ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-02

January 29, 2013

GRANDE YELLOWHEAD PUBLIC SCHOOL DIVISION NO. 77

Case File Number F3728

Office URL: www.oipc.ab.ca

Summary: The Complainants were successfully sued for defamation by the Alberta Teachers Association ("ATA"), a principal, and a teacher at the school their son attended. Following the trial of the defamation claim, the Complainants complained that the Public Body disclosed their personal information to the ATA in contravention of the *Freedom of Information and Protection of Privacy Act* ("Act").

The Adjudicator found that an implied undertaking not to use information disclosed through a pre-trial discovery process applied to much of the information at issue. Therefore, she dealt only with the information that was in the Complainants' possession as the result of an access request made to the Public Body by the Complainants.

Further, the Adjudicator found that if the information at issue was disclosed to the ATA by the Public Body, the Public Body was permitted to do so pursuant to section 40(1)(b) of the Act. As well, the Adjudicator found that if the information was disclosed by an employee of the Public Body acting in his or her personal capacity, the actions of that individual were not subject to the Act.

Statutes Cited: AB: *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11.; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 16, 17, 38, 40, and 72; *Public Inquiries Act*, R.S.A. 2000 c. P-39; *Teaching Professions Act*, R.S.A. 2000 c. T-2, ss. 5 and 6.

Authorities Cited: AB: Order F2010-035 and F2011-018.

Cases Cited: *Ed Miller Sales and Rentals Ltd. v. Caterpillar Tractor Co.* (1986), 72 A.R. 354 at 354-55; *LSI Logic Corp. of Canada, Inc. v. Logani*, 2001 ABQB 710.

I. BACKGROUND

[para 1] The Complainants' son was a student at a school in what was formerly Grande Yellowhead Regional Division #35 and is now called Grande Yellowhead Public School Division No. 77 ("the Public Body"). The Complainants had a strained relationship with a principal and teachers employed by the Public Body during the years that their son attended school. During this time, the superintendent, the principal and teachers were members of the Alberta Teachers' Association ("ATA").

[para 2] On June 4, 2002, the ATA, the principal and a teacher filed a Statement of Claim claiming that the Complainants had defamed them (the "defamation claim"). In accordance with the Alberta Rules of Court, the parties exchanged Affidavits of Records. When the ATA produced the records, it included several documents which the Complainants claim were provided by the Public Body, through its employees, to the ATA. The Complainants argue that this contravened of the *Freedom of Information and Protection of Privacy Act* ("the Act").

[para 3] The defamation claim went to trial and the trial judge's decision was issued March 13, 2006. On June 13, 2006, the Complainants complained to the Office of the Information and Privacy Commissioner ("this Office") that the Public Body had disclosed their personal information to the ATA. Mediation was authorized but did not resolve the issue and the Complainants requested an inquiry. Subsequently, the ATA was added as an Affected Party.

[para 4] The Notice of Inquiry, dated February 27, 2007 was sent to the parties. Initial and rebuttal submissions were received by all parties. However, the inquiry was placed in abeyance pending the outcome of a judicial review on the issue of jurisdiction. That matter has now been resolved. This order will deal solely with the merits of the Complainants' complaint.

II. INFORMATION AT ISSUE

[para 5] The information at issue in this inquiry consists of the documents allegedly disclosed by the Public Body to the ATA containing the Complainants' personal information.

III. ISSUES

[para 6] The Notice of Inquiry dated February 27, 2007, states that the issue in this inquiry is as follows:

Did the Public Body disclose the [Complainants'] personal information in contravention of Part 2 of the Act?

[para 7] In the Complainants' submissions they assert that the Public Body contravened several other statutes and codes and the *Charter of Rights and Freedoms*. I do not see the connection between the other statutes, procedures, agreements, codes and the *Charter* as cited by the Complainants, and the issue in this inquiry. For the purposes of this inquiry, I am concerned only with the Public Body's alleged contravention of the *Freedom of Information and Protection of Privacy Act*.

[para 8] The Complainants also quote section 38 of the Act. Section 38 requires a public body to make reasonable security arrangements to protect third party personal information. This was not an issue in this inquiry and I will not make any findings regarding section 38 of the Act.

IV. DISCUSSION OF ISSUES

Did the Public Body disclose the Complainants' personal information in contravention of Part 2 of the Act?

i. Did the records contain personal information?

