

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2009-048

December 1, 2011

### CALGARY BOARD OF EDUCATION

Case File Number F4397

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An individual complained that the Calgary Board of Education (“Public Body”) used and disclosed his personal information in contravention of the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act” or the “Act”). He also complained that the Public Body failed to protect his personal information as required under the Act.

The Complainant was a former employee of the Public Body, having retired in 2005. In 2003, the Complainant was the subject of harassment allegations, which were resolved but which led to the Complainant bringing an application before the Board of Reference (“Board”) regarding actions taken by the Public Body following the harassment complaints. This matter was resolved in a settlement between the Public Body and the Complainant.

In 2007, the Complainant gave evidence as a witness in a separate Board proceeding, initiated by a teacher employed with the Public Body. This 2007 Board proceeding was unrelated to the allegations made against the Complainant in 2003. As part of its cross-examination of the Complainant in the 2007 Board proceedings, the Public Body sought to introduce documents related to the 2003 allegations against the Complainant. After the Public Body disclosed some of the information in the documents to the Board, the Board ordered the Public Body to disclose a copy of the documents to the Board and the other party in the proceeding, before determining whether to allow the documents to be introduced. The Board decided, after reviewing the documents, not to admit them into evidence.

To make the copies requested by the Board, an HR employee of the Public Body used a photocopier in her husband's office, which was located in the same building as the Board hearing room. The HR employee's husband assisted her with the photocopying.

The Public Body had argued that the *Public Inquiries Act* and section 3(c) of the FOIP Act effectively remove the use and disclosure of the Complainant's personal information from the purview of Part 2 of the Act for the purposes of a Board proceeding. The Adjudicator found that while section 3(c) is relevant, Part 2 of the Act applies to the use and disclosure of the Complainant's personal information.

The Adjudicator found that the Public Body both used and disclosed the Complainant's personal information for the purpose of the 2007 Board proceeding. The use and initial disclosure were not authorized under the Act. However, the disclosure of the information by the Public Body in response to the order from the Board was authorized.

The Adjudicator also found that, while the Public Body's actions were not a best practice in terms of making reasonable security arrangements to protect personal information, it did not contravene section 38 of the Act.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 3, 38, 39, 40, 41, 72, *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1, 3, *Interpretation Act*, R.S.A. 2000, c. I-8, s.10, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, s. 4, *Public Inquiries Act*, R.S.A. 2000, c. P-39, ss. 4, 5, 9, *School Act*, R.S.A. 2000, c. S-3, ss. 131, 136. **ONT:** Ontario Regulation 460.

**Orders Cited:** **AB:** Orders 98-002, F2009-041, F2011-007, H2004-005, P2008-010, P2010-018. **ONT:** Investigation I94-029P.

**Cases Cited:** *Alberta Child Welfare v. C.H.S.*, 2005 ABQB 695, *Alberta (Workers' Compensation Board) v. Appeals Commission*, [2005] A.J. No. 1012, *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112.

**Authorities Cited:** **ONT:** Commission on Freedom of Information and Individual Privacy, *Public Government for Private People - the Report of the Ontario Commission on Freedom of Information and Individual Privacy*, vol.3. Toronto, Ont: Queen's Printer, 1980.

## **BACKGROUND**

[para 1] An individual complained that the Calgary Board of Education ("Public Body") used and disclosed his personal information in contravention of the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act" or the "Act"). He also complained that the Public Body failed to protect his personal information, as required under the Act.

[para 2] The Complainant was an employee with the Public Body for 37 years, retiring in 2005. In 2003, the Complainant was the subject of four related harassment allegations,

which were resolved informally. Later that year the Complainant brought an application before the Board of Reference (“Board”) regarding actions taken by the Public Body following the harassment complaints; this matter was resolved in a settlement between the Public Body and the Complainant.

[para 3] In 2007, the Complainant was asked to give evidence in a separate Board proceeding, which had been initiated by a teacher employed by the Public Body (“2007 Board proceeding”); the Public Body was the defending party in the proceeding. This 2007 Board proceeding was not related to the Complainant’s own 2003 allegations. As a witness in the 2007 Board proceeding, the Complainant was cross-examined by the Public Body’s counsel, who also sought to introduce the documents at issue, which relate to the 2003 allegations made against the Complainant, and subsequent investigation by the Public Body (“the documents”).

[para 4] The documents were provided to the Public Body’s counsel by an HR employee of the Public Body. When the Public Body sought to introduce the documents as evidence in the 2007 Board proceeding, the Board ordered the Public Body to disclose a copy of the documents to the Board and the other party in the proceeding.

[para 5] To make the copies requested by the Board, the Public Body’s HR employee used a photocopier in her husband’s office, which was located in the same building as the Board hearing room. The HR employee’s husband assisted her with the photocopying.

[para 6] The Board decided, after reviewing the documents, not to admit them into evidence.

## **I. INFORMATION AT ISSUE**

[para 7] The information at issue is information in documents related to the Complainant’s 2003 harassment investigation in the custody of the Public Body, which the Public Body sought to introduce as evidence in the 2007 Board proceeding.

## **III. ISSUES**

[para 8] The Notice of Inquiry, sent to the parties on July 7, 2009, lists the following as issues:

- 1. Did the Public Body use the Complainant’s personal information in contravention of the Act?**
- 2. Did the Public Body disclose the Complainant’s personal information in contravention of the Act?**
- 3. Did the Public Body fail to protect the Complainant’s personal information in contravention of the Act?**

## IV. DISCUSSION OF ISSUES

### Preliminary Issue – Jurisdiction

[para 9] The Public Body argues that the *Public Inquiries Act*, specifically section 9(3), together with section 3(c) and 40(1)(v) of the FOIP Act “effectively render *FOIP* inapplicable in respect of documents or information relevant to a Board of Reference hearing in that it requires said information and documents, even if private and/or confidential, be produced in a Board of Reference hearing”, and that

s. 9(3) of the *Public Inquiries Act* and s. 3(c) of *FOIP* render the other provisions of *FOIP*, including the constraints of necessity and reasonableness, inapplicable to the use and disclosure of personal information in legal proceedings provided the information was “otherwise available at law.”

[para 10] Section 3 of the FOIP Act states, in part:

#### 3 This Act

...

