

## Freedom of Information Requests (Local Teachers' Unions)

A number of districts have received requests for access to information under the *Freedom of Information and Protection of Privacy Act* ("FIPPA" or "Act") from their local teachers' unions/associations, similar to the document attached. These requests are for access to:

- Records related to advice or instructions by the school district to school-based administrators regarding the implementation of the 2017 Memorandum of Agreement ("MoA") between the BC Teachers' Federation (BCTF) and BCPSEA/Public Sector Employers' Council (PSEC)/Ministry of Education, and any restored local collective agreement language
- Records related to advice or instruction given by the Ministry of Education to the school district regarding implementation of the MoA or restored local collective agreement language
- Records related to advice or instruction given by BCPSEA to the school district regarding implementation of the MoA or restored local collective agreement language
- "Preliminary staffing plans based on project student enrolment for September 2017" which were submitted to the Ministry of Education by April 28, 2017
- Records related to correspondence between the Ministry of Education and the school districts related to requests for funding to support the implementation of the MoA and any restored collective agreement language.

BCPSEA does not normally provide advice or direction on FIPPA matters, but these requests by local teachers' associations appear to be coordinated and connected to the ongoing implementation of the MoA and restored collective agreement language. BCPSEA is therefore providing the general advice below to support districts in responding to their local unions' requests for records of "advice or instruction" within the school district, and between the school district and BCPSEA or the Ministry, regarding implementation of the MoA and/or restored collective agreement language.

Districts should note that this bulletin provides general advice based on their obligations under FIPPA only. It is recommended that districts review their individual collective agreements in case they have additional obligations regarding the sharing of information. If you have more specific questions or concerns, you may wish to contact external legal counsel for advice.

## Right to Access

The Act provides members of the public with a right to request access to existing records within the custody and control of a school district. School districts should also be aware that the Act also imposes on school districts a duty to assist applicants. It states that school districts must *“make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely”* (s.6). This means that school districts must make reasonable efforts to search for responsive records, respond in a timely way, and work with the applicant to clarify a request if it is unclear.

However, the Act does not require school districts to answer questions or manually create records in response to a request. If a record can be produced from information maintained by the school district in machine-readable form, then it may need to be generated if doing so does not unreasonably interfere with the district’s operations. Otherwise, the district’s responsibility is to compile and respond to requests by providing existing documents.

Requests should be examined carefully to ensure that they are clear and directed to records within the custody and control of the school district.

## Scope of Disclosure

The right to access records under the Act is not unlimited. Part 2 of the Act creates various exceptions to disclosure that authorize or require school districts to refuse disclosure. Some of the following exceptions to disclosure may be relevant to the current requests being received by school districts:

- **Section 13 – Advice and Recommendations**

The Act recognizes that the school district’s internal deliberative processes, and its process of developing plans and strategies, require protection from disclosure. Therefore, it protects communications and other records that constitute advice or recommendations that are developed by or for the school district. This means that the school district may withhold opinions, advice, and recommendations as well as the analysis leading to the giving of advice, and information from which advice and recommendations may be inferred. Draft documents developed by the school district will also generally fall within this exception. It applies to written material that a school district receives from its staff, consultants, and service providers as well as the advice it receives from BCPSEA, the Ministry, and other public bodies.

**Several of the recent requests appear to be specifically directed to receiving access to advice and recommendations that a school district has received from BCPSEA and the Ministry, or that it has developed internally regarding the implementation of the MoA and restored collective agreement language.** As some information is excluded from section 13 (see the exclusions in section 13(2)), school districts should carefully consider the application of section 13 before making disclosure.

- **Section 14 – Privileged Materials**

School districts are also authorized to refuse to disclose confidential communications with their legal advisors that are for the purposes of obtaining legal advice. A school district may also withhold material that is created or compiled for the dominant purpose of litigation. **District communications with their legal counsel and other records related to legal advice regarding the implementation of the MoA and restored collective agreement language may be withheld under section 14.**

- **Section 17 – Information harmful to the financial or economic interests of the School District or the government of British Columbia**

The Act recognizes that some disclosures may be harmful to a school district's own interests, and that protection from disclosure is warranted to ensure that the Act is not used to harm a school district's operations or ability to develop and implement plans and strategies. Accordingly, the Act at section 17 authorizes school districts to refuse to disclose records if doing so could reasonably be expected to harm the school district's financial or economic interests.

The Act identifies some situations in which this exception is presumed to apply, but the categories of information that may fall within this exception are not limited to those examples. They include information relating to the school district's labour relations plans or its administrative plans that are not yet public, and information about ongoing negotiations or information that would prejudice the school district in the course of ongoing negotiations. This exception applies to the pre-emptive disclosure of the school district's plans, proposals, or strategies if its interests would be prejudiced by such disclosure.

Section 17 contemplates both harm to the school district and harm to the provincial government's ability to manage the economy. A district may therefore also be required to consider the financial or economic interests of other public bodies, such as the Ministry of Education, before disclosing information related to **advice or instruction from the Ministry to the district on the implementation of the MoA or restored collective agreement language**. In such cases, consideration may also need to be given to the extent to which some disclosures may impact the sector as a whole.

