ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2008-023

March 31, 2009

EDMONTON SCHOOL DISTRICT NO. 7

Case File Number F4025

Office URL: www.oipc.ab.ca

Summary: A teacher (the "Teacher") and a secretary were involved in a dispute while both worked at a school operated by Edmonton School District No. 7 (the "Public Body"). Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Teacher asked the Public Body for a copy of a letter that had been received by the secretary and that the Teacher believed contained her personal information. The Public Body refused to provide access, saying that the letter was not in its custody or under its control, as it had been given to the secretary in her individual capacity.

The Adjudicator found that the letter contained the Teacher's personal information, but that it had not been collected by the Public Body. When the secretary obtained the letter, she did so in her personal capacity, albeit in relation to a dispute with a fellow employee. The fact that the secretary referred to the existence of the letter at a subsequent meeting was not enough to conclude that the Public Body collected the Teacher's personal information. In the Adjudicator's view, for there to be a collection by the Public Body, the secretary would have had to produce the letter at the meeting, provide it to the principal, assistant principal or another representative of the Public Body as her employer at any time, or convey or use the actual contents of the letter in some way.

The Adjudicator also found that the Public Body did not use or disclose the Teacher's personal information. The Teacher's personal information in the letter was not used at the meeting. Although the secretary submitted the letter to her union, she did not do so on behalf of the Public Body. As the Adjudicator found that the Public Body did not

collect, use or disclose the Teacher's personal information, he concluded that the Public Body did not contravene Part 2 of the Act.

The Adjudicator found that the letter requested by the Teacher was not in the custody or under the control of the Public Body. It was not held by the secretary for the purposes of her duties as an officer or employee, or created with the intent that it necessarily be addressed by the Public Body. Rather, it was written at the request of the secretary in order for her to use it at her own discretion, if at all. Even if there had been a harassment complaint by the secretary against the Teacher, which may have engaged an administrative regulation of the Public Body, the Adjudicator found that the regulation did not require the secretary to produce the letter, and therefore did not give the Public Body the right to possession of it.

As the Adjudicator found that the letter was never in the custody or under the control of the Public Body, he concluded that the Teacher had no right of access to it under the Act. He further concluded that the Public Body met its duty to assist the Teacher under section 10(1).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(b), 1(n)(viii), 4(1), 6(1), 6(2), 7(1), 10(1), 33, 34, 35(b), 39, 39(1), 39(4), 40, 40(1), 40(4), 41, 72, 92, 92(1)(a), 92(1)(g) and 92(2); *Personal Information Protection Act*, S.C. 2003, c. P-6.5.

Authorities Cited: AB: Orders 99-012, 99-032, 99-038, 2000-030, F2002-006, F2002-014, F2004-008, F2005-003, F2006-019, F2006-024, F2007-019 and P2008-007; Investigation Reports 99-IR-004, 2001-IR-004 and 2001-IR-010. **ON:** Orders M-902 (1997) and MO-1770 (2004).

I. BACKGROUND

[para 1] By letter dated February 28, 2007, a teacher (the "Teacher") employed by Edmonton School District No. 7, also known as Edmonton Public Schools (the "Public Body") made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act"). She asked the Public Body for a copy of a letter that had been recently written to and received by a secretary who was also employed by the Public Body, which letter the Teacher believed contained the Teacher's personal information.

[para 2] By e-mail dated March 5, 2007, the Public Body told the Teacher that it could not respond to her access request. The Public Body took the position that the letter was not in its custody or under its control, as it had been provided to the secretary in her individual capacity, rather than as a representative of the Public Body.

[para 3] By letter dated March 6, 2007, the Teacher complained to this Office that the Public Body had improperly collected and used the letter, and had improperly disclosed it to the Canadian Union of Public Employees, Local 3550. The Teacher and the Canadian Union of Public Employees, Local 3550 are parties to a separate but related

inquiry, being that for case file number P0647 under the *Personal Information Protection Act*. That inquiry has resulted in Order P2008-007, issued the same date as this Order. In her letter of March 6, 2007 to this Office, the Teacher also referred to the Public Body's decision not to provide her with access to the letter that she requested. (It is because the Teacher is both a complainant and an applicant under the Act that I have chosen to refer to her as the "Teacher".)

[para 4] Mediation by a portfolio officer of the matters involving the Teacher and the Public Body was authorized by the Commissioner, but was not successful. A written inquiry was therefore set down.

[para 5] In their submissions, both the Teacher and the Public Body referred to the portfolio officer's assessment of the matters between them, as well as attached the written assessment. These things should not be done, as an inquiry by this Office is a separate process from mediation or investigation. As set out in this Office's notices of inquiry, the Commissioner or his delegate in an inquiry normally has no access to information that arose in the context of possible settlement of the matter. In reaching my conclusions in this Order, I have not given weight to the findings of the portfolio officer.

II. RECORD AT ISSUE

[para 6] The record at issue is a letter received by a secretary of the school operated by the Public Body, which letter allegedly contains the Teacher's personal information.

III. ISSUES

[para 7] The Notice of Inquiry, dated July 16, 2008, set out the following issues:

> Did the Public Body collect, use and/or disclose the Teacher's personal information in contravention of Part 2 of the Act?
>
> Was and/or is the Teacher's personal information contained in a record that was and/or is in the custody or under the control of the Public Body, within the meaning of section 6(1) of the Act?