(c) does not limit the information otherwise available by law to a party to legal proceedings,

(d) does not affect the power of any court or tribunal in Canada to compel a witness to testify or compel the production of documents...

[para 11] Section 131 of the *School Act* provides for the creation of a Board of Reference, and provides that this board has the powers of a commissioner under the *Public Inquiries Act*.

[para 12] Section 9 of the *Public Inquiries Act* states, in part:

9(1) Every person has the same privileges in relation to the disclosure of information and the production of documents, papers and things under this Act as witnesses have in any court.

(2) Notwithstanding subsection (1), the rule of law that authorizes or requires the withholding of any document, paper or thing or the refusal to disclose any information on the ground that the disclosure would be injurious to the public interest does not apply in respect of an inquiry.

(3) Notwithstanding subsection (1),

(a) no provision in an Act, regulation or order requiring a person to maintain secrecy or not to disclose any matter applies with respect to an inquiry, and

(b) no person who is required by a commissioner or a person referred to in section 3(1)(b) to furnish information or to produce any document, paper or thing or who is summoned to give evidence at an inquiry

*shall refuse to disclose the information or produce the document, paper or thing on the ground that an Act, regulation or order requires the person to maintain secrecy or not to disclose any matter.*

[para 13] In response to the Public Body's argument, the Complainant states that

[w]hile Section 40(v) of the Act [the Complainant is likely referring to section 40(1)(v), quoted below] *may* allow for use and disclosure of personal information in a quasi-judicial proceeding – like a Board of Reference hearing – to which a public body is a party, the Act is not thereby “rendered inapplicable”. On the contrary, even if use and disclosure is allowed by Section 40(v) [sic] in such a context, the use and disclosure must still be governed and limited by the reasonableness requirements found in Sections 39(4) and 40(4).

[para 14] Sections 39(4), 40(1)(v) and 40(4) read as follows:

*39(4) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.*

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

...

*(v) for use in a proceeding before a court or quasi-judicial body to which the Government of Alberta or a public body is a party,*

...

*(4) a public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.*

[para 15] The Complainant also points out that although the *School Act* gives the Board the powers of a commissioner under the *Public Inquiries Act*, the Board proceeding is not an inquiry under that Act. I agree that giving the Board the powers of a commissioner under the *Public Inquiries Act* does not make a Board proceeding a public inquiry; this conclusion is supported by the fact that the *School Act* sets out its own processes governing Board proceedings, including a regulation-making power for the creation of a process for providing information to the Board and other parties. Thus, in my view, section 9(3)(a) of the *Public Inquiries Act* does not apply to Board of Reference hearings. Accordingly, I reject the idea that section 9(3) of that act permits production of the information at issue, much less that it *requires*, as the Public Body contends, that the information be produced. I note in any case that this provision is not paramount over the FOIP Act, since it does not expressly provide that it prevails within the terms of section 5 of the Act.

[para 16] The Public Body also refers to sections 4 and 5 of the *Public Inquiries Act*, which do apply to the Board. These sections grant the power to compel witnesses and documents:

*4 The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or*

*in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire.*

*5 The commissioner or commissioners have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench.*

[para 17] If section 3(c) (or 3(d)) of the FOIP Act, in conjunction with the *Public Inquiries Act*, rendered the FOIP Act effectively inapplicable, other provisions of the FOIP Act would also not apply. In other words, as both the Public Body and Complainant point out, the provisions limiting use and disclosure to the extent necessary under sections 39(4) and 40(4) respectively, as well as the requirement to make reasonable safeguards under section 38, would not apply to the information in the documents. This observation supports the view that sections 3(c) and 3(d) are intended as interpretive aids to the provisions in the Act that might be read as restricting disclosure, rather than as creating exclusions for certain categories of information.

[para 18] Section 3(c) of the *Health Information Act* (“HIA”) is a provision equivalent to the FOIP Act’s section 3(c). This provision of the HIA was considered in Order H2004-005. In that case, a doctor had disclosed an individual’s health information to an organization representing other doctors in a litigation proceeding in which the individual was a party. In discussing the effect of section 3(a) of the HIA, the Commissioner stated:

Section 3(a) of the [Health Information] Act [equivalent to section 3(c) of the FOIP Act] expressly recognizes that information is otherwise available by law, and other procedures that enable parties to legal proceedings to obtain information outside the Act continue to exist. Although legislation is usually presumed to override the common law, this presumption is rebutted where the legislature clearly intends to preserve the common law. Read in its ordinary and grammatical sense, this section means that in the sphere of the “information otherwise available by law to a party to legal proceedings,” the Act is not intended to change or alter the information available to parties to legal proceedings. In my view, the Act is intended to co-exist along with other laws such as the common law that previously governed the information available by law to a party to legal proceedings.

This does not mean that there are ‘no rules’ when it comes to disclosure for purposes of litigation. The judicial process and common law are well established. The courts balance and weigh the value of protecting individual privacy against the value of disclosing health information for purposes of legal proceedings, as evident in the large body of common law that exists. The protection of privacy is addressed in an extensive body of law with well established judicial precedent.

...

If section 3(a) allows the common law to co-exist along with the Act and apply to the information otherwise available by law to a party to legal proceedings, what is the purpose of the specific disclosure provisions that pertain to legal proceedings such as

court and quasi-judicial proceedings (section 35(1)(h)) [similar to section 40(1)(v) in the FOIP Act], court orders (section 35(1)(i)) [similar to section 40(1)(g) in the FOIP Act] and enactments such as the *Rules of Court* (section 35(1)(p)) [similar to section 40(1)(f) in the FOIP Act]? The above described rules of interpretation say that legislation is to be interpreted as speaking as a whole rather than as repetitive or internally inconsistent.

[Order H2004-005, at paras. 66-67, 71]

[para 19] The Commissioner concluded that section 3(a) of the HIA does not remove the disclosure of personal information from the scope of that act, even where the disclosure was made in the context of a legal proceeding.

[para 20] For similar reasons, I find that section 3(c) of the FOIP Act does not remove the disclosure of the Complainant's personal information by the Public Body from the scope of the Act. Section 40(1)(v) of the FOIP Act specifically permits a Public Body to disclose personal information for use in a court or quasi-judicial proceeding to which it is a party. As the Commissioner concluded with respect to the equivalent section in the HIA, it is unclear what the purpose of this provision would be if all disclosures by a public body of information that would otherwise be available by law to a party to legal proceedings were to be removed from the scope of the Act by section 3(c).

