

**THE NOVA SCOTIA FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT**

A **REQUEST FOR REVIEW** of a decision of the **TRI-COUNTY REGIONAL SCHOOL BOARD** to deny access to some records relating to a complaint against the Applicant.

REVIEW OFFICER: Darce Fardy

REPORT DATE: January 6, 2006

ISSUE: Whether **Section 20** (protection of personal information) supports the decision of the Tri-County Regional School Board to deny access to some records related to the Applicant.

In a Request for Review, dated October 13, 2005 under the **Freedom of Information and Protection of Privacy Act (FOIPOP)**, the Applicant asked that I recommend to the Tri-County Regional School Board (TCRSB) that it disclose all the records he asked for.

The Applicant asked for a copy of the initiating complaint against him, all records related to the investigation of the complaint, and all records relating to the disposition of the complaint and the Applicant's school transfer.

Background:

The Applicant is a teacher who was investigated for allegations of inappropriate conduct. The Applicant was placed on paid leave during the investigation and later reassigned to another school.

...

The TCRSB provided the Applicant with a copy of the report of the person who investigated the complaint, including his conclusions and recommendations. All other relevant records were withheld. TCRSB said there was no record of the complaint itself because it was made verbally. Additional records were released during this office's mediation process.

The School Board withheld seventeen records under **Section 20** of *FOIPOP* in particular parts of **s.20(3)** which read:

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

- (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (d) the personal information relates to employment or educational history;

The disclosed report contains summaries of the statements of witnesses. The disclosure of the summaries meets the requirements of **Section 20(5)** of *FOIPOP* which obliges a public body "on refusing to disclose personal information supplied in confidence about an applicant" to "give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of the third party who supplied the personal information."

Following the practice of the Review Office, both parties, the TCRSB and the Applicant, were asked to make submissions in support of their positions.

The Applicant's submission:

The Applicant's solicitor believes her client should be provided with all of the documents containing his personal information, in accordance with **Section 2** of the **Act**, which

gives individuals a right of access to, and a right to correction of, personal information about themselves held by a public body. She argues that the personal information in the records is not the personal information of a third party but the personal information of her client. The solicitor found support for disclosure of the information in a ruling by the Nova Scotia Court of Appeal in which an applicant was granted access to peer review records containing the views and opinions of others. [*French v. Dalhousie University* (2003) NSCA 16]

The solicitor also made reference to Review Report FI-04-16, where the same case was cited and where I concluded:

While the records at issue contain the personal information of third parties [their names], they also contain the personal information of the Applicant. The Nova Scotia Court of Appeal has ruled that opinions expressed about an individual who was the subject of a university “peer review,” are the personal information of that individual and disclosure would not be an unreasonable invasion of privacy if the information were necessary to the individual knowing what was said about him.

The Applicant’s solicitor cited two other Nova Scotia court cases to support her position in favour of disclosure: *O’Connor v. Nova Scotia* (2001) NSCA 132 which reminds public bodies they must be “fully accountable” to the public with disclosure subject only to “necessary exemptions that are limited and specific”; and *Cyril House* (Abacus Security Consultants), 2000, NSSC 429 which describes the steps for public bodies to take in analysing Section 20.

The submission concluded that although the Applicant has not seen the information denied, “it is assumed that much of the documentation contains assertions of fact, views, notes or opinions” about the Applicant.

The submission of the TCRSB:

The TCRSB reported that a second search for the initiating complaint failed to turn up a written record of the complaint.

In considering Section 20, the solicitor representing the TCRSB followed the steps set out by the Supreme Court of Nova Scotia [*Dickie v. Department of Health* (N.S.C.A) (1999)] which were refined in *House*. She first determined that the records contained “personal information” of third parties as defined in *FOIPOP*. The solicitor then determined that none of the factors of s.20(4) applied. [Section 20(4) lists personal information which, if disclosed, would not constitute an unreasonable invasion of privacy.] She then considered s.20(3) and concluded that s.20(3)(b) and (d) applied. In determining that ss.20(3)(b) applied, she said that the Applicant violated his duties under the *Education Act* and more generally that there were allegations of inappropriate conduct. With respect to ss.20(3)(d), the solicitor wrote that this exemption applied to the child witnesses and because the records contain the “educational history” of third party children. Having determined that s.20(3) applies, she then considered the criteria found in s.20(2), including ss.(2)(f) which deals with personal information supplied in confidence.

Conclusions:

I am satisfied that the TCRSB made an adequate search for a written record of the complaint.

In matters such as this, care must be taken to protect the privacy of the complainant and witnesses, where required, and at the same time, protect the rights of the person subject to the

complaint, in this case the Applicant. It is a delicate balance requiring understanding and goodwill from the parties.

It is clear, given the opinion in *French*, that others' opinions of the Applicant are the personal information of the Applicant. It is also clear that some of the records containing the personal information of the Applicant also include the personal information of third parties.

It is my view that the witness statements of the children were properly summarized in the disclosed report, in accordance with s.20(5). I am satisfied that none of the circumstances found in s.20(4) apply to those individuals who are not public employees. In my view, s.20(3)(b) applies because the records created were the result of a possible violation of the law. (Emphasis added).

I do not agree that s.20(3)(d) applies because the records do not contain the employment or educational history of the complainant or some other witnesses. The Ontario Freedom of Information and Privacy Commission has ruled that "for information to qualify as 'employment or educational history', the information must contain some significant part of the history of the person's employment or education." (*Order MO-1343*) The British Columbia Government's Policy and Procedures Manual for its FOIPOP Act, reads: "educational history refers to any information regarding an individual's schooling. This includes names of schools, colleges or universities attended, courses taken and grades achieved." While this list is not exhaustive I believe it's clear that the B.C. Government would not regard the information in these records as educational history.

Although the teacher-witnesses are third parties their personal information is about their “position” and “function” as an employee of a public body. [See s. 20(4)(e)]. Consequently I have concluded, again in line with the *French* decision, that personal information of the teachers, including their names and positions should be disclosed to the Applicant because this would not constitute an unreasonable invasion of their privacy.

Recommendations:

That the TCRSB disclose (we have numbered the records for easy reference)

- Record #1, title of the document, last two paragraphs of page 1; first and fifth paragraph of page 2 with third party names and other identifying information severed; last paragraph of page 3 with third party names severed; first, second and third paragraphs of page 4 with third party names and other identifying information severed; first paragraph of page 6; and the signature of page 7.
- Summarize portions of records 2 to 4 that contain the personal information of the Applicant including opinions, thoughts and views about him in accordance with s.20(5).
- Record #5 in its entirety.
- Record #7 in its entirety.

- Record #9 in its entirety.
- Second page of Record #10.
- Record #12 in its entirety.
- Summarize records 13 to 17 in accordance with s.20(5)

Section 40 of the Act requires the TCRSB to make a decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of that decision. If a written decision is not received within 30 days, the TCRSB is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 6th day of January 2006.

Darce Fardy, Review Officer