

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-71

November 28, 2018

PARKLAND SCHOOL DIVISION NO. 70

Case File Number 002397

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to the Commissioner that Parkland School Division No. 70 (the Public Body) had collected, used, and disclosed her son's personal information and her own personal information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). She complained that the Public Body had used personal information at an appeal hearing, even though the information had been given to assist a teacher to teach her son. In addition, the Complainant complained that a teacher had attempted to discuss her son's behavior with the Complainant in front of others at the school.

The Adjudicator determined that the Public Body's use and collection of personal information was authorized under the FOIP Act. She also determined that there was no evidence that the Public Body had disclosed personal information when the teacher had attempted to speak to the Complainant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 33, 34, 39, 40, 41, 72; *School Act*, R.S.A. 2000, S-3, s. 1, 8, 45, 16.2, 79; Student Record Regulation, Alta Reg 166/2018

I. BACKGROUND

[para 1] On January 15, 2016, the Complainant made a complaint to the Commissioner that Parkland School Division No. 70 (the Public Body) had collected,

used, and disclosed her son's personal information and her own personal information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). She attached a letter dated December 15, 2015, that she had sent to the Public Body detailing the circumstances giving rise to the complaint. In this letter, she stated:

This is to advise you that during my attendance to [pick up] both of my children with the supervision of [my father] as is required for [my daughter], the teacher responsible for my son's Grade one instruction had attempted to relay to me behavioural information in the presence of other parents and students who were also picking up [their] children. My father [...] interceded and discussed the behavioral issues separately with the teacher [...] I found the attempt to discuss such issues in public and in front of other parents and students a humiliating and embarrassing situation and immediately left the building as response to this gross violation of my privacy.

It was further stated by the Superintendent in front of Mrs. [...], Mrs. [...], Mrs. [...], Mr. [...], [my father] and [another family member] that in response to the statement of [my father] that open communication in the past had been provided to Mr. [...] and Mrs. [...] in confidence to assist in handling [my son]. The Superintendent replied "not wishing to pry, but as these are my [employees] I can have them provide the information given to me". This comment is totally unacceptable given the fact that the Superintendent also made admission that he had instructed all parties to not respond to our [family's] written or oral requests to address issues.

As you may or may not be aware all information was agreed by me to assist Mrs. [...] and Mr. [...] when reports of behavioral issues and extraction of [my son] from the Grade One classroom had become a common place occurrence very early into the school year.

I will view any further intrusions by the Superintendent into my personal health information including of forced disclosure by Mrs. [...] or Mr. [...] as a gross violation of my privacy and one for which the matter will be addressed with the Office of the Privacy and Information Commissioner of Alberta.

[para 2] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. Following this process, the Complainant requested an inquiry.

[para 3] The Commissioner agreed to conduct an inquiry with regard to the issues of whether the Public Body had collected, used, or disclosed the Complainant's personal information in contravention of, or compliance with, the FOIP Act. However, she declined to conduct an inquiry in relation to the aspects of the Complainant's complaint that referred to school ground conversations.

II. ISSUES

Issue A: Did the Public Body collect the Complainant's personal information and / or that of her child? If yes, did it do so in compliance with or in contravention of section 33 of the Act?

Issue B: Did the Public Body collect the Complainant's personal information and / or that of her child directly or indirectly? If indirectly, did it do so in compliance with or in contravention of section 34 of the Act?

Issue C: Did the Public Body use the Complainant's personal information and / or that of her child? If yes, did it do so in compliance with or in contravention of section 39 of the Act?

Issue D: Did the Public Body disclose the Complainant's personal information and / or that of her child? If yes, did it have authority to do so under sections 40(1) and 40(4) of the FOIP Act?

III. DISCUSSION OF ISSUES

Issue A: Did the Public Body collect the Complainant's personal information and / or that of her child? If yes, did it do so in compliance with or in contravention of section 33 of the Act?

[para 4] The substance of this part of the Complainant's complaint is that the Public Body collected her personal information, and that of her son, when her father contacted her son's teacher both in email and in conversation, to convey her personal information in order to explain the son's personal circumstances and their effect on his performance in school. The teacher who received the email responded to the email, stating:

Thank you [the grandfather] for sharing this information with me. I appreciate your trust and as with any child information is confidential. Sharing information is crucial as it allows everyone to gain a better understanding and then work together to help these little ones make further gains and reach their true potential.

The Complainant complains that her personal information was provided by her father to the teacher in confidence, but the information was subsequently referred to in a superintendent's notes that had been prepared for a closed hearing of an appeal regarding her son's placement.

