



Guide to Providing Counselling Services In School Jurisdictions

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Freedom of Information and Protection of Privacy Guide to Providing Counselling Services In School Jurisdictions

Table of Contents

| | |
|--|-----------|
| Chapter 1: The Counselling Service | 1 |
| 1.1 Introduction and Background..... | 1 |
| 1.2 Who Provides Counselling Services?..... | 2 |
| 1.3 Codes of Ethics..... | 2 |
| 1.4 Who is the Client?..... | 3 |
| 1.5 Effect of the FOIP Act on Counselling | 4 |
| Chapter 2: Applying the FOIP Act | 5 |
| 2.1 Who is an Employee? | 5 |
| 2.2 What is Personal Information?..... | 5 |
| 2.3 What is a Record? | 6 |
| 2.4 Records Management | 8 |
| 2.5 Custody or Control..... | 9 |
| 2.6 Psycho-Educational Testing | 9 |
| 2.7 Protection of Privacy..... | 10 |
| Use of personal information..... | 13 |
| Disclosure of personal information | 14 |
| 2.8 Exercise of Rights by Parents or Guardians..... | 19 |
| Orders in other jurisdictions | 20 |
| Alberta Children and Youth Services..... | 21 |
| School jurisdictions | 22 |
| 2.9 Exceptions to Disclosure | 23 |
| Disclosure harmful to personal privacy..... | 24 |
| Disclosure harmful to individual or public safety | 24 |
| Disclosure harmful to law enforcement | 24 |
| Local public body confidences..... | 25 |
| Advice from officials..... | 25 |
| Testing procedures, tests and audits..... | 25 |
| Privileged information..... | 25 |
| Appendix 1: Excerpts from Codes of Ethics Governing Counsellors | 27 |
| Definition of a Client..... | 27 |
| Confidential Information | 28 |
| Maintenance and Retention of Records..... | 30 |
| Third Party Contracts | 31 |
| Appendix 2: B.C. Commissioner’s Decision Regarding Counsellor’s Notes | 32 |

Chapter 1

The Counselling Service

1.1 Introduction and Background

The purpose of this guide is to present counsellors employed by local public bodies with some of the issues surrounding the collection, use and disclosure of personal information in a school or workplace setting. It will assist them in discussions with their FOIP Coordinator and legal counsel (where required) to ensure their practices comply with the FOIP Act.

Counselling services are also provided in post-secondary institutions to students. Family and Community Social Service programs in municipalities often provide counselling to families and individuals. Local public bodies provide employee assistance programs to their staff in a variety of ways. While this guide is focussed primarily on counselling services to minors in a school setting, many of the comments and suggestions have broader applicability to these other areas.

The guide assumes that counsellors will deal with third party requests for information in accordance with their contracted obligations and code of ethics. It also assumes that every effort will be made to mediate the provision of information about minors to their parents or guardians where this would not cause harm to the physical or mental health or safety of the minor. A formal FOIP request should be the last resort for a parent or guardian seeking information about the education and well-being of their child.

Since 1984, Alberta Education has viewed guidance and counselling services as an important component of the school program. This view is reflected in two documents: *From Position to Program: Building a Comprehensive School Guidance and Counselling Program* and *Comprehensive School Guidance and Counselling Programs and Services – Guidelines for Practice, 1997*.

The latter document provides a set of 16 guidelines in four key areas: philosophy and goals; program development, implementation, coordination and evaluation; delivery of services; and professional development and staff effectiveness. These guidelines are intended to assist school personnel to develop, monitor and evaluate guidance and counselling programs and services.

Alberta Education's policy on this subject is contained in its *K-12 Learning System Policy, Regulations and Forms Manual, Section 1.6.3 – Guidance and Counselling*.

This section 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 refer to an individualized, small-group or class process that assists students in overcoming specific personal/social issues and difficulties, and educational or career issues.

Counselling services may be developmental, preventive or crisis-oriented.

Alberta Education's policy 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 that 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.

1.2 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 (ATA).

- Social Workers – members of the Alberta College of Social Workers.
- Psychologists – regulated 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. This team may consist of the following individuals or professionals: school principal; school counsellor who is a certificated member of the ATA with additional training in school counselling; teachers as student advocates; social workers or family/school liaison workers and school psychologists. Other professionals may also work with this team, including child development assistants, mental health workers, nurses and police officers.

In some communities, case consultation occurs and involves sharing of personal information between service providers from different organizations to support and provide professional input regarding caseload management.

In the past, this sharing was often informal and without written agreements. It is now important under the FOIP Act that a formal agreement is reached concerning the sharing of personal information.

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.

1.3 Codes of Ethics

The Alberta Teachers' Association, the Alberta College of Social Workers and the College of Alberta Psychologists all have

Codes of Ethics.¹ The Alberta College of Social Workers also has a Standards of Practice Regulation and the College of Alberta Psychologists has two professional guidelines entitled *Release of Confidential Information: Special Issues in Third Party Requests, and Limits to Confidentiality and Consent for Services: Special Issues Working with Minors and Dependent Adults*.

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 student, and on respect and dignity of persons.

Extracts from these documents are provided in Appendix 1. They deal with:

- the definition of a “client”;
- confidential information;
- maintenance and retention of records; and
- third party contracts.

