OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order F09-21

# MINISTRY OF EDUCATION

Celia Francis, Senior Adjudicator

November 10, 2009

Quicklaw Cite: [2009] B.C.I.P.C.D. No. 27
Document URL: http://www.oipc.bc.ca/orders/2009/OrderF09-21.pdf

**Summary:** The applicant requested access to electronic copies of 70 fields of Foundation Skills Assessment student summary data for a certain period, in order to carry out statistical research on the data. The Ministry refused access under s. 22. In his inquiry submission, the applicant offered to reduce the scope of his request to a few fields. The Ministry provided three options for disclosure of the narrower set of data, with Personal Education Numbers (PENs) encrypted, which in its view would not unreasonably invade individual student privacy. Ministry is ordered to disclose data in accordance with the option involving disclosure of the narrowed data with PENs encrypted and populations or cells of fewer than five students suppressed.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 6(2), 22(1), 22(2)(a), (e) to (f) & (h), 22(3)(a), (d) & (i), 22(4)(a), (c), (d), 33.1(1)(c), 33.2(k), 35; *School Act*, ss. 1, 170 & 170.1.

**Authorities Considered: B.C.:** Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order 03-41, [2003] B.C.I.P.C.D. No. 41; Order 01-01, [2001] B.C.I.P.C.D. No. 1; Order F08-13, [2008] B.C.I.P.C.D. No. 21; Order F08-03, [2008] B.C.I.P.C.D. No. 6; Order F08-21, [2008] B.C.I.P.C.D. No. 39; Order 01-52, [2001] B.C.I.P.C.D. No. 55; Order 03-16, [2003] B.C.I.P.C.D. No. 16.

## 1.0 INTRODUCTION

[1] This decision arises out of a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for electronic copies of the Ministry of Education's ("Ministry") Foundation Skills Assessment ("FSA") student summary data. The applicant noted in his request that, in previous years, he had received

data through a research agreement under s. 35 of FIPPA and that school districts had found the results of his statistical research on the data useful in planning and evaluating their intermediate programs in reading, writing and numeracy. The applicant added that the Ministry had not renewed the research agreement in 2005, apparently in the belief that he was not conducting research and that it would thus be "unlawful" to enter into a research agreement.[1]

[2] The applicant said he therefore requested the FSA data under FIPPA, either in a form that included students' personal education numbers ("PENs") (Request 1) or in a form with the PENs encrypted[2] and certain other data fields (such as birthdate) deleted (Request 2). The Ministry responded that it had to withhold the data listed in Request 1 because it was personal information protected by s. 22 of FIPPA. In response to Request 2, the Ministry said that encrypting the PEN would require 34 to 78 days, spread over 3.5 to 8 months. Therefore, the Ministry said, it was not required to respond to Request 2 under s. 6(2) of FIPPA,

[3] The applicant requested that this Office ("OIPC") review the Ministry's decision, arguing that it had provided the data to him in the past and that many school districts wanted him to continue his research in the public interest. The applicant also stated the Ministry could not replicate his research to the same degree and that it was currently providing the same data to a competitor, causing his own business to lose ground. He added that encrypting the PEN would take an experienced programmer no more than a couple of hours.

[4] Mediation did not resolve the issues and the review proceeded to inquiry under Part 5 of FIPPA. After this Office issued the notice for the inquiry, the public body said that it no longer took the position that, under s. 6(2), it was not required to create a record with encrypted PENs. Rather, it said, and the applicant agreed, the issue was whether the Ministry is required by s. 22 to refuse access to elements of the requested data, including PENs, either encrypted or unencrypted.

[5] The applicant also complained that the Ministry had inappropriately exercised its discretion under s. 35 in denying him a research agreement. The OIPC opened a separate file on that issue and it is not part of this inquiry.

---

[1] The Ministry's information and privacy director gave these reasons: the applicant was not doing research under s. 35 of FIPPA but conducting "a commercial enterprise"; the Ministry had been "excessively liberal" in its past interpretations of FIPPA; that this ""weakness has now been appropriately corrected"; and that to set up any kind of research agreement with the applicant would be "unlawful and contrary to Ministry policy"; Exhibit "A", Mann affidavit #2.

[2] OIPC Investigation Report F06-02, at para. 44, defines encryption as "the coding of … information into unintelligible data by means of a mathematical algorithm".

## 2.0 ISSUES

[6] The issues before me in this inquiry are the following:

1. whether the public body is required to refuse access to any element of the applicant's request under s. 22 of FIPPA; and

2. if the answer to that question is that the public body is required to refuse access to personal education numbers (PENs) under s. 22 of FIPPA, whether the public body would be required to deny access to any element of the applicant's request if the PENs were not disclosed but were substituted with a new unique anonymous identifier for each PEN.

[7] Under s. 57(2) of FIPPA, it is up to the applicant to prove that disclosure of personal information about a third party would not be an unreasonable invasion of third-party personal privacy.

[8] The relevant provisions of FIPPA and the *School Act* are in the attached appendix.

## 3.0 DISCUSSION

[9] **3.1 Background**—Some background will place the applicant's request in context.

