

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2012-21

September 21, 2012

HIGH PRAIRIE SCHOOL DIVISION NO. 48

Case File Number F5585

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”), the Applicant asked High Prairie School Division No. 48 (the “Public Body”) for his daughter’s school counseling record. The Public Body withheld some information under section 17 (disclosure harmful to personal privacy) and section 27 (privileged information). The Applicant requested a review.

The Applicant raised the possibility that certain provisions of the *Family Law Act* prevailed despite the FOIP Act, pursuant to section 5 of the FOIP Act. The Adjudicator found otherwise, as the *Family Law Act* does not expressly provide that the provisions in question prevail, which is a requirement under section 5 of the FOIP Act in order for them to prevail.

The Adjudicator found that section 17(1) of the FOIP Act did not apply to some of the information that the Public Body withheld under that section, as disclosure would not be an unreasonable invasion of the personal privacy of any third parties. In particular, this consisted of information that was solely the personal information of the Applicant’s spouse, who had requested the disclosure of her personal information to the Applicant within the terms of section 17(2)(a), as well as some of the personal information of the school counselor, which merely revealed something that she said or did in her work-related capacity. The Adjudicator ordered the Public Body to give the Applicant access to the foregoing information.

The Adjudicator found that section 17(1) applied to other information in the daughter's school counseling record, as disclosure would be an unreasonable invasion of the personal privacy of third parties. In particular, this consisted of the personal information of the Applicant's daughter, which had been supplied in confidence under section 17(5)(f). The Adjudicator confirmed the decision of the Public Body to refuse the Applicant access to the information falling under section 17(1), or required the Public Body to refuse access.

The Adjudicator further found that some of the records at issue consisted of information that was subject to a type of legal privilege under section 27 of the FOIP Act, and he confirmed the decision of the Public Body to refuse the Applicant access to it.

Statutes and Regulations Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 5, 17, 17(1), 17(2), 17(2)(a), 17(2)(b), 17(2)(c), 17(4), 17(4)(a), 17(4)(g), 17(5), 17(5)(c), 17(5)(f), 17(5)(g), 17(5)(i), 27, 27(1)(a), 27(2), 71(1), 71(2), 72, 72(2)(a), 72(2)(b), 72(2)(c) and 84(1)(e); *Health Information Act*, R.S.A. 2000, c. H-5; *Personal Information Protection Act*, S.A. 2003, c. P-6.5; *Family Law Act*, S.A. 2003, c. F-4.5, ss. 21, 21(4), 21(5) and 21(6)(l); *Age of Majority Act*, R.S.A. 2000, c. A-6; *Mental Health Act*, R.S.A. 2000, c. M-13; *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, ss. 7(3) and 7(4). **CAN:** *Youth Criminal Justice Act*, S.C. 2002, c. 1.

Authorities Cited: **AB:** Orders 97-002, 97-018, 98-007, 98-008, 99-027, 99-028, 2000-019, F2003-005, F2004-015, F2004-026, F2005-007, F2006-006; F2006-030, F2007-021, F2008-012, F2009-033, F2010-017 and F2011-019; *C. (J.S.) v. Wren* (1986), 76 A.R. 115 (C.A.).

I. BACKGROUND

[para 1] The Applicant's daughter attended a school operated by High Prairie School Division No. 48 (the "Public Body"). She received counseling services from her school counselor from approximately April to June 2010, while she was in Grade 5.

[para 2] In a letter dated September 12, 2010, the Applicant asked the Public Body to allow him to view the original and complete copy of his daughter's counseling record. Because High Prairie School Division No. 48 is a "public body" subject to the *Freedom of Information and Protection of Privacy Act* (the "Act" or "FOIP Act"), the Applicant's request was processed under that Act. Although the Applicant made references to the *Health Information Act* and to the *Personal Information Protection Act* in his letter of September 12, 2010, the Public body is not a "custodian" subject to the *Health Information Act*, and it is not an "organization" subject to the *Personal Information Protection Act*.

[para 3] In a letter dated September 22, 2010, the Public Body requested proof that the Applicant was the legal guardian of his daughter, and he provided proof by way of

attachments to a letter dated September 24, 2010. He also provided proof that his spouse, being his daughter's stepmother, is the legal guardian of his daughter.

[para 4] By letter dated October 12, 2010, the Public Body granted access to some of the information requested by the Applicant, but refused to disclose other information on the basis that it consisted of the personal information of third parties, or was privileged at law. In the set of records included with the Public Body's letter, it specified the sections of the FOIP Act under which it was severing information, being section 17 (disclosure harmful to personal privacy) and section 27 (privileged information).

[para 5] With a letter dated October 23, 2010, the Applicant provided a "Permission to Release Third Party Information" in which his spouse and his son, being the daughter's older brother, consented to or requested the release of their personal information, as contained in the counseling record of the Applicant's daughter, to the Applicant. In a letter dated November 8, 2010, the Public Body wrote that it must comply with the provisions of the Act, which it said prohibited the disclosure of third party personal information.