1.4 Who is the Client?

Counsellors, whether employed directly or under contract, may have three sets of clients:

- the local public body that is employing the counsellor or contracting for services.
- the student or individual who is receiving the services of the counsellor.
- the parent(s) or guardian(s) of the individual, if the individual receiving

counselling is a minor, and is not an "independent student" as defined in the *School Act*.

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

- it can audit the services being provided and appraise the performance of its employees; and
- students are receiving the appropriate advice and are helped to further their education, and that they are assisted in their personal development.

The counsellor will want to:

- understand specifically what information has to be provided and the format in which it is provided so that he or she can maintain records which 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 explain at least some of the exceptions to confidentiality.

These exceptions may be:

- imposed on the counsellor by his or her contract with the local public body;

¹ Alberta Teachers' Association Code of Professional Conduct (1995), Canadian Association of Social Workers Code of Ethics (1983), College of Alberta Psychologists Code of Conduct (2000).

- related to provisions in other legislation such as the *Child Youth and Family Enhancement Act*; or
- related to a duty to inform others in the case of a criminal offence, or
- related to the requirements for disclosure under the FOIP Act.

When the person receiving services is a minor, and not an “independent student,” and has requested these services directly, the counsellor will need to explain to the individual the ramifications of involving or not involving parents or guardians in the decision-making process.

The individual should also be informed that records will be maintained and of how access may be granted to them.

Parents or guardians can be involved in requesting counselling services and/or be fully aware of and approve of the provision of services. In such cases, they 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.

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

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.

1.5 Effect of the FOIP Act on Counselling

The privacy provisions of the FOIP Act apply every day. These are the provisions that relate to the collection of personal information, its use, and its disclosure. This guide sets out the sections of the Act that allow the counselling function to operate within the school setting.

It will be the exception, rather than the rule, that a written FOIP request will be made for an applicant to receive counselling records. If such a request is made, the request should be forwarded to the school board's FOIP Coordinator immediately.

Normally, the FOIP Coordinator will consult with the counsellor regarding the disclosure and possible severing of the counsellor's records as part of the request processing procedure.

Chapter 2

Applying the FOIP Act

2.1 Who is an Employee?

According to the FOIP Act, **section 1(e)**, an “employee,” in relation to a public body, includes a person who performs a service for a public body as an appointee, volunteer or student or under a contract or agency relationship with the public body.

Counsellors 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 includes 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 requirements to create and maintain records 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 on 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; and
- 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 produces a guide on contract management that may be helpful.² It is available from Access and Privacy, Service Alberta.

2.2 What is Personal Information?

Section 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 identification number, social insurance number, or personal health number;
- information about the individual’s health and health care history;

² *Managing Contracts under the FOIP Act, A Guide for Government of Alberta Contract Managers and FOIP Coordinators.*

- information about the individual's educational, financial, employment or criminal history;
- opinions of other people about the individual; and
- 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.

2.3 What is a Record?

According to the FOIP Act, **section 1(q)**, "*record*" means a record of information in any form and includes notes, images, audio-visual recordings, x-rays, 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 or an outside agency;
- information obtained from a child welfare record;
- law enforcement information, including information about probation, community service or alternative measures under the *Youth Criminal Justice Act* (Canada); and
- 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; and
- 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. Generally, counselling records would not be included in the cumulative student record.

The Student Record Regulation identifies the components of the official student record. The primary sections relevant to counsellors’ records are:

- *Section 2(1)(l): 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 2(1)(n): in relation to any formal intellectual, behavioural or emotional assessment or evaluation administered individually to the student by a board,*
 - (i) *the name of the assessment or evaluation,*
 - (ii) *a summary of the results of the assessment or evaluation,*
 - (iii) *the date of the assessment or evaluation,*
 - (iv) *the name of the individual who administered the assessment or evaluation,*
 - (v) *any interpretive report relating to the assessment or evaluation, and*
 - (vi) *any action taken as program planning as a result of the*

assessment, evaluation or interpretive report.

- *Section 2(1)(o): in relation to any independent formal intellectual, behavioural or emotional assessment or evaluation requested by the student’s parent and administered to the student by an independent party*
 - (i) *the name of the assessment or evaluation,*
 - (ii) *a summary of the results of the assessment or evaluation,*
 - (iii) *the date of the assessment or evaluation,*
 - (iv) *the name of the individual who administered the assessment or evaluation,*
 - (v) *any interpretive report relating to the assessment or evaluation, and*
 - (v) *any action taken as program planning as a result of the assessment, evaluation or interpretive report.*
- *Section 2(2): Notwithstanding section 3, a board may include in a student record any information referred to in section 3(1)(a)(iii) [see below] that in the board's opinion would clearly be injurious to the student if disclosed, where inclusion of the information in the student record would, in the board's opinion, be*
 - (a) *in the public interest, or*
 - (b) *necessary to ensure the safety of students and staff.*
- *Section 2(3): if an individualized program plan is specifically devised for a student, the current plan and any amendments to the plan...*

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

- *Section 3(1)(a): any information contained in*

- (i) *notes and observations prepared by and for the exclusive use of a teacher, teacher's assistant, counsellor or principal, and that are not used in program placement decisions,*
- (ii) *a report or an investigation record relating to the student under the Child Youth and Family Enhancement Act, or*
- (iii) *counselling records relating to the student that is or may be personal, sensitive or embarrassing to the student, unless section 2(2) applies [as noted above].*
- *Section 3(1)(b): any information that identifies a student as a young person as defined in the Young Justice Act or the Youth Criminal Justice Act (Canada) and all information relating to that student in that capacity.*

The Student Record Regulation allows discretion to exclude test instruments from the official student record while still permitting access to them in some circumstances:

- *Section 3(2): notwithstanding section (2), a board may exclude from a student record a test instrument or any part of it, but where there is an appeal before the board in respect of a test, a test result or an evaluation of a student in respect of a test or a test result, the persons referred to in section 23(2) of the Act may review a test instrument as if it were part of the student record.*

2.4 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 (**section 3(e)**). 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 but are not required to provide evidence of decision-making and can then be destroyed.

