

**ALBERTA
INFORMATION AND PRIVACY COMMISSIONER**

**Report on Investigation into Complaints
Regarding the Collection, Use and Disclosure of Personal Information**

March 23, 2001

Grande Yellowhead Regional Division

Investigation #2028 and #2036

I. THE COMPLAINT

[para 1.] On October 2, 2000, a complainant filed a privacy complaint against the Grande Yellowhead Regional Division ("the Public Body"). Subsequently, on October 16, 2000, another complainant filed a complaint concerning the same matter against the Public Body. Both complainants will be collectively referred to in this Report as "the Complainants".

[para 2.] The Complainants' children attend a school (the "School") within the jurisdiction of the Public Body. The Complainants expressed concerns with the production of an Image CD-ROM disk, containing information about their children, at the School. Specifically, the Complainants questioned:

1. Why were parents not informed of the compilation of the Image CD-ROM disk?
2. Under what authority did the School disclose their children's information to a private sector company that was contracted to produce the Image CD-ROM disk?
3. What safeguards were effected to protect the information disclosed from potential misuse?
4. Is the information contained in the Image CD-ROM disk used in accordance with the provisions set out in the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act").

II. THE COMMISSIONER'S AUTHORITY TO INVESTIGATE

[para 3.] Under section 51(1)(a) of the FOIP Act, the Commissioner may conduct investigations to ensure compliance with any provision of the FOIP Act. In addition, section 51(2)(e) of the FOIP Act authorizes the Commissioner to investigate complaints that personal information has been collected, used or disclosed by a public body in violation of Part 2 of the FOIP Act. Accordingly, the Commissioner authorized me to investigate this matter.

III. APPLICATION OF THE FOIP ACT

[para 4.] During the investigation, I presented a number of questions to the Principal of the School (the "Principal") regarding the Image CD-ROM disk. In a written response to my questions, the Principal wrote:

*"...it has been recognized, in court, that while children are in school, school personnel function "in loco parentis", and this requires the school to implement procedures that will, in fact, allow us to act as "responsible parents would"...It may be worth noting that it has been argued, successfully, in court, that when a school acts "in loco parentis" they are not "agents of the state", but de facto parents. **As parents are not subject to any application of the Charter of Rights and Freedoms, or the FOIP Act, when a school is functioning in this capacity, it too should be able to exercise the same degree of care and concerns as any parent, without being answerable to an outside party, such as a Privacy Commission....***
[emphasis added]"

[para 5.] The Principal did not provide any case law, which would support the argument that the Charter or provincial legislation does not apply to a school when it is acting "in loco parentis". I found no provision under the FOIP Act that excludes the School when it is acting in this capacity. Therefore, I do not agree with the Principal's position regarding the application of the FOIP Act.

[para 6.] The FOIP Act was extended to school boards and charter schools on September 1, 1998. The Public Body is an "educational body" as defined under section 1(1)(d)(v) of the FOIP Act and is subject to the FOIP Act. The School is an extension or a part of the Public Body and therefore, is also subject to the provisions of the FOIP Act.

IV. WHAT IS THE IMAGE CD-ROM DISK?

[para 7.] The Image CD-ROM disk is a product offered by a private sector company (the "Company") that was contracted by the School to take individual student and class photographs. According to the Company's information sheet, the Image CD-ROM disk offers *"a very comprehensive but easy to use data base program, into which data can be added, changed or deleted"*.

[para 8.] The Image CD-ROM disk contains images of students photographed and can be used to produce ID cards, student profile sheets, report cards, quick identification in emergencies, newsletter or recognition projects, etc.

[para 9.] The Principal advised that the School decided to purchase the Image CD-ROM disk offered by the Company. In the Principal's opinion, the use of the Image CD-ROM disk is simply a change in storage medium i.e. the Image CD-ROM disk replaced a previous long-standing practice where student pictures were kept either in a Rolodex in the school office or attached to the student record file.

[para 10.] The Principal claimed the School disclosed only the students' names and student identification numbers to the Company. Information regarding a student's name, grade and teacher was provided to the Company by the parents when they completed the purchase form for student pictures.

