

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-038

September 23, 2002

CALGARY BOARD OF EDUCATION

Review Number 2035

Office URL: <http://www.oipc.ab.ca>

Summary: The Complainant wrote to the Office of the Information and Privacy Commissioner complaining that the Calgary Board of Education (the CBE) was using and disclosing personal information of his child to set up an email system in contravention of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Complainant argued that there was an advertising, marketing, and revenue generation aspect to the contract with the Internet service provider and that proper consent had not been received from parents. The CBE argued that students' personal information was used and disclosed in order to set up an email system to educate students about the use of email and the Internet. The commercial aspects of the contract allowed the CBE to obtain the service at no cost.

The Adjudicator found that the Complainant's Child's personal information was being used and disclosed for two purposes. The first purpose was the education of students about the use of email and the Internet. The Adjudicator found that this purpose was consistent with the purpose for which the information was collected or compiled and was therefore permissible under the FOIP Act. The second purpose was the advertising, marketing, and revenue generation aspect of the contract. The Adjudicator found that this was not a consistent purpose. Therefore, the CBE was not permitted to use or disclose the Complainant's Child's personal information for this purpose unless proper consent was obtained. The Adjudicator found that the CBE had not received proper consent, as set out in the FOIP Act Regulation.

The Adjudicator ordered the CBE to stop using and disclosing the Complainant's Child's personal information for advertising, marketing, and revenue generation unless the the CBE obtained proper consent for this purpose.

Statutes Considered: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c-F-25, ss. 1(n) [previously section 1(1)(n)], 1(n)(iv) [previously section 1(1)(n)(iv)], 1(n)(vii) [previously section 1(1)(n)(vii)], 33 [previously section 32], 33(c) [previously section 32(c)], 34 [previously section 33], 39 [previously section 37], 39(1) [previously section 37(1)], 39(1)(a) [previously section 37(1)(a)], 39(1)(b) [previously section 37(1)(b)], 39(4) [previously section 37(4)], 40 [previously section 38], 40(1)(c) [previously section 38(1)(b)], 40(1)(d) [previously section 38(1)(c)], 40(1)(e) [previously section 38(1)(d)], 41 [previously section 39], 53(2)(e) [previously section 51(2)(e)], 65 [previously section 62], 65(3) [previously section 62(3)], 67 [previously section 64], 67(1)(a) [previously section 64(1)(a)], 67(2) [previously section 64(2)], 69(1) [previously section 66(1)], 69(2) [previously section 66(2)], 69(3) [previously section 66(3)], 69(4) [previously section 66(4)], 69(5) [previously section 66(5)], 70 [previously section 66.1], 72 [previously section 68]; *Freedom of Information and Protection of Privacy Regulation*, Alberta Regulation 200/95, s. 6.

Orders Considered: AB: Order 97-009 and 98-006; **BC:** Investigation Report 01-01.

I. BACKGROUND

[para 1] The Complainant wrote to the Office of the Information and Privacy Commissioner and complained that the Calgary Board of Education (the CBE) or (the Public Body) had improperly disclosed personal information about his minor child (the Complainant's Child) to an Internet service provider for the purpose of issuing an email address to the Complainant's Child. The complaint was made under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The complaint was assigned to a Portfolio Officer and investigated. At the conclusion of the investigation, the Complainant was not satisfied with the results of the investigation and, in a letter dated August 28, 2001, he asked that the matter be set down for an inquiry.

[para 2] In conducting this inquiry, I am aware that the original complaint was made and an investigation was conducted. I have not reviewed the initial letter of complaint or the findings of the Portfolio Officer. The inquiry has been conducted on the basis of information contained or referred to in the submissions of the parties.

[para 3] The matter was set down for a written inquiry. The Complainant and Public Body submitted initial briefs, which were exchanged between the parties. Both parties submitted rebuttal briefs.

[para 4] The Revised Statutes of Alberta (R.S.A. 2000) came into force on January 1, 2002. Consequently, all section numbers referred to in this Order reflect the new

numbering. Where section numbers are listed, the previous numbers have also been included as follows: section 10(1) [previously section 9(1)]. Unless otherwise noted, the text of each section remains the same.

II. RECORDS AT ISSUE

[para 5] This inquiry deals with a complaint and not a request for access. Therefore, no records are directly at issue. The Public Body supplied copies of records that related to the complaint with its written submission.

III. ISSUES

[para 6] There are three issues for this inquiry, as set out in the Notice of Inquiry:

1. Did the Public Body collect the Complainant's Child's personal information in compliance with Part 2 of the Act?
2. Did the Public Body use the Complainant's Child's personal information in compliance with Part 2 of the Act?
3. Did the Public Body disclose the Complainant's Child's personal information in compliance with Part 2 of the Act?

