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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 113-1996
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INQUIRY RE: A decision of the Cowichan School Board to withhold records relating to the development of a five-year plan for School District No. 65 (Cowichan)

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner on May 2, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the Cowichan School Board's decision to withhold records requested by the Cowichan District Teachers' Association (the applicant).

2. Documentation of the inquiry process

On December 20, 1995 the applicant requested a series of records listed as "sources" in a November 1995 Response Document entitled "2000 and Beyond ... A Five Year Plan." On January 12, 1996 the School Board refused to disclose the records to the applicant on the basis of section 91 of the *School Act*. In a January 31, 1996 letter to the applicant, the School Board indicated that it was now withholding the requested records under section 12.1 of the *Freedom of Information and Protection of Privacy Act*. On January 26, 1996 the applicant wrote to my Office and requested a review of the School Board's decision. Subsequently, the School Board raised section 17 of the Act, and the applicant relied on section 13(2).

As noted immediately below, the School Board has now released most of the records in dispute to the applicant and is withholding only selected portions of one of them and the full text of another.

3. Issues under review at the inquiry and the burden of proof

This inquiry deals with the School Board's decision to withhold portions of the requested records under sections 12.1 and 17(1) of the Act. The applicant submitted that disclosure should be made under section 13(2). These sections read as follows:

Local public body confidences

12.1(1) The head of a local public body may refuse to disclose to an applicant information that would reveal

...

b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes holding that meeting in the absence of the public.

....

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

(2) The head of a public body must not refuse to disclose under subsection (1)

...

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

...

(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy,

....

Disclosure harmful to the financial or economic interests of a public body

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

...

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

....

Section 57 of the Act establishes the burden of proof. Under section 57(1), at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to a public body to prove that the applicant has no right of access to the record or part of the record. In this case, the School Board has to prove that, under sections 12.1 and 17, the applicant has no right of access to the records in dispute.

4. The records in dispute

The records originally in dispute consisted of eight reports prepared by administrative officers employed by the School Board and submitted to it for its consideration at an *in camera* Board meeting on March 24 and 25, 1995 to develop a five-year plan for the School District. Six of these have been disclosed to the applicant in their entirety. The remaining records are labeled as follows: Individual School Growth Plans for the Next Five Years (portions withheld); and Special Education at the Year 2000 (entirely withheld).

5. The Cowichan School Board's case

The records in dispute originated as "Briefs" prepared by School Board administrators and committees for a wide-ranging retreat of the School Trustees for Cowichan District held on March 24-25, 1995. The focus was on the preparation of a draft five-year plan, which was subsequently circulated to a number of parties in a printed pamphlet form in November 1995. I have presented below the Board's arguments against disclosure of the records. (Submission of the Board, pp. 1,2)

6. The Cowichan District Teachers' Association's case

The applicant points out that the draft five-year plan indicated that the full briefing records were available at the School District office, and it wants unrestricted access to them. As I deemed it appropriate to do so, I have presented below selected arguments from the submission prepared for it by the British Columbia Teachers' Federation.

7. Discussion

In camera submissions

The School Board designated a number of pages of its submission to me and the statutory declaration of the School Superintendent as being *in camera*. In this case, I believe that the practice may have been a disservice to the applicant and the general public, especially with respect to the arguments under section 17 of the Act, because they are deprived of the full force of relevant argumentation, which in my view is so general in this instance as not to be worthy of *in camera* status. While I find this questionable, there has been no prejudice to the applicant in this case.

I would urge public bodies and applicants to continue to use *in camera* submissions sparingly. The alternative is for me to refuse certain *in camera* submissions and then endure further delay in the review process as parties try to defend their reliance on an *in camera* submission.

Sections D.15 and 16 of the June 1996 Policies and Procedures of my Office reinforce the notion that a submission may be made *in camera* where "it may disclose the contents of the

record in dispute or where it contains information which may be subject to an exception under the Act." Sections 15 and 16 of these policies specifically provide that:

> 15. The Commissioner may receive an *in camera* submission (in whole or in part) from a party where it may disclose the contents of the record in dispute or where it contains information which may be subject to an exception under the Act. A party making an *in camera* submission must give reasons to the Commissioner as to why it should be received *in camera*.
>
> 16. If the Commissioner questions whether a submission should be received *in camera*, the party affected will be given an opportunity to make further representations on the issue before the Commissioner decides if another party is entitled to have access to the submission.