[para 11.] The Principal also claimed that there was "*one use, and only one use only*" for the Image CD-ROM disk: "*to be used in the case of an emergency when the police need a current picture of a missing child, and the home cannot provide one*".

V. PART 2 OF THE FOIP ACT

[para 12.] Part 2 of the FOIP Act sets out the provisions under which a public body may collect, use and disclose personal information. In order for the provisions of Part 2 of the FOIP Act to apply, the information at issue must be "personal information".

A. Information at issue

[para 13.] The Image CD-ROM disk contains the following data elements: student's photograph, first and last name, grade, name of teacher, and student identification number.

[para 14.] From the information provided during the investigation, it is unclear as to whether or not the student identification number is still a data element of the Image CD-ROM disk. However, as the student identification number is part of the disclosure issue raised by the Complainants and as the Principal said that the School disclosed those numbers, I will consider it as part of the information at issue for this investigation.

B. Is the information at issue "personal information"?

[para 15.] "Personal information" is defined in section 1(1)(n) of the FOIP Act as "recorded information about an identifiable individual", including the individual's name, address, telephone number, race, national or ethnic origin, colour, age, sex, an identifying number assigned to the individual, etc.

[para 16.] A student's name and grade falls under the definition of "personal information" as set out in section 1(1)(n) of the FOIP Act. The Alberta Student identification number is a unique identifier assigned to each student by Alberta Learning. Therefore, the student identification number is also "personal information" under the FOIP Act.

[para 17.] A photograph is a record of a student's facial image. The photograph reveals individual characteristics of the student such as hair, eye, skin color, national or ethnic origin, and gender. As the student photograph is "recorded information about an identifiable individual", it is also "personal information" as defined in the FOIP Act.

VI. ISSUES OF THE INVESTIGATION

[para 18.] The Complainants raised issues regarding the School's use, disclosure and security of their children's personal information. However, in reviewing this matter, I find there is also a collection issue. Specifically, the School receives information regarding the student's name, address, telephone number, etc. when a student registers with the School. However, a photograph of the student is not part of the registration process. By collecting student photographs, the School is collecting personal information that was previously not collected.

[para 19.] The collection issue is relevant regardless of the storage medium. In other words, it does not matter whether the student photographs are contained in a CD-ROM disk or a Rolodex system, the issue is whether the School had authority to collect the photographs in the first place.

VI. DID THE PUBLIC BODY COMPLY WITH THE COLLECTION PROVISIONS OF THE FOIP ACT?

A. Collection of Personal Information - Section 32 of the FOIP Act

[para 20.] In order to fulfill the collection provisions of the FOIP Act, the Public Body must:

1. Have the authority to collect the personal information under section 32 of the FOIP Act;
2. Collect the information directly from the individual the information is about unless the collection falls within one of the listed exceptions listed under section 33(1) of the FOIP Act; and
3. Provide notification as set out under section 33(2) of the FOIP Act when collecting information directly from the individual.

B. Is the collection authorized under section 32 of the FOIP Act?

[para 21.] Section 32 of the FOIP Act authorizes a public body to collect personal information if the collection is expressly authorized by legislation (section 32(a)) or if the collection relates directly to and is necessary for an operating program or activity of the public body (section 32(c)).

[para 22.] The Principal claimed that the information contained in the Image CD-ROM disk is authorized under the *School Act*.

[para 23.] Section 18(1) of the *School Act* authorizes the Public Body to establish a student record "*pursuant to the regulations*". Section 18(8) of the *School Act* authorizes the Minister to make regulations respecting student records. Section 2(1) of the *Student Record Regulation* sets out the information required in a student record such as a student's name, address, telephone number, etc.

[para 24.] Therefore, the collection of personal information listed under section 2(1) of the *Student Record Regulation* (such as the student's name) is in accordance with section 32(a) of the FOIP Act. However, I found no express authorization for the collection of student photographs in either the *School Act* or the *Student Record Regulation*.

[para 25.] The Principal also claimed that Alberta Learning required the collection of student photographs as part of the "student record":

"We are also required to use the Student Cumulative Record folder, produced by Alberta Learning, and it contains a section directing the schools to "attach student photo"."

