



**OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island**

Interim Order No. FI-23-004

Re: Department of Education and Early Years

**Maria MacDonald
Deputy Commissioner**

July 13, 2023

Summary: An applicant made access requests to the Department of Education and Early Years (the “Public Body”). The Public Body withheld some information from some records of a review committee and of the Registrar appointed under the *Education Act* and regulations. As a preliminary issue, the Deputy Commissioner considered whether the review committee or the Registrar were acting in a quasi-judicial capacity. If so, the Commissioner’s office does not have the jurisdiction to review the Public Body’s decisions to withhold information from these records. The Deputy Commissioner found that neither the review committee nor the Registrar were acting in a quasi-judicial capacity, the records are subject to the *FOIPP Act*, and the Commissioner’s office has the jurisdiction to review the Public Body’s decisions.

Statutes: *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, clause 4(1)(b)

Education Act, RSPEI 1988, c E-0.2, and the Teacher Discipline Regulations, PEI Reg EC235/16

Decisions considered:

Attorney General of British Columbia v. Information and Privacy Commissioner of British Columbia, et al., 2004 BCSC 1597 (CanLII),

Order F2010-016, *Re: University of Calgary*, 2011 CanLII 96628 (AB OIPC)

Minister of National Revenue v. Coopers & Lybrand Ltd., 1978 CanLII 13 (SCC)

Order 99-025, *Re: Alberta Justice*, 1999 CanLII 19663 (AB OIPC)

Other sources:

FOIPP Guidelines and Practices Manual (April 2023)

Black's Law Dictionary, 7th Ed. 1999, *Sub verbo*, "adversarial proceeding"

I. BACKGROUND

- [1] An applicant sought a review relating to two access requests to the Department of Education and Lifelong Learning which is now known as the Department of Education and Early Years (the "Public Body"). The Commissioner delegated the authority to conduct these reviews to me under subsection 58(1) of the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, (the "FOIPP Act").
- [2] Some of the responsive records relate to the suspension and revocation of a teacher's license. I will briefly summarize the suspension and revocation process set out in the *Education Act*, RSPEI 1988, c E-0.2, and the Teacher Discipline Regulations, PEI Reg EC235/16. The Minister of the Public Body appoints a Registrar to perform the duties related to teachers' licenses and temporary permits. If an educational authority has concerns about the suitability of a teacher, they notify the Registrar. If the Registrar is considering suspending or revoking a teacher's license, they must refer the matter to a three-person review committee established by the Minister of the Public Body. The review committee investigates the matter. In the meantime, the Registrar may suspend the teacher's license on an interim basis until the review committee concludes their investigation. When the review committee completes their investigation, they report to

the Registrar with their findings and recommendations about suspending or revoking the teacher's license. If the Registrar decides to suspend or revoke a teacher's license, even on an interim basis, they must notify the teacher and the teacher may appeal the Registrar's decision to an appeal board.

- [3] This interim order relates to records of the review committee and the Registrar. The Public Body withheld some information from these pages under section 15 [disclosure of personal information would be an unreasonable invasion of personal privacy], and section 22 of the *FOIPP Act* [advice to officials and consultations or deliberations].
- [4] Before considering whether sections 15 and 22 applied to records of the review committee and Registrar, I wanted to ensure that our office has jurisdiction. Clause 4(1)(b) of the *FOIPP Act*, says that the *FOIPP Act* does not apply to communications and draft decisions of a person acting in a judicial or quasi-judicial capacity. If this provision is applicable, it does not mean that the Public Body cannot disclose the records to the Applicant. The Public Body could decide to either disclose or withhold them without relying on any statutory provision, but if clause 4(1)(b) applies, our office does not have jurisdiction to review the Public Body's decision. The Public Body did not initially claim clause 4(1)(b) of the *FOIPP Act* but relied on this provision when I asked the Public Body for their position about whether it applied to communications of the Registrar or of the review committee.

