FILE NO. – 2003-068

SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT LA–2004–001

Lloydminster Public School Division

Summary: The Applicant was denied access to certain records in the possession or control of the School Division that were critical of the Applicant's suitability for volunteering in after-school sport activities. The Commissioner found that the stated reason for denial of access was not appropriate given *The Local Authority Freedom of Information and Protection of Privacy Act*.

Statutes Cited: *Local Authority Freedom of Information and Protection of Privacy Act* [S.S. 1990-981 as am.- s. 30(2)]

Authorities Cited: Saskatchewan Information and Privacy Commissioner Report 2004-003, [15]; Alberta Information and Privacy Commissioner Investigation Report 98-IR-015

I BACKGROUND

[1] The Applicant, a volunteer for after-school sports activities of the Lloydminster Public School Division ("the Division"), submitted two formal access requests to the Division. One Access to Information Request Form received by the Division on October 8, 2003 sought:

> *"(1) Minutes of School Board Meeting 26 August 2003*
> *(2) Any and all documents presented by* [named third party] *in complaint made against me originating 2 October 2003"* [hereinafter described as the October 8, 2003 request]

[2] A second Access to Information Request Form received by the Division on October 17, 2003 sought:

> *"Any material available from [third party's] complaint about [the Applicant]"*
>
> [hereinafter described as the October 17, 2003 request].

[3] With respect to the October 8, 2003 request, the Division advised the Applicant that there were no Minutes prepared for the August 26, 2003 meeting.

[4] Also, with respect to both the October 8, 2003 request and the October 17, 2003 request, the Division advised that it had received certain documents from the third party identified by the Applicant in his Request Form. He was further advised that access to these documents was denied on the authority of section 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* ("the Act") as records provided explicitly or implicitly in confidence.

[5] The Applicant submitted a Request for Review to our office in respect of the decisions of the Division on each of the two access requests.

[6] Our office advised the Division of our intention to undertake a review under the Act. We asked that the Division provide confirmation with respect to the October 8, 2003 request that the record does not exist. With respect to both the October 8, 2003 request and the October 17, 2003 request, we sought copies of the records to which access was denied together with the reasons for refusing to grant access.

[7] The Division responded with a letter dated November 4, 2003. With respect to October 8, 2003 request, the Division stated that:

> *"The meeting referred to was not a meeting of the Board of Education but rather a meeting of an ad-hoc committee duly struck by the Board. The Lloydminster Public School division does not record minutes from committee meetings as no resolutions are made. Verbal recommendations are made by the Committee, as required, at regular meetings of the Board."*

[8] With respect to the October 8, 2003 request and the October 17, 2003 request, the Division provided a copy of a letter from the third party dated October 6, 2003 together with a two page attachment. The attachment is a series of Email messages. We will refer to the third party as "B". The Division further advised that B had provided to the Board a binder with copies of a significant number of e-mail messages between the applicant and another person. The Division stated that:

> "[the Applicant] *was denied access to the documents under Section 30(2) of the Local Authority Freedom of Information and Protection of Privacy Act of the Province of Saskatchewan as* [third party] *provided the documents explicitly or implicitly in confidence.*
> *In accordance with* [B's] *letter, the binder of materials was returned to* [B] *on or around October 20, 2003. The materials were reviewed by the Board Committee and as there was no further interest of the Board in the materials no copies were made."*

[9] Our office requested that the Division provide confirmation that the only document in the possession or control of the Division responsive to either access request was the letter that accompanied the Division's correspondence to our office dated November 4, 2003. The Division promptly responded with that confirmation.

[10] The Applicant was invited to make any further submissions and responded with a two page letter dated November 17, 2003. The Applicant indicated that even if there were no Minutes prepared in respect of the August 26, 2003 committee meeting, one participant had taken notes at the meeting. It was indicated that this participant was a senior employee of the Division. The Applicant also suggested that the Division might have in its possession correspondence from another person relevant to the matters discussed at the committee meeting.