[para 21] The reasoning above also applies to section 3(d); the FOIP Act should not be read so as to limit what the Public Body can disclose in response to a direction from a court or tribunal in Canada to produce documents. Since public bodies may disclose personal information for use in a court or quasi-judicial proceeding, in response to an order from a court or other body having jurisdiction in Alberta to compel the production of documents (section 40(1)(g)) or in accordance with an enactment of Alberta or Canada that requires the disclosure (section 40(1)(f)), a public body can comply both with section 40 and section 3(c) and (d).

[para 22] I turn to the Public Body's contention, as I understand it, that applying the restrictions on use and disclosure in the Act to the information at issue would limit the information "otherwise available by law to a party to legal proceedings" within the terms of section 3(c) of the Act.

[para 23] The interpretation of "available by law" was raised, but not answered, with respect to Alberta's private-sector privacy legislation, the *Personal Information Protection Act* ("PIPA") in Order P2008-010. Section 4(5)(b) in PIPA is similar to section 3(c) of the FOIP Act, and states:

*4(5) This Act is not to be applied so as to*

*...*

*(b) limit the information available by law to a party to a legal proceeding,  
or...*

[para 24] In Order P2008-010, the Director of Adjudication said:

It is an open and largely novel question, therefore, whether section 4(5)(b) is also meant to have the effect that provisions that control the collection, use and disclosure of information by organizations are not to be applied if applying them would mean that someone who wishes to introduce information into a court or tribunal proceeding would be prevented from collecting, using or disclosing the very information that they need in the proceeding. If section 4(5)(b) is to be interpreted in this way, it is also necessary to ask what “available by law” is meant to convey in the context of such an interpretation. Possibly, section 4(5)(b) is to be read as affirming the ability to collect, use and disclose information, but only such information as was available to the party by the operation of a law or a legal process. Alternatively, given that information that is relevant to a legal proceeding may be admitted and considered by a court or tribunal, disallowing such information to be entered into the database, or to be used or disclosed for the purposes for which it was collected, could be said to entail limiting the information “available by law (including the common law that allows the reception by courts of relevant evidence) to a party to a legal proceeding.”

[Order P2008-010, at para. 45]

[para 25] As I discuss in more detail later, in my view, for information to be “available by law” pursuant to section 3(c) of the FOIP Act, there must be a statutory or common law process *that makes the information available to a party to a proceeding*, and the purpose of section 3(c) is to ensure that the restrictions in the FOIP Act are not interpreted so as to interfere with or override such a process. In other words, personal information in the possession of a public body that may be related to a proceeding is not “available by law” to the public body simply by virtue of the fact that the public body is a party in the proceeding and has the information in its possession.

[para 26] I conclude that I have jurisdiction to consider whether the Public Body’s use and disclosure of the Complainant’s personal information was in accordance with the FOIP Act; in doing so I will take into account the application and purposes of sections 3(c) and 3(d).

### **Preliminary Issue – Evidence**

[para 27] The Complainant urged me to disregard several sections of the Public Body’s submissions as being irrelevant or lacking evidentiary support for the claims made. He also objects to the affidavit from the HR employee, which was provided by the Public Body in its rebuttal submission, because “it is presented in rebuttal in an attempt to confirm or shore up argument made at first instance, and is therefore disallowed by the fundamental rules of evidence.”

[para 28] The Complainant was permitted to submit an additional rebuttal to address the evidence provided in the affidavit, which addresses any concern he may have with respect to fairness.

[para 29] Additionally, I am not bound by the rules of evidence applicable to court proceedings. The Court in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112 at para. 114 cited *Alberta (Workers’ Compensation*



*Board) v. Appeals Commission*, [2005] A.J. No. 1012, in which the Court found that administrative tribunals “are entitled to act on any material which is logically probative, even though it is not evidence in a court of law.” That said, I must consider the evidentiary support provided for each party’s arguments.

[para 30] The Complainant points out that the issue in the 2003 Board proceeding was settled between the Public Body and the Complainant. He indicates that the use of the documents, which related to a settled matter,

... violate the implicit understanding that legal disputes, once settled, will not be brought forward by the parties again, and that such matters will henceforth remain confidential. In the absence of such an understanding, the utility of settlement is seriously undermined... What comfort do other teachers have, and what motivation to settle, if they know that their disputes with the [Public Body], once “settled”, can be brought up again by that body in the context of completely unrelated proceedings?

[para 31] In my view, this is an issue that the Public Body must consider when exercising its discretion to use and/or disclose personal information in such circumstances. The FOIP Act *permits* the use and disclosure of personal information in the prescribed circumstances under Part 2; it does not prohibit the use or disclosure of personal information in a specific situation, although other laws might (legislation or common law). For this reason, whether the documents relate to a matter that was settled between the Complainant and the Public Body does not help me determine whether the use or disclosure was authorized under the Act.

### **1. Did the Public Body use the Complainant’s personal information in contravention of the Act?**

[para 32] A public body may use personal information only in certain circumstances, and only to the extent necessary. The relevant provisions of section 39 of the Act state:

*39(1) A public body may use personal information only*

- (a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,*
- (b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use, or*
- (c) for a purpose for which that information may be disclosed to that public body under section 40, 42 or 43.*

...

*(4) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.*

*Did the Public Body use the Complainant’s personal information?*

[para 33] The Public Body states that during the 2007 Board proceeding, it introduced the information as a means to challenge the veracity of the Complainant's testimony by bringing into question the Complainant's character.

[para 34] It is clear that the Public Body disclosed the Complainant's personal information to the Board of Reference. However, the Public Body has argued that it did not *use* the Complainant's personal information because "the Documents, as both parties in this matter agree, were ultimately never used in the Legal Proceeding." If this argument is correct, the Public Body would not have to demonstrate its authority under section 39 of the Act; it would only need to demonstrate its authority for disclosure under section 40.

[para 35] I must decide whether the Public Body *used* the Complainant's personal information within the terms of section 39 of the FOIP Act, or whether the Public Body only disclosed the information without ever having used it in this sense.

