

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER P2008-007**

March 31, 2009

**CANADIAN UNION OF PUBLIC EMPLOYEES,  
LOCAL 3550**

Case File Number P0647

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** A teacher (the “Teacher”) and a secretary with whom she worked were involved in a dispute. The secretary gave a sealed envelope to her union, the Canadian Union of Public Employees, Local 3550 (the “Organization”). Believing the envelope to hold a letter containing her personal information, the Teacher complained that the Organization collected and used her personal information in contravention of the *Personal Information Protection Act* (the “Act”). She also asked the Organization for access to the letter. The Organization refused to open the sealed envelope, effectively denying the access request.

The Adjudicator found that the Teacher had established that the letter contained her personal information. He also found that the Organization collected the Teacher’s personal information. Even though the Organization did not open the envelope and see the letter, it is not necessary for an organization to actually view personal information in order to collect it.

The Adjudicator found that the collection was reasonable for the purposes of an investigation under section 14(d) of the Act, being an investigation in relation to an employment matter involving the Teacher, the secretary and their employer. The personal information could therefore be collected without the Teacher’s consent and without notice to her. The Adjudicator concluded that the Organization’s collection of the Teacher’s personal information did not contravene the Act.

Because the Organization returned the sealed envelope to the secretary without opening it, the Adjudicator found that the Organization did not use the Teacher's personal information. As a result, it did not use the Teacher's personal information in contravention of the Act.

Section 24(1)(a) of the Act requires an organization to provide access to an individual's personal information where it is contained in a record that is in the custody or under the control of the organization, subject to any exceptions to disclosure and taking into consideration what is reasonable. As the letter was in the physical possession of the Organization, the Adjudicator found that the Organization had custody of the Teacher's personal information contained in it. However, in the specific circumstances of the case, the Adjudicator found that the Organization was reasonable in accepting the letter in a sealed envelope and refusing to open the envelope. As access could not be considered without opening the envelope, the Adjudicator concluded that – taking into consideration what was reasonable – the Organization did not improperly deny the Teacher's access request.

The Adjudicator further found that the Organization no longer had custody or control of the letter, and therefore was not required to retrieve the letter for the purpose of responding to the Teacher's access request. Finally, he found that the Organization met its duty to assist the Teacher under section 27(1) of the Act.

**Statutes Cited:** **AB:** *Personal Information Protection Act*, S.C. 2003, c. P-6.5, ss. 1(f), 1(f)(i), 1(f)(iii), 1(k), 2, 5(1), 5(2), 11, 11(1), 11(2), 12, 13, 13(1), 13(2), 13(3), 14, 14(d), 16, 17, 19, 20, 24, 24(1), 24(1)(a), 27, 27(1), 28(1), 29, 51(a), 52, 59, 59(1)(a), 59(1)(c) and 59(2); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n)(viii), 4(1), 6(1) and 10(1); *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(d) and 1(1)(w); *School Act*, R.S.A. 2000, c. S-3, s. 60(3).

**Authorities Cited:** **AB:** Orders 98-002, 99-032, 99-038, 2000-003, F2002-014, F2004-008, P2005-001, P2006-004, P2006-005, P2006-008, F2006-024, P2007-011 and F2008-023; Investigation Reports 99-IR-004, 2001-IR-004 and 2001-IR-010.

## I. BACKGROUND

[para 1] By letter dated March 6, 2007, a teacher (the "Teacher") made a request under the *Personal Information Protection Act* (the "Act" or "PIPA") to the Canadian Union of Public Employees, Local 3550 (the "Organization"). She asked for a copy of a letter that she believed contained her personal information, and that had recently been provided to the Organization by one of its union members, who was a secretary employed at the same school as the Teacher.

[para 2] By letter dated March 6, 2007, the Teacher complained to this Office that the Organization had improperly collected and used her personal information. In the same letter, she requested a review of matters involving Edmonton School District No. 7, also known as Edmonton Public Schools, which was the public body for which she and

the secretary worked, and to which she had made a request for access to a copy of the letter allegedly containing her personal information. The Teacher and Edmonton School District No. 7 are parties to a separate but related inquiry, being that for case file number F4025 under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”). That inquiry has resulted in Order F2008-023, issued the same date as this Order.

[para 3] Mediation by a portfolio officer of the matters involving the Teacher and the Organization was authorized by the Commissioner, and a letter to that effect was sent to the parties on March 22, 2007.

[para 4] By letter dated March 26, 2007, the Organization responded to the Teacher’s access request of March 6, 2007. It told her that it was not aware of having any of her personal information, as it had only received a letter from the secretary in a sealed envelope. As the letter would continue to remain sealed, the Organization effectively denied the Teacher’s access request.

[para 5] The Teacher sent this Office a copy of her March 6, 2007 access request to the Organization and a copy of the Organization’s March 26, 2007 response to her. They were received on April 11, 2007, and she included a handwritten notation to the effect that she was requesting a review. The matter regarding the access request also became the subject of possible mediation between the parties. (It is because the Teacher is both a complainant and an applicant under the Act that I am referring to her as the “Teacher”.)

[para 6] As mediation between the parties was not successful, a written inquiry was set down.

[para 7] In their submissions, both the Teacher and the Organization referred to the portfolio officer’s assessment of the matters between them. The Teacher also attached the written assessment. These things should not be done, as an inquiry by this Office is a separate process from mediation or investigation. As set out in this Office’s notices of inquiry, the Commissioner or his delegate in an inquiry normally has no access to information that arose in the context of possible settlement of the matter. In reaching my conclusions in this Order, I have not given weight to the findings of the portfolio officer.

## **II. INFORMATION AT ISSUE**

[para 8] The information at issue is the personal information of the Teacher, allegedly contained in a letter that was in a sealed envelope held by the Organization.

## **III. ISSUES**

[para 9] The Notice of Inquiry, dated July 16, 2008, set out the following issues, although I have split the original issue regarding custody and control into two separate issues:

Did the Organization collect the Teacher's personal information in contravention of sections 11, 12, 13 and/or 14 of the Act?

Was the Teacher's personal information contained in a record that was in the custody or under the control of the Organization, within the meaning of section 24(1)(a) of the Act?