[para 9] In a letter received by our Office on June 13, 2006, the Complainants list a number of documents which were disclosed to the Complainants (as Defendants in the defamation claim) as part of the ATA's production of documents in the defamation claim. It is my understanding of the Complainants' submissions that they claim that these records contain their personal information, and that these documents were disclosed by the Public Body to the ATA sometime prior to the ATA's Affidavit of Records being filed. The Complainants have provided me with copies of some of these records as part of their submissions in this inquiry. In addition, the Complainants made an access request to the Public Body pursuant to the Act, and obtained severed copies of some of these records which had also been disclosed as part of the pre-trial discovery process in the defamation claim.

[para 10] I know the contents only of the records which the Complainants have provided to me. Therefore, those are the only records which I can examine to determine if they contain the Complainants' personal information. Personal information is defined by the Act as:

> *1(n) "personal information" means recorded information about an identifiable individual, including*
>
> > *(i) the individual's name, home or business address or home or business telephone number,*

> *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, marital status or family status,*
>
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
>
> *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
>
> *(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 11] I have examined the records provided to me by the Complainants and find that they do contain the personal information of one or both of the Complainants. Specifically, the records contain the Complainants' names, marital status, opinions about the Complainants, and the Complainants' personal views or opinions.

[para 12] As the records listed by the Complainants in their complaint letter received June 13, 2006 were not provided to me as part of this inquiry, I do not know their contents and therefore I cannot find that those records contained the Complainants' personal information. Therefore, I will deal only with the records that were provided to this Office in the Complainants' submissions. These records can be categorized as follows:

a. E-mails between the superintendent and the principal;
b. E-mails between Alberta Learning and the superintendent;
c. Letters to the superintendent from the Complainants;
d. Draft letter from the superintendent to the Complainants;
e. Minutes from meetings of the school council executive, and board of trustees;
f. Notes of phone conversations taken by superintendent; and
g. Notes regarding the Complainants' son taken by superintendent and others.

ii. Did the Public Body disclose the Complainants' personal information to the ATA?

[para 13] The Complainants argue that the Public Body must have disclosed their personal information to the ATA. As evidence of this, the Complainants state that all of the e-mails noted above were printed by the superintendent. The Complainants believe this to be the case because on the e-mails there is a notation in the corner of the page that states that the superintendent printed the page. As well, the letters were sent to the superintendent and most of the notes were taken by the superintendent. Finally, the Complainants provided a fax cover sheet that clearly indicates that the superintendent sent a draft letter, containing the Complainants' personal information, to the ATA for review. As I understand their submissions, the Complainants believe that the records were, for the most part, given to the ATA by the superintendent. They also appear to believe that the minutes of the meetings may not have been disclosed by the superintendent personally, but would have certainly come from the Public Body, as they were notes from meetings of its committees. The Public Body confirmed that at all material times the superintendent was the head of the Public Body.

[para 14] After reviewing the records, I was still not certain how the records got into the possession of the ATA. I posed the following questions to the parties in a letter dated August 21, 2012:

1. When was the Alberta Teachers' Association's Affidavit of Records filed in Action Number 0203 10914?

2. The Complainants argue that their personal information was given by [the Superintendent] or other Board members to the Alberta Teachers' Association. Did the Public Body disclose (either through [the Superintendent] or otherwise) the following documents to the ATA:

    a. Three e-mails dated January 8, 2001;
    b. Four e-mails dated September 21, 2001;
    c. E-mail dated September 24, 2001;
    d. E-mail dated February 12, 2002; and
    e. Fax dated October 24, 2001;

    These documents can be found at tab 3 and tab 6 of the Complainants' initial brief.

3. If the answer to question #2 is yes, when were these records disclosed to the ATA and why?

[para 15] The reason I referred only to these specific records will be discussed in greater detail below. However, it is important to note that the Complainants made an access request to the Public Body and received these records in response. The Public Body redacted all these records prior to disclosing them to the Complainants, severing the

names of the people sending and receiving the e-mails and fax, as well as the names of the person(s) who printed the e-mails.

[para 16] The ATA responded to my questions noting that information answering my first question had been previously provided to this Office and reiterating the dates that the various Affidavits of Records in the defamation claim had been filed. It did not provide a response to either of the other questions posed.

[para 17] Counsel for the Public Body responded:

> In response to your letter of August 21, 2012 as was pointed out in my letter of August 27, 2009 [the Public Body] will not be providing any further information or submissions and re-iterates the points raised in the August 27, 2009 letter.