### *The Foundation Skills Assessment*

[10] The Ministry said that the FSA is an annual province-wide assessment of the academic skills of British Columbia students in grades 4 and 7 that provides a "snapshot" of how well students are learning "foundation skills" in reading comprehension, writing and numeracy.[3] It said the FSA helps the province, schools and school districts to evaluate and improve student achievement in basic skills. Each student gets a "raw score", from which the Ministry reports whether the student exceeds, meets or does not meet expectations. The Ministry compiles the results in its Education Data Warehouse ("EDW").

[11] Each student is tracked by his or her PEN, "a unique nine-digit number assigned to each student" on entering the school system that follows the student from kindergarten to grade 12 and through post-secondary education. The PEN is used for several purposes including these: distribution of funding to schools; transition analysis between schools, districts and post-secondary education; exams; and student reporting.

[3] The information about the FSA comes from paras 11-17, Ministry's initial submission, and Mann affidavit #1.

[12] The EDW also contains "demographic data" on students, all linked through their PENs, such as their age and sex, whether they have a disability or medical condition, whether English is their second language ("ESL") and if they self-identify as aboriginal. The Ministry said that all of the data in the EDW is considered a "student record" under the *School Act*, disclosure of which is limited by s. 170 of that Act.

***The applicant***

[13] The applicant has degrees in education and mathematics.[4] He worked for the Ministry from 1990-2006, first as an "in-house consultant in statistics, research, indicator development and reporting" and later as a contractor validating education data. During this time, the applicant said he had full access to FSA data at the student level, including students' names, birthdates, PENs, school names, students' item by item responses and summary results.[5] In addition, and with the Ministry's co-operation, the applicant developed binders of education statistics which his company, Adminfo Resources Inc., sold to schools and school districts for use in planning and evaluating their programs.

[14] In 2003, the applicant said the Ministry required him to enter into a two-year research agreement so he could access FSA data and unmasked summary data to continue his company's work. The Ministry did not renew the agreement in 2005[6] and, while the applicant was later able to gain access to some data, they did not include student-level FSA data—hence his access request. The applicant acknowledged that the Ministry has improved its capacity to store, process and report on education data and has in effect become his competitor. He would however like to continue reporting what he called "Matched FSA Cohort data", which he said the schools and school districts find useful. The applicant said that, under a research agreement, the Ministry provides student-level education data to a company called Edudata Canada, which is based at the University of British Columbia—data that the Ministry has denied him since 2005.

[15] **3.2 Records in Dispute**—The applicant requested 70 fields of data from the EDW which the Ministry described as "arising out of the FSA process", for the 1999-2006 period, including these:

- birth date
- sex

[4] The information about the applicant in this section comes from paras. 49-62, applicant's initial submission, and Taylor affidavit #1.
[5] Taylor affidavit #1.
[6] There is a difference of opinion between the applicant and the Ministry as to whether the research agreement has expired or not. This issue is not relevant to whether the Ministry is required to withhold the requested information under FIPPA.

- PEN
- name of school and school district
- whether the student has self-identified as aboriginal
- language spoken at home
- whether English is the student's second language
- whether the student is "special needs" and if so what category (*e.g.,* autistic, gifted, mentally ill, deaf, learning disabled)
- FSA test results (raw scores and whether a student exceeds, meets or does not meet expectations)

[16] The Ministry said that the request involves more than 110 million data elements and that with the appropriate software there are infinite ways one can sort or query the data and make linkages and associations between students.[7] The Ministry provided me with samples of the data from three school districts and a school, in the form of spreadsheets.

[17] **3.3 Application of Section 22**—Many previous orders have considered the application of s. 22[8] and I take the same approach here. Both parties made detailed arguments, all of which I have considered carefully. I have summarized their main points below.

[18] **3.4 Is the request for personal information?—**The applicant argued that, in order for the requested data elements (PENs, demographic information,[9] FSA results) to be personal information, it must be possible to identify the students from the data. He does not believe the data are personal information because it is not, in his view, possible to identify students from their PENs without a table linking the PENs to the students' names, and he has no way to make these links. He also made the novel argument that school is the "work" of students and the requested data are analogous to employment or professional information in workplace context and thus not "about" individual students.[10] Unlike the social insurance number ("SIN"), the applicant argued, a person cannot use the PEN to gain access to any other information about an individual except, for example, where the person already has access to data associated with the PEN.[11]

---

[7] Paras. 18-24, Ministry's initial submission.

[8] See Order 01-53, [2001] B.C.I.P.C.D. No. 56, and Order 02-56, [2002] B.C.I.P.C.D. No. 58, for example, and, for orders dealing with re-identification and the mosaic effect, Order 03-41, [2003] B.C.I.P.C.D. No. 41, Order 01-01, [2001] B.C.I.P.C.D. No. 1, Order F08-13, [2008] B.C.I.P.C.D. No. 21, Order F08-03, [2008] B.C.I.P.C.D. No. 6 and Order F08-21, [2008] B.C.I.P.C.D. No. 39.

[9] As noted above, demographic information includes students' age, sex, whether they have a disability or medical condition, whether English is their second language ("ESL") and if they self-identify as aboriginal.

[10] Paras. 15-18 & 69-76, applicant's initial submission.

[11] Paras. 10-12, reply submission.

