FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

Guide to Providing Counselling Services In School Jurisdictions

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Guide to Providing Counselling Services
In School Jurisdictions

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Chapter 1
The Counselling Service

BACKGROUND

Since 1984, Alberta Education has viewed guidance and counselling services as an integral component of the school program. This view is reflected in the manual *From Position to Program: Building a Comprehensive School Guidance and Counselling Program*. Alberta Education's policy on this subject is contained in its Policy Manual, Section 1.6.3 – Guidance and Counselling. This states that "school boards should make guidance and counselling services available to all students as an integral part of school programs and services".

"Guidance and counselling" are defined as including a variety of group oriented activities designed to enhance students' attitudes and values and refers to an individualized, small-group or class process that assists students to overcome specific personal/social issues and difficulties, and educational or career issues. Counselling services may be developmental, preventive or crisis-oriented.

The manual outlines the following procedures:

- School boards should provide guidance and counselling services for all students from Early Childhood Services through grade 12.
- School boards shall develop written policies and procedures for the provision of guidance and counselling services which are consistent with provincial policy and procedures. Policies should include roles and responsibilities of counsellors.
- School boards should employ professionally trained counsellors who have had successful teaching experience. For schools which do not have a counsellor, the school board should ensure that guidance and counselling services are available to students.
- Guidance and counselling services provided by school boards should meet identified needs of students in three key areas:
  1) Educational
  2) Personal/social, and
  3) Career development.
- School counsellors should coordinate community services with the school program.
- School counsellors or individuals providing guidance and counselling services shall respect the confidentiality of information received in accordance with professional ethics and the law.

Counselling services are also provided in post-secondary institutions for students; through FCSS programs in municipalities to families and individuals in the community and through employee assistance programs to employees in a variety of local public bodies. While this paper is focussed primarily on counselling services to minors, some of the comments and suggestions will have broader applicability to these areas.

WHO PROVIDES COUNSELLING SERVICES?

One or more of the following groups may provide counselling services:

- Teachers – certificated teachers who are members of the Alberta Teachers' Association.
- Social Workers – members of the Alberta Association of Registered Social Workers.
- Psychologists – Chartered Psychologists who are members of the College of Alberta Psychologists.

Sometimes these professionals may work alone; sometimes as a part of a multi-disciplinary team within the school. Other professionals may also work in the counselling area, including child development assistants, mental health workers and nurses.

Counsellors may be employees of the school board or they may be hired under contract to work for the school board and provide counselling services in one or more schools.

CODES OF ETHICS

Both the Alberta Association of Registered Social Workers and the College of Alberta Psychologists have developed Codes of Ethics.[1] The Alberta Association of Registered Social Workers is also in the process of producing a document *Standards of Practice*, and the College of Alberta Psychologists has a draft set of professional guidelines entitled *Release of Confidential Information: Special Issues in Third Party Requests.* The Alberta Teachers' Association has also enacted a code of ethics.[2]

These documents are important because they define the professional obligations and ethical standards of the professions. They also contain rules regarding confidentiality and retention of records. In broad terms they focus on responsible caring for the client and

[1] Canadian Association of Social Workers Code of Ethics (1983), College of Alberta Psychologists Code of Conduct (1997).
[2] Alberta Teachers' Association Code of Professional Conduct (1995).

student, and on respect and dignity of persons.

Extracts from these documents are given in Appendix One. They deal with:

- The definition of a "client".
- Confidential information.
- Maintenance and retention of records.
- Third party contracts.

WHO IS THE CLIENT?

Counsellors, whether employed directly or under contract, may have three sets of clients. The first is the local public body that is employing the counsellor or contracting for services. The second is the student or individual who is receiving the services of the counsellor. If the individual receiving counselling is a minor, and is not an independent student as defined in the *School Act*, the third client may be the parent(s) or guardian(s) of the individual.

It is important for the local public body and the counsellor to clearly understand the requirements that the former has for information, and who has the right to ask for this information. This is important because the local public body will want:

- to be sure that it can audit the services being provided and appraise the performance of its employees.
- It will also want to be sure that students are receiving the appropriate advice and help to further their education.

The counsellor will want to understand:

- the extent of information that has to be provided and the format in which it is provided so that he or she can maintain records that produce that information;
- agree to the limits of confidentiality for all personal information collected; and
- be able to explain to the individual receiving services what the requirements are of the school board or employer.

The individual receiving services will likely have an expectation that the information provided to the counsellor will be kept in confidence. It is important that the counsellor can explain at least some of the exceptions to this expectation. These exceptions may be:

- imposed on the counsellor by his or her contract with the local public body;
- may be related to provisions in other legislation such as the *Child Welfare Act*; or

- may be related to a duty to inform others in the case of a criminal offence, or may be related to the requirements for disclosure under the *FOIP Act*.

When the person receiving services is a minor, and not an "independent student", the counsellor will need to explore with the individual the ramifications of involving or not involving parents or guardians in the decision making process. The individual should also be informed of what records will be maintained and how access will be granted to them.

When parents or guardians are involved in the decision making process, they will have to be informed of any exceptions to the confidentiality expectations and of the extent to which they will be provided with personal information disclosed during the counselling. The counsellor will have to explain the circumstances under which he or she would regard disclosure of personal information to be an unreasonable invasion of the privacy of the individual receiving services, and particular issues when the student will be the client for decision making purposes.

Parents or guardians should also be informed of what records will be maintained and what access they have to those records.

Chapter 2
Applying the FOIP Act

WHO IS AN EMPLOYEE?

According to the *FOIP Act*, **section 1(1)(e**), *an "employee", in relation to a public body, includes a person retained under a contract to perform services for the public body.*

Counsellors actually working for wages or salary for a local public body are, of course, normally thought of as employees. The *FOIP Act* expands this to include any counsellors who are working on a contract. This would include a personal service contract as well as a contract with a corporation, partnership or sole proprietorship.

It is important that school boards ensure that counsellors who carry out their work through a contractual relationship have clauses written in the contract that deal with:

- The types of records required that would be created or maintained under the contract.
- The ownership of those records.
- The maintenance of any records transferred to the counsellor by the local public body and the separation of these records from any other records or databases.
- The conditions of access to the records by the local public body and the positions of those people employed by the public body who have access.
- The retention and disposition of the records.
- An acknowledgement that the counsellor is bound by the provisions of the *FOIP Act* as far as records created, obtained, collected, compiled or provided under the contract are concerned.
- Conditions for collection, accuracy and correction, use, protection and disclosure of personal information in the counsellor's possession.