[para 8] By letter dated August 6, 2008, the Teacher asked that four other issues be added to the inquiry. This Office provided a copy of the relevant parts of the letter to the Public Body. In letters dated September 12, 2008, this Office advised the parties of my decision regarding additional issues. The letter to the Teacher (referred to as the Complainant below) was as follows:

> *This is in response to your letter of August 6, 2008, in which you propose the addition of issues in the above inquiry under the Freedom of Information and Protection of Privacy Act.*

The Adjudicator has considered your request. At this time, it is his view that the issues identified in the Notice of Inquiry, dated July 16, 2008, adequately address the matters that are involved in this inquiry.

The Adjudicator has declined to add the first issue that you proposed, regarding the Public Body's duty to assist the Complainant, because the dispute over the Complainant's access request is sufficiently addressed by the issue of whether the Public Body had custody or control of her personal information. That issue subsumes the question of whether it should have responded to her in accordance with the Act.

The Adjudicator has declined to add the second issue that you proposed, regarding the specific provisions of Part 2 of the Act that may have been contravened, as the current Notice of Inquiry already sets out the issue of alleged improper collection, use and/or disclosure. The parties may already comment on any provision of Part 2 of the Act in that regard.

Regarding the third and fourth issues that you proposed, the Adjudicator has determined that he has no jurisdiction to address allegations of offences under section 92 of the Act (see Order F2005-003 at para. 41). The order-making powers that are available on completion of an inquiry, under section 72, do not grant the authority to find that an offence has been committed or that there is liability to pay a fine (see Order 99-012 at para. 48; Order 2000-030 at para. 37). However, the matter of alleged offences has been referred to the Commissioner for his consideration as to whether and how to proceed.

[para 9] In her submissions to the inquiry itself, the Teacher has objected to my decision not to hear additional issues, and has therefore proceeded to address them. I have not changed my decision as set out above – with one exception. In order to address whether the Public Body met its duty to assist the Teacher, I have decided to add the following issue:

> Did the Public Body meet its duty to assist the Teacher, as provided by section 10(1) of the Act?

[para 10] I will indicate, later in this Order, why I have now included the above issue in the inquiry, as well as respond more fully to the Teacher's submissions that other issues be added.

IV. DISCUSSION OF ISSUES

A. Did the Public Body collect, use and/or disclose the Teacher's personal information in contravention of Part 2 of the Act?

[para 11] Part 2 of the Act governs the collection, use and disclosure of personal information by a public body. In her letter of August 6, 2008 to this Office, the Teacher proposed to specifically add issues under sections 33, 39(1), 39(4), 40 and 41. As these all fall under Part 2 of the Act, the Teacher may address them in any event.

[para 12] Section 33 of the Act sets out the circumstances under which a public body has the authority to collect an individual's personal information, and section 34 governs the manner of collection. Section 39(1) sets out circumstances under which a public body has the authority to use personal information, and section 39(4) states that the use may only be to the extent necessary and in a reasonable manner. Similarly, Section 40(1) sets out circumstances under which a public body has the authority to disclose personal information, and section 40(4) states that the disclosure may only be to the extent necessary and in a reasonable manner. Finally, section 41 sets out when a use or disclosure of personal information is consistent with the purpose of collection.

[para 13] This part of the inquiry deals with the Public Body's alleged unauthorized collection, use and disclosure of the Teacher's personal information. In most instances, the initial burden of proof rests with the complainant, in that the complainant has to have some knowledge, and adduce some evidence, regarding what personal information was collected, used and/or disclosed, and the manner in which the personal information was collected, used and/or disclosed; the public body then has the burden to show that its collection, use and/or disclosure of personal information was in accordance with the Act (Order F2006-019 at para. 5; Order F2007-019 at para. 8).

1. Did the Public Body collect the Teacher's personal information?

[para 14] The record at issue is a letter written by a parent and given to the secretary of the school operated by the Public Body sometime between approximately February 16, 2007 – being the date the parent apparently witnessed an incident between the Teacher and the secretary – and February 21, 2007. On February 21, 2007, the letter was referred to by the secretary at a meeting attended by her, the Teacher, the school principal and the school assistant principal. The Teacher states that the meeting was for the purpose of resolving an informal harassment complaint made against her by the secretary, and that the complaint and resolution process were under an administrative regulation of the Public Body, discussed in more detail below.

[para 15] The Public Body disputes that there was a harassment complaint, submitting instead that the meeting was intended to informally resolve a personal dispute between the Teacher and the secretary. In a letter to this Office dated July 27, 2008, in response to this Office's request for the records at issue, the Public Body states that a parent witnessed an incident between the Teacher and the secretary, and that the secretary

asked the parent to document the incident in a letter and provide the letter to her. The Public Body says that the secretary arranged this, on her own counsel and for her own purposes, in the context of an interpersonal conflict with a fellow employee.