[11] Our office broached with the Division the question of meeting notes from the August 26, 2003 meeting. The Division responded to our office that a Division employee who attended the meeting had indeed prepared notes. These meeting notes were "*his personal, hand-written notes, taken at a committee meeting on August 26, 2003."* The author destroyed his meeting notes "*at the conclusion of the Committee's function*". The date of destruction was subsequently established by the Division as on or about September 2, 2003.

[12] Our office learned that there was discussion about the issue involving the Applicant at the Board meeting on August 27, 2004. The Division was unable to produce any documentation with respect to a decision taken or a formal resolution at that formal Board meeting. We were advised that action resulted from the final decision.

[13] Our office requested a copy of the Record Retention and Disposition Schedule in force for the Division at the material times. The Division responded by providing a three page document entitled LLOYDMINSTER PUBLIC SCHOOL DIVISION POLICY: Retention and Disposal of School Records, Code: 2080, BOARD APPROVAL May 1, 1985. A revised four page version of this Policy is accessible at http://www.lpsd.ca/Policies/2080%2701.pdf. This on-line version shows that it was amended February 25, 2004. We were advised by the Division that the handwritten notes of the meeting participant amounted to "personal information" of the author. Neither version of the record retention and disposal policy specifically addresses such "personal information".

[14] Further to the letter received from the Applicant dated November 17, 2003 and our further inquiry, the Division wrote our office on December 12, 2003 advising that it did have in its possession a copy of one additional document - a memo. This memo, that included reference to the Applicant, had been submitted by an employee of the Division "implicitly in confidence" according to the Division. We will refer to that employee as "C". At our request, the Division wrote to our office on January 8, 2004 enclosing a copy of this further memo.

[15] This memo was dated October 2, 2003 and is signed by C. It describes certain events involving three persons other than the Applicant and certain opinions about the Applicant. The focus of this document appears to be the suitability of the Applicant to be involved in a school related activity.

[16] We have decided not to refer to the precise allegations made against the Applicant to avoid disclosing the identity of the Applicant or information from which the Applicant's identity could be determined.

II RECORDS AT ISSUE

1. Missing records of the Board meeting of August 27, 2004.

2. Certain notes made by an employee of the Division at an ad hoc committee meeting at which minutes were not taken.

3. Letter from B dated October 6, 2003 to the Division complaining of the Applicant

4. Memo dated October 2, 2003 signed by C. This document detailed an interaction that C had with two other persons.

III ISSUES

Did the Division discharge its duty to make every reasonable effort to assist the Applicant and to respond to the applicant openly, accurately and completely?

Were the handwritten notes of the ad hoc committee meeting a "personal record" of the author?

Were the destruction of documents by the Division employee and the return of the binder to B in compliance with the Act?

Did the Division properly apply section 30(2) of the Act to deny access to (a) the October 6, 2003 letter plus two page attachment and to (b) the October 2, 2003 memo signed by C to the Applicant?

IV DISCUSSION OF THE ISSUE

Did the Division discharge its duty to make every reasonable effort to assist the applicant and to respond to the applicant openly, accurately and completely?

[17] There is no express duty in the Act to assist an applicant. Our office has taken the position however that a public body such as a School Division has an implicit duty to make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately and completely [Review #2004-003 [15] available at www.oipc.sk.ca].

[18] From our review of the materials, it appears that the Division did search for appropriate records that would be responsive to the Applicant's request. The Division did not

produce the memo from C until after the Applicant questioned the existence of such a document. We note that the two access requests in question specifically referenced B and made no mention of C. The memo from C did however reference B and proved to be responsive to the October 17, 2003 access request from the Applicant.

[19] We have noted above that there appears to be a missing record that would be responsive to the Applicant's request. This would be some document(s) from the August 27, 2003 Board meeting. We will discuss the destruction and disposal of certain records in the following section of this Report.