[para 18] The August 27, 2009 letter was a letter written by counsel for the Public Body to the former Commissioner expressing an objection to the former Commissioner's rejection of submissions provided by the Public Body. As the submissions were returned to the Public Body, I do not know the content of them, but counsel for the Public Body felt that their rejection was procedurally unfair and as a result took the position it would not provide new submissions.

[para 19] Needless to say, the responses of the ATA and the Public Body did not assist me in determining how and why the records listed in my letter of August 21, 2012 came to be in the possession of the ATA.

[para 20] In the information I have before me, although it never specifically states who gave the records to the ATA, the Public Body states that in the course of the defamation action, the superintendent was issued a Notice to Attend. The Public Body submitted:

> The effect of the Notice to Attend aforesaid was to require [the superintendent] in his individual capacity, and in his capacity as head of a public body to produce "…all relevant and material records that you may have relating to your involvement in the dealings between the Plaintiffs and the Defendants".

[para 21] This argument seems to indicate that the Public Body is suggesting that the documents were disclosed by the superintendent as the result of being issued a Notice to Attend. The Public Body provided a copy of the Notice to Attend as part of its submissions. It was not signed or dated. However, it indicated that the superintendent was to attend the trial of the defamation claim. The records were in the possession of the ATA prior to the Affidavits of Records being filed. The Affidavits of Records were filed before the trial of the defamation claim began. Therefore, although the Notice to Attend would explain any disclosures made by the superintendent at the trial of the defamation claim, it does not justify the disclosure of records prior to the trial.

[para 22] For reasons which I will discuss in greater detail below, in deciding how the ATA obtained the records, I considered the severed versions of the records provided to

the Complainants in response to their access request to the Public Body. The content of the e-mails indicate that the sender and recipient were employees of the Public Body who were discussing between themselves one of the Complainant's involvement in school functions and her interaction with staff at the school. The fax dated October 24, 2001, which was sent to the Public Body from someone using the school's letterhead, contains details of interactions between the Complainants and a staff member or members. Presumably, prior to the disclosure of these records to the ATA, the people who had possession of them were the senders and recipients of the e-mails and fax. Given the content of the correspondence, I find on a balance of probabilities that both the senders and recipients were employees of the Public Body.

[para 23] Given that these documents were listed in the Affidavit of Records filed in the defamation claim by the representative of the ATA, I find that these records were disclosed to the ATA prior to the Affidavit of Records being filed. The content of the e-mails and fax are a record of issues that employees of the Public Body were having with the Complainants. Although I was not advised as to why the records were disclosed to the ATA, I think they were likely provided to the ATA by the employees of the Public Body to enable the ATA to prepare for and support the defamation claim being made by the ATA and employees of the Public Body.

[para 24] Had I not been able to make a finding about this fact on the evidence before me, I would have required the Public Body to appear before me to answer my questions and provide all relevant documentation in this regard, in accordance with my powers under the *Public Inquiries Act*, and the Public Body would have been under a duty to answer truthfully. Its counsel's position that a refusal to answer by the Public Body is somehow justified on the basis of some perceived unfairness on the part of the former Commissioner has no merit.

iii. Implied undertaking

[para 25] One of the main arguments put forward by both the Public Body and the ATA is that due to an implied undertaking, the records cannot be used as the basis of a complaint to this Office because they were produced as part of the pre-trial discovery process.

[para 26] In Alberta, parties to litigation are subject to a pre-trial discovery process which requires them to provide, to the other parties in the action, all of the documents in their possession, custody or power that are relevant and material to the claim and not subject to privilege. In this case, the ATA provided the Complainants with an Affidavit of Records which listed the documents in its custody which were relevant and material to the defamation claim. This included the documents which the Complainants now complain were improperly disclosed by the Public Body to the ATA.

[para 27] The implied undertaking to which the parties to litigation are subject is:

> …information acquired through the discovery process shall not be used for any purpose which is ulterior or collateral to the lawsuit.