Consultation with other public bodies or the Ministry in these situations may be needed to determine the existence of harm. Detailed and convincing evidence of expected harm is required in order to apply the exception.

- **Section 21 – Disclosure harmful to the business interests of a third party**

Section 21 allows districts to withhold information which, if disclosed, would harm the business interests of a third party, including potentially PSEC or BCPSEA. This exception applies to the information of third parties that is provided in confidence and which, if disclosed, gives rise to a reasonable expectation of harm. Materials that have been developed by BCPSEA, PSEC, and other third parties and provided confidentially to the school district should be considered in light of this section. Again, consultations with affected third parties will facilitate the determination of appropriate decisions under this section.

- **Section 22 – Third party personal information**

Section 22 allows districts to withhold information if the disclosure would give rise to an unreasonable invasion of a third party's personal privacy. Section 22 sets out specific circumstances that must be considered when making this decision. While the recent requests do not appear to be directed to personal information, this exception to disclosure is mandatory and should therefore be considered carefully in responding to any request.

BCPSEA cannot specifically advise whether any of the exemptions in the Act apply to your district's specific records. That is a determination that must be made by the school district on a case by case basis and in the context of the records that are identified as responsive. However, BCPSEA encourages school districts to carefully consider the impact of disclosure and, if

necessary, to engage in consultations with affected third parties to ensure that all relevant information is available to the school district before a decision on disclosure is made.

Please also note that the above exceptions must be applied on a line by line basis. In other words, if an exception authorizes withholding part of a document, the remaining content in the document may still need to be disclosed.

## Consulting with Third Parties

Where records are requested that contain the information of third parties, the Act sets out a process for consulting with those third parties before a decision on disclosure is made. In this case, the school district may find that consultations are also helpful in providing information about how disclosure may impact the sector as a whole. Some consultations are required by the Act and some are discretionary.

If the third party information is personal information of an individual, the disclosure of which would give rise to an unreasonable invasion of personal privacy within the meaning of section 22, then the Act requires a consultation with the individual unless the school district does not intend to disclose the information. **Similarly, business or commercial information of third parties that has been supplied in confidence cannot be disclosed without a consultation if disclosing it is reasonably expected to harm the third party. The process for a consultation that is required by the Act is set out in section 23.**

However, even when not required by the Act, consultation may be appropriate in some cases. For example, if the records are the records of another organization or contain information about or are developed by another organization, then it is appropriate for the school district to seek the input of these other organizations before disclosure is made. **For example, in the face of the current requests, it may be appropriate for school districts to consult with BCPSEA, the Ministry, or PSEC if the requested records have been developed by or contain the information of these organizations.**

As explained below, if consultations with third parties are needed then the Act generally provides school districts with additional time to facilitate these processes.

## Time Limit for Responding

Section 7 sets out a **30 business day** timeline for responses to requests. The time limit excludes the day on which the request is received and includes the day on which the district responds to the request; Saturdays, Sundays and statutory holidays are excluded. For example, if a request for access was received June 28, 2017, the district must respond on or before August 11, 2017.

The timeline can be extended in certain limited circumstances such as where more time is needed by a public body to respond. Extensions for an additional 30 days can be taken:

- (1) if a school district needs to consult with third parties about the disclosure of records
- (2) where a large volume of records is involved and responding to the request would unreasonably interfere with the school district's operations, or
- (3) where additional time is needed to clarify the scope of the request with the applicant.

If a consultation with a third party is required by the Act under sections 21 or 22, then an additional 30 business days is allowed, which runs from the date that the third party notice is given. The third party has 20 business days to respond to the notice, and the school district will be required to make a decision on disclosure within 30 business days from the date that notice is given.

## Fees

Responding to access requests consumes the time and resources of school districts and other public bodies subject to the Act. In recognition of this, the Act permits public bodies to charge a fee in appropriate circumstances. When a school district determines to charge a fee, it must provide the applicant with an estimate of the fees that it expects to incur. Usually, the fee estimate will also request that the applicant provide a deposit.

Guidance on what fees can be charged are contained in the Act and its regulations. Until the applicant agrees to pay the fees or provides a requested deposit, then the time limits under the Act are suspended. Sometimes applicants who receive a fee estimate may request that the school district waive the fee because it involves a matter of public interest. School districts that receive a fee waiver request may wish to seek advice of their external legal counsel about how best to respond.

Guidance on what fees can be charged and the process for charging a fee can be found in section 75 of the Act and its regulations at Schedule 1:

[http://www.bclaws.ca/civix/document/id/complete/statreg/155\\_2012](http://www.bclaws.ca/civix/document/id/complete/statreg/155_2012)

## Other Resources

For additional guidance, a *Policies and Procedures Manual* for FIPPA is available at:

<http://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/FIPPA-manual>.

The full text of the Act is available at:

[http://www.bclaws.ca/civix/document/id/complete/statreg/96165\\_00](http://www.bclaws.ca/civix/document/id/complete/statreg/96165_00)

## Questions

If you have any questions or wish to consult with BCPSEA regarding disclosure, please contact Rosalie Cress, Director, Labour Relations and Legal Counsel.

Attachment: Sample Freedom of Information Requests