Examples might include:

- audio tapes used as a memory aid while preparing a report on a consultation or therapy session;
- interview notes and questions used as the raw material for a report; or
- diaries intended to record future events and meetings but not intended to record the substance of these meetings.

It is important that the records management policy and procedures of the school 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. This may require counsellors to compile a log of disclosures.

Once notes or audiotapes are transcribed or a report is finished based on them, and this transcription or report becomes the official record of the discussion or meeting, then the notes or tapes may be destroyed if that is the records management policy of the organization. Any decisions made 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.

2.5 Custody or 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 when there is some right to deal with the record and responsibility for its care. This includes situations where the records of a third party are kept on the premises or on property owned or occupied by the school board. 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 they may be 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.³ The inquiry arose out of a request for access to

³ Information and Privacy Commissioner of British Columbia, Order 115-96

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 or control of the public body.

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

The Alberta Information and Privacy Commissioner is not in any way bound by this decision. However, in this case it was found that the notes taken by a counsellor were within the custody or control of a public body because they were used to make reports which were in that body's custody and there were no policies or rules to the contrary. A summary of the arguments is included in Appendix 2.

2.6 Psycho-Educational Testing

Alberta Education has set standards for psycho-educational testing.⁴ The standards cover achievement tests, diagnostic tests, personality tests, self-esteem inventories, behaviour checklists, vision and hearing tests, learning and thinking 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 many of these tests can be conducted;
- this consent must be entered in the student record;

⁴ Alberta Learning (Education). Special Education Branch, *Standards for Psycho-Educational Assessment* (1994).

- 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; and
- written consent is required before disclosure can take place outside of the student record.

Section 4(1)(g) of the FOIP Act says, *This Act...does not apply to a question that is 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 26 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, or*
- (c) *standardized tests used by a public body, including intelligence tests,*

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

Alberta's Information and Privacy Commissioner has not yet considered this section.

However, there has been a case in Ontario that went through judicial review.⁵ 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.

2.7 Protection of Privacy

Collection of personal information by counsellors is authorized by **section 33(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.

Section 34(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 indicated above, parents must be informed prior to most psycho-educational testing. Parents also have the right to refuse the tests. Counsellors should also ensure that students are informed as outlined above prior to counselling being provided.

⁵ Information and Privacy Commissioner of Ontario, Order M-91.

A part of a counsellor's role in dealing with students is that of a confidant. It is important for counsellors to have the trust of students and others if they are to be able to accomplish their tasks. However, there will be instances when information may be disclosed to comply with the law. This could include disclosure under the FOIP Act. Students need to be aware that this could occur, but that every effort will be made to maintain confidentiality.

There are a number of reasons for this:

- 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 40**);
- 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 84(1)(e)**);
- the *Child, Youth and Family Enhancement Act* compels reporting of circumstances where a child may be in need of protective services. (e.g. cases of suspected child abuse); and
- 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 35(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 recorded and used for decision-making is accurate and complete. If there are any doubts about the accuracy or completeness, this should be noted.

Personal information gathered during counselling is often summarized for reporting purposes.

It is important that the summary is accurate 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 35(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 records of 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 (**section 36**) 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 head of a public body must not correct an opinion, including a professional or expert opinion (**section 36(2)**);
- 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 of the request; and
- the individual has the right to ask the Commissioner to review the local public body's decision.

Section 37 of the FOIP Act authorizes the head of a public body to transfer a request for correction to another public body (within 15 days after a request has been received) if the personal information was collected by the other public body, or the other public body created the record containing the personal information.

It is recommended that corrections of fact be made on request and without a FOIP request, thereby avoiding the considerable work outlined above. Corrections to the student record should be dealt with as outlined in the *School Act* and not through a request for correction.

The protection of personal information is a statutory duty.

According to **section 38** 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 that is not securely stored 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 a closed room or segregated area;
- if the records are in machine-readable format, they should be stored in a secure area of the Local Area Network, on the hard drive of the counsellor's own computer if it can be locked, or on diskettes which are

secured in the same way as paper records;

- if they are stored on a Local Area Network 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, there needs to be additional security when in transit between office and home and it should not be left unattended;
- 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;
- 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; and

- 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 39 to 41** of the FOIP Act.

Section 39(1) *A public body may use personal information only*

- for the purpose for which the information was collected or for a use consistent with that purpose,*
- if the individual the information is about has identified the information and consented, in the prescribed manner, to the use, or*
- for a purpose for which that information may be disclosed under section 40, 42 or 43.*

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

- educational planning, including individual student planning;
- career education; or
- personal and/or social growth of the student, including personal issues identified by the student.

Personal information may be used for the purpose for which it was collected. That use of the information may be developmental, preventive or crisis-oriented. Personal information should also be used only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner (**section 39(4)**).

