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Our File: 10-2940
Your File:

July 2, 2014

VIA FAX

Jill Clayton, Information and Privacy Commissioner
Office of the Information and Privacy Commissioner
#410, 9925 – 109 St
Edmonton, AB T5K 2J8

Dear Madam:

Re: Demand for Documents from the Minister of Education

We act for the Alberta Teachers' Association. The Honourable Jeff Johnson, the Minister of Education, has delivered the attached letter dated June 26, 2014 to all 62 School Boards in the Province requiring production of a wide-range of sensitive personal information about teachers from the last decade. We write on behalf of the Association to ask that you conduct an investigation pursuant to section 53(1)(a) of the *Freedom of Information and Protection of Privacy Act* ("FOIP") to ensure compliance with the legislation and to determine if the Minister's demand violates FOIP. We also ask that you consider using your power under section 53(1)(j) to give advice to the heads of School Boards with respect to their rights and obligations under FOIP concerning the demand for disclosure by the Minister. We make this request to ensure that teachers' privacy rights under FOIP are respected and also because the Alberta Teachers' Association is very concerned that the Minister's demand will give rise to inadvertent breaches of FOIP by School Boards unless the Commissioner's advice is provided in advance of the disclosure.

We note the following concerning the demand for information:

- The Minister's demand for documents does not appear to contemplate that FOIP applies. It appears to contemplate that complete files of information from the past decade will be delivered to the Minister without consideration of the FOIP mandatory and discretionary exceptions to disclosure. Certainly the two week deadline does not provide an opportunity for School Boards to conduct a proper review of a decade's worth of documentation and to properly apply the principles in FOIP to the proposed disclosure to the Minister.

- The Minister has asked for “details of cases” over the last decade from every School Board. This demand will include a wide-range of personal information of a very sensitive nature. The information requested is of the type that is either prohibited from disclosure to applicants under FOIP or for which disclosure is presumed to be an unreasonable invasion of personal privacy. For example: the request for information relating to the Board of Reference would constitute information supplied to a person or body appointed to resolve or inquire into a labour relations dispute (section 16(1)(c)(iv)); financial information of a third party (16(1)(a)(ii)); labour relations information of a third party (section 16(1)(a)(ii)); medical history (section 17(4)(a)); employment history (17(4)(c)); and personnel evaluations (17(4)(f));
- The Minister has recently been giving press interviews about the details of certain teacher cases so of course all parties concerned will want to proceed in a careful manner to ensure that any disclosure pursuant to the demand complies with FOIP.
- Section 40(1)(c) of FOIP provides that public bodies may disclose personal information for the purpose for which the information was collected or for a use consistent with that purpose. The Minister’s purpose for seeking the information appears to be related to potential legislative reform of professional conduct and competence processes. This was not the reason the information was collected and is not consistent with that purpose.
- Section 40(4) of FOIP provides that public bodies may disclose information only to the extent necessary to enable the public body to carry out purposes described in section 40(1), (2) and (3) in a reasonable manner. If School Boards are to be compelled to provide any of the information, they will need direction from the Commissioner on how much information to provide.
- The 62 School Boards in the Province are required to provide: “all complaints” filed with the Association; “all information” pertaining to Board of Reference matters; “all matters” relating to teachers resigning, retiring, being suspended or terminated for unprofessional conduct or professional incompetence reasons; and “all information” relating to suspension or termination for matters related to unprofessional conduct and/or professional incompetence. All of this information is required for the period June 2004 to June 2014 and must be provided to the Minister by the deadline of July 11, 2014. We are concerned that the very short time-frame along with the volume of files to be reviewed from the last decade will not provide an opportunity for School Boards to appropriately consider the privacy implications of the requested disclosure. School Boards will be required to weigh the appropriate factors under FOIP and consider disclosure on a document by document and page by page basis. We are uncertain whether School Boards intend to notify affected teachers and provide them with an opportunity to object to the disclosure. The short-time frame provided to School Boards immediately following the end of the school year suggests that affected teachers will not be given any opportunity to object to disclosure of their personal information. Indeed, the proposed

process does not even seem to contemplate that a teacher will be notified of the disclosure.

- The Minister relies on his powers under section 77(1)(a) of the *School Act* to require School Boards to disclose the information and documents. However, we note that if a provision of FOIP is inconsistent with or in conflict with another enactment, the provisions of FOIP prevail unless the other legislation or regulation states that it prevails. The only provisions in the *School Act* that prevail over FOIP are provisions relating to student examinations. (Regulation 186/2008, section 17(1)(d)). Thus, the provisions of FOIP prevail in this case over the *School Act*'s Ministerial power to order production of documents, in the event that they are viewed as being in conflict. If the provisions are not viewed as being in conflict, then the principles concerning disclosure in FOIP must still be respected and disclosure made in accordance with those principles. To allow production of the documents and information without application of FOIP principles would completely undermine the legislation.
- We also note that the *School Act* empowers the Minister to make regulations respecting the collection, use, disclosure, disposal and destruction of personal information within the meaning of the Act by the Minister and School Boards. The Minister has not used his power to make such regulations. In the absence of any guidance in the *School Act* regulations on disclosure, it is even more critical that the Commissioner utilize oversight powers with respect to the Minister's demand for disclosure.
- With respect to section 77(1) of the *School Act*, we note that it is contained within the section of the *School Act* dealing with the operation and management of School Boards. It is not contained within the section of the *School Act* dealing with Employment, Part 4, raising questions as to whether section 77(1) can require disclosure of private and confidential employment information without consideration of the principles in FOIP.

Given the very short time-frame set by the Minister for School Boards to respond, the Association has written the Minister asking him to hold his demand in abeyance pending your consideration of this matter. Respectfully, it may be useful for you to make the same request of the Minister. We are concerned that if School Boards make a rushed decision and begin disclosing a decade of documents without having an opportunity to receive advice from the Commissioner, then the risk is very high that FOIP will have been breached. This would in all likelihood result in a significant number of complaints given the magnitude of the required disclosure, all of which we hope to avoid with your direction.

Thank you for your attention to this matter.

In the event that a signed Complaint Form is required, please see the attached.

Yours sincerely,

Field LLP

James T. Casey, Q.C.

JTC/des

Encls.

cc. The Honourable Jeff Johnson the Minister of Education
School Board Chairs
Mark Ramsankar, President, Alberta Teachers' Association
Dr. Gordon Thomas, Executive Secretary, Alberta Teachers' Association