[para 16] As the Public Body submits that it never had the letter in question, a copy of it was not provided to me in this inquiry. Nonetheless, I find on a balance of probabilities that the letter contained the Teacher's personal information. In her affidavit, the Teacher states:

> *Towards the end of the meeting, I said that while I wanted to solve the matter, … I felt I was being harassed and not treated like the other teachers, or words to that effect. [The secretary] responded by saying: "If you want to go in that direction, I have a letter from a parent… complaining about you. I hadn't wanted to do anything with it, because I wanted to resolve things with you, but…", or words to that effect. [The secretary] said nothing otherwise about the contents of the letter… but from the context, I could only conclude that the [l]etter was critical of me and contained sensitive and negative personal information about me which she could use to her advantage in her harassment complaint against me.*

[para 17] Under section 1(n)(viii) of the Act, "personal information" includes anyone else's opinions about the individual. A letter from a parent "complaining" about the Teacher would contain the parent's opinions about her. The principal who swore an affidavit on the Public Body's behalf does not dispute that the secretary referred, at the meeting, to a letter that the secretary stated was complaining about the Teacher. The Teacher also states in her affidavit that the parent who wrote the letter approached her on or about May 10, 2007 to discuss the fact that the parent had written the letter and that, from the context of that discussion, the Teacher understood the letter to contain information about her. Finally, the Public Body's letter to this Office of July 27, 2008 states that the parent was asked to document an incident between the Teacher and the secretary. A description of an incident involving the Teacher would contain some of the Teacher's personal information.

[para 18] While I find that the letter contained the Teacher's personal information, I must also determine whether the Public Body collected the Teacher's personal information.

[para 19] Contrary to the submissions of the Public Body, I do not characterize the disagreement between the Teacher and the secretary as merely a personal matter. The matter between those two individuals arose in the context of their employment by the Public Body, apparently related to a disagreement over the employment responsibilities of the secretary, and it involved attempted resolution by the principal and assistant principal as representatives of the Public Body as their employer. Even if there was never a formal or informal harassment complaint, the matter was nonetheless an employment matter.

[para 20] However, I find that Public Body did not collect the letter and therefore did not collect the Teacher's personal information contained in it. When the secretary obtained the letter from the parent, she did not do so on behalf of, or as a representative of, the Public Body. She did so in her personal capacity, albeit in relation to a dispute with a fellow employee. In my view, in order for there to have been a collection of the letter by the Public Body, the secretary would have had to provide the letter to her employer (e.g., the principal, assistant principal or any other officer or employee of the Public Body acting as the employer's representative), or actually used the letter in some way in her capacity as an employee so that it could be said that, at that moment, she collected it in the name of her employer. In short, it is possible for employees to have or obtain personal information about other employees, and even keep that information at their place of work, without the personal information being collected by their employer. Something more has to happen in order for there to be a collection by the employer, in this case the Public Body.

[para 21] The Public Body states in its letter of July 27, 2008 to this Office that the letter was referred to but not shown at the meeting of February 21, 2007. In her affidavit, the Teacher indicates that the secretary mentioned the letter but that the secretary said nothing otherwise about its contents. The fact that the secretary referred to the existence of the letter at the meeting is not enough to conclude that the Public Body collected the Teacher's personal information. "Personal information" is defined in the Act as *recorded* information about an identifiable individual. In other words, in order for the Public Body (e.g., the principal or assistant principal representing it) to collect the Teacher's personal information from the secretary (who I find was not representing the Public Body when she, herself, first obtained the letter), the principal or assistant principal was required to write the information down. There is no suggestion that this occurred in this case. Alternatively, the secretary was required to convey or use the Teacher's personal information in such a way that it could be characterized that she collected the recorded information in the letter itself, on behalf of the Public Body, at the meeting. This did not occur either.

[para 22] I conclude that the Public Body did not collect the Teacher's personal information. Had the secretary produced the letter at the meeting, provided it to the principal, assistant principal or another representative of the Public Body as her employer at any time, or conveyed or used its actual contents in such a way that the personal information of the Teacher could be characterized as having been collected by the Public Body at the meeting or any other time, I would have decided differently.

[para 23] The question of whether a public body collected a record containing an individual's personal information overlaps with the question of whether it had or has custody of the record. I discuss whether the Public Body had or has custody or control of the letter at issue in the next part of this Order, which indirectly provides further explanation as to why I find that there was no collection of the Teacher's personal information by the Public Body.

[para 24] As I find that the Public Body did not collect the Teacher's personal information, the Public Body is not required to justify any purpose of collection under section 33 or any manner of collection under section 34. I accordingly conclude that the Public Body did not contravene Part 2 of the Act with respect to any collection of the Teacher's personal information.

2. Did the Public Body use or disclose the Teacher's personal information?

[para 25] The Teacher alleges that her personal information contained in the letter at issue was used and/or disclosed by the Public Body in two respects. The first is in the context of the complaint process involving her and the secretary, and the second is when the secretary submitted the letter to her union.

[para 26] There is no suggestion that the contents of the letter were used and/or disclosed in the context of any process involving the Teacher and the secretary, other than possibly during the meeting that they had with the principal and assistant principal on February 21, 2007. I find that the Teacher's personal information was not used or disclosed at that time, as the secretary merely referred to the existence of the letter and did not use or disclose its actual contents. Neither the Teacher nor the Public Body indicates that anything happened with the letter at the meeting, other than it being mentioned.

