ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-014

September 11, 2009

THE BOARD OF TRUSTEES OF EDMONTON SCHOOL DISTRICT NO. 7

Case File Number F4298

Office URL: www.oipc.ab.ca

Summary: Having a number of concerns related to his minor son's special programming and being dissatisfied with the Public Body's responses to those concerns, the Complainant engaged the assistance of his MLA. The MLA wrote a letter to the Public Body relaying the Complainant's concerns, and copied his letter to a school principal employed by the Public Body and to the Complainant. The Public Body responded to the MLA with a copy to each of the Complainant, the principal and the manager of a program area operated by another public body. The Complainant complained to the Commissioner that the Public Body had disclosed personal information contained in the response to the program area of the other public body in contravention of the *Freedom of Information and Protection of Privacy Act*, and requested a review by this office.

The Commissioner found that the Public Body had contravened Part 2 of the Act by disclosing personal information contained in the response to the program area of the second public body and ordered the Public Body to stop disclosing personal information in breach of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 17, 40, 72; *Health Information Act*, R.S.A. 2000, c. H-5; *Personal Information Protection Act*, S.A. 2003, c. P-6.5; *School Act*, R.S.A. 2000, c. S-3, ss. 1, 246.

Orders Cited: AB: Orders 99-037, 2000-032, F2002-018, F2005-016, F2007-019, F2008-015.

Court Cases Cited: AB: *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112.

I. BACKGROUND

[para 1] The Complainant and his spouse (together, the "Couple") have a minor son who has been diagnosed with a neurological disorder that causes developmental disability (the "Student").

[para 2] Dissatisfied with several issues arising from their dealings with the Public Body in respect of the Student, the Complainant sought the assistance of a Member of the Legislative Assembly of Alberta ("MLA"). On June 27, 2007, the MLA wrote a letter addressed to the Superintendent of Schools for the Public Body (the "Letter"), relaying some of the Complainant's concerns about the Student.

[para 3] One such concern related to discrepancies between differing versions of an Occupational Therapy assessment report, which were contradicted by other assessments and which were, or may have been, a factor considered in making funding decisions for the Student within the Family Support for Children with Disabilities ("FSCD") program. (Although I was provided with no submissions on this point, FSCD would seem to be a program area operated by a public body separate and distinct from the Public Body, namely, one of the Child and Family Services Authorities.) The Letter concludes: "In view of the above please review these discrepancies and reconsider your decision to eliminate additional program funding for [the Student]."

[para 4] Attached to the Letter was the Couple's "Consent to Release of Information" (the "Consent Form") and, in this regard, the Letter notes: "I have attached a duly authorized *Consent to Release of Information* in order that you may exchange information with me on this file."

[para 5] The Letter was copied (cc'd) to the principal of the school where the Student was and/or had been enrolled in the relevant timeframe and to the Complainant.

[para 6] The Superintendent, on behalf of the Public Body, responded to the MLA by letter dated September 10, 2009 (the "Response"). The Response was detailed and essentially explained the details of the Occupational Therapy assessment report, clarified the billing practices as between the Public Body and FSCD and advised that the funding issues raised in the Letter are within the authority of FSCD rather than the Public Body. The Response was copied (cc'd) to the Couple, to the manager of FSCD and to the principal.

[para 7] The Complainant wrote to me on November 23, 2007 (received November 27, 2007), complaining that a copy of the Response was forwarded to the manager of FSCD (the "Complaint") in contravention of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the "Act" or the "FOIP Act"). In the Complaint, the Complainant states: "…Although some of the issues raised involve answers obtained from FSCD, this information should have been collected in general terms. Not all of the information relates to FSCD, and the letter should not have been disclosed. This disclosure of personal information is in violation of the FOIP Act, and I would ask that you investigate this on my behalf." I note that the Complainant does not complain of any alleged concomitant collection of personal information by FSCD.

[para 8] I authorized mediation to attempt to resolve the Complaint. However, as mediation was unsuccessful, the matter was set down for a written inquiry. Each of the Complainant and the Public Body provided both an initial submission and a rebuttal submission in the inquiry; neither submitted any sworn evidence.

II. RECORDS AT ISSUE

[para 9] As this inquiry relates to the Complaint about the collection, use and/or disclosure of personal information, there are no records at issue *per se*.

