

**ALBERTA
INFORMATION AND PRIVACY COMMISSIONER**

**Report on the Investigation
Regarding the Destruction of Records
by a Public Body**

February 17, 2000

St. Thomas Aquinas Catholic Schools

Investigation #1768

Background

On December 7, 1999, the Office of the Information and Protection of Privacy Commissioner received a letter from an applicant regarding the St. Thomas Aquinas Catholic Schools (the "Public Body"). The Applicant indicated the Public Body had not responded to the Applicant's access request under the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act").

Section 10(2) of the FOIP Act reads:

10(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.

The Commissioner authorized mediation. On January 6, 2000, the Superintendent (who is also the Head of the Public Body for the purposes of the FOIP Act) informed this Office that the decision had been made to disclose the information requested by the Applicant. Therefore, the issue regarding the deemed refusal was resolved.

On January 11, 2000, this Office was informed that some of the records responsive to the Applicant's request were destroyed. On the basis of the information before our office, the Commissioner authorized an investigation to determine whether section 86(1)(e) of the FOIP Act applied.

Section 86(1)(e) and (2) of the FOIP Act read as follows:

86(1) A person must not wilfully

(e) destroy any records subject to this Act with the intent to evade a request for access to the records

86(2) A person who violates subsection (1) is guilty of an offence and liable to a fine of not more than \$10,000.

This report outlines the findings and recommendations of the investigation conducted by this office.

Issue

To determine whether section 86(1)(e) of the FOIP Act applies, the following criteria must be met:

1. The records destroyed must be subject to the FOIP Act; and
2. The destruction of the records must be willful and with the intent to evade a request for access to these records.

What Information was the Applicant Seeking Access?

The Applicant's child ("the Child") attends an elementary school. On November 3, 1999, the Applicant wrote to the Superintendent regarding a teacher ("the Teacher") who refused to allow the Child to bring home Math and Science tests that had been written and marked.

On November 30, 1999, the Applicant wrote a note to the Teacher on the Child's student agenda. In the note, the Applicant requested that the Child's completed Social test be sent home.

The tests requested by the Applicant are "unit tests" i.e. tests given at the end of a unit to assess students' understanding and knowledge of the material covered. Unit tests are written about every one to two months. The Applicant wanted to review the tests with the Child to assist the Child's educational progress.

The tests at issue are Math and Social. The Teacher refused to send the tests home, but offered to review the tests with the Applicant and the Child at the school. The Applicant felt that it was inconvenient for the Applicant to go to the school and wanted to review the tests with the Child at home.

Preliminary Objection Noted

Counsel for some of the individuals interviewed questioned the Office of the Information and Privacy Commissioner's jurisdiction in conducting this investigation. While the individuals cooperated during the investigation, their counsel reserved their rights to raise a preliminary objection regarding the jurisdiction issue. The preliminary objection is based on the position that the Applicant did not submit a formal access request under the FOIP Act. Counsel advised they would address the objection in a more substantive way if this Office determined that further proceedings were required.

Commissioner's Authority to Investigate

Under section 51(1)(a) of the FOIP Act, the Commissioner may conduct investigations to ensure compliance with any provision of the FOIP Act. Section 51(1)(a) of the FOIP Act reads:

51(1) In addition to the Commissioner's powers and duties under Part 4 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purpose are achieved, and may

(a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records

There is no requirement for a formal access application under the FOIP Act prior to the Commissioner authorizing an investigation pursuant to section 51(1)(a).

The FOIP Act applied to provincial government departments, agencies, boards and commissions on October 1, 1995. The FOIP Act was extended to educational bodies on September 1, 1998; health authorities on October 1, 1998; post-secondary institutions on September 1, 1999; and local government bodies on October 1, 1999.

However, section 86(1)(e) and (2) of the FOIP Act was proclaimed in force effective June 1, 1994. Section 98(1) of the FOIP Act states:

98(1) This Act, except section 86(1)(e) and (2), comes into force on Proclamation.

Section 86(1)(e) and 2 pre-dates the implementation of the FOIP Act when these bodies were not subject to the access provisions. Therefore, a formal access application under the FOIP Act is not a requirement for an investigation to determine whether section 86(1)(e) and (2) applies.

Was there a Formal Access Request?

In the November 3, 1999 note to the Superintendent, the Applicant questioned the Teacher's actions and asked how an application under the FOIP Act could be made for this information. The Applicant thought the Superintendent was also the FOIP Coordinator for the Public Body. The Applicant wrote: "*...as Foipp coordinator for the region which position I presume you assume as Superintendent can I ask you*".

On November 15, 1999, the Applicant wrote again to the Superintendent to advise that the issue remained unresolved. The Applicant also wrote: "*... my question remains under Foipp can I not reasonably request that [the Child's] work be sent home?*".

The investigation found that the Public Body did not address the Applicant's question regarding an application under the FOIP Act. The Superintendent advised that he was attempting to resolve the matter "informally".

In the letter received by this Office on December 7, 1999, the Applicant wrote: "*...As it is now more than 30 days since my Foipp request, [the Superintendent] and I have agreed this is a deemed refusal and we would like your assistance.*" This letter was also copied to the Superintendent.

The Applicant did not receive any response from the Public Body to indicate that this was not a formal access request, or any information regarding how to properly file an access request under the FOIP Act to the Public Body. Therefore, it is understandable that the Applicant might consider the November 3, 1999 note to the Superintendent as a formal access application.

