



Office of the
Saskatchewan Information
and Privacy Commissioner

INVESTIGATION REPORT 083-2022

St. Paul's Roman Catholic Separate School Division No. 20

December 7, 2022

Summary: The St. Paul's Roman Catholic Separate School Division No. 20 (SPRCSSD) received a complaint alleging that it shared personal information about a child with their stepmother without proper authority. The Complainant, the child's mother, requested that the Commissioner investigate. The Commissioner found that SPRCSSD did not have the authority to disclose the child's personal information to the stepmother. He recommended that SPRCSSD immediately cease disclosing the child's personal information to the stepmother. He also recommended that SPRCSSD, within 30 days, develop policies and/or procedures regarding subsection 49(d) of *The Local Authority Freedom of Information and Protection of Privacy Act*. The policies should clarify that the head will not rely on the direction or consent of one substitute decision-maker where another equally ranked substitute decision-maker objects.

I BACKGROUND

- [1] The Complainant is the mother of two children. The Complainant shares joint custody of the two children with the children's father who has remarried. The father's new spouse is referred to as the stepmother in this Investigation Report. The children attend a school within the St. Paul's Roman Catholic Separate School Division No. 20 (SPRCSSD). Child A is 12 years old. Child B is 15 years old.
- [2] The Complainant filed an [Alleged Breach of Privacy Reporting Form](#) regarding SPRCSSD's sharing of Child A's and Child B's personal information with the stepmother.

The complaint alleged that the disclosure of personal information was not authorized under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). During the investigation, SPRCSSD changed its practices with respect to Child B and the Complainant's concerns regarding Child B have been resolved. Therefore, this Investigation Report only deals with the issues relating to Child A.

- [3] SPRCSSD acknowledged that it shares Child A's personal information with the stepmother. It claimed that it has legal authority under LA FOIP to do so because the father, a legal custodian, has provided valid consent on behalf of Child A.

II DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

- [4] SPRCSSD is a "local authority" pursuant to subsection 2(f)(viii) of LA FOIP. Therefore, I have jurisdiction to conduct this investigation.

2. Is personal information involved?

- [5] LA FOIP's privacy rules apply where the alleged privacy breach involves personal information. Personal information is defined in subsection 23 of LA FOIP. To qualify as personal information, the information must relate to an identifiable individual and the information must be personal in nature.
- [6] SPRCSSD advised my office that information about Child A's school absences, homework, daily activities, progress reports and "day-to-day struggles and accomplishments" was shared with the stepmother by granting them access rights to SPRCSSD's online education portal.
- [7] The Complainant gave my office examples of the types of email communications shared through the online portal. Some of the information appears time sensitive such as information about assignments due the next day and how Child A can be supported in completing them. Other information appears to be about issues that do not require immediate attention such as strategies being deployed at the school to address learning issues or how the school responded to a particular incident during the day.

[8] This information qualifies as Child A’s personal information pursuant to subsection 23(1) of LA FOIP. Subsection 23(1)(b) of LA FOIP, which is relevant here, provides:

23(1) Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

[9] Subsection 23(1)(b) of LA FOIP applies because the information shared about Child A qualifies as their educational history. Therefore, I find that the alleged breach of privacy involves Child A’s personal information.

3. Did SPRCSSD have authority to disclose Child A’s personal information to the stepmother?

[10] A privacy breach occurs when personal information is collected, used, and/or disclosed without legal authority.

[11] Subsection 28(1) of LA FOIP establishes that a local authority may disclose personal information with the consent of an individual or without consent if one of the subsections of 28(2) or 29 of LA FOIP apply. As this matter does not involve individuals who are deceased, section 29 of LA FOIP has no application.

[12] Subsection 28(1) of LA FOIP provides:

28(1) No local authority shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 29.

[13] “Disclosure” means to share personal information with a separate entity (see my office’s [Investigation Report 234-2020](#)).

[14] SPRCSSD’s sharing of Child A’s personal information with the stepmother was a disclosure. The decision to disclose Child A’s information was based on the father’s consent. SPRCSSD did not provide my office with any information or evidence to support a finding that the disclosure was authorized without consent by subsection 28 of LA FOIP.

Therefore, I find that SPRCSSD was not authorized to disclose Child A's personal information to the stepmother without consent. I will now consider whether the father's consent was sufficient to authorize the disclosure.