[para 5] This aspect of the complaint engages three different provisions of the FOIP Act: whether the Public Body had the authority to collect the Complainant's personal information (section 33), whether it had the authority to collect that information from the Complainant's father rather than the Complainant herself (section 34), and whether the Public Body had the authority to use the Complainant's personal information for the purposes of the appeal hearing (section 39).

[para 6] The Public Body argues that I lack jurisdiction to decide the issues of the Public Body's collection and use of personal information. It argues that these issues are the result of impermissibly expanding the Complainant's complaint.

[para 7] I note that the Complainant's complaint, reproduced in the background above, does refer to the superintendent using her personal information and that of her son in making a decision and in the course of an appeal hearing. I therefore find that these issues were always part of the complaint. I therefore have jurisdiction to address them.

[para 8] I considered asking the Public Body to make further submissions regarding its collection and use of personal information; however, having reviewed the submissions and evidence of the parties, I am satisfied that I do not require anything further from the Public Body.

[para 9] I will first address whether the Public Body had the necessary authority to collect the Complainant's personal information and that of her son.

[para 10] Section 33 of the FOIP Act prevents a Public Body from collecting personal information except in specific circumstances. It states:

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

- (a) the collection of that information is expressly authorized by an enactment of Alberta or Canada,*
- (b) that information is collected for the purposes of law enforcement, or*
- (c) that information relates directly to and is necessary for an operating program or activity of the public body.*

[para 11] The Public Body in this case is a school board. Under the authority of the *School Act*, the Public Body makes education accessible to individuals who have a right to education. The right to education is acknowledged in section 8 of the *School Act*, which states, in part:

8(1) Every individual

- (a) who at September 1 in a year is 6 years of age or older and younger than 19 years of age, and*
- (b) who is*
 - (i) a Canadian citizen,*
 - (ii) lawfully admitted to Canada for permanent residence,*
 - (iii) a child of a Canadian citizen, or*
 - (iv) a child of an individual who is lawfully admitted to Canada for permanent or temporary residence*

is entitled to have access in that school year to an education program in accordance with this Act.

[para 12] The Complainant's son is an individual entitled to access to education under the foregoing provision.

[para 13] Section 8 of the *School Act* creates a duty in the province to provide education to individuals meeting the terms of section 8(1). The province has established school boards in order to meet this duty. Section 45 of the *School Act* establishes a school board's duty to make education available. It states, in part:

45(1) A board shall ensure that each of its resident students is provided with an education program consistent with the requirements of this Act and the regulations.

[para 14] Under the *School Act*, a school board has a duty to ensure that individuals falling within the terms of section 8 of the *School Act*, such as the Complainant's son, are provided with an education program.

[para 15] In order to meet its duties to provide education programs, a school board must necessarily acquire information about students, and matters affecting the student's functioning within an education program.

[para 16] The *School Act* does not contain a general provision expressly authorizing a school board to collect personal information in order to meet its duty to give access to education programs. Section 79 of the *School Act* authorizes the Minister to make regulations authorizing school boards to collect personal information. Having reviewed the regulations made under the authority of the *School Act*, including the Student Record Regulation, I was unable to identify legislation expressly authorizing *collection* of personal information, whether direct or indirect. Despite this, the obligation to provide access to education may be viewed as implicit authorization to collect personal information a school board would need to meet this objective, given that it would be impossible for a school board to meet its duty without the ability to collect personal information about, and relating to, students or potential students.

[para 17] Section 33(a) of the FOIP Act does not permit the Public Body's collection of the Complainant's and the Complainant's son's personal information, given that there does not appear to be any express legislative authority for the Public Body to collect personal information. However, section 33(c), which authorizes collection of personal information when the information relates directly to and is necessary for an operating program or activity of a public body, does authorize the collection in this case. The evidence before me establishes that the Complainant's son's teacher collected personal information about the Complainant and the Complainant's son for the purpose of gaining insight into the Complainant's son's educational needs in order to ensure they were met. Meeting the Complainant's son's educational needs was a necessary aspect of the Public Body's duty to provide an education program to the Complainant's son, within the terms of section 33(c) of the FOIP Act.

[para 18] I acknowledge that the Public Body collected the Complainant's personal information in addition to that of her son. However, the evidence of the teacher's email, which the Complainant submitted, supports finding that the Complainant's personal information was considered necessary to understanding the needs of the Complainant's son so as to address them. It does not matter under section 33(c) that the personal information shared was not only that of the Complainant's son. What matters for the purposes of section 33(c) is that the personal information collected be necessary for an operating program or activity of the Public Body. I find that the collection of the Complainant's personal information was necessary for the purpose of providing an education program to the Complainant's son, which is a statutory duty of the Public Body.