[para 6] In correspondence dated November 22, 2010, the Applicant asked the Commissioner to review the Public Body's decision to withhold the information that it had withheld. He also noted certain sections of the *Family Law Act*, which may be paramount to the FOIP Act. Mediation was authorized and was partly successful, in that the Public Body released some additional information to the Applicant. With respect to the information that the Public Body continued to withhold, the Applicant requested an inquiry into the matter, by letter dated June 27, 2011 attached to forms dated June 28 and July 15, 2011. A written inquiry was set down.

II. RECORDS AT ISSUE

[para 7] The records at issue consist of all or portions of 19 pages of the school counseling record of the Applicant's daughter.

III. ISSUES

[para 8] The Notice of Inquiry, dated December 12, 2011, set out the following issues:

Does a provision of another Act prevail despite the FOIP Act, pursuant to section 5 of the FOIP Act?

Does section 17(1) of the FOIP Act (disclosure harmful to personal privacy) apply to the records/information?

Did the Public Body properly apply section 27 of the FOIP Act (privileged information) to the records/information?

[para 9] In a letter dated August 26, 2011, the Applicant requested that an issue proceed in relation to a concern about there being two versions of the records that he requested. He wrote that, when he received additional information from the Public Body on pages 1, 3, 5 and 12 of the records in the course of mediation, the pages did not appear to be the same as those that he had previously received. He noted that the page numbering on some of the pages was different, and that page 5 appeared to have different text, which was on lined rather than blank paper. In his inquiry submissions, the Applicant also notes the appearance of hole punches on one set of records that he received but not the other. He refers to the existence of two versions of the records as “suspect” and “corrupt”.

[para 10] In an affidavit sworn February 13, 2012, the Public Body’s FOIP Coordinator and Assistant Superintendent of Business responded that, with respect to the appearance of lines versus the lack of lines, she could only speculate that any difference is attributable to the use of different photocopying machines. She further stated that she handwrote reference numbers on each set of records. Finally, she explained that, when the Applicant received the additional information on pages 1, 3, 5 and 12 of the records, the Public Body copied only the information that the Applicant had not previously received.

[para 11] On my review of the versions of the records provided to me, there are indeed differences, as noted by the Applicant. However, the Public Body’s FOIP Coordinator has indicated that she handwrote the reference numbers on each set of records, which explains the difference in the page numbering. As for the appearance of lines and hole punches, I accept that this is due to the size and quality of the photocopying. For instance, the hole punches do not appear on the version of the records containing a larger copy of text, presumably because the hole punches were outside the area being photocopied. I similarly presume that the lines on page 5 do not appear on one version of the records because the photocopier reproduced that version with lighter ink.

[para 12] In any event, I have various copies of the records at issue, and the substantive information is identical on all copies. This includes the information on page 5, which the Applicant believes to have different versions of text. As explained by the Public Body’s FOIP Coordinator, when the Applicant was given access to the additional information on pages 1, 3, 5 and 12 of the records, the Public Body did not re-copy the information that he had already received. In other words, he received a portion of the particular page in the first set of records released to him, and then received a different portion of the same page in the second set of records released to him. On my review of the unredacted/unsevered version of the records, both portions emanate from the same complete copy of the particular page.

IV. DISCUSSION OF ISSUES

A. Does a provision of another Act prevail despite the FOIP Act, pursuant to section 5 of the FOIP Act?

[para 13] Section 5 of the *FOIP Act* is a “paramountcy” provision. It determines whether the *FOIP Act* prevails over another enactment or a provision of it, or whether the other enactment or a provision of it prevails over the *FOIP Act*. Section 5 reads as follows:

5 If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

(a) another Act, or

(b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[para 14] Section 5 requires that I first decide whether information falls within another enactment or a provision of it that expressly provides that the enactment or a provision of it prevails despite the *FOIP Act*. If so, I must then decide whether there is an inconsistency or conflict between a provision of the *FOIP Act* and the other enactment or provision. If there is an inconsistency or conflict, the other enactment or provision governs the disclosure of the information, the *FOIP Act* does not apply, and I do not have jurisdiction over the information. [See Order F2005-007 at paras. 13 and 15; Order F2006-006 at para. 19.]

[para 15] The Applicant raises the possibility that sections 21(4) and 21(5) of the *Family Law Act* prevail over the FOIP Act, and that the *Family Law Act* effectively entitles him to his daughter’s counseling record. Sections 21(4) and 21(5) of the *Family Law Act* read as follows:

21(4) Except where otherwise limited by a parenting order, each guardian is entitled

(a) to be informed of and consulted about and to make all significant decisions affecting the child in the exercise of the powers and responsibilities of guardianship described in subsection (5), and

(b) to have sufficient contact with the child to carry out those powers and responsibilities.

