

**NEWFOUNDLAND AND LABRADOR**  
**OFFICE OF THE INFORMATION AND PRIVACY**  
**COMMISSIONER**

**REPORT 2006-012**

**Department of Education**

**Summary:** The Department of Education (the “Department”) received an Application for Access under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”). This Application was signed by a minor who was seeking access to notes and/or the transcript of an interview conducted with him by two Consultants from the Department. The Department informed the mother of the minor that access to the information was being denied in accordance with section 65 (exercising rights of another person). In response, the mother filed a Request for Review with this Office. Based on the specific circumstances of this case, the Commissioner concluded that the Applicant was actually the mother of the minor and not the minor himself. He further concluded that releasing the information to the mother would be an unreasonable invasion of the minor’s privacy. The Commissioner also found that the mandatory exception set out in section 30 (personal information) applied to the responsive record.

**Statutes Cited:** *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as am, ss. 2(o), 30(1) and (2), 49(2), 50, 60, 65(d); *Age of Majority Act*, S.N.L. 1995, c. A-4.2, as am

**Authorities Cited:** British Columbia OIPC Order 00-40 (2000); Ontario OIPC Order P-673 (1994)

**Other Resources Cited:**

*Access to Information and Protection of Privacy Act* Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September 2004, available at <http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf>

## I BACKGROUND

[1] The issue before me centres on a 14 year old boy who has been diagnosed with a number of disorders. In October of 2005 two consultants from the Division of Student Support Services, Department of Education, conducted interviews with this boy, with his parents and with other members of the community. In November of 2005, and again in December, the boy's mother wrote the Director of Student Support Services, Department of Education, asking for a copy and/or transcripts of the interviews conducted with her and her husband and with her son. In January of 2006 the Director of Student Support Services responded and advised the mother to submit a request through the *Access to Information and Protection of Privacy Act* (the "ATIPPA").

[2] On 9 February 2006 the boy's mother submitted an access to information request to the Department of Education (the "Department"), wherein she requested access to the following:

*I wish to obtain a copy of interview notes and/or a transcript of interviews conducted by [names of two consultants] (consultants with the Dept. of Education) on Oct. 26, 2005 with us and with my son [name of son], age 14 on Oct. 27, 2005. The Oct. 26, 2005 interview was with myself and husband [name of husband]. [Name of one of the consultants] took handwritten notes of the parent interview. The consultants did not follow-up with a verbal and/or written report of our interviews.*

[3] In correspondence dated 21 March 2006 the Department provided the mother with a copy of the interview notes between her and her husband and the consultants. However, the Department advised the mother that access to the interview notes pertaining to her son's interview on 27 October 2005 was being denied in accordance with sections 30 and 65(d) of the ATIPPA.

[4] Subsequent to the mother's request, the Department received a second access to information request, dated 11 April 2006, signed by the 14 year old son. I note that the address and telephone number on the son's application for access is the same as the mother's address and telephone number on her application, indicating that they both reside at the same location. This second request sought access to the following:

*I wish to obtain a copy of my interview (notes and/or transcript) with [two consultants]. It was held on Oct. 27, 2005 at [location of interview].*

- [5] The Department initially responded directly to the son, in a letter dated 20 April 2006, acknowledging receipt of his request. In denying access to the information, however, the Department issued a letter to the boy's mother, dated 12 May 2006, saying in part:

*The Department is denying the request in that I am of the view that this request is not for the benefit of [name of son] and maintain that disclosure would constitute an unreasonable invasion of his privacy.*

*Access has again been refused in accordance with Section 65(d) of the Access to Information and Protection of Privacy Act (the Act) which states:*

65. *A right or power of an individual given in this Act may be exercised*  
*(d) by the parent or guardian of a minor where, in the opinion of the head of the public body concerned, the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy;*

- [6] On 2 June 2006 the mother filed a Request for Review with this Office, asking that I review the decision of the Department to deny her son access to his own information. The Department was notified of this Request for Review in correspondence dated 6 June 2006, and was asked to provide the appropriate documentation and a complete copy of the responsive record for my review. An unsevered copy of the record was received at this Office on 9 June 2006.

