



Order F22-40

**THE BOARD OF EDUCATION OF SCHOOL DISTRICT 61
(GREATER VICTORIA)**

Jay Fedorak
Adjudicator

August 25, 2022

CanLII Cite: 2022 BCIPC 45
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Summary: An applicant requested from the Board of Education of School District 61 (SD61) copies of statistical reports relating to the number of times students with special needs were removed from classes or excluded from school trips. SD61 released the statistical information for each school listed in the reports but withheld the names of the schools under s. 22(1). It withheld this information on the grounds that disclosure of the numerical values could identify individual students. The adjudicator found that SD61 had correctly applied s. 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(a), 22(3)(d), 22(4).

INTRODUCTION

[1] An individual (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Board of Education of School District 61 (SD61) for copies of monthly reports regarding incidents where students with special needs were removed from classes or excluded from field trips (exclusion reports). SD61 responded by providing copies of the reports indicating the numbers of exclusions for individual schools but withheld the names of the schools under s. 22(1) on the grounds that disclosure of small numerical values could identify individual students and would constitute an unreasonable invasion of their personal privacy.

[2] The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC) of SD61's decision to withhold the information under s. 22.

[3] Mediation by the OIPC did not resolve the matter and the applicant requested that it proceed to an inquiry.

ISSUE

[4] The issue to be decided in this inquiry is whether s. 22 requires SD61 to withhold the information.

[5] Under s. 57(2) of FIPPA, in the case of personal information, the applicant has the burden of proving that disclosure of the information in dispute would not be an unreasonable invasion of a third party's personal privacy under s. 22(1) of FIPPA. However, SD61 has the initial burden to establish the disputed information is personal information.¹

DISCUSSION

[6] **Background** – The applicant is a parent concerned about the adequacy of funding for special needs students. She believes that the real reason that schools exclude students is staff shortages of educational assistants, rather than behavioral issues relating to the students involved, as SD61 claimed. She requested the exclusion reports to determine whether these issues relate only to a small number of schools within the district.

[7] The exclusion reports provide monthly statistics at a school level of the number of times special needs students were sent home or excluded from school trips and other activities. Each special needs student has an individual education plan (IEP) that identifies circumstances where they would work in isolation or avoid certain activities. The exclusion reports refer to incidents of exclusion that would not be covered by an IEP.

[8] **Records at Issue** – The records are a series of monthly reports from September 2018 to November 2019. As directed at a monthly meeting of the Board of Trustees, the superintendent provides a monthly report:

on students with special needs that specifies in unusual circumstances, outside of the student IEP and daily plan, the number of incidents, as per each point: 1. Being asked to stay home; 2. Being sent home; 3. Being dropped off late and/or picked up early by bussing services; 4. Being excluded from field trips; 5. Being sent out of the regular classroom to the Resource Room, or Sensory/Isolation Room, or other space, if no breakout room is available.²

¹ Order 03-41, 2002 BCIPC 49220 (CanLII), paras 9-11.

² SD61's initial submission, para. 15

[9] For months during which there were no reported exclusions, the superintendent generally does not create a report. The only exception was a report for March 2019 that indicated no incidents.

[10] There are seven pages of responsive records, including reports for one unidentified month, December 2018, January 2019, March 2019, June 2019, October 2019, and November 2019.

[11] The reports contain the name of the school and numbers under the following columns:

- Student was asked to stay at home
- Student was sent home
- Student was asked to come late or leave early
- Student was unable to participate on a field trip
- Student was sent out of the class to a space other than self-regulating space

[12] **Information at Issue** – The information SD61 has withheld is the column indicating the name of the school. There are 21 names of schools withheld. SD61 has disclosed all of the numerical values in the reports corresponding to the incidents of the different types of exclusions for each unidentified school. The numerical values are all 5 or fewer, with exception of one value of 6 and one of 9.

Section 22 – harm to third-party personal privacy

[13] The proper approach to the application of s. 22(1) of FIPPA has been the subject of analysis in previous Orders. A clear and concise description of this approach is available in Order F15-03, where the adjudicator stated the following:

This section only applies to “personal information” as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party’s personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party’s personal privacy.³

[14] I have taken the same approach in considering the application of s. 22(1) here.

³ Order F15-03, 2015 BCIPC 3 (CanLII), para. 58.

Step 1: Is the information “personal information”?

