BCSTA British Columbia School Trustees Association

March 8, 2010

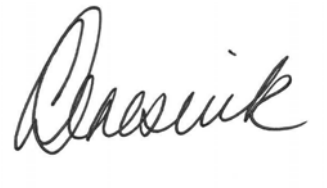
Special Committee to Review the
Freedom of Information and Protection of Privacy Act
Room 224, Parliament Buildings
Victoria, BC, V8V 1X4

Dear Committee:

Enclosed is a copy of the submission to your committee on the review of the *Freedom of Information and Protection of Privacy Act.*

Should you have further questions regarding this response, please contact Stephen Hansen, Executive Director of BC School Trustees Association directly at 604-734-2721, ext. 115.

Sincerely,



Connie Denesiuk
President

www.bcsta.org
bcsta@bcsta.org
t 604 734 2721
f 604 732 4559
4th Floor - 1580 W. Broadway
Vancouver, BC V6J 5K9

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Submission to the Special Committee to Review the *Freedom of Information and Protection of Privacy Act*

I. British Columbia School Trustees Association

BCSTA is a non-profit voluntary association of boards of locally elected school trustees (boards of education constituted under the *School Act*), committed to strengthening the local voice in public education and to improving student achievement. BCSTA represents all of the 60 public boards of education in British Columbia, including the francophone education authority.

BCSTA remains a strong supporter of the fundamental principles underlying the *Freedom of Information and Protection of Privacy Act* ("the Act"). Transparency supports good governance. Privacy is a fundamental value that is taken seriously by the educational system of this province. The purpose of this submission is to enhance the Act based on the experience of boards of education and their staff since the last Legislative Review.

II. Boards of education and information and privacy

Personal Information

Boards of education hold a great deal of personal information about more than 580,000 students and their families, past students, and staff. Some of this has been centralized through BCEsis, the electronic database promoted by the Ministry of Education for the storage of student records. Other personal information is distributed through the records of approximately 1,600 public schools in British Columbia, including records maintained by individual staff members, especially teachers (over 33,000 in 2008/2009) and school administrators (over 3,000). Personal information of one individual is often intertwined with information of others, for example, students with their families, students with other students (as in student discipline records), staff members with students. It will never be an easy task to manage all of this personal information, much of which is sensitive.

General access requests

Besides requests for personal information, many of which are dealt with as routine disclosure under the *School Act,* boards may also be subjected to requests for large amounts of information under the Act's general right of access. When boards of education have been involved in controversial decisions, such as decisions to administer Foundation Skills Assessment (FSA) tests (as mandated by the Minister of Education and the *School Act,* but contrary to the desire of the BC Teachers' Federation) or decisions about school closures or

www.bcsta.org t 604 734 2721 4th Floor - 1580 W. Broadway
bcsta@bcsta.org f 604 732 4559 Vancouver, BC V6J 5K9

reconfigurations (almost always opposed by some elements of the community), there may be very broadly framed access to information requests intended to gather evidence to be used in legal proceedings, or otherwise put pressure on the board. For example, BCTF eventually withdrew its request for the names of teachers who agreed to mark the FSA exams, but if it had been successful, this would have substantially impeded the board's efforts to recruit teachers for this task. Other requests more closely resemble not particularly well-designed research projects, such as a request for many years of honour roll data for all district high schools in the hope of showing a trend to a gender bias in the awarding of academic honours.

While not always repetitious, such requests can consume considerable time and resources and can impose significant financial costs on boards that are already struggling to meet their budgets.

III. Concerns relating to the *Freedom of Information and Protection of Privacy Act*

The concerns expressed herein are drawn from the experience of board staff and their advisors as well as those expressed by boards of trustees.

(1) Fees and resources to respond to requests

Boards of education are a democratic institution and recognize the important role that citizen and media access to information plays in a democracy. At the same time, there needs to be an appropriate balancing of the costs of access to discourage abuse and protect education dollars from being spent on pursuing projects that may have no discernible benefit to the public interest.

The time, and sometimes money, spent responding to requests is the major concern of boards of education and their staff. Although some boards have experienced very few requests, there is always the prospect of receiving one of the very broadly framed requests that have been sent to all or many boards by trade unions or media. In most boards, access-to-information requests are handled by staff who have many other duties. In many cases the staff responsible do not have an opportunity to develop a lot of expertise and must rely on outside legal advisors.

Since the last Legislative Review, boards have experienced an increasing number of applicants (including media and unions) who make wide-ranging, systematic and/or repeated requests requiring board staff to spend a great deal of time and resources in response. In the absence of circumstances dictating a fee waiver, boards should be able to recover their actual costs from such applicants.