[para 26.] However, Alberta Learning advised the collection of student photographs is optional, not mandatory for school boards. In 1990, Alberta Education (now Alberta Learning) revised the Student Record Portfolio (this is the folder referenced by the Principal). In its "Guidelines to Accompany the Alberta Education Student Record Portfolio", the section entitled "Optional Information" states certain information such as school pictures is not mandatory for the Student Record Portfolio.

[para 27.] Therefore, I conclude that the School's collection of student photographs is not authorized under section 32(a) of the FOIP Act.

[para 28.] Having said this, I believe schools may have a legitimate reason to collect and retain student photographs. Given the student population of some schools, student photographs may assist in "putting a face to a name". Some schools collect and use student photographs for their student

identification cards, report cards, yearbooks, etc. If a school decides that student photographs are directly related to and necessary for the delivery of its educational services and programs, then the collection may be authorized under section 32(c) of the FOIP Act.

[para 29.] In this particular case, the Principal advised that student photographs were needed to enable the School to provide a current picture to the police in emergency situations where a student is missing and the family cannot provide one. The Principal said this responsibility is in keeping with the School's "in loco parentis" role in emergency situations. I believe there is merit in the Principal's position and therefore find that that the School's collection of student photographs is authorized under section 32(c) of the FOIP Act.

C. Is the manner of collection in accordance with section 33(1) of the FOIP Act?

[para 30.] Section 33(1) of the FOIP Act requires that a public body collect personal information directly from the individual the information is about unless one of the exceptions listed applies.

[para 31.] The Principal claimed the Company is an "employee" of the School in accordance with section 1(1)(e) of the FOIP Act, which states:

1(1) In this Act,

(e) "employee", in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body.

[para 32.] In Order 96-019 and Order 97-003, the Commissioner said that "person" can include an individual or a corporation.

[para 33.] The Principal provided a copy of the Photography Service Agreement between the School and the Company. As the Company was contracted by the School to take student photographs, I accept the Principal's position that the Company was an "employee" of the School as defined by section 1(1)(e) of the FOIP Act for this specific undertaking. Therefore, while the Company is physically taking and processing the photographs, it is the School who is collecting the information.

[para 34.] As the photographs are taken directly from the students, I find that the School's manner of collection is in accordance with section 33(1) of the FOIP Act.

D. Was notification as set out in section 33(2) of the FOIP Act provided?

[para 35.] Under section 33(2) of the FOIP Act, when a public body is collecting personal information directly from an individual, the public body must inform the individual of:

- The purpose for which the information is collected;
- The specific legal authority for the collection; and
- 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 collection.

[para 36.] The Public Body's Student Registration Form contains a notification statement that is in accordance with section 33(2) of the FOIP Act. However, the collection of the student photographs is

not part of the registration process. Therefore, the notification statement on the Registration Form did not apply to the collection of the student photographs.

[para 37.] The Principal advised there was no direct notification to parents about the compilation of the Image CD-ROM disk but that the Image CD-ROM disk was discussed at the September 2000 Annual Meeting and the October 11th, 2000 school council meeting.

[para 38.] Although the Principal was able to provide me with a copy of the October 11th, 2000 school council meeting minutes, the September 2000 Annual Meeting minutes are not available until the next annual meeting. The Principal provided me with a copy of a letter issued to parents on October 25, 2000 regarding the Image CD-ROM disk.

[para 39.] I noted that the October 11th, 2000 school council discussion and the October 25th, letter to the parents were after the privacy complaints were filed with this office.

[para 40.] In reviewing the October school council meeting minutes and the October 25th, 2000 letter to the parents, I find that the documents do not meet the notification requirements set out under section 33(2) of the FOIP Act:

- The focus of both documents is on the storage medium i.e. the Image CD-ROM disk as opposed to the School's collection of student photographs.
- The documents do not directly address the School's authority for the collection of student photographs and the purpose for which that information will be used. The documents do not list an authorized representative of the Public Body who can answer questions regarding the collection.