[para 27] I considered whether the mere reference to the letter means that the Teacher's personal information was used or disclosed, but concluded otherwise. First, I am not certain that the reference to the existence of the letter – the words "I have a letter from a parent complaining about you" or something to that effect – constitutes the Teacher's personal information. The fact of the existence of the letter does not, in and of itself, reveal any actual opinions about the Teacher under section 1(n)(viii) of the definition of "personal information" set out in the Act. Having said this, I acknowledge that it is arguable that a statement about the mere existence of the letter nonetheless reveals some degree of information about the Teacher, albeit very general. However, even if the reference to the existence of the letter amounts to information about the Teacher, I do not find that it was *recorded* information, so as to meet the definition of "personal information" set out in the Act. I have no evidence that the fact that the secretary had a letter from a parent complaining about the Teacher, or something to that effect, was recorded at the meeting. Because I found above that the letter was not collected by the Public Body, the recorded information in the letter itself is not sufficient to amount to information that was recorded by the Public Body.

[para 28] When the secretary submitted the letter to her union, and allegedly used and/or disclosed the Teacher's personal information at that time, I find that she did not do so as an agent of the Public Body, or in her capacity as a representative of the Public Body. Rather, she did so as a member of her union, or in her individual capacity. Although a public body is accountable under the Act for the acts of its officers and employees acting on its behalf (Order 99-032 at paras. 51 and 52), not every act of an

employee is necessarily an act *on behalf of* his or her employer. To put the point another way, because the letter was never collected by the Public Body, it was not a record that the Public Body disclosed when the secretary gave it to her union. I found that the secretary did not obtain the letter on behalf of the Public Body, and likewise find that she did not submit it to her union on behalf of the Public Body.

[para 29] I find that the Public Body did not use or disclose the Teacher's personal information. As a result, the Public Body is not required to justify any use under section 39, justify any disclosure under section 40, or show that any use or disclosure was consistent with any purpose of collection under section 41. I accordingly conclude that the Public Body did not contravene Part 2 of the Act with respect to any use or disclosure of the Teacher's personal information.

3. Other issues proposed by the Teacher

[para 30] In her letter of August 6, 2008 to this Office and submissions to this inquiry, the Teacher proposed to add issues regarding the alleged commission of offences by the Public Body. The issues relate to wilfully collecting, using or disclosing information in contravention of the Act under section 92(1)(a); destroying a record, or directing another person to do so, with the intent to evade a request for access under section 92(1)(g); and liability for a fine under section 92(2).

[para 31] As stated in this Office's letter of September 12, 2008 to the Teacher, reproduced earlier in this Order, I have no jurisdiction to address allegations of offences under section 92 of the Act or assess penalties. The Teacher argues that the success of any steps taken under the offences and penalties provisions of the Act would be almost entirely dependent on a finding of the Commissioner that an offence has actually occurred. However, a finding that an offence has actually been committed cannot be made by me in the context of this inquiry, or by this Office at all. Rather, the Commissioner may – in the context of a separate investigation – determine whether there is evidence of an offence (as in Investigation Report 99-IR-004 at p. 5 or para. 29; Investigation Report 2001-IR-004 at para. 41; Investigation Report 2001-IR-010 at para. 56). If the Commissioner considers that there is evidence of an offence, he may then refer the matter to Crown prosecutors.

B. Was and/or is the Teacher's personal information contained in a record that was and/or is in the custody or under the control of the Public Body, within the meaning of section 6(1) of the Act?

[para 32] This part of the inquiry addresses whether the Public Body had or has custody or control of the letter at issue. If it did or does, the Teacher has a right of access to it, subject to any exceptions to disclosure set out in the Act. Sections 6(1) and 6(2) state:

> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
> *(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

[para 33] Whether a record is in the custody or under the control of a public body also determines whether the Act applies to it generally, as section 4(1) states that the Act "applies to all records in the custody or under the control of a public body" (subject to various exceptions, none of which apply here).

1. Custody versus control

[para 34] The Teacher submits that, because an employee of the Public Body had physical possession of the letter, the Public Body had physical possession, which is enough to establish custody. She further submits that the Public Body had custody and/or control on the basis of various factors that have been set out in previous orders of this Office. She cites an Ontario order that also referred to those various factors in its adoption of "a liberal and purposive approach to the custody or control question" [Ontario Order MO-1770 (2004) at pp. 7-8 or paras. 13 to 16].

[para 35] The Public Body submits that it did not have custody or control of the letter. In particular, it states that its employees can and do have physical possession of many things that may not be construed as being in the custody of the Public Body through the agency of the employee. Further, the Public Body provided an e-mail dated February 27, 2007 from the secretary to the school principal, in which the secretary maintains that the letter was her personal property, and that she had the prerogative not to hand it over.

[para 36] In Order F2002-014 (at paras. 12 and 13), the Commissioner discussed the concepts of custody and control as follows:

> Under the Act, custody and control are distinct concepts. "Custody" refers to the physical possession of a record, while "control" refers to the authority of a public body to manage, even partially, what is done with a record. For example, the right to demand possession of a record, or to authorize or forbid access to a record, points to a public body having control of a record.
>
> A public body could have both custody and control of a record. It could have custody, but not control, of a record. Lastly, it could have control, but not custody, of a record. If a public body has either custody or control of a record, that record is subject to the Act. Consequently, in all three

cases I set out, an applicant has a general right of access to a record under the Act.