Technology has also matured; it should no longer be necessary to hand out stacks of free paper to applicants seeking their own personal information. Public bodies should be able to choose to provide information in electronic form.

Boards of education do not question their obligation to make available to individuals their own personal information and accept that this necessarily includes costs. Boards seek the right to provide access in the most cost-effective way.

Boards do question the wisdom of using resources intended for public education to support private interests or pet research projects. Where requests are in the public interest, the provisions regarding fee waivers (in whole or in part) can be applied.

Recommendation:
That section 75 and the Schedule of Maximum Fees be amended to:

- Allow public bodies to recover the actual costs of providing service to all applicants except those seeking their own personal information, subject to fee waivers where requests relate to a matter of public interest.
- Reduce to one hour, the "three free hours" to locate and retrieve records (s. 75(2)), or alternatively, limit free hours to persons seeking their own personal information.
- Allow public bodies to choose the medium for providing copies of records to applicants requesting their own personal information and allow them to charge for copies if the applicant requests a more expensive medium.
- Allow public bodies to recover reasonable costs of severing information from all applicants, or alternatively, from all applicants except those requesting their own personal information, subject to fee waivers when requests relate to matters of public interest.
- Increase hourly rates permitted under the Schedule of Maximum Fees to more realistically reflect actual costs, especially considering that a fair degree of skill can be required to locate and sever records, and senior staff are often required to be involved.

(2) Release of student personal information through Ministry of Education data

The Ministry of Education's release of Foundation Skills Assessment (FSA) results by school has been a major concern to boards of education. In addition to concerns about the misleading nature of the information, boards have also expressed concerns about the impact on student privacy.

In 2009, numerous boards of education submitted motions to BCSTA relating to the controversy over FSA and the publication of results, leading to resolutions

- that the Minister of Education revise the Ministry's policy relating to the release of assessment data sets, specifically the Foundation Skills Assessment results to external bodies, such as the Fraser Institute, so that access for the purpose of ranking or identification of schools is no longer allowed (BCSTA PC Motion 09/2009 Masking of FSA Results);
- that BCSTA work with appropriate partner groups to conduct a broad review of all Ministry-mandated district performance assessment and accountability measures (AGM motion 5/2009);
- that BCSTA work with the Minister of Education other partner groups to resolve current problems with FSA testing and develop a long-term solution (AGM motion 6/2009).

Similar motions are expected to come before BCSTA's 2010 annual general meeting in April.
In their support for these motions, boards noted that even with masking of results for populations of less than five, there are situations where individual student results are disclosed. One board cited the following real-life examples:

- Five Aboriginal students in Grade 4, who all met expectations on the reading FSA. A parent familiar with that school would have been able to identify these students exactly.
- One Grade 7 girl had a different score than all the others, so her parents could tell the scores of all the other Grade 7 girls in that school.

The Vancouver Island School Trustees Association (a branch of BCSTA) wrote:

> "Currently the Ministry of Education releases FSA results to the public in a manner which has allowed individual student FSA results to be determined by both race and gender. In addition to violating the student's expectation and right to privacy, gender and race have been used to undermine the students' dignity.
>
> "Educators and the government have a responsibility to protect the privacy of student information and results should never be published that compromise the student's right to privacy.
>
> "Removing the FSA results from the Ministry's website is not enough to keep the student's data private. Changes may be required to legislation to clarify that student data are being collected exclusively for parental and educator use, along with changes to the *Freedom of Information and Protection of Privacy Act* to restrict access to school level educational data so as to ensure privacy is not accidentally released due to unforeseen circumstances."

Boards are also concerned about the misleading nature of the information. The example of hospitals is frequently cited. At least one board has urged the Minister of Education to withhold the names of individual schools when publicly releasing FSA scores and other student performance data, following the precedent set by the Ministry of Health in not naming hospitals in association with hospital data. The board argued:

> "Many in the general public, including some agencies and institutes, do not understand, or choose to not understand, how to interpret test scores administered in the manner FSA tests are conducted. Any analytical work conducted on data collected from our students must be appropriate, fair and scientifically rigorous. Currently, FSA data is inappropriately characterized and rated, causing unnecessary stress on districts, schools, teachers and, in some instances, students."

Similar concerns apply to release of class composition information (the number of special needs, gifted, or English as a Second Language students in a particular class).

> **Recommendation:**
> That the Commissioner work with the Ministry of Education to enhance legislative protection of student privacy under the Act and ensure school level data are not routinely released.

(3) Consent on behalf of persons under age 19

In many situations, schools base their operations on the authority of custodial parents and an assumption that they have the ability to consent (expressly or impliedly) on their own behalf and on behalf of their children to decisions affecting the welfare of the student, e.g., their educational program, whether they go on field trips, their participation in extracurricular activities.

