



Order F24-30

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 43

Rene Kimmett
Adjudicator

April 15, 2024

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Summary: An applicant made an access request and a privacy complaint to the Board of Education of School District No. 43 (School District) regarding a single email communication between the School District and an independent school. Initially, the School District withheld the email under s. 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and disagreed with the applicant's privacy complaint. However, during the inquiry, the School District determined that s. 14 did not apply and it disclosed the email to the applicant. It also acknowledged that it disclosed the applicant's personal information without authority under FIPPA. The adjudicator determined that the issues in dispute were moot and there were no factors that warranted continuing the inquiry. Therefore, the adjudicator cancelled the inquiry.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, SBC 1996, c. 165., ss. 58(1), 58(2)(a), 58(2)(b), and 58(3)(e).

INTRODUCTION

[1] This decision deals with the Board of Education of School District No. 43's (School District) request that the Office of the Information and Privacy Commissioner (OIPC) exercise its discretion to not conduct an inquiry into an applicant's request for review and privacy complaint on the basis that the issues are moot.

[2] A parent of a student (applicant) asked the Board of Education of School District No. 43 (School District) for access to an email sent from a School District employee to legal counsel for an independent school (Independent School). The applicant also complained to the School District that, through this email, the School District disclosed his personal information without authorization under the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The School District responded to the applicant by informing him that it was withholding the email under s. 14 (solicitor-client privilege) of FIPPA¹ and that it disagreed with the allegations in the applicant's complaint.

[4] The applicant asked the OIPC to review the School District's decision to refuse him access to the email and to investigate the School District's disclosure of his personal information.

[5] Mediation by the OIPC did not resolve either of the issues and this matter proceeded to inquiry.

[6] In its inquiry submissions, the School District withdrew its reliance on s. 14 and disclosed the email to the applicant.² The School District also stated that the email constituted an unauthorized disclosure of the applicant's personal information. On these bases, the School District submits there are no issues that remain in dispute in this inquiry and that, as a result, this inquiry is moot.³

[7] In light of the School District's submissions, I asked the applicant whether the School District had resolved his access request or privacy complaint.⁴ The applicant took the position that the School District had not fully resolved either matter and provided reasons for this position.⁵

[8] Based on the above, I find it is appropriate to determine whether the issues in this inquiry are moot, and if so, whether the inquiry should be cancelled or continued.

ISSUES AND BURDEN OF PROOF

[9] In this order, I will determine the following issues:

1. Does the inquiry raise only moot issues?
2. If yes, should I conduct the inquiry?

[10] The School District, as the party asserting that the issues are moot, has the burden of proving that the inquiry should not be held.⁶

¹ From this point forward, whenever I refer to section numbers, I am referring to sections of FIPPA, unless otherwise specified.

² School District's initial submission at page 2.

³ School District's reply submission at page 4.

⁴ Adjudicator's letters to parties dated February 23, 2024 and March 15, 2024.

⁵ Applicant's response letter dated March 27, 2024.

⁶ Decision F09-02, 2009 CanLII 3224 (BC IPC); Decision F08-11, 2008 CanLII 65714 (BC IPC).

DISCUSSION

Background

[11] The applicant's child transferred from an Independent School to a school within the School District (Public School).

[12] In 2019, the applicant asked the principal of the Public School if any staff from the Public School and the Independent School had communicated about his child. The applicant and the principal exchanged several emails on the subject.

[13] In May 2021, legal counsel for the Independent School contacted the principal of the Public School to get information about whether the Independent School and the Public School had communicated about the applicant's child. The Public School's principal responded by email on May 12, 2021. In this email, the principal summarized his efforts to determine whether the communications took place and included a copy of the emails that he and the applicant exchanged in 2019.

Records at issue

[14] The record at issue is the May 12, 2021 email sent from the Public School's principal to the Independent School's legal counsel, which includes eight emails from 2019 sent between the applicant and the principal.

Doctrine of mootness

[15] The leading Canadian case on mootness is *Borowski v. Canada (Attorney General)*⁷ [*Borowski*]. Previous OIPC orders have applied its principles in the context of adjudications under FIPPA.⁸

[16] The doctrine of mootness is a common law principle that allows courts and tribunals to decline to decide "moot" issues. An issue may be moot where it raises merely hypothetical, abstract, or academic questions or where a decision will not resolve a controversy that affects or may affect the rights of a party.⁹

[17] Generally, courts and tribunals will not make determinations on moot issues but may exercise their discretion to depart from this general rule where circumstances warrant.¹⁰ When deciding whether to depart from the general policy of not hearing a moot case, the Court in *Borowski* said that consideration should be given to the three rationales underlying the mootness doctrine. These

⁷ *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 [*Borowski*].

⁸ See e.g. Order F16-10, 2016 BCIPC 12 at para 11.

⁹ *Borowski*, *supra* note 7 at page 353.

¹⁰ *Ibid.*

three rationales are: the need for an adversarial context; the concern for judicial economy; and the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.¹¹

[18] I will first consider the doctrine of mootness in respect of the applicant's access request and then his privacy complaint.

Access Request

Does the inquiry raise only moot issues?

[19] The OIPC Investigator's Fact Report states that, at inquiry, an adjudicator will consider whether the School District is authorized to refuse to disclose the information at issue under s. 14 of FIPPA.