[19] The Ministry argued that the PEN is a unique identifier and therefore clearly personal information, just as a SIN is. In this regard, the Ministry said the former definition of "personal information" in Schedule 1 of FIPPA[12] is helpful in determining what personal information is. The Ministry also argued that, even without the PENs, members of a community or students' peers could likely identify students, either individually or as part of a small group, from the other 69 requested data elements, for example, by birthdate, language spoken at home (which can indicate ethnic origin), aboriginal status or special needs category.[13]

[20] The Ministry noted that a number of school districts in the province are small and that only students in grades 4 and 7 take the FSA, which in the case of some small schools can be one, two or three students. Thus, even with large schools, it said, populations rapidly become small.[14] The Ministry gave some examples of how, through "sort" functions available in software, individuals or groups of students who took the FSA could readily be identified by their peers or their community, either from the requested data itself or through the 'mosaic effect',[15] including these:

- only one student in a named school district is listed as speaking Chinese at home
- only one student in another named school district has a particular characteristic
- another named school has only one Albanian ESL student and only one Vietnamese ESL student

[12] Before the definition was amended on April 11, 2002, "personal information" was defined as "recorded information about an identifiable individual including (a) the individual's name, address or telephone number, (b) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations, (c) the individual's age, sex, sexual orientation, marital status or family status, (d) an identifying number, symbol or other particular assigned to the individual, (e) the individual's fingerprints, blood type or inheritable characteristics, (f) information about the individual's health care history, including a physical or mental disability, (g) information about the individual's educational, financial, criminal or employment history, (h) anyone else's opinions about the individual, and (i) the individual's personal views or opinions, except if they are about someone else".

[13] Paras. 26-37, Ministry's initial submission.

[14] Paras. 12–19, Mann affidavit #1.

[15] The mosaic effect occurs "where seemingly innocuous information is linked with other (already available) information, thus yielding information that is not innocuous and, in the access to information context, is excepted from disclosure" under FIPPA. See Order 01-01, [2001] B.C.I.P.C.D. No. 1, where the commissioner discussed the mosaic effect and said that cases where it applies are the exception, not the norm.

[21] The Ministry argued that it is reasonable to expect that these children could be identified from their personal characteristics and one would then know their test results, PENs and birthdates.[16]

[22] The Ministry provided these further examples:

- in one named school district, none of the students got a specific score in numeracy and reading comprehension

- in another named school district, all of the grade 4 children at two of the district's schools got a specific score in numeracy

[23] The Ministry argued that, in these two cases, one would only have to know that a student was in grade 4 or 7 at those schools to know the student's FSA results.[17] The Ministry also referred to a number of British Columbia and Ontario orders and to case law on the risk of re-identification and the mosaic effect.[18]

[24] The Ministry said that, to prevent the possibility of associating data with identifiable individuals, its policy is to "mask" data by suppressing (not releasing publicly) data about populations of fewer than five. It said it also aggregates or "pools" data for the same reason. The Ministry said it is possible to produce pools of students small enough that, "[w]ith a little local information", there is a reasonable expectation that one could identify one student and from there link to other information about the student. Even with removal or substitution of the PEN, the Ministry argued that it would be possible to sort the data in ways that could reasonably be expected to lead to identification of a student.[19] In the Ministry's view, it would be necessary to delete fields associated with the names of schools and school districts to de-identify the data.[20] The Ministry conceded that the possibility of identifying students from the requested data diminishes over time but it does not believe enough time has passed in this case to render the students non-identifiable from the data.[21]

[25] The applicant disputed the Ministry's arguments on a number of grounds, including the fact that he does not know what the students look like, nor what their names are. He said one would have to travel to a school and, through personal observation and/or other data available to someone in the community,

---

[16] Para. 38, Ministry's initial submission.

[17] Para. 40, Ministry's initial submission; paras. 23, 25, 26, 29 & 31, Mann affidavit #1 & Exhibits "G"-"J" to Mann affidavit #1.

[18] Paras. 26-42, Ministry's initial submission. Among others, the Ministry referred to Order 01-01, [2001] B.C.I.P.C.D. No. 1, Order F08-13, [2008] B.C.I.P.C.D. No. 21 and Order F08-03, [2008] B.C.I.P.C.D. No. 6.

[19] The Ministry provided a further series of detailed examples showing how one could sort the requested data in ways that in its view could reasonably be expected to lead to identification of individual students or small groups of students; see paras. 20-31, Mann Affidavit #1.

[20] Para. 77, Ministry's initial submission; para. 32, Mann affidavit #1.

[21] Footnote 14, p. 12, Ministry's initial submission.

such as a parent or school support staff, somehow identify students using the demographic data. FSA results are not available until after the school year, he said, by which time many classes have been disbanded.[22] He also argued that the Ministry publishes some information on FSA results by school.[23] He did not provide any evidence of this but the Ministry also did not dispute the applicant's claim.

***Analysis***

[26] The applicant's characterization of the requested data as information about students' work or analogous to information about an individual's workplace activities is not persuasive, to say the least. The PEN, as a unique number assigned to a student and used to link together different data elements about a student, is personal information, just as an individual's SIN is. It is irrelevant whether one is able to use a PEN to gain access to other information about an individual.