IV. PRELIMINARY ISSUE

[para 7] After the Notice of Inquiry was sent to the parties, the Public Body requested that it be supplied with a copy of the Complainant's initial letter of complaint to the Office of the Information and Privacy Commissioner. The request was denied. The Public Body was advised that the normal practice of this office is to supply the Public Body with the letter requesting a review and not the original complaint letter. The Public Body was further advised that it could make this a preliminary matter for this inquiry and that arguments could be included with the Public Body's initial brief. The Public Body chose to include this as an issue in its initial written brief. The Complainant did not address the issue in his rebuttal.

[para 8] As is the usual practice of this office, the Public Body was not given a copy of the Complainant's original letter of complaint at the time the investigation was opened. During the investigation, the Public Body was made aware of the allegations and the issues under investigation. When the Complainant elected to request an inquiry, the Public Body was supplied with a copy of the brief letter from the Complainant requesting that the unresolved issues proceed to an inquiry. As a result of the Complainant's letter, a Notice of Inquiry was sent to the parties, setting out the three issues listed in paragraph 6 of this Order.

[para 9] The Public Body argued that it was entitled to the Complainant's original complaint letter to this office. The Public Body offered arguments to support its position under the following headings:

1. Construction of section 67(1) [previously section 64(1)]
2. IPC Procedures Manual
3. Natural Justice
4. Discretion of the Commissioner

[para 10] Section 67(1) [previously section 64(1)] states:

67(1) On receiving a request for a review, the Commissioner must as soon as practicable

(a) give a copy of the request

(i) to the head of the public body concerned, and

(ii) to any other person who in the opinion of the Commissioner is affected by the request,

and

(b) provide a summary of the review procedures and an anticipated date for a decision on the review

(i) to the person who asked for the review,

(ii) to the head of the public body concerned, and

(iii) to any other person who in the opinion of the Commissioner is affected by the request.

[para 11] The Public Body pointed out that section 67(1)(a) [previously section 64(1)(a)] clearly places a duty on the Commissioner to give a copy of the request for a review to the Public Body. It further argued this duty applies to any review as set out in section 65 [previously section 62], including a review which fits the criteria for section 65(3) [previously section 62(3)] which states:

(3) A person who believes that the person's own personal information has been collected, used or disclosed in contravention of Part 2 may ask the Commissioner to review that matter.

[para 12] I agree with the Public Body's position that section 67(1)(a) [previously section 64(1)(a)] places a duty on the Commissioner to send a copy of the request for

review to the Public Body. However, what is unclear is what constitutes the “request for review.” Is it the complaint letter, the letter requesting that the matter proceed to inquiry, or both?

[para 13] When the Complainant’s letter was received, an investigation was commenced under section 53(2)(e) [previously section 51(2)(e)], which states:

(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that

(e) personal information has been collected, used or disclosed by a public body in contravention of Part 2.

[para 14] There is no requirement in the FOIP Act for the Commissioner to provide a copy of a complaint letter to the Public Body. Section 67(1)(a) [previously section 64(1)(a)] does not apply to complaints opened under section 53(2)(e) [previously section 51(2)(e)]. The Complainant’s issues were not considered a request for a review until his second letter requesting that the unresolved matters proceed to an inquiry. Therefore, I conclude that the Complainant’s second letter constituted the request for review as contemplated by section 67(1)(a) [previously section 64(1)(a)]. This letter was supplied to the Public Body.

[para 15] The Public Body argued that the Procedures Manual of the Office of the Information and Privacy Commissioner indicates that when a complaint shifts into a review, a copy of the request will be sent to the Public Body. The Public Body interpreted this to mean a copy of the initial complaint letter. As previously stated, it is the letter requesting that the complaint now be considered a review that constituted the request for review. Therefore, I conclude that this office followed its internal policy by sending the Public Body a copy of the Complainant’s second letter.

[para 16] The Public Body offered the following quote from David P. Jones and Anne S. de Villars, Principles of Administrative Law, 3rd ed. (Toronto, Carswell, 1999), at page 277:

Generally fairness requires that all information relied upon by the tribunal when making its decision be disclosed to the individual.

[para 17] The Public Body also offered the following quote from page 260 of the same text:

The courts have consistently held that a fair hearing can only be had if the persons affected by the tribunal’s decision know the case to be made against them.

[para 18] The Public Body acknowledged that in Order 97-009 and Order 98-006, the Commissioner found that the FOIP Act contemplates an inquiry like no other and that the

standard for natural justice and the duty to be fair may be lower than that required by most tribunals.