Is the Teacher's personal information contained in a record that is currently in the custody or under the control of the Organization, within the meaning of section 24(1)(a) of the Act?

[para 10] By letter dated August 6, 2008, the Teacher asked that nine other issues be added to the inquiry. This Office provided a copy of the relevant parts of the letter to the Organization. In letters dated September 12, 2008, this Office advised the parties of my decision regarding additional issues. The letter to the Teacher (referred to as the Complainant below) was as follows:

*This is in response to your letter of August 6, 2008, in which you propose the addition of issues in the above inquiry under the Personal Information Protection Act.*

*The Adjudicator has considered your request. In his view, the issues identified in the Notice of Inquiry, dated July 16, 2008, adequately address the matters that are involved in this inquiry.*

*The Adjudicator has declined to add the first four issues that you proposed, regarding use and disclosure of the Complainant's personal information, as the Complainant only raised the issue of alleged improper collection by the Organization in her request for review, dated March 6, 2007.*

*The Adjudicator has declined to add the fifth and sixth issues that you proposed, regarding the Organization's alleged denial of the Complainant's access request and its duty to assist her, because the dispute over the Complainant's access request is sufficiently addressed by the issue of whether the Organization had custody or control of her personal information. That issue subsumes the question of whether it should have responded to her in accordance with the Act.*

*Regarding the last three issues that you proposed, the Adjudicator has determined that he has no jurisdiction to address allegations of offences under section 59 of the Act or assess penalties (see Order P2006-005 at paras. 100 and 101). However, the matter of alleged offences has been referred to the Commissioner for his consideration as to whether and how to proceed.*

[para 11] In her submissions to the inquiry itself, the Teacher has objected to my decision not to hear additional issues, and has therefore proceeded to address them. Despite my previous decision, I have now decided to address some of the additional issues proposed by the Teacher. Specifically, in order to address whether the Organization used the Teacher's personal information in contravention of the Act, whether it responded to her access request in accordance with the Act, and whether it met its duty to assist her, I have decided to add the following three issues (the first of which combines two of the issues proposed by the Teacher):

Did the Organization use the Teacher's personal information in contravention of sections 16 and/or 17 of the Act?

Did the Organization deny the Teacher's request for access to her personal information, in contravention of section 24 of the Act?

Did the Organization meet its duty to assist the Teacher, as provided by section 27(1) of the Act?

[para 12] I will indicate, later in this Order, why I have now included the above issues in the inquiry, as well as respond more fully to the Teacher's submissions that other issues be added.

#### **IV. DISCUSSION OF ISSUES**

##### **A. Did the Organization collect the Teacher's personal information in contravention of sections 11, 12, 13 and/or 14 of the Act?**

[para 13] The relevant parts of sections 11, 12, 13 and 14 of the Act are as follows:

*11(1) An organization may collect personal information only for purposes that are reasonable.*

*(2) Where an organization collects personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is collected.*

*12 An organization may without the consent of the individual collect personal information about an individual from a source other than that individual if the information that is to be collected is information that may be collected without the consent of the individual under section 14, 15 or 22.*

*13(1) Before or at the time of collecting personal information about an individual from the individual, an organization must notify that individual in writing or orally*

*(a) as to the purposes for which the information is collected, and*

(b) *of the name of a person who is able to answer on behalf of the organization the individual's questions about the collection.*

(2) *Before or at the time personal information about an individual is collected from another organization with the consent of the individual, the organization collecting the information must notify the organization that is disclosing the information that the individual has consented to the collection of the information.*

(3) *Before or at the time personal information about an individual is collected from another organization without the consent of the individual, the organization collecting the personal information must provide the organization that is disclosing the personal information with sufficient information regarding the purpose for which the personal information is being collected in order to allow the organization that is disclosing the personal information to make a determination as to whether that disclosure of the personal information would be in accordance with this Act.*

...

14 *An organization may collect personal information about an individual without the consent of that individual but only if one or more of the following are applicable:*

...

(d) *the collection of the information is reasonable for the purposes of an investigation or a legal proceeding;*

...

[para 14] This part of the inquiry deals with the alleged unauthorized collection of personal information. In most instances, the initial burden of proof rests with the complainant, in that the complainant has to have some knowledge, and adduce some evidence, regarding what personal information was collected, and the manner in which the personal information was collected; the organization then has the burden to show that its collection of personal information was in accordance with the Act (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

### **1. Did the Organization collect the Teacher's personal information?**

[para 15] In an affidavit, the Teacher indicates that the secretary at the same school where she worked told her, at a meeting on February 21, 2007, that the secretary had a letter from a parent complaining about the Teacher. The Teacher states:

*Towards the end of the meeting, I said that while I wanted to solve the matter, ... I felt I was being harassed and not treated like the other teachers, or words to that effect. [The secretary] responded by saying: "If you want to go in that direction, I have a letter from a parent... complaining about you. I hadn't wanted to do anything with it, because I*

*wanted to resolve things with you, but...”, or words to that effect. [The secretary] said nothing otherwise about the contents of the letter... but from the context, I could only conclude that the [l]etter was critical of me and contained sensitive and negative personal information about me which she could use to her advantage in her harassment complaint against me.*

[para 16] The Teacher also attached correspondence that she wrote to the secretary on February 27, 2007, in which the Teacher referred to the letter. In her affidavit, the Teacher goes on to explain that she was told by the school principal that the secretary had sealed the letter and sent it to the Organization. The Teacher further states in her affidavit that the parent who wrote the letter approached her on or about May 10, 2007 to discuss the fact that the parent had written the letter and that, from the context of that discussion, the Teacher understood the letter to contain information about her.

[para 17] The Organization acknowledges that it received a sealed envelope from the secretary, but states that it was not aware of the author or the contents of the letter, as the envelope had no writing or other markings on it and the Organization did not open the envelope. The Organization argues that the Teacher has not demonstrated what personal information was supposedly contained in the letter. Because the Organization no longer has the letter allegedly containing the Teacher’s personal information, a copy of it was not provided to me in this inquiry.