II. RECORDS AT ISSUE

- [5] I will not list them, but the records at issue include emails of the Registrar and the three members of the review committee. Some of the emails of the Registrar have enclosures which are versions of the Registrar's letter to the teacher, that the Public Body describes as communications and draft decisions.

III. ISSUE

- [6] This interim decision is about whether our office has the jurisdiction to review the Public Body's decisions to withhold some information from the emails and enclosures of the review committee and/or Registrar.

IV. ANALYSIS

- [7] Clause 4(1)(b) of the *FOIPP Act* states:

4. (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(b) a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity;

...

- [8] The Applicant directed us to *Attorney General of British Columbia v. Information and Privacy Commissioner of British Columbia, et al.*, 2004 BCSC 1597 (CanLII), which says the purpose of a similar provision in British Columbia is to protect deliberative secrecy.

- [9] Alberta also has a similar provision and the Public Body directed us to Order F2010-016, *Re: University of Calgary*, 2011 CanLII 96628 (AB OIPC). Based on this decision and the wording of clause 4(1)(b), two requirements must be fulfilled for a record to be excluded from the *FOIPP Act*:

- a. the record must be a personal note, communication or draft decision; and
- b. the record must be created by or for a person who is acting in a judicial or a quasi-judicial capacity.

[10] As to the first requirement, the records are emails and enclosures to or from the Registrar, and emails to or from the three members of the review committee. I am satisfied that the emails are communications. I also accept the Public Body's descriptions of the enclosures are communications or drafts of a decision. I find that the first part of the test of clause 4(1)(b) of the *FOIPP Act* is satisfied.

[11] I will consider the second requirement of whether the review committee and Registrar were acting in a quasi-judicial capacity. Quasi-judicial decisions are made in a court-like process and have court-like functions such as finding facts, interpreting law, and hearing from witnesses. Not all investigators or decision-makers act in a quasi-judicial capacity.

[12] Pages 10-11 of the *FOIPP Guidelines and Practices Manual*, published by the PEI Access and Privacy Services Office, (last revised April 2023, and earlier versions), set out the following factors to review when considering whether a person is acting in a quasi-judicial capacity:

The following criteria, which is not exhaustive, should be reviewed in determining whether a body is acting in a "judicial" or "quasi-judicial" capacity:

- Is there anything in the language in which the function is conferred or in the general context in which it is exercised that suggests that a hearing is contemplated before a decision is reached?
- Does the decision or order directly or indirectly affect the rights and obligations of persons?
- Is an adversarial process involved?
- Is there an obligation to apply substantive rules to many individual cases rather than, for example, an obligation to implement social and economic policy in a broad sense?

No one factor is decisive, and it will be necessary to consider the legislation under which a decision is made to see whether the rules of natural justice apply. The nature of the issue to be decided and the importance of the decision for those affected should also be examined.

[13] This mirrors the criteria set out in the Supreme Court of Canada decision *Minister of National Revenue v. Coopers & Lybrand Ltd.*, 1978 CanLII 13 (SCC), when considering whether a body is acting in a quasi-judicial capacity. I will address each of these considerations.

a. Is there anything in the language in which the function is conferred or in the general context in which it is exercised that suggests that a hearing is contemplated before a decision is reached?

[14] The functions and powers of the review committee and the Registrar originate from the *Education Act* and the Teacher Discipline Regulations. These enactments confer to the review committee the function to investigate, and the powers to compel and inspect records, and the power to request (but not compel) that a teacher undergo a psychiatric, psychological, addictions, or medical fitness assessment. They must prepare a report for the Registrar including their recommendations about suspending or revoking a teacher's license.

[15] These enactments confer to the Registrar the function and power to suspend or revoke a teacher's license for cause and must provide notice to the teacher in accordance with the regulations. The Registrar's notice that they have suspended or revoked a teacher's license is given to the teacher after the Registrar made their decision. The mechanism does not contemplate the teacher participating in this process.

