OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-09-005

Re: Eastern School District

Prince Edward Island Information and Privacy Commissioner

Judith M. Haldemann, Acting Commissioner

October 30, 2009

I. BACKGROUND

This order results from a review of five decision letters of the Eastern School District ("Public Body") dated March 13, 2008, and a supplemental decision letter dated April 2, 2008, in response to five revised access to information requests ("revised access requests") submitted by the Applicant under the *Freedom of Information and Protection of Privacy Act* ("FOIPP Act"). The Public Body provided full access to some of the records requested by the Applicant, it partially severed some of the records at issue and refused to disclose some records in their entirety.

This office was first contacted by the Public Body by letter from its lawyer dated October 15, 2007, requesting guidance on how to proceed with an application under section 52 of the FOIPP Act for

authorization to disregard 11 access requests received from the Applicant, all dated September 14, 2007. The application was made "on the grounds that the requests would unreasonably interfere with the operations of the [Public Body], amount to an abuse of process, or are frivolous and vexatious." This office responded to the Public Body by letter dated October 17, 2009, and copied to the Applicant. The Commissioner advised the Public Body that a review of the FOIPP Act, together with related procedures, orders of other jurisdictions and caselaw related to a section 52 application would first be carried out before any direction would be given to the parties. The Commissioner reviewed the Public Body's application and the attached access requests. By letter dated November 16, 2007, the Commissioner advised the Applicant on the procedural errors that were found in the access requests submitted by the Applicant to the Public Body, and directed the Applicant to amend the access requests that did not comply with the FOIPP Act. The letter was copied to the Public Body.

On December 13, 2007, this office received from the Applicant five revised access requests dated December 10, 2007, that the Applicant had reworded to conform with the FOIPP Act. The Commissioner sent the revised access requests to the Public Body by letter dated December 17, 2007, for the Public Body's review and reconsideration. The Public Body responded by letter dated January 16, 2008, confirming that the Public Body would process the revised access requests, advising that it would not be pursuing a section 52 application under the Act and reserving its right to make a section 52 application in future. The Public Body asked the Commissioner to order that the Applicant not be permitted to file any further access requests until the revised access requests were disposed of, and to further order that the Applicant confirm in writing that the previous 11 access requests were abandoned. Based on the volume of records related to the revised access requests, the Public Body asked for a 60-day extension of time to respond to them.

By letter of January 21, 2008, this office sent the Public Body's letter to the Applicant, and advised her that the Public Body had accepted and would be processing the revised access requests. The Applicant was advised of the extension of time granted to the Public Body for processing the revised access requests. In addition, the Applicant was advised that she must provide a written confirmation

that the original 11 access requests had been abandoned, and that she would not submit other access requests to the Public Body until processing of the revised access requests was completed. This letter to the Applicant was copied to the Public Body on the same date.

By letter dated February 18, 2008, received by this office on February 21, 2008, the Applicant confirmed that the original 11 access requests were withdrawn, that the five revised access requests were accepted for action by the Public Body, and that the Applicant would not submit further access requests to the Public Body until processing of the revised access requests was complete. The Applicant also asked that the documents already received from a second public body not be duplicated. A copy of this letter of the Applicant was provided to the Public Body. By letter dated March 4, 2008, the Public Body advised that it needed further explanation about the records that the Applicant received from the second public body in order to avoid duplication. By letter dated March 6, 2008, this office directed the Applicant to provide an itemized list of the records already received from the second public body. This list was received by this office on March 25, 2008, and was sent on to the Public Body by letter dated April 2, 2008.

A request for review from the Applicant dated April 11, 2008 was received by this office on April 15, 2008 in respect of the decisions of the Public Body on the revised access requests. By letter of the same date, this office instructed the Applicant to provide a copy of the decision letters. By letter dated April 22, 2008, the Applicant sent to this office copies of the Public Body's five decision letters dated March 13, 2008, and a supplementary decision letter dated April 2, 2008. By letter dated April 25, 2008, this office provided the Public Body with a copy of the Applicant's request for review together with copies of the decision letters, and directed the Public Body to forward all related documentation. By email dated May 5, 2008, the Public Body asked for an extension in time to provide the records. An extension to June 2, 2008 was granted by letter to the Public Body dated May 9, 2008, and copied to the Applicant. On June 2, 2008, all records pertaining to each of the revised access requests were delivered to this office on behalf of the Public Body.

Requests for updates on the status of the investigation were received from the Applicant by letter dated June 12, 2008, and by email dated July 9, 2008. This office responded to the Applicant by email and by letter, both dated July 9, 2008, advising the Applicant that it would take time to review the records from the Public Body before the investigation could proceed.

By letter dated August 13, 2008, this office asked the Public Body to provide submissions supporting its decision to sever information from some of the records and to withhold some other records in their entirety. This letter included details of an explanatory nature, together with several questions. The Public Body asked for two extensions in time to submit its arguments; the first by letter dated August 20, 2008, and confirmed by this office by letters to the parties dated August 25, 2008; and the second by telephone on September 11, 2008, and confirmed by letters to the parties dated September 18, 2008. The Public Body's submissions were received at this office on October 1, 2008, in three volumes.

After a review of the submissions, and taking into consideration the Public Body's request that Volume II of the submissions be withheld, this office copied Volume I and Volume III of the Public Body's submissions to the Applicant. By letter dated October 27, 2008, the Applicant was asked to provide submissions in response to the submissions of the Public Body.

