

[*This ruling was modified on judicial review. See: S1 GS-22671*]

ORDER NO. PP-08-001

Re: Eastern School District

**Prince Edward Island Information and Privacy Commissioner
Karen A. Rose, Acting Commissioner**

March 3, 2008

I. BACKGROUND

The Office of the Information and Privacy Commissioner received a privacy complaint under the *Freedom of Information and Protection of Privacy Act* (the “*FOIPP Act*”) on April 2, 2007, pertaining to the Eastern School District (the “Public Body”).

The Complainant alleges that, (i) the Public Body failed to comply with Part II of the *FOIPP Act* by disclosing the Complainant’s personal information to a third party without the Complainant’s consent; and (ii) the Public Body failed to comply with Part II of the *FOIPP Act* by attempting to collect personal information from the Complainant without providing the purpose and authority for the collection of the personal information.

Section 50 of the *FOIPP Act* permits the Commissioner to investigate and attempt to resolve complaints that personal information has been collected, used or disclosed by a public body in violation of Part II of the *FOIPP Act*.

By letter dated April 25, 2007, this office provided the Public Body with an opportunity to conduct its own internal review of the complaint, to determine whether it agreed with the facts as described by the Complainant, and whether it agreed that the complaint as alleged constitutes a violation of Part II of the *FOIPP Act*. The Public Body’s response

was received on May 25, 2007. It relies on sections 31(c) and 32(1)(j) of the *FOIPP Act* to authorize the collection of the information at issue. Further, it cites sections 36(1), 36(2) and 37(1) of the *FOIPP Act* to support its disclosure of the information at issue.

The Complainant was provided with a copy of the Public Body's submissions on May 29, 2007, and the Complainant forwarded three separate submissions in response. The Complainant relies on sections 33 and 35 of the *FOIPP Act*. Copies of the three submissions received from the Complainant supporting their position with regard to this review, one dated April 23, 2007, one May 31, 2007, and the third dated July 11, 2007, were provided to the Public Body by letter dated July 24, 2007. With the consent of the Complainant, selected supporting documentation, the majority of which constitute background information and copies of correspondence concerning a related matter, were attached to the submissions. These included:

(1) Selected supporting documentation to the Complainant's submissions of April 23, 2007, consisting of:

- (i) a letter from the Complainant's physician dated March 7, 2007;
- (ii) a letter to the Complainant from the Public Body's human resources manager dated October 17, 2005;
- (iii) a letter to the union representative from the Complainant dated October 22, 2005, re attachment (ii);
- (iv) a letter to the Public Body's human resources manager and supervisor from the Complainant dated October 26, 2005, responding to attachment (ii) and enclosing physician's report;
- (v) a letter to the Complainant from the Public Body's human resources manager dated October 26, 2005;

(vi) a letter to the Complainant from the Public Body's human resources manager dated October 28, 2005;

(vii) a letter to the Public Body's human resources manager from the Complainant dated October 29, 2005, in response to attachment (vi);

(viii) a letter from the Public Body's human resources manager to the Complainant dated November 1, 2005, in response to attachment (vii);

(ix) a letter from the Complainant to the Public Body's human resources manager dated November 3, 2005, in response to attachment (viii);

(x) a letter from the Public Body's human resources manager to the Complainant dated November 8, 2005;

(xi) a letter from the Complainant to the Public Body's human resources manager and supervisor in response to attachment (x);

(xii) a letter from the head of the Public Body to the Complainant dated November 15, 2005;

(xiii) two grievance forms signed by the Complainant dated November 4, 2005, and November 16, 2005;

(xiv) a letter to the Complainant from Service Canada dated February 6, 2007; and

(xv) a four-page fax transmission dated January 6, 2006, from the Public Body's human resources manager;

(2) Selected supporting documentation to the Complainant's submissions of May 31, 2007, consisting of:

(i) a letter of complaint to the Minister of Education from the Complainant dated October 21, 2005;

(ii) an e-mail from the Public Body's human resources manager to the Complainant's union representative; and

(iii) Employers' Document submitted in the matter of the *Labour Act* of Prince Edward Island and a grievance filed pursuant to a collective agreement between the Public Body and the union.;

(3) Selected supporting documentation to the Complainant's submissions of April 23, 2007, consisting of a letter to the Minister of Education of another province from the Complainant dated March 8, 2005, which shows handwritten notes by an employee of that department.

The final reply from the Public Body was received at this office on September 6, 2007.

II. ISSUES

The issues arising from this complaint are as follows:

1. Did the head of the Public Body contravene Part II of the *FOIPP Act* in its collection of the Complainant's personal information?
2. Did the head of the Public Body contravene Part II of the *FOIPP Act* in its disclosure of the Complainant's personal information?

