

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

INVESTIGATION REPORT
F2002-IR-001

April 9, 2002

FORT MCMURRAY CATHOLIC SCHOOLS

Investigation Number 1972

This investigation is concluded and the matters within it are resolved, based on the Findings and Recommendations provided in this Investigation Report.

Frank Work, Q.C.
Acting Information and Privacy Commissioner

**ALBERTA
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Report on Investigation into Complaint Regarding Disclosure of Personal Information

April 2002

Fort McMurray Catholic Schools

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I. INTRODUCTION

A. Source of the Complaint

[para 1] This complaint comes to the Commissioner from a student in a school administered by the Fort McMurray Roman Catholic Separate School Regional Division (the “Public Body”).

[para 2] The term “Complainant” is used here to describe the student and the student’s parents, as the parents jointly are standing as the student’s representative in the exercise of the rights conferred on their minor child by the Freedom of Information and Protection of Privacy Act (the “Act”). In some matters touched on in this report, the student’s parents were conducting themselves as persons not representing the student in a FOIP matter; in those passages they are cited as the “Parents”.

B. The Disclosure Incident

[para 3] The Complainant was enrolled in Grade 4 when the alleged breach of his privacy occurred. He claims that his personal information was disclosed without proper authority to the general public through the posting of the Complainant’s Provincial Achievement Assessment (“PAA”) test results on a school-based, wall-mounted community bulletin board.

C. Nature of the Complaint

[para 4] The complaint is based on the claim that the disclosed information was not collected for the purpose of giving awards. In the Complainant’s own words:

It is inconsistent then to allow the (Public Body) to release the information and it would be considered an unreasonable invasion of privacy [section 38, (now section 40) FOIP Act].

[para 5] The complaint is expressed as a concern stemming from a deliberate practice by the Public Body. As evidence of that practice, the Complainant cites and complains about an incident involving the public disclosure of the Complainant’s own personal information.

[para 6] This investigation, conducted under the powers set out in section 53(2)(e) [previously 51(2)(e)] of the Act, looks into the alleged disclosure incident. This report comments on the general practices of the Public Body where they relate directly to that incident, or where they assist in understanding decisions leading to and from the disclosure incident.

II. CHRONOLOGY OF EVENTS

A. Pre-complaint Actions

[para 7] The Parents took their concern directly to the Public Body shortly after they became aware of the disclosure incident:

Oct. 14, 1999 Fax from Parents to Public Body / detailing concerns about the posting of their child's Provincial Achievement Test Result (Grade 3) on a bulletin board in a K-8 school without parental consent first being requested.

Oct. 15, 1999 Letter from the Public Body to the Parents / offering to remove the student's name from the recognition program if that is the parents' wish.

Nov. 24, 1999 Letter from the Parents to the Public Body / stating that the complaint is not to be taken as exclusively about the FOIP aspects but rather is mainly about the proper use of Achievement Test results.

Dec. 3, 1999 Letter from Alberta Learning's Director of Learner Assessment to the Public Body / suggesting an alternative approach to recognition.

Dec. 23, 1999 Letter from the Public Body to the Parents / stating that "it is the position of our Board that recognizing individual student achievement continues to be important and it is the Board's intention to continue to do so."

Jan. 10, 2000 Letter from the Parents to Alberta Learning / requesting that Alberta Learning investigate the Public Body for its decision to continue the practice of public recognition of Provincial Achievement test results.

Feb. 7, 2000 Letter from Alberta Learning's Director of Learner Assessment to the Parents / stating that he would encourage the Public Body to seek parental consent and would encourage the Parents to seek clarification from the Public Body.

Mar. 1, 2000 Letter from the Parents to the Director of Learner Assessment / challenging the refusal to take enforcement action and reiterating the request that Alberta Learning investigate the Public Body.

Apr. 17, 2000 Letter from Alberta Learning's Director of Learner Assessment to the Public Body / stating that the Public Body's practice is not consistent with Alberta Learning's policy and guidelines on the effective use of achievement test results, and that honouring high scorers is a non-intended use of the achievement test results, and urging the Public Body either to cease the practice or to ensure that prior permission from parents is obtained before publishing individual results.

May 23, 2000 Letter from the Parents to the Public Body / asking the Public Body to cease its practice of publicly releasing the names and results.

May 30, 2000 Letter from the Public Body to the Parents / confirming that the Parents' complaint letter of May 23rd was discussed by the Board of Trustees at their May 29th

regular board meeting, and that the Public Body is resolved to continue its practice of recognizing individual student excellence.