This office and the Applicant communicated by email on the status of the review between October 1 and 6, 2008. Further communications of a procedural nature occurred between this office and the Applicant between October 30 and November 6, 2008 during which the Applicant asked for an extension in time to submit her response. This office confirmed the extension with the parties by letters dated November 10, 2008. The Applicant's response was received at this office by email on December 12, 2008, with a hard copy received at this office on December 18, 2009.

By letter dated December 19, 2008, the Public Body was provided with a copy of the Applicant's response. On January 19, 2009, this office received the Public Body's final reply.

II. RECORDS AT ISSUE

This review covers five revised access requests. The descriptions of the access requests are very comprehensive and are attached as Schedule A. In summary, the revised access requests were made in respect of (1) the mediation, including qualifications and background of the mediator; (2) records concerning legal costs in respect of a letter sent to the Applicant; (3) policy and guidelines for retaining a lawyer; (4) information respecting the Applicant and her family and what information was disclosed or discussed with the lawyer, school principal and others; and (5) legislation regarding confidentiality and privacy, as well as information regarding all persons who were given access to the Applicant's personal confidential information.

The records at issue, totaling 83, include 36 documents that were provided to the Applicant in their entirety, three that were severed before being disclosed, and 44 records that were not disclosed. The records include emails, notes, letters, minutes of meetings, legislation, policies and directives. The Public Body relied on sections 4, 14, 15, 22, 25 and 27 of the FOIPP Act to refuse to disclose records or to sever parts of records in response to the revised access requests of the Applicant.

III. BURDEN OF PROOF

Section 65 of the FOIPP Act deals with the burden of proof required of the parties. As noted in previous orders of this office, the initial burden of proof lies with different parties, depending on which exception to disclosure under the FOIPP Act is relied on by the public body. In accordance with subsection 65(1), if a decision has been made to refuse an applicant access to a record or part of a record, the public body has the duty to prove that an applicant has no right of access to the record.

In an analysis of section 15 of the FOIPP Act, the burden may rest with the applicant. If it is determined that the record contains personal information of a third party, an applicant has the burden of proving that disclosure of the personal information of the third party would not be an

unreasonable invasion of the third party's personal privacy. However, it should be noted that an applicant has no such burden of proof in respect of personal information of a third party that falls under subsection 15(2).

IV. ISSUES

The issues to be determined by this review are as follows:

1. Section 4 – Records not in the custody or under the control of a public body

What does it mean if the records requested are not in the custody or under the control of a public body?

2. Subsection 14(1) – Disclosure would reveal labour relations information

Was the head of the Public Body correct in refusing to disclose information to the Applicant on the grounds that disclosure would reveal labour relations information that could reasonably be expected to result in similar information no longer being supplied to the Public Body, pursuant to subsection 14(1) of the FOIPP Act?

3. Section 15 – Disclosure would be an unreasonable invasion of a third party's personal privacy

Was the head of the Public Body correct in refusing to disclose information to the Applicant on the grounds that disclosure would be an unreasonable invasion of a third party's personal privacy pursuant to subsection 15(1) of the FOIPP Act?

4. Section 22 – Advice from officials

Did the head of the Public Body correctly refuse to disclose information to the Applicant on the grounds that disclosure could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body; or advice, proposals, recommendations, analyses

or policy options developed by or for a public body, pursuant to clause 22(1)(a) or (g) of the FOIPP Act?

5. Section 25 – Legal privilege

Did the head of the Public Body correctly exercise its discretion under subsection 25(1) of the FOIPP Act by refusing to disclose information to the Applicant on the grounds that the information is subject to a type of legal privilege, or that the information was prepared by or for an agent or lawyer of a public body in relation to a matter involving the provision of legal services, pursuant to clause 25(1)(a) or (b) of the FOIPP Act?

6. Section 27 – Information readily available to the public

Did the head of the Public Body correctly exercise its discretion under subsection 27(1) of the FOIPP Act by refusing to disclose information requested by the Applicant, on the grounds that the information is readily available to the public pursuant to clause 27(1)(c) of the FOIPP Act?

7. Submissions of a party that contain personal information about a third party

Where the submissions of a party to a review include the personal information of third parties, how should that third party personal information be treated?

V. ARGUMENTS OF THE PARTIES

Submissions of the Public Body

Section 4 – Records not in the custody or under the control of a public body

With respect to the access request about the mediator, the Public Body argued that it could not disclose information respecting the mediator because the records requested were not in the custody or under the control of the Public Body as contemplated by subsection 4(1) of the FOIPP Act. The

Public Body argues that therefore section 8 of the FOIPP Act did not apply to those records. The Public Body submits that

> All sections of the *Act,* including s. 8(1), are, however, subject to s. 4(1) of the *Act.* That section reads: *This Act applies to all records in the custody or control of a public body ...* The duty to assist in s. 8(1) does not, therefore, apply to records that are not in the custody or control of the public body by virtue of s. 4(1). More specifically, a public body has no duty to assist an applicant in locating records which are in the custody or control of another public body. In the alternative, if s. 8(1) applied to the Applicant's request for these records, the [Public Body's] only obligation was to "make reasonable efforts" to assist [the Applicant]. The standard is not a standard of perfection, and does not require that the [Public Body] "do everything possible". It only requires that the public body do what a fair and rational person would expect to be undertaken. (See *District of Saanich* v. *Township of Esquamalt* 2001 CanLII 21586 (B.C.I.P.C.) [Tab 1] at para. 9. The [Public Body] submits that a fair and rational person would not expect that the [Public Body] suggest to the Applicant that she might find these documents at the [other Public Body].