III. SUBMISSIONS OF THE PARTIES

Disclosure Complaint:

As noted above, this complaint alleges both improper disclosure and improper collection.

The facts of the alleged disclosure are as follows:

On October 17, 2005, the Human Resources Manager of the Public Body sent an e-mail to the union representative of the Complainant, which e-mail advised the union representative of actions the Public Body was taking relating to the Complainant, and the reasons for those actions. A copy of a letter being sent to the Complainant dated October 17, 2005, regarding medical evaluations and assessments was attached to the e-mail.

Regarding the alleged improper disclosure of personal information, the Complainant states the e-mail sent by the Public Body's human resources manager to the Complainant's union representative contained inaccurate opinions, including unfounded accusations. The Complainant states that this disclosure of their personal information not only violated their right to privacy, but also their credibility and reputation. The Complainant further submits that if the opinions stated in the e-mail held any substance, the head of the Public Body should have met with the Complainant to discuss the concerns, and the Complainant should not have been allowed to continue in their employment duties. Indeed, the Complainant questions why they were permitted to complete their duties if there was any basis to the expressed opinions in the letter of the Public Body. While these latter comments of the Complainant may hold merit, they are not relevant to the decision before me. This review is limited to the privacy provisions of the *FOIPP Act* as they apply to the facts, and not the other human resources decisions of the Public Body.

The Public Body submits that the Complainant's personal information was disclosed in the e-mail under the authority of both subsection 36(1)(a) and 37(1)(v) of the *FOIPP Act*. The Public Body states that advising the union of any significant matter concerning one of its members is a customary labour relations practice of the Public Body.

Collection Complaint:

The facts of the alleged improper collection are twofold, as follows:

On October 17, 2005, a representative of the Public Body directed, in writing, that the Complainant undergo two assessments, including a medical assessment. The Public Body did not outline its authority for the direction. In addition, the Complainant states that the Public Body did not explain the reasons for the direction.

On the issue of improper collection, the Complainant points out that the Public Body did not actually collect the personal assessment information from them, as the Complainant did not undergo either assessment. In reference to the opinions set out in the Public Body's e-mail, the Complainant claims the Public Body breached section 32(2) of the *FOIPP Act*, as they were not informed by the Public Body that their personal information was being collected. The Complainant also submits that section 33 of the *FOIPP Act* was violated, as the Public Body did not ensure that the personal information collected was accurate before using it to make a decision directly affecting them and their employment with the Public Body.

The Public Body states that it collected the Complainant's personal information under the authority of section 31(c) of the *FOIPP Act*, being information directly related to and necessary for an operating program or activity of the Public Body. The Public Body cites section 32(1)(j) of the *FOIPP Act* as authority to collect the Complainant's personal information from sources other than the Complainant in order to manage or administer personnel.

The collected information at issue in this review is, in the opinion of the Public Body, specifically related to and necessary for an operating program or activity of the Public Body. The Public Body states that it placed the Complainant, an employee of the Public Body, on leave with pay, pending the outcome of a specific evaluation and separate medical examination. This action on the part of the Public Body arose out of the Public Body's concerns regarding the Complainant's capacity to carry out their employment duties. The Public Body acknowledges that it did collect personal information regarding the Complainant from both third party complaints to the Public Body, as well as from comments of other employees of the Public Body. This personal information was used in the decision-making process to place the Complainant on leave with pay, and to have the Complainant undergo the evaluations cited.

The Complainant advises that, even after numerous requests, the Public Body has yet to discuss with them its concerns for their health, nor supply them with its reasons for having them undergo a medical assessment and evaluation of their ability to perform their job duties. In closing the Complainant states:

“The [Public Body] did not have the right to collect first, second or third party information on me without first requesting a meeting with me to discuss their concerns and their reasons for wanting me to take [the medical assessment]. Nor, does the [Public Body] have the right to send an e-mail to a third party, diagnosing me without the proper credentials to do so. In all of the letters that I have received from the [Public Body] staff, they never once quoted the [FOIPP] Act or informed me of my right to privacy.

In its reply to the submissions of the Complainant, the Public Body claims that the information provided by the Complainant is “third party hearsay information”. The Public Body questions its accuracy and expresses concern that this information would be relied

upon in reaching a conclusion in this matter. This argument mirrors the Complainant's position that third party information was relied upon by the Public Body in making its decisions regarding the Complainant's employment.

IV. FINDINGS

Is the information at issue "personal information"?

