

**ALBERTA
INFORMATION AND PRIVACY COMMISSIONER**

**Report on Investigation into Complaint
Regarding Part 1 and Part 2 of the
*Freedom of Information and Protection of Privacy Act***

June 6, 2001

Edmonton Public Schools

Investigation #2095

I. THE COMPLAINT

[para 1.] On February 5, 2001, the Commissioner received the following complaint against the Edmonton Public Schools ("the Public Body"):

1. The Complainant claimed that the Public Body did not comply with the access provisions of the FOIP Act when responding to the Complainant's request for information;
2. The Complainant questioned the Public Body's destruction of a record that was responsive to the Complainant's access request; and
3. The Complainant expressed concerns with the Public Body's retention of a computer disk containing personal information.

II. THE COMMISSIONER'S AUTHORITY TO INVESTIGATE

[para 2.] Under section 51(1)(a) of the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act"), the Commissioner may conduct investigations to ensure compliance with any provision of the FOIP Act. In addition, section 51(2)(e) of the FOIP Act authorizes the Commissioner to investigate complaints that personal information has been collected, used or disclosed by a public body in violation of Part 2 of the FOIP Act. Accordingly, the Commissioner authorized me to investigate this matter.

III. PRELIMINARY MATTER

[para 3.] In the complaint filed with the Commissioner, the Complainant also outlined concerns that are outside the mandate of the Commissioner's office as set out in the FOIP Act. This investigation will only address those matters that are under the Commissioner's jurisdiction.

IV. DID THE PUBLIC BODY COMPLY WITH THE ACCESS PROVISIONS OF THE FOIP ACT?

A. Background

[para 4.] In November 1999, the Complainant's child ("the Student") and some fellow students gave a letter of complaint to their teacher regarding another student. The letter of complaint will be referred to as "the Letter" in this report.

[para 5.] The teacher forwarded the Letter to the school's principal ("the Principal"). Subsequently, there was considerable communication and correspondences between the Complainant, school representatives, and Public Body representatives regarding the Letter and other matters.

B. What information did the Complainant want to obtain?

[para 6.] The Complainant initially attempted to obtain access to the Letter and other information outside the FOIP Act. The Public Body indicated it would release a copy of the Letter but that the names of the individuals who signed the Letter, with the exception of the Student, would be withheld. However, the Complainant wanted the Letter with all the names and was not convinced that the Public Body had provided all the other information requested.

[para 7.] As a result, the Complainant formally applied to the Public Body under the FOIP Act on September 27, 2000 for access to:

"Copies of all documents in files maintained or held by the Edmonton Public School Board, its officers, its advisors, its associates, consultants and all contract employees as well as any off site files that may be held at a school or independent office of a party contracted by the Edmonton Public School that includes any mention of [the Student] by name or circumstances involving [the Student], as well as any additional documents that include my name for the period from September 1993 until September 30, 2000.

C. Complainant's issues

[para 8.] The Complainant expressed a number of concerns with the Public Body's responses to the access attempts that were initially made outside the FOIP Act.

[para 9.] With regards to the Public Body's response to the formal access application, the Complainant claimed the Public Body failed in its duty to advise that the Complainant had a right to request a review from the Commissioner.

D. Investigation Findings and Analysis

1. Informal Access Requests

[para 10.] The FOIP Act does not preclude public bodies from disclosing records or information through other procedures. Public bodies routinely disclose information or respond to requests for information without requiring individuals to submit a formal access application under the FOIP Act. Requests for access to information outside of the FOIP Act are commonly referred to as "informal access requests" and the access provisions set out in Part 1 of the FOIP Act do not apply.

[para 11.] Section 51(1)(a) of the FOIP Act authorizes the Commissioner to ensure that public bodies comply with the provisions of the FOIP Act. Section 68 of the FOIP Act gives the Commissioner the power to issue a number of different orders including the power to require a public body to perform a duty imposed by the FOIP Act.

