

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2002-018

October 11, 2002

EDMONTON PUBLIC SCHOOLS

Review Number 2320

Office URL: <http://www.oipc.ab.ca>

Summary: The Complainant sent a letter of complaint to Edmonton Public Schools (the “Public Body”), and sent a copy of that letter to a number of other persons. The Public Body responded by letter to the Complainant, and sent a copy of that letter to the persons to whom the Complainant had sent a copy of the Complainant’s letter. The Complainant alleged that the Public Body disclosed personal information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (the “Act”) when it sent a copy of the letter to the other persons. The Commissioner found that the Public Body did not disclose the personal information in contravention of Part 2 of the Act.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17(2)(a) [previously section 16(2)(a)], 17(5)(a),(c),(i) [previously section 16(5)(a),(c),(i)], 40(1)(b) [previously section 38(1)(a.1)], 40(1)(d) [previously section 38(1)(c)], 40(1)(h) [previously section 38(1)(g)]; *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95, s. 6.

Order Cited: AB: Order 97-019.

I. BACKGROUND

[para 1] On September 23, 2001, the Complainant wrote a letter of complaint to Edmonton Public Schools (the “Public Body”) regarding the Complainant’s child. The Complainant sent a copy of the letter to the Complainant’s lawyer, a Member of the Legislative Assembly and two special interest organizations.

[para 2] On September 25, 2001, the Public Body responded to the Complainant’s September 23, 2001, letter. The Public Body initially did not send a copy of the letter to those persons to whom the Complainant sent a copy of the Complainant’s September 23, 2001, letter.

[para 3] On October 15, 2001, the Public Body sent a copy of the September 25, 2001, letter to all those persons to whom the Complainant sent a copy of the Complainant’s September 23, 2001, letter. The Public Body also sent a copy of its letter to a senior official of the Public Body. All those copied on October 15, 2001 are from now on referred to as the “cc’s” or “cc’d”. On October 15, 2001, the Public Body notified the Complainant that the cc’s identified in the Complainant’s September 23, 2001, letter had been mailed copies of the Public Body’s September 25, 2001, letter.

[para 4] On December 11, 2001, the Complainant wrote my Office alleging that the Public Body disclosed personal information of the Complainant’s child in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (the “Act”). The Complainant alleged the disclosure occurred when the Public Body’s letter of September 25, 2001, was mailed, on October 15, 2001, to the cc’s identified in the Complainant’s September 23, 2001, letter to the Public Body.

[para 5] My Office investigated the complaint. The Complainant was not satisfied with the results of the investigation and requested a review.

[para 6] The revised *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, F-25, came into force on January 1, 2002. Most of the section numbers of the Act changed but not the substance of the sections. Consequently, in this Order, I have set out the new section numbers. The previous section numbers appear in square brackets after the new section numbers.

II. RECORDS AT ISSUE

[para 7] This inquiry deals with a complaint and not a request for access. Although there are no records directly at issue, the Complainant supplied copies of records that related to the complaint.

III. ISSUE

[para 8] The issue in this inquiry is:

Did the Public Body disclose personal information in contravention of Part 2 of the Act?

IV. DISCUSSION OF THE ISSUE

[para 9] The Public Body contended that the disclosure to the cc'd individuals in the letter of October 15, 2002, was a disclosure allowed under Part 2 of the Act. The Complainant alleged that the disclosure was without consent and therefore in contravention of the Act and the Regulation to the Act.

[para 10] I have reviewed the records the Complainant supplied. I find that there is personal information of the Complainant's child as set out in section 1(n) of the Act [previously section 1(1)(n)]. I will now consider whether disclosure of that personal information was authorized under the Act.

A. Disclosure under section 40(1)(h)

[para 11] The Public Body argued that the internal disclosure within the Public Body by cc'ing a senior official, in this case the Superintendent of the Public Body, was permitted under section 40(1)(h) of the Act [previously section 38(1)(g)].

[para 12] The Complainant did not take issue with this type of disclosure by the Public Body.

[para 13] Section 40(1)(h) [previously section 38(1)(g)] reads:

40(1) A public body may disclose personal information only:

(h) to an officer or employee of the public body or to a member of the Executive Council, if the information is necessary for the performance of the duties of the officer, employee or member, ...

[para 14] The Superintendent is an officer and employee of the Public Body. One of the duties of the Superintendent is to review complaints made about the Public Body. Without knowledge of the personal information on this matter, the Superintendent could not properly carry out supervisory duties or perform the duties of the position for the Public Body.

[para 15] I conclude that the Public Body had authority under section 40(1)(h) [previously section 38(1)(c)] to disclose the personal information to the Superintendent of the Public Body. Therefore, the Public Body did not disclose personal information to the

Superintendent in contravention of Part 2 of the Act. Having made this finding, I will now consider disclosure to the remaining cc's.