Section 12.1: Local public body confidences

The Board submits that release of the records sought by the applicant "would reveal the substance of the Board's deliberations at the Retreat, a meeting of the Trustees which was authorized by the *School Act* to be held, and was held, in the absence of the public." (Submission of the Board, p. 3) At the opening of the retreat, the School Superintendent informed the Board that their deliberations were *in camera* and would remain strictly confidential. (Submission of the Board, p. 4) However, the applicant is not asking for the substance of the Board's deliberations but for the records that evidently served as background preparation for focused discussion of specific topics.

No minutes were kept at the retreat, and the authors of the briefing materials "were assured that their submissions would not be made public." (Submission of the Board, p. 4) The Superintendent states that he "advised the Authors explicitly that the information provided to the Board at the Retreat would be kept strictly confidential." (Statutory Declaration of Geoff Johnson, paragraph 5) Although I am prepared to accept the accuracy of these two statements, it is advice that the Superintendent can only give in advance on the basis of compliance with the multiple provisions of the Act as discussed below. The applicant has also questioned the adequacy of the evidence advanced by the School District in support of the authors' alleged expectations of confidentiality. (Submission of the Applicant, paragraphs 23 - 26)

The Board has emphasized the importance of its members being free to consider all options for the future at a retreat and to speak freely. (Submission of the Board, pp. 5-6) With respect, this has little to do with the request for records in this inquiry. Release of the remaining source documents would not "reveal the substance of the Board's deliberations at the Retreat." Nor do I find the Board's reliance on certain language in Order No. 8-1994, May 26, 1994, persuasive in this context, not least because there is nothing "oral" in content or origins about the records in dispute. (Submission of the Board, p. 6)

Even if the Board of Trustees spent all of its retreat discussing the source documents, and indeed they did form "the basis and framework for these deliberations," there is nothing in the language of section 12.1 that prohibits their disclosure in support of the draft five-year plan.

(Statutory Declaration of Geoff Johnson, paragraph 11) One can release the source documents without disclosing "the substance of deliberations" about them. There is a critical distinction, in my view, between revealing the "basis" for deliberations and protecting the "substance" of deliberations. As the applicant aptly stated:

> The applicant does not seek information on who voted how; who said what, or even whether background documents or suggestions were discussed. Rather, the information sought would disclose the kinds of policy visions and options, which, presumably, among others, were available for discussion by the governing body of the public body. The documents sought would not indicate how they were dealt with in the meeting, whether any visions or recommendations were accepted, or even if they were considered by the meeting. (Submission of the Applicant, paragraph 17)

Although I accept that the meeting of the Board of Trustees was properly *in camera* under the *School Act*, I find that disclosure of the records in dispute would not reveal the substance of deliberations of this meeting.

Section 13(2): Policy advice or recommendations

I note that the School Board did not rely on section 13 dealing with policy advice or recommendations. However, the applicant submitted that section 13(2)(k) should apply in this case. It states that the head of a public body must not refuse to disclose "a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body." (See Submission of the Applicant, paragraph 11) While I am sympathetic to this argument, I am also sensitive to the fact that the gathering of information from school administrators can be construed as receiving policy advice and options and not as a specific "report" of a task force, committee, etc. as contemplated by section 13(2)(k). I am also sympathetic to the applicant's argument that the records in dispute may fall under the language of section 13(2)(m): "information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy." (Submission of the Applicant, paragraph 13) I can only assume that the School Superintendent referred to the source documents in this manner at the public meeting where the applicant and the media first saw the pamphlet.

Section 13(2) provides that the head of a public body must not refuse to disclose specific kinds of information *under subsection (1)*. Because the School Board did not rely on section 13(1) to refuse disclosure, any determination by me under section 13(2) would be moot.

Section 17(1): Disclosure harmful to the financial or economic interests of a public body

My first Order established that there must be "detailed and convincing evidence of harm" for a public body to exercise its discretion not to release records in dispute under this section. (Order No. 1-1994, January 1, 1994, pp. 10-11) In this inquiry, the School Board argues that the withheld documents are "plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public," and

also "information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party." The Board emphasizes that the Special Education Report contains "a number of plans or proposals relating to the administration of the Board and the management of its personnel which have not been implemented or made public." In particular:

> The severed portions of the School Growth Plans contain specific plans or proposals regarding staffing levels, training, contract negotiations, capital expenditures and budgetary planning. These plans clearly relate to the administration of the Board or to the management of its personnel, and have not been implemented or made public. (Submission of the Board, p. 10)

Although I will test the Board's application of section 17 below when I review the specific records in dispute, my basic point is that it is not enough for the severed material to fall under the language of section 17(1)(c) or (d), because in the language of 17(1) itself, disclosure must also "reasonably be expected to harm the financial or economic interests" of the School Board. I find that the School Board has not proven this to be the case in the circumstances of this inquiry.