- [7] In correspondence dated 14 June 2006 the mother and the Department were each given the opportunity to provide written representations to this Office under authority of section 47 of the *ATIPPA*. In response, both parties provided written submissions in support of their respective positions.

## **II PUBLIC BODY'S SUBMISSION**

- [8] The Department argues that the son is not capable of fully comprehending the nature of his request, nor the process involved in filing such a request. As such, the Department believes that

this request is effectively for the benefit of the mother, particularly in light of the mother's previous attempts to gain access to this information. The Department maintains that releasing the information to the son would be tantamount to releasing it to the parents, thereby creating an unreasonable invasion of the son's privacy.

### **III MOTHER'S SUBMISSION**

[9] The mother of this 14 year old boy acknowledges receiving the information concerning the interview with her and her spouse. However, she disagrees with the Department's statement that she is not entitled to her son's information because it would be an unreasonable invasion of his privacy. She points out that her and her husband gave the consultants permission to interview their son and, as his parents, have not received any feedback specific to that interview. They also maintain that as the parents they are acting in the best interest of their son and "...knowing what occurs in all facets of his life, particularly school and planning for services with complex special needs, is crucial."

[10] Notwithstanding her concerns on getting access to her son's information, the mother maintains that her son has now applied for access to his own information and he should have access to it. The mother notes that the Department's original response to her son's application for access was addressed to him, yet subsequent correspondence was addressed to her. She argues that the Department cannot deny access to her based on an unreasonable invasion of her son's privacy, while denying access to her son for the same reason. The mother questions how an Applicant, her son, can be denied access to his own information.

### **IV DISCUSSION**

[11] There are two main issues to be decided in this case. First, I must determine who the actual Applicant is. Based on the information before me, it is not immediately apparent whether the son

is the Applicant or the mother. Second, once I have determined who the Applicant is I must then determine whether or not that Applicant is entitled to the responsive record.

### Who is the Applicant?

- [12] In the Background section of this Report I have described two applications for access to information in accordance with the *ATIPPA*. The first was filed by a mother seeking access to information about herself and her husband and about her 14 year old son. The Department provided her with partial access in response to this request. The mother did not file a Request for Review with this Office specific to that request. As such, I do not consider the mother's initial application for access to be the subject of this Review and will not comment on it outside the scope of the subsequent application for access signed by the son.
- [13] The second application for access bears the signature of the son. It is this application that led to a Request for Review with this Office and is the subject of this investigation. The record being sought in this second application, as described in paragraph 4 of this Report, is the responsive record for the purpose of this Review.
- [14] While there is no doubt that, *prima facie*, the application for access forwarded to the Department on 11 April 2006 was from the son, a more in-depth analysis of the request is warranted. I do not consider the mother's previous unsuccessful attempts to gain access to the responsive record to be coincidental. I would fully expect that the mother was disappointed that she was unable to get a copy of the notes and/or transcript of her son's interview, but I question if this justifies her gaining access to the information through other means. It appears quite likely that the second request for the information, signed by the son, was done so as a direct result of the mother having been previously denied access to that same information. In other words, if she was unable to secure access on her own behalf she would attempt to do so through her son. As previously noted, the son lives with his parents and I believe it is quite reasonable to accept that releasing the information to the son would result in its release to the parents.

[15] Without in any way providing commentary on specific medical or psychological conditions, I believe it is important to reference the son's ability to fully understand the process involved in filing an access to information request. The mother has indicated that the son has been diagnosed with a number of disorders, and I am satisfied that the evidence presented to me does suggest that the son likely did not initiate this request completely on his own accord. I also note that the mother filed the Request for Review and all subsequent correspondence to this Office. At no point did the son submit any information on his own behalf nor make any claim of ownership with respect to this request.

