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PRIVACY AND ACCESS:

NEW DIRECTIONS FOR COUNSELLORS'

RECORD KEEPING PRACTICES

by

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THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

in the Faculty

of

Education

SIMON FRASER UNIVERSITY

July 1995

ISBN 0-612-06652-5

APPROVAL

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DEGREE Master of Arts

TITLE Privacy and Access: New Directions for Counsellors' Record Keeping Practices

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Privacy and Access: New Directions for Counsellors' Record Keeping Practices

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ABSTRACT

The Freedom of Information and Protection of Privacy Act will have a major impact on the methods counsellors presently use in managing the personal information of their student/clients. This paper considers sections of the FIPPA that are most likely to be of relevance to BC school counsellors. To enhance this consideration, this study surveys and assesses the diversity of record keeping methods and record access policies public school counsellors in BC presently use: the extent to which counsellors keep records, the material they keep in student/client records, and the restrictions they place on access to these records.

Survey respondents' comments and concerns are addressed in regards to this new legislation. Specific guidelines are offered for common questions counsellors have: Who owns student/client records?; Can students deny parents' access?; What are the access rights of non-custodial parents?; What should be kept in student/client records?; When can access be denied? Answers to these questions are developed from combined analysis of the FIPPA, the BC School Act, various government publications, legal precedents, and a summation of the Information and Privacy Commissioner's Orders and Investigations to date. As a result, the paper draws a series of conclusions that guide counsellors toward managing the risks inherent in record keeping and record access.

TABLE OF CONTENTS

LIST OF TABLES

LIST OF SECTIONS

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CHAPTER ONE

PRIVACY AND ACCESS:
New Directions for Counsellors' Record Keeping Practices

The last several decades have seen increasing public concern over issues of privacy; to a point where privacy is at least a moderate concern for 92% of Canadians, ranking as high as concern over issues of unemployment, education and environment (Ekos Research Associates Inc., 1993). Canadians now find themselves in an increasingly global, technological world, what has been referred to as a "technological trance" (Flaherty, 1993), where technology and information gathering, retrieval, and dissemination is a major portion of everyday life. The obvious dilemma lies in balancing the provision of access to information while protecting personal privacy in the process.

As a response to increasing demands for government accountability in the realm of privacy and information issues, the federal government of Canada enacted two pieces of legislation in 1983, the Privacy Act and the Access to Information Act. These two Acts served as an attempt to lessen Canadians' Orwellian anxiety of the early 1980's over technological advances in an information age. (Flaherty, 1993) In the last decade, several provincial governments have followed suit and have introduced their own legislation. British Columbia is the most recent province to pass legislation in an attempt to "make public bodies more accountable to the public and to protect personal privacy," as defined in Part 1, the purpose of the Freedom of Information and Protection of Privacy Act ("FIPPA"). The introduction of the FIPPA in the province of British Columbia offers citizens a legal vehicle for pursuing their rights to information and privacy when dealing with all public bodies. Since Bill 50 passed Third Reading on June 23, 1992, there has been considerable speculation as to its future impact with the empowerment of private access to public records.

Although numerous public bodies at the provincial level were immediately affected by the initial provisions of the FIPPA, local municipal public sectors had yet to encounter this legislation. The second tier of the legislation came into effect, as of October of 1994, extending coverage to local public bodies. This two stage process offered local bodies time needed to adjust to the legislation and allowed for an 8-10 month consultation process, announced by Attorney General Colin Gablemann on September 1, 1992. (Jones, 1993) This process enabled local bodies to specify how the legislation would uniquely affect their interests. Among the public bodies affected by the second phase of this legislation are the seventy-five school boards operating within the province.

The FIPPA opens new channels for individuals to access information from school boards. Prior to the enactment of this legislation, individuals seeking access referred to the BC School Act:

> **Examination of student records**
>
> **9.** A student and the parents of a student are entitled to examine all student records kept by a board pertaining to the student while accompanied by the principal or a person designated by the principal to interpret the records.

Furthermore, Section 97 of the School Act refers to a school board establishing and maintaining student records as well as ensuring privacy and confidentiality. Access within this section is allotted to persons in the health, social, and support services.

The Ministry of Education requires a permanent record of attendance, reports of progress, and the results of standardized tests; these data are what normally constitutes a student's records within the school system. Section 1 of the School Act defines what the term "student record" encompasses:

> "student record" means a record of information in written or electronic form pertaining to
>
> (a) a student, or
>
> (b) a child registered under section 13 with a school,
>
> but does not include a record prepared by a person if the person is the only person who will have access to the record;

Teachers are to "maintain records required by the minister, the board and the school principal;" and work in "verifying the accuracy of the information" as per B.C. Regulation, 265/89. As well, under this document, teachers are advised to provide this information to parents, "subject to the approval of the board". Three written reports regarding each individual student are expected from teachers within each calendar year; again these are to be subject to the prior authorization of the Minister or board.

Beyond the basic information required by the Ministry, numerous service areas within any one school may have their own record keeping system. The administration of each school usually keeps a computerised record of student attendance, class assignments, disciplinary actions that may have been taken, methods of contact with and basic information pertaining to guardians and emergency contacts including health information. Individual teachers may have their own files with information of concern to the individual student: besides formal reports, teachers often keep informal records, observations, comments on work habits, or personal comments. Support staff such as learning assistance teachers, second language instructors, librarians, or counsellors may keep records within their own systems. Prior to the FIPPA, these records could be considered "private," not included in the student record.

It is the last group of documents that are most likely to be of importance to the person who looks to acquire information, especially in formatting a legal defence or in search of information to enforce a legal position. An educational record has been defined very widely and in fact may encompass "any form of information directly related to a child that is collected, maintained, or used by the school". (Hartshorne, et al., 1993) Presently there is no duty on teachers or counsellors to keep such notes, nor are they specified under the School Act as accessible to students or their parents/guardians if, as per the definition under Section 1, they are "records prepared by a person if that person is the only person who will have access to the record."

The B.C. School Counsellors' Association ("BCSCA") drafted Legal and Ethical Guidelines (BCSCA, 1994) as part of the fulfilment of the objectives of the organization. In the area of confidentiality, these guidelines state:

> Information received through the counselling relationship is confidential. The teacher-counsellor regards such information as confidential and does not voluntarily divulge such information without the student's prior consent.
>
> This statement applies equally to interview notes, tapes of interviews, test data, and any other documents used to assist in the counselling process. Notes are to be kept as part of the counsellor's record, but not part of the records kept in the office of the school.

These guidelines suggest that counsellors keep records of relevant personal material regarding student/clients. However, the guidelines do not state that it is necessary for counsellors to keep notes, nor do they cite ethical grounds for doing so.

There is a growing movement towards legislated regulation in the counselling profession (Alberding, Lauver, and Patnoe, 1993) along with an increasing concern with accountability and consistency. (BCSCA, 1990) Counsellors keep individual records on their student clients to fulfil professional obligations as well as to help provide the best possible service to their student/client. Presently, these records may be shared, to varying extent, with teachers, administrators, school based teams, social agencies or other counsellors in an attempt to better serve the interests of the student concerned. Counsellors do not have a mandate to keep such files although they may professionally be considered obligatory. Furthermore, each counsellor in BC has developed his/her own method of record keeping and access policies.

Presently counsellors use a diversity of methods for storing and retrieving information on their student clients. Since school counsellors have not been immune under any legally based counsellor/client privileges, correspondence and records within such a relationship have in past been legally subpoenable, or potentially available under the terms of contract law. (McLachlin, 1981) In a study undertaken by Fulero and Wilbert

(1988) where over three hundred licensed Ohio psychologists were queried on their record keeping practices, nearly ten percent kept no records whatsoever; keeping minimal or no notes at all was considered a method of avoiding litigation. The study found that "failure to maintain progress notes both increases the chances of therapist error because of failure of memory and deprives the therapist of valuable evidence in the case of a malpractice lawsuit". (Fulero & Wilbert, 1988)

Keeping adequate records helps ensure consistency of service to clients as well as keeping counsellors accountable to their profession. Further, since the role of the school counsellor in the 21st century in BC has been described as intending "to provide a consistent delivery of service" (BCSCA, 1990), consistency and accountability have become the framework for the future of school counselling. Counselling at the school level cannot fulfil this framework without a systematic and accessible information system. The dilemma counsellors face is in developing a system that both meets the needs of student/clients and the requirements of the FIPPA.

The FIPPA, in its effect in October 1994, opens the door for freer public access. The document's provisions for collection, protection, retention, use, access and disclosure will have far reaching effects for BC counsellors. The FIPPA provides counsellors with many new directions for the records they keep and the policies they follow regarding access to these records. As a result, counsellors will need to develop, as a professional body, a consistent, accurate, and well considered record keeping system. In the years to come, counsellors must become increasingly involved in their record keeping practices and must become aware of risk management techniques to minimize legal vulnerability. Studies have found (Fairchild, 1993; Gelman, 1992) that records often reflect personal values, attitudes, or beliefs, and are thus often distorted or even inaccurate. Counsellors will need to be skilled and deliberate in recording methods to ensure that records may be accessed or shared without fear of legal reprisal.

Purpose

This paper will assess the results of a survey providing data on the record keeping and records' access practices of BC school counsellors. Thess data will be assessed in combination with a section by section analysis of the FIPPA and the impact this legislation will have for school counsellors. In addition, information from various literary sources, legal cases, Commissioner's orders and relevant government documentation will be brought to bear on the discussion. Conclusions drawn here will consider the adequacy of BC school counsellors' present record keeping and access practices and will focus on the changes required of BC school counsellors to bring these practices in compliance with the new directions the FIPPA presents for counselling in BC schools.

Organization

This paper is divided into four chapters with four appendices. The initial chapter will consider the method and results of a survey of current members of the BC School Counsellors' Association; the discussion here will focus on the demographics of the survey sample as well as knowledge and training levels of respondents. Chapter Two begins with a discussion on the definition of records and continues with consideration of the FIPPA in light of specific record keeping issues: how records are to be collected, who has ownership and control, how to assure accuracy, methods for protection, retention, and disposal of records. Chapter Three extends the foundations of the previous discussion to assess the extent to which counselling records may be used and disclosed under the FIPPA as well as the exceptions under which access to records may be denied. Interspersed throughout these chapters are references to other studies, relevant legal precedents as well as other legislation, government documents and Commissioner's orders that may set precedents or serve as examples for interpretation of the FIPPA. Also included throughout is a considered effort to answer specific comments and concerns as expressed

by survey respondents. Conclusions drawn in Chapter Four offer BC school counsellors guidelines for ensuring that present practices comply with the new legislation, the FIPPA.

Four appendices serve to round out the paper and enhance the arguments considered within the four chapters. The first appendix offers an example of the survey as distributed as well as the basic results; the second appendix supplies the reader with a verbatim listing of comments and concerns of survey respondents. Appendix C presents a summary of the Information and Privacy Commissioner's Orders with notable quotations regarding decisions made therein. The final appendix provides examples of Ministry initiated letters of consent regarding information collection and usage that have been instituted to comply with provisions of the FIPPA. The final section categorizes the references used in developing this paper.

Limitations

Although efforts to assure compliance among survey respondents included: distributing surveys to current members of the BCSCA, mailing to home addresses, noting in the covering letter that the association endorsed the research, and that data accumulated would prove to be of value to professional members; there was a response rate of only 39%. Although there is some irony in requesting respondents to provide information in a survey regarding privacy, many of the counsellors who did respond were extremely positive about the topic of the research. A reiterated concern among respondents was the time constraints of their profession; perhaps for nonrespondents the time needed to respond to a survey was unavailable. Financial constraints hindered the ability to provide follow up letters or surveys to prompt members who had forgotten, misplaced or ignored the first mailing. Whatever the reasons, the survey sample was limited and this fact should be considered when generalizing the results.

Since one of the purposes of this thesis was to draw conclusions which would enable counsellors to alter record keeping and access practices that may not presently

comply with the FIPPA, certain efforts were made to make this paper easily digested. Information was derived from numerous sources: literary works, relevant legislation, legal analyses, Commissioner's Orders and government publications, are interspersed throughout discussions within the four chapters in an effort to make arguments and accompanying conclusions intelligible. Counsellors who lack a legal background and familiarity with these informational sources will find arguments posed within context much easier to consider than if they had to extrapolate meaning from a specific chapter devoted solely to literary or legal review.

Perhaps the major limitation of any discussion regarding the FIPPA lies in the obvious fact that the legislation is in its early infancy; school boards have not yet seen through their first year with the legislation. Much of what has been written in the area of privacy and access is either outdated or does not apply specifically to legislation in BC. There is little information regarding the FIPPA in relation to education, and no information which refers specifically to the FIPPA and school counselling. Attempting to assess current practices of counsellors in BC and draw conclusions of what the FIPPA means for counsellors' record keeping and records' access practices is extremely timely research, but is limited by a void in comparable research. Hence arguments posed and conclusions drawn are based on a reasonable consideration of a diversity of information sources in conjunction with a close reading of the FIPPA.

Method

A four page questionnaire, covering letter, and stamped return addressed envelope were mailed to the 507 current members of the BCSCA, a Professional Specialist Association of the BC Teachers' Federation. Members' home addresses were obtained through the BCSCA 1995 directory of members' addresses and phone/facsimile numbers; all members noted as presently employed in public schools were surveyed. This population was chosen because of direct relevance to the issues of record keeping and

records' access practices of counsellors in public school settings as well as the expectation that there would be interest in the survey topic among current members. A covering letter introducing the research accompanied the survey. The covering letter specified that the research was endorsed by the BCSCA and that there was a vested interest for the association in the data produced by the research.

The survey consisted of three parts: Part I, an initial page on demographics; Part II, a single page on self rated levels of knowledge and confidence in regards to the topic; and Part III, two pages regarding present record keeping and access practices. The first two parts of the survey were to be completed by all respondents, and the third part to be completed only by those who presently keep records on their student/clients. Counsellors were asked to comment on the final half page if they had concerns regarding their record keeping or access practices. These responses were taken almost verbatim, with spelling and grammatical errors corrected, in the order in which they were returned, and are reproduced in Appendix B.

Respondents were asked to return their questionnaires in the return addressed stamped envelope provided. No identifying marks were to be placed on the returned survey. Counsellors interested in obtaining further information on the results of this research were asked to request information separately from the returned survey. Responses were then tallied and percentages obtained. All data were entered into the Mystat statistical program, a version of Systat, for the purposes of obtaining descriptive statistics. A copy of the covering letter, survey, and survey results are reproduced in Appendix A.

Of the 507 surveys mailed out, 12 were returned undeliverable and 7 were returned by members noting their inability to respond: reasons varied from medical to retirement issues wherein members were not currently practicing counsellors. The total sample size was 488. Data were accumulated up until four weeks from initial mailing. Of the sample, 190 questionnaires were returned within the four weeks; a response rate of

39%. Of the usable returned questionnaires, 175 specified that they did keep notes, while 15 did not keep notes and therefore did not complete Part III of the survey.

The majority of respondents (86%) were over 41 years of age; with 58% in the age range of 41-50, and 28% over 51 years of age. The mean years of experience was 11.47 although obviously there was wide variation (SD=7.3) among respondents; maximum experience was noted at 33 years. A more mature age level of respondents was expected with many school districts in British Columbia having hiring restrictions on counselling positions in mandating acquisition of post graduate degrees. Of those responding, 78% had post graduate degrees; the majority having acquired a Master's degree in Education (52%) while one quarter of respondents stated they had presently acquired a Master of Arts degree (25%); two respondents had obtained Ph.D. degrees, with the remainder holding 5 year degrees or diplomas. 58% stated their field of study to be counselling, 12% stated their field to involve counselling and another area of study, while 28% stated no educational background in counselling was acquired. The larger number of respondents were presently employed in a secondary school level (63%); with the average school size of 700 students. The mean number of schools at which counsellors were employed worked out to be 1.58 schools; one counsellor worked in as many as seven schools.