[para 19] In reaching his findings, the Commissioner made the following conclusions:

[41.] I conclude that the Freedom of Information and Protection of Privacy Act maintains certain rights related to natural justice or the duty to be fair, such as:

(i) the requirement for an inquiry (section 66(1)) [currently section 69(1)]

(ii) an opportunity to make representations to the Commissioner during the inquiry (section 66(3)) [currently section 69(3)]

(iii) the right to be represented by counsel or an agent (section 66(5)) [currently section 69(5)]

(iv) the right to notice of the procedural information related to the inquiry (section 64) [currently section 67]

[42.] However, the Freedom of Information and Protection of Privacy Act specifically abolishes certain other rights related to natural justice or the duty to be fair. In summary, there is no right:

(i) to have an inquiry open to the public (section 66(2)) [currently section 69(2)]

(ii) to have an oral inquiry (section 66(4)) [currently section 69(4)]

(iii) to be present during an inquiry (section 66(3)) [currently section 69(3)]

(iv) to have access to another person's representations made to the Commissioner (section 66(3)) [currently section 69(3)]

(v) to comment on another person's representations made to the Commissioner (section 66(3)) [currently section 69(3)]

[para 20] I agree with the Commissioner's conclusions and note that the following amendments to the FOIP Act since Order 97-009 was released further limit the rights to natural justice or the duty to be fair:

67(2) Despite subsection (1)(a), the Commissioner may sever any information in the request that the Commissioner considers appropriate before giving a copy of the request to the head of the public body or any other person affected by the request.

70 The Commissioner may refuse to conduct an inquiry pursuant to section 69 if in the opinion of the Commissioner the subject-matter of a request for a review under section 65 has been dealt with in an order or investigation report of the Commissioner.

[para 21] Section 67(2) [previously section 64(2)] modifies the Public Body's right to receive a copy of the request for review by allowing the Commissioner the discretion to sever information that he deems appropriate. Section 70 [previously section 66.1] modifies an applicant's right to an inquiry by giving the Commissioner the discretion to refuse an inquiry under certain circumstances. The amendments since Order 97-009 further support the Commissioner's conclusion that the FOIP Act contemplates an inquiry like no other.

[para 22] The Public Body also pointed out that, in spite of the uniqueness of the process, the Commissioner has the discretion to release the letter. It argued that under the circumstances of this case, it would be appropriate and fair that the complaint letter be released. The Public Body argued that the full content of the letter was required in order to focus its written brief in the most efficient and economical fashion. The Public Body further argued that the complaint letter might deal with matters outside of the Commissioner's jurisdiction. By not being given a copy of the complaint, it is being denied the right to argue that some of the allegations are outside the scope of FOIP, if such a submission was warranted.

[para 23] In my view, the possibility that there may be non-jurisdictional issues contained in the complaint letter supports not supplying a copy of the letter to the Public Body. I see little to be gained by having the Public Body respond to issues that are not within my jurisdiction or to those issues which may have been resolved through the investigation process.

[para 24] In this inquiry, the issues were set out in the Notice of Inquiry. Both parties submitted initial written briefs, which were exchanged between the parties. Each party was then invited to submit a written brief in rebuttal. Both parties submitted rebuttal briefs, which were also exchanged. If additional issues arose during the course of the inquiry, I would have sought additional submissions. I did not identify such a need.

[para 25] I find that the Public Body does not have a right to a copy of the Complainant's letter of complaint. I also conclude that the Public Body was given adequate information about the issues to be dealt with in this inquiry and was given an opportunity to respond to the Complainant's written submission. Therefore, I find that the Public Body was not adversely affected by not receiving a copy of the complaint letter.

V. DISCUSSION OF THE ISSUES

A. Background to the Complaint

[para 26] In 1998, the Public Body made a decision to educate students about the Internet and the use of email by supplying each student with an individual email account. The Public Body instructed schools to send out a document known as the Acceptable Use Policy for Networked Information (the “AUP”) to parents at the beginning of the 1998/1999 school year. This document consisted of four pages. The first three pages offered information about the Internet, the Public Body’s policies and rules, expectations placed on students and parents, legal disclaimers, and the consequences of misuse. The last page, which is referred to by the Public Body in its submission as a “consent page”, contains the following four titled sections to be filled out and signed, as appropriate:

- Student
- Parent or Guardian (If student under the age of 18)
- Students 18 yrs. of age or older or 16 yrs. of age and deemed to be “independent students” as defined by the School Act.
- Teachers

[para 27] The Public Body indicated that the consequence of not returning a signed “consent page” to the Complainant’s Child’s school was that the Complainant’s Child would not be issued an email account. Arrangements would then be made for the Complainant’s Child to receive instruction in information and communication technology in an alternative fashion. The Complainant stated in his submission that the consequence for the Complainant’s Child was that she was not allowed access to the Internet.