III. ISSUE

[para 10] The sole issue in this inquiry, as set out in the Notice of Inquiry, is:

Issue A: Did the Public Body collect, use and/or disclose the Complainant's and the Complainant's sons' personal information in contravention of Part 2 of the Act?

IV. DISCUSSION OF ISSUE

Issue A: Did the Public Body collect, use and/or disclose the Complainant's and the Complainant's sons' personal information in contravention of Part 2 of the Act?

Preliminary Matter

[para 11] I note that the Notice of Inquiry issued by my office in this matter on February 5, 2009 identified the Public Body as "Edmonton Public School Board District #7". However, the FOIP Act defines a "public body" to include "a local public body" [section 1(p)(vii)], which in turn is defined to include "an educational body" [section 1(j)(i)], which then includes "a board as defined in the *School Act*" [section 1(d)(v)]. Section 1(1)(b) of the *School Act*, R.S.A. 2000, c. S-3, provides that "'board' means a board of trustees of a district or division"; see also section 246 of the *School Act*. In response to my Registrar of Inquiries' request for clarification, counsel for the Public Body confirmed by letter dated August 28, 2009 that the Public Body's proper corporate name is "The Board of Trustees of Edmonton School District No. 7". Accordingly, notwithstanding the misnomer in the said Notice of Inquiry, for the purposes of this

review in its entirety, including but not limited to this inquiry and, in particular, this Order, the Public Body is "The Board of Trustees of Edmonton School District No. 7".

Burden of Proof

[para 12] The Notice of Inquiry issued on February 5, 2009 states the following in respect of the applicable burden of proof:

> The Commissioner proposes that the burden of proof in this Inquiry is allocated as follows:
>
> Initially, the Complainant must provide some evidence that the Public Body collected, used and/or disclosed his and his sons' personal information and that there is some question as to whether or not the Public Body complied with the Act when it did so.
>
> Thereafter, the Public Body must demonstrate that it complied with the Act when it collected, used and/or disclosed the Complainant's and Complainant's sons' personal information.
>
> Nevertheless, the Commissioner reviews the decisions of the Public Body, as provided by section 2(e) of the Act.

[para 13] Relying on previous decisions of my office and relevant jurisprudence, I decided in Order F2007-019 that:

> The person initiating the complaint has the onus of establishing that he or she has standing to bring the complaint, and to point to evidence suggesting that his or her personal information has been collected, used or disclosed under the Act. Once the complainant has met the evidential burden, the onus then shifts to the public body to establish that its collection, use or disclosure of the complainant's personal information was authorized by the Act.

That decision was made under the FOIP Act but, on this point, applied the same analysis as under the *Personal Information Protection Act* and the *Health Information Act.*

[para 14] In dismissing an application for judicial review in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112, the Court approved this allocation of the burden of proof, stating:

> [108] [The FOIP Act] s. 71 deals with the burden of proof when a person seeks access to records. In some cases, the burden rests on the applicant. In others, the burden rests on the head of the public body. However, [the Act] does not contain any provision that tells us on whom the burden of proof rests when a person lodges a complaint with the OIPC alleging that they believe a public body has used or disclosed their personal information in contravention of [the Act] Part 2. Thus, the usual principle of "he who alleges must

prove" applies. The OIPC takes this approach on these types of matters, see *e.g.* Order F2002-020: ***Lethbridge Police Service*** (August 7, 2002) at para. 20, which said:

> ... in this inquiry, the Complainant has the burden of proving that his personal information was disclosed by the Public Body. The Complainant has not met this burden of proof. Before I am able to find that a breach of Part 2 of the Act has occurred, there must be a satisfactory level of evidence presented in support of the allegation. If this were not the case, a public body could be put into the untenable position of proving a negative (e.g. that a breach did not occur) based on any allegation raised by a complainant.

But see, Order P2006-008: ***Lindsay Park Sports Society*** (March 14, 2007) at paras. 9-21, where the OIPC said that complainants under [the FOIP Act] do not have a legal burden, but an evidential burden. Once the complainant satisfies the evidential burden, the burden shifts to the public body to show "that it has the authority ... to collect, use or disclose personal information," at para. 20. Because of [the Act's] structure, this Court agrees with the ***Lindsay Park*** analysis of the burden of proof and evidentiary burden.

[para 15] Neither of the parties took issue with, or made any submissions in respect of, the allocation of the burden of proof in this inquiry, as indicated in the Notice of Inquiry or otherwise.