The survey question regarding number of work hours in a week proved to be misleading as many counsellors based their answers on a school day equalling 5 hours and thus a work week equalling 25 hours. Others considered allotted preparation time, subtracting this from their basic 25 hours and stating they worked 22 hours. Others stated they worked a "normal" 40 hour work week, while others noted that the "real" hours they worked far exceeded their contract based work hours. Just over 10% stated they were also employed in private practice apart from the school system. In an attempt to delineate, full time was classified as any answer over 20 hours while part time employment was considered to be 20 hours or less. With this classification, 73% said they worked full time while 26% said they worked 20 hours or less; 2 people failed to respond to this question.

Results and Discussion

In Part II of the survey, counsellors were asked to rate their level of knowledge of various documents that pertain to counselling, to determine which of these documents they may have had cause to access in the past six months, to specify where they may have received information regarding record keeping, and to rate their general confidence level in their present practices. It was assumed that the document counsellors were most knowledgeable about would be their Code of Ethics, especially as this was revised recently under the title, Legal and Ethical Guidelines (BCSCA, 1994). In fact, nearly 80% of respondents rated their knowledgeof the Code of Ethics as Very High or High; this document may be the most readily available, may be seen to hold the most direct relevance, and is the least legalistic document of those listed.

Table 1
Respondents' self rated level of knowledge of legal and ethical documents in relation to counselling

Rate your level of knowledge of the following documents as they pertain to counselling.	Very High	High	Moderate	Low	Very Low
1) BC School Act	3%	24%	50%	17%	4%
2) Family & Child Services Act	7%	31%	41%	14%	6%
3) Constitution of Canada	1%	10%	41%	31%	16%
4) School Regulation	3%	27%	48%	14%	7%
5) Freedom of Information and Protection of Privacy Act	4%	33%	39%	19%	4%
6) Counsellor Code of Ethics	28%	51%	17%	2%	2%
7) Young Offender's Act	5%	27%	43%	21%	5%

Note: Percentages were rounded to nearest whole number so may not always add up to 100%.

When the above categories are collapsed into Very High, High, Moderate, 96% of those responding rated their knowledge of the Code of Ethics to fall into these categories. The lowest document rating in these collapsed categories was the Constitution of Canada at a total of 52%. Other documents were rated relatively constantly here with a difference between them spanning only 4% (79%-75%). Correspondingly, if categories are collapsed from Moderate, Low and Very Low, the highest rated document was the Code of Ethics at 21% while those rating a low level of knowledge of the Constitution of Canada were 88% across these categories. Responses for the other legal documents within this collapsed category vary by 10%: 61% for the Family and Child Service Act to the second to lowest rated level of knowledge, next to the Constitution, being of the BC School Act at 71%. Obviously, the Constitution of Canada is not as highly relevant to counsellors' daily practices as are other documents; this conclusion is substantiated by the fact that only 1% of respondents had need to refer to the Constitution in the past six months. It is surprising that nearly 3/4 of respondents had a moderate to very low level of knowledge of the BC School Act, although, from indications in Table 2, it was the third most likely document to have been referred to in the past six months.

It is evident from Table 1 that the FIPPA has become a familiar document with counsellors; 37% rated their knowledge as very high or high, the third highest rated document, following closely to the Family and Child Service Act at 38% and by a wide leap the Code of Ethics at 79%. Over twice as many counsellors rated a high level of knowledge of professional ethics over legal documents pertaining to the profession. It must be emphasized that responses here reflect respondents' own subjective appraisal of what they considered their knowledge levels to be and that these results may or may not be reflective of actual knowledge of the documents involved.

To substantiate the hypothesis that the rated levels of knowledge of the preceding documents corresponded to relatively recent exposure to these documents, counsellors were asked to specify to which of these documents they had referred in the last six

months. Table 2 portrays an interesting addition to the previous discussion. It was expected that counsellors would have had recent experience with documents they rated to have the highest level of knowledge, interestingly the FIPPA was noted to have been the most commonly referred to document in the recent six months. This is understandable as the FIPPA is the most recently enacted legislation to directly affect counselling practices.

Table 2
Percentage of respondents referring to legal and ethical documents within the last six months

If you have had need to directly refer to any of the above documents in the last six months, please specify the document(s) by number		Rank order of self-rated Perception of knowledge
1) BC School Act	18%	6
2) Family and Child Services Act	21%	2
3) Constitution of Canada	1%	7
4) BC School Regulations	9%	5
5) Freedom of Information and Protection of Privacy Act	25%	3
6) Counsellor Code of Ethics	12%	1
7) Young Offender's Act	7%	4

Note: Multiple responses were possible; 39% of those responding on this question stated they had referred to 3 or more documents
Note: This question allowed for non response; 58% did not respond

When the data for perceived levels of knowledge of documents is collapsed for categories very high, high and moderate and a Spearman rank correlation coefficient is obtained for this variable and noted reference to these documents, a low positive correlation of .464 is found. Thus there is not a strong relationship occuring between self rated levels of knowledge and reference to the documents stated.

Table 3
Respondents' rating of training and confidence levels

	Yes	Uncertain	No
8) You have had graduate level training in legal issues in counselling.	37%	5%	57%
9) You feel confident in your knowledge of record keeping practices.	67%	22%	11%
10) You have received sufficient Ministry information and guidelines on legal aspects of record keeping.	23%	25%	51%
11) You feel confident in your knowledge of laws governing access to information in counselling records.	56%	24%	19%
12) You have attended district based workshops dealing with record keeping issues.	50%	1%	48%
13) You feel confident in your legal position in regards to your present record keeping and access practices.	52%	27%	20%

Note: Percentages were rounded to closest whole number and may not add up to 100%

Many counsellors (58%) did not specify that they had need to refer to any of these documents. While 39% of those responding noted reference to 3 or more documents. It seems then that the tendency for some counsellors in their practices is to refer to documents as needed; others find no necessity to refer to any such documents. This notes an interesting diversity among counselling practices that may be accounted for by numerous variables: time, type of clients seen, counsellor personalities, etcetera.

Obviously, counsellors have come to note that the new FIPPA has bearing on the counselling profession. Evidence from Table 3 shows that 50% of respondents have attended district based workshops involving record keeping practices; the assumption is that some counsellors have encountered the FIPPA in these workshops.

Over half the respondents feel confident in their knowledge of record keeping practices, confident in their knowledge of laws governing records' access, and confident in their legal position on these issues. Around the same number of respondents have not had graduate level training in legal issues, have not received sufficient Ministry information, nor have they had the opportunity to attend district based workshops. Approximately 1/4 of respondents have some uncertainty in rating their confidence level in these matters, while nearly 3/4 of respondents are uncertain or have not received sufficient Ministry leadership in this area. Graduate level training in legal issues was rated considerably lower; perhaps it will take time for these issues to become incorporated within graduate programs or perhaps with the average 12 years of experience counsellors responding have, it is likely that graduate training a decade ago did not cover these issues, or simply that nearly one third of respondents reported no formal educational training in counselling.

Counsellors may be encountering the FIPPA through the associations to which they belong; the mean number of associations to which counsellors responding reported to be involved with was 2.4 per respondent. As one in every four counsellors has had the opportunity to have direct reference to the FIPPA in the last six months, and 50% of those responding have had district based workshops on record keeping issues, there is an obvious need for an indepth analysis of the effects of this legislation on the school counselling profession.

CHAPTER TWO

RECORDS AND PRIVACY:
From Definition to Disposal

There is an inherent difficulty in attempting to compare record keeping practices among professionals within the BC school system arising from the fact that there is no one clear definition of what a student record comprises, or should comprise. Thus, questions within the survey attempt to pin-point the type of information counsellors presently keep within their student/client records.

Presently, the definition of a student record can be found within the BC School Act in its initial section on interpretation:

> "student record" means a record of information in written or electronic form pertaining to
>
> (a) a student, or
>
> (b) a child registered under section 13 with a school,
>
> but does not include a record prepared by a person if that person is the only person who will have access to the record;

Obviously, this interpretation leaves a large expanse of information to potentially be kept within the student record. Indeed, in most public schools in BC today, the student record may involve administrative, personal, health, familial, social, or even psychological data that fall far beyond the confines of academic information. Furthermore, such records are not confined to one location in any given school but may be spread about between classroom teacher, administration, secretaries, psychologists, agencies, medical officers, board personnel, counsellors, resource persons, etcetera.

The following section of the School Act states that each board within the province controls records and access, and that each board sets out the parameters to each school within its boundaries.

> **97.** (1) Subject to the orders of the minister, a board shall establish written procedures regarding the storage, retrieval and appropriate use of student records and shall ensure the confidentiality of the information and ensure privacy for students and their families.

From this section it is apparent that written procedures could vary greatly from district to district and that students who may change districts may find entirely differing treatment of their records as they change schools. Again, however, the issue of what actually constitutes a record is not fully defined. BC Regulation, 265/89 provides teachers a role in "maintaining the records required by the minister, the board and the school principal." Yet, section 5 (7) within the regulations states that "the principal of a school is responsible for administering and supervising the school including...(f) the maintenance of school records." So it seems that records' maintenance is in the hands overall of the administrative officer and that he/she delegates a certain amount of control of maintenance to the teacher. This, nonetheless, fails to identify exactly what information the records ought to or may contain.

Curiously enough, the Independent School Act does not at any time refer to student records, either to define them or to even specify that they need be kept by anyone within the independent system. Independent schools are required to follow assessment and reporting procedures thus records must be kept to facilitate these processes; however, at no point in this legislation are such records specified.

The Ethical Code of the BC Teachers' Federation does not refer to record keeping or information gathering, retention, usage, disclosure and access, or disposal of records.

The Legal and Ethical Guidelines 1994 of the BCSCA states in far more explicit terms what constitutes records for the purposes of counselling.

> Records of the counselling relationship, including interview notes, test data, correspondence, tape recordings, and other documents retained by the teacher-counsellor, are to be considered professional information for use in counselling, research, and teaching of teacher-counsellors, but always with the full protection of the counsellees.

What constitutes counselling records is far more detailed under these guidelines than can be found in the provincial School Act.

The FIPPA (p. 45) defines information in a similar method as did previous federal legislation, the Privacy Act and the Access to Information Act, in considering student personal information" to include:

> (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 particulars 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;

Obviously, the above provisions refer to a vast quantity of data that counsellors may keep on their student/clients.

Further, the FIPPA very broadly refers to the entirety of information the school may keep on students as the "personal information bank" as a "collection of personal information that is organized or retrievable by the name of an individual or by an identifying number, symbol or other particular assigned to an individual." (p. 45) The term "record" within the FIPPA includes all present methods of data gathering by referring to computer data on students as well as electronic mail which may involve the student; a vast array of records which (p. 46),

> includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

Under Section 3, the FIPPA is stated to apply to all records in the custody or under the control of a public body.

Scope of this Act

> **3**. (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

Since none of the subsections to follow refer to student records within the public school system, then it must result that any records that counsellors keep are subject to the FIPPA.

The BC School Trustees Association submission to the tier two legislation's initial process noted that "'Record' is too broadly defined. Should be redefined to exclude private notes ('unofficial records'), as is done in the School Act." (Jones, 1993) The recommendations to this submission stated that Bill 50 addressed the issue in that "Any recorded information created by an employee or official of a public body in the course of their duties is a record of that public body and subject to the legislation." (Jones, 1993) Although the School Act allows for "private" records, in direct conflict with provisions of the FIPPA, the FIPPA overrides this legislation:

Interim relationship to other Acts

> **78**. (1) The head of a public body must refuse to disclose information to an applicant if the disclosure is prohibited or restricted by or under another Act.
>
> (2) If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

Thus, recorded information of a student/client made by the counsellor within the counselling relationship as part of the counsellor's employment would comprise part of the student record and thus be subject to the stipulations of the FIPPA. Maintenance of such records, as stipulated in the School Act, is delegated to both the administrative officer and the teacher, or the counsellor. The lack of reference to the quality and/or condition of

records' maintenance is notable on perusal of the previous documentation. There are no guidelines stating how thorough or complete student records need be.

In the United States, American Psychological Association guidelines (APA, 1993), referring to professional psychologists, define what records should include:

> a. Records include any information (including information stored in a computer) that may be used to document the nature, delivery, progress, or results of psychological services. Records can be reviewed and duplicated.
>
> b. Records of psychological services minimally include (a) identifying data, (b) dates of services, (c) types of services, (d) fees, (e) any assessment, plan for intervention, consultation, summary reports, and/or testing reports and supporting data as may be appropriate, and (f) any release of information obtained.

The guidelines stress that record keeping is an essential aspect in delivering an efficient and accountable professional service. In addition, these guidelines state that an adequate system of record keeping is a method of protection against potential legal or ethical proceedings. (APA, 1993) Soisson, et al. (1987) further suggest that, "failure to maintain progress notes both increases the chances of therapist error because of failure of memory and deprives the therapist of valuable evidence in the case of a malpractice lawsuit."

Various studies undertaken in the United States have found that records ought to be kept within basic parameters. Fulero and Wilbert (1988), when questioning a sample of 350 licensed Ohio psychologists and in review of relevant literature, offered four basic elements that records should maintain: 1. identification of the client, 2. statement of the reasons for the visit, 3. justification of treatment, and, 4. documentation of results. Gelman (1992), in regards to social work, has found that "records have become a critical element in the process of risk management" and that:

> Risk management involves the ongoing study and assessment of activities and practices that potentially may lead to legal vulnerability. It includes recommended changes in practices and procedures designed to avoid, limit, reduce, or prevent such exposure. Risk management is a preventive activity that is dependent on appropriate documentation and quality records.

In an assessment of social workers' records, Gelman found extensive diversity between agencies as well as between workers within an agency. Gelman concludes:

> The information contained in the record must be related directly to the problem, the purposes or goals of intervention, the actual services provided, and the outcome. In other words, all recording should have an identified purpose. Social workers must become skilled in separating essential information from information that is interesting but does not contribute to the helping process. The nature and extent of recording should support quality and accountable service provision.

The United States takes a somewhat different approach to defining records within the school context. With the enactment in 1974 of the US Family Educational Rights and Privacy Act, records came to be defined as "any form of information directly related to a child that is collected, maintained, or used by the school" (Hartshorne, et al., 1993); interestingly, usage defines records, not who originated them; thus, records the school uses but which were originated by and received from outside agencies also come under this Act. The FERPA has been in place considerably longer than the infant FIPPA. Although the FERPA holds several distinctions from BC's new legislation, perhaps the most important difference is that the FERPA allows for "private" records; similar to the distinction in Section 1 of the BC School Act. The FERPA states that "Private notes are just that: notes. Once they become the basis for a special education decision or intervention, they may no longer be considered private notes" and further that, "Not subject to disclosure are personal notes made by a teacher, kept in his or her sole possession, and revealed to no one except a temporary substitute." (Hartshorne, et al., 1993) Several counsellors responding to the survey at hand suggested that the notes they take are their own; their notes are private, or are their own personal notes, therefore not open for access as are the general files in the school. (see Appendix B) BC counsellors can no longer separate student files, some for access and others not, with the FIPPA as presently in effect.