(5) Except where otherwise limited by law, including a parenting order, each guardian has the following responsibilities in respect of the child:

(a) to nurture the child's physical, psychological and emotional development and to guide the child towards independent adulthood;

(b) to ensure the child has the necessities of life, including medical care, food, clothing and shelter.

[para 16] The first issue in this inquiry can be resolved very quickly. The *Family Law Act* does not expressly provide that section 21(4) or 21(5) prevails despite the FOIP Act. Further, it does not purport to entitle the Applicant to his daughter's counseling record. The fact that the Applicant is entitled to be informed of, consulted about and to make all significant decisions affecting his daughter does not equate to his being entitled to any particular information found in a record. In other words, there is no inconsistency or conflict with the Applicant's entitlement to be informed, generally, about significant decisions affecting his daughter and the provisions of the FOIP Act that authorize or require the Public Body to withhold specific information.

[para 17] I independently note section 21(6)(1) of the *Family Law Act*, under which a guardian may exercise the power "to receive from third parties health, education or other information that may significantly affect the child". However, the reasons just set out still apply. Section 21(6)(1) of the *Family Law Act* does not state that it prevails despite the FOIP Act, and the power of the Applicant to receive information that may significantly affect his daughter does not mean that he is automatically entitled to all of the information in her counseling record. The FOIP Act requires a consideration of whether disclosure would be an unreasonable invasion of her personal privacy, as discussed in the next part of this Order.

[para 18] In his request for review and/or attachments to it, the Applicant also referred to various other enactments, being the *Age of Majority Act*, the *Health Information Act*, the *Mental Health Act*, the *Personal Information Protection Act*, and the *Youth Criminal Justice Act*. My review of these pieces of legislation did not reveal any provisions that expressly prevail despite the FOIP Act. Having said this, I briefly return to these enactments – along with the *Family Law Act* and its section 26(1)(1) – when I discuss section 17(2)(c) of the FOIP Act below. Section 17(2)(c) contemplates a consideration of whether another Act authorizes or requires the disclosure of third party personal information to an applicant, such that disclosure would not be an unreasonable invasion of the third party's personal privacy. In other words, even where another enactment or provision does not prevail despite the FOIP Act, the other enactment or provision may still be a relevant consideration.

[para 19] I conclude that the enactments and provisions cited by the Applicant do not prevail despite the FOIP Act, pursuant to section 5 of the FOIP Act. The provisions of the FOIP Act therefore apply in this matter, and I have jurisdiction over all of the records at issue.

B. Does section 17(1) of the FOIP Act (disclosure harmful to personal privacy) apply to the records/information?

[para 20] Section 17 of the Act reads, in part, as follows:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

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

(a) the third party has, in the prescribed manner, consented to or requested the disclosure,

(b) there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party,

(c) an Act of Alberta or Canada authorizes or requires the disclosure,

...

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

...

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party,

...

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

- (f) *the personal information has been supplied in confidence,*
- (g) *the personal information is likely to be inaccurate or unreliable,*
...
- (i) *the personal information was originally provided by the applicant.*

[para 21] In the context of section 17, a public body must establish that the information that it has withheld is the personal information of a third party, and may present argument and evidence to show how disclosure would be an unreasonable invasion of the third party's personal privacy. If a record does contain personal information about a third party, section 71(2) states that it is then up to an applicant to prove that disclosure would not be an unreasonable invasion of the third party's personal privacy.

[para 22] The Applicant submits that the Public Body's decision to withhold his daughter's information from him was a violation of his parental rights. He argues that he has a legal right to his daughter's counseling record because he is her legal guardian. Section 84(1)(e) of the Act addresses a guardian's ability to access a minor's personal information. It reads as follows:

84(1) Any right or power conferred on an individual by this Act may be exercised
...

(e) if the individual is a minor, by a guardian of the minor in circumstances where, in the opinion of the head of the public body concerned, the exercise of the right or power by the guardian would not constitute an unreasonable invasion of the personal privacy of the minor, or

[para 23] In its letter of October 12, 2010 in response to the Applicant's access request, the Public Body acknowledged that the Applicant was the guardian of his daughter, indicated that it considered section 84(1)(e), but decided that some of the requested information could not be disclosed under section 17. Where, in the opinion of the head of a public body, a guardian is not entitled to exercise a minor's right of access under section 84(1)(e), the minor remains a third party and section 17 should be considered and applied in its usual way, on a record-by-record basis (Order F2006-006 at paras. 100-102; Order F2009-033 at paras. 17-19).

[para 24] The Applicant's daughter was ten years old when she received counseling from the school counselor of the Public Body, and she was eleven when the Applicant made his access request. In his request for review, the Applicant noted that a mature minor may give consent to health treatment, but argues that his daughter does not qualify as a mature minor given her age. He also cited *C. (J.S.) v. Wren*, which states that "[p]arental rights (and obligations) clearly do exist and they do not wholly disappear until the age of majority".