[27] An encrypted PEN is also personal information as it is an identifying number assigned to an individual, just as a PEN in unencrypted form is. However, if a PEN is encrypted and an applicant does not have the key and is thus not able to link an encrypted PEN back to an individual student, the encrypted PEN is not in my view information about an identifiable individual and is thus not personal information. In such a case, because there is no unique identifier in the form of the PEN, the information associated with the encrypted PEN is not information "about an identifiable individual" and is thus not personal information.[24]

[28] The other 69 requested data elements, with individual PENs attached, are personal information in that they are "about" individual identifiable students, including how well they did in the FSA, whether they have a disability and so on. Even if the PENs were removed or encrypted, I accept the Ministry's arguments that there is a reasonable expectation that members of students' communities or students' peers could identify at least some individual students from the requested demographic data elements, in conjunction with data on school names and school districts, either through personal observation or from other available information (*e.g.*, their own prior knowledge of students' families or situations). This would in turn reveal to these observers individual students' FSA results and other associated personal information. I therefore conclude that all of the requested information, including PENs in encrypted or unencrypted form, is personal information.

---

[22] Paras. 120-121, applicant's initial submission; paras. 13-30, applicant's reply submission.
[23] Paras. 41-49, applicant's reply submission.
[24] I return below to the issue of whether this same information can, on other grounds, be linked to specific individuals in such a way as to be "information about an identifiable individual", thus making it personal information for other reasons.

[29] The applicant may well not be interested in identifying individual students, including by travelling to schools and observing students. However, the Ministry must take into account, as it has, the reasonable expectation of re-identification of students from the requested information, through ways discussed above, in deciding whether the requested information is personal.

[30] **3.5 Does Section 22(4) Apply?—**The next step in the s. 22 analysis is determining whether the requested information falls under s. 22(4), which lists a number of types of personal information the disclosure of which is not an unreasonable invasion of third-party privacy. If the information falls into one of the categories listed in s. 22(4), there is no need to consider s. 22(3) and s. 22(2).

[31] The applicant argued that ss. 22(4)(c) and (d) apply in this case, as follows:

- even if the PENs and demographic information are personal information (which he denies), under s. 22(4)(c) their disclosure is not an unreasonable invasion of privacy because s. 170.1 of the *School Act* authorizes disclosure of the PEN for a number of purposes, including research and statistical analysis

- the Ministry regularly discloses the requested information for these purposes to public bodies and individuals under provisions other than FIPPA[25]

- s. 33.1(1)(c) of FIPPA thus also applies here

- the applicant seeks the requested data for research and statistical purposes and, under s. 22(4)(d), disclosure is therefore not an unreasonable invasion of third-party privacy; there have been no orders stating that s. 35 requires that there be a research agreement

- the applicant's research agreement still stands as it had no end date and he was in compliance with its conditions; alternatively the Ministry terminated a "valid and subsisting research agreement" contrary to law[26]

[32] The Ministry acknowledged that the applicant had a research agreement with the Ministry regarding records similar to those in dispute here but said this agreement expired in 2005 and has not been renewed. In its view, s. 22(4)(d) only applies where there is an existing research agreement.[27] The fact that the

[25] The applicant provided no concrete examples in support of this assertion.
[26] Paras. 21-29 & 84-93, applicant's initial submission. As noted above, this last issue is not part of this inquiry.
[27] Paras 48-50, Ministry's initial submission.

applicant previously received data as a contractor[28] or under a research agreement—under which the Ministry was able to impose conditions on use and disclosure of the personal information he had access to—is not, in the Ministry's view, relevant to whether s. 22 applies in this case. The Ministry reminded me that previous orders have stated that disclosure under FIPPA is disclosure to the world and argued that it could impose no conditions on the applicant's use of data he received in response to a FIPPA request.[29]

[33] The Ministry also pointed out that s. 170.1 of the *School Act* authorizes a number of *uses* of the PEN, not disclosures, and that it is s. 170 of the *School Act* that authorizes disclosures of school records (including the PEN) for various purposes, of which research is not one. Section 22(4)(c) therefore does not apply, in the Ministry's view, and nor does any other part of s. 22(4). The Ministry also disputed the applicant's argument that it has disclosed personal information under provisions other than FIPPA, saying it has disclosed personal information only in accordance with FIPPA, such as under a research agreement, an information sharing agreement or a service contract.[30]

***Analysis***

[34] The applicant's arguments on s. 22(4)(c) are not persuasive. Section 170.1 of the *School Act* does not, as the Ministry pointed out, authorize disclosure of the PEN but its uses. Section 170.1(3)(d) authorizes use of the PEN for research and evaluation of school programs and courses but does not authorize the Ministry to *disclose* the PEN for research purposes. As the Ministry also pointed out, s. 170 of the *School Act* authorizes disclosure of information in a school record (which I accept includes the PEN) for certain purposes but these do not include research.

[35] Section 33.1(1)(c) also does not apply here. It pertains to disclosures under Part 3 of FIPPA (protection of personal information) and has no bearing on the applicability of s. 22, which is in Part 2 of FIPPA (freedom of information requests).

---

[28] The Ministry said that, as a contractor, the applicant fell under the definition of "employee" in Schedule 1 of FIPPA.

[29] Para. 36, Ministry's initial submission. The Ministry referred here to Order 01-52, [2001] B.C.I.P.C.D. No. 55. This last argument misconceives access rights under FIPPA. It is clear from past orders that there is no ability under FIPPA to impose restrictions on applicants' use of information they receive under FIPPA. See para. 73 of Order 01-52.