Although the previous examples of information recording involve differing professional groups within the United States, the applicability of their aims are certainly similar to the goals and desires of the BCSCA. The role description of the School Counsellor in the 21st century as stated in a brief prepared by the BCSCA (1990), states that "a consistent level of service in all communities is seen as a desirable direction for counselling" and that the role description "is intended to provide a framework for the consistent delivery of service." In response to the B.C. School Trustees Association's question, "What is the rationale for including school boards in tier 2?" of the FIPPA, Barry Jones replied that, "School boards exercise a public function and the public interest will be served by making them more accountable." (Jones, 1993) Defining what is encompassed within the counselling record becomes advantageous for counsellors for consistency, avoidance of legal ramifications, ethical reasons, and for accountability of professional service.

When survey respondents were queried whether or not they kept records 92% stated that they kept some extent of records on their student clients, while 8% kept no records whatsoever. As mentioned earlier, the difficulty in addressing issues of record keeping lies in establishing a definition for what records actually contain.

Table 4
Respondents' rating of information they presently keep in student/client files

Which of the following types of information is generally kept in your student/client files?			
78%	Counselling session notes	46%	Class schedules
18%	Informal speculations	4%	Police records
62%	Formal test results	54%	Disciplinary information
25%	3rd party information	41%	Previous school records
11%	Social worker records	47%	Counselling process notes
55%	Academic records	17%	Student's extracurricular activities
64%	Staff notes/comments regarding student	13%	Notes on sexual behaviour

Note: Multiple responses were possible; responses do not equate to 100%

Of the respondents on the survey who stated that they had concerns regarding record keeping, many said that their concerns lay in specifically addressing what should actually be contained in a student record. Further, the inconsistency of what exactly comprises the counselling record is echoed in the responses to the survey as seen in Table 4.

The most commonly occurring choices in the above question reflect that counsellors mostly keep counselling session notes: to most counsellors on the survey this topic covered basic times and dates for sessions as well as referral information. Social worker records and police records are often difficult for the counsellor to obtain access to or copies of, therefore it is not surprising that little of this type of information is included in student/client records. Highly sensitive areas, such as informal speculations, third party information, extracurricular activities, and notes on sexual behaviour are not commonly found in student/client records.

In an attempt to classify responses, the following table reflects a grouping of the choice variables above.

Table 5
Respondents' ratings of basic information in student/client files as reclassified by clustered choice variables

Percentage Responding	
29%	1=General office records: formal test results, academic records, class schedules, disciplinary information, previous school records
9%	2=Counselling records: counselling session notes, counselling process notes
0%	3=Sensitive information: informal speculations, 3rd party information, social worker records, staff notes/comments regarding student, police records, student's extracurricular activities, notes on sexual behaviour
13%	4=Both General office records and Counselling records
13%	5=Both Counselling records and Sensitive information
9%	6=Both Sensitive information and General office records
28%	7=Combination of answers within all three groups

Note: Responses were classified according to predominance of choices within these categories
Note: Responses were rounded to nearest whole number; percentages do not equal 100%

When responses were grouped according to choice variables as listed in Table 5, nearly one third of the records counsellors stated that they do keep are fundamentally what are considered general school records that can be found on any student within the school regardless of whether or not they are in a counselling relationship. It can also be seen from this classification that counsellors are very careful about the information that they do keep in student files; the recording of sensitive information is highly avoided. As well, few counsellors keep records that pertain only to counselling sessions or progress with the client. Nearly two thirds of records can be seen to be a conglomeration of various materials within these categories. Other than avoidance of informal speculation and notations of sexual behaviour, there seems little consistency among the records counsellors keep on their student/clients. This diversity can be accounted for by varying factors including the presenting problems student/clients have or the roles or personalities of the individual counsellors. Thus it is not surprising to find counsellors' comments on the surveys questioning what is really supposed to be contained within the student/client record. (See Appendix B)

Table 6
Respondents' answers to the question requesting the percentage of student/clients on whom they presently keep notes

Percentage of clients on whom information is recorded	Percentage Responding
0 - 10 %	11%
10 - 25 %	9%
25 - 50 %	10%
50 - 75 %	9%
75 -99 %	30%
100 %	30%

It is notable that many students' counsellors see have some type of recorded information kept on them, with 60% of counsellors responding they keep recorded information on 75-100% of the student/clients they see. However as noted from Table 5, much of the information in these records can be found in general administrative student school files.

Of survey respondents, 8% keep no notes whatsoever on their student/clients; this number coupled with the 11% of counsellors who keep records on less than 10 % of the students they see, provides that for nearly 20% of counselling situations minimal or no records are kept. From counsellors' comments (See Appendix B) the reasons for this are diverse. Although time is an issue, counsellors seem mostly to fear legal ramifications; several commented that they must watch their record keeping as records can be subpoenaed. Many counsellors seem to feel that if they do not keep records, or only keep "private" records, then no legal ramifications will arise. However, numerous studies in the US reiterate conclusions that professionals are more likely to encounter litigation from inadequate record keeping practices. (Soisson, et al., 1987; Eberlein, 1990) Fulero & Wilbert (1988) stated succinctly that:

> Ironically, many of the reported record-keeping behaviors may actually increase malpractice risk. For example, it is clearly risky to place all information into the record, insofar as such things as speculation or premature diagnoses could form the foundation of a malpractice claim. On the other hand, excluding information such as dangerousness or sexual material is risky as well, should issues of duty to warn arise or should claims of inappropriate sexual behavior on the part of the therapist be made.

BC counsellors need to have a fully defined set of guidelines on minimum requirements for records kept on each and every student/client. Such guidelines, especially if instituted province wide, would regulate the information that minimally must be kept on each and every student/client the counsellor sees.

Collection

The Policies and Procedures Manual ("Manual") for the FIPPA defines "collected" under section 26; "This word is interpreted as the assembly or bringing together and recording of personal information by the public body, using any means." (Vol II, Sec D 3.1, p. 2) Thus, anything that is defined as a record, is personal information, created and maintained by the teacher-counsellor, is considered information collected by a public body.

Although the BC School Act does not specify how records are to be collected it does state that such records will be kept, as per Section 97:

> (1) Subject to the orders of the minister, a board shall establish written procedures regarding the storage, retrieval and appropriate use of student records and shall ensure the confidentiality of the information and ensure privacy for students and their families.

When registering a child for a first year program in a public school the initial district registration form is completed by the parent or legal guardian and in essence establishes the school record. The school enhances student records throughout the school years of the student's attendance and the FIPPA regulates this collection.

Purpose for which personal information may be collected

> **26.** No personal information may be collected by or for a public body unless
>
> (a) the collection of that information is expressly authorized by or under an Act,
>
> (b) that information is collected for the purposes of law enforcement, or
>
> (c) that information relates directly to and is necessary for an operating program or activity of the public body.

Subsection (a) does not deter from the collection of student records as stated in the School Act. Personal information may be collected by counsellors as part of student/client records' maintenance so delegated by the administrative officer. It could be argued that the information a counsellor collects is fundamentally necessary for an operating program,

as is counselling within the public school system, as per subsection (c). The use of the connection "and" within subsection (c) provides for a narrow interpretation of need, indicating that collection of data must fit both parts: directly relating and necessity. The Manual (Vol II, Sec D 3.1, p. 8) specifies that "**operating program** is a series of functions designed to carry out all or part of a public body's mandate" and further that an "**activity** is an individual action designed to assist in carrying out an operating program." Counselling would be considered an operating program and the activities that occur within the counselling relationship are specific to the operating program overall.

With the introduction of the FIPPA, counsellors will now find that they must formalize the methods they use to collect data.

How personal information is to be collected

27. (1) A public body must collect personal information directly from the individual the information is about unless

(a) another method of collection is authorized by

(i) that individual

(ii) the commissioner under section 42 (1) (i), or

(iii) another enactment,

(b) the information may be disclosed to the public body under sections 33-36, or

(c) the information is collected for the purpose of

(i) determining suitability for an honour or award

(ii) a proceeding before a court or a judicial or quasi judicial tribunal,

(iii) collecting a debt or fine or making a payment, or

(iv) law enforcement.

(2) A public body must tell an individual from whom it collects

personal information

(a) the purpose for collecting it,

(b) the legal authority for collecting it, and

(c) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the individual's question about the collection

(3) Subsection (2) does not apply if

(a) the information is about law enforcement or anything referred to in section 15 (1) or (2), or

(b) the minister responsible for this Act excuses a public body from complying with it because doing so would

(i) result in the collection of inaccurate information, or

(ii) defeat the purpose or prejudice the use for which the information is collected.

Collection of data, then, must be directly from the individual and may encompass numerous methods/mediums: interviews, videotaping, audiotaping, artwork, letters, etc. Another person or institution may provide information for the student/client record but the student/client must authorize this collection.

Prior to collecting data from other sources, the FIPPA states that the individual must understand the purposes for collection, allowing for the choice of opting out of providing data. If data is to be collected indirectly, consent must be established prior to collection and consent should be in writing or formally noted and acknowledged. The Information and Privacy Handbook ("Handbook") (p. 123) states that:

> Indirect collection is **authorized by that individual** if the individual gives verbal or written consent. In cases of verbal consent, the public body informs the individual about the nature of the personal information , the purpose of and reasons for indirect collection and the consequences of refusing to consent. The public body sends a confirming letter to the individual.

Counsellors will find that the task of informal data collection that occurs prolifically in schools presently, will now need to be formally acknowledged with student/client prior consent.

The extent of personal information kept on students has grown ever increasingly over recent years and a diversity of uses, i.e. program evaluations, have grown out of such data. The Ministry, under legal authority of the School Act section 99, instituted a program in 1994, whereby each student within the public school system has been issued a Personal Education Number whereby the Ministry may keep student data. However, to formalize the parental agreement to enable schools to collect data, and to more closely align the present ability of schools to collect data within the parameters of the FIPPA, the Information Services Branch of the Ministry of Education has provided school boards with sample letters to distribute to parents notifying them of the collection of information on students within the school system, and the usages to which this information may be put. (See Appendix D) The letters were drafted to align school board practices with the stipulations of notification specified within section 27; the letters however are far reaching and often refer specifically to Ministry practices. Counsellors will need to develop letters of consent more specifically framed to counselling guidelines.

> General guidelines drafted by the APA (1993) state that psychologists:
>
> Maintain records for a variety of reasons, the most important of which is the benefit of the client. Records allow a psychologist to document and review the delivery of psychological services. The nature and extent of the record will vary depending upon the type and purpose of psychological services. Records can provide a history and current status in the event that a user seeks psychological services from another psychologist or mental health professional.
>
> Counscientious record keeping may also benefit psychologists themselves, by guiding them to plan and implement an appropriate course of psychological services, to review work as a whole, and to self-monitor more precisely.

Although these statements of underlying principles and purposes of record collection are specifically addressed to the practices and standards of an American professional body,

there are certainly comparisons to be made to professional counsellors in BC schools. APA principles, as stated above, are closely aligned to the objectives of the BCSCA as stated in the Legal and Ethical Guidelines (BCSCA, 1994): promotion of professional standards, promotion of professional growth, support of research. As well, APA principles closely adhere to the capacities in which the BC school counsellor is expected to engage, as per the Legal and Ethical Guidelines: as counsellor, consultant, coordinator, curriculum specialist and as catalyst. Records are necessary for the welfare of the client; the underlying tenet for the counselling profession:

> A file documents progress with the client, contains risk-benefit analyses of treatment alternatives, and serves as a guide to future interventions on the client's behalf. Written forms set out the informed consent for treatment given by the appropriate part and aid in the proper release of confidential material about the client. Finally, the file serves as the basis for evaluating the services offered a client, assures that professional standards are met, and provides information necessary for appropriate referrals. (Eberlein, 1990)

With the diversity of "hats" the school counsellor may wear, there is no question that many methods of data collection are possible. Often, within a school, the counsellor receives data for student records in an informal atmosphere: discussions in the staff room, conferences with resource persons, chance meetings within the hallways; or in a formal atmosphere: parent interviews, school team based meetings, agency contacts, etcetera. All of the data collected by a counsellor and which may be entered into the student/client record must be authorized under section 27. With the Ministry taking such strides to notify parents/guardians of the information collection potential within the school system, it would do well for counsellors to take similar precautions in their dealings with individual student/clients. Unfortunately the parameters of this survey could not extend to present uses of consent and intake forms in counselling so it is not certain the present policies counsellors use in their methods of collecting data. Whether or not the clients that counsellors see know that files and recorded information are being kept on them is at present uncertain.

With the extent of personal information that could potentially be collected within the confidential nature of the counselling relationship, the counsellor needs to have ascertained prior consent to record collection from both the counsellee and legal parent or guardian. The issue of informed consent to record keeping with the FIPPA is obvious. Counsellors must have prior consent to record information received from student/clients **prior** to entering into a counselling relationship, including the purpose of the collection, the authority to collect, the consent to refer to other sources, and the ability to access information from third parties. The consent given by the student/client will prove paramount in any further dealings with records. In Frenette v. Metropolitan Life Insurance Co., the Supreme Court of Canada found that the prior written authorization to records' access held extensive weight with the court: "authorization signed by the insured at the time of application for life insurance clearly gave his insurer an unrestricted right of access to his medical records during his life or at his death." The student/client must be fully informed as to the extent of use that may be made of the student/client records once consent is given. Above all, the FIPPA allows that the student/client be given the right to withdraw consent; this condition, for many counsellors, would necessitate concluding the counselling relationship as there is considerable debate over whether it is ethical to continue with counselling without keeping adequate records.

It is unlikely that Section 27 (3 b.ii.) would apply to counselling. An argument could be made that following the parameters of collection as stipulated under subsection (2) counteracts the effectiveness of the counselling program. Under this section the Minister excuses the public body from complying as it would "defeat the purpose or prejudice the use for which information is collected." There is concern in counselling that students come to counsellors as confidentiality is maintained and the relationship offers a safe haven for students to discuss private issues or problems. The process of specifying such explicit consent prior to counselling may be considered by many to deter openness and ease of dialogue. Studies have found that when subjects were offered absolute

confidentiality they offered more self-disclosure and that most clients preferred to have less information revealed to others. (VandeCreek, & Miars, 1987; Nowell, & Spruill, 1993) The Manual discusses this paradox, "This provision acknowledges the fact that, in some cases, informing the person of the purpose of the collection would negate or hinder the program or activity for which the information is collected." (Vol II, Sec D 3.2, p. 14)

There is no question that openness and rights of access to any government record are paramount concerns of the FIPPA. Flaherty has echoed the philosophy throughout his appointment as Information and Privacy Commissioner: Flaherty noted in an article he wrote for the Times Colonist (October 1, 1993) that, "It is the commissioner's job to ensure that government complies with the rights of the public." In an article referring to Flaherty in the Vancouver Sun (February 1, 1993), Vaughn Palmer writes, "Actually, he's not sympathetic to those who would keep up the barriers." Further to this point, Flaherty noted in his decisions in regards to Investigation P94-003, that, "the thrust of the Act is to promote accessiblity of information." (see Appendix C) Thus, the importance of securing informed written consent to information collection is paramount within the counselling relationship. It is unlikely that any arguments that such methods deter the benefits of counselling would hold any weight.