The School District has relied on the language of sections 17(1)(c) and (d) to refuse disclosure. But the context in which they were prepared, that is, think pieces for a wide-ranging discussion at a retreat, indicates that the records are not "plans" relating to "the management of personnel of or the administration of a public body...that have not been implemented or made public," or "information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party." (Submission of the Board, pp. 9-14) Thus I agree with the following characterization by the applicant:

> ... the documents would not constitute the economic or financial plans of the public body but rather would provide wide ranging views on 'what initiatives or plans could be implemented in a perfect world.' [a quote from the Statutory Declaration of the School Superintendent] The documents would not disclose any contracts or financial plans which the public body is about to undertake but rather, at best, musings by Administrative officers about what plans could be undertaken without budgetary or contractual limitations. (Submission of the Applicant, paragraph 22)

Documents identified as publicly available

This inquiry raises the interesting issue of what happens when a public body states publicly that certain records are available for review by the public and subsequently discovers, or decides, that this was a mistake. (Submission of the Board, p. 5) I have sympathy for both sides in this debate. As head of a public body myself, I would like to be able to correct an "error" about what specific records are publicly available from my Office. But I also have a responsibility to have systems in place, whether involving myself directly or not, that prevent as

many errors as possible from occurring in this regard. Reviewing the School District's draft five-year plan in advance of distribution involved only thirteen simple columns of print by my count. I am surprised that this release occurred without the involvement of senior management, especially given the change of authorship during the process and the direct involvement of the School Superintendent with the editing of an early draft.

I obviously think that heads of public bodies, including myself and the Superintendents of School Districts, should reflect on the status of records under the Act before they ask for them to be created, prepared, and indeed mentioned in a public document as accessible. This makes sense under the new regime of openness and accountability to the public that the Act promotes. (See Submission of the Applicant, paragraphs 8, 9) In my view, it was fully appropriate for the pamphlet intended for circulation to the general public to indicate that a list of background documents could be consulted at the headquarters of the School District.

I am also pleased in the tangled circumstances of the present case that the School District finally withheld only one of the records in its entirety and selected portions of another one.

Review of the specific records in dispute

The School Board made several paragraphs of argument on an *in camera* basis in order to justify non-disclosure of the "most sensitive" portions of the Individual School Growth Plans and the Special Education Report. It attempts to argue for its position on the basis of both sections 12.1 and/or 17(1)(c) and (d) of the Act (as discussed above). My view, however, is that only section 17 is relevant.

My decision to release most of the small amount of records in dispute is influenced by the fact that they are dated March 1995 and they will not be effectively disclosed to the applicants until the early fall of 1996. The passage of time is relevant to the impact of financial harm.

The Individual Growth School Plans

The School Superintendent asked each of nineteen schools in the District to prepare, in point form, "a brief overview of what you see as being the needs and directions for the next five years ..." The specified headings were programs and learning; facilities; finance; administration; and mission statement. Most of the respondents followed this format. Only one response was withheld in its entirety. In reviewing the severed material, I could find no rationale for withholding it from the applicant.

I find that disclosure of the actual records in dispute cannot reasonably be expected to harm the financial or economic interests of the School District. Even if the applicant learns that one administrator, or indeed several or all of them, favoured a particular course of events in relation, for example, to hiring or reallocating staff or making renovations and repairs at a particular school, the Board has not proven to my satisfaction how this could harm District-wide negotiations or bargaining with various unions, because the views expressed in the planning documents are solely those of specific individuals and not the School District as a whole.

The Special Education Report

This document is three pages long, plus some appendices that appear to be publicly-available information such as one page of a newsletter and a questionnaire. On the surface, this record could be protected from disclosure as "plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public." The problem, however, is that under section 17(1) this information is intended to be "information the disclosure of which could reasonably be expected to harm the financial or economic interests of" the School Board. I fail to see how disclosure of the contents of this report, except for two paragraphs with some possible relevance to financial harm to the School District, would impact adversely on the School Board in this manner.

I conclude that the School Board has failed to prove that sections 12.1 and 17 apply to all of the information in the records in dispute.

8. Order

I find that the head of the Cowichan School Board was not authorized to refuse access to all of the information in the records in dispute under sections 12.1 and 17(1) of the Act. Under section 58(2)(a), I require the Ministry to give the applicant access to the record known as the Special Education Report and to the severed portions of the Individual Growth School Plans, except for a number of paragraphs that I have identified as protectible under section 17(1).

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David H. Flaherty
Commissioner

August 19, 1996