[para 37] The letter at issue was written by a parent and given to the secretary after the parent witnessed an incident between the secretary and the Teacher on approximately February 16, 2007. As the school operated by the Public Body is presumably the location where the secretary and the parent interacted, the letter was likely at one time at the school. However, I do not know whether the letter was at the school at the time of the Teacher's access request on February 28, 2007. This is because it is not clear on what date the secretary gave the letter to her union. It is also possible that the secretary moved the letter from the school to her home or elsewhere in the interim. Further, I do not know whether the secretary retained a copy of the letter that she submitted to her union.

[para 38] The foregoing is to say that I do not know whether the secretary had physical possession of the letter, whether the original or a copy, at the time of the Teacher's access request. Having acknowledged this, it is not necessary for me know the answer. Even if the secretary did have physical possession, or the letter was at the school itself, this would not be sufficient to find that the Public Body had physical possession. Conversely, even if the letter was *not* at the school, the Public Body may still have had control of it. Whether the Public Body had custody or control of the letter at any time depends, for instance, on whether the secretary obtained and possessed the record on behalf of the Public Body, or did so in her individual or personal capacity.

2. Factors to determine custody or control

[para 39] Previous orders of this Office have set out ten non-exhaustive factors, or questions, to consider in determining whether a public body had or has custody or control of a particular record (Order 99-032 at para. 63; Order F2006-024 at paras. 21 to 45). The factors or questions are as follows, along with my analysis of each of them:

Was the record created by an officer or employee of the public body?

[para 40] The letter at issue was written by a parent who was not an officer or employee of the Public Body. However, because the secretary asked the parent to write it, it is arguable that the letter was "created" by the secretary in that the parent wrote it on the secretary's behalf. The secretary was an officer or employee of the Public Body. Given these different interpretations of who "created" the record, I find that this factor is neutral in the analysis of whether the Public Body had or has custody or control of the letter.

What use did the creator intend to make of the record?

[para 41] The precise intention of the parent who wrote the letter is unknown. Because the parent had a child formerly enrolled at the school and the letter was about the Teacher, who was employed by the school, the parent may have contemplated that the letter would be seen and used by the Public Body in relation to the Teacher. However, I

believe that the parent intended the letter to be used at the discretion of the secretary, not that it be considered correspondence to be addressed by the Public Body, regardless. To the extent that the secretary was the "creator" of the record, I find that her intention was to maintain it as her personal property unless and until she chose to present the information in the letter to the Public Body.

[para 42] I make the foregoing findings because it would appear that the secretary asked the letter to be written by the parent in the context of an already existing dispute between the secretary and the Teacher, and that the secretary did not intend to use the letter until a later time, if at all. This characterization is consistent with the secretary's statement at the meeting of February 21, 2007 that she "hadn't wanted to do anything with it [the letter]" or something to that effect, as set out in the Teacher's affidavit. My finding that the secretary did not intend for the letter to be given to or used by the Public Body, as a matter of course, is also consistent with the secretary's e-mail of February 27, 2007 to the Public Body, in which she asserted that the letter was her personal property and that what was done with it was her prerogative. Given the intention of the secretary in obtaining the letter and the fact that she asked the parent to write it, I find it likely that the parent also intended for the letter to be used and disclosed at the discretion of the secretary. In other words, neither the parent nor the secretary intended for the letter to automatically or necessarily be addressed by the Public Body in some fashion.

[para 43] I find that this factor weighs against a finding that the Public Body had or has custody or control of the letter.

Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

[para 44] This question appears to assume that the particular public body has possession of whatever record is under discussion, and goes on to explore two possible reasons. However, even if the letter in this case was once at the school, I do not believe that this means that the Public Body necessarily had possession of it, as employees may keep private items at their place of work without them falling within the possession of their employer and therefore the latter's custody. Whether a public body had or has custody of a record is one of the very questions answered through review of the various factors regarding custody and control. None of the factors suggest that the location of a record at a public body's premises is sufficient for a finding of custody or control. Indeed, the reverse is suggested by the factor relating to how "integrated" the record is with other records held by the public body, in that a record may be on the premises of a public body yet not sufficiently integrated to mean that the public body has custody or control of it.

[para 45] In this particular case, I am aware of no mandatory statutory or employment requirement for the letter to be in the possession of the Public Body. On the other hand, the letter was voluntarily given to the secretary by the parent who wrote it. However, as this fact begs the question of whether the parent gave the letter to the

secretary in the latter's individual capacity, or in her capacity as a representative of the Public Body, I find that this factor is unhelpful in the analysis of whether the Public Body had or has custody or control of the letter.

If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?

[para 46] The letter was at one time held by the secretary, who was an employee of the Public Body, and it is possible that she still has a copy. However, I find that it was not, and is not, being held for the purposes of her duties as an employee. I determined earlier that the letter was written by the parent at the request of the secretary, and not as correspondence that either the parent or the secretary intended automatically or necessarily to be addressed by the Public Body. Therefore, when the letter came into the possession of the secretary, she did not receive it as part of any responsibility to accept letters on behalf of the Public Body. She instead received it for her own possible future purposes. She was free to do this of her own accord, as opposed to being required to do this as part of her employment duties.