[para 19] For the reasons above, I find that the Public Body's collection of the Complainant's and the Complainant's son's personal information was authorized by section 33(c) of the FOIP Act.

Issue B: Did the Public Body collect the Complainant's personal information and / or that of her child directly or indirectly? If indirectly, did it do so in compliance with or in contravention of section 34 of the Act?

[para 20] Section 34 of the FOIP Act prohibits a public body from collecting personal information from a source other than the individual the information is about except in accordance with the exceptions it provides. It states, in part:

34(1) A public body must collect personal information directly from the individual the information is about unless

- (a) another method of collection is authorized by*
 - (i) that individual,*
 - (ii) another Act or a regulation under another Act, or*
 - (iii) the Commissioner under section 53(1)(h) of this Act [...]*

[...]

(2) A public body that collects personal information that is required by subsection (1) to be collected directly from the individual the information is about must inform the individual of

- (a) the purpose for which the information is collected,*
- (b) the specific legal authority for the collection, and*
- (c) the title, business address and business telephone number*

of an officer or employee of the public body who can answer the individual's questions about the collection.

(3) Subsections (1) and (2) do not apply if, in the opinion of the head of the public body concerned, it could reasonably be expected that the information collected would be inaccurate.

[para 21] The personal information collected by the Public Body was information about the Complainant and her son that the Complainant's father considered had the potential to affect the Complainant's son's mental health and functioning in school. He provided the information to the teacher for that reason.

[para 22] In her letter of December 15, 2015, cited above, the Complainant indicated that she had agreed to share her personal information, and that of her son, with the school in order to assist the school to address her son's behavioral difficulties. As a result, I find that the Complainant had agreed communication with her father was a method by which the Public Body could collect her personal information and that of her son. I conclude that section 34(1)(a) (i) authorized the Public Body to collect the Complainant's personal information and that of her son from her father.

Issue C: Did the Public Body use the Complainant's personal information and / or that of her child? If yes, did it do so in compliance with or in contravention of section 39 of the Act?

[para 23] Section 39 of the FOIP Act establishes the circumstances in which a public body may use personal information. It states, in part:

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

(c) for a purpose for which that information may be disclosed to that public body under section 40, 42 or 43.

[...]

(4) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.

[para 24] The Complainant's complaint is that the Public Body's superintendent reviewed her personal information and that of her son for the purpose of an appeal hearing. The information in question is the information provided by the Complainant's

father to the teacher, discussed above. Within the terms of the FOIP Act, the complaint is one regarding the Public Body's use of the information.

[para 25] The Complainant argues that the personal information at issue was provided to the teacher in confidence and that it was not required for the superintendent to know the information in order to "deny the placement request". The Complainant submitted a document entitled "Final Script for PSD Presentation Appeal of Placement for [name of Complainant's son]". The document indicates that the script was prepared for the superintendent to make a presentation at the appeal hearing.

[para 26] The Public Body challenged the admissibility of the document, in addition to other documents submitted by the Complainant as evidence of the superintendent's use of her personal information and that of her son. The Public Body argues that it provided these documents to the Complainant's father for the purpose of the appeal hearing on the condition that it would only be used for the appeal hearing.

[para 27] It is unclear to me from the Public Body's submissions why the document submitted by the Complainant would be inadmissible in this inquiry as evidence. The document provides support for the Complainant's position that her personal information and that of her son was used by the Public Body at the appeal hearing, and is therefore relevant to the issue for inquiry. I am unable to identify a legal principle that would support finding the document to be inadmissible. I accept that the Public Body believed it imposed conditions of confidentiality on the document; however, on the facts before me, I am unable to say that an exclusionary rule would apply because of the Public Body's imposition of conditions of confidentiality. As noted in *The Law of Evidence in Canada*¹, if evidence is relevant and not subject to an exclusionary rule, the evidence is admissible. As I find that document is relevant, and as no exclusionary rule has been demonstrated as applicable to it, the document is admissible in the inquiry.

[para 28] The Public Body argues in the alternative that the superintendent's use of the Complainant's personal information, and that of her son, was in accordance with section 39(1)(a) of the FOIP Act. Cited above, section 39(1)(a) of the FOIP Act authorizes a public body to use personal information for the same purpose for which the information was collected, or for a use consistent with that purpose.

[para 29] Section 41 of the FOIP Act sets out the circumstances in which a use of personal information can be said to be consistent with a public body's purpose in collecting the information. It 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

¹ Sopinka et al. *The Law of Evidence in Canada* 2nd Edition, (Markham; Butterworths, 1999) p. 23

(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 30] I find that the Public Body used the information collected by the teacher to ensure that it had the background information it needed to decide how best to meet the Complainant's son's educational needs in accordance with its responsibilities under the *School Act*. I base this finding on the content of the superintendent's script for the appeal hearing, in addition to his affidavit evidence. The personal information used in the script is the information that the superintendent considered relevant in explaining why a decision regarding the Complainant's son's placement served the son's educational needs.