[para 28] The Complainant stated that he had initially refused to sign the form because the disclosure of information statement was vague. He indicated that he later signed the form so that the Child could have access to the Internet and not be treated differently from fellow students. There is some disagreement between the Public Body and the Complainant about whether subsequent consents were sought in January and September of 2000. The Public Body supplied copies of the form signed by the Complainant on September 24, 1998 and January 28, 2000.

[para 29] The Complainant supplied a copy of information taken off the Public Body’s web site that indicates that by the year 2000, the Internet would be a mandatory component of the curriculum and that students and parents would not be able to opt out of signing the AUP document. This would appear to put students and parents in the position of having to sign a mandatory “consent form”. The information supplied by the Complainant from the Public Body’s web site consists of “frequently asked questions” about the AUP. I note that nowhere in the 19 questions and answers provided is privacy specifically addressed.

[para 30] In October of 1998, the Public Body entered into a contact with WhoWhere? Inc. /Lycos Inc. and email services commenced in January of 1999. The comprehensive contract set out, among other things, what personal information was required about each student to set up an account and how the information could be used. It also provided that the Public Body would be paid 25% of the revenues generated from advertising and direct promotions. It further gave the Public Body the right to market the email system to all other school divisions in the Province of Alberta.

[para 31] The contract set out limitations on the advertising to ensure that WhoWhere? would take reasonable steps to ensure that advertising was “in good taste, suitable for children as young as 5 years old and compatible with its educational environment.” There were also clauses about filtering and removal of inappropriate material and the ability of the Public Body to opt out of marketing strategies that the Public Body felt were inappropriate.

[para 32] The Public Body lists the following personal information as being supplied to WhoWhere? in order to set up individual email accounts:

- first name
- last name
- gender
- year of birth
- username/email address
- password
- school code

[para 33] The Public Body indicated that they had considered pseudonyms for the email accounts. However, it was decided that the younger students would have trouble remembering their pseudonym. The program placed security restrictions on transmissions to and from children under the age of 12 years. This required that year of birth be given. The Public Body stated that gender was required because of the appropriate advertising condition in the contract.

[para 34] In June 2000, WhoWhere? gave notice to the Public Body that the contract would be terminated. The termination occurred on December 15, 2000.

[para 35] In its written submission, the Public Body supplied information about ePals, the email service provider that took over the supply of email services to the Public Body on January 1, 2001. The complaint, which is the subject of this inquiry, does not relate to ePals. However, the Public Body offered the information “so that the Commissioner has information on current privacy protection practices of the CBE”.

B. Was the information supplied to WhoWhere? Inc. the Complainant's Child's personal information?

[para 36] Personal information is defined in section 1(n) [previously section 1(1)(n)] of the FOIP Act. The applicable clauses are as follows:

I In this Act,

(n) "personal information" means recorded information about an identifiable individual, including

(i) an individual's name, home or business address or telephone number,

...

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

...

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

[para 37] It is obvious that the Complainant's Child's first and last name, gender (sex) and year of birth (age) are the Complainant's Child's personal information. The Complainant's Child's username/email address and password fit within the definition of *identifying number, symbol or other particular assigned to the individual*. Neither party disputed that any of this information was personal information within the definition under the FOIP Act. Therefore, I find that the Complainant's Child's name, gender, year of birth, username/email address and password are the Complainant's Child's personal information.

C. Is the School Code the Complainant's Child's Personal Information?

[para 38] The Public Body argued that the school code should not be viewed as personal information. It argued that the school in question has more than 600 students and therefore the school code lacks the specificity to allow the identification of a single student. The Public Body stated:

It would be more analogous to a quadrant in a city or some general geographic designation that would not reasonably function to identify any particular student.

[para 39] I take this to mean that the Public Body does not believe that the school code would fit under section 1(n)(iv) [previously section 1(1)(n)(iv)] of the FOIP Act. I would agree that the school code is not an identifiable number assigned to an individual. The Public Body assigns a school code to each school. Taken by itself, the school code would

identify a building or place and not an individual. Therefore, as a stand-alone piece of information, the school code is not the Complainant's Child's personal information. However, it is my view that when the school code is used or disclosed with a specific student's name, it forms part of a student's educational history and is the student's personal information.

[para 40] In coming to this conclusion, I had to look at the way in which personal information comes under the custody or control of a public body. Collection is the most obvious method. Collection is set out in sections 33 and 34 [previously sections 32 and 33] of the FOIP Act. Section 39(1)(a) [previously section 37(1)(a)] relating to use of personal information, section 40(1)(c) [previously section 38(1)(b)] relating to disclosure, and section 41 [previously 39] relating to consistent purpose, also refer to personal information which is "compiled".