Subsection 14(1) – Disclosure would reveal labour relations information

The Public Body refused to disclose some records to the Applicant, relying on subclause 14(1)(a) of the FOIPP Act. The Public Body submits that these records would reveal labour relations information. The Public Body also points out that the information in these records is confidential under subsection 45(2) of the *School Act*. And, the Public Body argues that disclosure of this information would result in similar information no longer being supplied to the Public Body when it is in the public interest that similar information continue to be supplied.

Section 15 - Disclosure would be an unreasonable invasion of a third party's personal privacy

The Public Body severed personal information from some records and refused to disclose other records to the Applicant, on the grounds that they contain third party personal information and disclosure would be an unreasonable invasion of the personal privacy of a third party. The Public

Body relies on the presumptions found at clauses 15(4)(b), (d) or (g) of the Act and on subsection 15(1) of the Act. The Public Body argues that the information at issue was not disclosed because it relates to employment history, and contains personal information of third parties.

The Public Body argues that these records contain not only identifiable personal information of third parties, but also the personal opinions of those third parties, as well as personal information concerning its employees. Citing *Dufferin Peel Catholic District School Board* 2000 CanLII 21016, the Public Body points out that this category of personal information falls under subclauses 1(i)(i), (vii), (viii) and (ix) of the FOIPP Act.

In determining whether the disclosure of the information at issue would constitute an unreasonable invasion of a third party's personal privacy, the Public Body considered the circumstances set out in clauses 15(5)(a), (e) and (f) of the FOIPP Act. The Public Body argues that clause 15(5)(a) applies because the situation has already been publicly scrutinized through the mediation process, and any further public scrutiny by the disclosure of the information would not be desirable. Clause 15(5)(e) of the FOIPP Act requires that consideration be taken of whether the third party would be exposed unfairly to financial or other harm. The Public Body submits further that a member of the Mediation Committee explicitly told the persons appearing before the Committee that what they said would be held in confidence. [clause 15(5)(f)] For these reasons the Public Body submits that the "personal information collected was supplied in confidence and/or is confidential under s. 45(2) of the *School Act*".

The Public Body submits that all of the records at issue in this category contain information that is an exception to disclosure under subsection 15(1) of the FOIPP Act, even if the application of other sections of the FOIPP Act is denied by the Commissioner.

Section 22 - Advice from officials

The Public Body refused to disclose some records to the Applicant in reliance on clause 22(1)(a) of

the FOIPP Act, where disclosure could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body. With respect to its arguments under section 22 of the Act, the Public Body quotes the previous Commissioner in *Prince Edward Island (Tourism Re)*, 2007 CanLII 55713, Order No. 07-001 (PEI P.C.) at page 13, as follows:

> Section 22(1)(a) is a discretionary exception and refers to the definition of "deliberation" and "consultation". These terms are given appropriate definitions in the FOIPP Coordinators' Manual as follows:
>
> > "deliberation" is a discussion or consideration by a group of individuals of the reasons for and against a measure;
> >
> > "consultation" is an activity where the views of one or more individuals are sought about the appropriateness of particular proposals or suggested actions.

Section 25 - Legal Privilege

The Public Body refused to disclose some records pursuant to clause 25(1)(a) of the FOIPP Act, as constituting information that is subject to either legal privilege or solicitor-client privilege. The Public Body also relies on subclause 25(1)(b)(iii) of the FOIPP Act, as constituting information that was prepared by or for an agent or lawyer of a public body in relation to a matter involving the provision of legal services.

The records at issue deal with information submitted to the members of the mediation committee or regarding the mediation process, as well as notes taken by the head of the Public Body on a meeting held with its lawyer and human resource staff, and records concerning the legal costs and fees associated with retaining a lawyer to draft a letter to the Applicant regarding the school issues and ensuing mediation.

The Public Body submits that legal privilege can be extended to include the mediation process, stating at page four of Volume I of its submissions that "[t]he privileges relied upon by the [Public

Body] in relation to these records are recognized common law privileges, that is, mediation and/or settlement privilege." The Public Body argues that the ministerial directive to hold the mediation was issued pursuant to the *School Act*, and that the Public Body was required to comply; therefore making the directive "mandatory in effect." The Public Body refers to several cases that recognize mediation privilege, and refers to Ontario's *Civil Procedure Rules*, as well as legal commentary on mediation privilege, including Wigmore on *Evidence*.

The Public Body argues that Wigmore's four conditions should be applied in determining whether privilege exists, as cited in *Rudd*, at paragraphs 26 and 29, and argues that this case "makes it clear that mediation privilege is based on the common law, and applied even in the absence of any statutory provision or rule."

The Public Body quotes parts of paragraphs 108 and 110 in Pepper, another case that refers to Wigmore's four conditions, as follows:

> The important and personal information disclosed to the mediator during caucuses, which in turn assists the mediator in resolving the dispute based on the parties' interests, needs, wants and desires, is also a vital part of the resolution process. Without the guarantee that information disclosed is confidential, mediation will not be productive.
> ...
> Accordingly, mediation works best if the parties are assured that their discussions with each other and with the mediator will be kept confidential.