These clauses are important because they define the relationship between the local public body and the counsellor in terms of who has control of the records. They will also ensure that the counsellor follows the rules of the *Act* with regard to the protection of individual privacy.

The Government of Alberta has published two booklets on contract management that may be helpful.[3]

[3] *Contracting by the Government of Alberta: a Guide for FOIP Coordinators and Senior Records Officers* (1997) and *Contract Manager's Guide to Freedom of Information, Protection of Privacy and Records Management in the Government of Alberta* (1997).

Both are available from the Information Management and Privacy Branch, Alberta Labour.

WHAT IS PERSONAL INFORMATION?

Section 1(1)(n) defines "personal information". Among the items that are likely to be a part of counsellors' records are:

- The individual's name, home address and home telephone number.
- The individual's race, national or ethnic origin, colour or religious beliefs or associations.
- The individual's age, sex and family status.
- Identifying numbers such as student I.D. number, social insurance number, and personal health number.
- Information about the individual's health and health care history.
- Information about the individual's educational, financial, employment or criminal history.
- Opinions of other people about the individual.
- The individual's own opinions about himself or herself.

An individual's personal views or opinions about another individual are the personal information of that other individual. These views or opinions, as well as similar information to that listed above about family members or other individuals may also exist in a counselling record. This would be particularly likely if any counselling is done in a focus group, family group or similar setting.

Wherever possible, counsellors should try to segregate this other information so that information can be more easily protected or severed if a person other than the individual the information is about requires access to the record.

Psycho-educational tests and the answers to these tests are personal information as they form a part of the individual's health and/or educational history.

WHAT IS A RECORD?

According to the *FOIP Act*, **section 1(1)(q),** *"record" means a record of information in any form and includes books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records.*

Some of the records that a counsellor might have include:

- Counsellor's schedule or calendar showing appointments.
- Student-counsellor log detailing student contacts.
- Needs assessments and goals.
- Student interview records.
- Parent interview records.
- Records of discussions in focus groups, family therapy or group therapy sessions.
- Referrals to outside sources or other professionals within the school, including forms, records of discussions and reports.
- Minutes of meetings of counselling teams within the school or community.
- Psycho-educational assessment tests and information, including results and summaries.
- Health information, including information provided by the individual's doctor.
- Law enforcement information, including information about probation, community service or alternative measures under the *Young Offenders Act*.
- Individual student plans.

These records might be in a number of formats:

- Raw notes – verbatim or summary notes taken during an interview, telephone call, meeting or group discussion.
- Audio tapes.
- Video tapes.
- Test questions and answers.
- Forms.
- Draft and final formal reports for the file.
- Letters.

They might be in paper form, on a computer or in both media formats.

It is important to differentiate the FOIP definition of "record" from that in the *Student Record Regulation*. The latter identifies the components of the official student record. The only components likely to match with counsellors' records are:

- *Section 1(1)(j): the results obtained by the student on any*
  (i) *diagnostic test, achievement test, and diploma examination conducted by or on behalf of the Province, and*
  (ii) *standardized tests under any testing program administered by the board to all or a large portion of the students or to a specific grade level of students.*
- *Section 1(1)(k): a notation of any formal intellectual, cognitive, social or emotional test or evaluation of the student provided by the board, the date of the test or evaluation, the name of the person who conducted the test or evaluation, a summary of the results*

of the test or evaluation or any interpretive report and any action taken as a result of the test or evaluation.

- *Section 1(2): If a formal education plan is specifically devised for a student the plan, together with all amendments, shall be placed on the student record of that student.*

- *Section 1(3)(c): Information of a sensitive nature…if in the opinion of the board, the release of the information would be in the public interest.*

The *Student Record Regulation* specifically excludes the following types of record from the official student record:

- *Section 1(3)(a): Notes and observations that are prepared by and for the exclusive use of a teacher or principal, and that are not used in program placement decisions,*
- *Section 1(3)(b): any information relating to a report or an investigation under the Child Welfare Act.*
- *Section 3(c): any information of a sensitive nature, the disclosure of which, in the opinion of the Board, would clearly be injurious to the student* (Except as noted above).

RECORDS MANAGEMENT

The *FOIP Act* does not prohibit the transfer, storage or destruction of records provided these actions are done under a properly constituted records retention and disposition schedule. Some of the records created and maintained by counsellors will be "transitory" – that is, they will have a short life span during which they serve a particular purpose and can then be destroyed.
Examples might include:

- Audio tapes used as a memory aid to facilitate preparation of a report on a consultation or therapy session.
- Interview notes and questions used as the raw material for a report.
- Diaries intended to record future events and meetings not as a record of these meetings.

It is important that the records management policy and procedures of the board clearly identify the types of records it deems are transitory and stipulate the retention schedule for such materials.

All personal information used to make a decision about an individual must be retained for at least one year after its use. This is to allow the individual reasonable time to obtain access to it and, if necessary, request corrections.

Once notes or audiotapes are transcribed or a report is finished based on them, and this transcription or report becomes an official record of the discussion or meeting, then the notes or tapes can be destroyed. The decision will be based on the official record.

There will be situations when these types of records cannot be considered transitory and are required as a part of the complete record of counselling for an individual student or to document a particular situation.

All records are subject to an access request under the *FOIP Act*. If a request is received, destruction of records must cease even though there is an authorized disposition schedule in place.

CUSTODY AND CONTROL

The *FOIP Act* gives any person a right of access to records in the *custody or under the control of a public body.* This right is subject to limited and specific exceptions set out in the Act.

Custody generally means having physical possession of the record. Files kept on school premises or on property owned or occupied by the school board will fall within this definition. Files which are kept at home but which constitute records created or received during the performance of duties as an employee of the board also meet this definition. Although in the personal custody of the employee, they belong to the board.

Control refers to having legal control over the record. This notion implies that the local public body can direct the counsellor or other person who has physical possession of the record to manage or treat it in a certain manner. This is why contractual arrangements should have clauses that clearly specify the extent of control exercised over contractors' records by the local public body.

The interpretation of custody and control has been brought sharply into focus through a case in British Columbia.[4] The inquiry arose out of a request for access to a school counsellor's notes in the Cranbrook School District.

The counsellor objected to providing the notes to the school district. British Columbia's Information and Privacy Commissioner found that the notes were in the custody and control of the public body.

[4] Information and Privacy Commissioner of British Columbia, Order 115-96

The counsellor appealed the decision to the Supreme Court of British Columbia. The Judge supported the Commissioner's decision.

This judgment makes it clear that any notes taken by a counsellor are within the custody or control of a public body if they are used to make reports which are in that body's custody and if there are no policies or rules to the contrary. A summary of the arguments are included in Appendix 2.