[para 47] To the extent that the letter continued to be "held" by the secretary while it was at her union, I found earlier that she did not submit the letter to her union in her capacity as a representative of the Public Body. It cannot normally be said that, when employees allow information to be held by their unions, they do so as part of their responsibilities vis-à-vis their employers. Rather, they normally do so as part of their *rights* vis-à-vis their employers. Accordingly, even if the letter may be characterized as being held by the secretary while it was at her union, it was not being so held for the purposes of her duties as an officer or employee of the Public Body.

[para 48] The Teacher argues that possession of the letter by the secretary was part of her responsibilities by virtue of the fact that she subsequently made a harassment complaint. The Teacher submits that, once the harassment complaint was made, an administrative regulation gave her the right to see the letter, meaning that the secretary had a duty to produce it. The Public Body disputes that there was a harassment complaint. Even assuming that a harassment complaint was made, I find that it was not part of the secretary's duties to hold or produce the letter. As will be explained in the context of the next factor relating to custody and control, the letter did not become something to which the Teacher was entitled under the administrative regulation that she cites.

[para 49] I find that this factor weighs against a finding that the Public Body had or has custody or control of the letter.

Does the public body have a right to possession of the record?

[para 50] In support of her argument that the Public Body has a right to possession of the letter, the Teacher cites *Edmonton Public Schools Board Policy and Regulation*

ACA.AR – Respectful Learning and Working Environments ("Regulation ACA.AR"), a copy of which she submitted in this inquiry. With respect to individuals who have initiated or are the subject of a harassment complaint, it states the following:

> *General principles of entitlement to information*
>
> - *A Complainant and a Respondent have a right to their own personal information.*
>
> - *A Complainant and a Respondent have a right to see written statements, information or reports related to the complaint process.*
>
> - *Individuals referred to in a written statement, information or report have a right to know what has been said about them, and by whom.*

[para 51] The Teacher characterizes the letter at issue as falling among the foregoing, on the basis that it contained her personal information, was a written statement related to the complaint process, and was a written statement in which reference was made to her. She accordingly argues that the Public Body had a right to possess the record by requiring the secretary to produce it, including if this meant that she would first have to retrieve it from her union. Again, the Public Body disputes that there was actually a harassment complaint and that Regulation ACA.AR even applied.

[para 52] I find that the letter obtained by the secretary was not required to be produced under Regulation ACA.AR, even assuming that a harassment complaint was made and the Regulation applied. The part of the Regulation regarding general principles of entitlement to information is preceded by the following (with my underline):

> *All persons are urged to keep the matter confidential and Edmonton Public Schools will make reasonable efforts to respect the confidential nature of a complaint made under these regulations. However, anonymity and complete confidentiality cannot be guaranteed once a complaint is made. Information collected and retained as part of an investigation may be subject to release as part of a legal process or under the Freedom of Information and Protection of Privacy Act.*
>
> *To respect the requirement of legislation, and the requirement that the process be fair to all parties, the following general principles will guide the release by EPS of written information:*

[para 53] In explaining the possibility of disclosure under Regulation ACA.AR, the above excerpt refers to "information collected and retained as part of an investigation". However, the letter was not collected by the Public Body as part of an investigation under Regulation ACA.AR, let alone retained. Although the secretary referred to its existence

at the meeting of February 21, 2007, the letter never actually became a written statement, information or report in or related to the complaint process. The secretary was free to submit it, so that it *would become* a written statement, but she did not do so. Only if she had actually submitted the letter would it have become collected and retained as part of an investigation, and therefore possibly subject to the Regulation's general principles of entitlement to information, in my view.

[para 54] I also find that the Public Body does not have the right to possession of the letter under Regulation ACA.AR given the reference to the Act underlined above, and the subsequently stated objective of respecting the requirements of the legislation. Regulation ACA.AR frames the entitlement to information as part of an individual's rights that already exist under the Act (or under another legal process, but no process apart from those under Regulation ACA.AR or the Act has been raised here). Because Regulation ACA.AR is intended to comply with the Act itself, I do not interpret the Regulation's general principles of entitlement to information as *resulting in* the Public Body's custody or control of the letter. Rather, the principles *flow from* custody or control that is demonstrated to already exist on the part of the Public Body.

[para 55] I have underlined, in the excerpt above, the reference to the process being fair to all parties as a further indication of the objective of the entitlement to information set out under Regulation ACA.AR. The objective is to allow individuals access to information that has been or may be used in relation to them in an investigation of a harassment complaint. In the end, the letter at issue was not used in relation to the Teacher, so I find that the Regulation did not intend for her to have a copy of it.

[para 56] Given my interpretation of Regulation ACA.AR, I find that it did not and does not give the Public Body the right to possession of the letter.

[para 57] The Teacher further argues that the general management rights of the Public Body, as confirmed in the collective agreement between it and the secretary, permitted it to take possession of the letter. However, the Teacher raises these general management rights in the context of the Public Body's capacity to require the secretary to provide the letter either under Regulation ACA.AR or the Act. As I have found that the Public Body was not entitled to possess the letter under Regulation ACA.AR – and the application of the Act is the very thing under discussion in this Order – I find that the reference to general management rights does not assist in the analysis of whether the Public Body had or has custody or control of the letter.