[para 25] The Applicant may be arguing that the Public Body should have sought his consent before the school counselor provided services to his daughter, but I have no jurisdiction over this issue. The Applicant may also be arguing, by way of analogy to the capacity to consent to health treatment, that his daughter does not have the capacity to request access to her own personal information, meaning that he should be able to do so on her behalf. However, his daughter's capacity to make an access request in her own right is not particularly relevant. Whether or not she has the capacity to request her own personal information, the access request here was made by the Applicant, meaning that section 84(1)(e) is engaged. Section 84(1)(e) sets out a statutory rule governing the ability of a guardian to make an access request on behalf of a minor and thereby obtain the minor's personal information. Notwithstanding parental rights in other contexts, the Act requires a consideration of whether disclosure of the minor's personal information to the guardian would be an unreasonable invasion of the minor's personal privacy. Even if a minor is not mature enough to make an access request under the Act, a guardian may still not be entitled to the minor's personal information.

[para 26] Having said this, arguments in relation to a guardian's interest in the personal information of a minor, in order to care for and parent the minor, may give rise to a relevant circumstance in favour of disclosure, in reference to section 17(5) of the Act. In other words, the fact that an applicant is the guardian of a minor does not automatically entitle the guardian to the minor's personal information, but it may still be a factor to consider. I therefore review the Applicant's arguments in this regard later in this Order.

[para 27] Finally, the Applicant wrote that his daughter does not have the capacity to legally instruct the school counselor to keep information from him as guardian, although he does not indicate whether she has, in fact, instructed the school counselor in that fashion. If the Applicant's daughter has indeed objected to the disclosure of her personal information, this would also be a relevant circumstance to be given the appropriate weight under section 17(5), and it would possibly weigh against disclosure. I will not address this possibility any further in this inquiry, however. Again, I do not know whether the Applicant's daughter has objected to disclosure of her school counseling record to the Applicant, and even if she has, I am able to reach my conclusion as to whether disclosure would be an unreasonable invasion of her personal privacy in reference to other relevant circumstances.

1. Personal information of third parties

[para 28] Section 1(n) of the Act reads, in part, as follows:

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

(i) the individual's name...

...

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

[para 29] The records at issue consist of the personal information of third parties. Primarily, they consist of recorded information about the Applicant's daughter, including her views and opinions. While these views and opinions are occasionally about someone else, meaning that they constitute the personal information of other third parties, I find that the personal information of the Applicant's daughter is often intertwined with this other personal information. As noted by the Public Body, a fact, observation, view or opinion about someone else can simultaneously reveal the identity of the individual who provided it, and a substantive comment about someone else can reveal the emotional state of the individual making the comment (see Order F2006-006 at para. 117).

[para 30] Where a different third party's personal information (such as views and opinions about him or her) is intertwined with the personal information of the Applicant's daughter (including contextual information that identifies her), it becomes necessary to decide whether some or none of the information can be disclosed (see Order 2000-019 at para. 76; Order F2010-017 at para. 39). The Public Body must make this decision regarding disclosure by weighing the Applicant's right of access to information against his daughter's right to privacy, as well as the right to privacy of the other third party (see Order 98-008 at para. 35; Order 99-027 at para. 134). I have borne this principle in mind when weighing the relevant circumstances later in this Order.

[para 31] As just indicated, the records at issue also consist of the personal information of third parties apart from the Applicant's daughter. For instance, they consist of recorded information about the school counselor, the school principal, the Applicant's spouse and the Applicant's son.

2. Circumstances in which there would not be an unreasonable invasion of personal privacy

[para 32] Under section 17(2) of the Act, a disclosure of personal information is expressly not an unreasonable invasion of a third party's personal privacy in certain circumstances. One of these circumstances, under section 17(2)(a), is where the third party has, in the prescribed manner, consented to or requested the disclosure. Under sections 7(3) and 7(4) of the *Freedom of Information and Protection of Privacy Regulation*, one of the prescribed manners for consenting to or requesting disclosure is as follows:

7(3) The consent or request of a third party under section 17(2)(a) of the Act must meet the requirements of subsection (4), (5) or (6).

(4) For the purposes of this section, a consent in writing is valid if it is signed by the person who is giving the consent.

[para 33] In a “Permission to Release Third Party Information” signed October 23, 2010, which the Applicant provided to the Public Body with his letter of the same date, the Applicant’s spouse requested that her third party personal information, as found in the records at issue, be released to the Applicant. In the same document, the Applicant’s son (who was 17 years old at the time) indicated that he granted permission for his third party personal information, as found in the records at issue, to be released to the Applicant. As the document is in writing and was signed by the Applicant’s spouse and son, I find that it meets the requirement set out in section 7(4) of the Regulation. It is therefore in the prescribed form for the purpose of section 17(2)(a) of the Act, meaning that the Applicant’s spouse and son have properly consented to or requested, as the case may be, the disclosure of their personal information to the Applicant.