[para 18] Under section 1(k) of PIPA, “personal information” means “information about an identifiable individual”. To the extent that it informs the meaning of “personal information” under PIPA, section 1(n)(viii) of the FOIP Act states that “personal information” includes “anyone else’s opinions about the individual”. The Teacher has adduced sufficient evidence to establish that the secretary referred to a letter at a particular meeting, and that the secretary indicated that the letter was “complaining” about the Teacher. Such a letter complaining about the Teacher would have contained the parent’s opinions about the Teacher. Even though PIPA does not expressly include opinions about an individual in its definition of “personal information”, part of the substance of the letter about the Teacher would nonetheless be information about her as an identifiable individual. I accordingly find on a balance of probabilities that the letter contained the Teacher’s personal information. It is not necessary for the Teacher to demonstrate, in any greater detail, the nature of the personal information about her that was in the letter.

[para 19] I also find that the letter containing the Teacher’s personal information was in the sealed envelope given to the Organization by the secretary. The Organization does not dispute that it received the sealed envelope. The Teacher submitted a copy of an e-mail dated March 5, 2007, in which the school’s representative responsible for district records and FOIP management states that the secretary provided the “letter in question” to her union representative at the Organization. The “letter in question” is the one referenced by the secretary at the meeting of February 21, 2007 and the one that I have found contained the Teacher’s personal information.

[para 20] PIPA does not define the term “collect”. However it is defined in section 1(1)(d) of the *Health Information Act* as “to gather, acquire, receive or obtain”, and this definition has been adopted for the purposes of PIPA (Order P2007-011 at paras. 44 and 50).

[para 21] It is the submission of the Organization that, when an organization keeps a sealed envelope with unknown contents in safe-keeping for one of its members, it cannot be said that the organization is collecting personal information. The Organization argues that the collection of personal information requires a positive and mindful action, and that an organization must be aware that it is in fact collecting information about an individual.

[para 22] I find that the Organization collected the Teacher’s personal information, as it acquired, received and obtained the letter containing her personal information. It does not matter that the letter was in a sealed envelope that the Organization did not open, or whether or not the Organization was aware of its contents. Collection of personal information is a matter of fact, regardless of the extent to which an organization was aware of what it was doing. In the comparable context of the FOIP Act, it has been stated that it does not matter how a public body comes to have personal information; any manner of getting personal information is a collection for the purposes of the Act; and it is not necessary for a public body to actively collect personal information for there to be a collection (Order 98-002 at para. 177).

[para 23] Moreover, in the context of PIPA, the Commissioner found in another inquiry that it was not necessary for an organization to actually view images captured on a video camera in order for the organization to collect the personal information contained in those images (Order P2006-008 at paras. 34 and 37). To state that personal information is collected only when images are viewed fails to consider the terms “used” and “disclosed” found elsewhere in the Act (Order P2006-008 at para. 36). I extend this reasoning to the present inquiry in that it was not necessary for the Organization to actually open the sealed envelope, or read the Teacher’s personal information, in order for the Organization to have collected the personal information contained in the letter. Had the Organization opened the sealed envelope, that act might have been relevant to finding whether there was a use, but it was not necessary for the envelope to be opened in order for there to have been a collection.

## **2. Did the Organization have the authority to collect the Teacher’s personal information?**

[para 24] The Organization submits that, if it collected the Teacher’s personal information, it did so under section 14(d) of the Act. As reproduced above, section 14(d) authorizes an organization to collect personal information about an individual, without the consent of that individual, if the collection of the information is reasonable for the purposes of an investigation or a legal proceeding. The Organization argues that it has a duty to fairly represent its members, and to respond to and investigate complaints with respect to workplace issues and concerns. It states that, in order to conduct investigations, it must sometimes collect not only the personal information of its

members, but of other individuals. The Organization states that, in this case, the secretary approached its representatives in late February or early March 2007, requesting that they hold the sealed envelope for her until she provided further instructions.

[para 25] In her affidavit, the Teacher states that the school principal told her that the secretary was making an informal harassment complaint against the Teacher. The Teacher states that, according to the principal, the secretary wanted to have a meeting with the principal and the Teacher, with a representative of the secretary's union, being the Organization, in attendance. The Teacher indicates that a meeting to discuss this employment matter took place between her, the secretary, the principal and an assistant principal. The Teacher further states that she called her own professional association, a different union than that of the secretary, for advice and assistance. She goes on to state in her affidavit that she conveyed at the meeting that she felt that she was the one who was being harassed, by the secretary. The Organization also understands the situation to be one where the Teacher and the secretary were each claiming that the other had acted in a harassing manner.

[para 26] Under the *Edmonton Public Schools Collective Agreement between Board of Trustees Edmonton School District No. 7 and Canadian Union of Public Employees Local 3550*, a copy of which the Teacher submitted for the period September 1, 2006 to August 31, 2009, the Organization is responsible for representing the secretary in employment matters. The Collective Agreement contemplates, in a Letter of Understanding on page 27, use of the provisions of Edmonton Public School Board policies and regulations on discrimination and harassment. One of these, a copy of which was submitted by the Teacher, is *Policy and Regulation ACA.AR – Respectful Learning and Working Environments* (“Regulation ACA.AR”), which in turn contemplates representation and assistance by the Organization when one of its members is involved in a harassment complaint.

[para 27] I find that the Organization's collection of the Teacher's personal information was reasonable for the purposes of an investigation under section 14(d) of the Act. Under section 1(f), “investigation” is defined as follows:

- 1(f) “investigation” means an investigation related to*
- (i) a breach of agreement,*
  - (ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
  - (iii) circumstances or conduct that may result in a remedy or relief being available at law,*

*if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation;*

[para 28] I first note that section 60(3) of the *School Act* authorizes the school that employed the Teacher and the secretary to make rules respecting the administration, management and operation of schools operated by it, and respecting any other matter under the jurisdiction of the board. Regulation ACA.AR prohibits behaviour that constitutes harassment, sets out forms of discipline that may result, and contemplates the investigation and resolution of harassment complaints, both formally and informally. The secretary asked for and obtained assistance from the Organization regarding the initiation or resolution of a complaint herself, or her defence against a possible complaint by the Teacher. Regardless of how far a harassment complaint on the part of either the secretary or the Teacher actually proceeded – or whether there even was a complaint within the meaning of Regulation ACA.AR – the Organization was acting as the secretary’s agent in an employment matter when she provided it with a copy of the letter.