As outlined in **section 41** 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 establishing a consistent purpose.

If the proposed use of the information does not meet the above criteria, or is not authorized under **section 40** as described below, the consent of the individual must be obtained. It must specify to whom the information may be disclosed and for what purpose it may be used following disclosure (**section 7** of the FOIP Regulation).

Disclosure of personal information

Section 40 sets out 33 instances where personal information may be disclosed without consent. In all cases, disclosure is discretionary and will be carried out in accordance with the school board's policy on disclosure. 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 40(1)(b): *if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17.*

Section 17(2) indicates when a disclosure would not be an unreasonable invasion of privacy; **section 17(4)** indicates when a disclosure is presumed to be an unreasonable invasion of privacy; and **section 17(5)** sets out the relevant circumstances that must be considered in

making a determination of "unreasonableness".

For example, the disclosure may be necessary because there are compelling circumstances affecting someone's health or safety (**section 17(2)(b)**). The disclosure may be desirable for the purpose of subjecting the activities of the public body to public scrutiny (**section 17(5)(a)**) or may be relevant to a determination of an applicant's rights (**section 17(5)(c)**).

Section 40(1)(e): *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 allows 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 of the student record, including information that may have been assessed by a board as needing to be maintained on the student records pursuant to section 2(2) of the Student Record Regulation (for public interest or safety of students or staff concerns) despite the requirement that it be managed separated, to another school board in accordance with the relevant provisions of the Regulation if a student transfers schools;
- compliance with a custody agreement under section 9 of the *Child, Youth and Family Enhancement Act*;
- disclosure to the 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; or
- disclosure of student personal information and name, address and telephone number of the student's parent or guardian to a medical officer of health to contact parents or guardians about voluntary health programs under section 7(4) of the Student Record Regulation.

Section 40(1)(f): *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, Youth and Family Enhancement Act*, section 4(1) which 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, Youth and Family Enhancement Act*, section 6 where a director refers a family member or family to a community resource and 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 23, 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; or

- the *Public Health Act*, section 22(1) which 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 40(1)(g): *for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body having jurisdiction in Alberta to compel the production of information or with a rule of court binding in Alberta that relates to the production of information.*

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

Section 40(1)(h): *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 board jurisdiction.
- Employees and officers 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.
- Disclosure of records to the local public body's FOIP Coordinator to allow a FOIP request to be processed would be permitted.

Section 40(1)(i): *to an officer or employee of the public body...if the information is necessary for the delivery of a common or integrated program or service and for the performance of the duties of the officer or employee...to whom the information is disclosed.*

A common program or service means a single program or service that is delivered by two or more public bodies. An integrated program or service means one that has several distinct components delivered by separate public bodies but that together comprise the complete program or service. Common clients may be shared by the public bodies. Other attributes may be:

- legislative authority for the bodies to work together;
- common goals expressed in program description or business plan;
- formal agreement or terms of reference between public bodies explaining their roles and how the components fit together;
- joint planning between the public bodies;
- clear delineation of services being jointly delivered from those that are not; and
- collaboration or coordination in delivery.

Examples may include work placement or practicum (clinical experience) programs; after-school care; a library operated

jointly by a school and a municipality; or Human Resource services provided by one municipality to another municipality. For a more detailed explanation, see *FOIP Bulletin #8* on common programs and services, available from Access and Privacy, Service Alberta.

Section 40(1)(j): *for the purpose of enforcing a legal right that...a public body has against any person.*

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

Section 40(1)(l): *for the purpose of determining or verifying an individual's suitability or eligibility for a program or benefit.*

This permits disclosure both to other public bodies and to other organizations.

It allows them to determine whether an individual has the characteristics that qualify him or her for a program or benefit, or whether or not he or she is eligible for the program or benefit. Normally, this will be in response to an application for the program or benefit by a student or his or her parents. Disclosure is permitted, for example, to determine eligibility for:

- special education or remedial programs;
- community programs; and
- alternative measures or community service programs under the *Youth Criminal Justice Act* (Canada).

Section 40(1)(q): *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*
- (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, and
- fire commissioners and investigators.

It also permits disclosure for internal investigations, for instance investigating employee harassment or employee theft, 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 or Regulation.

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), and the name, title and address of the person authorized to make the request. A sample form is included in the *FOIP Guidelines and Practices* publication.⁶

Section 40(1)(t): *in accordance with section 42 or 43.*

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 40(1)(u): *to an expert for the purposes of section 18(2).*

This permits disclosure to a physician, a regulated member of the College of Alberta Psychologists 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 6**, establishes conditions for such disclosure.

Disclosure to an expert for the purpose of **section 18(2)** may also be a consideration when a parent requests information about a child and that request is treated as a FOIP request under **section 84** of the Act.

Disclosure under this section may also be necessary as part of the process when an individual receiving counselling services makes a FOIP request for his or her own information.

Section 40(1)(v): *for use in a proceeding before a court or quasi-judicial body to which...a public body is a party.*

This 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*;
- Practice Review Panels under the *Practice Review of Teachers Regulation*;
- Human Rights and Citizenship Commission Appeal Boards; and
- Youth Justice Committees under the *Youth Criminal Justice Act* (Canada).