Ownership and Control

It was interesting to note in the surveys returned that numerous counsellors feel a proprietorship over the records that they do keep. (See Appendix B) Several suggested that the notes that they make are personal notes; several commented emphatically that they are "my" notes therefore not to be accessed by anyone; 21% of respondents stated that no one is allowed access to "their" personal files. The reality is, as stressed at various levels of precedent, that an individual's information belongs to the individual although the physical aspects may be under the control of another. The Supreme Court of Canada in McInerney v. MacDonald determined this position:

> At least in part, medical records contain information about the patient revealed by the patient and the information is acquired and recorded on behalf of the patient. The records consist of information that is highly private and personal to the individual. It is information that goes to the personal integrity and autonomy of the patient. This information remains, in a fundamental sense, the patient's own for the patient to communicate or retain as he or she sees fit. Thus, the patient has a basic and continuing interest in what happens to the information and in controlling access to it.

Obviously the issue of ownership of the records is key here. The court in McInerney v. MacDonald further stated that, "The physician, institution or clinic compiling medical records owns the physical records. However, a patient has a vital interest in the information contained in his or her medical records." The Facilitator's Manual for Local Public Bodies (1994), at 3.1 14, is very specific in interpreting the issue of ownership under the FIPPA:

> Any record created or obtained in the course of your duties as an employee or official of a public body belongs to the public body and is subject to the Act. These records are not your personal property.
>
> ...The Act applies to any record in the custody or under the control of a public body, whether it is physically stored on the premises or not.

Further elaboration is found in Re Josephine v. Wilson Family Trust and Swartz, wherein a company attempted to seize patients' records from a dentist who went bankrupt. The Gneral division of the Ontario Court determined that, "While a patient's dental records are the physical property of the dentist, the information in them is confidential and the patient has a trust-like beneficial interest in the information"; the court added that failure to keep the records confidential may even constitute grounds for professional misconduct. Furthermore, the court in this case stated, "This information remains, in a fundamental sense, the patient's own for the patient to communicate or retain as he or she sees fit. Thus, the patient has a basic and continuing interest in what happens to the information and in controlling access to it."

Although many counsellors feel that information in student/client records is the counsellor's personal property (see Appendix B), still others are mistaken in their belief that separation from the physical proximity of the school enables them to keep "secret" records, not open to any access, and hence not answerable to the FIPPA. However, as the records are created by the counsellor in the performance of duties while employed by a public body, the records are therefore subject to both the School Act and the FIPPA. The Manual (Vol I, Sec C 3.2, p. 3) stipulates that:

> Where the public body does not have physical possession of the record but an officer, employee or member of the public body has custody or control of the record (i.e., records are located in an employee's home or mobile office), the public body still has custody or control of the record.

Further, on page 5 of this section, "Once 'custody or control' applies to a record, an applicant potentially can access it through the public body." The Handbook (p. 25) further clarifies this issue:

> The term control means the authority to manage, restrict, regulate or administer the use or disclosure of a record. A public body that has possession of a record is assumed to have control unless there is evidence to the contrary. Where an employee has possession of a record away from the offices of a public body, the public body has control of the record.

There is no question then, that no matter where a counsellor physically keeps student/client records, those records are under the control of the public body. Indicators of control (Handbook, p. 25) that are relevant within this section are as follows:

- the record was created by an officer, employee or member of the public body;
- the record is specified in a contract as being under the control of a public body;
- the content of the record relates to the public body's mandate and functions;
- the public body has the authority to regulate the record's use and disposition;

It was interesting to note in the survey results the extent to which many counsellors in BC feel that if the records they keep on their student/clients are kept off of site of the physical school environment then the records were even more so in their possession and not open to anyone's scrutiny. Although the vast majority of counsellors

keep their records within their school office, several counsellors keep additional or duplicate information within other areas.

Table 7
Respondents' answers to the question regarding where information on student/clients is physically kept

	Number of Responses (n=175)	Percentage Responding
Counsellor's office	165	94%
Administration office	36	21%
Home office	36	21%
Other	20	11%

Note: Multiple responses were possible

Many of those responding on the survey noted that formal records of student attendance and academic information were kept in the offices of the administration. Some noted that they kept certain files or sensitive material at home. (See Appendix B) Some of the examples offered by respondents were stated to be "kept with them at all times" and therefore to some seemed all the more personal and unavailable for access by anyone else, including the student/client. Although the FIPPA does not specify that records need to be physically kept at the school, counsellors need to have security measures in place for student/client records will need to be locked in cabinets or offices. Counsellors who presently feel a proprietary ownership over the records they keep will need to change their mind set. There is no question that the information contained in student/client records is owned by the individual to whom the record pertains.

Protection, Retention, and Disposal

Although the BC School Act refers to the maintenance of school records, establishing that such records exist and that they be maintained by the administrative officer and delegated to some extent to staff members, the School Act does not specify the

physical placement of records and only generally refers to the protection and confidentiality of such records:

> **97.** (1) Subject to the orders of the minster, a board shall establish written procedures regarding the storage, retrieval and appropriate use of student records and shall ensure the confidentiality of the information and ensure privacy for students and their families.

A key issue in the collection and maintenance of school records is the physical placement and protection of such records. Although, the School Act offers that records will be ensured confidentiality and privacy, the School Act does not offer recommendations that records be kept in a locked and secure fashion; rendering the extent of stipulations of privacy suspect. There is also some contention as to what the term 'privacy' entails in regards to school records. The Supreme Court of Canada in R. v. Duarte offered a legal definition of privacy when it ruled that evidence obtained by electronic surveillance without authorization was not admissible: "Privacy may be defined as the right of the individual to determine when, how, and to what extent he or she will release personal information." Privacy may be considered not as the individual maintaining personal information in secret, for in today's growing technological world this is virtually impossible, but as the individual's ability to regulate the access and usage of his/her own personal information.

The BCSCA's Legal and Ethical Guidelines states within its section on confidentiality that "Notes are to be kept as part of the counsellor's record, but not part of the records kept in the office of the school." As noted in Table 7, when counsellors were asked in the survey where information on student/clients was physically kept, counsellor's offices proved to be the primary location for student/client records. Among the category option of other places where records were kept, respondents were offered a place to add comments. Several noted that information could be kept in a widely disparaging number of places, including: briefcases, day-books, binders, desk drawers, notebooks, resource rooms, student services office, classroom desks, counselling area, home computers,

backseats of vehicles, trunks of vehicles, resource rooms, carried on person, or in desks at home. With this diversity, it is not surprising that survey respondents commented they had concern over the security of records. (see Appendix B)

The FIPPA clearly stipulates, in Section 30, that the head of a public body is enforced with the responsibility of ensuring security. Further, although the FIPPA does not prevent counsellors from keeping information at another location if the public body can retrieve any information should a request for access be filed, the onus still seems to be on the public body, specifically the administrative officer, to ensure that records are protected from unauthorized scrutiny.

Protection of personal information

> **30.** 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 disposal.

It is clear from comments on the survey regarding other places where records may be kept both within and out of the school environment, that counselling records are not "reasonably secure".

Just as it is obvious there are diverse practices regarding protection of student records within BC schools, there seems to be ambiguity in the lengths to which records are retained over time. The BC School Act does not stipulate the length of record retention. Section 31 of the FIPPA states that:

Retention of personal information

> **31.** If a public body uses an individual's personal information to make a decision that directly affects the individual, the public body must retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

From this section, usage implies access; so if a record was accessed nearly a year after a decision was made which affected the individual, the record would need to be retained for yet an additional year; however, whether or not accessing a record equates to

using a record is uncertain at this time. Although the survey did not query the retention periods for counsellors' records, it is clear from concerns added on the survey that many counsellors are uncertain the timeframe within which records need to be maintained: some stated that they routinely destroy records at the end of each school year, some commented that they destroy the records they have made when a student graduates or leaves the school, and still others stated their confusion in this area. (See Appendix B) This is a difficult area for counsellors to make conclusions for although the FIPPA stipulates one year to ensure adequate time for access, examination or application for correction of personal information, often counsellors may continue with a client's family, specifically a sibling. The counsellor may wish to retain the records longer to aid with background material for a new but related counselling situation. Other professionals have suggested that when dealing with minors, records should be maintained for longer than the minimum the FIPPA stipulates, perhaps up until the age of maturity or graduation. (Eberlein, 1990)

Some counsellors suggested they had concerns regarding the method of disposal of records. (See Appendix B) Interestingly this is an area where legislation is sorely lacking. The School Act does not suggest or require methods for the proper disposal of records. It is important with the FIPPA legislating the privacy, usage, and disclosure of personal information, that at the end of the retention period of at least one year from usage, that personal information not simply be dropped into the nearest waste-bin, readily accessed by any passer-by. Some counsellors commented that they personally burned their student records and others 'admitted' shredding personal information. (See Appendix B) There is obviously, among counsellors presently, extreme diversity in the area of records' disposal. Although the present survey did not address retention periods and disposal methods, by comments from counsellors on the survey it seems that research data published by E.H. Humphries over 15 years ago (1980) still relates to the norms of practice in BC schools today:

> The removal of inaccurate, out-of-date, or non-pertinent data raises the problem of safe disposal. It seems incongruous if data removed from a record so as to protect the student are thrown into the waste bin, only to end up being blown about at the local garbage disposal site. However, among our survey respondents the wastebasket did seem to be the most often employed means of disposal. Less that one in five administrators reported that they used incineration, while a further one in four indicated that they "destroyed" the data. (On occasion destruction was further defined as tearing up and putting in the wastebasket.) Most schools and systems had no explicit policy for disposal. Some apparently retained all data for all time. Disposal of data removed from student records is generally unregulated, and the variety of methods used pay little heed to security.

There is obviously a necessity for enacting guidelines in regards to the retention and disposal of counsellors' records. APA guidelines (1993) offer guidance in this area:

> In the absence of such laws and regulations, complete records are maintained for a minimum of 3 years after the last contact with the client. Records, or a summary, are then maintained for an additional 12 years before disposal. If the client is a minor, the record period is extended until 3 years after the age of majority.

Further, APA guidelines (1993) state that "When records are to be disposed of, this is done in an appropriate manner that ensures nondisclosure (or preserves confidentiality)."

The Handbook (p. 127) specifies that authorized disposal is either:

- transfer of records to the BC Archives and Records Service (BCARS) or the archives of another public body; or
- physical destruction of records

Section 30 of the FIPPA states that "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 disposal." The Handbook (p. 125) elaborates on Section 30:

> The head of a public body makes reasonable arrangements to secure personal information against unauthorized access, collection, use, disclosure or disposal. Section 30 encompasses both physical and procedural security and staff training and awareness.
>
> Public bodies analyze the types and sensitivity of personal

> information in their records. Stringent security measures are appropriate for medical records, personnel files or inmate records. Less stringent measures are adequate for names and addresses.
>
> Employees, contractors and other individuals who handle personal information must be aware of the need to protect personal information and comply with security standards.

The adherence to the statement of "reasonableness" within this section seems somewhat akin to the common law concept of a reasonable man. The FIPPA often uses the term reasonable, a term explained in Part 1 of the Handbook (p. 19):

> Some sections of the Act use the term reasonable or reasonably. Where either term is used, the public body considers whether a reasonable person would agree with the decision the public body is about to make. The decision is supported by some objective or observable evidence. It is not sufficient for public officials to rely solely on their own opinions or findings of fact about how the Act applies to a specific request.

Often the Information and Privacy Commissioner, David Flaherty, determines "reasonableness" on a case by case basis. (see Appendix C). Fortunately, the Handbook (p. 126) offers counsellors concrete examples of physical and procedural security methods:

- using locked filing cabinets or rooms for storing sensitive personal information
- not leaving personal information unattended in unsecured areas
- keeping computer access codes secret
- limiting access to records containing personal information to personnel who **need to know**
- establishing procedures to secure transportation or transmission of personal information from one location to another

Unfortunately, it seems that present security methods in BC schools fall short of what seems to be considered reasonable under the FIPPA.

Accuracy

Besides regulating methods of collection, retention and disposal, the FIPPA brings legislated concern for the accuracy of student/client records. The BC School Act does not

specify that the records kept by schools ought to be accurate or at least attempt to ensure accuracy, however, one of the duties of teachers is to "verify the accuracy of the information provided to the minister," under BC Regulation, 265/89, section 4. There are no provisions that record keepers need to regularly ascertain that data is relevant and necessary or even correct. As well, the BCSCA's Legal and Ethical Guidelines do not refer to accuracy or need for revisions with regard to student/client records. Thus, records in schools may contain extensive amounts of information on students that may be outdated, collected in error, or simply not presently correct or relevant to the student.

The FIPPA is clear to state that information collected, as per the provisions of the FIPPA as already discussed, and used by a public body must ascertain its accuracy prior to use:

Accuracy of personal information

> **28.** If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must make every reasonable effort to ensure that the information is accurate and complete.

As there are a multitude of "decisions" made for or made about the student within the school setting it can be assumed that decisions made within the counselling relationship would be governed by this provision; although, the FIPPA leaves the conclusion of what actually encompasses a "decision" to be very broadly defined. (Levine, 1993) As well, which decisions within a school setting "directly" affect the individual may also be open to speculation. The Handbook (p. 125) specifies that, "**every reasonable effort** means that a public body takes steps to ensure that personal information is accurate and complete. The public body looks beyond its own interests and considers how a fair and reasonable person would ensure that personal information is accurate." The Handbook (p. 124) adds that this section "recognizes that public bodies can have profound effects on individuals when personal information is used in making decisions that directly affect them."

Section 29 of the FIPPA provides an applicant with the right to request correction of personal information that the public body controls; the public body must then correct any and all records within its control that may hold the information. If the public body refuses to correct the information, then a note must by made that the public body did not agree with the request explaining what the request entailed. If the public body corrects the information, then, under section 29, the public body must notify any third party to which the information had been disclosed within one year prior to the request for correction being made.

Right to request correction of personal information

29.(1) An applicant who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

(2) If no correction is made in response to a request under subsection (1), the head of the public body must annotate the information with the correction that was requested but not made.

(3) On correcting or annotating personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year period before the correction was requested.

(4) On being notified under subsection (3) of a correction or annotation of personal information, a public body must make the correction or annotation on any record of that information in its custody or under its control.

Obviously, for counselling records, this section has far reaching implications. If a student/client, or parent thereof, asks for correction of a record, not only must such a correction be made or the contents annotated to that effect, but the counsellor must be able to notify anyone who received the incorrect information over the prior year. It would then seem that not only must counsellors keep accurate records and ascertain prior to their

use that records are accurate according to the student/client, but counsellors would be well off to maintain accurate notations of who received information, what type of information was given or shared, when this occurred, and to what end of use the information was made. This is no small task for BC counsellors who already tend to feel that time is an essential part of their jobs and that record keeping entails far too much of it already. (see Appendix B) Similarly, in a recent study done in the United States (Partin, 1993), "Elementary, middle school, and senior high counsellors all rated paperwork as their greatest time robber"; foremost under the aspect of "paperwork" was record keeping.

It would seem then that, under the FIPPA, counsellors not only need to keep accurate records, but need also to regularly review accuracy with the student/client. Records should note the date when student/clients reviewed records and ascertained accuracy. This may prove to be a large leap for many counsellors in BC; 42% of survey respondents stated they presently do not allow student/client access while a full 21% do not allow any access to anyone. Taken together, there may be a significant number of counsellors who presently do not exchange information with their student/clients, although as stated in McInerney v. MacDonald, such information exchange is vital to a fiduciary relationship:

> The duty of confidentiality that arises from the doctor-patient relationship is meant to encourage disclosure of information and communication between doctor and patient. In my view, the trust reposed in the physician by the patient mandates that the flow of information operate both ways.