[para 36] An earlier order of this office under PIPA raised a similar question. In Order P2010-018 the Adjudicator considered a situation in which the complainant's personal information was disclosed by an organization in the course of litigation with an unrelated third party. Initially, the organization reviewed the document containing the complainant's personal information but determined that it was not relevant to the litigation with the third party. The organization was later ordered by the court to disclose the document to the third party. The Adjudicator found that

[w]hile the Organization writes that it did not "use" [the document] other than in relation to the litigation, I find that it did not actually use the Complainant's personal information. The Organization indicates that it reviewed [the document], but that it determined that the document was not relevant to the lawsuit involving Mr. X. As the Organization did not actually do anything with the information in the document, it did not use any of it in the course of the litigation.

I conclude that the Organization collected and disclosed the Complainant's personal information in [the document], but that it did not use his personal information in it.

[Order P2010-018, at paras. 37-38]

[para 37] The Alberta Court of Queen's Bench has considered the use of clients' personal information by a public body in the course of a civil proceeding to be a use as contemplated by section 39(1) of Alberta's Act. In *Alberta Child Welfare v. C.H.S.*, 2005 ABQB 695 ("*Child Welfare*"), the Court asked whether Alberta Children's Services was entitled to use personal information in its records to defend a lawsuit against it. The Court stated, with respect to consistent use under section 39(1)(a):

Where files are assembled as a part of a government activity, and litigation arises from that activity, *the use of the information to defend or prosecute* the litigation has a reasonable and direct connection to the purpose for which the information was collected (at para. 24, my emphasis).

[para 38] The FOIP Act does not include a definition for "use"; however, the *Health Information Act* ("HIA") defines "use" in the following way:

*I(1)(w) “use” means to apply health information for a purpose and includes reproducing the information, but does not include disclosing the information.*

Similarly, the Canadian Oxford Dictionary, 2<sup>nd</sup> ed., defines use as employ[ing] (something) for a particular purpose.

[para 39] Both the *Child Welfare* decision and Order P2010-018 are consistent with these definitions of “use”; in the former decision, the Court talks about the use of personal information *to defend or prosecute*, and in the latter decision, the documents were not initially applied to any purpose and hence were found not to have been used by the organization.

[para 40] If reading or reviewing personal information in order to determine whether the information is relevant for the purpose of disclosure is a use of the information under the Act, a public body would *use* information under section 39 in each instance where information was disclosed by it under section 40. This would include situations in which, as is often the case under section 40, the purpose for the disclosure was unconnected to the purpose for the collection of the information and was not for any purpose of the public body itself. I note that section 39 does not authorize the use of personal information for the purpose of determining its appropriateness for disclosure. At the same time, a public body cannot simply disclose a record containing personal information without first reading the information in order to determine the appropriateness of the disclosure as section 40(4) requires disclosure only to the extent necessary for the given purpose. If simply reading over the information were a *use* as contemplated under the Act, a public body might be in a situation where they do not have authority to use personal information for a purpose for which they could disclose the information and therefore cannot disclose the information simply because they cannot determine the contents and appropriateness first.

[para 41] Given that public bodies may use personal information in only the following circumstances: when the use is for, or consistent with, the purpose for which the information was collected; with the individual’s consent; or for a purpose for which the information may be disclosed to the collecting public body under Part 2, the more extensive provisions permitting disclosure under section 40 could be thwarted if a public body required authorization to use any personal information in order to judge its appropriateness for disclosure. It would in fact be an absurd result if public bodies were permitted to disclose personal information under sections 40(1)(a)-(ff), 40(2), 42 and 43; to exercise discretion when determining whether to disclose; and to disclose only the minimum personal information necessary for the relevant purpose; but at the same time they were not permitted to review the personal information in order to do these things.

[para 42] Consequently, in my view, the correct interpretation of the Act is that a public body is not *using* personal information for the purpose of section 39 of the Act if it is only reviewing the personal information for the purpose of determining whether to disclose it under section 40.

[para 43] However, that is not to say that a public body never uses information that it discloses under section 40, and indeed, many of the purposes for disclosure under section 40 are the public body's own purposes. It seems to me that there is a difference between a public body reviewing information to determine whether it can be disclosed under section 40 to another public body (for example) for that other public body's use, and a public body reviewing information to determine whether the record can be used for its own purpose.

[para 44] In her affidavit, the HR employee states that both she and the Public Body's counsel "were of the opinion that the evidence given by the Complainant at the Legal Proceeding on December 13, 2007 may have been inaccurate and dishonest." She goes on to say "[i]n addition, I also recognized a discrepancy between the contents of the Complainant's resume, which was provided by the Complainant to the Board of Reference in connection to his testimony, and the Complainant's Work History record with the Public Body." The HR employee states that as a result of her suspicion, she consulted with the Superintendent of HR, who had also been the Superintendent at the time of the Complainant's 2003 harassment allegations and related investigation. The Superintendent directed the HR employee to the file relating to the Complainant's 2003 Board proceedings.

[para 45] Thus, in the present case, the Public Body reviewed the Complainant's file and determined that the Complainant's personal information could be useful to the Public Body in the Board proceeding. I find that the Public Body used the Complainant's personal information, not simply because the Public Body was reviewing the information for its own purposes, but because the Public Body determined that the information would be useful and *applied or employed* the Complainant's personal information for a particular purpose (i.e. supporting its case before the Board).

*Was the Public Body's use of the personal information authorized?*

[para 46] As already noted above, section 39(1) allows a public body to use personal information in the following circumstances:

- (a) *for the purpose for which the information was collected or compiled or for a use consistent with that purpose,*
- (b) *if the individual the information is about has identified the information and consented, in the prescribed manner, to the use, or*
- (c) *for a purpose for which that information may be disclosed to that public body under section 40, 42 or 43.*

[para 47] Section 41 defines "consistent purpose" in the following manner:

*41 For the purposes of sections 39(1)(a) and 40(1)(c), a use or disclosure of personal information is consistent with the purpose for which the information was collected or compiled if the use or disclosure*

- (a) *has a reasonable and direct connection to that purpose, and*

*(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.*

[para 48] The Public Body argued, in the alternative, that if the Complainant's personal information was used, it was used in a manner that was consistent with the purpose for which it was originally collected, pursuant to section 39(1)(a) of the Act.