[para 34] As noted earlier in this Order, however, the personal information of the Applicant’s spouse and son is often intertwined with the personal information of the Applicant’s daughter. In other words, the same item of information is simultaneously the personal information of the Applicant’s daughter and one of these other third parties. For the purpose of section 17(2)(a), third parties can only consent to or request disclosure of information that is their own personal information, and theirs alone. As the Applicant’s spouse and son cannot consent to or request disclosure of information in instances where the information is also that of the Applicant’s daughter, section 17(2)(a) does not apply in those instances.

[para 35] Conversely, section 17(2)(a) applies in those instances where the information at issue consists solely of the personal information of the Applicant’s spouse or son. On my review of the records at issue, there are no instances of personal information that is solely that of the Applicant’s son. There is one instance of personal information that is only that of the Applicant’s spouse, being that found in the second paragraph below the wavy line on the lower half of page 12. As section 17(2)(a) applies, I find that disclosure of this information would not be an unreasonable invasion of the personal privacy of the Applicant’s spouse. As an aside, I note that the Public Body decided, in the course of mediation, to release the personal information of the Applicant’s spouse appearing on page 3 of the records.

[para 36] Unlike the second paragraph, the first paragraph below the wavy line on the lower half of page 12 consists of the intertwined personal information of the Applicant’s spouse and the Public Body’s school counselor. As with the instances of intertwined personal information involving that of the Applicant’s daughter, section 17(2)(a) does not apply to the foregoing, and I must go on to consider the other provisions of section 17, as I do later in this Order.

[para 37] Under section 17(2)(b), a disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy if there are compelling circumstances affecting anyone’s health or safety and written notice of the disclosure is given to the third party. The Applicant submits that section 17(2)(b) is engaged because, according to him, the Public Body encouraged his daughter not to listen to her parents, eroded the parental relationship by devaluing the parenting choices of him and his

spouse, and instilled a negative message in their daughter, which she internalized and manifested into increasingly bad behaviour. He argues that all of this compromised their ability to keep their daughter from harm, and that he should have access to his daughter's school counseling record to correct any damage caused by the Public Body. The Applicant further submits that the Public Body put his daughter's safety at risk when she ran away from home due to stress that she was experiencing in the course of a natural disaster. He says that if he and his spouse had obtained insight into the problems and stressors that their daughter may have disclosed in the course of counseling, they would have been better able to help her.

[para 38] I find that section 17(2)(b) is not triggered in this inquiry. First, the section requires notice to the third party in question, being the Applicant's daughter, which was not given in this case. Apart from this, the Public Body notes that an applicant relying on section 17(2)(b) must do more than simply say that compelling circumstances affecting someone's health or safety exist, in that the applicant must provide sufficient evidence (Order 98-007 at para. 48). It must also be likely that the release of the particular information will have a direct bearing on the compelling health or safety matter (Order 98-007 at para. 47).

[para 39] Here, the health or safety of the Applicant's daughter was not jeopardized, insofar as her counseling affected the ability of the Applicant and his spouse to parent her, so as to give rise to "compelling circumstances". The possibility that access to their daughter's school counseling record will assist the Applicant and his spouse in understanding their daughter and helping her does not mean that their daughter's health and safety was compromised, within the terms of section 17(2)(b). I further note the Applicant's argument that his daughter's school counseling record may reveal whether she has shown signs of a hereditary health condition. Even assuming that the daughter's predisposition to the health condition means that there are compelling circumstances affecting her health, my review of the information at issue does not lead me to believe that access will serve the purpose of indicating whether she is showing signs of the health condition. In other words, disclosure of the counseling record of the Applicant's daughter has no direct bearing on whether she has the particular health condition.

[para 40] Also assuming that there were compelling circumstances affecting the health or safety of the Applicant's daughter when she ran away from home, I find that section 17(2)(b) is not engaged. It is not sufficient, for the purposes of section 17(2)(b), that the personal information in question relates to past circumstances that affected the health or safety of someone, as there must be present compelling circumstances that warrant disclosure now (Order 97-002 at para. 104). I further note that, when contacted by the Applicant at the time that his daughter ran away, the school counselor revealed to the Applicant that she had told his daughter to go to a neighbour for help. In other words, the Public Body disclosed the information that was within its knowledge, in order to protect the safety of the Applicant's daughter.

[para 41] Finally, I considered the application of section 17(2)(c), under which a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if an Act of Alberta or Canada authorizes or requires the disclosure. As noted earlier in this Order, the Applicant refers in his material to the *Family Law Act*, the *Age of Majority Act*, the *Health Information Act*, the *Personal Information Protection Act*, the *Mental Health Act*, and the *Youth Criminal Justice Act*.

[para 42] I do not find that section 17(2)(c) applies in this inquiry so as to entitle the Applicant to the information at issue. First, I fail to see how the *Age of Majority Act*, the *Mental Health Act* or the *Youth Criminal Justice Act* informs the question of whether, or to what extent, the Applicant is entitled to the information in his daughter's counseling record. Second, I explained at the outset of this Order that the Public Body is not subject to the *Health Information Act* or to the *Personal Information Protection Act*.