[para 41.] Parents order student photographs for personal reasons, such as to have a memento of their child at a certain stage of the child's life; to send to relatives and family members, etc. Parents do not order student photographs so that the school may retain copies of the photographs to use for ID cards, report cards, identification, etc. While many parents would likely have no concerns with a school's usage of the photographs for these purposes, it is important to remember that they have a right to be notified of the collection and the usage(s) of that information. The notification requirement under section 33(2) of the FOIP Act is mandatory and the School, as a public body subject to the FOIP Act, must comply with this requirement.

VII. DID THE PUBLIC BODY COMPLY WITH THE USE AND DISCLOSURE PROVISIONS OF THE FOIP ACT?

A. Use of Personal Information - Section 37 of the FOIP Act

[para 42.] Under section 37(1)(a) of the FOIP Act, a public body may use personal information for the purpose for which the information was collected.

[para 43.] The Principal claimed the School collected student photographs for the purpose of releasing a current photograph to police in emergency situations when the family cannot. The Principal provided no evidence during the investigation to indicate that the School used student photographs for any other purpose. Therefore, I find that the School's use of the student photographs is in accordance with section 37(1)(a) of the FOIP Act.

B. Disclosure of Personal Information - Section 38 of the FOIP Act

[para 44.] The Complainants questioned the information disclosed by the School to the Company for the production of the Image CD-ROM disk. In addition, the Complainants questioned whether the Image CD-ROM disk would be disclosed in its entirety to the police or RCMP.

1. Disclosure to Company

[para 45.] The Principal advised that the School provided the Company with students' names and student identification numbers for the production of the Image CD-ROM disk. As the parents also provided student names to the Company when ordering student photographs, the Principal's position is that the School released only the student identification numbers to the Company.

[para 46.] I disagree with the Principal's position. Regardless of other sources of information i.e. parents, the Company did receive student names and identification numbers from the School.

[para 47.] The Principal questioned whether the School's release constituted a disclosure. The Principal argued that the Company was not an "external body", but was "an employee" as defined under section 1(1)(e) of the FOIP Act.

[para 48.] Section 38(1)(g) of the FOIP Act allows a public body to disclose personal information to an officer or employee of the public body if the information is necessary for the performance of the duties of the officer or employee. Therefore, I find that the School's release of information to the Company is a disclosure under the FOIP Act. I then had to consider whether the information disclosed to the Company was "necessary".

[para 49.] The Principal claimed that the Company "*received, and had access to, only as much information as was necessary to prepare the disk to our specifications.*" However, the Principal provided no detail as to what these specifications are and no explanation as to why the disclosures are necessary.

[para 50.] The necessity of disclosing student names is understandable i.e. to match the students to the correct photographs. As student names are also provided to the Company on the purchase order forms, this provides a verification check that the students are correctly matched with their photographs and that their names are spelled correctly. However, the necessity in disclosing student identification numbers is not clear.

[para 51.] In discussions with the Public Body's FOIP Coordinator, I was informed that the Company may not require student identification numbers. The Public Body's FOIP Coordinator indicated that the student identification numbers are used by the Company to sort the student photographs. However, the Public Body's FOIP Coordinator believed the Company could sort the student photographs alphabetically or by class.

[para 52.] The Company's information sheet states "*the CD data is fully sortable*" and can generate class lists, etc. In addition, the Principal's statement "*prepare the disk to our specifications*" leads me to believe that there could be parameters (other than student identification numbers) to sort the data in the Image CD-ROM disk.

[para 53.] As the Principal did not provide any explanation as to why the disclosure of the student identification numbers was necessary, I have no choice but to conclude that the disclosure is not necessary and is not in accordance with section 38(1)(g) of the FOIP Act.

[para 54.] None of the remaining provisions under section 38(1) of the FOIP Act appear to apply to the disclosure of the student identification numbers to the Company. Therefore, I conclude that the disclosure is a violation of Part 2 of the FOIP Act.

2. Disclosure to Police/RCMP

[para 55.] The Principal advised the School would use the Image CD-ROM disk to produce pictures that can be given to the police or RCMP in emergency situations when a student is missing and the student's family is unable to provide a current photograph. The Principal also advised that the School would only disclose a picture of the missing student to the police or RCMP; not the entire collection of student photographs.