[16] Based on the evidence before me, I believe that the person seeking access to this information is the mother. While the second application for access bears the signature of the son, I believe that the mother was facilitating the request for her own purposes. For this reason, I am considering the mother to be the Applicant for the purpose of this Review.

#### Is the Applicant Entitled to the Responsive Record?

[17] Having found that the mother is the Applicant, it is not necessary for me to consider the ability of the son to gain access to his own personal information. The question now before me is whether or not the mother is entitled to the personal information of her son?

[18] Before considering this question, however, I must first determine whether the responsive record is considered to be "personal information" as contemplated by the *ATIPPA*. Personal information is defined in section 2(o) of the *ATIPPA* to mean recorded information about an identifiable individual, including, among other things, the individual's name and personal views or opinions. On reviewing the record I am satisfied that it contains the personal information of the son.

[19] In denying the mother access to the responsive record the Department relied on section 65(d) of the *ATIPPA*:

65. *A right or power of an individual given in this Act may be exercised*

*(d) by the parent or guardian of a minor where, in the opinion of the head of the public body concerned, the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy;*

[20] Section 65 clearly provides parents with certain rights with respect to their children, but it is equally clear that such rights are not absolute. Application of this section, therefore, involves a two step process. First, it must be determined that the individual seeking to exercise a right or power under the *ATIPPA* is a parent or guardian of a minor. In the absence of a definition of "minor" in the *ATIPPA*, I am guided by the *Age of Majority Act*, S.N.L. 1995, c. A-4.2, which establishes that an individual under the age of 19 years is a minor. The son, being 14 years of age, is obviously a minor for the purposes of section 65(d). In addition, I see no reason to dispute that the Applicant is the parent of the minor.

[21] The question then turns to the second step in this process, which is a determination of whether or not there exists an unreasonable invasion of the minor's privacy. In reaching my conclusions on this issue, I considered the words of my counterparts in British Columbia and Ontario. In his Order 00-40, the Information and Privacy Commissioner for British Columbia dealt with the refusal of a school board to provide an Applicant with copies of a school counsellor's notes of interviews with the Applicant's children. He said, in part:

*In Neilson, Dorgan J, in passing, raised the issue of whether s. 3 of the Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 323/93 ("Regulation") adequately protects the privacy of children. Section 3 of the Regulation reads as follows:*

3. *The right to access a record under section 4 of the Act and the right to request correction of personal information under section 29 of the Act may be exercised as follows:*
  - (a) *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;*
  - (b) *on behalf of an individual who has a committee, by the individual's committee;*

(c) *on behalf of a deceased individual, by the deceased's nearest relative or personal representative. [emphasis added]*

*Dorgan J.'s concern may have stemmed from her perception that a parent could, in a case such as this, purport to rely on s. 3(a) of the Regulation in order to, in effect, claim an unfettered right of access to his or her minor children's personal information.*

*I acknowledge that concern, but note that s. 3(a) speaks of the exercise by a parent or guardian of the right to have access to a record where that right is exercised "on behalf of" someone who is under 19 years of age. As my predecessor said in Order No. 53-1995, **where an applicant is not truly acting "on behalf" of an individual described in s. 3 of the Regulation, the access request is to be treated as an ordinary, arm's-length request under the Act, by one individual for another's personal information...***

(Emphasis added)

[22] The British Columbia Commissioner went on to refer to a decision of the Office of the Information and Privacy Commissioner of Ontario, which I also find useful to the case currently before me. In his Order P-673, the Assistant Commissioner of Ontario agreed that personal information of a 14 year old boy should not be released to the boy's father. In reaching his conclusions the Assistant Commissioner said, in part:

*I have carefully reviewed the representations provided to me in conjunction with the records at issue. While the father has argued that he requires his son's personal information to determine whether the various government agencies acted within their statutory mandates, he has failed to convince me that he is exercising such a right of access on behalf of his son. Rather, my conclusion is that the father, while acting in good faith, is seeking this information to meet his personal objectives and not those of his son.*