4. Did SPRCSSD properly apply subsection 49(d) of LA FOIP?

[15] In this case, the father asserts the right to consent, on Child A's behalf, to the disclosure of Child A's personal information to the stepmother. Section 49 of LA FOIP provides that another person, under specific circumstances, may exercise any right or power under LA FOIP conferred on an individual. Subsection 49(d) of LA FOIP gives custodial parents rights or powers conferred under LA FOIP that can be exercised on their children's behalf if certain conditions are met. That section states:

49 Any right or power conferred on an individual by this Act may be exercised:

...

(d) where the individual is less than 18 years of age, by the individual's legal custodian in situations where, in the opinion of the head, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual; or

[16] Under subsection 49(d) of LA FOIP, the rights or powers of the individual can only be exercised:

- in relation to individuals who are less than 18 years of age
- by the individuals' legal custodian and
- where, in the head's opinion, the exercise of the right or power would not constitute an unreasonable invasion of privacy of the individual.

[17] As noted above, Child A is 12 years old. Therefore, the first criteria for the application of subsection 49(d) of LA FOIP has been met.

[18] I now turn to considering whether the second criteria has been met.

[19] In determining the rights of an individual to serve as sole or joint legal custodian under subsection 49(d) of LA FOIP, my office will consider applicable provisions of *The Children's Law Act, 2020* (CLA), court orders and agreements between the parties.

[20] Subsection 3(1) of CLA provides that where there is no court order or agreement between the parents of a child, the parent are joint legal decision-makers. That section states:

3(1) Unless otherwise ordered by the court and subject to subsection (2) and any agreement pursuant to subsection (3), the parents of a child are joint legal decision-makers for the child, with equal powers and responsibilities.

[21] Subsection 3(1) of CLA does not apply in this case because the parents have entered into an Interspousal Agreement as contemplated in subsection 3(3) of CLA.

[22] Subsection 3(2) of CLA applies where the child's parents have never cohabited after birth. Subsection 3(3) of CLA provides that, among other things, the parents may enter into an agreement that may vary their status as joint legal decision-makers. Subsections 3(2), (3)(a) and (b) of CLA provide:

3(2) If the parents of a child have never cohabited after the birth of the child, the parent with whom the child resides is sole legal decision-maker for the child.

(3) The parents of a child may enter into an agreement that may:

(a) vary their status as joint legal decision-makers for the child;

(b) specify the powers and responsibilities of each parent with respect to the child;

[23] Subsection 3(2) of CLA does not apply on the facts before me.

[24] I understand that there are no court orders in place that would apply. Therefore, the Interspousal Agreement, as contemplated under subsection 3(3) of CLA, defines the father's and Complainant's powers and responsibilities in relation to Child A.

[25] The Interspousal Agreement provides that the father and Complainant have joint custody of the children of the marriage. It also provides:

The parties agree that in terms of making decisions affecting the children, day-to-day decisions are to be made by the party who has care of the children at that time. The parties have agreed that decisions affecting school, health care, religion, etc. will be made jointly.

...

The parties agree that both are equally responsible for and entitled to communicate with the children's schools and those involved with their other activities.

...

The parties agree that copies of report cards or other documents relating to the children shall be provided to the other party within 72 hours of receiving the same.

[26] In their direction or consent to SPRCSSD, the father explained why he wanted Child A's information to be shared with the stepmother. The father stated that their employment requires them to work 13-hour shifts. When they are at work, they do not have access to their telephone or email. Therefore, they felt it was necessary to keep the stepmother informed until they returned from work.

[27] SPRCSSD does not dispute that the father and Complainant are joint custodians of Child A. In its submission, SPRCSSD asserted that the only information disclosed to the stepmother is through the online portal. It asserted that the information is the kind of information that would be shared to support day-to-day decision-making by parents. It points to the Interspousal Agreement provision which states:

In terms of making decisions affecting the children, day-to-day decisions are to be made by the party who has care of the children at that time. The parties have agreed that decisions affecting school, health care, religion, etc. will be made jointly.