1. Missing records from August 27, 2004 Board Meeting

We are mindful of the following observation by the Information Commissioner of Canada, the Hon. John Reid:

> *"When records documenting the actions, decisions and considerations of public officials are not created, when such records as are created are not included in an indexed institutional system of records, or when the disposition or archiving of records is left to the unguided whim of the records creator, then there can no longer be an effective right of access to information no matter how strong the words of the law may be."* [Hon. John Reid, E-Government Reconsidered: Renewal of Governance for the Knowledge Age, Canadian Plains Research Centre, University of Regina, 2004, 82]

We are frankly surprised that no record can be found of the August 27, 2004 formal meeting of the Board that is responsive to the access request of the Applicant. Public officials must create records which document their actions, decisions and considerations. This should result in better decisions, improved program delivery in government and preservation of an acceptably complete historical record.

In light of the other analysis and recommendations in this Report it will be necessary for the Division to make a further and better search for these missing records.

2. Certain notes made by an employee of the Division at an ad hoc committee meeting at which Minutes were not taken.

Classification of the notes

[20] The Division asserted that these notes were "personal notes" or a "personal record". Our office was advised that the notes were written by the one Division employee to be a "personal reminder" of meeting details. The implication of something being a personal record is that it would not be a record in the custody or control of a local authority and therefore would not be subject to the Act.

[21] Our view is that such a record prepared by an individual employed by the Division concerning matters for which the Division is responsible should neither be classified nor treated as a personal record. A personal record might consist of someone's grocery list or a dry-cleaning receipt. To give "personal record" the expansive meaning ascribed to it by the Division would undermine the principle of transparency that is fundamental to the Act.

Were these notes a "transitory record"?

[22] This does not appear to be the case. A transitory record is a record of temporary usefulness needed only for a limited period of time; to complete a routine task or to prepare an ongoing document. Once they have served their purpose, they would be destroyed.

[23] Does the record or document provide evidence of a business activity, decision or transaction related to the functions and activities of the organization? In this case, the answer appears to be affirmative. Consequently, the notes should have been classified and retained.

Retention and Disposition of Records

[24] Our investigation revealed that it was standard practice of the Division not to take Minutes at closed meetings of committees. No agenda had been prepared in advance of the August 26, 2003 meeting. Subsequent to the meeting the subcommittee made verbal recommendations to the full board at the meeting on August 27, 2003. The Division was unable to produce any documentation with respect to the final resolution although we were assured that it would be normal to have documentation of the outcome of the board's deliberations. We note that Code 1061 includes the following provision for Board of Education Meetings Agenda:

> *"The agenda shall be prepared by the Director of Education in consultation with the Chairman, and shall be delivered to the members of the Board of Education at least two full days in advance of regular Board of Education meetings, together with such letters, reports and information as the members of the Board of Education may require to deal effectively with items therein."*

[25] There does not appear to be a different provision for Board meetings that may not be a "regular" meeting. The Retention and Disposal of School Records portion of Code 2080 provides that Minutes (and all supporting documentation, including copies of agenda) are to be retained permanently. Although we have not seen the notes in question, we would expect that such notes would be considered as "supporting documentation". This would trigger the obligation to retain permanently.

[26] *The Education Act* states that all public records of a school division or school district should be preserved until their disposal is authorized by the board of education and approved by the Minister [section 369(1)].

[27] The Lloydminster Public School Division policy 2080 states, "*the Board of Education requires that all its official records and public documents shall be preserved and/or disposed of in accordance with legislation and under the supervision of the Secretary-Treasurer"*.

[28] At the time an access request under the Act is received by a local authority, all undestroyed transitory records relating to the request would be subject to the Act. In

these situations, existing transitory records cannot be destroyed until the Applicant's request has been processed and any appeal period exhausted.

[29] The foregoing analysis applies to any records of a school division regardless of whether it may be personal information of an identified individual. There is however a matter unique to personal information that warrants consideration. Since the Act and regulations are silent on the question of how long personal information should be retained by a local authority, we suggest that it important that personal information used to make a decision should be retained by a local authority for at least one year after the decision is made. This would allow the individual affected a reasonable opportunity to seek access to the record.