*I also find, based on the sensitive nature of the materials contained in the records, that the release of the son's personal information would not serve the best interests of the child.*

[23] I find the arguments in these decisions to be relevant and compelling. While I fully appreciate the intent of section 65(d) in imparting specific rights on a parent or guardian, I believe the qualification imposed on this provision is an important one and not to be taken lightly. The legislation clearly recognizes the privacy rights of individuals, including the rights of



a minor. As such, it is incumbent on a public body, and on me as the Commissioner, to consider the best interests of the individual whose privacy may be invaded and to exercise discretion in ensuring an appropriate level of protection in circumstances where it is warranted. The *ATIPPA Policy and Procedures Manual*, produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice, provides clear direction on this point. In describing section 65(d) of the *ATIPPA*, this Manual, on page 2-8, states:

*A parent or legal guardian of a minor (an individual under 19 years of age) does not automatically have authority to exercise rights or powers on behalf of his or her minor child or ward under the Act. The head of the public body concerned must be satisfied that the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy. This leaves discretion in the hands of the public body to ensure the minor's privacy rights are protected in appropriate circumstances.*

[24] Based on all the evidence before me, I do not believe that releasing any of the information to the mother would be in the best interest of the son. Having placed significant emphasis on the privacy rights of the individual, I find that releasing the responsive record to the mother in this case would constitute an unreasonable invasion of the son's privacy. As such, the Department has appropriately relied on section 65(d) in deciding to withhold this information.

[25] Notwithstanding the application of section 65(d), I believe that section 30(1) is also relevant to this case. Section 30(1) of the *ATIPPA* is a mandatory exception that protects personal information:

*30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*

[26] Having decided that the Applicant in this case is the mother, and the information being sought is the personal information of the son, I find that section 30(1) applies to the responsive record. The Department, therefore, was correct in its decision to refuse to disclose the information to the mother.

[27] I acknowledge that section 30(2)(a) allows personal information to be released to an Applicant where the Applicant is the individual to whom the information relates. However, I have previously determined that the son is not the Applicant in this case and, as such, section 30(2)(a) does not apply.

## V CONCLUSION

[28] This case was particularly challenging in that the identity of the Applicant was brought into question. The Applicant appeared to be a 14 year old boy who was seeking access to his own personal information. However, on reviewing the material before me it became apparent that in fact it was the mother of the boy who was seeking access to the information. As such, I concluded that the mother was the Applicant for the purposes of this Review and not the son.

[29] Having reached that conclusion, I then had to determine whether or not the mother was entitled to her son's personal information. After a thorough analysis of the responsive record, all material provided to me by the mother and the Department and the decisions of my counterparts in other jurisdictions, I concluded that the circumstances of this case warranted a decision in favour of the son's privacy. In my opinion, the mother was acting on her own behalf in attempting to gain access to this information. I do not believe that her request for this information is in the best interest of the son and, as such, her request does not outweigh the son's right to have his personal information protected. I have concluded, therefore, that the entire record must not be released to the mother, as per section 65(d) and 30(1) of the *ATIPPA*.

[30] Having found that the Department of Education acted appropriately, it is not necessary for me to make a recommendation in this circumstance. Accordingly, I hereby notify the Applicant, in accordance with section 49(2) of the *ATIPPA*, that she has a right to appeal the decision of the Department to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60. The Applicant must file this appeal within 30 days after receiving a decision of the head of the Department as per paragraph 31 of this Report.

[31] Under authority of section 50 of the *ATIPPA*, I direct the head of the Department of Education to write to this Office and to the Applicant within 15 days after receiving this Commissioner's Report to indicate the Department's final decision with respect to this Report.

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21<sup>st</sup> day of July 2006.

Philip Wall  
Information and Privacy Commissioner  
Newfoundland and Labrador