[para 41] "Compiled" is not defined in the FOIP Act. The Concise Oxford Dictionary defines "compile" as follows:

compile (1a) collect (material) into a list, volume, etc. (b) make up from such material

[para 42] I conclude that the act of compiling personal information by a public body would be the process by which certain information is created and becomes tied to or is associated with an identifiable individual. For instance, the Public Body assigns or creates a student ID number for each student. This information becomes the personal information of a student, as defined by section 1(n)(iv) [previously section 1(1)(n)(iv)]. This information was not collected from the student. It was "compiled" by the Public Body.

[para 43] An individual's educational history would include information that was not collected from the individual. It would include information such as courses taken, marks achieved, dates of attendance and the name of the school or schools attended. The Public Body compiles this information during the course of its normal record keeping. When all of this information is tied to an individual, it becomes part of that individual's educational history.

[para 44] In my view, there is little difference between the name of a school and the school code. Both relate to the same building or group of buildings. When the name of a school or the school code is associated with an identifiable individual, it becomes a part of the individual's education history. Therefore, I find that, under these circumstances, the school code is the Complainant's Child's personal information as defined in section 1(n)(vii) [previously section 1(1)(n)(vii)] of the FOIP Act.

C. Did the Public Body collect the Complainant's Child's personal information in compliance with Part 2 of the Act?

[para 45] Collection of personal information is set out in section 33 [previously section 32] of the FOIP Act. The applicable subsection states:

33 No personal information may be collected by or for a public body unless

...
(c) the information relates directly to and is necessary for an operating program of the public body.

[para 46] The Public Body stated that the Complainant's Child's first and last name, year of birth, and gender are a part of the information required to register the Complainant's Child in the school system. I would agree with this position. The Complainant did not specifically address the issue of collection in his submissions.

[para 47] The Public Body stated that school code was not personal information for the purposes of collection. I have already found that the school code is the Complainant's Child's personal information under these specific circumstances. However, the Public Body compiled the school code. It was not collected. Therefore, collection does not apply to this information.

[para 48] The Public Body further stated that the username/email address and password were required in order to set up and administer the email system. The username and email address are assigned by the Public Body. Therefore, collection does not apply to this information.

[para 49] The remaining element of personal information is the student's password. I am not certain from the Public Body's submissions whether the Public Body assigns the password or whether the student selects his or her own password. If the password is assigned, collection does not apply. If the student makes up their own password, the collection requirements would apply. As previously stated, the Public Body argued that the password is necessary in order to administer the Internet access and email system within the school. Therefore, the password *relates directly to and is necessary for an operating program of the public body*. I agree with this position. If the Public Body collects this information, it is authorized by section 33(c) [previously section 32(c)].

[para 50] I find that the Public Body was authorized by section 33(c) [previously section 32(c)] of the FOIP Act to collect the Complainant's Child's personal information, consisting of the first and last name, year of birth and gender.

D. Did the Public Body use the Complainant's Child's personal information in compliance with Part 2 of the Act?

[para 51] Use of personal information by a public body is set out in section 39 [previously section 37] of the FOIP Act. The applicable subsections 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*

[para 52] The Public Body compiled the username/email address and collected or compiled the password for the purpose of setting up and administering the email system. To the extent that the Public Body used that personal information for that purpose, the Public Body was in compliance with the first part of section 39(1)(a) [previously section 37(1)(a)] regarding use.

1. Consistent Purpose

[para 53] The Public Body collected the first and last name, year of birth, gender, and compiled the school code when registering the Complainant's Child in the school system. Using that personal information for setting up and administering the email system is a use for a different purpose. I must now determine if the use was for a consistent purpose, as set out in section 39(1)(a) [previously section 37(1)(a)].

[para 54] Consistent purpose is described in section 41 [previously section 39] of the FOIP Act, which states:

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 55] The Public Body stated that its mandate is to educate students. The Public Body argued that education of students about the use of email and the Internet falls within this mandate and therefore should be considered as a consistent use. The Public Body offered evidence that Alberta Learning has encouraged school divisions to offer this type of education within the school curriculum.

[para 56] Offering education to students about the use of email and the Internet has *a reasonable and direct connection* to the purpose for which the personal information was connected or compiled. Use of personal information *is necessary ... for operating a legally authorized program* of the Public Body. Therefore, I find that setting up and administering an email system is a use that is consistent with the purpose for which the personal information was collected or compiled, with the exception of gender.

[para 57] The Public Body stated in its submission that gender was used because of the contract clause related to appropriate advertising. Therefore, I find that the use of the Complainant's Child's gender was not a use consistent with the purpose for which it was collected.