PSYCHO-EDUCATIONAL TESTING

Alberta Education has set standards for psycho-educational testing.[5] The standards cover achievement tests, diagnostic tests, personality tests, self-esteem inventories, behaviour checklists, vision and hearing tests, learning and think skills tests, intelligence scales and neurological examinations. The standards include the following provisions:

- Informed written consent is required from the parents or legal guardians before most of these tests can be conducted.
- This consent must be entered in the student record.
- The parent or guardian has the right to withhold consent and refuse testing.
- Consent includes consent to disclose the results to school personnel and anyone with regular access to the student record.
- Written consent is required before disclosure can take place outside of the student record.

Section 4(1)(d) of the *FOIP Act* says**,** *This Act…does not apply to a question to be used on an examination or test.*

Questions to be used on future testing instruments are not subject to the *FOIP Act* and are not accessible through a FOIP request. Most testing instruments use the same questions so this protects those questions from being obtained and, thus, biasing the test results.

Section 25 of the *FOIP Act* says, *The head of a public body may refuse to disclose to an applicant information relating to*

(a) testing or auditing procedures or techniques, or

(b) details of specific tests to be given or audits to be conducted,

if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

This gives a school board the discretion to withhold information

[5] Alberta Education. Special Education Branch: *Standards for psycho-educational assessment* (1994).

relating to the procedures which it follows in administering psycho-educational tests, as well as the details of the tests themselves.

Although this section has not yet been considered by Alberta's Information and Privacy Commissioner, there has been a case in Ontario that went through judicial review.[6] The judge overturned the Ontario Commissioner's order and upheld the school board's case that release of test answers as well as questions would compromise the future use of standardized tests such as the Stanford Binet Intelligence Scale and the Weschler Intelligence Scale.

PROTECTION OF PRIVACY

Collection of personal information by counsellors is authorized by s**ection 32(c)** of the *FOIP Act*. This authorizes the collection of personal information where the information relates directly to and is necessary for an operating program or activity of the local public body. As outlined earlier, guidance and counselling services are mandated programs for school boards.

Section 33(2) of the *FOIP Act* says, *A public body that collects personal information that is required… to be collected directly from the individual the information is about must inform the individual of*

(a) the purpose for which the information is collected,
(b) the specific legal authority for the collection, and
(c) the title, business address and business telephone number of an officer or employee of the public body who can answer the individual's questions about the collection.

As stated above, parents must be informed prior to most psycho-educational testing. Parents should also have the right to refuse the tests. Counsellors should also ensure that students are informed as outlined above prior to counselling being provided.

A part of a counsellor's role in dealing with students is that of a confidante. It is important that counsellors never promise confidentiality in their dealings with students. A recommended course of action is to say to students that you, as a counsellor, are more than willing to discuss any problem or situation and are open to listening to what the student has to say, but cannot guarantee that you will not disclose the information to anyone.

There are a number of reasons for this:

[6] Information and Privacy Commissioner of Ontario, Order M-91.

- The *School Act* gives parents a range of rights with regard to information about their children. This includes access to the student record, and information about disciplinary matters.
- The *FOIP Act* provides discretion to the board to disclose personal information in a range of specified circumstances [**section 38**].
- The *FOIP Act* allows parents to exercise the rights of their children under the *Act* provided the head of the local public body feels the exercise of these rights would not be an unreasonable invasion of the child's privacy [**section 79(d)**].
- The *Child Welfare Act* compels reporting of cases of suspected child abuse.
- The information provided may be the personal information of a third party (another student, family member etc) and, therefore, is normally accessible to that third party.

When dealing with collection of personal information in a group setting, all members of the group should be informed at the same time and have an opportunity of discussing and agreeing to the sharing of information within the group.

If an audio or video record is to be made of a counselling session, it is recommended that specific written consent is obtained prior to the record being made, and that consent is included at the beginning of the audio or video tape.

Accuracy of personal information is very important in a counselling situation.

Section 34(a) of the *FOIP Act* requires that the local public body make every reasonable effort to ensure that the information is accurate and complete if it is using that information to make a decision about an individual.

Counsellors need to be sure that any information which is recorded and used for decision making is accurate and complete, and if there are any doubts about this should record these doubts on the record.

Personal information gathered during counselling is often summarized for reporting purposes. It is important that the summary is an accurate one because the individual has the right to request the records from which the summary was made if they are retained, and can then request corrections if the summary is inaccurate.

Section 34(b) of the *FOIP Act* requires that any personal information used to make a decision about an individual

be retained for at least one year to give the individual a reasonable opportunity to obtain access to it.

If information is compiled into a report, and that report is then used to make a decision, the report must be retained for at least a year. The notes, audiotapes or other information used in compiling the report do not need to be retained for the purpose of complying with this section of the *FOIP Act*. If notes or other information are used directly to make a decision about an individual, then those notes or other information must be retained for at least a year.

An individual has the right to ask for **correction of personal information** if he or she believes that there is an error or omission in it. The *FOIP Act* has rules for dealing with this situation and these can be summarized as follows:

- The individual has the right to ask for a correction of personal information.
- The local public body has the right to determine whether or not to make the requested correction.
- If no correction is made, the local public body must annotate the record or link the request for correction with the information that was alleged to be in error.
- Any third party that has had access to the information during the previous year must be informed of the correction, annotation or linkage.
- These acts must be completed within 30 days.
- The individual has the right to ask the Commissioner to review the local public body's decision.

It is recommended that corrections of fact be made on request and without a FOIP request, thereby avoiding the considerable work outlined above.

The **protection** of personal information is a statutory duty.

According to **section 36** of the *FOIP Act*, *the head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.*

The codes of ethics emphasize the importance of confidentiality of personal information, and professionals already have mechanisms in place, which likely meet the requirements of the *FOIP Act.* Some points to consider are:

- If the records are in paper, audio or video formats and are stored on school premises, they should be in locked cabinets and in a locked room.