[para 43] As for the Applicant's reference to the *Family Law Act*, I note a previous Order of this Office in which a public body was authorized to disclose particular information to the mother of children on the basis that the information "significantly affected" them within the terms of section 21(6)(l) of the *Family Law Act*, and was therefore authorized by another statute under section 17(2)(c) of the FOIP Act (Order F2011-019 at paras. 27-34). However, for many of the same reasons given elsewhere in this Order, I would not say that the information that the Applicant has not received from his daughter's counseling record constitutes information that may "significantly affect" her. While the information at issue is about the Applicant's daughter, and the Applicant submits that he and his spouse require the information in order to properly parent her and meet her needs, I do not believe the information to be of the same kind that the *Family Law Act* contemplates being disclosed to guardians under section 21 of that Act. There were unique circumstances in the previous Order of this Office, in that the children in question were being driven around by an unlicensed and uninsured individual.

3. Circumstances in which there is a presumption of an unreasonable invasion of personal privacy

[para 44] Under section 17(4) of the Act, a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy in certain circumstances. The Public Body submits that there are presumptions against disclosure of the records at issue as a result of sections 17(4)(a) and 17(4)(g). I agree. The school counseling record of the Applicant's daughter consists of information that can be characterized as relating to her psychological history or condition, within the terms of section 17(4)(a). The records at issue also consist of the names of third parties appearing with personal information about them, or names the disclosure of which would reveal personal information about the third parties, within the terms of section 17(4)(g).

4. Relevant circumstances in deciding whether disclosure would be an unreasonable invasion of personal privacy

[para 45] Section 17(5) of the Act states that, in determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, one must consider all the relevant circumstances, and section 17(5) sets out a non-exhaustive list of such circumstances. I will now review the enumerated and unenumerated relevant circumstances possibly weighing in favour of or against disclosure of the information at issue in this part of the Order, as raised by the parties or else independently noted by me.

[para 46] Where third parties were acting in their employment capacities, or their personal information exists as a consequence of their activities as staff performing their duties or as a function of their employment, this is an unenumerated relevant circumstance weighing in favour of disclosure (Order F2003-005 at para. 96; Order F2004-015 at para. 96; Order F2007-021 at para. 98). It has also been stated that a record of the performance of work responsibilities by an individual is not, generally speaking, personal information about that individual, as there is no personal dimension (Order F2004-026 at para 108; Order F2006-030 at para. 10; Order F2007-021 at para. 97). In this inquiry, I find that the personal information of the school counselor in the first paragraph below the wavy line on the lower half of page 12 of the records merely reveals information of a work-related nature on her part, and that disclosure therefore would not be an unreasonable invasion of her personal privacy. While the information is intertwined with the personal information of the Applicant's spouse, the latter requested disclosure of her own personal information in accordance with section 17(2)(a), resulting in a conclusion that the Applicant should be granted access to the foregoing information. In other instances, the personal information of the school counselor is intertwined with the personal information of the Applicant's daughter, so the same conclusion does not apply.

[para 47] I now turn to the remaining information that the Public Body withheld under section 17, which is found on pages 1-2, 4, 6-10, 12-14 and 17-21 of the records at issue. The Public Body cites section 17(5)(f), under which a relevant circumstance weighing against disclosure of third party personal information is the fact that it was supplied in confidence. The Public Body notes its Administrative Procedure 219 entitled *Guidance and Counseling Services*, which states that "[s]chool counselors providing programs and services in schools shall respect the confidentiality of information received in accordance with professional ethics and relevant legislation".

[para 48] I find that the relevant circumstance under section 17(5)(f) weighs heavily against disclosure of the personal information of the Applicant's daughter. The very nature of counseling services generally implies that the individual obtaining the services provides his or her personal information to the counselor in confidence. The fact that the individual is a child makes no difference. While there will be times when an individual does not mean to supply their personal information in confidence in the course of counseling, my review of the information at issue in the daughter's school counseling

record persuades me that she meant to supply her personal information in confidence. Moreover, as noted by the Public Body, the sensitivity of information is another relevant circumstance to consider under section 17(5) (Order F2006-006 at paras. 106 and 108; Order F2009-033 at para. 27). I find that this relevant circumstance also weighs against disclosure of the information at issue to the Applicant.

[para 49] The Applicant cites section 17(5)(g), under which a relevant circumstance to consider, in deciding whether disclosure would be an unreasonable invasion of a third party's personal privacy, is the likelihood that the information is inaccurate or unreliable. He cites it because he believes that his daughter's school counseling record does not reflect the truth of what was going on, and that he should therefore be given access to this inaccurate and unreliable information. However, the relevant circumstance under section 17(5)(g) normally weighs *against* disclosure (see, e.g., Order 97-018 at para. 17), so as to prevent inaccurate or unreliable information about a third party from falling into the hands of someone else.