[para 12.] However, the Commissioner's powers and authority are not invoked unless a formal access application under the FOIP Act has been filed with a public body. In the same way, the obligations and requirements set out in Part 1 of the FOIP Act do not apply to public bodies unless a formal access application under the FOIP Act has been made.

[para 13.] In Order 99-011, the Commissioner said:

[para 38.]...A public body's duty to assist under section 9(1) is triggered by an access request. No duty under section 9(1) arises before that triggering event.

[para 39.] It may be that, prior to an access request, a duty to assist arises elsewhere, but it does not arise under section 9(1).....

[para 14.] As the access provisions set out in Part 1 of the FOIP Act do not apply to informal access requests, I find that the Complainant's concerns with the Public Body's responses to the initial informal access requests are outside the Commissioner's jurisdiction.

2. Formal Access Application

[para 15.] On September 27, 2000, the Complainant formally applied for access to information under the FOIP Act to the Public Body's FOIP Coordinator ("the FOIP Coordinator").

[para 16.] Section 11(1)(a) of the FOIP Act requires public bodies to advise applicants whether access to records will be granted or refused. If access to records or parts of the records are refused, the public bodies must tell applicants:

- the reasons for the refusal and the provision of the FOIP Act on which the refusal is based (section 11(1)(c)(i));
- the name, title, business address and business telephone number of an officer or employee who can answer the applicant's questions about the refusal (section 11(1)(c)(ii)); and
- that applicant may ask for a review by the Commissioner (section 11(1)(c)(iii)).

[para 17.] The Public Body completed the processing of the Complainant's formal access application on November 29, 2000. However, the Complainant did not meet with the FOIP Coordinator to receive the package of responsive records until December 2000.

[para 18.] The package released to the Complainant contained a letter from the FOIP Coordinator dated November 29, 2000 advising that the requested records were being released to the Complainant. The letter also indicated that the Public Body was applying section 16(1) [third party personal information] and section 26(1) [privileged information] of the FOIP Act to sever information from the records released. The letter confirmed that some records were not released as the Complainant already received this information.

[para 19.] The package released to the Complainant also included letters from Public Body employees who reported they do not have any responsive records in their possession.

[para 20.] I find that the Public Body's November 29, 2000 letter complied with the requirements set out in section 11(1)(a), section 11(1)(c)(i) and section 11(1)(c)(ii) of the FOIP Act.

[para 21.] With respect to section 11(1)(c)(iii), the Complainant claimed the Public Body did not notify the Complainant of the right to request a review.

[para 22.] The FOIP Coordinator said that he verbally advised the Complainant during the December 2000 meeting about the Complainant's right to request a review from the Commissioner.

[para 23.] Section 11(1)(c)(iii) does not require that the notification to applicants be in writing. However, to minimize situations as to what was or was not communicated, I think it would be better if public bodies ensure that their notifications to applicants on this matter be in writing. Therefore, I recommend that the Public Body revise the wording of their letters to applicants to include the notification set out in section 11(1)(c)(iii) of the FOIP Act. The Public Body indicated that it would accept this recommendation upon receipt of this Report.

[para 24.] Regardless whether the Public Body did or did not notify the Complainant of the right to request a review, I find that this issue is remedied by the fact that the Complainant did subsequently file a complaint with the Commissioner and an investigation was authorized. The Complainant did not lose any rights in this matter.

[para 25.] In my view, no practical remedy can be granted to the Complainant in pursuing this issue further. Section 68 of the FOIP Act authorizes the Commissioner to issue a number of different orders, such as ordering a public body to perform a duty imposed by the FOIP Act or its regulations (section 68(3)(a)). It would make no sense for the Commissioner to order the Public Body to notify the Complainant of the right to request a review of the Public Body's response when the Complainant has already done so.

[para 26.] Therefore, I conclude that no further action is warranted on the section 11(1)(c)(iii) issue.

V. DID THE PUBLIC BODY'S DESTRUCTION OF A RECORD COMPLY WITH THE FOIP ACT?

1. Complainant's issues

[para 27.] One of the records that the Complainant wants is a copy of the Letter containing the signatures of the Student and the fellow students.