The Public Body further cites at paragraph 117 of *Pepper*, in a reference to *R. v. Gruenke* 1991 CanLII 40(S.C.C.), that there is "an arguable case for a *prima facie* protection of communications exchanged during mediation where these communications are linked with the effective operation of an adjudication process recognized by state."

The Public Body submits that the mediation-related records at issue that were not disclosed to the Applicant have mediation privilege, in that they meet Wigmore's four conditions. These conditions are: (i) that the communications originated in confidence in that the submissions to the mediation

committee address the performance of an employee, and thus are confidential under s. 45(2) of the *School Act*; (ii) that the confidentiality is essential to the maintenance of the relationship; (iii) that the relationship at issue must be "sedulously fostered"; and (iv) that there is public interest in observing confidentiality.

The Public Body acknowledges that a decision under section 25 of the FOIPP Act is discretionary, and sets out its reasoning at page 16 of Volume I of its submissions as follows:

> In exercising its discretion, the head took into account:
> - The objects or purposes of the *Act,* including the fact that it favours disclosure;
> - the universal recognition of the importance of maintaining the confidentiality if mediation processes are to be effective at all;
> - the importance of having an effective and inexpensive means of resolving disputes between school principals and school councils.

The Public Body refused to disclose records related to obtaining the advice of a lawyer and relies on Order P-1631, arguing that "solicitor/client privilege extends to the seeking of legal advice" [page 23, Volume I, emphasis added]. The Public Body submits that it considered the following in accordance with section 25 of the FOIPP Act:

- the objects and purposes of the *Act,* including that it leans in favour of disclosure;
- the desirability of keeping communications with its solicitor confidential, and to prevent its disclosure "to the world";
- the fact that the Applicant is a person who was adverse in interest to the [Public Body];
- that there could be litigation between the [Public Body] and the Applicant;
- the disclosure of this information could be used by the Applicant to retaliate against or harass third parties.

In respect of the cost of obtaining legal advice, the Public Body further submitted that even if the disclosure of the amounts of the invoices do not reveal privileged, identifying information, the total amounts cannot be broken down to reveal the exact cost of preparing the letter in question.

The Public Body also submits that some of the records that are categorized as mediation records that the Public Body refused to disclose under section 25, also qualify for exemption under section 22, being advice, proposals, recommendations, analyses or policy options developed by or for a public body.

Section 27 - Information available to the public

In respect of legislation, regulations and policies that are available to the public, the Public Body cites clause 27(1)(c) of the FOIPP Act, because under this section it is not required to provide copies of publicly available records.

Submissions of the Applicant

The Applicant in her response to the submissions of the Public Body says that she found the volume of documentation submitted was overwhelming. The Applicant notes that

> Volume I mostly dealt with the reasons why I could not have the information that I was not provided, namely Volume II and the supporting affidavit of [head of Public Body]. Volume III dealt with numerous precedent cases where information was not released for one reason or another. I am not a lawyer; however, from my perspective there seems to be a hair line between when you can release information and when you can't.

In support of her position, the Applicant attached correspondence from the Chair of the Mediation Committee that contained an invitation to attend a meeting of the committee to make presentations. The Chair advised that all the parties involved would have an opportunity to hear what was said, and that the presentations would be recorded. The Applicant cites from the *Pepper* case, in Volume I of the Public Body's submissions, as follows:

> Mediation would not survive long if parties were not prepared to accommodate each other by exchanging available information in order to explore settlement possibilities.

and ... This cooperative approach is one of the key reasons for mediation's success

The Applicant submits that accusations that were made against her must be substantiated and that Volume II of the submissions of the Public Body, and the records to which she was denied access, would assist her in substantiating these accusations.

Reply by Public Body

In its reply, the Public Body submits that the original intent was to have the parties meet together with the Mediation Committee; however, the Applicant did not attend the meeting. The Public Body argues that by this absence, the Applicant gave up any opportunity to receive information from the meeting that was held.

VI. ANALYSIS

This was a complex investigation, involving arguments on several sections of the FOIPP Act. I have read every record provided by the Public Body, with the application of the various sections of the FOIPP Act in mind. In some cases in my analysis, where I determine that non-disclosure of a record was in accordance with a section of the FOIPP Act, then the application of that section is sufficient to determine the matter. If non-disclosure is determined to be correct with respect to a record, I do not consider it necessary to analyze arguments on other sections of the Act concerning non-disclosure of that same record. However, I will comment further where I consider it to be appropriate.

1. Section 4 – Records not in the custody or under the control of a public body

This issue is a question of the application of the FOIPP Act. The Applicant requested access to the qualifications or credentials of the mediator, information regarding the number of cases decided by that mediator, and similar information. The Public Body argued that such information did not fall

under the FOIPP Act since it was information that was not in the custody or under the control of the Public Body as required by section 4 of the Act. The Public Body argued that therefore section 8 of the FOIPP Act did not apply, meaning that the Public Body had no duty to assist the Applicant to find that information. Although it was reasonable for the Public Body to consider section 4 of the FOIPP Act, I think that it misapprehended the import of section 4. Section 4 of the Act is an application section; it says the Act applies to all records in the custody or under the control of a public body. Section 4 does not say that the FOIPP Act does not apply to a particular public body that does not have the records; instead the application is to the records themselves and whichever public body has the custody or control of the records. Thus, if such records exist, they are subject to the FOIPP Act and an applicant has a right of access to the records subject to the other provisions of the Act. This is not to deny the Public Body's right to argue that it does not have the custody or control of such records.