[30] Paras. 3-12 & 18-24, Ministry's reply submission. I take the Ministry to argue here that it has disclosed personal information only under authorities found in Part 3 of FIPPA, albeit through such mechanisms as research agreements, information sharing agreements or service contracts. Such arrangements do not of course in themselves constitute authority for disclosure of personal information, which is only found in Part 3.

[36] Similarly, although I accept that the applicant genuinely wants to conduct research with the requested data, I reject his arguments that s. 22(4)(d) applies. First, s. 35 explicitly requires a researcher to sign an agreement. This necessarily means a research agreement must be in writing. The evidence before me indicates that the applicant's research agreement with the Ministry began in August 2003.[31] Under the agreement, he was required to destroy the data he received by September 30, 2005 "unless there is agreement by both parties to extend this Agreement for another term". Although the applicant argued that the research agreement was still in effect, there is no evidence of any extension. Moreover, the applicant's own communications with the Ministry show that he reproached the Ministry for not renewing the agreement.[32] I therefore find that s. 22(4)(d) does not apply.

[37] The parties made no other arguments about s. 22(4) and I see no basis for finding that any other part of s. 22(4) applies here.

[38] **3.6 Unreasonable Invasion of Third-Party Privacy**—The applicant does not believe that s. 22(3) applies and, if it does, the only potentially applicable provision is s. 22(3)(d). However, he argued, in previous cases involving requests for educational history, the third parties have been associated by name with the information, which would not be the case here. Harking back to his arguments that school is a student's "work" and FSA results are analogous to information about an individual's actions in the course of employment, the applicant argued that previous orders have found that disclosure of information about one's workplace activities is not an unreasonable invasion of third-party privacy.[33]

[39] The Ministry vigorously disagreed with these arguments,[34] countering that disclosure of all the requested data elements would be an unreasonable invasion of third-party privacy because they are students' educational history,[35] medical history[36] and, in the case of information on the language a student speaks at home, often an indicator of ethnic origin.[37]

***Analysis***

[40] Most of the 70 requested data elements relate to information about students' schooling (such as school, school district, FSA results, PEN, sex, age and grade at the time of the FSA, whether students are in French immersion and

[31] The applicant provided a copy of this research agreement as Exhibit "B" to Taylor affidavit #1.
[32] See for example Exhibit "A", Mann affidavit #2, which I referred to above.
[33] The applicant did not refer to any specific orders on these points.
[34] Paras. 16-17, Ministry's reply submission.
[35] The Ministry said the requested FSA results fall under s. 22(3)(d) as they reveal how well a student is doing at school.
[36] Field 50, which can contain information about whether a student is autistic, mentally or physically disabled, deaf, blind or mentally ill, which the Ministry argued falls under s. 22(3)(a).
[37] The Ministry argued this type of information falls under s. 22(3)(i).

other similar information related to students' education and the FSA process.[38] All of this information constitutes the students' educational history as contemplated by s. 22(3)(d). Data elements which concern students' special needs categories (such as mental or physical disability, autism, visual impairment, behaviour disorder) relate to students' medical history and thus fall into s. 22(3)(a). Other information (language spoken at home, aboriginal status, English as a second language) sufficiently indicates ethnic origin as to fall into s. 22(3)(i). Disclosure of all the requested data elements is therefore presumed to be an unreasonable invasion of third-party privacy.

[41] **3.7 Relevant Circumstances—**The Ministry argued that the relevant circumstances favour withholding the requested information. It expressed concern about possible stigmatization and discrimination of students, for example, where the data would identify aboriginals, immigrants and children who are mentally or physically disabled. Thus, in its view, ss. 22(2)(e) and (h) apply. The Ministry also argued that s. 22(2)(f) applies, as s. 170 of the *School Act* requires that student records be kept confidential, with some exceptions. The Ministry also referred to the policies on its website on privacy and avoiding the possibility of associating statistical data with an identifiable individual.[39]

[42] The applicant argued that s. 22(2)(a) favours disclosure as there is a public interest in scrutinizing school performance and the results students obtain in educational programs. He shares the Ministry's concern about needlessly stigmatizing students but argued that the Ministry's arguments on ss. 22(2)(e) and (h) are speculative. Students' names would not be disclosed, he said, and it would not otherwise be possible to identify students through disclosure to the applicant or publication of his research. If the Ministry is concerned that disclosure of the information would stigmatize certain groups who are over—represented in the "does not meet expectations" category of FSA results, the applicant went on, then this is a fact and one that the Ministry has itself reported on.[40] The applicant also disputed that all of the requested information was supplied in confidence.[41]

***Analysis***

[43] The applicant's arguments on s. 22(2)(a) have merit. The Ministry itself acknowledged that the purpose of the FSA process is to assess how well students are doing in school in three basic areas. By extension, in my view, the FSA process indicates how well schools and school districts are doing in

[38] The 70 data elements the applicant requested were coded. Ministry provided a table explaining the meanings of the codes and the types of values used; Exhibit "E", Mann Affidavit #1.

[39] Paras. 55-64, Ministry's initial submission. The Ministry provided copies of the policies to which it referred: Exhibit "F", Mann affidavit #1 (PEN protocol) and at Tab 10, "Policy Document: Protection of Personal Information when Reporting on Small Populations".

[40] The applicant did not provide any evidence to support this assertion.