- Personal information should never be left unattended.
- Personal information about third parties should not be visible and readable during a counselling session with an individual.
- Collection of personal information, whether on forms or through counselling interviews, should take place away from other school personnel, preferably in an enclosed room.
- If the records are in machine-readable format, they should be stored in a secure area of the LAN, on the hard drive of the counsellor's own computer, or on diskettes which are secured in the same way as paper records.
- If they are stored on a LAN or hard drive, the directories should have additional security such as a separate password to prevent unauthorized access.
- If they are stored on a laptop, additional security when in transit between office and home.
- Access should be limited to those with the need to see this information. The decision on what to share and when is that of the counsellor every time.
- Personal information should never be left "on screen" when the computer is unattended.
- If records are stored at home, either in "hard" format or on computer, the same precautions should be taken as would be taken at school.
- If records are accessed from home via a home computer, the same precautions should be taken as if the computer was in the school. Personal information should not be stored on a home computer.
- If records are stored in an office separate from the school (i.e. a contractor's own office), security arrangements should be spelled out in the agreement for the contractor's services.
- Personal information in paper format should be shredded so that the document cannot be reconstructed on disposal.
- Personal information on audio or videotape should have the tape completely erased before reuse.
- Personal information stored on computer should be regularly reviewed to ensure retention and disposition policies are being followed. Back up tapes should be recycled quickly to avoid any inadvertent disclosure from them. Diskettes should be reformatted before reuse to destroy any information on them.
- If a computer which has personal information on its hard drive is being transferred to another office or sold, the hard drive should be professionally "cleansed" before transfer or sale.

Use of personal information

Use of personal information is governed by **Sections 37 to 39** of the *FOIP Act*.

Section 37 *A public body may use personal information only*

(a) for the purpose for which the information was collected or for a use consistent with that purpose,

(b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use, or

(c) for a purpose for which that information may be disclosed under Section 38, 40 or 41.

Personal information gathered by counsellors will likely be used for the following purposes:

- Educational planning, including individual student planning.
- Career education.
- Personal and/or social growth of the student, including personal issues identified by the student.

The use of the information may be developmental, preventive or crisis-oriented.

As outlined in **section 39** of the *Act*, providing the use of information has a reasonable and direct connection to the above purposes, and is necessary for performing the statutory duties of the local public body, or a legally authorized program of the same local public body, there should be no difficulty in proving consistent purpose.

If the proposed use of the information does not meet the above criteria, or is not authorized under **Section 38**, the consent of the individual must be obtained in writing. It must specify to whom the information may be disclosed and for what purpose it may be used following disclosure.

Disclosure of personal information

Section 38 sets out 27 instances where personal information may be disclosed without consent. Following are some of the circumstances where counsellors may be asked to disclose information. In all cases, the counsellor will have to take into account the effect of the disclosure on the individual receiving services, the nature of the information being requested and the reasons given for the disclosure.

Section 38(1)(d): *for the purpose of complying with an enactment of Alberta or Canada or with a treaty, arrangement or agreement made under an enactment of Alberta or Canada,*

This provides discretion to disclose personal information when the purpose of the Act, Regulation or agreement

could not be achieved without such disclosure.

Examples would include:

- Arrangements entered into with community service agencies or other local public bodies that require personal information to be disclosed.
- Disclosure to another school board if a student transfers schools and it is considered necessary for the educational and social growth of the student to transfer some or all of the counselling record as well as the student record.
- Compliance with a custody agreement under Section 9 of the *Child Welfare Act*.
- Disclosure to Alberta Alcohol and Drug Abuse Commission to allow that body to operate its programs for the prevention and treatment of alcohol and drug abuse.
- Agreements respecting work experience or co-op programs.

Section 38(1)(e)**:** *for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure,*
This allows the local public body to comply with an Act or Regulation that requires disclosure to be made.

Examples would include:

- The *Child Welfare Act, section 3(1)* that requires any person who has reasonable and probable grounds for believing that a child is in need of protection to report this fact to a director of child welfare.
- The *Child Welfare Act, section 5(3)* where a director refers a family member or family to a community resource, the community resource is required to report any matter respecting the protection of the child that might require investigation.
- The *Human Rights, Citizenship and Multiculturalism Act, section 20.1* which gives an investigator of a human rights complaint the power to demand the production for examination of any records which may be relevant to the subject matter of the investigation.
- *The Public Health Act, section 33(1)* that requires a teacher to report to the regional medical officer of health if he or she has reason to believe an individual has a communicable disease. Diseases such as AIDS, chickenpox, mumps or herpes have to be reported immediately; sexually transmitted diseases have to be reported within 48 hours.

Section 38(1)(f)**:** *for the purpose of complying with a subpoena, warrant of order issued or made by a court, person or body having jurisdiction to compel*

the production of information or with a rule of court that relates to the production of information,

Counsellors should contact the local public body's legal advisor if served such an order. Legal counsel will determine the action that is necessary.

Section 38(1)(g)**:** *to an officer or employee of the public body…if the information is necessary for the performance of the duties of the officer (or) employee,*

This permits disclosure to officers or employees within the local public body. It assumes disclosure of the minimum amount of information required for each circumstance.

- Disclosure is permitted between schools within the same school authority.
- This section does not apply to permit disclosure to boards of trustees who are elected officials. Elected officials are not officers or employees.
- Employees and officials should only have access to the information required to do their job or deal with a particular situation. This section does not give "carte blanche" access to all counselling records for the school principal or other staff members.
- Sharing information during team meetings to discuss an individual's educational needs would be permitted.
- Sharing of information to ensure the safety of staff, students and other persons would be permitted, including information about a violent individual.

Section 38(1)(h)**:** *for the purpose of enforcing a legal right that…a public body has against any person,*

This section allows disclosure to legal representatives of a public body in order to enforce legal rights, whether civil or criminal.

Section 38(1)(j)**:** *for the purpose of determining an individual's suitability or eligibility for a program or benefit.*

This permits disclosure both to other public bodies and to other organizations to allow them to determine whether an individual has the characteristics which enable him or her to be qualified for a program or benefit, or whether or not he or she is eligible for the program or benefit.

- Permits disclosure for determining eligibility for special education or remedial programs.
- Permits disclosure for determining eligibility for community programs.

- Permits disclosure for determining suitability for alternative measures or community service programs under the *Young Offenders Act*.

Section 38(1)(o): *to a public body or a law enforcement agency in Canada to assist in an investigation*

(i) undertaken with a view to a law enforcement proceeding, or from which a law enforcement proceeding is likely to result.

(ii) from which a law enforcement proceeding is likely to result.

This permits disclosure to agencies such as:

- the RCMP
- Municipal police forces
- Safety inspection groups
- Fire commissioners and investigators

It also permits disclosure for internal investigations provided that the intent of the investigation is to determine whether or not there will be proceedings resulting in penalties or sanctions specified in an Act.

Requests must be justified, be in writing and contain the exact nature of the information desired, the authority for the investigation (e.g. case or file number, statute violation), the purpose for which the information is to be used and the name, title and address of the person authorized to make the request. A sample form is included in the *FOIP Policy and Practices Manual*.[7]

Section 38(1)(r*):* *in accordance with Section 40 or 41.*

This permits disclosure for research purposes. Strict rules are specified in both the *FOIP Act* and the *FOIP Regulation* concerning the agreements that have to be in place before such disclosure can take place.