[28] SPRCSSD also asserted:

Based on [the opposing wishes of both parents and the Interspousal Agreement] it was deemed appropriate to grant the stepmother day-to-day communication. [The stepmother] has been married to [the father] for over 8 years and has an in loco parentis relationship with [Child A] as [Child A] lives with [the stepmother] and [father] on alternating weeks and, because of the nature of [the father's] work, it was in [Child A's] best interests for [the stepmother] to access [Child A's] personal information on [the online portal]. In addition, the exercise of the right or power with [the father's] written consent as joint legal decision-maker for [the stepmother] to access [Child A's] personal information on [the online portal] would not constitute an unreasonable invasion of [Child A's] privacy.

[29] The Complainant's position is that the father does not have the right to consent to the disclosure of Child A's personal information without their agreement. The Complainant acknowledged that once the father receives information about Child A, there would be nothing preventing the father from sharing that information with the stepmother.

[30] Given the terms of the Interspousal Agreement, and reading it in its entirety, I find that the father and Complainant have joint custody of Child A. This includes joint rights and responsibilities to make decisions affecting school and other matters. The parties are also

equally responsible for and entitled to communicate with the child's school. Therefore, they are joint custodial parents with equal rights to exercise the powers and rights of Child A pursuant to subsection 49(d) of LA FOIP. Accordingly, I must now consider how a disagreement between them, two equally ranked substitute decision-makers, impacts the potential application of subsection 49(d) of LA FOIP.

[31] LA FOIP does not explicitly address the situation where equally ranked substitute decision-makers disagree. Furthermore, my office has not addressed this issue in previous reports under LA FOIP, its provincial equivalent (*The Freedom of Information and Protection of Privacy Act* (FOIP)) or *The Health Information Protection Act* (HIPA).

[32] The issue has been addressed by the Ontario Information and Privacy Commissioner (ON IPC) in the context of reviews involving Ontario's health privacy legislation, the [*Personal Health Information Protection Act, 2004*](#) (PHIPA). PHIPA includes a provision that precludes one equally ranked substitute decision-maker from overriding the explicit objection of another equally ranked substitute decision-maker in relation to mentally incapable individuals. However, PHIPA does not explicitly address such a situation in relation to mentally capable children other than where the mentally capable child has made their own decision (see subsection 23(3) of PHIPA).

[33] ON IPC has ruled that where equally ranked substitute decision-makers do not agree on the exercise of rights or powers of a capable individual under the age of 18, one of the decision-makers cannot act in the absence of the agreement of the other.

[34] The first of these decisions was [PHIPA Decision 107](#) which involved a request made by a joint custodial parent for a correction of their child's record of personal health information. The other custodial parent, the child's mother, expressly disagreed with the request for a correction. The doctor refused to correct the record citing the mother's objection. The father filed a complaint. ON IPC found that the doctor had appropriately refused the father's request in view of the objection of the other joint custodial parent. The decision states:

I reach this conclusion for several reasons. First, applying a purposive approach that takes into account not only the words of the section but also the whole of PHIPA and

its objects, I conclude that section 23 should not be interpreted to enable one substitute decision-maker to override an explicit objection by another equally ranked substitute decision-maker in decisions concerning a mentally capable child's personal health information. Among other reasons, such an interpretation could create a great deal of uncertainty for the custodian, as well as for all the other parties affected by a request involving a mentally capable child's personal health information.

- [35] The adjudicator went on to find that subsection 23 of PHIPA enables a health information custodian to rely on a person's assertion of their authority as a substitute decision-maker, except where the custodian has reason to believe that another equally ranked substitute decision-maker for the child objects.
- [36] PHIPA Decision 107 has been followed by ON IPC in two other decisions. [PHIPA Decision 129](#) involved a request for access by a joint custodial parent to their children's counselling records (upheld on reconsideration in [PHIPA Decision 149](#)). [PHIPA Decision 160](#) also involved a request for access made by a joint custodial parent to their child's health records. In both cases, the other joint custodial parent objected to access being granted to the requester.
- [37] The purposes of the privacy provisions of LA FOIP are, among other things, to define rules for the collection, use, and disclosure of personal information by local authorities. I agree with the findings made by the ON IPC in the decisions referred to above regarding the need for a purposive approach. Accordingly, it is my position that LA FOIP should not be interpreted to permit one equally ranked substitute decision-maker to override the decision of the other equally ranked substitute decision-maker. This is particularly the case where the substitute decision-makers share rights as joint custodians. Without an agreement, court order or other evidence that one decision-maker's views should prevail in a conflict, a head should not rely on the consent of one joint custodian where the other joint custodian objects.
- [38] I am mindful of the need to bring some certainty to the work of local authorities managing access to information requests, and consents for use and disclosure of personal information from joint custodial parents. I am also sensitive to the challenges of staff when navigating personal information collection, use and disclosure rules with joint substitute decision-makers.