Further, the court stated, although referring specifically to a doctor/patient relationship, that the "reciprocity of information between the patient and physician is prima facie in the patient's best interests." Since the counsellor is working in the child's best interests, the policy of open access to files is necessary for the ethical functioning of the counselling relationship. Studies on this topic have found that an open policy of client access to and involvement with his/her own records improved the quality of the records, resulted in

"more meaningful and satisfying relationships, and workers (who) came to strongly support the practice." (Gelman, 1992; Eberlein, 1990)

Along with open access and participation policies for student/clients, counsellors should keep specific notes on when and who received student information, of course, along with the student's consent. In the event of information at a later date proving to be inaccurate and in need of correction, the counsellor would have a running log of where and with whom corrections need to be made so that notification to others receiving inaccurate data proves a less onerous task. Of course, a benefit of active student/client participation in the recording process, is that there is less risk that information will prove to be inaccurate.

APA guidelines (1993) look at maintenance of accurate records as a necessity in the consistent delivery of service in the event that psychologists change, or in the event that records need to be adjusted.

> As may be required by their jurisdiction and circumstances, psychologists maintain to a reasonable degree accurate, current, and pertinent records of psychological services. The detail is sufficient to permit planning for continuity in the event that another psychologist takes over delivery of services, including, in the event of death, disability, and retirement. In addition, psychologists maintain records in sufficient detail for regulatory and administrative review of psychological service delivery.

Guidelines also state that, "psychologists are attentive to situations in which record information has become outdated, and may therefore be invalid, particularly in circumstances where disclosure might cause adverse effects." (APA, 1993) In schools, counsellors may retain relative constancy in their positions, but their student/clients may change often; students change grade levels, developmental levels, or may even change schools within or out of district. The counsellor should strive to maintain records that are as accurate as possible, noting when records were purged for inaccuracies, and by keeping note of a record's use.

It can, however, be assumed from these sections that the scope of the obligation to keep records accurate will vary from case to case depending on the extent of the personal information and its use or relevance. There is also considerable debate as to the extent to which a counsellor must go to ascertain accuracy. Especially with information provided from third parties, it is often difficult for the counsellor to ensure accuracy. Friesen (1994) noted the limits of this provision on the information police receive from third parties, "Police will assert in the strongest terms that the collection and use of this type of information is absolutely necessary to police work, and that it is simply not possible for them to verify the accuracy of all this information." With the stress on reasonableness within the FIPPA it can be assumed that employees of public bodies must make reasonable efforts to ascertain accuracy, although this may not always be possible. A reasonable person would conclude that the greater the use that is made of records the greater the necessity for ascertaining the accuracy of those records.

Although counsellors may be concerned about generating open access policies for student/clients, counsellors really have no choice but to allow such access and opportunity for records' correction under the FIPPA. The survey tried to determine the extent to which counsellors have, in past, allowed access to records and the general favourability of the results of such access. Table 8 shows that most counsellors who have allowed access have encountered relatively favourable responses or situations. This data is consistent with favourable outcomes in other studies where access has been allowed. (Gelman, 1992) Gelman concluded, when considering various studies allowing client access to personal files, that:

> The underlying theme of all of this research is that there is a qualitative improvement in both recording practices and relationships as a result of client participation. When clients are involved as active participants in the recording process, there is a higher level of client satisfaction, and they are less likely to challenge the outcome of their involvement with the agency. Therefore client access to and participation in case recording are likely to reduce agency exposure to litigation by clients.

Table 8
Respondents' answers to the question "If in past, you have allowed access, what have the results generally been?"

	Very Good	Good	Uncertain	Poor	Very Poor
Number Responding (n=175)	20	53	8	1	1

Note: If the question did not apply respondents were asked not to answer; 92 did not respond

Interestingly in the above table is the number of counsellors to whom this question did not apply. A total of 92 (53%) responded that the question did not apply. As well, the one counsellor who rated past experience as Very Poor added that the situation involved records being subpoenaed.

The implication from this research is that BC counsellors have a long way to go in adapting their present access policies with those expected under the FIPPA. Counsellors who have not allowed access in the past will now need to have open access policies with opportunity for the student/client to request correction of inaccuracies within the record. Initially counsellors, already strapped for time in busy schedules, may find this change of policy intrusive and time consuming. However, it is likely that positive outcomes will eventually result, as other studies in this area have found; "Some positive implications are that records are better organized, shorter, more factual, and easier to use. Goals and objectives are more easily recognizable. The record becomes a tool in evaluating outcomes." (Gelman, 1992) Counsellors, as a professional body, should institute standard practices regarding regular access, accuracy updates and correction procedures so that policies are constant between counsellors and districts.

CHAPTER THREE

RECORDS AND ACCESS:
From Disclosure to Denial

The FIPPA defines records, specifies how they will be collected, maintained, retained and even destroyed. Yet, the most important aspect of this legislation is really how records will be used, or to whom and when will access be given or denied. Sections 32 through to 36 of the FIPPA specify the use to which student/client records may be put and the conditions under which disclosure is possible as well as to whom disclosure may be allowed. While Sections 12-22 of the FIPPA outline a huge variety of areas under which information may be exempted from disclosure.

Use and Disclosure

One of the first allowances under Section 32 is that personal information may only be used for purposes consistent with the purpose for which it was originated, more specifically, for which it was obtained or compiled.

Use of personal information

32. A public body may use personal information only

(a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose (see section 34),

(b) if the individual the information is about has identified the information and has consented, in the prescribed manner, to the use, or

(c) for a purpose for which that information may be disclosed to that public body under sections 33 to 36.

The Handbook (p. 130) details the meaning of the exact wording in this section in stating that "**Obtained** refers to personal information that is collected under Section 26," and that "**Compiled** refers to personal information that is assembled from several sources or

generated, calculated, extrapolated, interpolated, linked, deduced or created from information collected under Section 26." There is little doubt that virtually any information arising from the counselling situation would be considered here; several counsellors stated in the survey that they keep a vast variety of information in records: student artwork, informal tests, diagrams, letters, etc.; it would seem that all these would be allowable for uses consistent with the purpose for which they were collected. The argument becomes cyclical in that a counsellor can collect information from a student/client if the collection was authorized, and a counsellor may use the information in a way consistent with the reasons for which it was originally authorized. It follows then that the student/client must give authorization for usage of personal information prior to entering the counselling relationship, and that this written authorization should be specific to the expected uses.

Of Section 33, the following subsections are likely to be the most relevant to the counselling situation:

Disclosure of personal information

33. A public body may disclose personal information only

(a) in accordance with Part 2,

(b) if the individual the information is about has identified the information and consented, in the prescribed manner, to its disclosure,

(c) for the purpose for which it was obtained or compiled or for a use consistent with that purpose (see section 34)

(d) for the purpose of complying with an enactment of, or with a treaty, arrangement or agreement made under an enactment of, British Columbia or Canada,

(e) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information,

(f) to an officer or employee of the public body or to a minister, if the information is necessary for the performance of the duties of, or for the protection of the health or safety of, the officer, employee or minister,

(n) 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,

(p) if the head of the public body determines that compelling circumstances exist that affect anyone's health or safety and if notice of disclosure is mailed to the last known address of the individual the information is about,

(q) so that the next of kin or a friend of an injured, ill or deceased individual may be contacted, or

(r) in accordance with sections 35 and 36.

It already states in Sections 7 and 9 of the School Act that parents have access to student records, and the initial sections of the FIPPA do not abrogate from this: subsections (c) and (d) do not infringe on these access rights. It would seem by both pieces of legislation that parents will have full access to the counselling records of their child. It is unlikely students will have the right to deny parents access within their initial authorization or consent forms as the School Act offers parents of children under the age of 19 the legal rights of full access and the FIPPA adheres to this. In a recent investigation by the Information and Privacy Commissioner of Ontario, Investigation 193-028M, a seventeen year old specifically asked and was assured by school staff that her personal information would not be shared with her mother and stepfather, whose premises she had left because of threatened physical abuse. The school thereafter disclosed the information. On investigating, the Ontario IPC determined that the Ontario Education Act grants parents the right to examine the Ontario Student Record of their child until the

child reaches the age of 18. The recommendation of the Commissioner was that "students under the age of 18, who request non-disclosure of their OSR information to their parents, be advised of the Board's obligations under the Education Act to allow parents to examine their child's OSR." It would seem with the BC School Act reiterating similar conditions of access, that the BC Information and Privacy Commissioner would not deter from using this recommendation as a precedent.

Although the Handbook (p. 206) complicates this discussion by offering that:

> The right to access a record under section 4 of the Act and the right to request correction of personal information under section 29 of the Act may be exercised as follows:
>
> (a) on behalf of an individual under 19 years of age, by the individual's parent or guardian if the individual is incapable of exercising those rights;
>
> (b) on behalf of an individual who has a committee, by the individual's committee;
>
> (c) on behalf of a deceased individual, by the deceased's nearest relative or personal representative.

This section most likely refers to specific incapacity or death of the primary individual who owns the personal information. Incapacity would necessitate overriding the initial step of referring to the individual who has primary concern with the personal information. Incapacity and inability are key here in determining the primary step for access and rights of correction. If the student/client in the counselling situation is incapable or unable to exercise first rights of access and correction, then the parent or guardian would be granted this primary step. This section brings in a separate argument from the issue of parental access to counselling records of able student/clients.

Since there is no concrete stipulation in any information at present that able student/clients will be allowed to deny parents access to counselling records, counsellors should notify student/clients that their records are open to access by their parents on

request. This presently seems the best course of action until minors receive more legal recognition or until formal acknowledgement of the student/client's ability to deny parental access is provided by the Information and Privacy Commissioner.

> In any case, keeping parents well informed (within confidentiality limits) about what is happening in their child's sessions is essential to co-operation It should also be noted that increasingly minors are legally allowed to pursue medical treatment without parental consent. As this trend is extended to psychologists, parents would logically lose a right to access, for example, a mature minor's file. (Eberlein, 1990)

Subsection (e) directly refers to the access to records when required by court order or subpoena. Several counsellors in responding to the survey questioned what extent of records could be subpoenaed and what information a counsellor could withhold. Obviously from this section the entirety of the student/client record will be disclosable. As stated in the results of R v. Coon, wherein the General Division of the Ontario Court ordered disclosure of the records pertaining to the complainants mental condition at the time period of an alleged assault, "in ordering production (of personal records), a balance must be struck between the right of the accused to full answer and defence and the right of the complainants, the disclosure of whose records are at issue, to privacy and confidentiality which is embodied in the legislation." Herein the courts ordered release of information from a confidential doctor/patient relationship which, although not privileged information, is personal, private, and was retained within a fiduciary relationship; although a balance was referred to here, priority was given to the accused being allowed access. This result is echoed in R. v. Stinchcombe wherein the Supreme Court of Canada determined that failure to disclose records impeded the accused's rights: the court stated that "information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence." The student/client needs to be aware, prior to entering the counselling relationship that records being subpoenaed is a potential, albeit unlikely, hazard of the counselling relationship.

Subsection (f) is somewhat alarming when referring to the record a counsellor keeps on the student/client. This section states that personal information may be disclosed to other employees of the public body if it is necessary for the performance of their duties. The use of the term "employee" here is extremely open, especially in the school situation wherein a large school could employee upwards of one hundred teachers, support staff, administration, etc. Often the counselling relationship in the schools is initiated by a teacher or problems that may impinge on the relationship between the student and classroom teacher, coach, or resource person. There is a difficulty in maintaining the confidentiality of the counselling relationship when the same teacher that may be referred to in the student/client record is allowed access to records; the argument could be made by the same teacher that knowing what information is in the counselling records facilitates the teacher's performance. As the FIPPA's definition (p. 45) of "personal information means recorded information about an identifiable individual including...(i) the individual's personal views or opinions, except if they are about someone else," the particular information regarding the teacher could fall under this definition.

In that the FIPPA goes to such great extents in attempting to protect privacy, a teacher would probably have to establish need for access that would be of greater importance than the confidentiality of the information. As well, a teacher would probably need to establish a direct relationship with the student that would necessitate access in order to provide service unlikely to be gained by any other means. However, it is of concern that many teachers and/or counsellors may read this subsection to mean open access for all employees. The reality is that this is likely to happen in schools where information exchanges occur constantly within informal channels. The only way this subsection will be clarified is if a counsellor refuses to allow access to a teacher who then appeals the decision to the Information and Privacy Commissioner on which to rule.

Section 34 reiterates much of what has already been discussed here. It brings in, again, reference to reasonableness. The use of the terms "reasonable" with "direct

connection" strikes a specific interpretation: there would need to be an identifiable link between use and purpose that would be considered reasonable.

Definition of consistent purposes

> **34.** (1) A use of personal information is consistent under section 32 or 33 with the purposes for which the information was obtained or compiled if the use
>
> (a) has a reasonable and direct connection to that purpose, and
>
> (b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses the information or to which the information is disclosed.

Again, the section allows that counselling and counselling records be determined as necessary in performing the duties of an employee within a public body.

Section 35, although more specific than the School Act, redefines what is already allowed under the School Act. This section does, however, allow for specific conditions to be placed on the methods used by schools, boards, or the Ministry.

Disclosure for research or statistical purposes

> **35.** A public body may disclose personal information 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,
>
> (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.

It is unlikely that Section 35 will hold any changes for counsellors from their present practices.

Section 36, **Disclosure for archival or historical purposes**, does not pose any changes for counsellors' practices and therefore will not be reproduced here.

Sections 32 through 36 reiterate much of what has been discussed throughout this paper in that use of records must be consistent with the purpose they were originated and fully informed prior consent must be obtained. The major impact of these sections for counsellors is that they now have two pieces of legislation that allow parents open access to student/client counselling records unless, of course, one of the exceptions to access specifically applies.

Exceptions

> The underlying purpose of severing and the exercise of discretion is the same: to release as much of the requested information as possible without causing the harm set out in the exception.
>
> (Handbook, p. 47)

The spirit of the FIPPA has been stated repeatedly as a new order of openness in government. Exceptions to allowing this openness must be firmly established before records may be severed or withheld. In situations wherein the counsellor is considering withholding or severing information from student/client records, the FIPPA is specific in the formal channels to be followed in doing so; although the final decision lies with the

head of the public body, the counsellor's first step would be to refer the issue to the Information and Privacy Coordinator at the district office.

As well, with each of the exceptions to access, the FIPPA has a burden of proof element attached depending upon who is denying access, how much access is to be given (parts of a record may be severed under the appropriate exceptions to access sections), or what the information entails. Section 57 of the FIPPA lays out in quite plain language on whom the burden of proof lies, depending upon the exemption involved.

Burden of proof

> 57. (1) At an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part.
>
> (2) However, if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.
>
> (3) At an inquiry into a decision to give an applicant access to all or part of a record containing information that relates to a third party,
>
> (a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and
>
> (b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part.

The FIPPA is quite progressive legislation in this area as others that have come before it have not worked out such an equitable burden on parties involved, nor has other legislation allowed people access to review without regress to a costly intrusive legal process. (Levine, 1993; Fulero & Wilbert, 1988) The Information and Privacy

Commissioner often specifies who owns the burden of proof in the Commissioner's Orders. (see Appendix C)

Section 12 of the FIPPA will have little bearing on the counsellor in day to day practice as it involves Cabinet confidences, and so will not be reproduced here. And although it would be difficult to ascertain what circumstances within the counselling situation would give rise to reference to Section 13, there may indeed be a few remote ways in which certain subsections may relate to counselling.