B. Disclosure under section 40(1)(d)

[para 16] Section 40(1)(d) of the Act [previously section 38(1)(c)] reads:

40(1) A public body may disclose personal information only

(d) if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure, ...

[para 17] The Public Body argued that under section 40(1)(d) [previously section 38(1)(c)], consent to disclose personal information must be in the “prescribed manner” and that consent must clearly conform to section 6 of the Regulation to the Act.

[para 18] Section 6 of the Regulation reads:

- 6 The consent of an individual to a public body's using or disclosing any of the individual's personal information under sections 39(1)(b) or 40(1)(d) of the Act*
- (a) must be in writing, and*
 - (b) must specify to whom the personal information may be disclosed and how the personal information may be used.*

[para 19] The Public Body noted that in Order 97-019, “cc’ing” did not amount to consent in that particular context.

[para 20] However, the Public Body went on to argue that the “cc”, in the context of the Complainant’s letter, did amount to consent under section 6 of the Regulation. The Public Body supported the argument for consent in context by highlighting that:

- (a) the letter of the Complainant was evidence that the consent was in writing, allowing personal information to be disclosed (a response to very specific questions and allegations),
- (b) the letter of the Complainant advised to whom the personal information could be disclosed (the cc’s).
- (c) the letter directed how the personal information could be used (for the further information of those cc’d).

[para 21] The Complainant argued that “prescribed manner” referenced in section 6 of the Regulation clearly illustrates what constitutes written consent.

[para 22] The Complainant further argued that Order 97-019 is clear in that consent cannot be inferred from a “cc” in a letter and at minimum does not remove the obligation, especially where there might be doubt, from obtaining the consent of the writer.

[para 23] I do not accept the Public Body’s argument that there is a section 40(1)(d) [previously section 38(1)(c)] consent, in this context, to disclosure that meets the requirements of section 6 of the Regulation.

[para 24] I agree with the Complainant that consent cannot be inferred under section 40(1)(d) [previously section 38(1)(c)]. Section 6 of the Regulation sets out what is required to constitute written consent. As section 6 of the Regulation was not followed, the Public Body had no authority to disclose under section 40(1)(d) [previously section 38(1)(c)].

C. Disclosure under section 40(1)(b)

[para 25] The Public Body argued that the disclosure to the cc’s was authorized under section 40(1)(b) of the Act [previously section 38(1)(a.1)].

[para 26] Section 40(1)(b) [previously section 38(1)(a.1)] reads:

40(1) A public body may disclose personal information only

(b) if the disclosure would not be an unreasonable invasion of a third party’s personal privacy under section 17,...

[para 27] The Public Body noted that section 40(1)(b) [previously section 38(1)(a.1)] references the entirety of section 17 of the Act [previously section 16].

[para 28] The Public Body went on to examine the application of section 17(2)(a) of the Act [previously section 16(2)(a)].

[para 29] Section 17(2)(a) reads:

17(2) A disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy if

(a) the third party, has in writing, consented to or requested the disclosure.

[para 30] The Public Body argued that section 17(2)(a) [previously section 16(2)(a)] does not contain the same requirement of section 40(1)(d) of the Act [previously section 38(1)(c)], which is consent in the “prescribed manner”. The Public Body contended that the section only required consent to be in writing. The Public Body, while accepting the regulatory requirements for consent under section 40(1)(d) [previously section 38(1)(c)],

submitted that the same did not hold true for section 40(1)(b) [previously section 38(1)(a.1)] and the consequential section 17(2)(a) [previously section 16(2)(a)] arguments. The Public Body submitted that for the purpose of determining whether an unreasonable invasion of a third party's personal privacy has occurred, section 17(2)(a) [previously section 16(2)(a)] is not as rigid as section 40(1)(d) [previously section 38(1)(c)].

[para 31] The Public Body concluded that the restrictions imposed by section 6 of the Regulation to the Act do not apply where there is consent in writing under section 17(2)(a) [previously section 16(2)(a)].

[para 32] The Complainant argued that section 6 of the Regulation illustrates what is sufficient to constitute appropriate written consent and therefore applies to section 17(2)(a) [previously section 16(2)(a)]. The Complainant went on to argue that regardless of whether section 6 of the Regulations to the Act applies, a "cc" is not proper evidence of intent to disclose.

[para 33] It appears that the consent contemplated by section 6 of the Regulation and section 17(2)(a) [previously section 16(2)] are different. However, I do not need to decide which of those consents section 40(1)(b) [previously section 38(1)(a.1)] requires in this case because there is clearly no consent in writing as required by either section 6 of the Regulation or section 17(2)(a) [previously 16(2)(a)]. Therefore section 17(2)(a) [previously section 16(2)(a)] does not apply.