[para 16] Therefore, I find that, in accordance with previous orders of my office and the Notice of Inquiry issued in this inquiry, it is incumbent upon the Complainant to provide some initial evidence that the Public Body collected, used and/or disclosed his and his sons' personal information and that there is some question as to whether or not the Public Body complied with the Act in doing so, following which the burden of proof shifts to the Public Body to demonstrate that it complied with the Act.

Collection, Use and/or Disclosure

[para 17] Although the issue as stated in the Notice of Inquiry references collection, use and/or disclosure in contravention of Part 2 of the FOIP Act, it appears from the Complaint that the Complainant's sole concern is the disclosure of personal information contained in the Response to FSCD.

[para 18] I see no evidence of any unauthorized collection or use of personal information on the facts of this case, and the Complainant neither alleges nor offers any indication or evidence of same. As such, I find that there was no wrongful collection or use alleged or at all on these facts, and I hereby narrow the issue in this inquiry to the following: *Did the Public Body disclose the Complainant's and the Complainant's sons' personal information in contravention of Part 2 of the Act?*

Does the Response contain "personal information" as defined in the Act?

[para 19] "Personal information" is defined in section 1(n) of the 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,
(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,
(iii) the individual's age, sex, marital status or family status,
(iv) an identifying number, symbol or other particular assigned to the individual,
(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,
(vi) information about the individual's health and health care history, including information about a physical or mental disability,
(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 20] The Complainant argues that the Response contains the personal information of the Student, who is the subject of and who is referenced in the Letter, the Consent Form and the Response. The Complainant's authority to complain on behalf of the Student is, rightfully, unchallenged. The Complainant does not complain in respect of his spouse's personal information, nor does he appear to have any authority to do so. He concedes that the reference in the Response to the Couple's other son appears to have been a "clerical error" and he does not appear to complain in that regard either (notwithstanding the reference to "sons'" in the Notice of Inquiry). The Complainant requests in the Complaint that I investigate the disclosure of personal information allegedly in violation of the Act "on his behalf" and, in his submissions, argues that the Student's personal information was wrongfully disclosed.

[para 21] The Public Body, meanwhile, concedes that the Response contains "personal information" within the meaning of section 1(n) of the Act without specifying the nature of the personal information or whose personal information it is.

[para 22] Upon review of the contents of the Response, it is apparent that it contains personal information. At minimum, such personal information includes personal information of the Complainant, his spouse, the Student and the Couple's other son as described in section 1(n)(i), as well as the Student's personal information as described in sections 1(n)(vi) and 1(n)(vii).

[para 23] On these bases and considering the parties' submission on this point, I find that the Response contains personal information of the Complainant, his spouse, the Student and the Couple's other son, all as defined in the Act. Further, I find that the subject-matter of the Complaint is the personal information of the Complainant and the Student.

Was the disclosure of the Complainant's and the Student's personal information in the Response in breach of the Act?

[para 24] Given my finding that the Response contains personal information, and given that it is apparent that the Response was copied to FSCD (which is not disputed by the Public Body) and that FSCD was not privy to the initial Letter, I find that the Complainant has met his burden as articulated above. He has established a *prima facie* case. Accordingly, the Public Body must demonstrate that it complied with the Act in disclosing the personal information to FSCD.

[para 25] A complaint of an allegedly unauthorized disclosure of personal information is governed by Part 2 of the Act. Section 40 sets out instances in which a public body may disclose personal information. The following paragraphs are potentially relevant on the facts of this case:

> *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,*
>
> …
>
> *(d) if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure,*
>
> …
>
> *(l) for the purpose of determining or verifying an individual's suitability or eligibility for a program or benefit,*
>
> …
>
> *(n) to a member of the Legislative Assembly who has been requested by the individual the information is about to assist in resolving a problem,*
>
> … .

[para 26] The Public Body did not seek or obtain consent to disclose personal information to FSCD in this case. Rather, the Consent Form authorizes the MLA to release and exchange information in relation to the Complainant's issues. Further, the Letter attaches the Consent Form "…in order that [the Public Body] may exchange information with [the MLA] on this file." I find that section 40(1)(d) does not apply in this case.

[para 27] It appears to me that the Public Body disclosed personal information to FSCD in order to, and in the context of, justifying itself and buttressing its position to the MLA in response to the Complainant's issues. I find this to be distinct from reconsideration or verification of the Student's suitability or eligibility for a program or benefit, and not to have been for such purpose. I find that section 40(1)(l) does not apply in this case.