[para 28.] In response to the Complainant's formal access application, the Public Body released a copy of the Letter with a notation that the names of the students were severed under section 16(1) of the FOIP Act. The Letter also contained a hand-written notation from the Principal dated October 24, 2000 that states the Letter was a copy and that the original Letter was shredded.

[para 29.] In a telephone conversation on February 1, 2001, the FOIP Coordinator advised the Complainant that the original Letter was shredded in November 1999.

[para 30.] The Complainant expressed concerns that the Public Body had not previously advised the Complainant that the original Letter had been destroyed and finds such action "very suspicious".

2. Investigation Findings and Analysis

[para 31.] The Public Body advised the original Letter was shredded in November 1999, but that the Principal kept a copy of the original Letter. However, the Principal had used white-out to cover the names of the students who signed the Letter.

[para 32.] When the FOIP Coordinator was searching for records responsive to the Complainant's access request, the Principal located the copy of the Letter. Prior to forwarding the Letter to the FOIP

Coordinator, the Principal wrote on the margin of the Letter that this was a copy as the original was shredded.

[para 33.] The Public Body showed me the copy of the Letter that contained the Principal's original written notations with the names of the students covered in white-out. The FOIP Coordinator advised that the names of the students could be revealed if the white-out was scrapped off and the Letter held against a light.

[para 34.] In my view, the Letter that now exists is not a true copy of the original Letter. Although the contents of the original Letter are still intact and can be discerned, it is a "new record" because it has been altered with the Principal's additional notations. It should be noted that this new record is subject to the current records retention and disposition schedules authorized by the Public Body.

3. Does section 86(1)(e) of the FOIP Act apply to the destruction of the original Letter?

[para 35.] Section 86(1)(e) of the FOIP Act states:

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.

[para 36.] The Complainant did not specifically allege that the destruction of the original Letter was an attempt to evade the Complainant's access application. However, the Complainant did describe the destruction as "very suspicious". The Complainant also outlined the attempts made to obtain access to the original Letter both outside and under the FOIP Act and expressed concerns that the Public Body did not previously advise that the original Letter was destroyed. Given the Complainant's concerns and comments, I decided to review whether section 86(1)(e) of the FOIP Act applied to the destruction of the original Letter.

[para 37.] In order to determine whether section 86(1)(e) of the FOIP Act applies, I must find that:

1. records were destroyed; and
2. the destruction was wilful and with the intent to avoid requests for access to those records.

[para 38.] As a result of the original Letter, an investigation was conducted at the School. Although the Complainant had issues with the investigation, the Public Body advised that the Principal believed the matter was concluded and therefore destroyed the original Letter in November 1999. However, the Principal did retain a copy of the Letter.

[para 39.] The fact that the Principal did keep a copy of the Letter is evidence to me that the destruction of the original Letter was not for the purpose of evading the Complainant's access request. Had the Principal's intent been to evade the Complainant's access request, no copies of the Letter would have been retained at all.

[para 40.] I noted that the Principal located and brought forward the Letter when the FOIP Coordinator was searching for records responsive to the Complainant's access application. The Principal also clearly indicated that the Letter was a copy and that the original had been destroyed.

[para 41.] Therefore, I conclude that section 86(1)(e) of the FOIP Act did not apply to the destruction of the original Letter.

VI. IS THE PUBLIC BODY'S RETENTION OF A COMPUTER DISK CONTAINING PERSONAL INFORMATION IN ACCORDANCE WITH THE FOIP ACT?

[para 42.] The Complainant was "dismayed" that the Public Body "knowingly" kept a computer disk that contained personal information. The Complainant said the computer disk is the personal property of the Student and contained a "journal writing" project that included material that was "personal".

[para 43.] The Public Body advised that students use computer disks to work on various school assignments throughout the school year. In some schools, students purchase a computer disk from the school and in other schools, students buy their own computer disks and bring them to school. Generally the computer disks are returned to students at the end of each school year.