[para 58] The Complainant did not argue that this type of education is outside the Public Body's educational mandate. However, the Complainant argued that offering students individual email addresses is not the only way to offer this type of education. The Complainant added that the information was also being used for commercial purposes in the form of barter for free Internet and email services and in revenue from advertising. I have already found that the use of personal information to set up and administer an email system is a consistent use of personal information collected by the Public Body. I do not believe, however, that it is my place to dictate to the Public Body how this objective is to be met. Therefore, I will not comment on whether there are other or better methods of curriculum delivery.

[para 59] The Public Body was silent about the commercial aspect of the contract with the service provider in its initial brief. The Public Body dealt with this issue in its rebuttal in the following paragraph:

The complainant focuses on the fact that there was a commercial advantage for the contractor obtaining personal information. Clearly this was not the primary reason for disclosure. The primary reason was to allow each child to have an e-mail account to enable that child to learn certain E-mail skills. It should also be noted that the opportunity for the third party contractor, WhoWhere? Inc./Lycos Inc., to display advertising on the home page resulted in an affordable service to the CBE.

[para 60] I agree with the Public Body's statement that the primary use and reason for disclosure was the educational component of setting up email accounts for each student. However, it is my view that the Public Body is not entitled to disregard the secondary commercial use. Given the fiscal realities that school divisions face, it is not unreasonable for the Public Body to seek out economical ways of supplying services to students. In my view there is also nothing fundamentally wrong with school divisions finding ways to generate revenue. However, this component cannot be hidden behind an educational program, particularly when personal information is being used and disclosed.

[para 61] I must now consider whether the commercial component of the contract can be considered a consistent use. As previously stated, the Public Body was relatively silent

about the commercial component of the contract. The Complainant made specific comments about the inappropriate use of his child's personal information for commercial purposes. However, he did not offer specific arguments related to consistent use. Therefore, I relied primarily on the contract in making my decision on this issue.

[para 62] In order for a use or collection to be considered consistent with the purpose for which it is collected, it must have a reasonable and direct connection to that purpose and it must be necessary for performing the statutory duties of, or for operating a legally authorised program of, the public body that uses or discloses the information.

[para 63] The Public Body is a school division that exists for the authorised purpose of educating children. Advertising, marketing and revenue generation generally are not part of its core business. It is doubtful that parents could reasonably expect that their children's personal information would be used to generate revenue for the Public Body. It is also very difficult to draw the conclusion that there is a direct connection to an educational mandate. The Public Body has offered me no evidence to support the proposition that advertising, marketing and revenue generation fit within its statutory duty or operating programs. I therefore find that the commercial or business component of the contract is not a use consistent with the purpose for which the Complainant's Child's personal information was collected or compiled.

2. Consent

[para 64] Since I have found that advertising, marketing and revenue generation are not consistent uses, the Public Body must seek consent before the personal information can be used, as provided by section 39(1)(b) [previously section 37(1)(b)]. The Public Body relied on the position that the use was consistent with the purpose for collection. It was therefore the Public Body's position that no consent was required. The Public Body admitted the form in which consent was sought was deficient. The Public Body put forward the argument that it should not be criticized for deficient consent when consent was not specifically required under these circumstances.

[para 65] I would agree with the Public Body that it is good business practice to seek consent, even when it is not specifically required. It is often a good method of educating people about the uses and disclosures of personal information. However, since I have found that the Public Body would not be authorized to use personal information for advertising, marketing and revenue generation without consent, I will examine the consent form used by the Public Body to determine if it meets the requirements of the FOIP Act.

[para 66] Consent is described in section 6 of the *Freedom of Information and Protection of Privacy Regulation* (the FOIP Regulation), which states:

6. *The consent of an individual to a public body's using or disclosing any of the individual's personal information under sections 39(1)(b) or 40(1)(d) of the Act*

(a) must be in writing, and

(b) must specify to whom the personal information may be disclosed and how the personal information may be used.

[para 67] I interpret the words “any of the individual’s personal information” combined with “the personal information” to mean that the consent must set out exactly what personal information the Public Body wishes to use or disclose. Therefore, for consent to meet the requirements of the Regulation, it must be in writing, list the personal information to be used or disclosed, state whom it will be disclosed, and state the use or uses of the personal information.

[para 68] The Complainant asked in his submission:

When seeking consent to release information to a third party does the Board not have a duty to disclose all the information concerning the purpose of the disclosure?

[para 69] The Complainant then went on to argue that he feels that the Public Body must disclose all uses. He argued that the students and parents would not have known that the information was being used by the Public Body in exchange for services and revenue.