Section 38(1)(s*):* *to an expert for the purposes of Section 17(2).*

Permits disclosure to a physician, chartered psychologist or psychiatrist or other expert in order to determine whether or not release of an applicant's own personal information could reasonably be expected to result in immediate and grave harm to the applicant's health or safety.

The *FOIP Regulation, Section 5* establishes conditions for such disclosure.

This section does not apply when a parent requests information about a child – it only applies if the individual receiving counselling services makes a request for his or her own information.

[7] Government of Alberta: Freedom of Information and Protection of Privacy Policy and Practices Manual. Appendix 3.

Section 38(1)(t): *for use in a proceeding before a court or quasi-judicial body to which…a public body is a party.*

Permits disclosure to a legal representative in proceedings and, depending on disclosure and discovery rules that apply, to legal representatives of other parties. Some examples of quasi-judicial bodies are:

- Attendance Boards
- Boards of Reference under the *School Act*
- Competency Review Panels under the *Practice Review of Teachers Regulation*.
- Human Rights & Citizenship Commission Appeal Boards.

Section 38(1)(y): *for the purpose of supervising an individual under the control or supervision of a correctional authority.*

Examples include:

- Individuals performing community service work under the *Young Offenders Act*.
- Individuals in an alternative measures program.
- Individuals on probation.

In such cases, regular attendance at school or meetings with a counsellor may be a condition of the program or probation order.

Section 38(1)(aa): *to the relative of a deceased individual if, in the opinion of the head of a public body, the disclosure is not an unreasonable invasion of the deceased's personal privacy.*

Privacy for a deceased individual normally endures for a period of 25 years, but this provision enables earlier disclosure to a relative. Proof of relationship is required before disclosure can be made.

This provision recognizes the need for relatives to have access to information to resolve personal issues or pursue their rights. In considering disclosure, the public body should weigh the sensitivity of the information against the interest of the relative in knowing the information. The need of the relative should go beyond curiosity. Only as much information as is necessary for the relatives needs should be disclosed.

Some factors to consider are:

- Whether the information was supplied in confidence.
- Whether the information is relevant to a fair determination of the relative's rights.
- Whether disclosure may endanger the physical or mental well being of any other living member of the family.

- Whether there are grounds for believing that another member of the family does not want the information disclosed to the relative.
- Whether the information includes medical, psychological or social work case reports or data that it is reasonable to believe would prove harmful to familial relationships.
- Whether disclosure may harm the reputation of the deceased.

EXERCISE OF RIGHTS BY PARENTS OR GUARDIANS

Section 79(1) *Any right or power conferred on an individual by this Act may be exercised*

(d) if the individual is a minor, by a guardian of the minor in circumstances where, in the opinion of the head of the public body concerned, the exercise of the right or power would not constitute an unreasonable invasion of the personal privacy of the minor.

When a parent or guardian makes a request for personal information of a child and this information is not contained within the student record, it can be assumed that the adult is exercising the child's rights under **section 6** of the *FOIP Act* but this is not an absolute right.

This provision leaves discretion in the hands of the local public body when privacy rights are involved. The *Policy and Practices Manual*[8] suggests that public bodies should follow their own policies and procedures for deciding when such individuals have the ability to understand the matter being decided and to appreciate their consequences.

The *School Act* defines parent as:

(a) the biological parent or, if the student is an adopted child, the adoptive parent,

(b) notwithstanding clause (a), if the student's biological or adoptive parent resided in Alberta and has changed his residence so that it is outside Alberta or unknown, the individual who has care and custody of the student as a result of the change,

(c) notwithstanding clauses (a) and (b), the individual who has custody of the student under

(i) a court order, or

(ii) a written agreement made pursuant to a statute governing custody of the student,

if the individual notifies the board in writing of his custody,

[8] Government of Alberta: *Freedom of Information and Protection of Privacy Policy and Practices Manual*. Chapter 7.

(d) notwithstanding clauses (a) to (c), the guardian of the student appointed under
  (i) a temporary or permanent guardianship order under the *Child Welfare Act*,
  (ii) a written agreement made pursuant to the *Domestic Relations Act* or the *Child Welfare Act*, or
  (iii) an order of a court,
  if the guardian notifies the board in writing of his appointment, or

(e) notwithstanding clauses (a) to (d), the Minister of Justice and Attorney General if the student is in custody under the *Corrections Act*, the *Corrections and Conditional Release Act (Canada)*, the *Young Offenders Act* or the *Young Offenders Act (Canada).*

These rights cannot be exercised if the student is an "independent student" as defined in the *School Act*, that is:

A student who is 16 years of age or older and who is living independently, or who is a party to an agreement under section 7(2) of the *Child Welfare Act*, or on behalf of whom a social allowance is issued under section 9(1) of the *Social Development Act*.

Some school boards have policies or practices that extend the rights of a non-custodial parent to have access to the student records or information about his or her child unless there is an order specifically forbidding such access.

It would be safe for a school board to adopt the *School Act* definition for the purposes of determining who can exercise guardianship rights under the *FOIP Act*.

The legislation in other provinces is considerably different from Alberta:

Ontario: Rights can be exercised if the individual is less than sixteen years of age, by a person who has lawful custody of the individual.[9]

British Columbia: Rights can be exercised on behalf of an individual under 19 years of age, by the individual's parent or guardian if the individual is incapable of exercising those rights.[10]

In neither case is it necessary to consider whether or not there would be an unreasonable invasion of the minor's privacy, and the ages used are different.

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[9] *Municipal Freedom of Information and Protection of Privacy Act, Section 54(c).*
[10] B.C. *Freedom of Information and Protection of Privacy Regulation, Section 3(a).*

Orders in Other Jurisdictions

Several orders have been made in Ontario and British Columbia that are relevant to consideration of the rights of guardians.

The only Ontario order relevant to this guide is one in which the request was for six pages of handwritten notes made by one of a School Board's social workers during an interview with the appellant's son. These notes relate to an incident involving the son and the teacher. The appellants submitted that the record should be disclosed in order to allow them to more fully understand the circumstances of the Board's investigation of the incident involving their son.

The Commissioner found that the personal information of the teacher contained in the record was supplied by the appellants' son, not the teacher, so was not supplied in confidence by the teacher.

In addition, neither the Board nor the teacher provided any evidence to suggest that the teacher would be exposed unfairly to pecuniary or other harm, or that disclosure of this personal information would unfairly damage the teacher's reputation.