[para 28] I note that the Complainant does not complain about the disclosure of personal information to the MLA in his capacity as such. I find that section 40(1)(n) does not apply in this case.

[para 29] I find, however, that section 40(1)(b), and by extension section 17, apply to this case.

[para 30] Section 40(1)(b) authorizes a public body to disclose personal information so long as doing so would not unreasonably invade a third party's personal privacy, as determined using the analysis mandated under section 17. In other words, the personal information in the Response should not have been disclosed to FSCD if that disclosure unreasonably breached the Complainant's and the Student's personal privacy.

[para 31] Section 17(2) lists particular circumstances in which a disclosure of personal information is not an unreasonable invasion of personal privacy. Neither the Public Body nor the Complainant has argued that any paragraph of section 17(2) applies to the Complaint, and I find that none of section 17(2) applies in this inquiry.

[para 32] Section 17(4) provides, in part:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
>
> …
>
> *(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,*
>
> *(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 33] Neither the Public Body nor the Complainant provided submissions on the applicability of section 17(4).

[para 34] The personal information at issue relates to the Student's disability, therapies and treatments for it, and funding of same as part of his educational programming, notwithstanding that particulars of such therapies, treatments, funding and programming are themselves not revealed in the Response. Accordingly, I find that disclosure is presumed to be an unreasonable invasion of personal privacy based on one or more of sections 17(4)(a), (c), (d) and (g).

[para 35] Section 17(5) requires that, "[i]n 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 a public body must consider all of the relevant circumstances…". Accordingly, as confirmed by the Court in *University of Alberta v. Pylypiuk*, 2002 ABQB 22, upholding this aspect of Order 2000-032 on judicial review:

> [42] In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be a [*sic*] an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5), and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4).
>
> [43] In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is [*sic*] met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

[para 36] Section 16 discussed above is now section 17. The circumstances expressly enumerated in section 17(5) include: "(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Albert or a public body to public scrutiny" and "(c) the personal information is relevant to a fair determination of the applicant's rights". Numerous orders of my office have identified other circumstances that may be considered under section 17(5), none of which are relevant to the facts at hand.

[para 37] In their respective submissions, the Public Body points to several circumstances it believes to be relevant and supportive of its disclosure to FSCD of the personal information contained in the Response, with an emphasis on public scrutiny, whereas the Complainant denies the existence of any relevant circumstances under section 17(5) and, in particular, denies that there was any element of public scrutiny, or scrutiny of FSCD, in his decision to seek the assistance of the MLA.

[para 38] The Public Body provides factual context by explaining the funding scheme and decision-making process in respect of eligibility for the programs in which the Student was enrolled. Subsequently, and after pointing out that "…some of the points raised by [the] MLA…related directly to the FSCD…", the Public Body characterizes FSCD as "an integral component of the specialized services funding, as set out in the [Response]". The Public Body's position is that the Complainant's concerns were about the actions, specifically the billing practices, of both the Public Body and FSCD, and that the Complainant engaged the MLA because he believed his concerns warranted public scrutiny.

[para 39] In respect of section 17(5), the Public Body specifically argues that

> [i]n this case some of the relevant circumstances are as follows:
>
> - the Complainant made the decision that public scrutiny was necessary to have the Student's education matters dealt with by a party *other than* the Public Body. In this regard, the Complainant's expectation of privacy was reduced;
> - this third party was an elected public official who represented…constituents at the Alberta Legislative Assembly;
> - the Complainant chose to seek public scrutiny of this matter (as opposed to having it addressed internally by the Public Body pursuant to the *School Act* (for example, a s. 123 hearing) or having it internally addressed by the FSCD [*sic*]; and
> - the Complainant raised issues relating to both the Public Body and the FSCD.

[para 40] Further, the Public Body submits that

> The balance in this inquiry…is between protecting the privacy of the Complainant and the Student and holding the Public Body accountable for copying the [Response] to [FSCD]. … One of the consequences of the Complainant's request for the matter to be handled by a member of the Alberta Legislative Assembly was public scrutiny by those potentially involved in the matter, including those directly involved in the education, health and special services funding of the Student. In this case this included the FSCD.