[para 70] The Public Body argued in its rebuttal that it should not be required to seek consent for every use. The Public Body argued that this would be too high a standard. In support of this position, the Public Body offered the following quote from British Columbia’s Information and Privacy Commissioner’s Investigation Report 01-01:

It should also be noted that the concept of ownership of personal information is not necessarily appropriate in the context of the Act. The Act governs Vancouver Hospital’s ability to collect, use, disclose, store and retain personal information about its patients and property-related concepts have little to do with the privacy rights and obligations imposed on Vancouver Hospital by the Act.

[para 71] I do not disagree with this statement. However, taken in the context of the Public Body’s rebuttal submission, it appears that the Public Body would like me to draw the conclusion that because it does not own student information, it cannot sell the information. In a usual sale of goods, title to those goods changes hands. In that context, it is obvious that the Public Body did not sell the Complainant’s Child’s name and other personal information. However, the personal information is placed on a list or database. It is possible to sell the list or database that contains the Complainant’s Child’s personal information even if the Public Body does not own the personal information within the list or database. In effect, this is what the Public Body has done.

[para 72] The Public Body entered into a contractual agreement that allowed WhoWhere? to use the information in order to target the students with appropriate advertising and direct marketing offers for which the Public Body received 25% of the

revenue and free email and Internet service. In the context of this contract, it would be difficult for me not to conclude that the Public Body was a partner in a commercial enterprise. As I have said before, I see nothing fundamentally wrong with this arrangement. However, if the Public Body wishes to use personal information for this purpose, it must obtain consent.

[para 73] I have some sympathy for the Public Body's position that it should not have to disclose every conceivable use. The Public Body also argued that being required to disclose a copy of the 22-page contract to all parents would be excessive. I agree. However, in this case, it would not be unreasonable to advise parents that there is an advertising and promotions component to the email program and that the Public Body hopes to generate revenue as well as offering an educational opportunity. It is also not unreasonable for the Public Body to let students and parents know what information and under what conditions WhoWhere? can pass on or sell summary information.

[para 74] The Public Body stated that the fourth page of the AUP document was a consent page. Throughout its submissions, the Public Body stated that the consent page must be read in conjunction with the entire document. The Public Body has admitted that the school in which the Complainant's Child attended sent out only the last page on more than one occasion. As previously stated, the last page contains the following four titled sections to be filled out and signed, as appropriate:

- Student
- Parent or Guardian (If student under the age of 18)
- Students 18 yrs. of age or older or 16 yrs. of age and deemed to be "independent students" as defined by the School Act.
- Teachers

[para 75] I have reviewed the entire document and found only one reference to the release of personal information. The following paragraph appears just prior to the space for a signature in the "Parent or Guardian" section of the fourth page:

I hereby give permission to issue an account to WhoWhere? Inc. including email, for my child and certify that the information in this form is correct. I also consent to the release to WhoWhere? Inc. of information necessary to establish the account.

[para 76] In addition to the signature of the parent or guardian, the form asks for home address and phone number of the parent or guardian. There is no information about whether the name, address and phone number of the parent or guardian was also passed on to WhoWhere? or if they were sent a copy of the form. Likewise, the student section asks for the Student CBE ID number. There is no indication if this information was passed on to WhoWhere? This additional information is the personal information of the parents and students.

[para 77] What is most noticeable about the consent page is that the wording of each section is different for students, parents or guardians, “independent students” and teachers. This is understandable for the teachers. However, there is no reference to the release of personal information in either section to be filled out by a student. The first section, to be signed by all students (under and over 18 yrs.), certifies that the student understands and will abide by the Acceptable Use Policy (AUP), the consequences of a breach and a statement about the form staying on the student’s file.

[para 78] It appears that the Public Body has left consent for the release of personal information up to the parent or guardian. However, for those 18 or older or for “independent students,” only the following statement appears:

I hereby give permission to issue an account, including email, to me.

[para 79] The effect of this omission is that no consent has been sought from this specific group for the release of their personal information. This leads me to the conclusion that the AUP document was never intended to constitute consent under the FOIP Act or the FOIP Act Regulation. It is as it appears, a document that sets out policy about acceptable use of the Public Body’s computer network, including sanctions and legal disclaimers.

[para 80] Having said that, I must still determine whether the consent statement contained in the parents and guardians section meets the requirements for consent, as set out in the Regulation.

[para 81] The statement is in writing and contains the name of the service provider. It also states that the release is for the purpose of establishing an account. There is no mention about what information will be used or disclosed. As the Complainant argues, the statement is vague and leaves a parent guessing exactly what information would be released. In addition, there is no indication about the secondary or commercial use. Therefore, I find that the consent statement contained in the Public Body’s Acceptable Use Policy document does not meet the requirements set out in the Regulation.