[para 49] The Public Body states that it collects employee information, such as the information at issue, for the purpose of managing and administering personnel, and that the Complainant was an employee of the Public Body at the time of the incident to which the information relates. It argues that the use of the Complainant's information at the 2007 proceeding was also for the purpose of managing personnel, and therefore consistent with the purpose of the original collection.

[para 50] The Public Body also argued that the use was authorized by section 40(1)(v) of the Act; the Public Body states that as the provision authorizes the disclosure of information for use in a legal proceeding, it "authorizes both the disclosure *and* the use of the Documents by the Public Body in the Legal Proceeding. By permitting the disclosure of personal information for use in a legal proceeding, s. 40(1)(v) clearly envisages such information being produced by parties into evidence."

[para 51] Lastly, the Public Body argued that section 3(c) of the Act, together with the *Public Inquiries Act*, "explicitly exempts the type of use and disclosure in question from constituting a violation of FOIP." For reasons already set out above, neither section 3(c) of the Act, nor the *Public Inquiries Act* (nor a combination of the two) "exempts" the Public Body's use or disclosure of the Complainant's personal information at issue.

[para 52] The Complainant argues that the information in the documents was originally collected by the Public Body in order to investigate and respond to the allegations made against the Complainant in 2003, and that this is not consistent with using the information later to discredit him in the 2007 proceeding to which he was a witness.

[para 53] The Complainant also argues that even if the Public Body's use of the information was authorized under section 39, it was beyond the extent necessary to enable the Public Body to carry out its purpose in a reasonable manner, as required by section 39(4). He argues that the issue about which he testified in the 2007 hearing was unrelated to the issues in the 2003 hearing and it was therefore not necessary for the Public Body to attempt to discredit the Complainant based on issues brought up in 2003.

[para 54] If I find that the Public Body's use of the Complainant's information is not authorized under section 39, this creates a situation in which the Public Body is in possession of personal information that it believes is relevant to a quasi-judicial proceeding, but cannot use it.

[para 55] I acknowledge that an interpretation of the FOIP Act that limits what information a public body may use or introduce into a judicial or quasi-judicial proceeding voluntarily or on its own motion may be seen as interfering with judicial or quasi-judicial processes. However, these limits would not apply to all legal proceedings. In situations where the legal proceeding is related to the purpose for which the information was collected, such as in the *Child Welfare* case, the use of the personal information for the proceeding is, in my view, authorized under section 39(1)(a), (and its disclosure into the proceeding is authorized under section 40(1)(v)).

[para 56] As well, in situations where there are processes for access to information in legal proceedings, such as the rules of discovery, section 3(c) applies so as to eliminate any restrictions the Act might otherwise be taken to impose on the ability of such processes to make information for legal proceedings available to parties.

[para 57] However, there are no similar rules governing the proceedings of the Board of Reference. I note that a process for disclosure of personal information in Board proceedings was clearly contemplated under the *School Act*. Section 136(3) of the *School Act* states

136(3) Not less than 30 days before the date set for hearing the appeal, or such shorter time period as determined by the Board of Reference, each of the parties to the appeal must provide to the Board of Reference and the other parties to the appeal any material and information and make any disclosures as set out, described, governed or otherwise provided for by regulation.

However, regulations setting out the process have not been created under this provision.

[para 58] Absent a specified process for obtaining information in the course of the Board proceeding, I do not think that section 3(c) extends to permit the Public Body to use personal information in a manner that would not otherwise be authorized under the Act simply because the Public Body is a party to a quasi-judicial legal proceeding and happens to have information in its possession that it regards as relevant (though it collected the information in unrelated circumstances). The existence of a Board proceeding does not create a situation in which any possibly relevant information in the custody or control of the Public Body becomes “available by law” to the Public Body.

[para 59] I am strengthened in this conclusion by the *Report of the Commission on Freedom of Information and Individual Privacy* (“Report”), which served as the basis for Ontario’s *Freedom of Information and Protection of Privacy Act*. The Williams Commission Report expressed concerns about subsequent uses and disclosures of personal information by government, that are unrelated to the purpose for which the information was collected. The Commission stated on page 692 of the Report:

Perhaps the major concern arising from the collection of substantial amounts of personal data by government is the fear that information collected for one purpose may be used, to the disadvantage of the data subject, for quite another purpose. It is no doubt for this reason that Alan F. Westin defines ‘informational privacy’ as ‘the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others [15].’ When

sensitive personal information has been collected by government, the informational privacy interest is further violated if that information is transferred from one agency to another, or if the collecting agency uses the data for a purpose other than that for which it was collected. For this reason, a careful consideration of the problematic aspects of ‘transfers of personal information’ is an important element in our review of privacy protection issues.

[para 60] There is an acknowledgement in the Report that subsequent uses and disclosures of personal information cannot be prohibited absolutely:

It is evident, however, that it would be both impractical and undesirable to adopt an absolute principle that information concerning individuals cannot be transferred from one government agency to another (or, in appropriate cases, from government agencies to individuals or institutions outside government). How can the necessary exemptions to the general principle of no transfer be fashioned so as not to reduce unacceptably the value of privacy protection embodied in the no-transfer principle?

[para 61] With respect to subsequent use and disclosure of personal information for law enforcement purposes, the Commission states:

The well-established mechanisms of our legal process attempt to strike a balance between the rights of the subject and the public interest in access to information which will lead to the conviction of those who have committed criminal or quasi-criminal offences. The traditional mechanisms of the search warrant or other judicial orders are the proper means for gaining access to personal information in government files. Just as one would not gain access to a person’s home without a properly issued search warrant [28], so too, we believe, access should not be granted to sensitive data in one’s welfare or medical files without proper legal process. The effect of this requirement is to ensure that a judicial officer will have to be satisfied that the granting of access is reasonable in the circumstances and is related to a specific investigation of a particular offence.

[para 62] The Report does recommend permitting law enforcement agencies to continue the information-sharing practices that are common to those agencies, stating that “such cooperative efforts are instrumental in the apprehension of suspected criminals, and it would be unwise, in our view, to preclude information exchanges for that purpose.”

[para 63] Finally, the Report notes that “access given [to law enforcement] for the purpose of enforcing the statute under which the information was initially collected would fit within the new definition of “routine use” and would not require either compliance with exemption 7 or judicial process.” (The phrase “routine use” is substantially similar to the definition of “consistent use” in the Act).