[para 41] Conversely, the Complainant expressly disputes the existence of any relevant circumstances under section 17(5) including, in particular, any element of "public scrutiny" under section 17(5)(a). He observes that the Letter and Response address two distinct issues, namely, the Occupational Therapy report and the funding issue, and that the portion of the Response relating to the differing versions of the report

did not relate to, and should not have been disclosed to, FSCD. (I note that the Public Body admits in its submission that only "…some of the points raised by [the] MLA…relate directly to the FSCD…".) The Complainant regards the concerns set out in the Letter as a private matter in which he had exhausted all other avenues of redress, statutory and otherwise, and regarding which the MLA, in his capacity as such, was advocating on his behalf. As well, he emphasizes that the notion of "public scrutiny" does not support disclosure in this case in any event, as the activities called into question were entirely those of the Public Body and not at all those of FSCD.

[para 42] I disagree with the Public Body that engaging the assistance of an individual holding public office, such as an MLA, on a particular issue automatically and necessarily entails public scrutiny of that issue. Each such situation must be assessed on its unique facts to determine whether public scrutiny applies in that particular case. As I pointed out in Order F2008-015:

> In Order F2005-016 I held that for section 17(5)(a) to apply as a relevant circumstance, there must be evidence that the activities of the Government of Alberta or a public body have been called into question, which necessitates the disclosure of personal information. I also said the following:
>
> (i) It is not sufficient for one person to decide that public scrutiny is necessary;
>
> (ii) The applicant's concerns must be about the actions of more than one person within the public body; and
>
> (iii) If the public body had previously disclosed a substantial amount of information, the release of further personal information would likely not be desirable. This is particularly so if the public body had already investigated the matter.

I subsequently continued:

> However, notwithstanding the above three criteria, it should be noted that the overriding consideration under section 17(5)(a) is whether the activities of the Government of Alberta or a public body have been called into question which necessitates a disclosure of personal information (Order F2005-016). In addition, in *University of Alberta* v. *Pylypiuk* (2002), A.J. No. 445 (Alta. Q.B.) Justice Gallant stated that public scrutiny of government or public body activities under section 17(5)(a) requires some public component, such as public accountability, public interest and public fairness.

[para 43] In Order F2002-018, I posited that "[i]t 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." However, I did not say, and do not believe, that to be true in every case. In some circumstances, citizens may seek the intervention or advocacy of their elected officials in sensitive and personal situations where, in their view, they have reached an impasse with the opposing party, without intending to raise the spectre of public accountability, interest or fairness and

without intending to expose their personal details to tangential parties beyond the MLA and the opposing party.

[para 44] Although the Complainant, through the MLA, called into question the activities of the Public Body in the present case, I do not find that section 17(5)(a) applies. I must emphasize that the provision speaks of the disclosure being "desirable for the purpose of…public scrutiny." Neither party applies the criteria for public scrutiny that I articulated in my Order F2005-016. In doing so myself, I note that the only party believing public scrutiny to be necessary is the Public Body itself, which then incorrectly equates 'public' scrutiny to 'internal' scrutiny by arguing, as excerpted above, that a consequence of involving the MLA was "public scrutiny by those potentially involved in the matter, including those directly involved in the education, health and special services funding of the Student. In this case this included the FSCD." Thus, these facts do not meet the first part of the test for public scrutiny and lack the requisite public component—accountability, interest, fairness or other—and, as such, I decline to consider the remainder of the test and find that section 17(5)(a) is inapplicable. I accept the Complainant's submission that, having reached an impasse with the Public Body, he resorted to seeking the assistance of the MLA in addressing his and his family's personal and private issues and concerns with the Public Body, without intending to make them public or to subject the Public Body or these issues and concerns to public scrutiny.

[para 45] Similarly, I do not accept the Public Body's submissions that FSCD was also under scrutiny by virtue of the Letter, nor that the impugned disclosure was appropriate and within the spirit of the Act based on FSCD's role in the issues complained of by the Complainant. Disclosure that is presumed to be an unreasonable invasion of personal privacy by virtue of section 17(4) may only be saved upon consideration of all of the relevant circumstances in accordance with section 17(5). I do not find any element of public scrutiny to be present in this case and, as such, disclosure to FSCD of the personal information contained in the Response neither achieved or contributed to public scrutiny of the Public Body's activities, nor was the disclosure desirable or necessary for that purpose.