With regard to consents to disclosure of student information, the regulation provides that the consent of a guardian of a person under age 19 is only valid if the individual is incapable of exercising his or her own rights. It is simply not practical for a school system to operate on the basis of an individualized assessment of student capacity.

> **Recommendation:**
> That the *Freedom of Information and Protection of Privacy Regulation* be amended to allow a public body to rely on a guardian's consent unless it has reason to believe that the guardian is seeking access to a minor child's personal information on his or her own behalf rather than the minor's.

(4) Employment/labour relations/investigation records

The Act has insufficient recognition of the sensitivity and the need to protect from disclosure investigations and negotiations of labour relations and employment matters, such as disciplinary investigations.

The Ontario *Freedom of Information and Protection of Privacy Act* s. 65 and *Municipal Freedom of Information and Protection of Privacy Act* s. 32 provide specific exemptions for records of labour relations and employment disputes and negotiations:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
> a) Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
> b) Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
> c) Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

An amendment of the definition of "law enforcement" to specifically include employee misconduct matters would partially address this concern.

The ability of public bodies to disclose information related to employment to other public bodies should be expanded (s. 33.2). For example, one board officer, acting on information received from an individual about one of the board's teachers on call, was blocked from obtaining information from another board that had employed the same substitute teacher about the reason that the teacher's employment with the other board had been terminated since the teacher refused to provide consent for verification of his information.

> **Recommendation:**
> That the Act be amended to provide similar protection for labour relations and employment information as is provided by Ontario information and privacy legislation.

(5) Third party contracts

Section 21 requires a public body to refuse to disclose commercial or financial information about a third party that is supplied in confidence, and that would harm a competitive position or interfere with the negotiating position of a third party or result in undue financial loss or gain to any person or organization. The jurisprudence has developed a very narrow definition of "supplied" with the result that a great deal of third-party commercial information provided in or pursuant to a contract and specifically stated to be confidential, is subject to disclosure. This is so even if there is strong evidence of resulting harm.

Most businesses would assume that labeling their business and commercial information "confidential" in their contract with a public body would prevent, rather than require, disclosure, so are highly likely to object to disclosure in response to an access request. Because this is a mandatory exception and inappropriate disclosure is an offence, the cautious information and privacy coordinator will generally refuse to grant access if the third party contractor objects and claims confidentiality and likely harm. As a result, cases proceed to mediation unnecessarily.

There is a strong need for a clear rule, expressed in the Act, that does not require an expert interpretation. Such a rule should honour both the public interest and the intention of the contracting parties where there is a reasonable likelihood of harm flowing from disclosure.

> **Recommendation:**
> That section 21 be amended to more closely align with the expectations of the public and of contractors:
>
> - Contracts with public bodies are public documents
> - Information provided pursuant to a contract may be withheld if there is a clearly expressed expectation that the information be confidential and there is a reasonable likelihood of harm that would flow to the contractor.
>
> Such amendments should apply to new contracts, since many past contracts include proprietary information. If the rules were this clear, many unnecessary disputes would be avoided and public bodies would save on legal costs and staff time to deal with them.

(6) Public body interests

Section 17 of the Act recognizes the fiduciary obligations of public bodies to protect their financial and economic interests but does not reflect the broader duties of school boards to protect other interests that could sometimes be harmed by disclosure. Some of these are also fiduciary in nature, given the broadening definition of fiduciary duties.

For boards of education, such interests include workplace safety and school environments that are free of discrimination and harassment. Boards have a duty not just to deal with specific identified threats that may come within the scope of section 19 as threats to public safety, but also to be proactive in promoting positive school environments.

> **Recommendation:**
> That section 17 be amended to permit public bodies to refuse disclosure that could reasonably be expected to harm the interests of the public body in labour relations or in safe and positive workplaces or environments for the users of their services.

(7) Information to be published within 60 days

Under section 20 of the Act, a public body need not supply copies of information in response to an access request if the information will be published within 60 days after the request is received. The equivalent section in the *Ontario Municipal Freedom of Information and Privacy Act* sets the limit at 90 days.

We suggest that the Act not apply to information that will be published according to a statutory schedule.

The *School Act* and other statutes under which boards operate include a wide variety of accountability and transparency mechanisms, including specified timelines by which information must be published. For example, the *Financial Information Ac*t requires publication of financial information including schedules of employees' and elected officials' remuneration and expenses within three months of the end of a fiscal year. Where the Legislature has established a time for publication, there is no reason to allow a private interest to accelerate the production of the information and disrupt the workflow of the public body.

> **Recommendation:**
> That section 20 be amended to provide that an access request may be refused if the information will be published according to a schedule set out in an enactment.

Respectfully submitted by the Board of Directors of the BC School Trustees Association

March 2010