[para 64] Although the Report refers to law enforcement, there is no reason to expect that broader principles would have been applied in the context of a legal proceeding, such as the Board proceeding.

[para 65] While not determinative of the Alberta Legislature’s intent with respect to the interpretation of section 39, this Report supports the conclusion that even in the context of legal proceedings, a public body’s use of personal information must fit within the confines of section 39(1). There are few circumstances in which a public body is

authorized to use personal information under section 39, especially in comparison to the significantly longer list of circumstances in which personal information may be disclosed under section 40. The recommendations made in the Report regarding secondary uses of personal information are reflected in both section 39 of the FOIP Act as well as the respective provision in Ontario's Act, which contains the same constraints on secondary use as Alberta's provision. In my view, in the absence of a discovery process, a direction or order from a body with the power to compel the production of information, or a similar process or order, a public body may use personal information to build its case for a legal proceeding only if the proceeding is sufficiently related to the purpose for the collection (as stated in the *Child Welfare* case), if the individual has consented, or if the information was disclosed to the public body by another public body under section 40, for that purpose.

[para 66] There are only three circumstances in which the Public Body could use the Complainant's personal information under section 39(1). As the information was not disclosed to the Public Body for the purposes of the 2007 Board proceeding, section 39(1)(c) is not applicable. Clearly the Complainant did not consent, in the prescribed manner, to the use of his personal information for this proceeding, so section 39(1)(b) is not applicable. The Public Body argues as an alternative argument, that the use of the Complainant's personal information for the 2007 Board proceeding was consistent with the purpose for which it was originally collected.

[para 67] As already noted, the Public Body argues that employee information is collected for the purpose of managing and administering personnel. It further states that since the 2007 Board proceeding involved a grievance between the Public Body and one of its employees, and Board proceedings are the statutorily mandated way of handling such grievances, the use of the Complainant's personal information in the 2007 Board proceeding was consistent for the purpose for which it was collected, namely the management and administration of employees by the Public Body.

[para 68] In the *Child Welfare* case, individuals were suing Alberta Children's Services, alleging negligent care. The individuals sought copies of their files held by Children's Services, but objected to Children's Services itself using the files in the litigation. The information at issue was information about the individuals that Children's Services had collected in the course of providing care for the individuals, and the subsequent litigation concerned the quality of that care.

[para 69] In contrast, the Complainant's personal information was collected by the Public Body for the purposes of managing his employment and responding to complaints brought in 2003, but was used in a later proceeding where the Complainant was not a party and the 2003 complaints were not at issue. In other words, the 2007 Board proceeding was not reasonably and directly connected to the management of the Complainant's employment with the Public Body. For these reasons, I find the *Child Welfare* case is not persuasive on this point.



[para 70] In addition, I find that the use of the Complainant's personal information in the documents is not consistent with the purpose for which it was initially collected, as required by section 39(1)(a). When the Public Body collected the Complainant's personal information for the 2003 Board proceeding, the purpose was to manage the Complainant's employment, not to manage the employment of all of its employees, as the Public Body argues. I cannot see that the Public Body's use of the Complainant's information in 2007 had a reasonable and direct connection to the purpose for which it was collected in 2003.

[para 71] The Public Body argued in the alternative that the use of the Complainant's personal information was authorized by section 40(1)(v) of the Act; the Public Body states that as the provision authorizes the disclosure of information to use in a legal proceeding, it "authorizes both the disclosure *and* the use of the Documents by the Public Body in the Legal Proceeding. By permitting the disclosure of personal information for use in a legal proceeding, s. 40(1)(v) clearly envisages such information being produced by parties into evidence."

[para 72] I agree that section 40(1)(v) contemplates the *use* of information, in addition to the disclosure. That provision states:

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

...

*(v) for use in a proceeding before a court or quasi-judicial body to which the Government of Alberta or a public body is a party,*

[para 73] I interpret this provision as meaning that the purpose of the disclosure is so that the public body (or another party to the proceeding or the decision-maker) can use the information that was disclosed. For example, when the Public Body disclosed the Complainant's file to the Board, the Board *used* that information to determine whether the information should be introduced in the proceeding. This provision may also permit the disclosure of personal information to a public body's counsel so that counsel might prepare for the proceeding.

[para 74] However, in this case the Complainant is objecting to the Public Body's actions that took place *before* the disclosure to the Board and to the Public Body's counsel; he argues that the Public Body was not authorized to use his file for the purposes of their defence in the Board proceeding. Therefore whether the Board ultimately accepted or rejected the use of the file in the proceeding is beside the point. I agree that the term "use" in section 40(1)(v) is not to be understood such that a disclosure for use under section 40 simultaneously authorizes a use under section 39 where the use occurred prior to the disclosure.

[para 75] I note that both the Public Body and the Complainant discussed in their submissions the application of an Investigation report from the Office of the Information and Privacy Commissioner of Ontario. In Investigation I94-029P, the complainant was an employee of the Ministry who was subpoenaed to testify in a grievance proceeding

brought by another employee. During the grievance proceedings the Ministry produced evidence of the complainant's criminal history obtained from the complainant's employment file. However, the question of whether the Ministry had authority to use the information was not an issue in the Investigation; rather, the Assistant Commissioner (as she then was) considered whether the management employee had authority to access the complainant's personal information pursuant to Ontario Regulation 460, a provision that does not have an equivalent in Alberta's FOIP Act. For this reason, this Investigation report is not helpful in addressing the issues before me.

[para 76] I find that the Public Body was not authorized to use the Complainant's personal information for the purposes of the 2007 Board proceeding.

## **2. Did the Public Body disclose the Complainant's personal information in contravention of the Act?**

[para 77] The Public Body cited sections 40(1)(h) and (v) as authority to disclose the Complainant's personal information. Section 40(1)(f) is also relevant. These provisions read as follows:

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

...

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

...

*(f) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires that disclosure,*

...

*(v) for use in a proceeding before a court or quasi-judicial body to which the Government of Alberta or a public body is a party,*

...

*(4) a public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.*

[para 78] Although the Public Body's submissions refer to disclosure of the Complainant's personal information to its own counsel, as well as to the Complainant's counsel, the Complainant has clarified that the only disclosures at issue are to the HR employee, and to the Board of Reference.