The next step, for a public body that does not have custody or control of the records at issue is that the public body should consider section 13 of the FOIPP Act. Section 13 provides for situations where a (a) a record was produced for another public body; (b) another public body was the first to obtain the record; or (c) the record is in the custody or under the control of another public body. In this case if there was any reason to believe that another public body would have such records, then the Public Body should have considered whether the access request should be transferred to the other public body. In the circumstances of this case there were many complex issues involved, and the Public Body did a good job of analyzing and providing statutory and caselaw arguments in support of its handling of the records at issue. I think the Public Body happened to miss the implications of section 13, which in any event is discretionary in nature. I do suggest that the next time the Public Body finds that it does not have custody or control of the records requested, it should consider making a section 13 referral to another public body that might reasonably be thought to have such records.

2. Subsection 14(1) – Disclosure would reveal labour relations information

Subsection 14(1) of the FOIPP Act says (relevant provisions),

> 14. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant information
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> (a) that would reveal
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
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> (b) that is supplied, explicitly or implicitly, in confidence; and
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> (c) the disclosure of which could reasonably be expected to
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

The Public Body relies on subsection 14(1) of the FOIPP Act for its refusal to disclose labour relations information. Each of the three clauses of subsection 14(1) of the Act must be met. I am satisfied that these records fulfill the conditions set out in each of clauses (a), (b) and (c) of subsection 14(1), in that they contain labour relations information, supplied in confidence and that disclosure of the records could result in such information no longer being supplied to the Public Body when it is in the public interest that similar information continue to be supplied. Subsection 45(2) of the School Act is indicative of the confidentiality of these records and I do not see anything in the FOIPP Act that would abrogate that confidentiality. Thus, the Public Body was correct in refusing to disclose these records in accordance with subsection 14(1) of the FOIPP Act.

3. Section 15 – Disclosure would be an unreasonable invasion of a third party's personal privacy

Personal information was severed from some records, and other records were not disclosed in their entirety by the Public Body on the grounds that the undisclosed information contains the personal information of third parties. The Public Body submits that access to these records would be an unreasonable invasion of a third party's personal privacy under subsection 15(1) of the FOIPP Act,

and the Public Body relies on the presumptions set out in clauses 15(4)(b), (d) and (g) of the FOIPP Act.

Subsections 15(1), (4) (relevant provisions) and (5) of the FOIPP Act are as follows:

> 15. (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> (b) the personal information was compiled and is identifiable as part of a law enforcement matter, except to the extent that disclosure is necessary to prosecute in respect of , or to continue or conclude, the matter;
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> (d) the personal information relates to employment or educational history;
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> (g) the personal information consists of the third party's name where
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> (i) it appears with other personal information about the third party, or
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> (ii) the disclosure of the name itself would reveal personal information about the third party; or
>
> (5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Prince Edward Island or a public body to public scrutiny;
>
> (b) the disclosure is likely to promote public health and safety or the protection of the environment;
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> (c) the personal information is relevant to a fair determination of the applicant's rights;
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> (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;
>
> (e) the third party will be exposed unfairly to financial or other harm;
>
> (f) the personal information has been supplied in confidence;
>
> (g) the personal information is likely to be inaccurate or unreliable;
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant; and

(i) the personal information was originally provided by the applicant.

When a public body determines whether section 15 is applicable to particular records, it must look at the whole of section 15. Subsection 15(5) requires a public body to consider the relevant circumstances, including those set out in that subsection. In my opinion, the rationale of subsection 15(5) is to provide guidance as to the types of relevant circumstances that should be considered by a public body in determining the application of section 15 as a whole, and the application of subsection 15(1) to a particular case. I am satisfied that the Public Body did consider the provisions of subsection 15(5) before determining that it was required by subsection 15(1) to refuse to disclose certain records. I am also satisfied that none of the records fell under subsection 15(2) of the Act. The Public Body correctly relied on the presumptions found in subsection 15(4) at clauses (b), (d) and (g) to reach the conclusion that it was required to refuse to disclose the records in accordance with subsection 15(1) of the FOIPP Act.

4. Section 22 – Advice from officials

While it is clear that section 22 of the FOIPP Act is a discretionary exception to disclosure, section 22 sets out clear examples of the kinds of records the head of a public body can refuse to disclose under the section. Reading the provisions of subsection 22(1) of the Act as a whole, it is clear that the records that would fall under the subsection are records related to the everyday management activities of a public body, whereby it plans for its operations and programs, including consultations with, and advice from, its officers or employees. These are clearly matters that should not be prematurely disclosed before the plans, policies, programs or other activities are developed or implemented. In addition, subsection 22(2) of the Act sets out the types of such records that should be disclosed. That is not to say that information described by subsection 22(1) cannot be released, because a refusal to disclose under the subsection is discretionary. But the discretion is that of the head of the Public Body, and so long as the head of the Public Body has considered section 22 of the FOIPP Act as a whole, and the records do not fall under subsection 22(2), then the Public Body has the discretion to refuse to disclose records under subsection 22(1).