[para 50] To the extent that an applicant may sometimes have an interest in knowing the allegedly inaccurate or unreliable personal information of a third party, for the purpose of commenting on or correcting it for instance, I find that the Applicant does not have a sufficient interest in this inquiry. His daughter has left the school operated by the Public Body, the school counselor is no longer counseling her, and a particular case involving the Applicant has been closed, so there is no longer anything that the Applicant might need to prove or establish in relation to any inaccurate or unreliable information that he believes to be found in his daughter's school counseling record. This finding is consistent with this Office's approach under section 17(5)(c), regarding the relevant circumstance in which a third party's personal information is relevant to a fair determination of an applicant's rights. For section 17(5)(c) to be a relevant consideration, there must be, among other things, an existing or contemplated legal proceeding involving the applicant (see, e.g., Order 99-028 at para. 32; Order F2008-012 at para. 55). Here, the Applicant is no doubt curious to see whether there is inaccurate or unreliable information in his daughter's school counseling record, but this is not sufficient to give rise to a relevant circumstance in favour of disclosure.

[para 51] The Applicant also raises various unenumerated circumstances that he believes should weigh in favour of disclosure of his daughter's school counseling record to him. He argues that the Public Body failed to consider the following: that his daughter was new to the town and school and was having difficulty adjusting to the move; that she had displayed manipulation and deception; that she had been disciplined twice for unacceptable behaviour at school; that she is at risk of developing a hereditary health condition, which requires the Applicant and his spouse to monitor her for signs; that the Applicant and his spouse had engaged a psychologist to provide family strategies to assist with their daughter's transition and behavior; that the Applicant and his spouse had requested a meeting with the school counselor and principal in order to seek support in dealing with their daughter's behavior (for instance by requiring her to write down positive things); that a particular case in relation to them was closed; and that the portions

of the school counseling record disclosed to the Applicant show that he and his spouse were doing positive things and being proactive in parenting their daughter.

[para 52] The Applicant further submits the following: that the Public Body did not notify him and his spouse that their daughter was being counseled; that it failed to adhere to its own policy of working collaboratively with parents as a team and consulting with them when a student is being counseled; that the Public Body drove a wedge between the Applicant and his spouse on one hand, and their daughter on the other, by devaluing and overriding their parenting choices (for instance by disallowing their daughter to discuss something with her friends that they had told her to discuss); and that the Public Body violated their family's confidentiality when another teacher came to know their personal affairs. In short, the Applicant argues that he and his spouse were taking steps to deal with their daughter's behavior, and that the involvement of the school counselor, as well as the Public Body's decision to withhold their daughter's personal information from them, has hindered them in that effort. In his request for review, the Applicant additionally wrote that he requires his daughter's school counseling record in order to take a holistic approach to her well-being. He said that, without the information at issue, he and his spouse do not have a complete understanding of her cognitive process and therefore cannot get proper help and supports to assist her needs.

[para 53] The Public Body objects to many of the foregoing submissions of the Applicant on the basis that he has not offered any objective evidence to support them, or they involve matters over which I have no jurisdiction, such as whether or not the Public Body gave the Applicant and his spouse notice that their daughter was in counseling, and whether or not the nature of that counseling was appropriate. However, I characterize the essential part of the Applicant's argument as being about his and his spouse's interest in knowing the content of their daughter's school counseling record so as to be in a better position to parent her and address her needs. I find that this is a relevant circumstance in favour of disclosure, in reference to section 17(5) of the Act. However, I also find that this relevant circumstance is outweighed by the relevant circumstances relating to the confidentiality and sensitivity of the information at issue.

[para 54] While parents have an interest in knowing the personal information of their child, particularly where it relates to the latter's psychological or emotional well-being, the confidential and often sensitive nature of counseling services should generally supersede this interest, in my view. There will be times when the best interests of the child militate in favour of disclosure of confidential and/or sensitive personal information that the child has disclosed to a counselor – indeed this is the purpose, for instance, of section 17(2)(b) regarding compelling circumstances affecting someone's health or safety – but this is not one of those times. The Applicant argues that the Public Body placed too much emphasis on confidentiality in reference to section 17(5)(f), and failed to consider all of the other relevant circumstances under section 17(5). However, on my own independent review of all of the relevant circumstances, I find that section 17(1) applies to the information remaining at issue in this part of the Order.

[para 55] Finally, the Applicant notes that the Public Body released all or most of the information on pages 3 and 5 of the records at issue, and questions why the relevant circumstances weighed in favour of disclosure in these instances, but not in others. It would appear that the Public Body released information on pages 3 and 5 because they are accounts of conversations involving the Applicant and his spouse. In those instances where pages 3 and 5 consist of the personal information of the Applicant and his spouse, the Applicant would be entitled to the information on the basis that it is his own personal information or else that of his spouse, who requested disclosure to him in accordance with section 17(2)(a). In those instances where pages 3 and 5 consist of the personal information of the Applicant's daughter, it would appear to be information that the Applicant and his spouse provided themselves to the Public Body. Under section 17(5)(i), a relevant circumstance weighing in favour of disclosure of third party personal information is the fact that it was originally provided by an applicant. This relevant circumstance does not exist with respect to other information in the daughter's school counseling record, which would explain the different approach of the Public Body when it refused access.