Ed Miller Sales and Rentals Ltd. v. Caterpillar Tractor Co. (1986), 72 A.R. 354

[para 28] The rule balances the requirement that parties make full disclosure to one another with the recognition that parties still have privacy interests in the information being disclosed. The Court in *LSI Logic Corp. Of Canada, Inc. v. Logani* states:

> The implied undertaking rule springs from the requirement that one party in litigation is compelled to provide disclosure to the other. The disclosing party's privacy rights give way to the need to do justice between the parties in the litigation pending between them. However, the rule protects the confidentiality of the disclosed information and limits the invasion of privacy by confining the use of disclosed information to the "litigation then before the court between those parties and not for any other litigation or matter or any collateral purpose".
>
> *LSI Logic Corp. of Canada, Inc. v. Logani*, 2001 ABQB 710

[para 29] There is no doubt that the records which the Complainants use as the basis for their complaint were obtained by them through the pre-trial discovery process and that they are subject to an implied undertaking to use them only in the defamation claim. This includes a fax that was provided to the Complainants by counsel for the ATA on October 18, 2005. That being said, the Complainants could have been relieved of this implied undertaking with the consent of the ATA. However, it is my understanding that the Complainants did not seek the consent of the ATA to be relieved of this undertaking.

[para 30] The Complainants could also have applied to the Court and asked to be relieved of the implied undertaking. The Court has inherent jurisdiction to relieve the Complainants from their implied undertaking because it controls its own process.

[para 31] Had the Complainants applied to the Court requesting relief from their implied undertaking, there are several factors the Court could have considered. These factors were listed in *LSI Logic Corp. of Canada, Inc. v. Logani* as follows:

> In exercising its discretion to grant relief, the court must consider the public interest and the importance of maintaining the integrity of the pretrial disclosure process. Other factors the court may consider include the presence of fraud or criminal wrongdoing, whether the information could have been obtained from other sources, whether third parties are involved, and whether the new proceedings are connected with the proceedings in which disclosure was made, in the sense that they involve the same or similar parties, the same or similar issues, and arise out of the same series of events: B.E. Chandler Co. v. Mor-Flo Industries Inc. (1996), 50 C.P.C. (3d) 122 at 126 (Ont. Gen. Div.); Ochitwa v. Bombino (1997), 56 Alta. L.R. (3d) 37 (Q.B.); and Sybron Corp. v. Barclays Bank, [1985] 1 Ch. 299 (Ch. D.). In Ochitwa at 47-48 the court, relying on Goodman v. Rossi (1995), 24 O.R. (3d) 359 (C.A.), suggested that it should consider whether injustice to the discovered party is outweighed by a greater injustice to the discovering party if that party is precluded from using the disclosed documents.
>
> *LSI Logic Corp. Of Canada, Inc. v. Logani*, 2001 ABQB 710

[para 32] Several of these factors might have weighed in favour of the implied undertaking being lifted. However, an application was not made, and I do not have the inherent jurisdiction to relieve the Complainants of their implied undertaking.

[para 33] However, the Complainants also made an access request to the Public Body and received some of the records that appear in the ATA's Affidavit of Records. The Complainants provided some of these records as part of their submissions. Prior orders issued by this Office have stated that the process of obtaining access to records under the Act is a separate process from document discovery that is part of litigation and, therefore, an applicant and public body being involved in litigation is not a reason, under the Act, to deny an applicant's access request (see Order F2011-018 at para 50). Given that these records were not obtained by the Complainants through the pre-trial discovery process, I do not believe that they are subject to an implied undertaking

[para 34] The records that were obtained by the Complainants' access request, of which I have a copy, are:

1. Three e-mails dated January 8, 2001;
2. Four e-mails dated September 21, 2001;
3. E-mail dated September 24, 2001;
4. E-mail dated February 12, 2002; and
5. Fax dated October 24, 2001.

[para 35] For the reasons above, I find that I lack jurisdiction to lift the implied undertaking. Therefore, the severed versions of these five records are the only records with which I will deal in the remainder of this Order.

iv. Was the superintendent a member of the ATA at the time of the disclosures?

[para 36] In its initial submissions, the ATA states that at all material times the superintendent was an associate member of the ATA and as such could seek advice from the ATA. This position is supported by the Public Body. However, the Complainants argue that superintendents were not able to be associate members of the ATA until an amendment to the *Teaching Profession Act* came into force July 2, 2004. On my reading of the membership provisions of *Teaching Profession Act* (sections 5, 5.1 and 6) both before and after the 2004 amendment, with respect to who may be a member of the ATA, I do not see anything preventing a superintendent from being an associate member or lifetime member.

[para 37] As well, the ATA provided this Office with an Affidavit in which it swears that the superintendent was an associate member of the ATA from September of 1991 to August of 2003 and a life member thereafter. The records that were disclosed dated as far back as January 8, 2001 and were disclosed to the ATA sometime prior to November 29, 2002, when the initial Affidavit of Records was filed by the plaintiffs in the

defamation claim. On the basis of this evidence, I find that, at all material times, the superintendent was a member of the ATA.

v. Did the Public Body disclose the Complainants' information in contravention of the Act?