June 19, 2000 Letter from the Parents to the Minister of Learning / asking the Minister to look into the Public Body's practices "for the privacy and protection of all students within the Province."

B. Complaint Actions

[para 8] The Parents, as representatives for their child, became a Complainant under the Act in July 2000:

July 14, 2000 Letter from the Complainant to the Information and Privacy Commissioner / "requesting that your office investigate the (Public Body) initiative regarding the use of individual Alberta Provincial Achievement Tests results." (The disclosure incident involving the Complainant's own personal information, as described in Paragraph 5 above, was articulated as the heart of the complaint in subsequent exchanges between the Complainant and the Investigator.)

July 26, 2000 Letters from the Commissioner to the Complainant and to the Public Body / notifying the parties that the Commissioner has opened his investigation into the received complaint as Case #1972.

C. Post-complaint Actions

[para 9] The Parents continued to engage the Public Body and the provincial ministry during the investigation phase of Case #1972:

July 26, 2000 Letter from Minister of Learning to the Parents / pointing to Alberta Learning's policy indicating the results of individual students cannot be publicly released, and requesting by copy to the Public Body that its Board review its recognition program accordingly.

Aug. 22, 2000 Letter from the Chairman of the Board at the Public Body to the Minister of Learning / agreeing to undertake a review but disagreeing with the suggestion that there occurred a FOIP contravention.

Feb. 2, 2001 Letter from the Complainant to the Investigator / summarizing the complaint as a use issue and questioning the claim that the parental-consent process overcomes the contravention of the use rules in the Act.

III. EXAMINING FACTS & JURISDICTION

A. Agreement on the Main Facts

[para 10] Both the Complainant and the Public Body see the information as personal information of the student. They agree too that the posting was done in October 1999 by staff at the elementary school attended by the Complainant. The Complainant believes that the effect of the posting was to introduce an element of competition to the PAA testing procedures; the Public Body says it was done to publicly recognize the score attained by the Complainant.

[para 11] The posting cited all students who had attained a certain standard (e.g., 85%+) in the PAA tests. According to the Public Body, the posting showed name, test grade and subject, but not the precise mark attained. According to the Complainant, the posting did list his exact mark.

B. Right to Complain Under the Act

[para 12] School boards were made subject to the FOIP Act effective September 1998. The disclosure incident happened in October 1999. So the Public Body was obliged to protect personal privacy at the time of the disclosure, and the Complainant had the right to make a complaint to the Commissioner regarding the treatment of his personal information by a public body under the Act.

IV. ISSUES FOR INVESTIGATION

[para 13] This investigation looked at two related issues:

Q1. Did the Public Body contravene Part 2 of the Act when it disclosed the Complainant's personal information?

Q2. If the answer to Q1 confirms a breach of Part 2 of the Act, is the Public Body continuing to operate in a way that contravenes Part 2 of the Act?

V. REASONABLE OR UNREASONABLE DISCLOSURE

A. Disclosures Without Consent or Explicit Authority

[para 14] The 1999 FOIP Act amendments allow public bodies to disclose some personal information without gaining formal consent from the affected third party. Section 40(1)(b) reads:

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

...

(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,

...

[para 15] The Complainant is concerned that the Public Body is using the 1999 amendments to fit its disclosure practice under the counter-exception in section 17(2)(j) [previously 16(2)(j)]:

17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(j) subject to subsection (3), the disclosure is not contrary to the public interest and reveals only the following personal information about a third party:

(i) enrollment in a school of an educational body.....

...

(iv) receipt of an honour or award granted by or through a public body.

[para 16] The ability to make disclosures of limited personal information in section 17(2)(j) [previously 16(2)(j)], designed very much with educational bodies in mind, is cancelled when the individual the information is about has requested the information not be disclosed. Section 17(3) [previously 16(3)] reads:

17(3) The disclosure of personal information under (2)(j) is an unreasonable invasion of personal privacy if the third party whom the information is about has requested that the information not be disclosed.

[para 17] The Complainant claims he was not ever canvassed on his wishes regarding disclosure prior to the disclosure being done. He questions the Public Body's ability to say there was no request for shielding under section 17(3) when it did not take the step of checking with the Complainant to see how the Complainant viewed the matter.

