

# lawmatters

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## Freedom of Information and Privacy: Who Owns Board Records?



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It is our experience that freedom of information and privacy legislation is being used with greater frequency and by a wider variety of actors. Traditionally, freedom of information legislation has been used by journalists, newspapers and other media to obtain information from school boards that is not otherwise publicly available.

Increasingly, parents are now using freedom of information legislation to obtain access to their own and their child's "personal information" held by the school board. Additionally, school boards are receiving "privacy complaints" from parents who feel that their child's and/or their own personal information has been improperly released by the school board. There are also instances of school board employees filing privacy complaints against their employers.

Educators will be familiar with individuals who simultaneously engage school boards in a multiplicity of forums. For example, an aggrieved parent may file a human rights complaint against the school board, appeal a suspension and apply for the review of a special needs placement. Freedom of information requests and privacy complaints are two less expensive ways in which individuals can question the actions of school boards and educators.

In this article we discuss three cases that raise issues for the day-to-day conduct of educators.

*Re Edmonton Public Schools*, [2002] A.I.P.C.D. No. 37, Alberta Information and Privacy Commission

A letter of complaint was sent to Edmonton Public Schools (the "Board") by a parent who accused the principal and several staff members of a school of being unfair to the Complainant's child. The Complainant copied the letter to her lawyer, a Member of the Legislative Assembly, and two special interest organizations. The Board responded to the Complainant in writing. The Board also forwarded its response to all the parties originally copied by the Complainant, and informed the Complainant that it had done so.

The Complainant filed a privacy complaint with the Alberta Information and Privacy Commissioner (the "Commissioner"), alleging that the Board had improperly released confidential information about her child.

The Commissioner determined that the information contained in the Board's letter about the Complainant's child was "personal information" as defined by Part II of Alberta's *Freedom of Information and Protection of Privacy Act* (the "Alberta Act") and that it had been "disclosed". The issue was whether the disclosure in these circumstances was permitted by the Alberta Act.

The Commissioner held that the Complainant did not consent to the release of personal information simply by listing the names of people and

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institutions who had received a copy of her Complaint.

However, the Commissioner upheld the Board's position that the release of the information was "desirable for the purpose of subjecting the activities of ... a public body to public scrutiny", as contemplated by s. 17(5)(a) of the Alberta Act. The Commissioner observed that, when a person requests a publicly elected official to review matters of concern, it is normally because the activity in question warrants public scrutiny, particularly where, as in the case, the Complainant had questioned the actions of the child's principal and staff members at the child's school. Accordingly, the Commissioner held that the Board had exercised proper discretion in releasing the child's personal information in its response.

Despite the favorable outcome of this case for school boards and educators, it is cause to "think twice" about the possible consequences of copying school board correspondence to third parties. This is not to say that school boards should not try to defend themselves and their employees from the deleterious consequences of objection-

able or defamatory correspondence; however, if school boards' responses are to be shared with third parties, the information disclosed in their responses ought first to be carefully reviewed.

#### *Re Edmonton Public Schools*, [1999] A.I.P.C.D. No. 25, Alberta Information and Privacy Commission

In another Alberta case involving the Edmonton Public Schools, the Complainant alleged that the Board had breached the privacy of Grade Six students by failing to obtain consent from a parent/guardian prior to asking the students to complete a questionnaire. The questionnaire was part of a study that was intended to identify factors affecting student and school performance. The parents, including the Complainant, only became aware of the study when they received a related questionnaire sent home with their children, which the parents were asked to complete and return to the organization conducting the study. The parents were told that their results would be matched with the results of their children.

The study was sponsored by Human Resources Development Canada and

administered by a division of the University of Alberta. The Board facilitated the study because further research was needed in the area of student achievement scores, which had not been correlated with factors other than socio-economic factors. However, the Board acknowledged it had not considered whether the questionnaire might violate the provincial privacy legislation prior to administering it.

The questionnaire was clearly designed to elicit the students' personal information. Section 32 of the Alberta Act permits a school board to collect personal information if the purpose of collection relates directly to and is necessary for an operating program or activity. The Commissioner held that the purpose of the study met the requirements for collection.

The pressing issue before the Commissioner was whether the Board had violated the Alberta Act by failing to notify parents prior to collecting the information and disclosing it to a third party. The Commissioner found that the Board had violated the legislation in both circumstances and that its conduct was not justified by the use to which the information was to be put.

Although the Alberta Act does not contain a specific requirement to obtain written consent prior to gathering personal information, the Commissioner explained that public bodies have a duty to ensure individuals are properly informed. Further, it was noted that elementary school children could not be expected to fully comprehend the purposes for which their personal information would be used, nor would they be able to raise questions or make informed decisions about providing the information. In fact, students who failed to complete the questionnaire had been told they would be reported to the principal.

There is nothing inherently wrong with surveys and research studies being conducted in public schools and, indeed, s. 40 of the Alberta Act permits a public body to disclose personal information for research purposes in a number of circumstances. School boards are frequently approached in this regard by well-respected institutions that enjoy government funding. However, school boards must independently ensure that students' and parents' privacy rights

have been protected prior to participating in such studies.

*Re Toronto District School Board,*  
[2002] O.I.P.C. No. 145, Ontario  
Information and Privacy Commission

A parent requested the release of records relating to his child's educational history at the Toronto District School Board (the "Board") pursuant to the Ontario *Municipal Freedom of Information and Protection of Privacy Act* (the "Ontario Act"). The request also included records related to the parents.

Of particular interest for our purposes is whether the Board is obligated to release the principal's and teachers' personal notes, which the Board had refused to do. The Board argued that it did not have "custody or control" of the records, as required by s. 4(1) of the Ontario Act, as the records belonged to the educators who had authored them.

The Commissioner disagreed, finding that the notes were made by educators and administrators in the student's school, were intended to document the student's progress during the relevant

period, and were maintained by Board staff on the Board's premises.

Furthermore, even though the notes were never incorporated into the Ontario Student Record mandated by the *Education Act*, the notes were nevertheless a function of "the Board's mandate and the professional duties of the writers toward the education and social development of the [student]." The Commissioner held that the intention of the records was never for personal use, but rather to act as memory aids to assist in the evaluation and treatment of the student.

The Board has applied for judicial review of this decision. In the interim, educators would do well to consider its import. In the freedom of information context, it may not matter whether an educator's notes were intended to be solely for the educator's own reference. Any document created by an employee of a school board that refers to a student and/or the student's parents may be considered for the purposes of freedom of information legislation to "belong" to the student/parents, not to the educator. In our opinion, educators ought not to be discouraged from making notes in the course of carrying out their professional duties; however, educators may wish to bear in mind when making such notes that these are "records" that could eventually be subject to a freedom of information request. 🗣️

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**Marion Hoffer** is a lawyer with the Education and Public Law Group at the law firm Shibley Righton LLP in Toronto. In addition to information and privacy issues, her practice includes human rights, employment and labour, professional discipline, construction, municipal/planning, civil litigation and general advice for school board and education-related clients.

**Jason Green** is currently a student-at-law with the Toronto District School Board and was called to the Nova Scotia Bar in 2002. He has been involved in a range of legal issues in the areas of labour and employment, construction, civil litigation and information and privacy complaints. He will join the Education and Public Law Group at Shibley Righton LLP upon completion of his articles with the Board.