[para 34] The Public Body also argued that it found support for disclosure under section 17(5) of the Act [previously section 16(5)]. The Public Body considered the following provisions of section 17(5) [previously section 16(5)], which read:

- 17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of the public body must consider all of the relevant circumstances, including whether*
- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
 - (c) the personal information is relevant to a fair determination of the applicant's rights,*
 - (i) the personal information was originally provided by the applicant.*

[para 35] The Public Body in arguing section 17(5) [previously section 16(5)] did not want to limit the submission to sections 17(5)(a),(c) or (i) [previously section 16(5)(a), (c) or (i)]. As the Public body did not directly address any other sections, I have limited my comments to only those sections specifically raised by the Public Body.

[para 36] The Public Body cites various Orders of the Commissioner establishing the criteria set out for the application of section 17(5)(a) [previously section 16(5)(a)], which criteria the Public Body summarized as:

1. *More than one person has decided that scrutiny of the public body is necessary*-in this case the Complainant and spouse.
2. *The Complainant's concerns are about actions of more than one person in the public body*-the principal and teachers.
3. *The public body has not previously disclosed a substantial amount of information about the matter*-as is the case

[para 37] The Public Body argued that it met the criteria and therefore the disclosure is supported by section 17(5)(a) [previously section 16(5)(a)], as the Complainant's action of copying the letter was to subject the Public Body's activities to public scrutiny.

[para 38] The Public Body submitted that the disclosure of the personal information to the cc'd is authorized under sections 40(1)(b) [previously section 38(1)(a.1)] and section 17(5)(a) [previously section 16(5)(a)] and was therefore not an unreasonable invasion of privacy.

[para 39] The Complainant believed that the Public Body failed to comply with the established criteria. The Complainant argued that the Orders cited by the Public Body are distinguishable as they dealt with applicants seeking access to information and not an "after the fact" justification for disclosing third party personal information.

[para 40] I do not share the view of the Complainant regarding the "after the fact" concern. It appears that, early on, the Public Body thought it was being subjected to public scrutiny. Hence, the Public Body cc'd the response to inform the persons cc'd about how the Public Body would handle the issue.

[para 41] Section 40(1)(b) [previously section 38(1)(a.1)] allows a public body to exercise its discretion to disclose personal information if disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17 [previously section 16]. Consequently, I would expect a public body to use section 17 [previously section 16] as guidance when deciding whether to exercise its discretion to disclose personal information under section 40(1)(b) [previously section 38(1)(a.1)].

[para 42] Upon reviewing both submissions, it became evident that the Complainant decided public scrutiny was necessary, as indicated by the status of those copied in the letter by the Complainant. One of the individuals copied was a publicly-elected official. It is often the case that when one asks a publicly-elected official to review matters of concern it is because the complainant believes that the activity in question warrants public scrutiny. It also became apparent that the Complainant's concerns are about actions of more than one person. The complaint deals with actions of the principal and called into question the actions of several staff members. Lastly, there is no evidence that the Public Body had previously disclosed the personal information in question.

Consequently, the relevant circumstances of section 17(5)(a) [previously section 16(5)(a)] tips the balance toward disclosure not being an unreasonable invasion of the Complainant's child's personal privacy.

[para 43] Considering that relevant circumstance, the Public Body properly exercised its discretion when it disclosed the personal information to inform the cc's about how it would handle the issue. I find the Public Body had authority under section 40(1)(b) [previously section 38(1)(a.1)], to disclose the personal information.

[para 44] Even though it is not necessary, I will deal with the Public Body's other arguments briefly.

[para 45] In addition to arguing for disclosure under section 17(5)(a) [previously section 16(5)(a)], the Public Body submitted that the disclosure could have been allowed under section 17(5)(c) [previously section 16(5)(c)] of the Act. The Public Body loosely connected the issue as to how the disclosure related to the sharing of the information with

the Superintendent to obtain a fair determination of the Complainant's rights. The Complainant did not find a need to address the application of section 17(5)(c) [previously section 16(5)(c)].

[para 46] The Public Body did not clearly establish a clear link between the disclosure and the Superintendent needing to or making a fair determination of the Complainant's rights. Therefore, section 17(5)(c) [previously section 16(5)(c)] does not apply. Furthermore, I have already considered the disclosure to the Superintendent elsewhere in this Order.

[para 47] The submission of the Public Body went further to briefly examine the possible application of section 17(5)(i) [previously section 16(5)(i)]. The Public Body viewed the information in the response letter as a reiteration of the information found in the original letter of the Complainant. The Complainant's view of this was that it is not applicable because the response of the Public Body had personal information that was not included and deviated from the information in the Complainant's original letter.

[para 48] Section 17(5)(i) [previously section 16(5)(i)] is relevant in circumstances when an applicant requests access to personal information of a third party that the applicant supplied. Since that situation does not exist here, section 17(5)(i) [previously section 16(5)(i)] does not apply.

V. ORDER

[para 49] I make the following Order under section 72 of the Act [previously section 68].

[para 50] The Public Body did not disclose personal information in contravention of Part 2 of the Act.

Frank Work, Q.C.
Information and Privacy Commissioner