[para 31] In addition, the superintendent's use of the Complainant's personal information on behalf of the Public Body had a reasonable and direct connection to the Public Body's purpose in collecting the personal information. I found above that the Public Body collected the Complainant's and the Complainant's son's personal information for the purpose of providing an education program to the Complainant's son, which is a statutory duty of the Public Body. It follows that I find that the superintendent performed the Public Body's statutory duty within the terms of section 41(b) when he used the information available about the Complainant's son's circumstances to make a decision regarding the educational program that would be made available for the Complainant's son and then made a presentation at the appeal hearing as to why it was the best choice.

[para 32] For the foregoing reasons, I find that the requirements of section 41 are met and that section 39(1)(a) authorizes the Public Body's use of the Complainant's personal information. I turn now to the question of whether the Public Body complied with the requirements of section 39(4) when it used the Complainant's personal information and that of her son. Cited above, section 39(4) limits a public body to using only that personal information necessary to enable it to meet its purpose in using the personal information reasonably.

[para 33] The Complainant argues that the Public Body did not need to use the personal information it did "to deny the placement request." In my view, the question is not whether the Public Body used appropriate personal information in *denying* the request, but whether the Public Body used appropriate personal information in making the placement *decision*, regardless of outcome. As noted above, the Public Body used the Complainant's personal information to make a decision regarding the Complainant's son's placement. The decision was to deny the request, although it was within the scope of the Public Body's authority to grant the request. In other words, the Public Body would use the same information in making a decision to grant the request, as it did in denying the request.

[para 34] The Complainant argues that the Public Body's placement decision should have been made solely on the basis of the IPP in place for the Complainant's son, the

most recent report card, the daily logs, and the student record. As is made clear by section 16.2 of the School Act, a student's parent and family circumstances play a significant role in the success or failure of a student's education program. From my review of the evidence, I find that the Complainant's son's parental and family circumstances were relevant in assessing the level of support he needed to succeed in an education program. As the personal information that was reviewed related to his family circumstances and needs for educational support, I find it was necessary for the Public Body to review it in order to perform its duties under the *School Act* in a reasonable way.

[para 35] To conclude, I am satisfied that the Public Body used only the personal information necessary to perform its decision-making function in a reasonable way. I therefore find that the Public Body complied with section 39(4) of the FOIP Act.

Issue D: Did the Public Body disclose the Complainant's personal information and / or that of her child? If yes, did it have authority to do so under sections 40(1) and 40(4) of the FOIP Act?

[para 36] The foregoing question addresses the aspect of the Complaint regarding the Complainant's son's teacher's attempt to communicate with the Complainant regarding her son. The Complainant argues:

[...] the public discussion of her son's classroom behavioural issues by [the teacher] in a hallway in front of other parents and students is a gross violation of privacy for both the Complainant / her son.

[para 37] I have reviewed the Complainant's complaint and her account of what transpired. I have also reviewed the teacher's response to the complaint, which the Public Body submitted into evidence. At most I can conclude that the teacher attempted to discuss the son's behavior with the Complainant but was prevented from doing so by the departure of the Complainant.

[para 38] It is not clearly the case that the Public Body would have been in violation of the FOIP Act had the teacher communicated concerns about the son's behavior in the circumstances described in the complaint, as section 40 of the FOIP Act authorizes a public body to disclose personal information in many different circumstances. However, in this case, the complaint, cited in the background above, is regarding the teacher's *attempt* to discuss matters with the Complainant. I have not been told what was said to be able to conclude that the Complainant's personal information or that of her son was disclosed in the circumstances described by the Complainant. I am therefore unable to find that the Public Body disclosed personal information within the terms of the FOIP Act. There is no reason to conclude that either section 40(1) or 40(4) of the FOIP Act is engaged.

The Public Body's request that I seal the records

[para 39] In its submissions, the Public Body asked that I seal the records submitted by the Complainant to support the position that her personal information had been used

by the superintendent in making a placement decision and at an appeal hearing. It made this application on the basis that the personal information of the Complainant's son is in these records.

[para 40] I have no power under the FOIP Act to seal records. However, it is the practice of this office to anonymize the information of individuals and to avoid releasing personally identifying information in decisions where practicable. I have endeavoured to do so in this order.

IV. ORDER

[para 41] I make this Order under section 72 of the Act.

[para 42] I confirm that the Public Body did not fail to meet its duties to the Complainant.

Teresa Cunningham
Adjudicator