[41] Paras. 41-49, applicant's reply submission.

educating students. The Ministry argued that it produces reports for school districts and the public which, while not identical to those the applicant sells to school districts, are "functionally equivalent". It said that the applicant used to produce a unique product but now the Ministry's ability to make customized reports has improved greatly and the applicant no longer produces reports that the Ministry cannot replicate.[42]

[44] Nevertheless, the applicant argued that he can do research with the requested data which the Ministry does not do and which would assist schools and school districts in evaluating how well they are doing educating students.[43] I agree that this will assist in subjecting schools and school districts to public scrutiny, a goal explicitly cast as a relevant factor by s. 22(2)(a). I find that s. 22(2)(a) applies here, favouring disclosure.

[45] As for the Ministry's arguments on harm, I accept that the requested data may show that certain groups of students may not perform well academically in the FSA process. However, I am not persuaded that this would constitute "unfair" harm or damage to the reputation of any individual student or students, as contemplated by ss. 22(2)(e) and (h), respectively.

[46] Turning to s. 22(2)(f), s. 170 of the *School Act* states that a Ministry employee or contractor must not knowingly disclose information in a student record that identifies a student. In addition to its policies, to which I referred above, the Ministry provided evidence from the Ministry's Manager, Surveys and Data Exchange, that students and parents are told that personal information the Ministry collects through the FSA process will be protected and kept confidential and that his office takes care to protect students' privacy from unauthorized disclosure under FIPPA. He did not explain how or when this assurance of confidentiality is communicated, for example, through letters to parents or statements on the Ministry's website.

[47] I accept that parents and students expect that schools and school districts will protect their personal information from unauthorized disclosure in identifiable form. The Ministry's arguments and the two policies it provided do not however address the issue of confidential supply and I do not therefore give much weight to them. In addition, the list of requested data elements contains a number of codes that it appears the Ministry itself creates or assigns and which are thus not "supplied". For these reasons, I give little weight to the factor in s. 22(2)(f).

[48] Turning to other circumstances, the applicant stressed that he had received similar data, including students' names and birthdates, for several years, both under s. 35 of FIPPA and to do his validation work for the Ministry as a service provider. He said there was never a concern about his work or security

[42] Para. 10, Mann affidavit #2.
[43] Para. 29, Taylor affidavit #1; see also Jones, Elder and Gaskill affidavits .

of the information.[44] The applicant also argued that his research is important and that schools and school districts want him to continue his research. In this regard, he provided a number of affidavits from school officials.[45]

[49] The Ministry conceded that the applicant is well-respected in the education community but said this is not relevant to the application of s. 22. Nor is it relevant, the Ministry argued, that he received information as a contractor and researcher.[46]

[50] I do not question the applicant's reasons for wanting the information nor his good faith. However, I agree with the Ministry that his arguments on these points are not relevant.

***Conclusion on s. 22(1)***

[51] I found above that the requested information was personal information and that s. 22(4) does not apply here. I then found that disclosure of the requested data elements would be an unreasonable invasion of third-party privacy under ss. 22(3)(a), (d) and (i).

[52] I give little weight to the factor in s. 22(2)(f) and, while the factor in s. 22(2)(a) weighs in favour of disclosure, I find that it does not rebut the presumptions under ss. 22(3)(a), (d) and (i). I therefore find that s. 22(1) requires the Ministry to refuse access to the requested data.

[53] This is not the end of the matter, however, as I must also consider whether it is reasonable under s. 4(2) to sever excepted information from the requested records and disclose information that is not subject to s. 22(1).

[54] **3.8 Duty to Sever**—The Ministry acknowledged that it has a duty under s. 4(2) to sever records if I find that disclosure of information would be an unreasonable invasion of third-party privacy. It argued that, in order to de-identify the data, it would be necessary to remove the PEN. In addition, because some of the school districts are small, the Ministry said it would be necessary to remove data fields related to the names of schools and school districts in order to anonymize the students within a larger pool.[47] For example, the Ministry said, a named school district had 309 students in 2006/07, 40 of whom took the FSA. Three quarters of the school districts in the province have fewer than 10,000 students and six have fewer than 1,000. The Ministry said it would not be feasible to manually review the data and remove fields associated with "unique circumstances" such as special needs children, "ethnically unique

[44] Para. 50, applicant's initial submission.
[45] Paras. 63-67, applicant's initial submission; Jones, Elder and Gaskill affidavits.
[46] Para. 12, Ministry's reply.
[47] The applicant said that, as the Ministry knows, this level of severing would render the data useless for his purposes; para. 58, applicant's reply submission.

children" or "homogenous small groups", as such severing would rely on an analyst's personal judgement, subject to errors and omissions and, given the huge volume of records, would take "an enormous amount of time".[48]

[55] The Ministry did not explain why it would be necessary to undertake these tasks manually, why severing an electronic database would rely on an analyst's personal judgement or why such severing would take "an enormous amount of time". In any case, I do not accept that the possibility of errors or omissions is relevant to determining whether it is reasonable to sever under s. 4(2). As for the time required to sever the records, I acknowledge that previous orders have taken the amount of time into account in deciding whether severing is reasonable.[49] In the absence of details on the amount of time it would take to sever these records and why, however, I do not find the Ministry's arguments on this point to be persuasive.