[para 18] During the life of this case, the Complainant has stated that the "issue of how Provincial Achievement Test results are used in education is of great concern to us..." That position is developed in a letter where the Complainant makes clear that the complaint is aimed at ending a non-consent disclosure practice the Complainant views as generally harmful:

It is my position that although the initiative set forth by the (Public Body) is indeed a (FOIP) Act issue it is more complex than simply receiving parental permission from those who score 100% before the awards are presented. Alberta Learning has informed the (Public Body) that the "achievement tests should not be used as the sole basis for individual recognition" and "using individual students' achievement test results publicly is inconsistent with the reporting guidelines". These guidelines are set forth for the protection of all students.

[para 19] In the combination of the disclosure provision in section 40(1)(b) [previously 38(1)(b)] and the tests for unreasonable invasion of privacy in section 17(2)(j)(i) and (iv) and 17(3) [previously 16(2)(j) and 16(3)], the Public Body must arrive, in the Investigator's view, at three conclusions before it can assume authority to make a disclosure of student award information without prior consent.

[para 20] First it must determine that disclosure is not contrary to the public interest.

[para 21] Second it must satisfy itself that the information being disclosed fits within the types of information enumerated in section 17(2)(j) [previously 16(2)(j)].

[para 22] Third it must be confident that the party whom the information is about has not requested that the information not be disclosed. While the Act places no explicit obligation on public bodies to provide opportunities for registering disclosure blocks at every turn, it does suggest that it is prudent to allow blocks for information disclosures involving people who do not want their information disclosed or involving disclosures of an unexpected nature. Otherwise the public body would be free to parade in public all manner of inordinately-sensitive personal information so long as an award was attached to it. That prospect is absurd and cannot be the intention of the lawmakers.

[para 23] The lack of detailed statutory direction leaves public bodies to their own devices to determine when to provide a structured opportunity for registering a disclosure block and when to proceed without having extended that chance to their publics. In adopting this approach, the lawmakers deferred to the expert familiarity of public body administrators regarding the sentiments

and sensitivities of their constituents, leaving those administrators to draw the lines between cases worthy of some pre-disclosure consultation and cases where objection to disclosure is simply not conceivable. Somewhere in that discretionary factoring, a reasonable administrator has to take into account the expectations that an ordinary person might have for how her/his privacy will be respected.

[para 24] In this case, the Complainant argues that the messages from various levels of authority, including some from the Public Body itself, pointed to an expectation that the PAA test results would not be disclosed and would not be used in a public setting. The investigation looked at four sources of public advice on that point.

1. Guidance from Alberta's Department of Learning

[para 25] In its Policy 2.1.3. dealing with *Use and Reporting on Results of Provincial Assessments*, the Department of Learning emphasizes that “the right to privacy of the individual must be ensured.” It reinforces that principle by saying that “results on provincial assessments for individual students shall not be publicly released.”

[para 26] An allied Department of Learning document, Policy 3.2.5. on *Access to Information*, mirrors the Act's rules on use and disclosure of personal information:

4. *The Department may use or disclose personal information only for the purpose for which it was collected or compiled or for a use consistent with that purpose...*

[para 27] These messages are replicated consistently in other Department of Learning guidelines and advisory documents relating to the administration of the Provincial Achievement tests. However, none of the Department's pronouncements take the form or have the effect of statutory directives on local boards, including the Public Body.

[para 28] After the disclosure incident but before coming to the Commissioner with his complaint, the Complainant had garnered support in this outlook from the source of the achievement testing program. The Minister of Learning, in a letter copied to the Superintendent of the Public Body, had in July 2000 written to the Complainant:

I agree that achievement test results must be used appropriately. That is why my department's policy, Use and Reporting of Results on Provincial Assessments, emphasizes the importance of using additional measures of performance and providing contextual information when reporting the results of provincial assessments. The policy also states that the results for individual students cannot be publicly released. I expect all school boards to comply with this policy, as well as with the requirements of the FOIP Act.

I am confident that the (Public Body) wants to encourage students to do their best and to acknowledge outstanding achievement. However, using individual students' achievement test results publicly is inconsistent with the reporting guidelines noted above, which state that achievement test results should not be used as the sole basis for public recognition. Rather, they could be part of a more comprehensive basis for recognizing individual student achievement. I am asking that the board review its recognition program accordingly.

2. Views of Experts on Test Reporting

[para 29] The Complainant argues that there is a real possibility of harm arising from the disclosure of this type of result. As authority for that position, the Complainant offers the adopted positions of the Canadian Psychological Association and the Canadian Association of School Psychologists against exposing individual test scores to the comparison mania that marks most media coverage of released scores (cf., *The Globe and Mail*, March 23, 2001, p. A5).