Policy advice, recommendations or draft regulations

13. (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.

(2) The head of a public body must not refuse to disclose under subsection (1)...

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

(l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,...

(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or

(n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

(3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

Records of staff committees or team meetings that may share student records within the professional arena, under this section would be allowed disclosure as these are established

for the purpose of making reports or recommendations to the school or board as functions of the public body. Various initiatives in programming or policy would be allowed disclosure once a decision is made based on the information; prior to a decision being made, such information could be exempted from disclosure. It is difficult to understand, at this point in the FIPPA's infancy how this section will affect student/client counselling records, other than as disclosed in formal meetings. Records so used would have to have prior consent and be used in a manner consistent with their origination.

Section 14, **Legal advice**, refers specifically to solicitor/client privilege in stating that, "The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege." There may be times in the counselling relationship that information may be shared by the student/client which may have some bearing on a legal case in progress, however, as the counsellor is not the solicitor obtaining the information, this section would not apply; there is no formal notice in legislation of such a privilege existing between counsellor and student/client; although there may be some argument that a fiduciary relationship exists. In Slavutych v. Baker, a professor was dismissed as the result of information he was asked to supply on a confidential form. The Supreme Court of Canada ruled the evidence inadmissible due to the confidential relationship between the professor and the university. While counsellors may feel that their student/client records are privileged information, there is no privilege granted to such communications in common law. As a matter of fact, privilege really cannot be used as an issue within the school situation, as McLachlin (1981) explains:

> Privilege is a rule of evidence, not a rule of substantive law, and its only effect is to protect communications from disclosure in the litigation process. It may prevent communications being disclosed at trial or in pre-trial procedures; it does not prevent disclosure in other circumstances. The concern of universities and schools typically will not be with preventing documents from being used at trial, but with disclosure of documents in situations unconnected with litigation.

In considering patient access to her own medical records, in Parslow v. Masters, a court of the Saskatchewan Queen's Bench determined that, "The physician-patient relationship is a fiduciary or trust relationship. The fiduciary qualities of the relationship imposes on the physician a duty to grant access to information used in administering treatment." In McInerney v. MacDonald, the Supreme Court of Canada determined that:

> The physician-patient relationship is a fiduciary relationship. Certain duties arise from that special relationship of trust and confidence between physician and patient. Among these are the duty of the doctor to act with utmost good faith and loyalty and to hold information received from or about a patient in confidence.

The key here is in establishing that a fiduciary relationship exists between counsellor and student/client; although the counselling relationship is similar in many ways to a medical model, at very least, it is a relationship based on trust and confidence. The difficulty in establishing the fiduciary argument was elucidated by Beverly McLachlin over 10 years ago (McLachlin, 1981):

> Another equitable doctrine which, arguably, might by applied to the problem of confidential communications is the concept of a *fiduciary* relationship between the student and the university or school. This means the university is a trustee of information submitted by or about the student. While it has received some recognition in the United States, the Canadian courts have yet to adopt this approach.

Section 15, **Disclosure harmful to law enforcement**, and its numerous subsections may apply to excepted disclosure of the student/client record, or parts thereof. Basically this section states that a public body may refuse disclosure if such disclosure would bring harm to or endanger in any way: law enforcement procedures, investigations, confidentiality of legal matters, security or supervision measures, persons or property. The BCSCA's Legal and Ethical Guidelines already encompasses many of these tenets. These guidelines state that first and foremost the counsellor works in the best interests of the student/client. The counsellor must take appropriate action if the behaviour of a student threatens potential harm. The counsellor works to ensure the child is protected.

As well, the "teacher-counsellors are obliged to respect the integrity and promote the welfare of counselees with whom they are working." If disclosure of information works to the disadvantage of any of these situations, the counsellor is bound by ethics and law to refer the issue to the Information and Privacy Coordinator at the district office after which point formal channels will evolve to consider withholding or severing information.

Section 16, **Disclosure harmful to intergovernmental relations or negotiations**, Section 17, **Disclosure harmful to the financial or economic interests of a public body**, and Section 18, **Disclosure harmful to the conservation of heritage sites, etc.** would be hard pressed to have any effect on record keeping and access within the counselling relationship. Thus, these sections and their hypothetical relevance will not be considered here.

Section 19, however, is very likely to be encountered when considering releasing records. As a matter of fact, the Information and Privacy Commissioner puts the onus on the public body to search meticulously through a record for any information such as what may be covered under this section. In Order No. 29-1994, David Flaherty stated that "a public body normally must undertake a line-by-line analysis of an entire record." (see Appendix C)

Disclosure harmful to individual or public safety

19. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health or

(b) interfere with public safety.

(2) the head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

There is no need for proof that violence will result if information is released, if the potential for violence exists. As the wording states, "could reasonably be expected," this provision, along with Flaherty's statement in Order No. 28-1994, "Further, I do not require that the proof of violence be actual as opposed to potential," allows for some leeway in interpreting this section. (see Appendix C) Along with legal and ethical guidelines, the counsellor will have the backing of the FIPPA in refusing to disclose information when disclosure would prove not to be in the best interests of the child. Again, the standard of reasonableness is established here and elsewhere in the FIPPA. In Order 1-1994, to determine financial or economic harm as an exception to disclosure, Flaherty referred to whether a "'reasonable person' would expect releasing records would result in harm." (see Appendix C) The interpretation of this section within the Handbook (pp. 110-111) is extensive:

> **Harm** means that disclosure could reasonably be expected to damage or be detrimental to an individual's safety or health. A fear that disclosure could hinder, impede, or minimally interfere with an individual's health or safety is not sufficient. Under subsection 19 (2), harm includes mental or physical trauma.
>
> **Immediate** and **grave** means that harm could occur at once or without delay and that the harm could be extremely serious or threatening.
>
> **Threaten** means to create the possibility of risk or harm or to jeopardize an individual's safety or health.

In Orders 7 and 18, Flaherty decided not to release the information requested as he felt that the applicant, an active member of the anti-abortion movement, could threaten or could reasonably be expected to pose harm should he receive the personal information he sought to obtain regarding employees of the clinics involved. (see Appendix C) Flaherty's opinions in these cases were not based on fact, but reasonable conjecture on what the applicant may be capable of and the mind set of the individual involved. Counsellors in

schools often see student/clients in crisis situations whereby counsellors make judgement calls regarding what the individual may be capable of doing. The guidelines Flaherty has established here are really little different than the ethical code counsellors presently practice under in considering the best interests of the child when making difficult decisions.

Since a public body, such as a school board, may not always possess the ability to assess whether information, when disclosed, could be expected to produce harm, BC Regulation 323/93, Amendment to the FIPPA, allows for extensive consultation with outside professional sources:

Disclosure of health care information

5. (1) The head of a public body may disclose information relating to the mental or physical health of an individual to a health professional for an opinion on whether disclosure of the information could reasonably be expected to result in grave and immediate harm to the individual's safety or mental or physical health.

(2) A health care professional to whom information is disclosed under subsection (1) must not disclose or use the information except for the purposes described in that subsection.

(3) The head of a public body may require a health professional to whom information is disclosed under this section to do either or both of the following:

(a) to enter into a confidentiality agreement;

(b) to examine the record containing the information on the public body's premises.

(4) If a copy of a record containing information relating to the mental or physical health of an individual is forwarded to a health professional for examination, the health professional must return the record to the head of the public body after giving the opinion.

(5) The head of a public body may recommend that an applicant who makes a request for access to a record containing informa-

> tion relating to the applicant's mental or physical health should not examine the record until a health professional or a member of the applicant's family is present to assist the applicant in understanding the information in the record.

Obviously there are extensive considerations when exempting disclosure under Section 19, especially if it is uncertain to the public body whether or not the disclosure could result in harm. Fortunately, the Section 5 Amendment is thorough in its guidance in seeking professional appraisal of the situation if needed. The section allows that even if a student/client allows disclosure to others or demands access to his/her own file, the counsellor can deny access under Section 19. However, if the counsellor decides that there is some question whether or not harm could result from disclosure and therefore wishes to opt for exemption under Section 19, there are formal channels offered here that need to be considered; hopefully the counsellor will be knowledgeable enough about the FIPPA to follow this process.

Section 20 of the Act refers to **Information that will be published or released within 60 days**, and allows for exception from disclosure of such information. Again, it is unlikely this section will have much bearing on the counselling situation.

Section 21, **Disclosure harmful to business interests of a third party**, regards the business interests of a third party. Although the section states that "The head of a public body must refuse to disclose to an applicant information...that is supplied, implicitly or explicitly, in confidence," this section applies to financial or economic interests of the third party. On reading the Commissioner's Orders, this section is called into play specifically when business interests are at stake, something unlikely in the counselling relationship. (see Appendix C) The Commissioner's comments in this area do have some relevance for the counselling situation in that Flaherty repeatedly demands that the provision of confidentiality be unquestionable; in Order 21-1994, he states "in future cases I would hope to receive more explicit proof on this matter of expectations of confidentiality," and in Order 22-1994, he again stresses the manner in which information

was supplied, "the information was financial but not explicitly or implicitly supplied in confidence." (see Appendix C) The Commissioner does seem to place the burden of proof on formulating that a confidential relationship was formally agreed to by the parties involved; he tends to question nonspecificity of references to confidentiality.

Section 22 of the FIPPA is likely to have a large impact on the disclosure of student/client records, when disclosure will affect a third party. As suggested by the survey results, 25% of respondents keep third party information in their student/client files. It will prove to be a large task to determine if disclosure of the student/client record will be harmful to the privacy of a third party. Fortunately such decisions do not fall into the counsellor's realm but need to be referred to the district office and decided through formal channels. For example, if a parent requests access, it must be determined, on a line-to-line basis, whether or not the record contains any personal information about a third party, such as another staff member or student; if so, the information may be exempted from disclosure here:

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,

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

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

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

(g) the personal information is likely to be inaccurate or unreliable, and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(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,

(b) the personal information was compiled and is identifiable as part of an investigation into possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

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

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax,

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit-worthiness,

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,

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

(i) the personal information consists of the third party's name together with his or her address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(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,

(b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,

(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,

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

(g) public access to the information is provided under section 5 of the Financial Information Act,

(h) the information is about expenses incurred by the third party while travelling at the expense of a public body,...

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied

the personal information.

(6) The head of the public body may allow the third party to prepare the summary of personal information under subsection (5).

Many of these subsections will apply to the records counsellors keep, and will impose a new necessity to review records line by line to look for possible disclosures that may impinge on third party personal privacy. Often in student/client records counsellors may note information from other sources than from the student/client him/herself. As survey respondents noted, 64% keep staff notes/comments regarding the student and 25% keep third party information within their student/client files; less than one half of those responding specifically exclude such information from student/client files. There would be little question that subsection (2) (f) would apply to this information as the relationship between the counsellor and other staff would be considered collegial and confidential; although, as per the previous discussion, use of this exemption may require formal proof that the information shared was understood by both parties to be confidential prior to the information being exchanged.

Various subsections within (3) are relevant to the third party information that counsellors may receive; most likely of these would be (g) wherein the "personal information consists of personal recommendations or evaluations, character references or personnel evaluations." A phenomenal amount of this type of information is presently shared and acquired by counsellors within schools through informal channels; teachers may discuss students in the staff room, or in the office, or by chance meetings within hallways. Survey results (see Table 9) show that some counsellors purposely exclude "sensitive" material from student/client records. Counsellors are most likely to exclude informal speculations and notes on sexual behaviour from student/client records; although police records are likely to be excluded, this may have more to do with the fact that counsellors are not often given access to such information. These results show that counsellors are already cautious about recording third party information. With the FIPPA,

counsellors will need to be even more cautious in considering what they include in and exclude from the student/client record.

Table 9
Respondents' rating of information they presently exclude from student/client files

Which of the following information do you specifically exclude from student/client files?			
22%	Counselling session notes	12%	Class schedules
63%	Informal speculations	48%	Police records
16%	Formal test results	20%	Disciplinary information
48%	3rd party information	23%	Previous school records
33%	Social worker records	26%	Counselling process notes
13%	Academic records	18%	Student's extracurricular activities
27%	Staff notes/comments regarding student	57%	Notes on sexual behaviour

Note: Multiple responses were possible

If information that may impinge on third party privacy is to be included, counsellors should maintain such information on separate pages in the student/client record from those pages that contain information received directly from the student/client. This practice will facilitate the severing process should it be required to maintain third party privacy. As well, prior to placing third party information within the student/client record, the counsellor needs to formalize that the information was received in confidence. The Handbook (p. 60) specifies circumstances for assessing confidentiality of informational exchanges:

- the existence or absence of an explicit statement, request for confidentiality or confidentiality agreement;
- past practice of the public body
- the type of information and whether it would normally be kept confidential by the third party
- whether the information was supplied voluntarily, supplied upon request or required by the public body and whether there would be negative consequences in failing to supply the information
- actions or conduct by or between the public body and the third party that would indicate an understanding of confidentiality.

Counsellors may acquire information from an infinite number of third party sources besides teachers: coaches, adults the student lives with or with whom they are acquainted, before/after school workers, other social service workers, etc. Often a counsellor may turn to outside sources to develop a more accurate picture of the student/client situation. There is now, with the instigation of the FIPPA, a phenomenal amount of record keeping changes and a new level of awareness that counsellors must develop whenever they record information from these sources. The survey at hand has shown that counsellors keep a variety of this type of material within student files. Others specifically exclude such materials from files, although the dilemma is that such information may prove invaluable in facilitating services for the student/client.

The remaining sections in Part Two of the FIPPA refer to the steps necessary when notifying the third party, the time limits within which a decision must be made, i.e. 30 days after an access request is received, and finally whether or not the information must be disclosed on the basis of public interest. Although these sections are procedural, counsellors should be familiar with these processes. Should any concerns over severing or withholding information from student/client records arise, counsellors need to know that their first course of action is in referring the matter to the Information and Privacy Coordinator at the district office to ensure adequate response and documentation of the situation.

CHAPTER FOUR

PRIVACY AND ACCESS:
Conclusions for New Directions

There is no question that the implications the new Freedom of Information and Protection of Privacy Act will have on the record keeping and access practices of counsellors in BC schools will be far reaching. At present, from survey results, it is obvious that counsellors need to revisit the information they have in their student/client files and to whom they allow access and under what conditions. With the FIPPA offering open access to students and their parents, the 42% of respondents who did not allow access to the student/client will seriously have to reappraise their procedures. Counsellors will find that their records will now have to be maintained as if the public will have open access with the ability to request correction; not as in past where there was a remote chance that one person at some point may request information. The Facilitator's Manual for Local Public Bodies (1994) suggests that records contain only facts, that if information is unnecessary then it should not be kept, and that the assumption should be that what is written will be accessed.

Unfortunately, as the survey has found, some counsellors presently keep minimal or no notes on their student/clients: 8% keep no notes and a further 11% keep notes on less than 10% of the student/clients they see. Though counsellors who keep minimal notes may be doing an adequate job for their student/clients, the focus for the future direction of counselling in BC points to the necessity of maintaining a systematic and fully accountable record keeping system. Although some counsellors may fear that legal repercussions may arise from having a traceable "paper trail," the US experience has shown that it may be more dangerous from a legal perspective to keep minimal notes within professional practices than to keep notes which sufficiently document the counselling relationship and process. As the Alberta Court of Appeal in Lindsay v. M. stated, "It is unthinkable that

the healing professions require a prior and blanket assurance of confidentiality without which they would fail in their professional duty to keep adequate records." The BCSCA's Legal and Ethical Guidelines (1994) refer to "records of the counselling relationship...and other documents retained by the teacher-counsellor" and thus considers such recordings to be part of the counselling relationship.