[para 29] Here, the investigation by the Organization may be characterized as the investigation of a possible breach of Regulation ACA.AR, whether by the Teacher or the secretary. The Teacher submits that a breach of Regulation ACA.AR would only amount to a breach of policy, not a breach of agreement under section 1(f)(i) of the definition of “investigation”. However, I characterize the Regulation as an agreement that the Teacher and secretary at least implicitly indicated that they would abide by when they became employed by their employer. In other words, Regulation ACA.AR is part of their employment agreement.

[para 30] Alternatively or in addition, because an employee’s conduct in contravention of Regulation ACA.AR may result in various forms of discipline, and the Regulation was made under the authority of the *School Act*, I find that such conduct or contravention may result in a remedy or relief being available to the employer at law, under section 1(f)(iii) of the Act. The Teacher submits that discipline could not have resulted in this case because the harassment complaint was only informal. However, the definition of “investigation” requires only that a remedy or relief available at law “may result” and that the conduct or contravention “may have occurred”. Here, a harassment complaint may have proceeded to a formal complaint and therefore resulted in discipline. It is not necessary, in my view, for a harassment complaint to even have been made at all, as the Organization may also investigate a matter in order to assist a member in deciding *whether* a complaint should be made – in addition to deciding whether another person has breached Regulation ACA.AR, whether the member has breached Regulation ACA.AR, and what the possible responses or defences are.

[para 31] In another way, the investigation by the Organization may be characterized as the investigation of a possible breach of the Collective Agreement between the secretary and her employer. While I make no finding in this regard, it is possible that the collective agreement requires the secretary’s employer to maintain a harassment-free workplace and that, if it fails to do so, the employer breaches the Collective Agreement. The Organization states that the letter given to it by the secretary could have founded a grievance, or have been relevant to one. A determination by the Organization of whether the Collective Agreement applied and/or was breached would also constitute an investigation. Further, Regulation ACA.AR is incorporated by

reference in the Collective Agreement between the secretary and her employer, and the Collective Agreement requires the secretary to use its provisions if she wishes to make a harassment complaint. If the secretary was indeed making a harassment complaint and did not follow the terms of Regulation ACA.AR, she could have been found to breach the Collective Agreement. Accordingly, the Organization could have assisted her in an investigation to determine whether she had.

[para 32] Given all of the foregoing, I find that the investigation by the Organization related to a breach of agreement under section 1(f)(i) of the Act and/or related to circumstances or conduct that may result in a remedy or relief being available at law under section 1(f)(iii). Whether the breach or conduct was on the part of the Teacher or secretary in relation to Regulation ACA.AR, or on the part of the secretary or her employer in relation to the Collective Agreement between them, I also find that the breach, conduct or circumstances may have occurred. The version of events presented by the parties suggest that one or both of the Teacher and the secretary were harassing the other, which in turn may have given rise to obligations that were breached under one or both of Regulation ACA.AR and the Collective Agreement. Finally, given the ongoing dispute between the Teacher and the secretary, the involvement of their employer, and the fact that the Organization has a responsibility to assist its members, I find that it was reasonable for the Organization to conduct an investigation into the employment matter. The definition of “investigation” under section 1(f) of the Act has accordingly been met, which in turn means that section 14(d) has been met.

[para 33] I conclude that the collection of the Teacher’s personal information was reasonable for the purposes of an investigation under section 14(d) of the Act. The Organization therefore had the authority to collect the Teacher’s personal information without her consent. It did not contravene section 14.

[para 34] I recognize that, in the end, the Organization did nothing more in its investigation than collect the letter from the secretary and return it to her. However, the Teacher’s personal information did not actually have to be *used* in order for the *collection* to be authorized. It was sufficient that the collection was reasonable for the purposes of an investigation. How far that investigation proceeded is irrelevant, in my view.

### **3. Did the extent and manner of the Organization’s collection of the Teacher’s personal information contravene the Act?**

[para 35] Section 11(1) of the Act permits an organization to collect personal information only for purposes that are reasonable. As I have found that the collection of the Teacher’s personal information was “reasonable for the purposes of an investigation” under section 14(d), the collection was also for purposes that were reasonable under section 11(1). The Organization therefore did not contravene section 11(1).

[para 36] Section 11(2) of the Act permits the collection of personal information only to the extent that is reasonable for meeting the purposes for which the information is collected. The letter that the Organization collected was a letter in which a third party

was complaining about the Teacher. The information was possibly relevant to the secretary's own complaint against the Teacher, or relevant to defending the secretary in the context of a complaint made by the Teacher against the secretary. I find that the Organization's collection of the Teacher's personal information in the letter was to an extent that was reasonable for the purposes of an investigation. Had an investigation proceeded further, the Organization would reasonably have used the personal information in the letter to further the interests of the secretary who it represented, or at least reviewed the letter to determine its relevance. The Organization therefore did not contravene section 11(2).

[para 37] Section 12 of the Act permits the collection of personal information about an individual from a source other than that individual, without his or her consent, if the information may be collected without consent under section 14. As I found that the Organization had the authority to collect the Teacher's personal information without her consent under section 14(d), the Organization did not contravene section 12 when it collected her personal information from a source other than her.

[para 38] Section 13(1) of the Act sets out an organization's duty to notify and provide certain information to an individual when it collects – from that individual – his or her personal information. Specifically, the organization must advise the individual, in writing or orally, of the purposes for which the information is collected, and give the name of a person who is able to answer on behalf of the organization the individual's questions about the collection. Sections 13(2) and 13(3) set out an organization's duty to provide certain information to another organization when it collects personal information from the other organization. As the Organization in this inquiry did not, and was not required to, collect the Teacher's personal information directly from her, and did not collect her information from another organization, none of the provisions of section 13 apply. The Organization therefore did not contravene section 13.