[para 79] The Complainant characterizes the HR employee's acquisition of the information at issue as an unauthorized disclosure of his personal information to the HR employee. I disagree that this is a disclosure to the HR employee. I noted in Order F2011-007 that "when personal information is used by employees within a work unit, this is

often (although not always) a use of personal information. If the information is ‘shared’ with another work unit, this may constitute a disclosure.” In this case, the information was originally collected by HR for employee management purposes, and was later accessed by another HR employee while managing another employee file. According to the Public Body’s submission, the HR employee was the Public Body’s “representative” at the Board hearing. It seems that her duties included supporting the Public Body’s legal counsel. I do not think that by telling the HR employee about possibly relevant information about the Complainant the Superintendent of HR disclosed information as contemplated by the FOIP Act. Rather, this appears to be an internal (though, as I have found, unauthorized) *use* of the Complainant’s personal information.

[para 80] The Public Body and Complainant both make arguments regarding an email from the Complainant’s counsel to the Public Body, regarding information related to the documents at issue, which was not disclosed by the Public Body. The Public Body states that the Complainant’s counsel was requesting that *more* information related to the 2003 documents be released to the 2007 Board. The Complainant denies that his counsel was requesting further disclosure of the related information but was merely pointing out that the documents presented to the 2007 Board by the Public Body were incomplete. I do not have any evidence to indicate that further information was in fact disclosed so whether it was requested is irrelevant to my decision; the issue here is whether the Public Body had authority to disclose the information it had already disclosed by the time the email was sent.

[para 81] The Public Body argued that section 40(1)(v) authorizes the Public Body to disclose personal information for use in a proceeding before a quasi-judicial body to which the Public Body is a party. In this case, the Public Body is a party, with the other party being an employee on whose behalf the Complainant was testifying.

[para 82] With respect to section 40(1)(v), I begin by noting this provision applies only to legal (judicial or quasi-judicial) proceedings to which the Government of Alberta or a public body is a party, and not to legal proceedings generally. In my view, this limitation supports the idea that the purpose of the disclosure provision is to permit a public body to disclose into a legal proceeding, on its own motion, only information in its possession that relates to its (or the Government’s) involvement in the proceeding as a party, rather than permitting disclosure of any information in its possession.

[para 83] Were it otherwise, a public body would be enabled to voluntarily disclose personal information in its possession into a legal proceeding based simply on the random fact that it has collected such information, in an unrelated context, that is of relevance to the subsequent legal proceeding in which it or the Government is involved. Section 40(1)(v) means that a public body can disclose personal information for use in a legal proceeding if the use is not a secondary use but relates to or is consistent with the purpose for which the public body had the information in the first place; put another way, the purpose for which the public body collected the information is related to the events leading to the proceeding.

[para 84] I have found that the Public Body was not authorized to use the Complainant's personal information for the purpose of the 2007 Board proceeding. It seems absurd to find, on one hand, that a public body cannot use certain personal information to prepare a case before a court or quasi-judicial body, but could, on the other hand, disclose that same information for the same purpose. In my view, in this case, the Public Body was no more authorized to voluntarily disclose this information than it was to use it.

[para 85] However, the Public Body and Complainant both state in their submissions that once the Public Body informed the Board about the information it sought to introduce, the Board ordered the Public Body to disclose the information both to the Board and the other party. The Public Body argues that sections 4 and 5 of the *Public Inquiries Act* give the Board the authority to compel the production of documents. I find that the disclosure of the Complainant's personal information to the Board, at the Board's request, was authorized by sections 3(d) and 40(1)(f) of the FOIP Act, as the *Public Inquiries Act* and *School Act* enable the Board to compel the information.

[para 86] In saying this, I note that the Board became aware of the existence of the information, which it then ordered disclosed, only through what I have concluded was the Public Body's unauthorized use and initial disclosure of the information (the Public Body initially disclosed some of the information in the documents to the Board before the Board ordered the Public Body to provide a copy of the documents). Given this finding, it is to be hoped that such circumstances do not arise in future.

### **3. Did the Public Body fail to protect the Complainant's personal information in contravention of the Act?**

[para 87] Section 38 of the Act states:

*38 The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.*

[para 88] The Complainant argues that the Public Body has the burden of providing evidence that it took reasonable steps to safeguard his personal information.

[para 89] In Order F2009-041, the Adjudicator provided a useful overview of the burden of proof with respect to an alleged unauthorized disclosure of personal information under Part 2 of the FOIP Act, which I believe is sufficiently analogous to an alleged contravention of section 38 so as to apply in this case:

In Order P2006-008, the Commissioner explained the burden of proof in relation to complaints made under PIPA in the following way:

Relying on these criteria in Order P2005-001, I stated that a complainant has to have some knowledge of the basis of the complaint and it made sense to me that the initial burden of proof can, in most instances, be said to rest with the complainant. An organization then has the burden to show that it has authority under the Act to collect, use and disclose the personal information.

This initial burden is what has been termed the “evidential burden”. As I have said, it will be up to a complainant to adduce some evidence that personal information has been collected, used or disclosed. A complainant must also adduce some evidence about the manner in which the collection, use or disclosure has been or is occurring, in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act.

In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112, Yamauchi J. approved this approach to the burden of proof in complaints made under the FOIP Act. He said:

FOIPPA 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, FOIPPA 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 FOIPPA 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 FOIPPA 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 FOIPPA’s structure, this Court agrees with the *Lindsay Park* analysis of the burden of proof and evidentiary burden.

The authors of *The Law of Evidence* 2nd Edition describe the evidential burden in the following way:

A party... may satisfy an evidential burden without doing anything; for example, a witness called by the Crown testifies to facts, which raise the issue of self-defence. Thus, a party may discharge an evidential burden by pointing to some evidence already on the record. In these circumstances, the defendant does not adduce evidence but rather, the issue is raised by the evidence...

The term “evidential burden” means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.

A complainant bears the initial burden of adducing or pointing to evidence that establishes his or her information was collected, used or disclosed, depending on the nature of the complaint.

In the present case, the Complainant argues that the WCB disclosed his personal information in contravention of Part 2 of the FOIP Act. Consequently, the Complainant bears an initial evidential burden of establishing that the WCB disclosed his personal information.