3. Views of Experts on Access and Privacy

[para 30] The guidance publicly available in October 1999 from the Government of Alberta agency representing the Minister responsible for implementation and administration of the Act contains a “Student Marks and Achievements” section which, in Q&A format, says posting grades “may be a breach of privacy.”

4. Information Distributed by the Public Body Itself

[para 31] A document circulated to parents by the school prior to running the PAA tests in Spring 1999, and said to be reflective of:

- The Alberta Home and School Councils’ Association
- The Conference of Alberta School Superintendents
- Alberta Learning
- The Alberta School Boards Association, and
- The Alberta Teachers’ Association,

states, under the sub-topic *How Shouldn’t Test Results Be Used*, an expectation that “achievement test results should not be used to rate performance of ... students”.

[para 32] The school’s one-page general notice to parents received in June 1999 by the Complainant prior to the conducting of the PAA tests made no mention of a plan or intention to announce any of the results.

[para 33] On October 12, 1999 a school administrator sent the Parents a personalized letter congratulating their child for the excellent results the child attained in the June 1999 PAA tests. The letter made no mention of the public posting that had been done by the school. It declared that the “school will be celebrating (the child’s) achievement at a future school assembly.” While there can be seen a spirit of notification in this letter, the disclosure had already happened by the time the letter arrived at the Complainant’s home.

B. Conclusion About Reasonableness of the Disclosure Action

[para 34] Given the consensus from outside authorities that disclosure of test results should be avoided, the lack of contrary information emanating from the Public Body on the point, and the knowledge that the Public Body had or should have had about the controversy respecting the posting to PAA results, the Public Body should have turned its mind to the possibility that the release might be an unreasonable invasion of personal privacy. It did not have to go so far as to poll public opinion when exercising that discretion, but the common-sense nature of the conditions in section 17 calls for a prudent connectedness to public expectations when contemplating disclosures to the public.

C. Conclusion About Permissibility of the Disclosure (Q1)

[para 35] The Public Body says that it has received only the one complaint about the practice. However, lack of complaints is a valid indicator only where negative consent procedures are the accepted process. The Act does not allow for the concept of negative consent. So the lack of an expressed block on disclosure from an individual cannot be taken as agreement by that individual to a disclosure.

[para 36] Similarly, the historical roots of the recognition program, going back to 1996, cannot be a saving factor for the Public Body. A school board cannot easily presume that its programs, particularly those that deviate from a widely-pronounced norm, are known to families cycling through the school system for the first time. Here the Complainant was in just Grade 4, in his first encounter with the PAA procedures, when the disclosure happened.

[para 37] It appears that the Public Body did not run its practice fully through the test set out in section 17 of the Act to determine the permissibility of the disclosure. Running that test on the factors present at October 1999 would have led to the conclusion that the conditions require consulting with the data subject (the Complainant) prior to making a public disclosure, and that a disclosure without that consultation would be an unreasonable invasion of privacy. The disclosure action, in the opinion of the Investigator, produced a contravention of Part 2 of the Act.

VI. CHANGES TO THE RECOGNITION DISCLOSURE PROCESS

A. Procedural Reforms

[para 38] The Complainant states in correspondence to the Public Body that the Complainant became aware in 1999 that the Public Body supported an initiative to release individual Alberta Provincial Achievement Test scores. When the Complainant raised this with the Public Body as a concern, the Complainant was advised that the Public Body felt it had a right to recognize individual student excellence.

[para 39] But the complaint, made directly to the Public Body two months before being delivered to the Commissioner, seems to have prompted prudent reforms in the Public Body's procedures even before the commencement of this investigation. The May 30, 2000 letter from the Public Body to the Parents acknowledges that complying with the Act entails:

...acquiring prior permission of parents before having students attend a Board meeting to be recognized. While the Board would be surprised to find a parent opposed to having his/her child honoured in this way, should a parent be so opposed, the Board would not proceed with any public recognition of that individual student.

[para 40] The practice of school-based recognition that led to the complaint in this Case ceased shortly after the complaint was initially received at the Public Body in October 1999.

[para 41] The Public Body continues to maintain its "Salute to Excellence" program. Its guidelines describe criteria for official recognition. That recognition is described as an award, taking the tangible form of letters of commendation, a certificate of recognition, and possibly a plaque or a pen, all presented by the Trustees and the Superintendent. A listing of honoured students (the 100% attainers) by name, subject, grade and school is presented in the Public Body's annual report.