[para 38] I have found that the Complainants' personal information was disclosed to the ATA by employees of the Public Body. The employee who disclosed the information was likely either the superintendent or the principal of the school which the Complainants' son attended. Both were members of the ATA but, while the principal was a plaintiff in the defamation claim, the superintendent was not. (The Public Body was named as a defendant in an action started by the Complainants' son, by his next friend, on August 16, 2002, but I do not believe that the action in which the Public Body was named as a defendant is material to this inquiry.)

[para 39] In my view, the records were likely disclosed to the ATA in one of two ways: either the records were disclosed to the ATA by the superintendent, or, they were disclosed to the ATA by the principal. I will discuss each of these possibilities below, but given that the ultimate outcome is the same, I do not need to make a finding regarding who actually disclosed the records to the ATA.

a. Disclosure by the Superintendent:

[para 40] The Public Body submits the following:

> GYRD states that quite apart from the need to comply with a subpoena the analysis of [a Portfolio Officer], in his letter of October 2, 2006 is accurate as to [the superintendent] acting in an individual capacity, which is not, however, the subject of this inquiry.

[para 41] The letter of October 2, 2006 to which the Public Body refers is a letter written by a Portfolio Officer from this Office who was assigned to mediate and attempt to resolve the issues between the Complainants and the Public Body. This process was not successful and an inquiry was requested. Inquiries in this Office are *de novo*. Therefore, I have not reviewed the Portfolio Officer's letter of October 2, 2006 and it is not before me in this inquiry.

[para 42] That being said, I take the quote above to mean that the Public Body submits that the superintendent was acting in his own personal capacity in making any disclosures to the ATA and not as the head of the Public Body. Although the Public Body makes this statement in reference to the superintendent having given evidence (which I found above happened after the records were first disclosed to the ATA), I believe this argument could be equally applicable to any disclosure made by the superintendent to the ATA in this matter.

[para 43] It is my understanding that the ATA is an association with two primary functions. The first is as the oversight body which governs the teaching profession and disciplines teaching professionals as needed. The second function is as a union which acts as a resource and representative for its members. As a part of this second role, members may contact the ATA for advice.

[para 44] If the superintendent was contacting the ATA as a member of the ATA, seeking its advice, and he disclosed the records at issue to the ATA in the course of seeking advice in his personal capacity as a member of the ATA, his actions were not subject to the Act because he was not acting as the head of a public body. The Act governs the actions of public bodies, not individuals.

[para 45] However, as I mentioned above, I was given no assistance from the Public Body or the ATA when I asked who disclosed the records to the ATA and why. Therefore, I cannot find that the superintendent was acting in his personal capacity when the records were disclosed, if he was, in fact, the one who disclosed them.

[para 46] If the superintendent disclosed the records at issue in his capacity as the head of the Public Body, he would be required to comply with the Act. The relevant portions of section 40 of the Act state:

> *40(1) A public body may disclose personal information only*
> *…*
> *(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,*
>
> *(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,*
> ...

[para 47] Because I do not know the purpose for the disclosure to the ATA, I cannot find that the disclosure was for the same purpose for which the information was compiled or a use that is consistent with that purpose.

[para 48] Therefore, to find the Public Body complied with section 40(1)(b) of the Act, I would have to find that the disclosure of the records was not an unreasonable invasion of the third party's personal privacy within the terms of section 17 of the Act.

[para 49] Section 17 of the Act states:

> *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.*

[para 50] Sections 17(2) and 17(3) of the Act lists circumstances in which disclosure of an individual's personal information will or will not be an unreasonable invasion of a third party's personal privacy. Section 17(2) of the Act states:

> *17(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,*
> >
> > *(d) repealed 2003 c21 s5,*
> >
> > *(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,*
> >
> > *(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,*
> >
> > *(g) the information is about a licence, permit or other similar discretionary benefit relating to*
> >
> > > *(i) a commercial or professional activity, that has been granted to the third party by a public body, or*
> > >
> > > *(ii) real property, including a development permit or building permit, that has been granted to the third party by a public body,*
> >
> > *and the disclosure is limited to the name of the third party and the nature of the licence, permit or other similar discretionary benefit,*
> >
> > *(h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body,*
> >
> > *(i) the personal information is about an individual who has*

been dead for 25 years or more, or

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

(i) enrolment in a school of an educational body or in a program offered by a post-secondary educational body,

(ii) repealed 2003 c21 s5,

(iii) attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or

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

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

[para 51] None of these circumstances are applicable to this inquiry.