Section 40(1)(aa): *for the purpose of supervising an individual under the control or supervision of a correctional authority.*

Examples include:

- individuals performing community service work or under the supervision of a Youth Justice Committee under

⁶ Government of Alberta, *Freedom of Information and Protection of Privacy Guidelines and Practices*, Appendix 5.

the Youth Criminal Justice Act (Canada),

- individuals in an alternative measures program, and
- 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. As in the case of **section 40(1)(q)**, the request must be justified in writing and contain the exact nature of the information desired, the authority, the purpose, and contact information.

Section 40(1)(cc): *to the surviving spouse or adult interdependent partner or a 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 and of the individual's death are 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 relative's 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; and
- whether disclosure may harm the reputation of the deceased.

Section 40(1)(ee): *if the head of the public body believes, on reasonable grounds, that the disclosure will avert or minimize an imminent danger to the health or safety of any person.*

"Imminent danger" means that the harm is likely to happen immediately or very soon. "Reasonable grounds" means that there is evidence that the potential danger or harm will happen unless a disclosure of personal information occurs.

Examples of this would be disclosure by the police to a victim that a certain violent offender who has made threats against them has escaped from prison, or disclosure to a supervisor of a student residence that a certain resident has threatened to commit suicide.

Finally, public bodies should always be guided by **section 40(2)** when considering a disclosure of personal information. Under that section personal information may only be disclosed to the extent necessary for the public body to carry out the purposes in **section 40**, in a reasonable manner.

2.8 Exercise of Rights by Parents or Guardians

Section 84(1) *Any right or power conferred on an individual by this Act may be exercised*

(e) 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 formal request for personal information of a child and this information is not contained within the student record, the local public body must determine whether the adult is exercising the child's rights under **section 6** of the FOIP Act. This is not an absolute right.

The local public body must exercise discretion when a minor's privacy rights are involved. The *Guidelines and Practices* publication⁷ suggests that public bodies should establish their own policies and procedures.

These internal policies will determine how to decide when minors have the ability to understand the matter being decided and to appreciate the consequences.

In a recent Investigation Report dealing with a complaint of a privacy breach regarding Grade 6 students, the Alberta Information and Privacy Commissioner recommended that parents/guardians be provided with written notice of the collection of personal information of elementary school children (*IPC Investigation Report 99-IR-002*).

⁷ Government of Alberta, *Freedom of Information and Protection of Privacy Guidelines and Practices*, Chapter 2.

Although this Investigation didn't deal with a parent or guardian making a formal request for personal information of a child, it showed the Commissioner's inclination towards supporting the concept of a parent/guardian exercising the rights of an elementary school child under the Act.

The School Act, section 1(2) defines parent as:

- (a) subject to subsection (3),
 - (i) *the guardian as set out in section 20 of the Family Law Act, or*
 - (ii) *the guardian appointed under Part 5 of the Child Welfare Act, Part 1, Division 5 of the Child, Youth and Family Enhancement Act or section 23 of the Family Law Act if the guardian notifies the board in writing of the guardian's appointment,*
- (b) *notwithstanding clause (a), if the student's guardian resided in Alberta and has changed the guardian's residence so that it is outside Alberta or unknown, the individual who has care and control of the student as a result of the change,*
- (c) *notwithstanding clauses (a) and (b), the guardian of a student appointed under a temporary or permanent guardianship order or a permanent guardianship agreement under the Child Welfare Act if the guardian notifies the board in writing of the guardian's appointment, or*
- (d) *notwithstanding clauses (a) to (c), 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).*

(2.1) The authority of a guardian to act under this Act is subject to any limitation imposed by law on the authority of the guardian, and where a person claims to be

a parent or guardian or claims the existence of any limitation on the authority of a parent or guardian, the onus is on that person to provide proof of the claim.

Exercise of rights under the *School Act* usually exercised by parents cannot be exercised in the case of a student who is an "independent student" as defined in section 1(m) of that Act:

1(m) "independent student" means a student who is

- (i) 18 years of age or older, or*
- (ii) 16 years of age or older and*
 - A) who is living independently,*
 - B) who is a party to an agreement under section 8(2) of the Child, Youth and Family Enhancement Act.*

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. However, the legal concept of guardianship may be more complex than that definition. Boards may wish to seek some evidence that a requester of a child's personal information does indeed exercise guardianship. A parent whose child has status with a Child and Family Services authority under a Permanent Guardianship Order has in effect lost their status as a guardian, as does a parent who has given their child up for adoption.

The legislation in other provinces is considerably different from Alberta's legislation. In 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.⁸ In British Columbia, rights can be exercised on behalf of an individual under 19 years of age by the individual's parent or

⁸ *Ontario Municipal Freedom of Information and Protection of Privacy Act*, section 54(c).

guardian if the individual is incapable of exercising those rights.⁹

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.

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 relevant Ontario order 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 applicants' son. These notes relate to an incident involving the son and the teacher. The applicants 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 applicants' 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.

The Commissioner 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.¹⁰

⁹ B.C. Freedom of Information and Protection of Privacy Regulation, section 3(a).

¹⁰ Ontario IPC Order M-642.

British Columbia's Commissioner has issued four orders dealing with access to records by a parent or guardian. Three of these 11 dealt with who could exercise the access rights of the minor. He stated that, where one parent has legal custody, only that parent can 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 fourth 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.”¹²

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 approaches the age of majority. This might be one of the tests employed in determining whether or not exercise of rights under **section 84(1)(e)** is an unreasonable invasion of privacy.

¹¹ B.C. IPC Orders 2-1994, 10-1994 and 44-1995.

