I set out the criteria for “advice” (which includes advice, proposals, recommendations, analyses or policy options) under section 23(1)(a). That advice should:

- (a) be sought or expected, or be part of the responsibility of a person by virtue of that person’s position;
- (b) be directed toward taking an action; and
- (c) be made to someone who can take or implement the action.

[para. 46.] In order to fulfill this section, the information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process. The record must contain more than a bare recitation of facts or summaries of information, although factual information sufficiently interwoven with other advice, proposals, recommendations or policy options may also be withheld.

[para. 47.] The balance of the severed portion of page two of the Record involves analyses, advice and proposals. This advice is expected as part of the responsibilities of a principal to communicate with an associate superintendent. This advice is directed towards taking an action and is made to the associate superintendent who can implement the action.

[para. 48.] After carefully reviewing the records, I find that the Public Body properly withheld the balance of the severed portions of lines two to twenty of page two of the Record under section 23(1)(a).

[para. 49.] The application of section 23(2) must also be considered, as section 23(1) information must not be withheld when the information falls within section 23(2). I find that the Public Body correctly determined that section 23(2) does not apply and therefore does not require disclosure of this portion of the record.

3. Application of section 23(1)(b) (consultations and deliberations)

[para. 50.] The Public Body says that section 23(1)(b) applies to the same information severed on page two of the Record to which the Public Body applied section 23(1)(a). As I have already found that the Public Body correctly applied section 23(1)(a) to the information, I do not find it necessary to decide whether section 23(1)(b) also applies to that same information.

4. Exercise of discretion under section 23(1)(a)

[para. 51.] Section 23(1) is a discretionary (“may”) exception. Consequently, even if this section applies to the information in the records, a public body may nevertheless decide to disclose the information. In Order 96-017, I said that a public body exercises its discretion properly when (1) it considers the objects and purposes of the legislation in question, and (2) it does not exercise its discretion for an improper or irrelevant purpose.

[para. 52.] After reviewing the submissions and the affidavits, it is my opinion that the Public Body properly exercised its discretion according to the objects and purposes of the Act and did not exercise its discretion for an improper or irrelevant purpose. I find that the Public Body has disclosed the information that it could disclose.

5. Conclusion under sections 23(1)(a) and 23(1)(b)

[para. 53.] I find that the Public Body correctly applied section 23(1)(a) to the information severed from the balance of lines two to twenty on page two of the Record. The Public Body has the burden of proof under section 67(1) to prove that the Applicants have no right of access to the Record, and I find that the Public Body has met this burden of proof. Therefore, I uphold the Public Body’s decision to refuse the Applicants access to that information.

[para. 54.] I find that the Public Body correctly applied section 23(1)(a) to the following parts of page two of the Record:

- (a) The second and the last sentence in the second paragraph (part of line 2, line 3 and part of line 4);
- (b) The first four sentences in the third paragraph (lines 10-12 and part of line 13);

- (c) The first sentence in the fourth paragraph (line 15 and part of line 16); and
- (d) The entire fifth paragraph (lines 18-20).

[para. 55.] I wish to caution the parties not to interpret my decision under section 23(1)(a) too broadly, as my decision is limited to the specific facts and circumstances of this case.

V. ORDER

[para. 56.] I make the following Order under section 68 of the Act:

A. Did the Public Body properly apply section 16 (unreasonable invasion of a third party's personal privacy) to the Record?

[para. 57.] The Public Body properly applied section 16(2)(g) to the following parts of the Record:

- i. The severed parts of lines 11 to 13 and lines 28 to 30 on page one of the Record;
- ii. The second and third sentences of the second paragraph on lines 4 to 7 on page two of the Record;
- iii. The last sentence of the third paragraph on part of line 13 and all of line 14 on page two of the Record; and
- iv. The last sentence of the fourth paragraph on part of line 16 and all of line 17 on page two of the Record.

[para. 58.] I uphold denial of access to the foregoing parts of the Record severed by the Public Body pursuant to section 16(2)(g). The Public Body is required to refuse access to those parts of the Record.

B. Did the Public Body properly apply section 23(1)(a) (advice) and section 23(1)(b) (consultations or deliberations) to the Record?

[para. 59.] The Public Body properly applied section 23(1)(a) to the following parts of the Record:

- i. The second and the last sentence in the second paragraph (part of line 2, line 3 and part of line 4);
- ii. The first four sentences in the third paragraph (lines 10-12 and part of line 13);
- iii. The first sentence in the fourth paragraph (line 15 and part of line 16); and
- iv. The entire fifth paragraph (lines 18-20).

[para. 60.] I uphold denial of access to the foregoing parts of the Record severed by the Public Body pursuant to section 23(1)(a). I find that the Public Body is authorized to refuse access to the foregoing parts of the Record.

[para. 61.] Having made this decision under section 23(1)(a), I do not find it necessary to decide whether the Public Body correctly applied section 23(1)(b) to the same information.

[para. 62.] In summary, the Applicants do not receive access to any of the information that was withheld by the Public Body.

Robert C. Clark
Information and Privacy Commissioner