**B. Did the Organization use the Teacher's personal information in contravention of sections 16 and/or 17 of the Act?**

[para 39] I initially declined to add issues regarding the alleged unauthorized use of the Teacher's personal information by the Organization, as the text of her request for review dated March 6, 2007 only discussed alleged unauthorized collection. On further review of that letter, however, I see that the Teacher referred in one of the subject lines to unauthorized use of her personal information. I have therefore now decided to add the above issue to the inquiry. This does not prejudice the Organization, as it made submissions regarding its alleged unauthorized use of the Teacher's personal information and my conclusions are in its favour in any event. My addition of the issue also does not prejudice the Teacher, as she was the party who proposed to add issues regarding the alleged unauthorized use of her personal information and she made submissions regarding them.

[para 40] The relevant parts of sections 16 and 17 of the Act read as follows:

*16(1) An organization may use personal information only for purposes that are reasonable.*

*(2) Where an organization uses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is used.*

*17 An organization may use personal information about an individual without the consent of the individual but only if one or more of the following are applicable:*

*[various circumstances]*

[para 41] The allocation of the burden of proof regarding the alleged unauthorized use of personal information is the same as that for the alleged unauthorized collection of personal information, set out earlier in this Order. In most instances, the initial burden of proof rests with the complainant, in that the complainant has to have some knowledge, and adduce some evidence, regarding what personal information was used, and the manner in which the personal information was used; the organization then has the burden to show that its use of personal information was in accordance with the Act (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

#### **1. Did the Organization use the Teacher's personal information?**

[para 42] PIPA does not define the term "use". However section 1(1)(w) of the *Health Information Act* states that "use" means "to apply... information for a purpose and includes reproducing the information, but does not include disclosing the information". This definition has been adopted for the purposes of PIPA (Order P2007-011 at paras. 51 and 53).

[para 43] The Organization states that it returned the sealed envelope to the secretary on May 16, 2007. The Teacher submits that it is precisely by accepting the letter from the secretary, and permitting the secretary to retrieve it, that the Organization used the Teacher's personal information. However, the Organization did not apply the information in the letter for any purpose. It could not have done so, as it did not open the sealed envelope containing the letter. Although I found earlier in this Order that the letter in the envelope contained the Teacher's personal information, the Organization was required to do something more than merely receive the information in order to use it. Receiving the information is a "collection" but not a "use".

[para 44] I find that the Organization did not use the Teacher's personal information. As a result, I conclude that it did not use her personal information for unreasonable purposes, or to an unreasonable extent, in contravention of section 16 of the Act, and that it did not use her personal information, without her consent, in contravention of section 17.

## 2. Other issues proposed by the Teacher

[para 45] In her letter of August 6, 2008 to this Office and submissions to this inquiry, the Teacher also proposed to add the issues of whether the Organization disclosed her personal information for unreasonable purposes and to an unreasonable extent in contravention of section 19 of the Act, and whether it disclosed her personal information without her consent in contravention of section 20. The Teacher submits that the Organization disclosed her personal information when it permitted the secretary to retrieve the sealed envelope.

[para 46] I stand by my previous decision not to add issues regarding alleged unauthorized disclosure to this inquiry. It appears that the Teacher did not raise these issues until her letter of August 6, 2008, which I find was too late in the process. Unlike the issues of collection and use, the issue of disclosure was not identified at all in the Teacher's request for review dated March 6, 2007. The alleged improper disclosure by the Organization occurred on May 16, 2007 when the Organization returned the sealed envelope to the secretary. This was the day before the portfolio officer completed his written assessment of the matters between the parties. As the issue of disclosure was never the subject of a request for review or mediation between the parties, I will not address it now.

[para 47] In her letter of August 6, 2008 to this Office and submissions to this inquiry, the Teacher proposed to add issues regarding the alleged commission of offences by the Organization. The issues relate to wilfully collecting, using or disclosing personal information in contravention of the Act under section 59(1)(a); disposing of or destroying a record relating to personal information, or directing another person to do so, with an intent to evade a request for access under section 59(1)(c); and liability for a fine under section 59(2).

[para 48] As stated in this Office's letter of September 12, 2008 to the Teacher, reproduced earlier in this Order, I have no jurisdiction to address allegations of offences under section 59 of the Act or assess penalties. The Teacher argues that the success of any steps taken under the offences and penalties provisions of the Act would be almost entirely dependent on a finding of the Commissioner that an offence has actually occurred. However, a finding that an offence has actually been committed cannot be made by me in the context of this inquiry, or by this Office at all. Rather, the Commissioner may – in the context of a separate investigation – determine whether there is evidence of an offence (as in Investigation Report 99-IR-004 at p. 5 or para. 29; Investigation Report 2001-IR-004 at para. 41; Investigation Report 2001-IR-010 at para. 56, dealing with alleged offences under comparable provisions of the FOIP Act). If the Commissioner considers that there is evidence of an offence, he may then refer the matter to Crown prosecutors.

**C. Was the Teacher’s personal information contained in a record that was in the custody or under the control of the Organization, within the meaning of section 24(1)(a) of the Act?**

[para 49] Section 24(1)(a) of the Act reads as follows:

*24(1) Subject to subsections (2) to (4) [which address exceptions to disclosure], on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:*

- (a) the individual’s personal information where that information is contained in a record that is in the custody or under the control of the organization;*

[para 50] Subject to possible exceptions to disclosure and severing – as well as taking into consideration what is reasonable – section 24(1)(a) requires an organization to provide access to an individual’s personal information, on request, if the personal information is contained in a record that is in the custody or under the control of the organization. Further, section 5(1) of the Act states that an organization “is responsible for personal information that is in its custody or under its control”.

[para 51] The concepts of custody and control have been discussed in various orders of this Office under the FOIP Act. Sections 4(1) and 6(1) of that Act use the same phrase “in the custody or under the control of” in reference to records of a public body. As the purposes of the FOIP Act and PIPA are comparable – in that they grant a right of access to a record (FOIP) or personal information contained in a record (PIPA) if the record is in the custody or under the control of the public body or organization – this Office’s statements and principles regarding custody and control under the FOIP Act are applicable to the same concepts under PIPA.

[para 52] In Order F2002-014 (at paras. 12 and 13), the Commissioner discussed the concepts of custody and control as follows:

Under the Act, custody and control are distinct concepts. “Custody” refers to the physical possession of a record, while “control” refers to the authority of a public body to manage, even partially, what is done with a record. For example, the right to demand possession of a record, or to authorize or forbid access to a record, points to a public body having control of a record.