[30] The notes of the August 26, 2003 meeting were destroyed before the Division received the Applicant's access request. We certainly have no evidence that the records of the meeting in this case were destroyed to evade a prospective access request. The destruction of these records is contrary to the purpose of the Act, particularly the right of access and the right to able to ask for a review of the decision of a local authority.

[31] The binder provided to the Division by B was returned to B on October 20, 2003. This was only three days after the Division acknowledged receipt of the second of the two access requests of the Applicant. This raises the concern that the Board has made a decision that affects the Applicant based presumably in part on records that it has disposed of subsequent to receiving the access requests. Again, the action taken by the Division to return the binder and thus put it out of the Division's possession and control is contrary to the purpose of the Act.

[32] We are mindful that this is the first case in which our office has considered the destruction/disposition of records that would otherwise be responsive to an access request under the Act. Our view is that the consequences of improper destruction of records must be serious and must be communicated to all local authorities in an impactful way. We recommend that the Legislative Assembly consider an amendment to the *Act* that would make it an offence to destroy any records subject to this Act or to direct another person to do so, with the intent to evade a request for access to the records.

3. Letter from B dated October 6, 2003 and two page attachment

[33] The letter from B dated October 6, 2003 and the two page attachment clearly is personal information of the Applicant. It represents the opinion of B about the Applicant. The definition of personal information in section 23(1) includes "*…(h) the views or opinions of another individual with respect to the individual;"*

Did the Division properly apply section 30(2) of the Act to deny access to the Applicant?

[34] Section 30(2) of the Act provides as follows:

> *(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the local authority, where the information is provided explicitly or implicitly in confidence.*

[35] In our view, there are two required elements of this section:

1) The personal information must be evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the local authority, plus

2) The personal information must have been provided explicitly or implicitly in confidence.

[36] The Division asserted that the material received from B was provided "explicitly or implicitly in confidence". Indeed, the material from B includes the statement "*I expect the enclosed materials to be kept strictly confidential"*. From our review of the later disclosed material it is unclear whether the October 2, 2003 memo signed by C was provided explicitly or implicitly in confidence. Even if we found that all of this material was provided explicitly or implicitly in confidence, that is not sufficient to refuse disclosure under the Act.

[37] On the evidence, the evaluative or opinion material was not compiled for either of the two purposes stated in section 30(2). It was evaluative or opinion material apparently

compiled for the purpose of determining the suitability of a **volunteer** to engage in volunteer activity in an after-hours sports program.

Does section 30(2) apply to volunteers as well as current or prospective employees?

[38] "Employee" is not defined in the LA FOIP Act. This question does not appear to have been addressed by this office in the past. We note that in the Alberta *Freedom of Information and Protection of Privacy Act*, employee was defined prior to 1999 as *"…a person retained under a contract to perform services for the public body;"*. [s. 1(1)(e)] This was considered by the Alberta Information and Privacy Commissioner's office in Investigation Report 98-IR-015. That case involved a parent who worked as a volunteer fund raiser at the high school her children attended. The Portfolio Officer considered that subsequent to the date of the complaint the Alberta Legislative Assembly redefined employee to include *"a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body [s. 1(1)(e)]."* In the particular circumstances of that case, the Portfolio Officer concluded that the parent was an employee of the school division. We note that the volunteer role of the individual in the Alberta case appears to have been more formal and more defined than was the case for this Applicant.

[39] In the case of the Saskatchewan provision, our view is that it should be for the Saskatchewan Legislative Assembly to amend the Act if it determines that the word "employee" should be given an expanded scope to capture volunteers.

[40] In interpreting the statute, I am guided by *The Interpretation Act*, 1995, S.S. 1995 c. I-11.2. Section 10 provides as follows:

> *"Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects."*

[41] The object of *The Freedom of Information and Protection of Privacy Act* was considered by this office in Report 2004-003 [8] to [11]. We apply the same object to *The Local Authority Freedom of Information and Protection of Privacy Act* with necessary changes to substitute local authority for government institution. We take the object of the Act to be to make local authorities more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records

(b) giving individuals a right of access to, and a right of request corrections of, personal information about themselves

(c) specifying limited exceptions to the rights of access

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act

[42] To achieve that object, it is important to ensure that the general rule is disclosure unless it is clear that a mandatory or discretionary exemption applies.