[para 58] The Teacher states that the school principal acknowledged that the Teacher had a right to the letter, and agreed to obtain it from the secretary in a manner that demonstrated the Public Body's control over it. The Public Body's disputes this version of events. Regardless, the alleged acknowledgment or agreement on the part of the Public Body does not determine the issue of control over the letter. It is possible for a public body to believe that it has control over a record, when in fact it does not, and for a public body to believe that an applicant has a right of access to a record, when in fact the applicant does not.

[para 59] The Teacher cites a previous order of this Office that states that, if a public body requests that a record be created for its use and obtains a copy of that record, the public body will, in the absence of any contractual or statutory authority that says otherwise, have the right to possess the record (Order F2002-006 at para. 53). Again, however, this begs the question of whether the secretary requested that the letter be created for the secretary's own use or that of the Public Body.

[para 60] Given all of the foregoing, I find that the Public Body did not and does not have the right to possess the letter. This factor accordingly weighs against a finding of custody or control on the part of the Public Body.

Does the content of the record relate to the public body's mandate and functions?

[para 61] I do not know the content of the letter, except that it complained about the Teacher and contained information about an incident involving the Teacher and the secretary. The Teacher argues that the letter relates to the Public Body's functional mandate to investigate and try to resolve formal and informal harassment complaints among its employees. As previously pointed out, the Public Body disputes that there was a harassment complaint.

[para 62] On one hand, the contents of the letter were arguably unrelated to the mandate and functions of the Public Body because the secretary did not submit or otherwise rely on it during the harassment complaint process that was allegedly engaged, or otherwise. It was the secretary's choice whether or not to rely on the letter, and therefore to bring it within the Public Body's mandate or functions. On the other hand, the letter arguably related to the Public Body's mandate and functions simply by virtue of the fact that it was in connection to a dispute between two employees. Further, the Public Body became involved in the employment-related dispute, and the letter was referenced at a meeting attended by the Teacher, the secretary, and representatives of the Public Body as their employer.

[para 63] Given these different interpretations, I find that this factor is neutral in the analysis of whether the Public Body had or has custody or control of the letter.

Does the public body have the authority to regulate the record's use?

[para 64] The Teacher argues that the Public Body has the authority to regulate the letter's use because it has policies regarding the right of access to information that it collects. She submitted and cites *Policy and Regulation CN.BP – Managing District Information*, under which "[a]ll records created in the service of Edmonton Public Schools, regardless of form or creator, are the property of Edmonton Public Schools" and "staff … have the right of access to records held by the district except where district or legislative requirements prevent". I further note that *Policy and Regulation CN.AR – Creation, Use and Maintenance of District Information*, also submitted and cited by the Teacher, refers to records "created or received by the board or an agent of the board".

[para 65] The foregoing policies and regulations apply to the extent that the letter was created by the secretary in her capacity as an agent of the Public Body, was created in her service to the Public Body, or may be said to be "held" by the Public Body rather than the secretary as an individual. For reasons previously set out, I believe that the secretary received the letter in her personal capacity, rather than as an agent of, or in the service of, the Public Body. Whether the letter was "held" by the Public Body begs the question of whether it had custody or control of it. Accordingly, none of the foregoing policies and regulations is evidence that the Public Body may regulate the letter's use.

[para 66] I find that the Public Body did not and does not have the authority to regulate the letter's use. This factor accordingly weighs against a finding that the Public Body had or has custody or control of the letter.

To what extent has the record been relied upon by the public body?

[para 67] As I found earlier in this Order that the letter was not used at the meeting of February 21, 2007, or otherwise used, it has not been relied upon by the Public Body. This factor therefore weighs against a finding that the Public Body had or has custody or control.

How closely is the record integrated with other records held by the public body?

[para 68] The letter was at one time held by the secretary, likely at the school, but I do not know the extent to which it was integrated with records held by the Public Body. The secretary may have had it with her personal belongings on site, or she may have had it with other records of the Public Body. I therefore find that this factor is neutral in the analysis of whether the Public Body had custody or control of the letter.

Does the public body have the authority to dispose of the record?

[para 69] As evidence that the Public Body may dispose of the letter at issue, the Teacher cites the Public Body's policies on the retention and destruction of records, set out in *Policy and Regulation CN.AR – Creation, Use and Maintenance of District Information*. Again, however, this document refers to records "created or received by the board or an agent of the board." As I believe that the secretary was not acting as an agent of the Public Body when she obtained the letter, I find that the foregoing policy and regulation does not apply.

[para 70] The Teacher cites section 35(b) of the Act, which requires a public body to retain personal information for at least one year after using it to make a decision that directly affects an individual. However, I have found that the Public Body did not use the Teacher's personal information at all, let alone in a decision that directly affected her. Section 35(b) is therefore not relevant.

[para 71] As I find that the Public Body did not and does not have the authority to dispose of the letter, this factor weighs against a finding that the Public Body had or has custody or control.