He ordered release of the records as they did not constitute an unreasonable invasion of privacy of the teacher, and the parent had the power to request them on behalf of the child.[11]

B.C.'s Commissioner has issued four orders dealing with access to records by a parent or guardian. Three of these [12]dealt with who could exercise the access rights of the minor. He stated that, where one parent has legal custody, only that parent could exercise these rights. This has the effect of keeping to a minimum the number of persons with access to a minor's personal information. The third order dealt with access to records existing when the individual was a minor, but who at the time of the application was an adult and refused consent. The Commissioner stated:

> "As a custodial parent, a mother has decreasing rights to exercise a daughter's right of access to her personal information during the period of the daughter's minority. Such rights of access terminate completely once the minor subject of the records has become an adult."[13]

[11] Ontario IPC Order M-642.
[12] B.C. IPC Orders 2-1994, 10-1994 and 44-1995.
[13] B.C. IPC Order 49-1995.

As can be seen, British Columbia's Commissioner interprets the legislation in a narrow fashion and was not prepared to extend rights to those who did not have legal custody. It may be that Alberta's Commissioner will take a similarly narrow view in interpreting this provision against the definition in the *School Act*. Note also that the Commissioner in British Columbia suggests that the rights of a parent or guardian diminish as a child ages, thus supposing that the child becomes more capable of exercising those rights as he or she becomes older. This might be one of the tests employed in determining whether or not exercise of rights under **section 79(1)(d)** is an unreasonable invasion of privacy.

Alberta Family and Social Services

In addition to the definition in the *School Act* and the implications in the British Columbia orders, the practice followed by Alberta Family and Social Services should be noted. That department's Information and Privacy Branch follows the following procedure;

- If a guardian is requesting his/her child's information, determine if the guardian is the custodial guardian and the age of the child.
- A custodial guardian is one who has legal custody or joint custody and is either involved with or provides day to day care of the child.
- If the child is not living with the applicant, the FOIP coordinator must establish proof of being involved with the provision of day to day care.
- If the child is under twelve years old, the guardian is allowed to access the child's information on his/her behalf.
- If the child is twelve or older, the FOIP coordinator must obtain the child's opinion about releasing his/her information.
- If the information is not released because the child does not wish it released, the applicant is so informed.
- If, after considering the child's wishes, the coordinator decides to release the information, the child is notified as a third party so that he or she can request the Commissioner to review the decision.[14]

This implies that, at least for those students whose parents meet the definition outlined as (d)(i) above, the child should be consulted if the child is 12 or older. It may also have implications for all students as one factor in determining whether or not it

[14] Alberta Department of Family and Social Services: FOIP Departmental Policy and Procedures, 1997 and Information and Privacy Branch Policy and Procedures 1996.

would be an unreasonable invasion of personal privacy to provide access to a parent or guardian.

School Jurisdictions

Factors to consider in applying Section 79(1)(d):

- Does the applicant (i.e. the person who makes the request) meet the definition of "parent" in the *School Act* or in the local public body's policy? If not, the request would be denied and the applicant has the choice of asking the Commissioner to review this denial or making a formal request as a third party.
- Is the disclosure an unreasonable invasion of the minor's personal privacy? In particular consider:
- Does the information meet the definition in section 16(2) of the *FOIP Act*?
- The age of the child.
- The family situation.
- The sensitivity of the information being sought.
- Whether or not the child supplied the information in confidence.
- Whether the information is likely to be inaccurate or unreliable.
- Whether the information is relevant to a fair determination of the child's rights, not the applicant's rights.
- Whether disclosure is desirable for subjecting the activities of the local public body to public scrutiny.
- Should the minor be contacted and the request discussed with the minor?

If the decision is made, without contacting the minor, that it would not be an unreasonable invasion of privacy, then the information can be released subject to a review of the exceptions contained in sections 17, 19, 22, 23, 25 and 26.

If, after contacting the minor, a decision is reached that disclosure would not be an unreasonable invasion of privacy, the minor should be informed of that decision so that he or she has an opportunity to ask the Commissioner to review it.

If a decision is made that the applicant cannot exercise the rights of the minor, or that disclosure of the information would be an unreasonable invasion of the minor's personal privacy, then disclosure under section 79(1)(d) is refused. The applicant can then ask the Commissioner to review that decision and/or make a formal FOIP request as a third party.

It is not clear who bears the burden of proof in these cases. **Section 67(1)** places the onus on the local public body to prove why the applicant has no right of access to the record or part of

the record. If the decision is that the adult cannot exercise the rights of the minor, then this would apply.

However, **section 67(2)** states that the burden of proof rests with the applicant to show that it would not be an unreasonable invasion of a third party's personal privacy to release the information.

The argument could be made that the minor, in the case of a refusal to disclose information, is a third party and that this subsection would apply if refusal is based on the fact that the local public body considers disclosure to be an unreasonable invasion of privacy of the minor.

EXCEPTIONS TO DISCLOSURE

Counselling records may contain information other than personal information about the individual applying for access to them. Following is a very brief review of some of the exceptions that may need to be considered both when looking at disclosure of information about the individual who is the applicant and at disclosure of other information.

More detail about how to apply and interpret these exceptions is found in the *FOIP Policy and Practices Manual*.[15]

Disclosure harmful to personal privacy

Often counselling records will contain personal information about several individuals. It is important to remember that when dealing with a request from one individual for information, the personal privacy of the other individuals must be respected.

Section 16 outlines the kinds of information that would be presumed to be an unreasonable invasion of privacy and the factors to be taken into consideration when considering whether or not this information should be disclosed.

Records will usually be severed to remove the personal information of third parties, but sometimes the information is so intertwined with the information about the applicant that severing is impossible. In these situations either the whole record has to be released or the whole record withheld.

[15] Government of Alberta: Freedom of Information and Protection of Privacy Policy and Practices Manual. Chapter 4.

Disclosure harmful to individual or public safety

Section 17(1) allows a local public body to refuse to disclose information if disclosure could reasonably be expected to threaten anyone else's safety or mental or physical health, or interfere with public safety.

This section can be considered once a decision has been made that disclosure will not be made under **section 79(1)(d)** and the parent or guardian makes a request as a third party. It allows consideration of the safety, mental and physical health of the minor to be taken into account before disclosure. Commissioners in other provinces have taken a liberal interpretation of the equivalent section in their legislation in order to protect the health and safety of third parties.

Section 17(2) allows a local public body to refuse to disclose information about an applicant if, in the opinion of a physician, chartered psychologist, psychiatrist or other appropriate expert depending on the circumstances of the case, the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's health or safety.