5. Section 25 – Legal Privilege

The Applicant's view of the mediation is that she is entitled to all information that was before the mediation committee, including any comments that may have been made about her, and she seems to equate that with Volume II of the Public Body's arguments. The Applicant says "Volume I mostly dealt with the reasons why I could not have the information I was not provided, namely Volume II and the supporting affidavit of the head of the Public Body." In further support of her argument that Volume II and the affidavit should be given to her, the Applicant quotes an email from the chairperson of the mediation committee that "All the parties involved will have the opportunity to hear what was said". The Applicant says: "I feel that I should receive the information I requested for the very reason that [the Chair] said we would."

Minister's Directive No. MD 99-04 School Councils provides for mandatory mediation in section 14, as follows (in part):

> 14. Mediation shall be used in instances where there is a dispute between parents of a school advisory body and the principal with regard to the role of the advisory body, or with regard to the formation of a school council where no such representative school body exists, and the mediation process shall be as follows:
>
> > e. The School Council Mediation Committee shall determine its own procedures.
> >
> > f. The School Council Mediation Committee shall issue a written decision within 30 days following the referral of the matter from the Unit Superintendent and the decision of the School Council Mediation Committee shall be final.

It should be noted that a mediation committee established under the Minister's Directive determines its own procedure and its decision is final. It is clear that the Applicant did not meet with the Mediation Committee at the same time as the Public Body. It is not within my jurisdiction to question or look into the conduct of the mediation or whether information that arose from it should have been made available to the Applicant by the Mediation Committee. The procedure of the mediation is irrelevant to a FOIPP request; only the application of the FOIPP Act to mediation

related documents is relevant to this review.

The Public Body relies on legal privilege as a ground to refuse the disclosure of information respecting the mediation to the Applicant is set out in clause 25(1)(a) of the FOIPP Act, which says:

> 25. (1) The head of a public body may refuse to disclose to an applicant
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege;

Regarding the Public Body's arguments dealing with mandatory mediation under the Ontario Civil Procedure Rules, I hesitate to give weight to the arguments respecting mediation privilege of such a mandatory mediation because the context is the Civil Procedure Rules of Ontario. I cannot find any corresponding mandatory mediation in the PEI Civil Procedure Rules ("Rules"), nor is there any mention of confidentiality for reports of a family mediator appointed under Rule 70.21. A family mediator is the only kind of mediator referred to in the PEI Rules that I can find. Similarly, there is nothing relevant to this issue on settlement as it is found in the PEI Rules. However, a mediation held in accordance with a Minister's Directive under the *School Act* is mandatory in nature, as shown by the language of paragraph 14 of the Minister's Directive. Paragraph 14 says, "Mediation shall be used in instances where there is a dispute between parents of a school advisory body and the principal..."

The Public Body provided examples and precedents to support its argument that mediation privilege is a type of legal privilege contemplated by clause 25(1)(a) of the FOIPP Act. The Public Body submits that the mediation was required by a Minister's Directive under the *School Act* and met Wigmore's four conditions to determine that the communications involved in the mediation were privileged.

In *Rudd v. Trossacs Investments Inc.* 2006 CanLII 7034 (Ont. S.A.), Swinton, J. reviewed the case law in respect of mediation privilege. At pp. 25-30, the justice says:

> [26] Common law principles have recognized a privilege for confidential communications in certain important societal relationships. In *Slavuytych v. Baker* (1975), 55 D.L.R. (3d) 224, the Supreme Court of Canada held that the four conditions from Wigmore on Evidence should be applied to determine whether communications are privileged (at 228):
>
> > (1) The communications must originate in a confidence that they will not be disclosed.
> >
> > (2) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
> >
> > (3) The relationship must be one which, in the opinion of the community, ought to be "sedulously fostered".
> >
> > (4) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.
>
> [27] In *Slavuytych*, the Court held that a document submitted in a university tenure process was privileged – in part because the document was labeled "confidential", and in part because of the importance of confidentiality in the tenure process, where individuals are asked to give their frank opinion of colleagues.

Swinton, J. also refers to a more recent case from the Supreme Court of Canada, saying:

> [28] In *M.(A.) v. Ryan* 1197 CanLII 403 (S.C.C.), (1997), 143 D.L.R. (4th) 1 (S.C.C.), the Supreme Court reaffirmed the approach in *Slavuytych*, making it clear that privilege is to be determined on a case by case basis (at para. 20).
> [The Ryan case was related to psychiatrist-patient records – comment mine]

In my opinion, the Supreme Court of Canada's views on the existence of legal privilege, outside of solicitor-client privilege or parliamentary privilege, still prevails. Thus, it is a matter of determining whether, on the facts of the case, the conditions set out in *Wigmore on Evidence* have been met.

To summarize the conditions as they apply to this case:

Wigmore's first condition – communications originated in confidence. I agree with the Public Body that the communications in respect of the mediation originated in confidence. It is clear that the mediation addressed issues respecting an employee of the Public Body, and such matters are, under subsection 45(2) of the *School Act*, confidential. Such confidentiality was obviously an essential element in the sharing of employee information by the Public Body with non-employees who were members of the mediation panel.