[43] In the result, the Division did not properly apply section 30(2) of the Act to deny access to the Applicant.

4. Memo dated October 2, 2003 signed by C

[44] This document was written by a Division employee. There is no reference in the document to confidentiality or any restriction on disclosure. It appears to be a narrative description of certain conversations that the author had with other persons. It appears that the conversations were directed to C specifically in her role as an employee of the Division and therefore the information was given to C in the course of her employment. Since the subject of these recorded conversations was the Applicant, I find the memo is responsive to the Applicant's access requests.

[45] Section 23(2) (b) provides that "personal information" does not include information that discloses "*…the personal opinions or views of an individual employed by a local authority given in the course of employment, other than personal opinions or views with respect to another individual.*"

[46] This document does not include "personal opinions or views" of C.

Is the Applicant entitled to access?

[47] The Division clearly has the burden of proof according to section 51 of the Act. That section states:

> *"51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned."*

[48] The position of the Division has been that the basis for denying access is that the records contain material supplied implicitly or expressly in confidence and that section 30(2) should apply.

[49] As noted in an earlier part of this Report, to properly invoke section 30(2) the information must not only be provided in confidence but must also relate to an employee of the Division. It must have been compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the local authority, where the information is provided explicitly or implicitly in confidence. That is not the case here.

[50] I find that the Division has not discharged the burden of proof to support section 30(2).

[51] The document signed by C should be disclosed to the Applicant. Such disclosure would reveal to the Applicant the names and opinions of other persons who provided information to C. Names in conjunction with opinions are personal information within the meaning of section 23(1)(k) of the Act. Section 28(1) prohibits disclosure of such personal information without the consent of the persons in question unless section 28(2) applies. I find that section 28(2) does not apply in this case. In the result this document

should be disclosed to the Applicant but only after the names of these other persons is masked.

I am providing the Division with a copy of the document on which the personal information to be masked is clearly identified.

V RECOMMENDATIONS

[52] I find that section 30(2) of the *Local Authority Freedom of Information and Protection of Privacy Act* does not apply in this case and therefore recommend that the Applicant be furnished with a copy of the letter about him dated October 6, 2003 together with the two page attachment.

[53] The record described in the preceding recommendation should have certain personal information severed before it is furnished to the Applicant and a copy of the record with those portions to be severed is provided to the Division together with this Report.

[54] I recommend that the Division undertake a further search for records related to the August 27, 2003 Board meeting that relate to the Applicant and to provide those records to the Applicant subject to any applicable mandatory or discretionary exemptions. This is necessary since the Division did not apply the appropriate test of what was a personal record.

[55] I recommend that the Division review and revise its Record Retention and Disposal Schedule to clearly address what is and is not a record of the Division and to clarify the difference between transitory records and permanent records.

[56] I recommend that personal information of an individual that is used to make a decision by a local authority should be retained for at least one year after the date of the decision to enable the affected individual to seek access to that record.

[57] I recommend that the Division provide this office and the Applicant with a copy of its revised Record Retention and Disposition Schedule within 90 days.

[58] I recommend that the Division institute a training program for staff on the requirements of *The Local Authority Freedom of Information and Protection of Privacy Act* with particular attention to what records and information are subject to the act and what the requirements are for dealing with an access request and how mandatory and discretionary exemptions are applied.

[59] I recommend that the Legislative Assembly consider an amendment to *The Local Authority Freedom of Information and Protection of Privacy Act* to create an offence to destroy any records subject to this Act or to direct another person to do so, with the intent to evade a request for access to the records.

[60] Dated at Regina, in the Province of Saskatchewan, this 20th day of July, 2004.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for Saskatchewan