¹² B.C. IPC Order 49-1995.

Alberta Children and Youth Services

In addition to the definition in the *School Act* and the implications in the British Columbia orders, the practice followed by Alberta Children and Youth Services should be noted. That department's Information and Privacy Office follows the following two-part procedure where information requests are submitted by a parent or other third party.

Determination of Guardianship Rights:

- If the applicant identifies him- or herself as a guardian requesting their minor child's information, the applicant will be required to demonstrate that he/she has a right of access if evidence of that right is not on file.
- If the applicant is not a guardian, (or legal representative of the guardian) then **section 84(1)(e)** does not apply, and the request for information cannot be processed as a personal request. (Recall that personal requests are those where an individual is seeking access to their own information, or where they have authority to exercise the rights of the person whose information they are seeking to access.¹³)
- If the applicant establishes that he/she is a guardian, then a determination needs to be made as to whether or not the disclosure of information would be deemed an unreasonable invasion of the minor child's privacy.

¹³ Note: Although a third party could make a general request for the personal information of another person, caution should be exercised before advising the applicant of that possibility, as the personal information of another person would be subject to exception from disclosure. The Information and Privacy Office may respond to such a request by refusing to conform or deny the existence of a record.

Determination if disclosure is an invasion of Minor Child's Privacy:

- The FOIP coordinator must consider a number of factors in order to determine whether the disclosure would be deemed an unreasonable invasion of the child's privacy, including taking into consideration the age of the child.
- The Coordinator will consult with the child in cases where the child is 12 years old or over. In situations where this does not seem appropriate, the Coordinator may ask the Director of the Information and Privacy Office to waive this requirement.
- Consent or agreement by the child does not automatically give the applicant access to the child's records. The Coordinator must be certain that the child's consent was informed. For example, it is important to ensure, to the extent possible, that the child knows about the contents of the records he or she has consented to disclosure of. All relevant information is reviewed to determine whether or not access is an unreasonable invasion of the child's privacy. The case manager may also be consulted on what if any information will be disclosed.
- In some situations, the Coordinator may have concerns that the child is consenting under duress, given their reliance on the parent/guardian.
- Other factors considered include whether or not the applicant has full or partial custody of the child; the amount of involvement with or on behalf of the child, and the existence of sensitive or privileged information (e.g. legal, reporter, adoption, or medical records).
- The final decision rests with the Coordinator (delegated). If the

information is not disclosed, even if in part because the child does not wish it to be, the applicant is informed only that the Coordinator has determined that the guardian does not have a right of access.

In this scenario the disclosure to the guardian is deemed to be an unreasonable invasion of the child's privacy. If it is determined that there is some information in the records to which the right of access does not extend because of the sensitivity of that information, it would be excepted from disclosure. Examples of this would include the notes from a Social Worker's interview with the child.

If, after considering the child's wishes, the Coordinator decides to release the information contrary to the child's opinion, the child should be notified as a third party so that he or she is given the opportunity to request a review of the decision by the Commissioner. This would need to be managed carefully, given the living arrangements of the child with their parent or guardian. In most situations the Coordinator will err on the side of privacy if it appears that the disclosure may be an unreasonable invasion of the minor's personal privacy and remove the sensitive information.

This implies that, at least for those students whose parents' fall within the definition of "parent" outlined in section 1(2) of the *School Act*, 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 providing access to a parent or guardian would be an unreasonable invasion of the student's personal privacy.

School jurisdictions

The following factors should be considered in applying **section 84(1)(e)**:

- Does the applicant (i.e. the person who makes the request) meet the definition of “guardian” 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 of making a formal FOIP request as a third party.
- Should the minor be contacted and the request discussed with the minor?
- Is the disclosure an unreasonable invasion of the minor’s personal privacy? In particular consider:
 - whether the information is personal information as defined in **section 17(2)** of the FOIP Act;
 - the age of the minor;
 - the family situation;
 - the sensitivity of the information being sought;
 - whether the minor 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 minor’s rights, not the applicant’s rights;
 - whether the disclosure is desirable for subjecting the activities of the local public body to public scrutiny; and
 - whether there are compelling reasons affecting anyone’s health or safety.

If the decision is made that the disclosure would not be an unreasonable invasion of privacy, without contacting the minor, then the information can be released subject to a review of the exceptions contained in **sections 18, 20, 23, 24, 26 and 27** of the FOIP Act.

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 84(1)(e)** would be refused. The applicant can then ask the Commissioner to review that decision and/or make a FOIP request as a third party.

It is not clear who bears the burden of proof in these cases. **Section 71(1)** places the onus on the local public body to prove why an applicant has no right of access to the record or part of the record. If a decision has been made that the adult cannot exercise the rights of the minor, then the onus is on the public body.

However, **section 71(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.

2.9 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 Guidelines and Practices* publication.¹⁴

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 17 outlines the kinds of information whose disclosure would be presumed to be an unreasonable invasion of privacy and the factors to be taken into consideration when deciding 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.

Disclosure harmful to individual or public safety

Section 18(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

¹⁴ Government of Alberta, *Freedom of Information and Protection of Privacy Guidelines and Practices*, Chapter 4.

will not be made under **section 84(1)(e)** 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 18(2) allows a local public body to refuse to disclose information about an applicant if, in the opinion of a physician, a regulated member of the College of Alberta Psychologists, 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 applies in the preceding subsection. If a decision is made to allow access under **section 84(1)(e)**, 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, if it has been 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 6**. In some circumstances a registered social worker may be considered an appropriate expert.