Survey data coupled with an analysis of pertinent sections of the FIPPA provide that counsellors need to more closely align their present record keeping and access practices with the FIPPA. The following list of guidelines is offered in an attempt to facilitate this process. However, these guidelines minimally reflect the immediate changes needed in present counselling practices and by no means can replace the unquestionable need for thorough policies and guidelines for counsellors on a province wide scale.

Guidelines

Counsellors' records on their student/clients:

- are in the control/or under the custody of the public body, the school
- belong to the public body, regardless of where a counsellor physically keeps them
- hold personal information to which the student holds an interest, whether or not the counsellor created the record
- must be originated with prior written, informed consent which includes: purpose for which information is collected; methods of collection; persons who will be allowed access; uses that may made of the information consistent with purpose of collection; notice that consent may be withdrawn at any time; name of the principal or district Information and Privacy Coordinator and the method of contact
- can be accessed on request by the student, or parent of a student under age 19
- can be accessed by the custodial parent, the adult who has legal custody or guardianship; access for non-custodial parent should be directed through the custodial parent; access for others must provide legal means/proof of allowable access

- are to be secure: such as in a locked filing cabinet or a locked room with accompanying procedural security methods

- should be reviewed regularly by the student, or parent, to ascertain accuracy and offer opportunity for correction; with notations made of who noted records as accurate and when records were purged for inaccuracies

- may be accessed by other staff who are directly involved with ensuring the educational program, i.e. school based team

- may be withheld from disclosure or severed if significant mental or physical harm could result; even if student agrees to disclosure the counsellor may deny access; if uncertainty of harm exists the counsellor may consult with a health professional for a determination, of course confidentiality must be maintained and other stipulations of the Act considered

- should be referred to the district Information and Privacy Coordinator if any issues regarding nondisclosure or severing arise; these need to follow formal channels of documentation and response

- should provide a running log of who accesses, when access was allowed, and the purposes for which access was requested

- should keep any information supplied by third parties separate from information supplied directly by the student/client so that such information can be more easily severed or withheld if formally exempted from disclosure

- should keep any information supplied by the student/client that pertains to the student/client's personal views or opinions about someone else separate so that such information can be more easily severed or withheld as formally exempted from disclosure

- may be destroyed no less than 1 year from the last time they were used to make a decision regarding the student/client

- destruction should be by shredding or incineration, methods that maintain confidentiality

There is no question that the FIPPA challenges counsellors to adopt new directions for record keeping methods and access policies. The extent of changes for

some counsellors will indeed seem overwhelming, to a point where it may seem easier to keep minimal or no records. As has been pointed out extensively throughout this paper, insufficient record keeping does not work to the best interests of the student/client. Although adjusting to the parameters of the FIPPA may prove to be onerous initially, as better systems develop, counselling as a profession will become more consistent, and perhaps more effective. Specific forms, letters of consent, and access policies along with inservice training for counsellors need to be instituted province-wide. Records would then become more objective and consistent between school and districts. Counsellors would have no difficulty interpreting records that follow a student as he/she changes schools as all counsellors would be using the same forms and keeping records of similar quality. Finally, effective record keeping would serve to alleviate present concerns over allowable access, record contents, legal vulnerability, costly time involvement, and most importantly, whether counsellors are indeed serving the best interests of the child.

Dear Colleague:

As a member of the British Columbia School Counsellors' Association, you have received a survey regarding record keeping practices in counselling and your knowledge of legal issues around this topic. Over 500 counsellors from throughout BC are being asked to complete this survey; however, participation is entirely optional and may be refused at any point. The results of this survey will form part of a Master's thesis in Counselling Psychology for Simon Fraser University. This survey is entirely confidential and will be used by myself and my graduate committee solely for the purposes of data gathering for the aforementioned thesis.

The survey has been developed into three parts: (1) basic demographics, (2) knowledge of topic, (3) present practices. You will be asked general demographic information as well as questions regarding your knowledge of laws that effect counselling. Specific questions will focus on your own record keeping practices and access policies. If you do not presently keep student client records, please complete the first two sections only and return the survey.

If you are interested in obtaining a summary of the results or further information on this topic, please notify me separately from this survey; you will find my address and fax number at the bottom of this page. The BC School Counsellors' Association endorses this research and looks toward the data accumulated as valuable to its members. Thank you in advance for taking the time to respond.

Should you have any concerns regarding this survey or the confidentiality of this research please address your concerns to Dr. Robin Barrow, Dean of the Faculty of Education, Simon Fraser University, fax number 291 3203.

Sincerely,

Monica Lynn Frank
6465 Lasalle Rd
Nanaimo, BC
V9V 1P3

fax: 390 1932

PART ONE:
DEMOGRAPHICS

1) What level of education/training do you presently possess?

B.A._____ PB5_____ M.A._____ M.ED.____ Ph.D.____

What field?_____

2) How many years of counselling experience do you presently have? _____

3) In which age group do you fall?

25-30____ 31-40____ 41-50_____ 51+____

4) Which setting most closely fits your present placement?

Elementary _____ Secondary _____ Alternate _____ Private _____
(gr . 1-7) (gr. 8-12)

5) What is the present student population in the school/schools in which you are presently employed? (Answer if applicable)

School #1 _____ School #2 _____ School #3 _____

6) How many hours per week do you work as a counsellor in the school system? _____

7) Are you also employed in private practice apart from the school system?

Yes _____ No _____

8) Besides the BC School Counsellors' Association, you belong to which association(s)?

BC Teachers' Association _____

District Teachers' Association _____

Secondary Teachers' Association _____

Elementary Teachers' Association _____

Other _____

PART TWO:
KNOWLEDGE OF TOPIC

Rate your level of knowledge of the following documents as they pertain to counselling.

	Very High	High	Moderate	Low	Very Low
1) BC School Act	1	2	3	4	5
2) Family & Child Service	1	2	3	4	5
3) Constitution of Canada	1	2	3	4	5
4) BC School Regulations	1	2	3	4	5
5) Freedom of Information Protection of Privacy Act	1	2	3	4	5
6) Counsellor Code of Ethics	1	2	3	4	5
7) Young Offender's Act	1	2	3	4	5

If you have had need to directly refer to any of the above documents in the last six months, please specify the document(s) by number _____

	Yes	Uncertain	No
8) You have had graduate level training in legal issues in counselling.	1	2	3
9) You feel confident in your knowledge of record keeping practices.	1	2	3
10) You have received sufficient Ministry information and guidelines on legal aspects of record keeping.	1	2	3
11) You feel confident in your knowledge of laws governing access to information in counselling records.	1	2	3
12) You have attended district based workshops dealing with record keeping issues.	1	2	3
13) You feel confident in your legal position in regards to your present record keeping and access practices.	1	2	3

DO YOU PRESENTLY KEEP RECORDS ON YOUR STUDENT CLIENTS?

YES _____ **NO** _____

IF NO, PLEASE DISREGARD THE REMAINDER OF THIS SURVEY AND RETURN THE SURVEY IN THE ENVELOPE PROVIDED.

PART THREE:
PRESENT PRACTICES

1) You keep recorded information on what percentage of your clients?

0-10_____ 10-25_____ 25-50_____ 50-75_____ 75-99_____ 100_____

2) This information is in what form? (Check whichever you presently use; may be more than one of the following)

Brief handwritten notes _____
Forms/formal notes _____
Computer files _____
Audio cassete _____
Videotape _____
Other _____

3) Where is this information physically kept? (Choose as many as are applicable)

Counsellor's office _____
Administration office _____
Home office _____
Other _____

4) Which of the following types of information is generally kept in your student/client files?

_____ Counselling session notes
_____ Informal speculations
_____ Formal test results
_____ 3rd party information
_____ Social worker records
_____ Academic records
_____ Staff notes/comments regarding student
_____ Class schedules
_____ Police records
_____ Disciplinary information
_____ Previous school records
_____ Counselling process notes
_____ Student's extracurricular activities
_____ Notes on sexual behavior

5) Which of the following information do you specifically exclude from student/client records/files?

_____ Counselling session notes
_____ Informal speculations
_____ Formal test results
_____ 3rd party information
_____ Social worker records
_____ Academic records
_____ Staff notes/comments regarding student
_____ Class schedules
_____ Police records
_____ Disciplinary information
_____ Previous school records
_____ Counselling process notes
_____ Student's extracurricular activities
_____ Notes on sexual behavior

PART THREE:
continued

6) Which of the following persons are allowed access to the records that you do keep on your student clients?

_____ Parent of student under 18	_____ Social worker
_____ Parent of student over 18	_____ Police liason worker
_____ Student him/herself	_____ Student's close friend
_____ Staff members	_____ Administrators
_____ School board officials	_____ Other counsellors
_____ School psychologist	_____ Student's guardian

7) Under what conditions would you allow access to these persons?

_____ With your own considered authorization
_____ With parent authorization (student under 18)
_____ With parent authorization (student over 18)
_____ With student/client's authorization
_____ With administrator's authorization
_____ Without concern for authorization
_____ Within an emergency/crisis situation

8) If, in past, you have allowed access, what have the results generally been? (If the question does not apply, do not answer)

Very Good	Good	Uncertain	Poor	Very Poor
1	2	3	4	5

9) Have you any concerns regarding your present record keeping system or access practices?

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

PART ONE:
DEMOGRAPHICS

1) What level of education/training do you presently possess?

B.A.__8__ PB5 27 M.A.__48_ M.ED._99_ Ph.D.__3__

What field?_____

2) How many years of counselling experience do you presently have? _____

3) In which age group do you fall?

25-30 = 1 31-40 = 25 41-50 = 110 51+ = 54

4) Which setting most closely fits your present placement?

Elementary 79 Secondary 119 Alternate 1 Private _____
(gr . 1-7) (gr. 8-12)

5) What is the present student population in the school/schools in which you are presently employ (Answer if applicable)

School #1 _____ School #2 _____ School #3 _____

6) How many hours per week do you work as a counsellor in the school system? _____
less than 20 = 50 more than 20 = 138

7) Are you also employed in private practice apart from the school system?

Yes 20 No 170

8) Besides the BC School Counsellors' Association, you belong to which association(s)?

BC Teachers' Association _____

District Teachers' Association _____

Secondary Teachers' Association _____

Elementary Teachers' Association _____

Other _____
_____

PART TWO:
KNOWLEDGE OF TOPIC

Rate your level of knowledge of the following documents as they pertain to counselling.

	Very High	High	Moderate	Low	Very Low
1) BC School Act	7	46	96	33	8
2) Family & Child Serv	14	59	78	27	12
3) Constitution of Cana	2	19	79	59	31
4) BC School Regulatio	6	51	92	27	14
5) Freedom of Informati Protection of Privacy Act	8	62	75	37	8
6) Counsellor Code of Ethics	53	97	32	4	4
7) Young Offender's Ac	9	51	81	40	9

If you have had need to directly refer to any of the above documents in the last six months, please specify the document(s) by 1=34, 2=40, 3=2, 4=17, 5=48, 6=23, 7=13

	Yes	Uncertain	No
8) You have had graduate level training in legal issues in counselling.	71	9	108
9) You feel confident in your knowledge of record keeping practices.	127	41	20
10) You have received sufficient Ministry information and guidelines on legal aspects of record keeping.	44	47	97
11) You feel confident in your knowledge of laws governing access to information in counselling records.	106	46	36
12) You have attended district based workshops dealing with record keeping issues.	95	2	91
13) You feel confident in your legal position in regards to your present record keeping and access practices.	99	52	37

DO YOU PRESENTLY KEEP RECORDS ON YOUR STUDENT CLIENTS?

YES 175 NO 15

IF NO, PLEASE DISREGARD THE REMAINDER OF THIS SURVEY AND RETURN THE SURVEY IN THE ENVELOPE PROVIDED.

PART THREE:
PRESENT PRACTICES

1) You keep recorded information on what percentage of your clients?

0-10 = 19 10-25 = 16 25-50 = 17 50-75 = 15 75-99 = 53 100 = 53

2) This information is in what form? (Check whichever you presently use; may be more than one of the following)

Brief handwritten notes	165
Forms/formal notes	96
Computer files	43
Audio cassete	0
Videotape	2
Other	11

3) Where is this information physically kept? (Choose as many as are applicable)

Counsellor's office	164
Administration office	36
Home office	36
Other	20

4) Which of the following types of information is generally kept in your student/client files?

137 Counselling session notes	80 Class schedules
32 Informal speculations	7 Police records
108 Formal test results	94 Disciplinary information
44 3rd party information	71 Previous school records
19 Social worker records	82 Counselling process notes
96 Academic records	29 Student's extracurricular activities
112 Staff notes/comments regarding student	22 Notes on sexual behavior

5) Which of the following information do you specifically exclude from student/client records/files?

38 Counselling session notes	21 Class schedules
110 Informal speculations	84 Police records
28 Formal test results	35 Disciplinary information
84 3rd party information	41 Previous school records
58 Social worker records	46 Counselling process notes
22 Academic records	32 Student's extracurricular activities
47 Staff notes/comments regarding student	100 Notes on sexual behavior

PART THREE:
continued

6) Which of the following persons are allowed access to the records that you do keep on your student clients?

84 Parent of student under 18	27 Social worker
23 Parent of student over 18	15 Police liason worker
101 Student him/herself	2 Student's close friend
37 Staff members	64 Administrators
36 School board officials	65 Other counsellors
58 School psychologist	53 Student's guardian
	36 No One

7) Under what conditions would you allow access to these persons?

84 With your own considered authorization
61 With parent authorization (student under 18)
8 With parent authorization (student over 18)
86 With student/client's authorization
32 With administrator's authorization
6 Without concern for authorization
52 Within an emergency/crisis situation
28 None

8) If, in past, you have allowed access, what have the results generally been? (If the question does not apply, do not answer)

Very Good	Good	Uncertain	Poor	Very Poor	N/A
20	53	8	1	1	92

9) Have you any concerns regarding your present record keeping system or access practices?

Yes = 72 No = 103

APPENDIX B

SURVEY COMMENTS & CONCERNS

The following listing is reproduced verbatim, except for spelling and grammatical alterations, from the final half page results of the survey where counsellors offered their answers to the following question:

9) Have you any concerns regarding your present record keeping system or access practices?

No--I keep files locked and do not put anything in file I would not want client and/or hostile parents to see.

My notes are very scant indeed. I consider them to be for my own private use. I usually include only pertinent info, including a few notes from the academic history, etc. Session notes are a few words, to remind myself of what was covered, and a word or two about planning for the next session. I am very careful, and very aware of my vulnerability, as it is still unclear as to whether my notes could be seized or not!

I would appreciate more information re privacy act.

New pressures on reporting of counselling. I do not endorse public access to any counselling records or references.

I find this form confusing because I keep two types of records--My personal notes kept in a binder for my use only--Central records kept in administrative office when formal testing and year end reports are filed but other information such as counselling notes are not kept there. Central records are not controlled by me but by the school principal and staff.

Do not allow anyone access--they are my records.

To reduce concerns, present formal (office) files include only a record of contacts/communications with parents/guardians, outside agencies, internal decisions (i.e. support team), assessment data which parents have been informed of, all of which can be described as a counsellors "running record."