[para 44.] The Public Body said that the computer disk was found on the gym floor at the School during the Public Body's search for records responsive to the Complainant's access request. The FOIP Coordinator advised he accessed the information contained in the computer disk in order to confirm that the computer disk belonged to the Student.

[para 45.] As the information contained in the computer disk is responsive to the Complainant's access request, the FOIP Coordinator printed a paper copy of the information. A copy of the printed information was given to the Complainant, along with the actual computer disk itself.

[para 46.] The FOIP Coordinator said the Public Body no longer has the computer disk and did not make a duplicate computer disk. However, the FOIP Coordinator retained a copy of the printed information that was contained in the computer disk to ensure the "integrity of the information". As the information contained in the computer disk is responsive to the Complainant's access request and the Public Body's processing of the Complainant's access application may be reviewed by the Commissioner at a later date, I find the Public Body's retention of the information is justified.

[para 47.] The FOIP Coordinator said no copy of the information contained in the computer disk is on the Student's official education file.

VII. SUMMARY OF FINDINGS AND RECOMMENDATIONS

[para 48.] In summary, my findings and recommendations are as follows:

1. The Commissioner's powers and authority are not invoked unless a formal access application under the FOIP Act has been filed with a public body. Therefore, the Complainant's concerns regarding the Public Body's responses to the initial informal access requests are outside the Commissioner's jurisdiction.
2. The Public Body's November 29, 2000 response to the Complainant's access application complies with the requirements set out in section 11(1)(a), section 11(1)(c)(i) and section 11(1)(c)(ii) of the FOIP Act.
3. The Complainant said the Public Body failed in its duty to notify the Complainant as required under section 11(1)(c)(iii) of the FOIP Act. The Public Body claimed it verbally notified the Complainant of this right. To minimize situations as to what was or was not communicated, I recommend that the Public Body revise the wording of its letters to applicants to include the notification set out in section 11(1)(c)(iii) of the FOIP Act. The Public Body indicated it would accept this recommendation upon receipt of this Report.
4. Section 86(1)(e) of the FOIP Act did not apply to the destruction of the original Letter.

5. The Public Body is justified in its retention of the information printed from the computer disk.

VIII. CLOSING COMMENTS

[para 49.] The Complainant's frustration and dissatisfaction with the Public Body's handling of an investigation involving the Student and other matters are clearly conveyed in the complaint filed with the Commissioner.

[para 50.] This investigation has attempted to address those concerns that are under the Commissioner's jurisdiction.

[para 51.] I find that the Complainant's concerns were primarily of a privacy complaint nature. Although there appear to be some issues with the Public Body's response to the Complainant's access application, these were not as clearly conveyed as the complaint matter. For example, I understand the Complainant wishes to access the names of the students who signed the Letter. However, the Letter is only one of the responsive records that the Public Body applied section 16(1) of the FOIP Act to sever information. I am uncertain whether the Complainant has issue with the other severed records. Therefore, this investigation did not address the Public Body's application of the FOIP Act to withhold information.

[para 52.] If the Complainant wishes to pursue the matter relating to the Public Body's application of the FOIP Act to withhold information, I would recommend that the Complainant submit a request for review to the Commissioner under section 62(1) of the FOIP Act as soon as possible. I would recommend that the Complainant clearly outline whether the Complainant is requesting a review of all the documents that were severed or only the Letter. Upon receipt of the Complainant's request for review, this Office will open a new file on this matter.

[para 53.] However, the Complainant should note that the request for review would only address the information withheld and the Public Body's application of the FOIP Act to withhold the information. The request for review will not comment on or address how the Public Body dealt with the investigation involving the Student or other matters relating to the Student's education.

[para 54.] In my view, no further action is warranted on the matters outlined in this Report, as there would be no practical remedy that can be offered to the Complainant.

[para 55.] Therefore, I recommend that this file be closed.

Submitted by,

Marylin Mun
Portfolio Officer