Disclosure harmful to law enforcement

Section 20 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

proceeding that leads or could lead to a penalty or sanction imposed by the body conducting the investigation or proceeding or by another body to which the results of the investigation or proceeding are referred.

This section also allows 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, reveal information in a correctional record supplied in confidence, reveal criminal intelligence reasonably related to the detection, prevention or suppression of organized crime, or interfere with or harm an ongoing or unsolved law enforcement investigation.

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. Criminal intelligence would include information compiled to anticipate, prevent or monitor possible criminal activity such as the selling of controlled or restricted substances, or serious repetitive criminal activity by gangs.

The *Youth Criminal Justice 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 23 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 21** 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 24 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*.

Discretion would have to be exercised, taking into consideration the purposes of the Act and whether or not disclosure would impact the future deliberative and advisory processes of the local public body.

Testing procedures, tests and audits

Section 26 allows a local public body to withhold information relating to testing procedures or techniques, details of specific tests to be given, or standardized tests used by the school, including intelligence tests, 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 27 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.

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Appendix 1

Excerpts from Codes of Ethics Governing Counsellors

Definition of a Client

Client means a recipient of professional services and includes:

- the guardian of a child under age 14 or an individual for whom a guardian has been appointed;
- the guardian of a minor aged 14 or over who does not have the requisite understanding to appreciate the nature and consequences of the services being rendered;
- a corporate entity or organization where the professional services are provided to benefit the corporate entity or organization;
- a couple, family or other group where professional services are provided to benefit the couple, family or other group;
- a child under the age of 14 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 the services.

(Alberta College of Social Workers (ACSW): Social Work Standards of Practice Regulation, section 1(c))

Informed consent means permission, based on reasonable disclosure of the facts, risks and alternatives, given by a client to use identified intervention procedures which may include diagnosis, treatment, follow-up, research or community intervention. It is the responsibility of a registered social worker

to obtain the informed consent of a client before providing professional services. Informed consent shall include consent to disclose client information for supervision and professional consultation.

(ACSW: Social Work Standards of Practice Regulation, sections 1(a) and 2(1) and (3))

Client means a recipient of professional services and includes

- the guardian of a minor or an individual for whom a guardian has been appointed;
- a corporate entity or organization where the professional services are provided to benefit the corporate entity or organization.

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, 2000, section 1(b), 19, and 20)

A psychologist must inform minors that their parents have the right of access to all information revealed during the provision of services. If this poses a problem for the minor, the psychologist has the option of

implementing section 19 of the CAP Code of Conduct, whereby an agreement is reached in advance with the minor and his or her parents that certain issues will not be disclosed to the parents.

If a psychologist is working in an agency that is subject to the *Freedom of Information and Protection of Privacy Act* (FOIP), an exception may apply. If the head of the public body determines that disclosure of information to the parent would constitute an unreasonable invasion of the personal privacy of the minor, the information will remain confidential.

A further exception may apply to psychologist working in schools. Section 1(h) of the *School Act* defines an “independent student” as a student who is:

- (i) 18 years of age or older, or
- (ii) 16 years of age or older and
 - (a) who is living independently,
 - (b) who is a party to an agreement under section 7(2) of the *Child Welfare Act*, or
 - (c) on behalf of whom a social allowance is issued under section 9(1) of the *Social Development Act*.

When a client is defined as an independent student, the psychologist may not disclose information to a parent without the student’s consent.

(CAP: Limits to Confidentiality and Consent for Services: Special Issues in Working with Minors and Dependent Adults, Adopted by CAP November 2001, revised May 2002, page 1)

A psychologist should not provide services to a minor without parent’s knowledge and consent unless a) the psychologist has first ascertained that the recipient or services can be defined as a mature minor, or b) the courts have ordered that psychological services be provided to a minor.

Two exceptions may apply to psychologists who work in schools: a) in the case of the “independent student” as defined above, the student, and not the parent, is the one who has authority to consent to services, and b) by policy of Alberta Education, guidance and counseling services provided in the schools are viewed as an integral component of the school program. Consequently, parental consent is not required for the provision of guidance and counseling services. However, informed consent is required for psycho-educational testing.

(CAP: Limits to Confidentiality and Consent for Services: Special Issues in Working with Minors and Dependent Adults, Adopted by CAP November 2001, revised May 2002, page 2)

Confidential Information

Confidential information means information obtained by a social worker in the context of a professional relationship or in other circumstances where there was a reasonable expectation by the client that the social worker would not disclose that information.

(ACSW: Social Work Standards of Practice Regulation, Section 1(d))

A social worker must explain to a client the purposes for which information will be used and the limits of confidentiality. The confidentiality of the information obtained in the course of practice must be safeguarded. A social worker can only disclose information about a client to others with the documented informed consent of the client. When a corporation or other organization is the client, standards of confidentiality apply to information pertaining to the organization, including personal information about individuals when obtained in the proper course of that contract.