[para 42] The Public Body continues to publish the names, grades, test-subjects and school names of students who gain 100% on their Provincial Achievement Test/Diploma Exams. The “Board Highlights” summary published by the Public Body for its Regular Board Meeting of November 26, 2001, leads off with a section listing 15 students, from Grades 3, 6, 9 and 12, who attained the 100% score on provincial tests. The published report is titled “Salute to Excellence-Students Achieving 100% in June Provincial Achievement Tests/Diploma Exams.”

[para 43] A “Letter of Consent” has been adopted for use at the Public Body to support the Salute to Excellence program. The Letter is a simple form asking parents to agree to the Board recognizing their child with a public tribute at a specific regular board meeting “relative to the Provincial Achievement Test results.”

B. Alignment to the Act (Q2)

[para 44] The Public Body’s new Letter provides an effective opportunity to block the planned disclosure, thereby ensuring that the Public Body can confidently make disclosures of personal information that are permitted under section 17(2)(j) [previously 16(2)(j)]. The new *Letter of Consent* does not identify what information is going to be disclosed, and so arguably would not stand up as a consent procedure for disclosure under other sections of the Act. But it does serve to open up adequate opportunity for students and their parents to explore the details (if they are interested) prior to confirming their attendance at the disclosure event, and to apply a block on disclosure, in the form of a refusal to attend, if that is their choice. It seems reasonable to presume that agreeing to attend the public disclosure event is tantamount to allowing the disclosure to proceed, so long as the Public Body takes a refusal to attend as a block on disclosure.

[para 45] The Act contemplates public celebration of awards being given. It allows a Public Body to announce who has warranted an award, from what part of the public body that person comes, and, implicitly, what criteria the person has met to win the honour. The Salute to Excellence program, like other schemes built on the excellence philosophy, adheres to that same formula, presenting identifiable real-life models of behaviour for others to consider. With a process in place for checking in and gaining agreement from the persons affected by disclosure of test performance results, the Public Body has brought its program into alignment with, and is no longer in contravention of, Part 2 of the Act.

C. Issue of Legitimate Use

[para 46] The Complainant has joined to the initial complaint an argument that claims the use rules of Part 2 of the Act preclude the Public Body from even initiating a parent-consent process, and that the restrictions on inconsistent use thereby negate the effect of any parent consents already gained.

[para 47] The Complainant tries to make the case that the rules for information use in Part 2 have a direct bearing on whether a disclosure is made legitimately under Part 2. To get there, the Complainant would have to show that the collection of the disclosed information was unauthorized [section 33 (previously 32)], was improperly done [section 34 (previously 33)], or that the use made of the information was inconsistent with the purpose for which the Public Body collected it [section 39 (previously 37)]. The closest the Complainant can come on that tack is to claim that the purpose for which the Department of Learning, a wholly different public body, collected it was not consistent with ultimate disclosure done by the Public Body that is here under investigation. But the initial collection of raw score data was done by the Public Body, and then transferred to Alberta Learning to be tallied and milled into individual and aggregated reports. Those reports were then returned to the Public Body for individual and aggregated assessment purposes.

[para 48] The use made by the Public Body is consistent with its own program requirements. The Public Body has consciously chosen to support a program of individual recognition. It draws a link between the behaviors being celebrated and the goals of its educational programs, and concludes, with the benefit of local historical experience, that it must be in the public interest to pursue its goals in the manner it has chosen.

VI. FINDINGS AND RECOMMENDATIONS

[para 49] The October 1999 disclosure of the Complainant's PAA test result information was a contravention of Part 2 of the Act. The circumstances surrounding that disclosure should have caused the Public Body to consult with the Complainant prior to making the disclosure.

[para 50] The Public Body has since instituted a practice of seeking agreement prior to making disclosures of individual PAA and diploma test results, and has corralled those disclosure actions to be a controlled exercise that meets the requirements of the Act.

[para 51] The Investigator appreciates the cooperation of the parties and their interest in achieving compliance with the Act. In that spirit, the Investigator makes one suggestion to the Public Body:

Recommendation #1: That the Public Body indicate, in the spirit of fair advance notice, its differing approach to disclosure whenever it distributes Alberta Learning materials about the PAA tests to parents and teachers so that there is no mistaken expectation about what practices will prevail at the school-district level regarding disclosure of the information.

Respectfully submitted this 8th day of April 2002,

John Ennis
Investigator