Personal information is defined in section 1(i) of the *FOIPP Act* as follows:

1. In this Act

(i) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number;

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, blood type or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational,

financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinion about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

Information at issue for collection in this case arise from evaluations concerning the Complainant's ability to perform their job duties, as well as their medical health. Based on the definition of personal information set out above, I find that this information falls under subsections 1(vi) and (viii) of the *FOIPP Act*. Further information at issue for collection are the third party opinions set out in the e-mail from the Public Body to the union representative. I find that this information is also personal information in accordance with subsection 1(viii) of the *FOIPP Act*.

The alleged information at issue for disclosure in this case is employment information, as well as Public Body and third party opinions concerning the Complainant's medical health. Based on the definition of personal information set out above, I find that this information falls under subsections 1(vii) and 1(viii) of the *FOIPP Act*, and is, therefore, personal information, as well.

Did the head of the Public Body disclose the Complainant's personal information in contravention of Part II of the FOIPP Act?

To support its disclosure of the Complainant's personal information, the Public Body relies upon sections 36 and 37 of the *FOIPP Act*.

Section 37(1) of the *FOIPP Act* sets out all of the circumstances under which disclosures

of personal information may occur. The relevant subsection of section 37 relied on by the Public Body is as follows:

37. (1) A public body may disclose personal information only

...

(v) for the purpose of managing or administering personnel of the Government of Prince Edward Island or a public body;

The Public Body disclosed the Complainant's personal information to the Complainant's union representative. The e-mail advises the union of the steps the Public Body was taking to address the concerns it had, and set out, in part, the basis of the concerns. It also attached a copy of a letter to be sent to the Complainant from the Public Body on that day.

The Alberta Office of the Information and Privacy Commissioner has considered the subsection above in Investigation Report 2001-IR-006, relating to unauthorized disclosure of personal information. In that case, the public body relied on its section 38(1), which also states that a public body may disclose personal information only for the purpose of managing or administering personnel of the Government of Alberta or the public body. The investigator found that this section was drafted to allow disclosures to meet the purposes of managing personnel within the public body. Such management includes the address of occupational health and safety issues.

Although I find the described e-mail itself to lack clarity, I agree that the disclosure relates to a work safety issue. I find this to be an acceptable disclosure under section 37(1)(v) of the *FOIPP Act* cited above. Indeed, the disclosure to the Complainant's union representative is made with the ultimate purpose of protecting the Complainant's interests.

The union, as bargaining agent for the Complainant, needs to be kept abreast of the

activities of the employer relating to the employee, so that the union can provide appropriate advice and representation to the Complainant.

Based on the above, I find that there was no violation of Part II of the *FOIPP Act* in disclosing the Complainant's personal information to the Complainant's union representative.

Although the head of the Public Body did not violate Part II of the *FOIPP Act* in disclosing the Complainant's personal information to their union representative, he should question the security of the method used. In my view, e-mail is not the appropriate method to discuss the highly personal opinions relating to the Complainant which are expressed therein. In addition, the description in the final sentence of the e-mail was, at best, unprofessional.

Did the head of the Public Body collect the Complainant's personal information in contravention of Part II of the FOIPP Act?

The Public Body relies on sections 31 and 32 of the *FOIPP Act* as the basis for its decision to collect the personal information of the Complainant.

Sections 31 and 32 of the *FOIPP Act* set out the purposes and manner by which a public body may collect personal information. The subsections relied on by the Public Body relating to the collection of the Complainant's personal information are set out below:

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

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

...

32. (1) A public body shall collect personal information directly from the individual the information is about unless

...

(j) the information is collected for the purpose of managing or administering personnel of the Government of Prince Edward Island or a public body;

...

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

- (a) the purpose for which the information is collected;
- (b) the specific legal authority for the collection; and
- (c) the title, business address and business telephone number of an officer or employee of the public body who can answer the individual's questions about the collection.

I disagree with the Public Body's argument that its attempted collection of the Complainant's personal information via job and medical evaluations is authorized by Part II of the *FOIPP Act*. In order to satisfy the above-noted subsections of 31 and 32 of the *FOIPP Act*, the Public Body must not only show that the information collected is necessary for an operating program or activity of the Public Body, but also that it complies with subsection 32(2) of the *FOIPP Act*. In this case, the Public Body did not disclose in its October 17, 2005 letter to the Complainant, the explicit purpose for collecting their personal information via two evaluations, although it did describe the purpose to a limited extent in its response letter to the Complainant dated November 1, 2005. At no time did the Public Body inform the Complainant of its specific legal authority for the collection of their personal information. Further, rather than providing the Complainant with an opportunity to consent to the collection of their medical information, the letter advised that it was "incumbent" on the Complainant to fully cooperate and participate. When the Complainant did not attend one of the evaluations, they were suspended without pay. Finally, upon request by the Complainant for an explanation as to the purpose for the evaluations, no further information was provided by the Public Body, aside from a

reiteration that the Complainant's employment was in jeopardy. For these reasons, I find that the Public Body violated subsection 32(2) of the *FOIPP Act*.