[16] These powers and functions are contrasted by the language in the Teacher Discipline Regulations about appealing a decision of the Registrar. The appeal procedures specifically include the word "hearing" and includes detailed information about costs, timing, information required to initiate an appeal, a teacher's right to be heard and represented, and to receive advance notice, powers of the appeal board (confirm, reverse, vary a decision), etc.

[17] In my opinion, it is more likely than not that the Legislature did not intend for the review committee or the Registrar to conduct a hearing. If the Legislature had intended the review committee or the Registrar to conduct a hearing, they could have included provisions similar to the process for an appeal.

[18] I also considered whether the context suggested that either the review committee or the Registrar conduct a hearing. There were no hearings in the responsive records, and we are not aware of any practices or policies that suggest that the review committee or the Registrar conduct hearings.

[19] I find that neither the enactments nor the contexts suggest a hearing by the review committee or Registrar is contemplated before a decision is made about whether to suspend or revoke a teacher's license. This factor weighs against a finding that either the Registrar or the review committee were acting in a quasi-judicial capacity.

b. Does the decision or order directly or indirectly affect the rights and obligations of persons?

[20] I will address the review committee and the Registrar separately when considering this factor.

[21] After investigating, the review committee must prepare a report and make a recommendation to the Registrar about whether to suspend or revoke a teacher's license. A recommendation is not a decision, but I still considered whether their recommendation is the substantive decision. The review committee's investigation and recommendations are a required step in the process that may influence the disposition of the matter. But, in my opinion, the review committee does not decide whether to suspend or revoke a teacher's license. As the review committee does not make a decision, I do not need to

consider whether the review committee's report and recommendations impact the rights or obligations of a person.

- [22] I find that the review committee does not decide whether the teacher's license is suspended or revoked. This factor weighs against a finding that the review committee was acting in a quasi-judicial capacity.
- [23] The *Education Act* gives the Registrar the power to decide whether to suspend or revoke a teacher's license which aligns with the scope of the Registrar's other powers overseeing teacher's licenses and temporary permits. I find that the Registrar makes the decision about whether to suspend or revoke a teacher's license.
- [24] The second part of this factor is whether the Registrar's decision directly or indirectly affects the rights and obligations of a person. An educational authority may not employ a teacher without a teacher's license (or temporary permit). Where a license is required to do something, that activity is a privilege as opposed to a right. But, for the purposes of this assessment, I would accept that the Registrar's decision to suspend or revoke a teacher's license would indirectly affect the rights of a teacher to work.
- [25] I find that the Registrar makes the decision about whether to suspend or revoke a teacher's license and it indirectly affects the rights of a teacher. This factor weighs in favour of a finding that the Registrar was acting in a quasi-judicial capacity. As noted, this is only one factor to consider.

c. Is an adversarial process involved?

- [26] *Black's Law Dictionary*, 7th Ed. 1999, defines an "adversary proceeding" as "a hearing involving a dispute between opposing parties".

[27] The Public Body says:

While the powers authorized by section 102 of P.E.I.'s *Education Act* do not have a formal hearing component, they do contain language associated with an adversarial process that includes the establishment of a committee that conducts an investigation and makes recommendations to the Registrar. . . [underlined emphasis added]

[28] The Public Body did not direct me to any language associated with an adversarial process, and I would not describe the process of the review board or the Registrar as adversarial. The review committee and Registrar are not adjudicating a dispute between two parties; for example, there was no complainant. The review committee and Registrar did not weigh evidence or consider opposing positions. It does not appear that the teacher was notified or talked to the review committee before the review committee made their recommendation, or to the Registrar before the Registrar decided to suspend or revoke the teacher's license. If the Registrar considers, but decides not to suspend or revoke a teacher's license, the Registrar would not notify that teacher, and that teacher may never know that the Registrar considered but rejected suspending or revoking their teacher's license.