A public body could have both custody and control of a record. It could have custody, but not control, of a record. Lastly, it could have control, but not custody, of a record. If a public body has either custody or control of a record, that record is subject to the Act. Consequently, in all three

cases I set out, an applicant has a general right of access to a record under the Act.

[para 53] I will now determine whether the Organization had custody or control of the Teacher's personal information when she made her access request. Later in this Order, I will also determine whether the Organization currently has custody or control of the Teacher's personal information, given that the secretary retrieved the letter from the Organization on May 16, 2007.

[para 54] The Teacher submits that, at the time of her access request, the letter was in the custody of the Organization by virtue of the fact that it had physical possession of the sealed envelope containing the letter. The Organization argues that there is no evidence that the sealed envelope contained the Teacher's personal information, and that it would have to be further demonstrated that the Organization was aware that the envelope contained her personal information.

[para 55] I found earlier in this Order that the sealed envelope given to the Organization by the secretary held a record containing the Teacher's personal information. While the exact date that the secretary gave the sealed envelope to the Organization is unknown, the Organization does not dispute that, at the time of the Teacher's access request of March 6, 2007, it had the sealed envelope that had been given to it by the secretary.

[para 56] It cannot be argued in this inquiry that the secretary is the one who had physical possession of the sealed envelope and therefore the letter that was at the Organization. The secretary was not an officer or employee of the Organization and there is no suggestion that she had an office or some other space on the premises of the Organization. Therefore, when the secretary gave the sealed envelope containing the letter to the Organization, physical possession passed from her to the Organization. Physical possession is sufficient for a finding of "custody", without anything further (Order 2000-003 at paras. 34 and 36; Order F2006-024 at para. 19). A legal right to control the record, over and above simple possession, is not relevant to a determination regarding custody (Order 2000-003 at para. 38; Order F2006-024 at para. 19).

[para 57] The Organization argues that the keeping of a sealed envelope in trust for a member cannot and should not constitute grounds for an allegation that personal information was ever in the custody or under the control of the Organization. However, even if a party has custody of a record under conditions of trust imposed by another party, there is still custody (Order 2000-003 at para. 37).

[para 58] Given the foregoing, I find that, at the time of the Teacher's access request of March 6, 2007, the Organization had custody of the letter and therefore the Teacher's personal information contained in it under section 24(1)(a) of the Act. As I have concluded that the Teacher's personal information was in the custody of the Organization at the time of her access request, it is not necessary for me to determine whether her

personal information was also under its control at that time (Order 99-032 at para. 65; Order 2000-003 at para. 49).

[para 59] While I have found that the Organization had custody of a record containing the Teacher's personal information, I will now determine whether it was required to grant access, or at least consider granting access.

**D. Did the Organization deny the Teacher's request for access to her personal information, in contravention of section 24 of the Act?**

[para 60] In her letter of August 6, 2008 to this Office, the Teacher proposed to add the issue of whether the Organization denied her request for access to her personal information, in contravention of section 24 of the Act. In letters of September 12, 2008 to the parties, this Office conveyed my view that the Organization's alleged denial of the Teacher's access request was subsumed by the issue of whether the Organization had custody or control of her personal information. My thinking was as follows: If I found, at inquiry, that the Organization did not have custody or control of the Teacher's personal information under section 24(1)(a), it would have no obligation to consider granting access, and it would be unnecessary to address whether it denied access in contravention of the Act. Conversely, if I found that the Organization had custody or control of the Teacher's personal information, I would order it to respond to her access request in accordance with the Act.

[para 61] After receipt of the parties' submissions, however, I find that I am in a position to determine whether the Organization denied the Teacher's access request, in contravention of section 24. My addition of this issue does not prejudice the Organization, as the Organization made submissions regarding the appropriateness of its response to the Teacher's access request and my conclusions are in its favour in any event. I did not find that I required anything further from the Organization, as its letter of March 26, 2007 to the Teacher, along with other information provided by the parties, was sufficient for me to address whether the Organization properly responded to the access request. My discussion of the issue also does not prejudice the Teacher, as she was the party who proposed its addition and she made submissions on it.

**1. The Organization's response to the access request**

[para 62] I found above that the letter requested by the Teacher contained her personal information and that the letter was in the custody of the Organization when she made her access request. I will now determine whether the Organization's response complied with section 24 of the Act, the relevant parts of which were reproduced above.

[para 63] The Organization's response of March 26, 2007 to the Teacher's access request read, in part, as follows:

*At this point in time, we are not aware of having any personal information that pertains to you. Our member [the secretary] has provided to us a sealed letter which she has requested we keep safe and sealed. It will*

*continue to remain sealed. On the advice of our legal counsel, we will be honouring our member's request.*

*CUPE 3550 believes it has met its duty in accordance with the Personal Information Protection Act (PIPA). Our response complies with section 24(1), 27 [regarding the duty to assist] and 28(1)[regarding the time limit for responding to an access request] of the Personal Information Protection Act (PIPA).*

[para 64] Under section 51(a) of the Act, the Organization has the burden of proving that the Teacher has no right of access to her personal information contained in the letter that was in the sealed envelope:

*51 At an inquiry into a decision under which an individual was refused*

*(a) access to all or part of the personal information about the individual or a record relating to the information...*

*...*

*it is up to the organization to establish to the satisfaction of the Commissioner that the individual has no right of access to the personal information about the individual...*

[para 65] The Teacher argues that, because the letter containing her personal information was in the custody of the Organization and she requested access to it, the Organization was in contravention of section 24(1)(a) of the Act – unless it can justify its actions in reference to one of the exceptions to disclosure set out elsewhere in section 24. However, even where the personal information of an individual is in the custody of an organization, section 24(1) permits an organization to take into consideration what is reasonable in its decision to provide access. In other words, the existence of an applicable exception to disclosure under section 24 is not the only reason why an organization may properly refuse to grant access. Section 24(1) requires an organization to provide access only if it is reasonable to do so (Order P2006-004 at para. 21).