I acknowledge that an employer requires effective means to ensure the safe performance of its employees' duties, more so in circumstances where the employees' performance may have an effect on the safety of others. However, this important obligation can easily go hand-in-hand with the Public Body's duties under the *FOIPP Act* to provide the purpose and authority for collecting its employees' personal information.

I note that this violation of the *FOIPP Act* by the Public Body occurred in 2005, two years after the Public Body became subject to the *FOIPP Act* (the school boards of Prince Edward Island did not fall under the *FOIPP Act* until late 2003). One would expect that the Public Body would have policies and procedures in place to ensure compliance with the *FOIPP Act* for their employees. However, I have observed that the heads of public bodies appear to be much more attuned to the privacy rights of the general public, than they are to the same rights applicable to their own employees. I have addressed the issue of employee privacy in previous orders of this office, namely, Order PP-06-001, involving the Office of the Attorney General, the Department of Health and the Prince Edward Island Public Service Commission, and Order PP-06-003, also involving the Department of Health. I have encouraged education and training, as I will be doing in this case, but I realize that while *FOIPP Act* training is the best first step, it is only part of the solution.

Respect for employee privacy is sensitivity to a basic human right, which must be fostered at the top of the organization. The Legislature, in its wisdom, has placed the responsibility for privacy protection with the heads of public bodies. I encourage the head of the Public Body here, as well as the heads of all public bodies, to review this order and the orders cited above to take steps to seek out areas which require improvement in employee privacy

protection, and to develop effective methods to carry out required improvements.

Did the head of the Public Body use the Complainant's personal information in contravention of Part II of the FOIPP Act?

While these issues were not raised explicitly in the initial complaint, they are corollary issues which arose during the course of this investigation. As noted above, the Complainant claims the Public Body breached section 32(2) of the *FOIPP Act*, as they were not informed by the Public Body that their personal information was being collected. The Complainant has misapprehended section 32, which deals with information collected directly from the Complainant. The opinions were collected from third parties.

With regard to the third party opinions, the Complainant states that the Public Body did not ensure the accuracy of the information that it collected from third parties about them, thus violating section 33(a) of the *FOIPP Act*. I disagree with the Complainant's argument in this regard. The evidence reveals that the Public Body collected just enough personal information from third parties to determine that it did, indeed, require further and more reliable information, and that is why it sought the independent evaluations. Further, the Public Body's use of the initially collected information was consistent with the "use" provisions of the *FOIPP Act*, as follows:

36. (1) A public body may use personal information only
 - (a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose;
 - (b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use; or
 - (c) for a purpose for which the information may be disclosed to that public body under section 37, 39 or 40.

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

38. For the purposes of clauses 36(1)(a) and 37(1)(b), a use or disclosure of personal information is consistent with the purpose for which the information was collected or compiled if the use or disclosure

- (a) has a reasonable and direct connection to that purpose; and
- (b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.

If I were to find otherwise, a Public Body employer would not be permitted to gather important third party reports concerning its employees, which reports might lead to decisions relating to the safety and well-being of both employees and affected third parties.

VI. ORDER

I thank the head of the Public Body and the Complainant for their submissions. However, I find the Public Body's submissions to be lacking in sufficient detail. Public bodies are in a much better position to understand the *FOIPP Act* and the evidentiary requirements of a *FOIPP Act* review. Thorough submissions permit the Complainant to better understand the Public Body's actions, and allow me to reach a better-informed decision.

I have found that the head of the Public Body did not violate Part II of the *FOIPP Act* in disclosing the Complainant's personal information to the Complainant's union representative without their consent.

I have also found that the head of the Public Body violated Part II of the *FOIPP Act* in

failing to advise the Complainant of its purpose and authority for collecting the Complainant's personal information.

In accordance with subsection 66(3)(f) of the *FOIPP Act*, I recommend that the head of the Public Body provide education and training to its management and employees in this regard, focusing on Part II of the *FOIPP Act*. In particular, all Public Body personnel should be made aware of the importance of protecting the security of employees' personal information, and consistently advising employees of the Public Body's purpose and authority for collecting employees' personal information. I ask that the head of the Public Body advise me in writing, within 90 days of the date of this order, the details of how and when this recommendation is carried out.

In accordance with section 68(1.1) of the *FOIPP Act*, the head of the Public Body shall not take any steps to comply with this order until the end of the period for bringing an application for judicial review of the order under the *Judicial Review Act*.

Karen A. Rose
Acting Information and Privacy Commissioner