[para 46] Although not addressed by either of the parties, I wish to comment briefly on section 17(5)(c), which I feel could have been argued, albeit unsuccessfully, in defending the impugned disclosure. Section 17(5)(c) applies when the personal information at issue "is relevant to a fair determination of the applicant's rights"; for the purposes of the present case, I am prepared to assume, without definitively deciding, that "the complainant's rights" may be read-in in the place of "the applicant's rights" when a public body is relying on section 17 through section 40(1)(b).

[para 47] In Order 99-037 the former Commissioner stated the following in respect of section 16(3)(c), which is now section 17(5)(c):

> …In Order 99-028, I discussed the interpretation of section 16(3)(c). I adopted the reasoning of the Ontario Assistant Commissioner in Order P-312 (1992) and said that in

order for section 16(3)(c) to be a relevant circumstance, all four of the following criteria must be fulfilled:

> (i) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
>
> (ii) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
>
> (iii) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (iv) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

The parties have not submitted any evidence or argument that these four criteria are met. In particular, in the case of the Complainant, or more correctly of the Student, a funding decision had already been made, allegedly based, in whole or in part, on the Occupational Therapy assessment report in question. Although the MLA suggested that the assessment be disregarded and that the Student be re-assessed or independent reports be relied on in making any funding decisions (without, at that point, expressly specifying by whom) and coupled his suggestion with the request that the Public Body review the discrepancies and reconsider its decision to eliminate funding for the Student, and although the Complainant indicates that such funding was eventually reinstated on appeal based largely on the unreliability of the questionable assessment, there is no indication contemporaneous to the impugned disclosure that any determination or re-determination, by the Public Body or FSCD or anyone, of such funding existed or was contemplated, or that the personal information was required for the purpose of preparation or ensuring an impartial hearing in that proceeding. In the absence of evidence and/or argument that the four criteria set out above are fulfilled, I cannot assume that they are or that section 17(5)(c) applies.

[para 48] Moreover, I note that the Response concluded as follows: "I am confident that the information provided above will address your concerns. … For additional information regarding FSCD, the MDT [being Multi-Disciplinary Team] Review process, specialized services, or [the Student's] eligibility for these services, please contact [FSCD] at [phone number]". In my opinion, the Public Body's final statement implies that the Response was disclosed to FSCD merely as notice to FSCD that issues had been raised with the Public Body by the MLA, on behalf of the Complainant and in respect of the Student, some of which related to FSCD, and that although the Public Body had provided what it felt to be a complete response to the MLA, he had been referred to FSCD should he require more information regarding those issues that fell within its purview. In a similar vein to my preceding comments in respect of section 40(1)(l), I find that this situation involves the justification of an existing decision to an unrelated party, being the MLA, not a deliberation about and ultimate determination of rights.

[para 49] Even if I am wrong in these respects, not all of the personal information contained in the Response is relevant to any such determination of rights. Accordingly, the circumstance set out in section 17(5)(c) could be, at the very most, only partially persuasive in rebutting the presumption raised by application of section 17(4) of unreasonable invasion of personal privacy.

[para 50] Accordingly, I find that none of the circumstances listed in section 17(5) apply in this case so as to rebut any presumption under section 17(4). However, section 17(5) requires that all of the relevant circumstances be considered, including but not limited to those listed therein. Therefore, it is incumbent upon me, in reviewing the Complaint, to consider whether any other circumstances might be relevant in supporting or rebutting the presumption raised under section 17(4).

[para 51] The Public Body argues that, in these circumstances and particularly given the engagement of the MLA, the Complainant had a decreased expectation of privacy. The Complainant, on the other hand, points out that the Consent Form authorized the Public Body to exchange information regarding the concerns raised in the Letter with the MLA, but did not authorize the Public Body to share any such information with anyone else. As such, he argues that the Consent Form confirmed or supported his expectation of privacy because it specified authorized flows of communication. He further points out that, in the Letter, the MLA wrote "I have attached a duly authorized *Consent to Release of Information* in order that you may exchange information with me on this file" (emphasis added). I agree that, not only did the Consent Form not authorize any exchange of information beyond the MLA and the Public Body, it had the effect of increasing the Complainant's expectation of privacy outside of the channel of communication specifically authorized by it. I therefore find that the Consent Form and the reference to it in the Letter are factors that support the presumption of an unreasonable invasion of personal privacy in this case.