Wigmore's second condition – confidentiality is essential for the mediation. The mediation was mandatory under a Minister's Directive made under section 8 of the *School Act*. The fact that the employer and employee involved had no choice but to go to mediation in itself makes confidentiality essential in order for the candid information to be brought before the mediation panel.

Wigmore's third condition – the relationship must be sedulously fostered. This condition means that in order for the mediation process to work, care and diligent effort must be taken to ensure that the relationship between the parties is such that the confidentiality of information obtained through the mediation is maintained. This relationship is the relationship between the parties to the mediation and the Mediation Committee itself. I agree that sedulous fostering of the confidential relationship between the parties is essential to the mandatory mediation that occurred in this case, and thus the third condition of Wigmore is met.

Wigmore's fourth condition – the injury to the relationship of the parties to the mediation caused by disclosure must be greater than the benefit gained by disclosure (i.e., through an access to information request). This kind of mediation would not be successful if there were any question of the release of the confidential information

involved in the mediation. It is clear that candid and detailed information would not be available to the mediation panel if the information gathered by the mediation panel was subject to disclosure. This meets the premises of Wigmore's fourth condition.

As discussed above, I agree with the Public Body that mediation privilege meets the four conditions described by Wigmore. As a basic principle of statutory interpretation, the use of the term "legal privilege" in clause 25(1)(a) of the FOIPP Act must be necessarily broader than the term "solicitor-client privilege", which latter term is used in a subordinate sense to the larger category "legal privilege". The clear intent of clause 25(1)(a) is that legal privilege encompasses more that the two named privileges. Legislators do not use words that have no meaning, and to equate the terms "legal privilege" and "solicitor-client privilege" would result in the term legal privilege being rendered meaningless. This is particularly so since there is another term used in the clause as an example of legal privilege, that being "parliamentary privilege". I agree with the Public Body that mediation privilege is a necessary element to a mandatory mediation. I find that mediation privilege is an example of legal privilege in the same manner as solicitor-client privilege is an example of legal privilege. As a result, the Public Body was correct in refusing to disclose records related to the mediation in accordance with section 25 of the FOIPP Act.

6. Section 27 – Information available to the public

Subsection 27(1) of the FOIPP Act says:

27. (1) The head of a public body may refuse to disclose to an applicant information
(a) that is available for purchase by the public;
(b) that is to be published or released to the public within 60 days after the applicant's request is received; or
(c) that is otherwise readily available to the public.

In some cases an applicant might seek records that are already available to the public, whether on a website or in printed form. Subsection 27(1) is intended to relieve a public body from searching for records or providing them in cases where such records are already available or are soon to be available to the public. Records that fall within that category are legislation, regulations and policies that are already posted on a government website. I agree with the Public Body that it is not required to provide the Applicant with these records in response to the revised access request.

7. Submissions of a party that contain personal information about a third party

[Volume II and affidavit submitted by the Public Body]

The Public Body's submissions to this review included three volumes. Volume II [including the affidavit submitted by the Public Body] of the Public Body's submissions included personal information about third parties. The Public Body requested that a copy of Volume II not be sent to the Applicant. Having examined Volume II, it is clear that the information contained in Volume II is virtually all in the category of personal information about third parties. The Applicant has indicated her wish that Volume II should be released to her. The Applicant submits that accusations have been made about her and that Volume II would help her to substantiate those accusations.

As Commissioner, I am also subject to the FOIPP Act. In my opinion, I am required to exclude Volume II from the information sent to the Applicant on the grounds that the harm that would be caused to the privacy rights of third parties by the disclosure of their personal information in Volume II outweighs any need to give access to these particular records. Under subsection 50(1) of the FOIPP Act, my functions as Commissioner include the responsibility "for monitoring how this Act is administered to ensure that its purposes are achieved". Certainly one of those purposes of the FOIPP Act that the Commissioner must monitor and protect is the privacy rights that third parties have in their personal information. The privacy rights of third parties that a public body is required to protect under section 15 of the FOIPP Act would be meaningless, if the Commissioner does not also protect those rights. In addition, clause 56(2)(a) of the FOIPP Act says:

> 56(2) The Commissioner may disclose or may authorize anyone acting for or under the direction of the Commissioner to disclose, information that is necessary to
>
> (a) conduct an investigation or inquiry under this Act; or

In most cases, the process used in the inquiry includes giving the submissions of each party to the other party in their entirety. However, the discretionary nature of clause 56(2)(a) means that I can determine whether it would better serve the purposes of the FOIPP Act to withhold some part of the submissions of a party if I consider it to be necessary to achieve the purposes of the FOIPP Act.

In addition, the Public Body submits that subsection 64(3) of the FOIPP Act applies:

> 64(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review shall be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.

Subsection 64(3) of the FOIPP Act means that parties have a right to make representations (submissions) to an inquiry by the Commissioner, but the parties have no entitlement to have access to the representations of the other parties. This section is clearly intended to provide a discretion to the Commissioner in an inquiry to hold back submissions which might contain the personal information of third parties, or for other reasons that may infrequently arise.

In light of the above discussion, I have carefully considered whether I should or should not have withheld Volume II of the Public Body's submissions (representations) from the Applicant. The essential content of Volume II is third party personal information, and it is my opinion that there are good and overriding privacy reasons to refrain from releasing Volume II to anyone.