[29] I find that the decision of whether to suspend or revoke a teacher's license does not involve an adversarial process. This factor weighs against a finding that the review committee or the Registrar were acting in a quasi-judicial capacity.

d. Is there an obligation to apply substantive rules to many individual cases rather than, for example, an obligation to implement social and economic policy in a broad sense?

[30] In Order 99-025, *Re: Alberta Justice*, 1999 CanLII 19663 (AB OIPC), the Commissioner states that “substantive rules are that part of the law that create, define and regulate rights and duties of parties” (at paragraph 23).

[31] The power to suspend or revoke a teacher’s license for cause could apply to many individual cases. The Registrar must refer a matter to the review committee, and it is implicit that the Registrar should consider the review committee’s findings and recommendations. But I do not consider this to be a substantive rule. There are no rules that create, define, or regulate the rights and duties of parties in this decision-making process.

[32] I find that there are no obligations to apply substantive rules. This factor does not weigh in favour of a finding that the Registrar and review committee were acting in a quasi-judicial capacity.

e. Other considerations?

[33] Justice Dickson remarks in the 1978 Supreme Court decision, *Lybrand, supra*, that the list of criteria was not exhaustive, and that one should examine the nature of the issue to be decided and the importance of the decision for those affected.

[34] The *Education Act* and regulations set out a multi-step process to address the suitability of a teacher to hold a teacher’s license. The processes permit the Registrar to address concerns about the suitability of a teacher to hold a teacher’s license promptly and fairly, and the appeal mechanisms incorporate the rules of natural justice. The rights of a teacher are balanced with the over-arching responsibility to protect children. Neither the nature of the issue or the importance of the decision for those affected suggest that the review committee or the Registrar are acting in a quasi-judicial capacity.

[35] I am not aware of any other relevant factor to consider when assessing whether the review committee or Registrar was acting in a quasi-judicial capacity.

Summary of findings about whether clause 4(1)(b) of the FOIPP Act applies

[36] With respect to the first requirement of clause 4(1)(b) of the *FOIPP Act*, I find that the emails and enclosures of the review committee and the Registrar are communications and drafts of a decision.

[37] The second requirement of clause 4(1)(b) of the *FOIPP Act*, is that the person is acting in a quasi-judicial capacity. I considered the above noted factors and find that:

- a. neither the enactments nor the context suggests a hearing by the review committee or Registrar is contemplated before a decision is made about whether to suspend or revoke a teacher's license,
- b. the review committee does not decide whether a teacher's license is suspended or revoked, but the Registrar makes this decision and it indirectly affects the rights of a teacher,
- c. the decision of whether to suspend or revoke a teacher's license does not involve an adversarial process,
- d. there are no obligations to apply substantive rules, and
- e. there are no other relevant considerations.

[38] In consideration of all of these factors, I find that neither the review committee nor the Registrar act in a quasi-judicial capacity, and that clause 4(1)(b) of the *FOIPP Act* does not apply to exclude the records of the review committee or the Registrar from the scope of the *FOIPP Act*.

[39] The Applicant had an alternate reason for why they believed that clause 4(1)(b) of the *FOIPP Act* did not apply to some of the communications, but in consideration of this finding, it is not necessary to consider their alternative reason.

V. CONCLUSION

[40] In consideration of these factors, I find that the review committee and the Registrar do not act in a quasi-judicial capacity, similar or analogous to a court, when making decisions about whether to suspend or revoke a teacher's license. I find that the second part of the test of clause 4(1)(b) of the *FOIPP Act* is not satisfied.

VI. DECISION

[41] For the reasons outlined above, I find that clause 4(1)(b) of the *FOIPP Act* does not apply, and the records of the review committee or of the Registrar appointed under the *Education Act* and regulations are not excluded from the scope of the *FOIPP Act*. Therefore, I find that I have jurisdiction to review the decisions of the Public Body to withhold information from these pages.

[42] I thank all parties for their submissions. I will continue the review of the other issues.

SGD MARIA MACDONALD

Maria MacDonald
Deputy Commissioner