

Local Authority Freedom of Information and Protection of Privacy Act

Case Study

FACTS

Jane Smith was employed by the Happy Haven School Division as a school counsellor. In that capacity she worked with the two Jones children who were in elementary school. She worked with the children for two years. As is her practice, from time to time during these counselling sessions, Jane made what she refers to as "raw notes."

She indicated that at the end of the school year, or earlier if a student transfers schools, she prepares a summary of her involvement with that student. The summary is included in the student's cumulative file. On occasion she uses her raw notes in the preparation of this summary. The summary becomes part of the student's record.

Following a complaint to the Ministry of Social Services regarding the children, their mother asked Jane to provide her raw notes taken during the counselling sessions. Jane refused to do so.

The mother submitted an access request to the Happy Haven School Division pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act*. The request asked for the notes taken by Smith during her counselling sessions with the applicant parent's children. The request was clarified to be a request for the notes of what the counsellor said to the children, rather than what the children said to the counsellor.

Jane asked the court to find that her notes were not in the care and control of the school division and should not be released to the mother.

The school division argued the the notes were within their care and control but that they should not be released to the mother.

ISSUE

Are the notes of the counsellor within the care and control of the Happy Haven School Division?

ARGUMENTS

Jane's Arguments

Jane argued that the content and format of the notes, as well as the discretion to retain or destroy them were within her exclusive control and not subject to any guidelines or control imposed by her employer. . She said that neither the Ministry of Education, nor her employer the school division, nor the principal of any school in which she works, requires that she maintain the notes. She submits further that any notes she makes are kept in her personal notebooks, stored at home when not in use during her counselling sessions with students, and that they were not intended to be used by, or provided to, any other person or organization.

Jane argued that the nature of the work of counselling required confidentiality and that her ethical obligations regarding confidentiality support her position that her raw notes are not in the custody and control of the school division.

School Division's Arguments

The school division's position was 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 employer. Further, the school division argued that it is essential for the school division 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.

DECISION

Are the notes of the counsellor within the care and control of the Happy Haven School Division?

The judge found that the facts in this case support the finding that the counsellor's disputed notes are under the control of the school division. The counsellor is an employee of the school division. 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.

He stated, however:

"I emphasize that my decision that a school counsellor's notes are subject to the Act is completely separate from the decision as to who can have access to them, whether school officials or parents, and under what circumstances."

*Based on **Neilson v. British Columbia (Information and Privacy Commissioner)** [1998] B.C.J. No. 1640*