E. Did the Public Body disclose the Complainant’s Child’s personal information in compliance with Part 2 of the Act?

[para 82] Use and disclosure are two separate issues under the FOIP Act. Under the circumstances of this inquiry, however, the two issues are very closely related. I have already found that setting up and administering an email system is consistent with the purpose for which the Complainant’s Child’s personal information was collected or compiled. I have also found that the commercial or business component of the contract is not consistent with the purpose for which the information was collected or compiled. Both of these findings have application when determining if the Public Body was authorized to disclose the Complainant’s Child’s personal information.

[para 83] Disclosure of personal information is set out in section 40 [previously section 38] of the FOIP Act. The applicable clauses are as follows:

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

(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,

(d) if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure,

[para 84] The Public Body relied on section 40(1)(c) [previously section 38(1)(b)] of the FOIP Act to authorize the disclosure of the Complainant's Child's personal information. I have already found that setting up and administering an email system is either the purpose for which the personal information was collected or compiled or is consistent with the purpose for which the personal information was collected or compiled. Consequently, I find that disclosure of the Complainant's Child's personal information for this purpose is authorized by section 40(1)(c) [previously section 38(1)(b)], except for gender.

[para 85] However, I have already found that advertising, marketing and revenue generation are not consistent uses, as set out in section 41 [previously section 39] of the FOIP Act. Therefore, I find that the Public Body was not authorized to disclose the Complainant's Child's personal information to WhoWhere? under section 40(1)(c) [previously section 38(1)(b)] for the purpose of advertising, marketing and revenue generation.

[para 86] I have already found that the consent received by the Public Body does not meet the requirements of section 6 of the Regulation. Therefore, I find that the Public Body was not authorized to release the Complainant's Child's personal information under section 40(1)(d) [previously section 38(1)(c)] of the FOIP Act.

VI. ORDER

[para 87] For the reasons previously stated, I make the following order under section 72 [previously section 68] of the FOIP Act.

1. Did the Public Body collect the Complainant's Child's personal information in compliance with Part 2 of the Act?

[para 88] I find that the Public Body collected the Complainant's Child's personal information in compliance with Part 2 of the FOIP Act.

2. Did the Public Body use the Complainant's Child's personal information in compliance with Part 2 of the Act?

[para 89] I find that, except for gender, the Public Body used the Complainant's Child's personal information in compliance with Part 2 of the Act for the purpose of setting up and administering an email system.

[para 90] I order the Public Body to stop using the Complainant's Child's gender information for the purpose of setting up and administering an email system, unless the Public Body obtains consent for that use, as required by section 6 of the FOIP Act Regulation.

[para 91] I find that the Public Body did not use the Complainant's Child's personal information in compliance with Part 2 of the Act for the purpose of advertising, marketing and revenue generation.

[para 92] I order the Public Body to stop using the Complainant's Child's personal information for the purpose of advertising, marketing and revenue generation, unless the Public Body obtains consent for that use, as required by section 6 of the FOIP Act Regulation.

3. Did the Public Body disclose the Complainant's Child's personal information in compliance with Part 2 of the Act?

[para 93] I find that, except for gender, the Public Body disclosed the Complainant's Child's personal information in compliance with Part 2 of the Act for the purpose of setting up and administering an email system.

[para 94] I order the Public Body to stop disclosing the Complainant's Child's gender information for the purpose of setting up and administering an email system, unless the Public Body obtains consent for that use, as required by section 6 of the FOIP Act Regulation.

[para 95] I find that the Public Body did not disclose the Complainant's Child's personal information in compliance with Part 2 of the Act for the purpose of advertising, marketing and revenue generation.

[para 96] I order the Public Body to stop disclosing the Complainant's Child's personal information for the purpose of advertising, marketing and revenue generation, unless the Public Body obtains consent for that disclosure, as required by section 6 of the FOIP Act Regulation.

[para 97] The Public Body may comply with this Order in one of two ways. The Public Body must stop using and disclosing the Complainant's Child's personal information as set out in this Order or it must obtain proper consent for the use and disclosure. I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, how it has complied with this Order.

VII. CONCLUDING COMMENTS

[para 97] The contract between the Public Body and WhoWhere? Inc./Lycos Inc. terminated December 15, 2000. The Public Body offered evidence that ePals currently is being used for email and Internet access. The specific contract with ePals was not supplied to me because it was not relevant to the specific circumstances of the complaint that was the subject of this inquiry. Therefore, I am unaware if the same revenue opportunities are built into this arrangement. It is apparent, however, that the Public Body does not pay a fee for the service.

[para 98] The Public Body is reminded that if there are similar considerations concerning the use or disclosure of personal information in the current agreement, the requirements of this Order would apply.

Dave Bell
Adjudicator