This is a much more stringent test for harm than the preceding subsection. If a decision is made to allow access under **section 79(1)(d)**, then this is the test that would have to be met should the counsellor feel disclosure of the information could be harmful to the minor. In essence, having decided that the parent or guardian can exercise the minor's rights, the applicant would be the minor.

Guidance for seeking the advice of experts is provided in the *FOIP Regulation Section 5*. In some circumstances a registered social worker may be considered an appropriate expert.

Disclosure harmful to law enforcement

Section 19 provides for a variety of circumstances where information may be withheld because it could harm a law enforcement matter. The information would have to relate to an investigation or proceedings that could lead to a penalty or sanction being imposed under an Act or Regulation. It includes the identity of confidential sources of law enforcement information.

This section also gives discretion to withhold information that could facilitate the commission of an unlawful act or hamper the control of crime, harm the security of any property or system or reveal

information in a correctional record supplied in confidence. An unlawful act would include assault. Information in a correctional record would include information supplied to the school relating to a young offender's record.

The Young Offenders Act (Canada) sets very strong limitations on the disclosure of young offender information. Federal legislation overrides provincial legislation and information subject to these limitations must not be disclosed in response to a request under the *FOIP Act*.

Local public body confidences

Section 22 allows a local public body to withhold information that could reasonably be expected to reveal the substance of in-camera discussions of its elected officials or governing body, or of a committee of its governing body. The subject matter that may be dealt with in such a meeting is itemized in section 18 of the *FOIP Regulation.* If counselling records have been revealed in an in-camera discussion about an individual and they could reveal the substance of that discussion, then they may be withheld from disclosure.

Advice from officials

Section 23 allows a local public body to withhold information that could reasonably be expected to reveal advice, recommendations, analyses or consultations or deliberations of its officials. Counselling records containing this type of information would have to meet the Commissioner's test for advice contained in *IPC Order # 96-006* and consideration would need to be given on how disclosure would harm the deliberative and advice giving process of the local public body.

Testing procedures, tests and audits

Section 25 allows a local public body to withhold information relating to testing procedures or techniques, or details of specific tests to be given, if disclosure could reasonably be expected to prejudice the use or results of particular tests. This would allow for withholding of standardized psycho-educational testing instruments and, possibly, the answers to those tests.

Privileged information

Section 26 allows the local public body to refuse to disclose information subject to any type of legal privilege, including solicitor-client privilege. If counselling records contain any correspondence or advice with the local public body's lawyers, they

should be consulted prior to release of the records.

Appendix 1

Extracts from Codes of Ethics Governing Counsellors

DEFINITION OF CLIENT

A client may be an individual, couple, group, family, community or corporate entity who receive social work services. In the case of children, the legal guardian may be the client for decision making purposes. A child shall be the client for:

- Issues directly affecting the physical or emotional well being of the individual, such as sexual or other exploitive relationships, and/or
- Issues specifically reserved to the individual, and agreed to by the guardian prior to rendering of services, such as confidential communication in a professional relationship.

[Alberta Association of Registered Social Workers (AARSW): *Introduction to proposed standards of practice*, section 2.3.1]

A child who understands the nature and consequences of the service they will receive is a client for purposes of consent and decision making respecting services. The onus to establish informed consent rests with the Registered Social Worker who is expected to fully explore with minors the implications of involving or not involving the minor's parents or guardians in the decision making process.
[AARSW: *Introduction to proposed standards of practice*, section 2.3.2]

Client means a receiver of psychological services. A corporate entity or other organization can be a client when the professional contract is to provide services of a benefit, primarily, to the organization rather than to individuals. In the case of individuals with legal guardians, including minors, the legal guardian shall be the client for decision making purposes, except that the individual receiving service shall be the client for:

1. Issues directly affecting the physical or emotional well being of the individual, such as sexual or other potentially exploitive dual relationships, and
2. Issues specifically reserved to the individual, and agreed to by the guardian prior to rendering of services, such as confidential communication in a therapy relationship.

[College of Alberta Psychologists (CAP): *Code of Conduct*, page 8]

CONFIDENTIAL INFORMATION

Confidential information means information obtained in the context of a professional relationship or other circumstances where there was a reasonable expectation that the registered social worker would not subsequently disclose that information. Except under compelling circumstances, registered social workers shall not disclose confidential information in a way that identifies a client without the informed written consent of that client.
[AARSW: *Introduction to proposed standards of practice*, section 2.4]

The right of privileged information is respected by the social worker notwithstanding that this right is not ordinarily granted in law. The disclosure of confidential information is social work practice involves the obligation to share information professionally with other in the workplace of the social worker as part of a reasonable service to the client. Social workers recognize the need to inform clients at the outset of their relationship that some information may be shared with the officers and personnel of the agency who maintain the case record and who have a reasonable need for the information in the performance of their duties. The social worker, in a workplace setting may disclose information to persons who, by virtue of their responsibilities, have an identified need to know.
[Canadian Association of Social Workers (CASW): *Code of Ethics*, section 6.1]

Confidential information means information revealed by a client or clients, or, otherwise obtained by chartered psychologists where there is reasonable expectation that because of the relationship between the client(s) and chartered psychologists, or the circumstances under which the information was revealed or obtained, the information shall not be disclosed without the informed written consent of the client(s). When a corporation or other organization is the client, rules of confidentiality apply to information pertaining to the organization, including personal information about individuals. Such information about individuals is subject to confidential control of the organization, unless there is reasonable expectation by the individual that such information was obtained in a separate professional relationship with the individual and is therefore subject to confidentiality requirements in itself.
[CAP: *Code of Conduct*, page 8]

Chartered psychologists may disclose confidential information without the informed written consent of the client when they judge that disclosure is necessary to protect against a clear and substantial risk of imminent serious harm being inflicted by the client on himself/herself or another person. When the client is an organization, disclosure shall be made only after there has been a reasonable and unsuccessful attempt to have the problems corrected within the organization.
[(CAP): *Code of Conduct*, page 14]

The teacher may not divulge information obtained about a pupil received in confidence or in the course of professional duties except as required by law or where, in the judgment of the teacher, to do so is in the best interest of the pupil.
[Alberta Teachers' Association: *Code of Professional Conduct*, section 5]

MAINTENANCE AND RETENTION OF RECORDS

Registered social workers shall keep, at their place of practice, systematic and legible records. They shall include the client's full name, address and telephone number; a brief description of the professional services requested and provided, location and dates; a copy of all reports and other documents prepared or received as part of the professional relationship; clear identity or the authorship of notes and reports written and filed in the record; goals, services and outcomes.
[AARSW: *Introduction to proposed standards of practice*, section 3.9.3]