However, whether or not the Applicant's November 3, 1999 note to the Superintendent constituted a formal access application, the investigation identified the following concerns:

- The Public Body had no board policies or procedures regarding the processing of access applications under the FOIP Act. No instructions were provided to principals and teachers on how to handle queries or requests for access under the FOIP Act.
- The Principal of the school and the Teacher both indicated they did not know whether or not the Applicant had made a formal access application under the FOIP Act. The Teacher informed this Office that the Applicant verbally informed the Teacher on December 1, 1999 that the Applicant would "foip" the information. However, the Teacher did not know whether or not the Applicant followed through on this.
- The FOIP Coordinator for the Public Body did not receive a copy of the Applicant's November 3, 1999 note and was not involved in any discussions with the Superintendent regarding this matter.
- On December 3, 1999, the Public Body's FOIP Coordinator received a continuing access request from the Applicant with specific reference to the FOIP Act. However, the FOIP Coordinator did not send a letter to the Applicant acknowledging the receipt of the request, did not have any discussion with the Applicant regarding the access request and did not process the access request in accordance with Part 1 of the FOIP Act. The FOIP Coordinator explained that no action was taken because the FOIP Coordinator understood the Superintendent was handling the situation.

The FOIP Act places specific duties and responsibilities on the Public Body. While the FOIP Act does not preclude a public body from attempting to resolve an issue informally, the public body must process an access request in accordance to timelines and provisions set out in Part 1 of the FOIP Act. If a public body is unclear as to whether or not it has received a formal access application, the public body should clarify this matter with the individual and inform the individual as to the procedures for filing an access application.

Were Records Destroyed?

The unit tests referenced in the Applicant's November 3, 1999 note to the Superintendent and the November 30, 1999 note to the Teacher were shredded. The Teacher could not recall the specific date when these unit tests were destroyed but was sure it was prior to Christmas.

In response to the Applicant's December 3, 1999 request, the Public Body has advised the Applicant that future tests will be sent home.

Was the destruction willful and with the intent to evade a request for access to the records?

The Principal and the Teacher advised that there was no written board or school policies regarding the retention and disposal of completed tests. The general practice of the school has been to dispose of the tests after the reporting period and after parent-teacher interviews. However, the decision to dispose of tests is left with the individual teacher.

The reporting period was the end of November 1999. The Teacher indicated the tests were available during the parent-teacher interview. On December 3, 1999, the Applicant's spouse went to the school and reviewed the tests with the Teacher and the Child. The Teacher thought that the issue of sending the tests home was concluded, and destroyed the tests in accordance with the Teacher's usual practice.

The investigation concludes that the destruction of the unit tests was not willful, and it was not with the intent to evade a request for access. This conclusion is based on the following:

- The Teacher had completed the parent-teacher interviews, the unit tests were available during these interviews, and the Applicant's spouse had reviewed the tests with the Child and Teacher. Therefore, it is reasonable for the Teacher to assume that this issue had been resolved.
- In the absence of school or board policies regarding the retention and disposal of completed tests, the Teacher shredded the tests in accordance with the Teacher's usual practice.
- Although the Applicant had verbally informed the Teacher on December 1, 1999 that the Applicant would "foip" the information, the Teacher did not know if the Applicant followed through with this comment. In addition, the Teacher did not understand the implications of an access request under the FOIP Act. There are no established procedures or directions given to schools on how access requests are to be handled by the Public Body.
- At the time of the incident, there was no Board policy regarding the retention, disposal and release of completed tests. The release of completed tests was inconsistent and dependent upon the teacher. The Public Body is currently working on a division policy to address this matter.
- The Teacher's concern with sending the unit tests home was not to prevent the Applicant or any parent from viewing the tests. The concern was to maintain the integrity of tests. The Teacher indicated that some of the questions on the tests may be used for future tests and related a previous incident where tests released home were used by other children on subsequent tests.

Are the Records Subject to the FOIP Act?

As the investigation concludes that the destruction of the unit tests was not willful and with the intent to evade a request for access to these records, the investigation did not need to consider the issue of whether these records were subject to the FOIP Act.

Closing Comments and Recommendations

The investigation concludes that section 86(1)(e) and (2) of the FOIP Act did not apply to the destruction of unit tests. Therefore, no further proceedings are warranted in this matter.

Based on the findings of the investigation, the Portfolio Officer would make the following recommendations for the consideration of the Head of the Public Body:

1. The Public Body should develop procedures on how access applications under the FOIP Act would be processed. These procedures should be communicated to teachers, principals and front line staff. The procedures should also be available to the public upon request.
2. Applications for access under the FOIP Act should be forwarded immediately to the Public Body's FOIP Coordinator for processing in accordance with the timelines and provisions set out in Part 1 of the FOIP Act.
3. The Public Body should develop a policy regarding the retention, disposal and release of completed tests in accordance with the provisions of the FOIP Act. The policy should be clearly communicated to principals and teachers.
4. The Public Body should educate and train its employees on the FOIP Act through a variety of means including training sessions, presentations, established policies and procedures, etc.

The investigation found minimal training on the FOIP Act has been provided to teachers and principals. The Superintendent, the Principal and the Teacher referenced a meeting conducted in 1998 that included a video and some general discussions as the extent of their training on the FOIP Act to date.

Submitted by,

Marilyn Mun
Portfolio Officer