[para 52] Each of the Complainant and the Public Body refer to my Order F2002-018 in their respective submissions. The Public Body maintains that "[f]rom a legal perspective, the privacy principles set out in the Commissioner's decision in Order F2002-018 remain good law and are squarely applicable to this case." I agree with the first part of this statement. However, the Complainant correctly distinguishes the facts at hand from those dealt with in that previous Order. The difference is readily apparent: there, the complainant had copied a letter of complaint addressed to the Public Body to other persons and the Public Body had, in turn, sent copies of its response to those same persons, whereas here, the Public Body copied its Response to the Letter to FSCD, to which the Letter had been neither addressed nor copied. Therefore, although good law, I disagree that Order F2002-018 is directly applicable to this case and rather find that, on the facts, it is distinguishable from this case.

[para 53] I observe that the Complainant also elaborates on, and attaches to his rebuttal submission, the FSCD Agreement that the Couple entered into with Alberta Children's Services on July 26, 2005 and that was in effect June 1, 2005 to May 31, 2006. He then proceeds to argue it and the Addendum to the concomitant Agreement

dated June 1, 2006, which he also attached, and the funding scheme discussed in the Response. With all due respect, ultimately this line of argument and documentary evidence put forward by the Complainant goes primarily to the merits and contents of the Letter and Response, the background thereto and the discussion of the issues therein; I find it to be of only minimal assistance in resolving, and largely irrelevant to, the Complainant's privacy Complaint *per se* about the Public Body's disclosure to FSCD of personal information in the Response.

[para 54] I am cognizant also of the strong possibility that much of the personal information contained in the Response, as well as the underlying dispute itself, would have been known to FSCD prior to its receipt of the Response, with the exception of the knowledge that the Complainant had approached and sought the assistance of the MLA. I do not find this to be a relevant circumstance favouring the disclosure, however, because it is no evidence, one way or the other, as to whether or not disclosure to FSCD of the Response itself was an unreasonable invasion of privacy. In other words, just because FSCD might have already been privy to the personal information does not necessarily mean that such personal information should have been disclosed to it again in the form of the Response.

[para 55] As well, I acknowledge that free communication flows and sharing of information as between the Public Body and FSCD, insofar as permitted by law, is likely intended to, and likely does, facilitate the provision of services and support to the Student, thereby benefiting the Student and his family. However, the disclosure complained of here was outside of the specific context of provision of services and programming to the Student, as distinct from the discussion and explanation of those services and programs to the MLA.

[para 56] That said, I find that there are relevant circumstances that assist in rebutting the presumption of unreasonable invasion of personal privacy. The funding and programming scheme in question coordinates and integrates the efforts and contributions of the Public Body and FSCD in working with students with disabilities. While each of the Public Body and FSCD (along with Children and Youth Services, which administers the funding in question through FSCD) has its own independent role in this context, they work together in assisting the Student and his family, which is to their benefit. This point is related to the Public Body's assertion that the issues raised by the Complainant through the MLA relate to both the Public Body and FSCD, which in turn somewhat assists in rebutting the section 17(4) presumption.

[para 57] Ultimately, though, in my opinion, all of the relevant circumstances that I am to consider under section 17(5) are insufficient to rebut the presumption of an unreasonable invasion of privacy raised under section 17(4) on these facts. It follows that the Public Body was not authorized under section 40(1)(b) to disclose the Response to FSCD. Having already determined that the disclosure was not otherwise authorized under section 40, I find that the Public Body breached Part 2 of the FOIP Act when it disclosed personal information contained in the Response to FSCD.

[para 58] I am aware that my decision may dampen the ability of public bodies to be helpful in responding to requests and/or inquiries by MLAs on behalf of their constituents. As a result, in cases where a public body may legitimately claim that not it but another entity is the correct party to reply to the MLA's communication, the public body will be precluded from engaging that other entity in the communications between the public body and the MLA. In this way, *bona fide* attempts to be helpful and thorough may be thwarted, and public bodies may be seen to be simply trying to "pass the buck" without advancing resolution of the constituent's issue as much as, or in as meaningful or effective a way as, they otherwise might. This repercussion is regrettable. However, I believe that this problem may be overcome at the outset by obtaining the constituent's consent to disclose personal information to the other entity or entities.

V. ORDER

[para 59] I make this Order under section 72 of the Act.

[para 60] I find that the Public Body disclosed the Complainant's and the Student's personal information in contravention of Part 2 of the FOIP Act. Under section 72(3)(e), I order the Public Body to cease disclosing personal information in this manner, in contravention of Part 2 of the Act.

Frank Work, Q.C.
Information and Privacy Commissioner