[15] Under FIPPA, “personal information” is recorded information about an identifiable individual, other than contact information. “Contact information” is “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”⁴

[16] The central issue in this case is whether the information withheld constitutes personal information. The specific information at issue is the names of the schools where special needs students experienced unplanned exclusions. Normally, the name of a school would not constitute personal information. It would only reveal personal information, if disclosure of the name of the school could enable someone with sufficient knowledge of students at the school to identify the students those numbers represent. This would only occur with respect to statistical reports involving small numerical values.

[17] SD61 submits that, in this case, disclosure of the names of the schools, combined with the numbers of incidents indicated in the reports could enable members of each school’s community to re-identify those students or deduce sensitive personal information about them. Some members of the school community already know the identities of students with special needs, from the students’ educational programs or supports in place. Some members would also be aware of school trips or other activities where certain special needs students did not participate. Comparing this information with unsevered exclusion reports with small numerical values, SD61 says, could enable someone to re-identify the students.⁵

[18] SD61 provides the following example. In the event there was only one school field trip during a particular month where the exclusion report indicates that only one student was excluded from a field trip, parents or students could determine the identity of that student by discovering who was absent that day. Another possible case would be, if anyone knew a particular special needs student missed an activity, but that absence did not appear in the exclusion report, that person could conclude information about the student’s IEP.⁶

[19] SD61 cites the following list of available information, which, combined with unsevered copies of the exclusion reports, could lead to the re-identification of students:

- knowledge of special education teachers;

⁴ FIPPA provides definitions of key terms in Schedule 1

⁵ SD61’s initial submission, para. 36.

⁶ SD61’s initial submission, para. 37.

- eyewitness observations of who was present at particular events or times or who are sent home;
- the applicant's knowledge as a parent in the community;
- the small number of reports; and
- attendance lists and similar records.⁷

[20] The submissions of the applicant do not address whether this information constitutes personal information. They argue merely that disclosure of the names of the schools is desirable for the purpose of holding SD61 accountable.

[21] The circumstances of this case persuade me that disclosure of the names of the schools would provide sufficient contextual information to enable some individuals to identify some of the students, given the small numerical values involved. Therefore, this information constitutes personal information. SD61 has disclosed the total number of exclusions for each month. I find it is reasonable to conclude that the name of the school combined with the small number of exclusions and other information available to teachers, parents and students could identify students that were excluded. SD61 has provided sufficient evidence and explanation to support this conclusion.

Step 2: Does s. 22(4) apply?

[22] SD61 submits that s. 22(4) does not apply as the names of the schools do not fall into any of the provisions of that subsection. The applicant does not contest this point.

[23] There is no evidence before me that any of the provisions of s. 22(4) apply in this case, and none of them appear to me to apply. Therefore, I find that none of the information falls within s. 22(4).

Step 3: Does s. 22(3) apply?

[24] The relevant provisions read as follows:

22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if:

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

...

(d) the personal information relates to employment, occupational or educational history.

⁷ SD61's initial submission, para. 41.

[25] **Section 22(3)(a) medical history** – SD61 submits that disclosing the names of the schools could reveal the special needs status of students, details of their individual educational plans and that the reasons for their absence from school or trips is related to their medical, psychiatric or psychological condition.⁸

[26] The applicant does not comment on the application of s. 22(3)(a).

[27] SD61 has made its case that information indicating that an identifiable student has special needs relates to their medical, psychiatric or psychological condition. As the disclosure of the names of the schools along with the small numerical values could lead some members of the school community to identify some students, I find that s. 22(3)(a) applies and disclosure is presumed to be an unreasonable invasion of privacy.

[28] **Section 22(3)(d) educational history** – SD61 submits that the information about students that may be inferred from the exclusion reports constitutes the educational history of those students.⁹

[29] The applicant does not comment on the application of s. 22(3)(d).

[30] SD61 has satisfied me that information about students' exclusions from classrooms and activities constitutes their educational history. I find that disclosure of the names of the schools would reveal some students' identities and simultaneously reveal details of their educational history. Therefore, s. 22(3)(d) applies and disclosure is presumed to be an unreasonable invasion of privacy.

Step 4: Do the relevant circumstances in s. 22(2) rebut the presumption of unreasonable invasion of privacy?

[31] The relevant provisions read as follows:

22 (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

⁸ SD61's initial submission, para. 47.

⁹ SD61's initial submission, para 48.