[39] There is no requirement for a local authority to canvass the views of every substitute decision-maker who is equally ranked to satisfy itself that it has the requisite authority. However, where a local authority is aware that one of the decision-makers does not agree with a request from the other equally ranked decision-maker, the local authority should not rely on the direction of one of the decision-makers, only. For these reasons, I find that SPRCSSD did not properly apply subsection 49(d) of LA FOIP.

[40] I recommend that SPRCSSD immediately discontinue disclosing Child A's personal information to the stepmother. I also recommend that, within 30 days, SPRCSSD develop policies and/or procedures regarding subsection 49(d) of LA FOIP. The policies should clarify that SPRCSSD will not rely on the direction or consent of one substitute decision-maker where another equally ranked substitute decision-maker objects.

Mature Minor

[41] As noted in my office's *Guide to LA FOIP*, the fact that an individual is the guardian of a minor does not automatically entitle the guardian to the minor's personal information. The head must determine if the exercise of the rights and powers by the legal guardian would not be an unreasonable invasion of the minor's privacy (*Guide to LA FOIP*, Chapter 3, "Access to Records", updated June 29, 2021 [*Guide to LA FOIP*, Ch. 3], pp. 142-143).

[42] LA FOIP does not specifically address the question of a minor's capacity to exercise their own rights. In contrast, HIPA allows the guardian of a minor to exercise personal information rights or powers of the minor, but only if the minor is incapable of exercising those rights or powers.

[43] This rule is set out in subsection 56(c) of HIPA which provides:

56 Any right or power conferred on an individual by this Act may be exercised:

...

(c) by an individual who is less than 18 years of age in situations where, in the opinion of the trustee, the individual understands the nature of the right or power and the consequences of exercising the right or power;

[44] Even though LA FOIP does not include an express requirement to consider if a child is a mature minor, I recommended that local authorities do so in my bog, [UPDATED: Who Signs for a Child?](#) Applying this approach, heads should use their discretion to enable the exercise of rights by the minor if the minor “understands the nature of the right or power and the consequences of exercising the right or power.” Some factors to consider are maturity, economic status (i.e., self-supporting, or not), living arrangements and mental state.

[45] The Complainant and the SPRCSSD have not provided me with any information about Child A’s wishes. SPRCSSD stated that it did not explore if Child A had any concerns or wanted any restrictions set on access to their personal information. With respect to Child A’s capacity, SPRCSSD stated:

At the time that we were making the decision to allow the stepmother to have access to [the online portal], we did not explore if [Child A] is or was a mature minor as he has never expressed concern nor requested restriction of access to his personal information on [the online portal] by [the Complainant], [father] nor [stepmother]. Considering [Child A’s] age only, he is arguably on the cusp of being an informed/mature minor but an assessment would need to be made as to whether he had capacity to give consent.

[46] The Complainant stated they did not believe that Child A is sufficiently capable of understanding the consequences of providing consent to disclose their private information with the stepmother. They added that they did not want Child A to be in a position where they may be required to take sides between the father’s and the Complainant’s wishes.

[47] Given Child A’s age and the limited information before me about the Child’s capacity to consent, I am not able to conclude that Child A is a mature minor. If SPRCSSD decided Child A was a mature minor, then I would have recommended it consult with them to determine their wishes.

III FINDINGS

[48] I find that I have jurisdiction.

[49] I find that SPRCSSD was not authorized to disclose Child A’s personal information to the stepmother without consent.

[50] I find that SPRCSSD did not properly apply subsection 49(d) of LA FOIP.

IV RECOMMENDATIONS

[51] I recommend that SPRCSSD immediately cease disclosing Child A's personal information to the stepmother.

[52] I recommend that, within 30 days, SPRCSSD develop policies and/or procedures regarding subsection 49(d) of LA FOIP. The policies and/or procedures should clarify that SPRCSSD will not rely on the direction or consent of one substitute decision-maker where another equally ranked substitute decision-maker objects.

Dated at Regina, in the Province of Saskatchewan, this 7th day of December, 2022.

Ronald J. Kruzeniski, K.C.
Saskatchewan Information and Privacy
Commissioner