[56] The applicant closed his submissions by saying that, if I found that it would be possible to identify some individuals from unique combinations of demographics, he was willing to withdraw from his request all but fields 9, 13, 14, 15, 16, 17 (the PEN or an encrypted version of the PEN), 19, 32, 38, 56, 57 and 69.[50] He argued that removing fields associated with sex, ESL, language spoken at home, aboriginal status, special needs and French immersion would answer the Ministry's concerns about identification of individual students, as there would be no possibility of identifying students from the remaining characteristics.[51]

[57] I invited the Ministry to comment on the applicant's proposal. The Ministry said that it maintained its position that PENs are personal information and should not be disclosed. It said however that it was not opposed to providing the applicant with encrypted PENs. It also said that any release of data in a form that would allow students to be individually identified would be an unreasonable invasion of their privacy under s. 22(1), as argued earlier.

[58] The Ministry then argued that release of what it called the "narrowed data" would still bring with it an unacceptable level of risk that individual students will be identified, as the data would include information broken down to the school level. This would not be in keeping with the Ministry's policy on reporting statistics about small populations, it said, and would not meet privacy standards of other organizations that handle personal information. The risk of identification could be mitigated, the Ministry said, by disclosing the narrowed data in one of three ways, each of which would involve encrypting the PEN:

---

[48] Paras. 66-74, Ministry's initial submission; paras. 32-33, Mann affidavit.
[49] See Order 03-16, [2003] B.C.I.P.C.D. No. 16, for example.
[50] The numbered fields that the applicant listed, other than the PEN, are mainly associated with grade, school year, FSA results and school name.
[51] Para. 59, applicant's reply submission.

- disclose the data in masked form, that is, by suppressing populations of fewer than five students; this would ensure that no students would be identifiable

- disclose the data in unmasked form, without field #32 (which identifies individual schools); this would create larger populations within which students would not be identified

- disclose the data in unmasked form, replacing field #32 with field #22 (which reports school district rather than school); again this would create large enough pools of data within which students would not be identified[52]

[59] The applicant rejected the Ministry's arguments on s. 22. He said the Ministry's first option for disclosure did not apply as he has requested one record per student and the first option applies to groups of students. He also questioned how this data could be supplied at the school level but in masked form and suggested the Ministry's option would result in all the data being masked,[53] rendering it useless to him. The applicant also said that the second and third options would render the data useless to him as he intends to provide statistics which would allow individual schools to analyze the effectiveness of their instructional programs.[54]

[60] The material before me supports the conclusion that the problematic data elements with regard to the reasonable expectation of identifying students are the demographic data, that is, those related to unique characteristics such as sex, aboriginal status, special needs, language at home, ESL and French immersion. I agree with the Ministry that it would be necessary to sever these items, whether the PEN were disclosed in encrypted or unencrypted form, in order not to cause an unreasonable invasion of third-party privacy through disclosure of the associated data.

[61] I also accept the Ministry's arguments that there is not a reasonable expectation of identification of individual students through disclosure of the "narrowed data", with PENs encrypted, in one of the three ways it outlined. I have not considered the Ministry's second and third options as the applicant stated that they would render the data useless to him. However, the Ministry's first option—disclosure of the "narrowed data", with PENs encrypted, and data on populations or cells of fewer than five students suppressed—provides the applicant with the requested data in a form that I understand will be useful to him and that will also protect the privacy of individual students. In arriving at this conclusion, I have also taken into account the passage of time since the request, the period of time covered by the request and the desirability of subjecting individual schools to public scrutiny.

---

[52] Ministry's letter of October 30, 2009; Morton affidavit.
[53] I did not understand this option to have the result the applicant suggested.
[54] Applicant's letter of November 5, 2009; Taylor affidavit #2.

[62] I therefore find that s. 22(1) does not require the Ministry to refuse access to the narrowed FSA student summary data, that is, fields 9, 13, 14, 15, 16, 17 (an encrypted version of the PEN), 19, 32, 38, 56, 57 and 69, for the time periods specified in the applicant's request, provided data on populations or cells containing fewer than five students are suppressed.

## 4.0 CONCLUSION

[63] For reasons given above, under s. 58 of FIPPA, I make the following orders:

1. Subject to para. 2 below, I require the Ministry to refuse access to the requested information under s. 22(1).

2. I require the Ministry to comply with its duty under s. 4(2) to sever the excepted information and to give the applicant access to the remainder of the requested FSA student summary data, that is, fields 9, 13, 14, 15, 16, 17 (*i.e.*, PENs in encrypted form), 19, 32, 38, 56, 57 and 69, for the time periods he specified in his request, with the proviso that the Ministry must suppress data on populations or cells containing fewer than five students.

3. I require the Ministry to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before December 23, 2009 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

November 10, 2009

**ORIGINAL SIGNED BY**

Celia Francis
Senior Adjudicator

## Appendix

**FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT**
***[RSBC 1996] CHAPTER 165***

**Information rights**

4(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record. …

**Duty to assist applicants**

6(2) Moreover, the head of a public body must create a record for an applicant if

(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

**Disclosure harmful to personal privacy**

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

…

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence, …

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

…

(d) the personal information relates to employment, occupational or educational history,

…

(i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or …

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure,

…

(c) an enactment of British Columbia or Canada authorizes the disclosure,

(d) the disclosure is for a research or statistical purpose and is in accordance with section 35, …

**Disclosure inside or outside Canada**

33.1(1) A public body may disclose personal information referred to in section 33 inside or outside Canada as follows:

…

(c) in accordance with an enactment of British Columbia or Canada that authorizes or requires its disclosure;

**Disclosure inside Canada only**

33.2 A public body may disclose personal information referred to in section 33 inside Canada as follows:

…

(k) in accordance with section 35 (disclosure for research or statistical purposes).