(ACSW: Social Work Standards of Practice Regulation, section 29)

A social worker must disclose information about a client without the client's consent when the disclosure is necessary to protect against a clear and substantial risk the client will inflict imminent serious harm on himself or others; when required by a provincial or federal Act or regulation or court order to disclose the information; if necessary to collect a fee and there is no clear and substantial risk that the client will inflict imminent serious harm on himself or others as a result of the disclosure; when the information is required for the social worker to defend against a complaint of unprofessional conduct; or when directed to do so by an investigator and or prosecutor of a complaint under the *Social Work Profession Act* or the *Health Professions Act*.

(ACSW: Social Work Standards of Practice Regulation, section 30(1))

The social worker must ascertain and make clear to clients the bounds and limits of confidentiality and except in compelling circumstances, the boundaries and limits are to be agreed to in writing.

(ACSW: Social Work Standards of Practice Regulation, section 30(2))

Confidential information means information revealed by a client to a psychologist and that may not be disclosed by the psychologist except in accordance with sections 14 to 28 of this code.

(CAP: Code of Conduct, 2000, section 1(c))

Psychologists shall endeavour in all cases to inform clients of the limits to confidentiality and shall safeguard the confidential information about clients obtained in the course of practice, teaching, research or other professional services.

(CAP: Code of Conduct, 2000, section 14(1))

Psychologists may disclose, in accordance with sections 16 to 18 and 21 to 23,

confidential information about a client to an individual other than the client only with the informed written consent of the client.

(CAP: Code of Conduct, 2000, section 14(2))

Where professional services are rendered to a minor or other person for whom a guardian exists or has been appointed, psychologists shall at the beginning of the professional relationship clarify for the minor or other person and the guardian that the law may impose a limit on the minor's or other person's right to confidentiality.

(CAP: Code of Conduct, 2000, section 18)

Psychologists shall limit access to their professional records to preserve confidentiality and shall ensure that all persons working under their authority comply with the requirement to keep information about clients confidential.

(CAP: Code of Conduct, 2000, section 21)

The duty of psychologists to maintain confidentiality under this Code does not relieve any psychologist of the obligation to release confidential information in accordance with a court order or federal or provincial laws, rules or regulations.

(CAP: Code of Conduct, 2000, section 22)

Psychologists shall provide access to and shall permit the reproduction and release of confidential information about a client to the client unless there is a significant likelihood that disclosure of the information would cause

(a) a substantial adverse effect on the client's physical, mental or emotional health, or (b) harm to a third party.

(CAP: Code of Conduct, 2000, section 23)

Chartered psychologists may disclose confidential information without the informed written consent of the client when they believe 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.
(CAP: Code of Conduct, 2000, section 15)

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

Social workers shall keep systematic and legible records. Records must include, wherever possible, 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 in the record; reasons for professional involvement, the assessment, purpose of involvement, intervention and progress of the case.

A social worker may use any form of technology for keeping records, provided the confidentiality of the information contained in the record is maintained.

A social worker shall provide access to a record to a client who is the subject of the record, on request of the client and shall provide to the client written conditions under which access will be provided.
(ACSW: Social Work Standards of Practice Regulation, section 9(5))

Only information relevant to the matters set out in section 9(2) may be collected.
(ACSW: Social Work Standards of Practice Regulation, section 10)

Reasonable efforts must be made to ensure that professional records are maintained for 10 years following the last entry for a professional service, in accordance with an applicable law or established policy.
(ACSW: Social Work Standards of Practice Regulation, section 11)

Records must be stored and disposed of in a way that will maintain the confidentiality of the information contained in the records.
(ACSW: Social Work Standards of Practice Regulation, section 12)

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.
(ACSW: 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, 2000, section 7)

Third Party Contracts

Where social work services have been contracted for a client by a third party, the social worker shall clarify to all parties prior to providing the services the rules of confidentiality and professional responsibility to be followed.

(ACSW: Social Work Standards of Practice Regulation, section 31)

When a social worker's professional responsibilities to an employer and to a client are in conflict, the social worker shall attempt to safeguard client rights and promote changes by bringing the situation to the attention of the employer and attempting to facilitate a satisfactory resolution of the conflict. Where a conflict cannot be resolved, the social worker must cease acting for the client, or if the nature of the service is such that the social worker cannot cease acting for the client, document the conflict of interest and all measures taken to try to resolve the conflict.

(ACSW: Social Work Standards of Practice Regulation, section 4)

In a situation involving a third party, such as an employee assistance program or an insurance company, in which more than one party has an interest in the professional services rendered by a psychologist to a client or clients, the psychologist shall, to the extent possible, clarify for all parties prior to rendering the services the dimensions of confidentiality and professional responsibility that apply to the rendering of the services.

(CAP: Code of Conduct, 2000, section 16)

When professional services are rendered to more than one client during a joint session (for example, to a family, a couple, a parent and child or a group),

psychologists shall at the beginning of the professional relationship clarify for all parties the manner in which confidentiality will be handled and all parties must be given an opportunity to discuss and accept whatever limitations to confidentiality apply.

(CAP: Code of Conduct, 2000, section 17)

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, the psychologist will inform the client of this request and will release the information if the client consents, or if the psychologist can establish that the third party has the legal right to the information.

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 confidential information: special issues in client and third party requests, Adopted by CAP 1998. revised May 2002, pages 2-3)

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.¹⁵ 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:

“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

¹⁵ Information and Privacy Commissioner of British Columbia, Order 115-96

decision rendered on July 8, 1998.¹⁶ 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 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.

¹⁶ Judgment of Honourable Madam Justice Dorgan, July 8, 1998, docket A962846, Vancouver Registry.