5. Conclusions with respect to the application of section 17(1)

[para 56] For the reasons set out above, I conclude that section 17(1) of the Act does not apply to some of the information that the Public Body withheld under that section, as disclosure would not be an unreasonable invasion of the personal privacy of any third parties. In particular, I am referring to those parts of the records at issue that consist solely of the personal information of the Applicant's spouse, who requested the disclosure of her personal information to the Applicant within the terms of section 17(2)(a), or consist of the personal information of the school counselor, where the information merely reveals something that she said or did in her work-related capacity.

[para 57] I conclude that section 17(1) applies to the remaining information that the Public Body withheld under that section, as disclosure would be an unreasonable invasion of the personal privacy of third parties. In particular, I am referring to third party personal information that was supplied in confidence under section 17(5)(f), primarily being that of the Applicant's daughter.

C. Did the Public Body properly apply section 27 of the FOIP Act (privileged information, etc.) to the records/information?

[para 58] In its submissions exchanged with the Applicant, the Public Body cites sections 27(1)(a) and 27(2) of the Act for the purpose of the above issue. These read as follows:

27(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

...

(2) *The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*

...

[para 59] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 27.

[para 60] The Public Body applied section 27 to information on pages 1, 2, 5, 15 and 16 of the records at issue. I already found that the information on page 1 is subject to the exception to disclosure under section 17, so do not need to discuss that information here.

[para 61] I find that the information that the Public Body withheld on pages 2, 5 and 15 falls within the terms of section 27, as the information is subject to a type of legal privilege. I further find that the Public Body properly exercised its discretion to withhold the privileged information in this case, and/or was required to withhold it. I cannot indicate the type of privilege, or otherwise explain my findings in this Order, as it would reveal the privileged information. All that I can say is that my reasons are essentially the same as the explanation set out by the Public Body in submissions that I accepted from it *in camera*. I accepted the submissions *in camera* because they reveal the information being withheld from the Applicant under section 27.

[para 62] I find that the information that the Public Body withheld on page 16 does not fall within the terms of section 27, as I am not satisfied that it is privileged information. First, it is not subject to the same type of privilege as the information on pages 2, 5 and 15. Second, while the Public Body submits that it is subject to a different type of privilege, I require more background and context in order to determine whether it is.

[para 63] Having said this, it is not necessary for me to inquire further, as I find that the information that the Public Body withheld on page 16 is subject to the mandatory exception to disclosure under section 17(1) of the Act. The information consists of the personal information of third parties supplied in confidence to the school counselor, which the school counselor then recorded in her notes. For reasons explained in the part of this Order discussing the application of section 17, I find that the relevant circumstance relating to confidentiality under section 17(5)(f) outweighs the relevant circumstances in favour of disclosure, as raised by the Applicant. The result is that disclosure of the information withheld on page 16 would be an unreasonable invasion of the personal privacy of third parties, and the Public Body was therefore required to withhold it.

V. ORDER

[para 64] I make this Order under section 72 of the Act.

[para 65] I find that the enactments and provisions cited by the Applicant do not prevail despite the Act, pursuant to section 5 of the Act. The provisions of the FOIP Act therefore apply in this matter, and I have jurisdiction over all of the records at issue.

[para 66] I find that section 17(1) of the Act does not apply to some of the information that the Public Body withheld under that section, as disclosure would not be an unreasonable invasion of the personal privacy of any third parties. Under section 72(2)(a), I order the Public Body to give the Applicant access to the information below the wavy line on the lower half of page 12 of the records.

[para 67] I find that section 17(1) of the Act applies to the remaining information that the Public Body withheld under that section, as disclosure would be an unreasonable invasion of the personal privacy of third parties. Under section 72(2)(b), I confirm the decision of the Public Body to refuse the Applicant access to the remaining information that it withheld under section 17 on pages 1-2, 4, 6-10, 12-14 and 17-21 of the records.

[para 68] While the Public Body did not apply the section itself, I also find that section 17(1) of the Act applies to the information that the Public Body withheld on page 16 of the records, as disclosure would be an unreasonable invasion of the personal privacy of third parties. Under section 72(2)(c), I require the Public Body to refuse the Applicant access to the information that it withheld on page 16 of the records.

[para 69] I find that the Public Body properly applied section 27 of the Act to the information that it withheld on pages 2, 5 and 15 of the records, as the information is subject to a type of legal privilege. Under section 72(2)(b), I confirm the decision of the Public Body to refuse the Applicant access to the information that it withheld under section 27 on pages 2, 5 and 15 of the records.

[para 70] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Wade Riordan Raaflaub
Adjudicator