[20] Section 14 says that a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[21] On completing an inquiry into a public body's decision to refuse to give access to information in a record under s.14, I must either require the public body to give the applicant access to the information in dispute or confirm the public body's decision to refuse access to this information.¹²

[22] The parties agree that s. 14 does not apply to the information in dispute and the School District disclosed the email to the applicant.¹³ Given that all the information in dispute in this inquiry has been released to the applicant, I find that any order I make would not have a practical effect on the applicant's right to access the information in dispute. As a result, I find that the issue of whether the School District is authorized to refuse the applicant access to the May 2021 email is moot.

Should I conduct the inquiry?

[23] I have considered the rationales underlying the mootness doctrine and, for the reasons that follow, I find there are no circumstances that warrant deviating from the general rule of not making determinations on moot issues.

[24] The applicant says the inquiry regarding his access request should continue because the School District has not provided all the information related to his access request.¹⁴ I understand the applicant to be making a complaint that the School District did not comply with its duty to assist him under s. 6(1).

¹¹ *Borowski*, *supra* note 7 at page 358.

¹² FIPPA, ss. 58(1), 58(2)(a), and 58(2)(b).

¹³ School District's initial submission at page 2.

¹⁴ Applicant's response letter dated March 27, 2024 at page 1.

[25] A complaint under s. 6(1) could represent a continued adversarial relationship between the parties. However, neither the OIPC Investigator's Fact Report nor the Notice of Inquiry includes s. 6(1) as an issue in this inquiry. The Notice of Inquiry, which was provided to both parties at the start of this inquiry, states parties may not add new issues without the OIPC's prior consent.¹⁵ The applicant did not request permission to add s. 6(1) or point to any exceptional circumstances that would justify doing so at this stage. As a result, I will not add s. 6(1) as an issue in this inquiry and find there is not a sufficient adversarial context to warrant continuing this inquiry.¹⁶

[26] The issue of whether a public body can refuse access to information under s. 14 is regularly before the Commissioner and the OIPC has issued many orders that interpret and apply s. 14. It is, therefore, not necessary to hear this case out of concern that the interpretation or application of s. 14 will evade being addressed at inquiry.

[27] I find there is no value in spending the OIPC's limited resources adjudicating whether the School District can refuse access to information that it has already given the applicant and no longer claims falls under s. 14.

Complaint

Does the inquiry raise only moot issues?

[28] The OIPC Investigator's Fact Report states that, at inquiry, an adjudicator will consider whether FIPPA authorized the School District to disclose the applicant's personal information when the Public School's principal sent the May 2021 email to the Independent School's legal counsel.

[29] Section 33(1) of FIPPA states a public body may disclose personal information in its custody or under its control only in the circumstances set out in subsections 33(2) to (9) or s. 33.3.

[30] Under s. 58(3)(e), upon completion of an inquiry into an unauthorized disclosure complaint, I may order a public body to stop disclosing personal information in contravention of FIPPA or confirm a decision of a public body to disclose personal information.

[31] The parties agree that the 2021 email constituted a disclosure of the applicant's personal information that was not authorized by FIPPA.¹⁷ The School District submits the unauthorized disclosure was quickly contained because the Independent School's legal counsel recognized there may be privacy concerns

¹⁵ Notice of Inquiry dated June 16, 2023.

¹⁶ For similar reasoning, see Order F15-15, 2015 BCIPC 16 at paras 10-11.

¹⁷ School District's reply submission at page 2.

about her receiving the email and immediately deleted it.¹⁸ The applicant does not challenge the veracity of the School District's claim that the legal counsel immediately deleted the email in question.

[32] Based on the above, I conclude there is no live controversy between the parties regarding whether FIPPA authorized the School District's disclosure of the applicant's personal information. In other words, I find this issue is moot.

Should I conduct the inquiry?

[33] I have considered the rationales underlying the mootness doctrine and, for the reasons that follow, I find that there are no circumstances that warrant deviating from the general rule of not making determinations on moot issues.

[34] The applicant says the inquiry regarding his privacy complaint should be continued because he believes the School District's disclosure was deliberate and that it sought to hide this disclosure from him and the OIPC by refusing to admit the unauthorized disclosure occurred until the complaint went to inquiry.¹⁹

[35] I understand the applicant to be saying that the parties continue to disagree on whether the disclosure was deliberate and whether the School District's response to the applicant's complaint was appropriate. However, the remedy for a finding of unauthorized disclosure is set out in s. 58(3)(e). Section 58(3)(e) does not provide a different remedy based on whether the disclosure was intentional or inadvertent. It also does not provide a different remedy based on whether or when the public body admitted the disclosure was contrary to FIPPA. Therefore, making determinations about these issues would not change the order I can make under s. 58(3)(e). As a result, I find the adversarial context identified by the applicant is not sufficient to warrant using OIPC's limited resources to continue this inquiry.

[36] Further, complaints about whether a public body has disclosed personal information in contravention of FIPPA are regularly before the Commissioner. I find it is not necessary to hear this case in order to resolve any uncertainty in the law regarding public bodies disclosing personal information without authorization to do so.

¹⁸ School District's initial submission at page 2 and School District's reply submission at page 3.

¹⁹ Applicant's response letter dated March 27, 2024 at page 3.

CONCLUSION

[37] For the reasons given above, I am cancelling this inquiry on the basis that the issues are moot and there are no circumstances that warrant adjudicating these moot issues.

April 15, 2024

ORIGINAL SIGNED BY

Rene Kimmitt, Adjudicator

OIPC File Nos.: F21-86858 & F21-86857