[para 56.] Section 38(1)(b) of the FOIP Act allows a public body to disclose personal information for the purpose for which the information was collected. As the student photographs were collected for the purpose of emergency situations and would be disclosed for this same purpose, the disclosure of the student photographs to the police or RCMP in emergency situations would be in accordance with section 38(1)(b) of the FOIP Act.

VIII. DID THE PUBLIC BODY PROTECT PERSONAL INFORMATION AS REQUIRED UNDER SECTION 36 OF THE FOIP ACT?

[para 57.] Section 36 of the FOIP Act states:

36 The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

[para 58.] The Principal advised that the personal information contained in the Image CD-ROM disk is protected as follows:

- Release of information on the Image CD-ROM disk is authorized by only the Principal and two Vice-Principals (in the Principal's absence).
- Knowledge of the location of the Image CD-ROM disk is limited.
- Access to data is password protected and knowledge of the access code is limited.

[para 59.] In my view, these are reasonable security measures at the School site. However, section 36 of the FOIP Act also places a duty on the School to ensure that there are reasonable security measures in place when releasing personal information. I found that the Photography Service Agreement between the School and the Company outlines the products that the Company is contracted to deliver (i.e. student photographs) but contains no privacy protection provisions.

[para 60.] The Principal appears to rely on the "fiduciary relationship" between the School and the Company as adequate protection against potential information misuse. In my view, reliance on a company's reputation is not sufficient as individuals representing parties may change over time, different understandings can arise from verbal discussions, etc. I believe it is reasonable for the School to ensure that future contracts with the Company include privacy protection clauses such as:

1. Information released by the School can only be used for the purpose of taking individual student photographs and the production of the Image CD-ROM disk;

2. Student photographs can only be used for the purpose of producing the packages ordered by the student's family and the School's Image CD-ROM disk.
3. The Company cannot use or disclose the student photographs or the information released by the School for any other purpose without the consent of the particular student's family e.g. marketing purposes.
4. The Company cannot retain copies of student photographs once the contract has expired.
5. The Company must protect personal information received from the School or collected on behalf of the School against unauthorized access, collection, use and disclosure.

IX. SUMMARY OF CONCLUSIONS

1. Collection:

[para 61.] I find that the School's collection of student photographs is allowed under section 32(c) of the FOIP Act. As the photographs are collected from the students, the manner of collection is in accordance with section 33(1) of the FOIP Act. However, I find that the School did not comply with the notification requirement set out in section 33(2) of the FOIP Act when it collected student photographs.

2. Use

[para 62.] I find that the School's use of the student photographs in the event of emergencies is for the purpose for which that information was collected. Therefore, this is in accordance with section 37(1)(a) of the FOIP Act.

[para 63.] If student photographs will be used for other purposes, the School must review these uses to ensure they accord with section 37 of the FOIP Act and notify parents as set out in Section 33(2) of the FOIP Act.

3. Disclosure

[para 64.] The School violated Part 2 of the FOIP Act when it disclosed student identification numbers to the Company. However, the disclosure of student photographs to police or RCMP in emergency situations would be in accordance with section 38(1)(b) of the FOIP Act [disclosure for the purpose for which the information was collected].

4. Security

[para 65.] The School complied with section 36 of the FOIP Act in relation to its security measures at the School site. However, the School did not comply with section 36 in relation to its contractual agreement with the Company.

X. RECOMMENDATIONS

[para 66.] Based on the findings of the investigation, I would make the following recommendations to the head of the Public Body:

1. That the School provide notification statements in accordance with section 33(2) of the FOIP Act regarding the collection of student photographs. The School may wish to include this notification

statement at the beginning of the school year or at the time when student photographs are being taken.

2. That the School stop disclosing student identification numbers to the Company.
3. That the School incorporate privacy protection clauses into its contract with the Company to protect personal information from unauthorized access, collection, use and disclosure. The School may wish to reference the publication produced by the Alberta Government's Information Management and Privacy Branch entitled "*Contract Manager's Guide*" for sample privacy contractual clauses.

X. CLOSING COMMENTS

[para 67.] The Complainants also have a number of issues and concerns that are outside the jurisdiction of the FOIP Act. I would like to encourage the Public Body and the Complainants to resolve these matters in the appropriate forum.

Submitted by,

Marilyn Mun
Portfolio Officer