## **2. Taking into consideration what is reasonable**

[para 66] What the Act means by “taking into consideration what is reasonable” under section 24(1) of the Act is informed by section 2:

*2 Where in this Act anything or any matter*

*(a) is described, characterized or referred to as reasonable or unreasonable, or*

*(b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,*

*the standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.*

[para 67] The Organization states that the secretary approached representatives of the Organization in late February or early March 2007, requesting that they hold the sealed envelope for her until she provided further instructions. The representatives agreed to do so. The Organization states that the secretary subsequently came to the Organization to request that the envelope be returned to her. The Organization returned the envelope to her, unopened, on May 16, 2007. It argues that, given the conditions under which it accepted the sealed envelope, it had no legal right to open the sealed envelope or request that its contents be shared by the secretary.

[para 68] The secretary was one of the Organization's members, and she gave the letter to the Organization in a sealed envelope while she determined whether and how to proceed in an employment-related dispute with the Teacher. Regardless of whether the secretary chose to place the letter in a sealed envelope herself, or was prompted by the Organization, I find that there was an understanding or agreement between the secretary and the Organization that the sealed envelope would not be opened without further instructions from the secretary. I also find that the understanding or agreement was reasonable. It would appear that the secretary did not wish to convey and/or the Organization did not wish to know the actual contents of the letter unless and until it became necessary, or desired by the secretary, for the purposes of the Organization's investigation into the employment matter.

[para 69] Because there was an understanding or agreement between the secretary and the Organization that the envelope would not be opened, and this understanding or agreement was reasonable, I believe that a reasonable person would consider it appropriate, in the circumstances, that the Organization did not open the envelope that was entrusted to it. Because the Organization was not in a position to open the sealed envelope, it was not in a position to determine the extent to which any exceptions to disclosure applied to the information in the letter, and not in a position to consider granting the Teacher access. Therefore, taking into consideration what was reasonable under section 24(1)(a) of the Act, I find that the Organization was not required to provide the Teacher with access to her personal information contained in the letter.

[para 70] In its letter of March 26, 2007, the Organization took the view that its response to the Teacher's access request complied with section 24(1). While the Organization stated that it was not aware of having any of the Teacher's personal information, the letter also told her that the Organization was unwilling to open the sealed envelope that had been submitted to it by the secretary, given the advice of its legal counsel. This was an indirect way of saying that the Organization would not open the envelope that had been entrusted to it, taking into consideration what was reasonable. Although the Organization might have more clearly explained why it was not providing

access (the adequacy of the contents of its response under section 29 of the Act is not an issue in this inquiry), I conclude that it did not deny the Teacher's access request in contravention of section 24.

[para 71] The Organization made submissions regarding the possible exceptions to disclosure that it might have applied had it hypothetically opened the envelope and reviewed the letter. I make no findings in this regard, as the Organization did not apply any exceptions, and I have concluded that its response to the Teacher's access request complied with section 24 in any event.

[para 72] Although I have reached the foregoing conclusion in this particular inquiry, I do not purport to create a general rule by which an organization is never required to open a sealed envelope and consider granting access to the information in it. In this case, if I had found that the understanding or agreement between the secretary and the Organization was unreasonable or in bad faith, I might have decided differently. Instead, I construe the situation as one where the secretary wished to give the letter to her union, without revealing its actual contents, while she decided how to proceed. In the end, she chose not to further involve her union and asked for the letter back. I would go so far as to say that, in sealing the letter in the envelope, the secretary was attempting to prevent the Teacher's personal information from being known more specifically by individuals within the Organization, or disclosed outside the Organization. She appears to have been making a good faith attempt to preserve and protect the information while the employment matter between her and the Teacher was being resolved.

[para 73] As my conclusion in this inquiry is very fact-dependent, it should not be interpreted as a justification for organizations generally, or unions in particular, to request or receive information in sealed envelopes, while they determine whether or how that information will be used, including in the context of an investigation. In a different case, an organization may be required to open a sealed envelope in order to respond to an access request. While I did not find so in this inquiry, it might be concluded in a future case that it is unreasonable to accept information in a sealed envelope, as the person dealing with the organization should first decide that he or she wishes to proceed in some fashion, and then fully convey the relevant information to the organization.

**E. Is the Teacher's personal information contained in a record that is currently in the custody or under the control of the Organization, within the meaning of section 24(1)(a) of the Act?**

[para 74] The Organization returned the sealed envelope to the secretary on May 16, 2007. It therefore no longer has physical possession of the letter that was in the envelope. However, I must go on to consider whether it currently has custody or control of the letter containing the Teacher's personal information, on some other basis. If it does, it may be required to take steps to retrieve the letter from the secretary in order to now respond to the access request, and despite the fact that it was not required to open the sealed envelope previously.

[para 75] Although I have adapted them from orders under the FOIP Act in relation to public bodies (e.g., Order 99-032 at para. 63; Order F2006-024 at paras. 21 to 45), the following ten non-exhaustive factors, or questions, are relevant in determining whether a record containing personal information is in the custody or under the control of an organization for the purposes of PIPA:

- Was the record created by an officer or employee of the organization?
- What use did the creator intend to make of the record?
- Does the organization have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the organization does not have possession of the record, is it being held by an officer or employee of the organization for the purposes of his or her duties as an officer or employee?
- Does the organization have a right to possession of the record?
- Does the content of the record relate to the organization's mandate and functions?
- Does the organization have the authority to regulate the record's use?
- To what extent has the record been relied upon by the organization?
- How closely is the record integrated with other records held by the organization?
- Does the organization have the authority to dispose of the record?

[para 76] On consideration of the foregoing questions, I find that the Organization does not currently have custody or control of the letter in the hands of the secretary. The letter was not created by an officer or employee of the Organization. Given the version of events set out by the parties, I do not believe that the parent who wrote the letter, or the secretary who obtained it, intended for the letter automatically or necessarily to be given to or used by the Organization. The letter is not currently in the possession of the Organization, let alone pursuant to a voluntary supply of the letter or a mandatory requirement. The letter is not being held by an officer or employee of the Organization, let alone for the purposes of his or her duties. The Organization has no right to possess the record, regulate its use or dispose of it, as I find that it has no legal authority over it. The Organization did not rely on the letter. The letter is not integrated with other records of the Organization. Although the contents of the letter related to the Organization's mandate and functions with respect to assisting the secretary as a member, it is the secretary who determined the extent of that mandate and those functions. Once she chose not to proceed further and retrieved the letter, any mandate or functions exercised by the Organization ended.