VII. FINDINGS

My findings are as follows:

1. I find that the Public Body was entitled to refuse access to records that were not in its custody or under its control. I find that the Public Body should have considered whether the access request for these records could have been transferred to another public body under section 13 of the FOIPP Act.

2. In respect of the records that the Public Body refused to disclose in reliance on subsection 14(1) of the FOIPP Act, I make the following findings:

> (1) I find that subsection 45(2) of the *School Act* does provide proof of the confidentiality of employee records, which is an important element for consideration in a FOIPP request, even though the FOIPP Act prevails over the *School Act.*
>
> (2) I find that the records that the Public Body refused to disclose in reliance on subsection 14(1) of the FOIPP Act were correctly refused because the records met the three criteria required by clauses (a), (b) and (c) of subsection 14(1).

3. I find that the records that the Public Body refused to disclose under section 15 of the FOIPP Act were correctly refused, because disclosure of the information would be an unreasonable invasion of a third party's personal privacy under subsection 15(1) of the FOIPP Act.

4. I find that the records that the Public Body refused to disclose in reliance on subsection 22(1) of the FOIPP Act were correctly refused because disclosure of the records could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body.

5. I find that mediation privilege is a type of legal privilege contemplated by section 25 of the FOIPP Act. I find that the mediation that occurred in this case meets the four conditions known as Wigmore's conditions and is subject to mediation privilege. I find that the Public Body correctly refused to disclose the records related to the mediation held in accordance with a Minister's Directive under section 8 of the *School Act,* because the records fell within the legal privilege exception to disclosure pursuant to clause 25(1)(a) of the FOIPP Act.

6. I find that the Public Body correctly refused to provide the Applicant with information that is available to the public pursuant to subsection 27(1) of the FOIPP Act.

7. In respect of Volume II of the Public Body's submissions, I find that the arguments presented in Volume II are comprised of information in the nature of third party personal information. I find that I have the discretion under clause 56(2)(a) or 64(3) of the FOIPP Act to withhold Volume II from disclosure to the Applicant. In addition, I find that exercising my discretion under clause 56(2)(a) or 64(3) is related to the functions of a Commissioner under subsection 50(1) in administering the FOIPP Act to ensure that its purposes are achieved.

VIII. ORDER

Thank you to the parties for their submissions.

Given my findings on the issues in this review, I order that this matter is concluded.

In accordance with subsection 68(1.1) of the FOIPP Act, the Public Body shall not take any steps to comply with this order until the expiry of the time period for bringing an application for judicial review of this order under section 3 of the *Judicial Review Act.*

_____

Judith M. Haldemann
Acting Information and Privacy Commissioner

SCHEDULE A

Request to Access Information # 1

I would like to request information with respect to the Mediation Meeting of April 27, 2007. [Mediation Committee Report was April 2, 2007] I would like to receive a copy of any records related to the minutes/notes and discussion papers from the Mediation meeting, including all e-mails, letters, phone transcripts and call logs. I would like to receive a copy of all documentation including all submissions from all parties involved in the mediation. I would like to receive all material pertaining to this Mediation and pertaining to the belief that something needed to be done in regards to formal steps put in place for the upcoming school year. Please include identification of who or what was verbalized, written or otherwise and under what belief these steps were deemed necessary. See additional list attached regarding the Mediator.

Also, please forward to me the following information with respect to the Mediator:

- The criteria used to choose the mediator in the Mediation of April 12, 2007. [Mediation Committee Report was April 2, 2007] Please include the criteria that relates to choosing an employee of the Department of Education rather than an independent mediator.

- With regard to the mediator who was chosen for the Mediation held on April 27, 2007, [Mediation Committee Report was April 2, 2007] please forward me a copy of the mediator's qualifications and credentials, along with the number of cases this mediator mediated on prior to April 12, 2007.

- Please include all letters, e-mails, phone logs, minutes of meetings or discussions in relation to the mediator as it pertains to myself and my children [names].

Request to Access Information # 2

I would like to receive information and all records including invoices concerning the amount of legal costs and fees associated with retaining the Law Firm, [name], in regards to a legal letter addressed to me dated June 18, 2007.

Request to Access Information # 3

I would like to receive information with respect to the Policy and Guidelines of the [Public Body] with regards to retaining Legal Counsel.

I would like to receive information, including any records, letters, e-mails, phone logs, minutes of meeting, discussion, decision papers, either verbal or electronic, which regard to the decision to retain Legal Counsel which resulted in the legal letter addressed to me and dated June 18, 2007.

Request to Access Information # 4

I would like to receive copies of mine, my children and my husband's [names] files, including memos, letters, e-mails, telephone logs/transcripts, minutes of meeting, or discussions in relation to myself, my children and my husband, together with documents both electronic and otherwise that were released or given to or discussed with the Law Firm [name], the principal of [name] School, the School itself and the [Public Body].

Request to Access Information # 5

I would like to receive information regarding legislation on: 1) confidentiality policies, 2) confidentiality rules that are in place to protect one's privacy, 3) Who has access to one's confidential information. Also, I would like to receive information on where or to whom my

personal confidential information was shared - i.e. politicians, trustees, Home & Schools (local and provincial), school members, clergy, [Public Body], [name of organization] - please include any e-mails, phone call logs, transcripts, letters, memos, meeting notes, discussion papers, communication (verbal, electronic and otherwise).