[para 52] Section 17(4) of the Act lists circumstances in which the disclosure of a third party's personal information will be presumed to be an unreasonable invasion of the third party's personal privacy. The relevant portions of section 17(4) of the Act state:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

…
(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,

[para 53] I have reviewed the records and find that they consist of one or both of the Complainants' names as well as other personal information about them (opinions about one or both of them).

[para 54] Although, by application of section 17(4)(g) of the Act, a presumption exists that the disclosure of the Complainants' personal information would be an unreasonable

invasion of their privacy, it is still necessary to examine the factors listed in section 17(5) of the Act and all other relevant factors must be examined.

[para 55] Section 17(5) of the Act states:

> *17(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*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
> >
> > *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
> >
> > *(c) the personal information is relevant to a fair determination of the applicant's rights,*
> >
> > *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
> >
> > *(e) the third party will be exposed unfairly to financial or other harm,*
> >
> > *(f) the personal information has been supplied in confidence,*
> >
> > *(g) the personal information is likely to be inaccurate or unreliable,*
> >
> > *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
> >
> > *(i) the personal information was originally provided by the applicant.*

[para 56] Section 17(5)(a), (b), (d), (f), and (i) are not applicable to this matter.

[para 57] The key factor in the present case is section 17(5)(c) of the Act. Given the ATA was a plaintiff in a defamation claim, the information at issue was relevant to a fair determination of its rights, specifically the right not to be defamed. In Order F2010-035, I made a similar finding in respect to teachers who may have received third party personal information from the principal of a school. The teachers had successfully sued

the third party for defamation based on the information they had received. In weighing the section 17(5) factors (as I am here) I found:

> …most significantly, the information would be relevant to a fair determination of the teachers' rights to not be defamed, which would weigh powerfully in favour of disclosure of the parts of the statements that are the Complainant's personal information.
>
> (Order F2010-035 at para 55)

[para 58] I believe this to be true in this inquiry as well, and find that section 17(5)(c) weighs in favour of disclosure.

[para 59] The Complainants argue that the disclosure of the information at issue caused them to be sued for defamation. The Complainants may be suggesting they would be exposed unfairly to financial harm (section 17(5)(e)), or that the disclosure unfairly damaged their reputation (section 17(5)(h)). As the Court that heard the defamation claim found that the Complainants had defamed the Plaintiffs, I cannot find that the Complainants were *unfairly* exposed to financial harm or that their reputation was *unfairly* damaged. Therefore, I find that sections 17(5)(e) and 17(5)(h) of the Act do not weigh in favour of withholding the information.

[para 60] I also find that section 17(5)(g) of the Act (information likely to be inaccurate or unreliable) does not weigh in favour of withholding the information at issue. There is no suggestion from any of the parties that the information at issue is not accurate or reliable, and the Court found that there was truth to the position of the plaintiffs in the defamation claim.

[para 61] Weighing the section 17(5) factors above against the presumption that disclosing the Complainants' personal information would be an invasion of their personal privacy, I find that the Public Body (through the superintendent) was entitled to disclose the information at issue pursuant to section 40(1)(b) of the Act.

[para 62] The Complainants also submit that section 16 of the Act prohibited the Public Body from disclosing the information at issue to the ATA. Section 16 of the Act deals with "disclosure harmful to business interests of a third party". As there are no "business interests" at issue in this inquiry, this section is not applicable.

b. Disclosure by the Principal:

[para 63] As noted earlier, the other possibility is that it was the principal who disclosed the information at issue to the ATA. Assuming this to be so for the purposes of discussion, because the principal was named as a plaintiff in the defamation claim and was being represented by the same counsel as his union, the ATA, I find that he was acting in his personal capacity and not as an employee of the Public Body when the information was disclosed. Therefore, his actions are not subject to the Act.

[para 64] Further, if I am incorrect and the principal did disclose the information at issue to the ATA and was acting on behalf of the Public Body at the time of making the disclosure, I find that section 40(1)(b) of the Act would permit this disclosure, for the reasons set out above.

V. ORDER

[para 65] I make this Order under section 72 of the Act.

[para 66] I find that the Public Body did not disclose the information at issue in contravention of the Act.

_____

Keri H. Ridley
Adjudicator