[Order F2009-041 at paras. 25-29]

[para 90] In this instance, the issue is whether the information was at risk of unauthorized access, collection, use, disclosure or destruction (or similar risk). I do not think it is sufficient for the Complainant to merely allege that the Public Body failed to make reasonable safeguards; rather, he bears an initial evidential burden of establishing that his personal information was at risk.

[para 91] The Complainant states that the Public Body failed to safeguard his personal information in two ways: first, the HR employee should not have been able to access his personal information relating to the 2003 Board proceedings; second, the HR employee should not have taken the documents offsite, to the 2007 Board proceedings and later to her husband's office to photocopy them.

[para 92] In Order 98-002, the former Commissioner stated that unauthorized access under section 38 includes:

- (i) access by the public, where there is no right to access;
- (ii) access by a public body's employees, if those employees do not need to see the personal information in the course of their duties; and
- (iii) situations in which information is stored in an unsecured manner such that someone can obtain unauthorized access.

[Order 98-002, at para. 136]

[para 93] With respect to the HR employee's access to the documents, the HR employee has stated, and I accept, that the HR employee accessed the documents only after being told about their existence and possible relevance. She had to request the file from administrative personnel who had the key to the file cabinet in which the file was kept. In my view, the question of whether the HR employee's ability to access and use the Complainant's file breached the Public Body's duty to create reasonable safeguards is separate from the question of whether the HR employee's use of the Complainant's personal information was authorized under section 39. In other words, although I have found that the HR employee's use of the personal information was not authorized, this does not necessarily lead to the conclusion that her ability to access and use the information is a breach of section 38. I find it reasonable that the HR employee had access to, and could use, personal information in personnel files. The file was not available to anyone walking in the room, but needed to be requested from administrative personnel, who retrieved it from a locked cabinet. In other words, the HR employee was authorized to access and use personal information in personnel files to perform her work duties. The fact that the use of the Complainant's personal information was ultimately not authorized under section 39 does not negate the HR employee's authority to access and use information in personnel files, nor does it mean that the security arrangements that

allow her access are unreasonable. I find that there was no unauthorized access or risk of unauthorized access to the Complainant's personal information in the file, within the terms of section 38.

[para 94] With respect to the second objection, the Complainant argues that the HR employee's physical transportation of the documents to the site of the 2007 Board proceeding, as well as the physical transportation of the documents to her husband's office in the same building, was an egregious breach of section 38. I disagree. Public bodies often need to transport physical copies of information and must take precautions when doing so; there is no indication in this case that the HR employee transported the information in an insecure manner. For example, there is no indication that she left the information out in public view or treated it in such a manner so as to make it available for public access. When the HR employee took the documents to her husband's office to be copied, she did not leave the documents with her husband, but photocopied them herself, with his assistance.

[para 95] The Complainant questions why the Public Body did not take adequate copies of the record to the 2007 Board proceeding in the first place, stating that "[i]t is reasonable to expect that the 2007 Board of Reference would require its own copy of the documents, and that counsel for the appellant... would also require a copy." It would have been preferable for the Public Body to have made copies of the documents on its own premises; however, this does not mean that actions that fall short of ideal are thereby unreasonable under the Act.

[para 96] The Board had ordered the Public Body to provide the Complainant's lawyer with the documents. The Public Body states that the hearing room did not have a photocopier, and a request from the Public Body to use the photocopier at the Attorney General's office, located on the same floor, was denied. The office of the HR employee's husband was also located in the building, and the HR employee used the photocopier there to copy the documents. The Public Body's submission states that the employee required assistance to operate the copier and was assisted by her husband in completing the copying. It also states that the husband did not view the documents.

[para 97] The Public Body states that its HR employee was careful when photocopying the documents, to ensure that none were left behind in her husband's office.

[para 98] The Complainant argues that the HR employee could have returned to her office to make copies of the documents. I do not think it would be reasonable to require public bodies to copy personal information using only their own equipment; occasions may arise where making copies off-site is necessary. In such situations, public bodies must take reasonable steps to ensure that the personal information is secure from unauthorized access, use, disclosure etc. I find that in this situation the actions of the HR employee were not unreasonable. The Complainant does not allege that an unauthorized access, use, or disclosure actually occurred as a result of a lack of security on behalf of the Public Body, nor is there evidence to suggest this.

[para 99] Additionally, I find that the actions of the Public Body did not result in an unacceptable risk of unauthorized access, use or disclosure. A public body may contract out photocopying or printing services for a variety of reasons; in this case, the HR employee enlisted the help of her husband.

[para 100] The Complainant also argues that the HR employee does not explain in her affidavit how she can be certain that her husband did not view the documents while helping to photocopy them. However, I see no reason to expect that the husband *did* view the documents; the Complainant must provide me with some reason to suspect that an unauthorized access or disclosure took place. I do not have any reason to find that by eliciting the husband's help, the HR employee created an unreasonable security risk.

[para 101] Had the circumstances of this case been otherwise, for example, had the HR employee left the documents with her husband for him to photocopy himself, I might have found differently. I note that while the actions of the Public Body did not constitute a breach of section 38, they were also not a "best practice."

[para 102] The Board later ruled that the documents could not be used by the Public Body in the proceedings. The Board returned its copy of the documents to the Public Body; the Public Body also asked the Board to direct the Complainant's lawyer to destroy the documents but the Board did not respond to this request. I find that the Public Body took reasonable precautions to ensure the security of the Complainant's personal information in the files.

## **V. ORDER**

[para 103] I make this Order under section 72 of the Act.

[para 104] I find that the Public Body used and initially disclosed (on its own motion) the Complainant's personal information in contravention of Part 2 of the FOIP Act. I order the Public Body to stop using and disclosing personal information in this manner. The Public Body may comply with this order by providing training to staff concerning the appropriate management of personal information in personnel files.

[para 105] I find that the Public Body had authority to disclose the Complainant's personal information to the Board of Reference after it had been ordered to do so.

[para 106] I find that the Public Body made reasonable security arrangements to protect the Complainant's personal information.



[para 107] I further order the head of the Public Body to notify me and the Complainant, in writing, within 50 days of being given a copy of this Order, that it has complied with the Order. The notification should include a description of the steps the Public Body has taken to comply with my order in paragraph 104.

Amanda Swanek  
Adjudicator