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

[32] **Section 22(2)(a) public scrutiny**– The applicant submits that disclosure of the names of the schools is desirable for the purposes of submitting SD61 to public scrutiny. She asserts her belief that the reason for the exclusions were not related to any behavioural challenges on the part of the student but rather to a staffing shortage of educational assistants. She argues that it is necessary to know whether there are any particular schools that are repeatedly short of educational assistants. She submits that students with learning needs are supposed to be guaranteed an education suitable to their requirements and school administration must budget accordingly. She concludes that the failure to disclose the identity of the schools permits them to continue discriminatory practices that harm special needs students.¹⁰

[33] SD61 disagrees with the applicant’s assessment. It submits that the small number of reported exclusions identified in the exclusion reports refutes her allegation of the prevalence of discriminatory practices. Moreover, it asserts that publicly addressing concerns about staffing practices requires information about staffing levels, rather than student exclusions. It concludes that disclosure of the school names would harm the privacy of students without providing any benefits the applicant is seeking¹¹.

[34] I agree that disclosing the names of the schools generally would be desirable for the purposes of subjecting the programs of the public body to public scrutiny. Nevertheless, I do not give this consideration much weight in this case. SD61 has disclosed the total number of exclusions and types of exclusions. I do not see how the disclosure of the names of the schools would provide any significant value with respect to holding SD61 accountable.

[35] **Section 22(2)(f) supplied in confidence** – SD61 submits that the identities of the students subject to the exclusions were supplied in confidence. It cites the requirement in s. 79 of the *School Act*¹² for Boards of Education to keep student records confidential and protect the privacy of students. It adds that information about students’ special learning needs is confidential, and it has always treated this information in a confidential manner.¹³

[36] The applicant does not comment on whether the information was supplied in confidence.

¹⁰ Applicant’s response submission, pp. 1-2.

¹¹ SD61’s reply submission, paras. 6-9.

¹² *School Act* RSBC 1996, ch. 412.

¹³ SD61’s initial submission, paras. 53-56.

[37] I find that SD61 treats information identifying students as having special needs and information about their educational programs in confidence. This is a relevant consideration supporting the withholding of the information at issue.

[38] **Section 22(2)(e) and 22(2)(h) other harms** – SD61 submits that disclosure of the names of the schools would identify special needs students and could cause them embarrassment, stigma and reputational harms. In this case, it would identify students with special needs that have been disciplined or excluded from school. This disclosure could subject them to embarrassment and harm their reputations, as it would create suspicions about their medical condition and behaviour that they would not have the opportunity to refute.¹⁴

[39] The applicant does not comment on the application of ss. 22(2)(e) and (h).

[40] SD61 has persuaded me that the issue of embarrassment or reputational harm is a relevant consideration favouring withholding the information, but I do not give it much weight. Students would be identifiable only to members of the school community who would already know that those students were special needs students. There is no evidence before me that there is a real risk of significant embarrassment or reputational harm.

Conclusion on s. 22(1)

[41] I have found that disclosure of the information at issue would reveal personal information. I have found that none of the provisions of s. 22(4) apply that would have excluded the application of s. 22(1).

[42] I have found that disclosure of the personal information would reveal the students' medical, psychiatric or psychological history, in accordance with s. 22(3)(a). Disclosure of that information is presumed to be an unreasonable invasion of privacy.

[43] I have found that disclosure of the personal information would also reveal the students' educational history, in accordance with s. 22(3)(d). Disclosure of that information is presumed to be an unreasonable invasion of privacy.

[44] I have found that disclosure of the information at issue would be desirable for subjecting the public body to public scrutiny, in accordance with s. 22(2)(a). This is a relevant consideration favouring disclosure of the information, but, as I indicated above, I do not give it much weight in this case.

[45] I find that the students provided their personal information to the schools in confidence, in accordance with s. 22(2)(f). This supports withholding the information.

¹⁴ SD61'2 initial submission, paras. 57-60.

[46] I have also found that disclosure of their personal information could cause the students embarrassment or reputational harm, in accordance with ss. 22(2)(e) and (h). These are relevant circumstances supporting withholding the information, but, as I indicated above, I do not give them much weight.

[47] In assessing the relevant circumstances favouring disclosure and those favouring withholding the information at issue, I find that the latter outweigh the former. Therefore, the relevant circumstances in this case do not rebut the presumption that disclosure of the information at issue would be an unreasonable invasion of the students' privacy.

[48] I also find that the applicant did not make a case that disclosure of the information at issue would not be an unreasonable invasion of the students' privacy. The burden of proof lies with the applicant on this issue, and she has not met the burden of proof.

[49] In conclusion, I find that s. 22(1) applies to the information at issue and SD61 must withhold it.

CONCLUSION

[50] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. I require SD61 to refuse to disclose, under s. 22(1), the names of the schools in the exclusion reports

August 25, 2022

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F20-81791