3. Conclusion regarding custody or control

[para 72] Some of the factors reviewed above are neutral or unhelpful in the analysis of whether the record at issue was in the custody or under the control of the Public Body. However, the remaining ones suggest that the Public Body did not, and does not, have custody or control of the letter. It was not the intention of the parent who wrote it, or the secretary who obtained it, that the letter automatically or necessarily be addressed by the Public Body. The letter was not and is not being held by the secretary for the purposes of her duties as an officer or employee of the Public Body. The Public Body did not and does not have a right to possession of the letter. The Public Body did not and does not have the authority to regulate the letter's use. The letter has not been relied upon by the Public Body. The Public Body did not and does not have the authority to dispose of the letter. As the ten questions regarding custody or control are not exhaustive, I considered whether there were other relevant factors and circumstances, but none were drawn to my attention.

[para 73] I conclude that the record at issue was not, and is not, in the custody or under the control of the Public Body. This is regardless of whether and when the letter was at the school, when it was at the secretary's union, or when it was taken back by the secretary from the union. My conclusion also holds in respect of any copies of the letter retained by the secretary for her own purposes and use. As the Public Body never had custody or control of the letter, the record is not subject to the Act under section 4(1), and the Teacher has no right of access to it under section 6(1).

[para 74] The Teacher made her formal access request under the Act on February 28, 2007. However, she states that she made an informal request for access when she spoke to the school principal on February 21 or 22, 2007. The principal disputes this, saying that the Teacher approached her to request the letter several days after the meeting that occurred on February 21, 2007. As I have found that the Public Body *never* had custody or control of the record, I do not need to determine whether the Teacher would have been entitled to the record on the basis of a request that was earlier than the one she formally made on February 28, 2007.

C. Did the Public Body meet its duty to assist the Teacher, as provided by section 10(1) of the Act?

[para 75] Section 10(1) of the Act reads as follows:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 76] I initially did not include an issue regarding the Public Body's duty to assist. However, I have now decided that I am in a position to address it, on review of the Teacher's specific concerns. My addition of the issue does not prejudice the Public Body, given that it made brief submissions on it and my conclusions are in its favour in any event. My addition of the issue also does not prejudice the Teacher, as she was the party who proposed its addition and she made submissions on it.

[para 77] The Public Body has the burden of proving that it fulfilled its general duty to assist an applicant under section 10(1) (Order 99-038 at para. 10; Order F2004-008 at para. 10). The duty to assist applies in respect of any applicant, which the Act defines in section 1(b) as a person who "makes a request for access to a record under section 7(1)". In other words, a public body has a duty to assist an individual requesting a record – even if the record falls outside the scope of the Act – in that the public body should at least respond. Having said this, I will limit my discussion of the Public Body's duty to assist in this case to the specific concerns raised by the Teacher in her submissions.

[para 78] The Teacher submits that the Public Body failed to meet its duty to assist her because it failed to conduct an adequate search for the letter, did not act quickly enough to secure the letter before the secretary gave it to her union, took no steps to retrieve the letter from the union, had an obligation to give the Teacher access to the letter under the terms of Regulation ACA.AR discussed earlier, and did not remind the union of the application of Regulation ACA.AR.

[para 79] None of the foregoing means that the Public Body failed to make every reasonable effort to assist the Teacher and to respond to her openly, accurately and completely. Because I have found that the letter was never in the custody or under the control of the Public Body and that it therefore had no obligation to grant access to it, the Public Body also had no duty to conduct a search for the letter, secure it before it was given to the union, or take steps to retrieve it from the union. I also found earlier in this Order that the Public Body had no obligation to produce the letter under Regulation ACA.AR, meaning that it also had no obligation to draw the application of Regulation ACA.AR to the union's attention.

[para 80] The Teacher cites Ontario Order M-902 (1997), in which it was found that employees should have searched their personal files for responsive records (at para. 14). That decision is not applicable here precisely because, on the facts of this case, I have found that the letter at issue was not in the custody or under the control of the Public Body and therefore not subject to the Teacher's access request. Whereas Ontario Order M-902 found that records of the school board in that case may exist in the personal files of its employees – and this may likewise be possible in a future case before this Office – I have found that the particular record at issue in this inquiry was *not* a record of the Public Body.

[para 81] Finally, the Teacher suggests that the Public Body should review its records to ensure that there are no copies of the letter in any location. However, my understanding of the evidence in this inquiry is that there was only ever, at most, one

copy of the letter at the school operated by the Public Body, and that this letter was then provided to the secretary's union and subsequently taken back by her. There is no suggestion from the version of events presented by either party that there may be additional copies of the letter at the school. To the extent that the secretary may have made or retained copies of the letter for her own purposes and use, those copies would also be outside the custody or control of the Public Body, meaning that the Teacher would not have a right of access to them under the Act.

[para 82] I conclude that the Public Body met its duty to assist the Teacher, as provided by section 10(1) of the Act.

V. ORDER

[para 83] I make this Order under section 72 of the Act.

[para 84] I find that the Public Body did not collect, use or disclose the Teacher's personal information. I therefore conclude that the Public Body did not collect, use or disclose the Teacher's personal information in contravention of Part 2 of the Act.

[para 85] I find that the record at issue was not, and is not, in the custody or under the control of the Public Body. I therefore conclude that the Teacher has no right of access to the record under section 6(1) of the Act.

[para 86] I find that the Public Body met its duty to assist the Teacher, as provided by section 10(1) of the Act.

Wade Riordan Raaflaub
Adjudicator