Each client, on request, shall have access to the information about them in the record whether served as an individual or as a member of a group or family. All clients in the group or family shall have access to the group of family record for only the sessions they attend.
[AARSW: *Introduction to proposed standards of practice*, section 3.9.5]

All entries in the professional records are maintained for a period of 10 years after the last date of service rendered to clients.
[AARSW: *Introduction to proposed standards of practice*, section 3.11, CAP: *Code of Conduct*, page 10]

Written, electronic film or other records shall be stored and disposed of in ways that will maintain the confidential nature of the data contained in them.
[AARSW: *Introduction to proposed standards of practice*, section 3.12, CAP: *Code of Conduct*, page 11]

The social worker will ensure that all information recorded is either relevant to the solution of the client's problems

or is needed for others within the workplace setting who have a need to know the information in the performance of their duties. The social worker will make reasonable efforts to avoid recording information that would be against the best interests of the client should the case record be subpoenaed or seen by the client. The case record itself is the property of the self-employed social worker or the employer of social workers and is, unless otherwise dictated by statute, the responsibility of the social worker or employer and subject to their control.
[CASW: *Code of Ethics*, section 6.5]

Chartered psychologists shall maintain professional records that include appropriate identifying information; the presenting problem(s) or purpose of the consultation; the date and substance of each service, relevant information on interventions, progress, any issues of informed consent or issues related to termination; any test results or other evaluative results obtained and any basic test data from which they were derived; notation and any results of formal consults with other providers; a copy of all test or other evaluative reports prepared as part of the professional relationship.
[CAP: *Code of Conduct*, page 10]

THIRD PARTY CONTRACTS

In cases such as employee assistance programs, it is the responsibility of registered social workers to ascertain and make clear to both organizational and individual clients the bounds and limits of confidentiality. Except in compelling circumstances these contractual boundaries and limits of confidentiality are to be agreed in writing by all parties. When professional responsibilities to the employer and client are in conflict, the registered social worker will bring this situation to the attention of the employer and attempt to facilitate a satisfactory resolution of the conflict.
[AARSW: *Introduction to proposed standards of practice*, sections 2.4.2 and 3.3]

In a situation in which more than one party has an appropriate interest in the professional services rendered to a client or clients, the chartered psychologist shall, to the extent possible, clarify with all parties prior to rendering the services the dimensions of confidentiality and professional responsibility that shall pertain in the rendering of services.
[CAP: *Code of Conduct*, page 14]

Psychologists will sometimes provide services to a client that are "brokered" by a third party such as an agency, insurance carrier, employee assistance program or lawyer. In such cases it is important to establish before

proceeding with the service who the client is and who has access to and control of the information.

A more difficult situation is where an agency or program asserts this right [or ownership] after services have been provided and requires the release of confidential information about a client without the client's consent. In this situation a prudent psychologist will inform the client of this request and try to secure agreement to the release. Most reputable [employee assistance] programs play the role of putting the client and provider in contact but not intruding significantly into the clinical matters at stake. They will also state clearly in their policies what their position is with regard to access to clinical information about persons referred to contract providers.

[CAP: *Professional guidelines for psychologists: release of information: special issues in third party requests*, page 2]

Appendix 2

B.C. Commissioner's Decision Regarding Counsellor's Notes

The interpretation of "custody and control" has been brought sharply into focus through a case in British Columbia.[16] The inquiry arose out of a request for access to a school counsellor's notes in the Cranbrook School District.

The applicant asked for copies of all notes of a school counsellor that pertained to her two children during a 14-month period. The applicant was particularly interested in notes recording what the counsellor had said to the children. The counsellor stated that she discussed a wide variety of topics with children, including very personal matters such as relationships with parents.

During such conversations she keeps notes to refresh her memory as she continues to work with the student. Sometimes she takes no notes, but normally decides what to note, the format of the notes and how to retain and destroy the notes.

Normally at the end of the school year, the counsellor prepares a summary of her involvement with the student and this is placed on the student's file. The general topics discussed will appear there, but not the notes. The notes were kept in the counsellor's own notebook, stored at home and carried to the school when required to work with a student.

The counsellor argued that the records in question were neither in the custody nor under the control of the school board. British Columbia's Information and Privacy Commissioner determined that the school counsellor is an employee of a public body, the School District, creating records in the course of her employment as a counsellor. He rejected the argument that it would be an unwarranted invasion of the confidential student/counsellor relationship for a school board to attempt to regulate the raw notes of a counsellor. He stated that these records are the product of an employer-employee, or contractual, relationship.

He further stated:

[16] Information and Privacy Commissioner of British Columbia, Order 115-96

> "I think it is inappropriate for this counsellor to keep her raw notes and files in her own home. Although counsellors' notes should be maintained separately from general school records, all such counselling records should be kept in locked files in a school's counselling office, or other appropriate, secure location within a school, because of the requirement for "reasonable security" for personal information under the Act.
>
> I would strongly encourage the Ministry of Education and School Districts to develop appropriate policies on privacy and access matters for counselling records including record keeping, informed consent, waivers and competency, if none exist."

The counsellor appealed the Commissioner's decision to the Supreme Court of British Columbia. The case was heard on January 15, 1998 and the decision rendered on July 8, 1998.[17] In her argument before the judge, the school counsellor stated that the notes are not intended to be used by or provided to any other person or body. She further submitted that neither the Ministry of Education, the School Board for which she works or any principal of any school requires that she maintain these notes. Finally, she submitted that making her raw notes available would so undermine the student/counsellor relationship as to significantly impair it.

The Cranbrook School District was an intervenor in the case and submitted that the fact that the notes were made by an employee during the course of her employment is sufficient to support a finding that the notes are within the custody or control of the School District, the employer. Further, it argued that it is essential for the School District to have access to such notes in order to ensure continuity of service to students and in order to properly supervise the work of the counsellors it employs.

Madam Justice Dorgan concluded by finding that the facts supported the Commissioner's finding that the disputed notes are under the control of the School District. She stated:

> "The petitioner counsellor is not an independent contractor; she is an employee of the School District. During the course of her employment she makes notes. These notes are relied upon in the preparation of school records, which preparation is a requirement of her employment. The notes are

[17] Judgment of Honourable Madam Justice Dorgan, July 8, 1998, docket A962846, Vancouver Registry.

> created by an employee of a public body and used to make periodic reports, possession of which is held by the public body."

This judgment makes it clear that any notes taken by a counsellor conducting services for a public body are within the custody or control of a public body if they are used to make reports which are in that body's custody and if there are no policies or rules to the contrary.