**Disclosure for research or statistical purposes**

35(1) A public body may disclose personal information or may cause personal information in its custody or under its control to be disclosed for a research purpose, including statistical research, only if

(a) the research purpose cannot reasonably be accomplished unless that information is provided in individually identifiable form or the research purpose has been approved by the commissioner,

(a.1) subject to subsection (2), the information is disclosed on condition that it not be used for the purpose of contacting a person to participate in the research,

(b) any record linkage is not harmful to the individuals that information is about and the benefits to be derived from the record linkage are clearly in the public interest,

(c) the head of the public body concerned has approved conditions relating to the following:

(i) security and confidentiality;

(ii) the removal or destruction of individual identifiers at the earliest reasonable time;

(iii) the prohibition of any subsequent use or disclosure of that information in individually identifiable form without the express authorization of that public body, and

(d) the person to whom that information is disclosed has signed an agreement to comply with the approved conditions, this Act and any of the public body's policies and procedures relating to the confidentiality of personal information.

(2) Subsection (1) (a.1) does not apply in respect of research in relation to health issues if the commissioner approves

(a) the research purpose,

(b) the use of disclosed information for the purpose of contacting a person to participate in the research, and

(c) the manner in which contact is to be made, including the information to be made available to persons contacted.

**"personal information"** means recorded information about an identifiable individual other than contact information;

***School Act***
**[RSBC 1996] CHAPTER 412**

**"student record"** means a record of information in written or electronic form pertaining to

(a) a student or francophone student, or

(b) a child registered under section 13 with a school or francophone school,

but does not include

(c) a record prepared by a person if that person is the only person with access to the record, or

(d) a record of a report under section 14 (1) or 16 (3) (b) of the *Child, Family and Community Service Act* or of information that forms the basis for a report under section 14 (1) of that Act;

***Non-disclosure of student records***

170(1) Except for the purposes of the administration of this Act or the *Independent School Act* or conducting the business of the ministry, a person who is or has been

(a) an employee of the ministry, or
(b) engaged by the ministry in the administration of this Act or the *Independent School Act*

must not knowingly disclose any information contained in a student record that identifies a student or francophone student.

(2) Despite subsection (1), a person referred to in that subsection may disclose information in a student record that identifies a student or francophone student if

(a) the disclosure is required under an enactment of British Columbia or Canada,
(b) the disclosure is to counsel in respect of a proceeding or is given in evidence in a proceeding, or
(c) the student or francophone student or, if that student is of school age, a parent of that student consents in writing to the disclosure.

(3) An employee of the ministry who has access to student records must swear an oath in the prescribed form.

(4) A person who contravenes subsection (1) commits an offence.

**Personal education numbers**

170.1(1) In this section, **"personal education number"** means a unique identification number assigned to a person under subsection (2).

(2) The minister may assign a personal education number to the following persons:

(a) a student;
(b) a francophone student;
(c) a child registered under section 13;
(d) a student as defined in the *Independent School Act*;
(e) a child participating in an early learning program;
(f) at the request of a first nation or a Community Education Authority established by one or more participating First Nations under the *First Nations Jurisdiction over Education in British Columbia Act* (Canada), a person who is engaged in a program of studies at an educational

institution operated by the first nation or Community Education Authority;

(g) a person

(i) who is not resident in British Columbia, and
(ii) whose study outside British Columbia is under or related to an agreement entered into by the minister under section 168 (3) with a school authority that is responsible for the education of the person;

(h) at the request of an educational institution operated by a treaty first nation under its own laws, or of the treaty first nation, a person participating in a kindergarten to grade 12 program of studies provided by the treaty first nation under its own laws.

(3) The personal education number of a person referred to in subsection (2) may only be used for the following purposes:

(a) determining the amount of the operating grant under section 106.3 or the targeted grant under section 106.4;

(b) ensuring the efficient and effective use of grants paid under sections 114 and 115;

(c) determining enrollment in an independent school and ensuring the efficient and effective use of grants paid under the *Independent School Act*;

(d) researching and evaluating the effectiveness of boards, francophone education authorities and authorities governed by the *Independent School Act* and the programs, courses and curricula delivered by them;

(e) administering the processes referred to in section 168 (2) (d) and (d.1);

(f) administering Provincial examinations;

(g) issuing graduation credentials and transcripts;

(h) awarding Provincial scholarships and bursaries;

(i) determining the eligibility of persons to receive reimbursement of expenses under section 11.2 of the *Independent School Act* or section 168.1 of this Act;

(j) enabling the services and functions of programs established by the ministry to provide educational services to

(i) students,
(ii) francophone students,
(iii) children registered under section 13 of this Act, and
(iv) students as defined under the *Independent School Act*;

(k) conducting research and statistical analysis relating to the transition of individuals to post-secondary institutions.