[para 77] The Teacher specifically argues that the Organization had an obligation under Regulation ACA.AR, discussed earlier in this Order, to disclose the letter to the Teacher even before, and separate from, her access request. The Collective Agreement to which the Organization is a party requires its members to use the provisions of Edmonton Public School Board policies and regulations, and Regulation ACA.AR sets out the Teacher's entitlement to certain information. However, it is not the Organization that has any obligation to provide information to the Teacher under Regulation ACA.AR. That Regulation states that its general principles of entitlement to information "will guide the

release by EPS [i.e., Edmonton Public Schools] of written information” (my underline). While the Organization could have advised or encouraged the secretary to submit the letter to Edmonton Public Schools as her employer – and Edmonton Public Schools might in turn have been required to provide it the Teacher – I find that the Organization had and has no authority or requirement to give the letter to the Teacher itself.

[para 78] I also considered section 5(2) of the Act, which states:

*5(2) For the purposes of this Act, where an organization engages the services of a person, whether as an agent, by contract or otherwise, the organization is, with respect to those services, responsible for that person’s compliance with this Act.*

[para 79] I have no evidence that the secretary was engaged by the Organization to provide any services. Although the Organization may be her agent for certain employment matters, the fact that she is a union member does not make her the Organization’s agent. Accordingly, I find that the Organization was not responsible for any compliance with the Act on the part of the secretary.

[para 80] I conclude that, once the Organization returned the sealed envelope containing the letter to the secretary, it no longer had custody or control of the letter. The Organization is therefore not required to take steps to retrieve the letter from the secretary for the purpose of responding to the Teacher’s access request.

**F. Did the Organization meet its duty to assist the Teacher, as provided by section 27(1) of the Act?**

[para 81] The relevant parts of section 27(1) of the Act read as follows:

*27(1) An organization must*

*(a) make every reasonable effort*

*(i) to assist applicants, and*

*(ii) to respond to each applicant as accurately and completely as reasonably possible,*

[para 82] I initially did not include an issue regarding the Organization’s duty to assist. However, I have now decided that I am in a position to address it, on review of the Teacher’s specific concerns. My addition of the issue does not prejudice the Organization, given that my conclusions are in its favour. My addition of the issue also does not prejudice the Teacher, as she was the party who proposed its addition and she made submissions on it.

[para 83] The Organization has the burden of proving that it fulfilled its general duty to assist an applicant under section 27(1) (Order 99-038 at para. 10 and Order F2004-008

at para. 10, discussing the analogous section 10(1) of the FOIP Act). Having said this, I will limit my discussion of the Organization's duty to assist to the specific concerns raised by the Teacher in her submissions.

[para 84] The Teacher submits that the Organization failed to meet its duty to assist her because it failed to conduct an adequate search for the letter. She argues that it did not really even have to conduct a search, as it knew the location of the letter in the envelope yet still refused to consider granting access. She argues that the Organization failed to adhere to the disclosure requirements of Regulation ACA.AR discussed earlier, and improperly sought to create a new exception to disclosure by refusing to open the sealed envelope.

[para 85] The foregoing does not mean that the Organization failed to make every reasonable effort to assist the Teacher and to respond to her as accurately and completely as reasonably possible. As concluded earlier in this Order, the Organization properly took into account what was reasonable, under section 24(1)(a) of the Act, when it refused to open the sealed envelope that had been entrusted to it. It did not purport to create a new exception to disclosure. Because the Organization was reasonable in refusing to open the envelope, it was not required to search in the envelope for the letter or for the Teacher's personal information. Finally, I found earlier that Regulation ACA.AR did not require the Organization to disclose the contents of the letter to the Teacher.

[para 86] The Teacher submits that sending a record offsite, failing to retain possession of it, or claiming that it is the personal property of a third party is not sufficient to discharge the duty to assist. She argues that the Organization failed in its duty to assist her because it permitted the secretary to remove the letter from its possession. However, the Organization did not have the authority to prevent the secretary from retrieving the letter. As the Organization does not currently have custody or control of the letter, it is not required to bring the letter back into its possession for the purpose of responding to the Teacher's access request.

[para 87] I conclude that the Organization met its duty to assist the Teacher, as provided by section 27(1) of the Act.

## **V. ORDER**

[para 88] I make this Order under section 52 of the Act.

[para 89] I find that the Organization collected the Teacher's personal information, and that the collection was reasonable for the purposes of an investigation under section 14(d) of the Act. The Organization therefore did not contravene section 14. As I find that the purpose of the collection was reasonable, and was done to an extent that was reasonable, the Organization did not contravene section 11.

[para 90] I find that the Organization did not contravene section 12 of the Act by collecting the personal information of the Teacher without her consent, as the information could be collected without her consent under section 14(d).

[para 91] As I find that the Organization was not required to collect the Teacher's personal information from the Teacher herself, and did not collect it from another organization, it was not required to notify the Teacher of the purpose for which the information was collected and the name of a person able to answer questions about the collection, or to provide information to another organization. The Organization therefore did not contravene section 13 of the Act.

[para 92] As the Organization did not use the Teacher's personal information, I find that it did not use her personal information for unreasonable purposes, or to an unreasonable extent, in contravention of section 16 of the Act. I also accordingly find that it did not use her personal information, without her consent, in contravention of section 17.

[para 93] I find that the Teacher's personal information was contained in a record that was in the custody of the Organization, under section 24(1)(a) of the Act, at the time of her access request. However, I find that the Organization did not contravene section 24 by denying the Teacher's request for access to her personal information. Taking into consideration what was reasonable, the Organization was not required to consider granting access, as the personal information was contained in a letter in a sealed envelope, further to a reasonable agreement with the third party who provided it, and the Organization was reasonable in its decision not to open the envelope.

[para 94] I find that the letter is not currently in the custody or under the control of the Organization. The Organization is therefore not required to take steps to retrieve the letter for the purpose of responding to the Teacher's access request.

[para 95] I find that the Organization met its duty to assist the Teacher, as provided by section 27(1) of the Act.

Wade Riordan Raaflaub  
Adjudicator