I have no concerns regarding my record keeping system. However, I do worry about the security of case files. Therefore, highly pertinent or sensitive client/case information is stored safely at home and not on school property. After two years have elapsed since final client contact confidential files are shredded or burned.

How long to keep files of students who move or go on to high school. Several times I've been asked for information two years after a student has moved on. Sometimes I resume work with a family and a younger sibling. P.S. Good luck with your thesis--yes there is life beyond your thesis defense!!

There are 6 members of our counselling department at this time. We have, in the past, spent considerable time concerned with the problem of record keeping. In general we don't keep detailed notes of every counselling session. Issues related to academic advising will be kept far more frequently than case history notes.

One always has to keep current with legislation and regulations--the key is to be as succinct as possible and not include speculation.

The only people reading my files have been other School Psychologist/Counsellors after I have concluded with the student & they are not involved. Teachers, administrators, and parents receive reports from me. They do not read my notes. The student does not receive or read these reports. I'm not sure that this is correct.

I feel uncertain about the legal situation regarding the sharing of information. I am currently sending reports to doctors, psychiatrists, and social workers with parents knowledge and verbal permission only. Should I also have written permission? Should the child be informed & give consent? I am also unsure whether I should be discussing my clients with these professionals & school personnel without the permission of the student and their parent. This is common practice. (e.g. School Based Team meetings)

Yes, I'm not sure of what is allowed to be kept in a student file, what kinds of observations I am allowed to record--legalities involved in student record keeping.

As the Freedom of Information and Protection of Privacy Act works through its first year I find that I have more and more questions about records, access, etc... find that I do not have time to keep and/or maintain records to the standard that I should.

I realize my records can be legally obtained through the school district and that students have a right to know what I have on file about them. I am therefore selective about what I put in the file and write only factual information that I need to remind me, what details I need to remember and specifics that may be called upon at a future date--almost no interpretations or discussion of my intuitions, feelings, etc. I sometimes wonder if I have enough written down.

Don't seem to keep them up--time doesn't always allow & sometimes I'm left wondering "where we're at."

No, I feel comfortable but I have never been challenged legally. Students sometimes ask to see their files & they get free access. Teachers sometimes ask & they get academic information.

Yes, The time constraints of the job don't allow for good logs to be kept, so too often I make a few hasty informal notes--just enough to remind myself of issues, details, family genograms, etc. I have never had to refuse access to anyone, because my notes have never been requested. In some cases, I make detailed records of sessions & write them on my computer--stored on disk. My handwritten files are "incomplete" rather than dangerously revealing, and my concern is that in a court case I would be in a vulnerable position. If I write thorough, specific notes, where do I keep them & do I have the right to refuse access? Evidently not, so I tend to err on the "sketchy" side. Good luck with your thesis! Good topic.

Always concerned as to what can be subpoenaed.--never have adequate time to keep effective, comprehensive notes or keep them current--fear that a court issue could potentially jeopardize my reputation either due to lack of adequate information or incomplete record keeping.

I'm unclear presently what should be kept in files and what should be taken out when one receives files. As it now stands we "clean out" files as students graduate--but in some schools in our District files are being cleaned as they are received--so...We are unclear in my opinion.

P.S. Most counsellors have a computer in their office. Attendance, report card marks class schedules etc. are all there. Some schools have a disciplinary file that is accessible to counsellors. This type of information is therefore not held in a counsellor's file.

I am not satisfied with my level of knowledge re Freedom of Information Act...otherwise ok.

I would very much appreciate a policy which would state what type of records I need to keep and the rules for access to these records.

The School District has no policies, guidelines, expectations, or leadership about record keeping. There is nothing imminent. We are left to our own system & nothing will provide the impetus for change until the courts become an issue.

Although I speak about confidentiality only being breached with regard to safety issues, I know parents/Guardians have a right to information re: minor children. My rule is--I don't lie when asked a direct question. I also am careful to separate fact from speculation in my case notes.

Records time consuming & somewhat ad hoc--lacking consistency.

That my records could be subpoenaed against my wishes.

Without brief notes my memory is NOT adequate to recall events later eg. student/teacher/student conflict, conference results, career goals, etc.

I consider my records to be mine. I try not to write anything legible that could be a problem for me.

The 'grey' area between FOI Act and BC School Act. Counsellors are very reluctant to keep records and many are unaware we have a legal obligation to keep some notes. Also--FOI & Privacy Act overrides School Act-& age 12 is the consent age--not age 18!!

My confidential notes on student counselling sessions have never been requested (I've searched them myself looking for requested information).

I struggle constantly with what information I should record & what information not to record. Because I deal presently with senior students (15 yrs plus) I always consult with the student on access, etc. The only exception would be perhaps dealing with the police on criminal matters.

No--our records are kept to a minimum & if access is requested, we can go over them with the individual.

Somewhat haphazard. In my years of counselling, I have had only a handful of requests for access to student's file--usually by the student and once by parent with custody but "non-resident" student other counselling services have, with student's signed consent, been given access.

I am concerned about my legal liability regarding confidentiality in the use of my records in consultation with colleagues & others. I am also concerned about who should have legal access to my records.

My own counselling notes are very brief and only for my benefit to record incidents/remind myself to follow up etc--They do not include info on sessions & cannot be accessed by anyone but me.

Conflict of legislation--unclear of students/parents rights--appropriate access information esp. legally.

I feel that I keep nothing of a sensitive issue in my files. Word clues as to "what" is dealt with are in my files. File keeping is a low priority--meeting student needs takes all my time therefore files are minimalist in nature. Issues of longer "therapy" are referred to the proper social agency thru the School Based Team. Hell I don't even have a computer! Let's get into the 90's and link me to the office and maybe I'll have time to record more than who, what, and where do you go from here!

I have not yet run into this, however, I would bring forth information upon request by - parents, admin, teacher, etc.

Accessibility & right to deny accessibility.

My goal in keeping records is to remember my interactions with clients (students and parents) so that I can provide continuity in counselling sessions. I do not share written information unless in a brief covering letter for referral to a community agency. My concern is always that my notes might be requested in court proceedings. This has never happened however.

Consistency across district--confidentiality

Our district has never clarified Privacy Act issues. As allegations against teacher's conduct increase ethical considerations are becoming more serious. BCTF vs Counselling ethics. Record keeping and documentation of counselling times becomes more of an issue as counselling time is attacked. Good choice of thesis exploration. Hope to hear results. Good luck.

Most of my record keeping is used as a reminder of what I've been doing with client. At the Elementary level, much of the work involves reading stories and discussing these stories.

To know what should be in each client's file.

They are my notes just to refresh my memory. Anything that I think should go into the main student file, I would put there & then it is accessible by the parent or other school authority. I'm comfortable with it & so is my administrator.

Have been subpoenaed twice. My recollections seemed to satisfy in these cases, but I am concerned about this. I don't want to keep written records of each "counselling" session mostly because the time it would take to do this would drastically cut down on the time I am available to students, plus, legal concerns worry me. I've talked to other counsellors about these issues. Some I believe are naively confident about their practises.

Legal "jurisprudence"

There is not time to do an adequate job is this area.

Yes, it has not been adequate in the past. My answers above are stemming from a brand-new system of note-keeping that I have just instituted in the past few months. I am wishing that I had kept more detailed notes of a conflict resolution episode over a year ago as I am about to confront a parent for slander on my conduct. Good luck on your thesis!

I would like more information on the legal ramifications of information accessing practices eg. Freedom of Information & Privacy Act.

My records should strictly be confidential. Record keeping takes too much of my time. I do it to protect myself for people seem to want me to be credible, accountable, and accurate. Its like we have to justify our jobs with all this paperwork. Mind you my memory doesn't serve me as well now so it helps to remember with my notes.

Would like to know more about guidelines and laws governing my legal position in keeping records.

I am careful as to the nature of information included in counselling office. Generally, as long as my student gives permission will I consider allowing access to information.

I record only the facts & quotes from 3rd party. It would be nice to have some private notes for my own thoughts.

There is a question as to who actually "owns" the information.

Yes--difficult to answer 6 & 7 as my notes are basically for my use and are not accessed by anyone else--I realize that all student records are under the jurisdiction of the principal of the school and I can be asked at any time to show my records. I have been directed by senior district staff to shred records of students who are no longer in the system--I do not know the legality of this.

I usually give client copies of any notes made or transcriptions done.

I admit I do shred!~

Yes. I believe there is a great discrepancy among teacher-counsellors about record keeping even though our legal and ethical guidelines recommend record keeping. Also, there is no standardized format for keeping records or understanding about access. Good luck in your important and timely work.

I make it clear that they are simply my personal notes and perspectives, and will be destroyed at some point. No (concerns) beyond the ever nagging concern about them being stolen. To alleviate this concern I try to be very careful in how notes are recorded. I tend to personally burn most of my personal notes at the end of each year. When off on a deferred salary leave plan I burned them all!

The Freedom of Information/Protection of Privacy Act seems to leave a lot of situations unclear, with even legal opinions differing. We have been given guidelines for writing and keeping records "safely", but old records don't necessarily follow them and it would be very time-consuming to go through and check/redo them all.

Yes, indeed! Questions more than concerns because I see MANY children and parents, I keep quite detailed notes at times, for keeping info. correct and meaningful and for professional accountability (this is direct information, not "hypothesis"). However, I feel there are far too many discrepancies between: School Act; District expectations for sharing of necessary information for benefit of child's health; Freedom of Information Act; clinical and school counsellors' confidentiality processes; BCTF and union Code of Ethics (especially concerning issues surrounding teachers) VS. district administrative expectations of reporting teachers via their policies and procedures and possible expectations of Ministry of Social Services regarding such issues as well. We all need to meet and dialogue so we can decide on clearer protocol and guidance in record keeping before school counsellors are called into court. Some counsellors believe their own notes belong to them, and if not shared, are their own personal records. Others understand if notes are written at school etc., they belong to school district. So they are not clear about accessibility by others. Overall uncertainty and differences in perceptions and expectations at present time is disturbing.

These are my own personal notes and I will destroy them each year. Sometimes I will not keep them at school and take them home.

Security, when I am working in other schools occasionally other staff had access without my consent.

The only concern is for myself--that is--in the rush of the day I must constantly remind myself that what I write is accessible by many people. This necessitates the need for careful, cautious, descriptive, behavioural, non judgemental record keeping. In all likelihood a good course in appropriate record keeping would be warranted in light of the new laws i.e. Privacy Act, Family and Child Service, Divorce, etc. These clearly have changed what is to be recorded and the language to be used to record.

I have rarely been asked by anyone to see these records. I have shared the content verbally during case conferences when it is warranted. Once the student has left the school or graduated, I destroy my records. There are, of course, formal "counselling files" which are kept in the office and travel from school to school with the student.

My concern is how long do I keep these records? What should I keep for long periods? Where should closed files be kept?

My client records are kept in a locked filing cabinet or desk in each of my schools--if they were to be subpoenaed I assume that I must still present them and therefore am always cautious as to what I write in them. My biggest concern is that there isn't any direct, clear, written communication from the Board level as to how to keep records and to what (extent) they will back us up regarding our record keeping.

My policy is only to include documents already given to parents eg. copies of disciplinary letters, copies of progress reports. Other notes I make; if I make them, are kept in my office at home which are destroyed at the end of June.

The only concern I have is that my record keeping is defined by available time. I would like to be more thorough with my record keeping recognizing that if I left the district or whatever some of my notes would only have meaning for me!

I do have a concern with your questionnaire. Counsellors often keep two files on students. 1. Support Services File--open to any professionals working with the student--I am extremely careful as to what I put in that file. 2. My own running record with long and short term goals. Under the Freedom of Information Act I must open my files to parents and students at their request.

1. My concerns regarding access relate mostly to parental access to files--in particular when there are custody issues being raised and the parents use school records and information as part of their ongoing disagreements. 2. Outdated testing information (our sp ed department indicates a 3 yr. shelf life on testing) is rarely removed from files & I wonder if it should be because it can be useful for a long term look at student. 3. Children often live with parent & another adult. The "other adult"may be significant in child's life--when does this person have access to child's file. Does "common law spouse" apply or does the "other adult" never have access to files?

I have become more consistent in record keeping practices for my own efficiency and wonder whether the increased amount of informal notes could pose a problem.

No--access seldom given and almost always with student consent.

Nobody reads my notes. They are mostly written in my own code and I take them only to help myself remember and to help me look at a broad picture.

I hate it when a VP removes a file without a word.

My notes are very sketchy and probably of no use to anyone else unless I were to interpret. Basically they are a record of contacts, dates, and keyword reminders of what took place.

Yes--it's inadequate.

I'm concerned about having to share my personal notes with anyone. I would like more info on Freedom of Information and Protection of Privacy Act. I attended an info session on this subject at the BC Couns Association Provincial Conference in Feb '95--too many unanswered questions.

Recent info on Info & Privacy Act lends concern re: what should be recorded and who should have access to these records.

Not really--Your questions are a little unclear. I maintain my own notes that are only for my use--these are generally summaries of meetings and conversations with schools and/or parents. The school keeps files which contain the items listed in question 4 and access to these files is limited to teachers/administrators and parents. I keep children's drawing and notes made during discussions with each child. These files are accessible to the child at each session.

No. --this concern will change over the next two years though as our school moves to Gr 8-12 school.--currently we are a junior high school only.

What must legally be in the file?

Not really although I would be open to hearing alternate methods of record keeping.

No concerns--notes are innocuous: all notes would be open to scrutiny without embarrassment, etc--"sensitive" stuff doesn't get written down anywhere.

Yes--with the # of clients I see I need to keep good records; however, feel burdened by the possibility of a subpoena / and / or request to see records.

There are not many "confidential" issues related to course selection and post-sec plans.

Because I am not really familiar with the FIPP Act, I have stopped keeping records as conscientiously as I had in the past. Now I just jot down a few words in my day book. Sometimes I'm concerned that I have enough info to support my position without revealing too much info re: the client.

Yes - as the laws change - so must I. I realize that with the new guidelines for access to information I need to change. Inservice on this area would be helpful.

I rely on my memory to protect client confidentiality!

I keep all formal records. I keep few, if any, informal records. Most of what I do lives in my head. Some complex situations are summarized in brief notes. Many formal records are also on our computer system.

In the event of death who would have access to personal files?

In a small community and in an isolated place where resources may not be available a person must exercise considerable discretion. Breaching some regulations may (and have in my case) saved lives. They may also result in disciplinary action--I will take the risk and go into each situation with eyes open and the human thing to do always at heart. The

problem here lies in the fact that: who gave me the power to be a morally and ethically independent agent in these regards? Unfortunately our lack of concise training **and** meaningful regulations limit the reality out there--you do what is best (legal or not) for the client. The rub lies in having laws and training that enable this and **not** laws and training that protect one's ass or the school board's. There needs to be limits to this as well--but not the ones we've got at present. Good luck on your journey--great topic!

Counsellors need a locking, private file cabinet to store their files, at school sites.

Many - would like to feel free & comfortable to take notes for my **own** sake without worry of possible access by anyone. Would like **some** specific & consistent rules as to who has access NOT from administrators but from counselling body. Would like consistency within/without ministries and private counselling--confidentiality continues to have many grey areas within the system & we are often confronted & not supported for keeping it, i.e. SBT/phone calls/etc.

I know that anything I write down might ultimately be seen by someone no matter how careful I am & legally could be demanded. I also know it is unlikely as no search request to date & all my notes stay with me--no school storage ever.

I keep very minimal notes only on high risk students (for example highly suicidal clients) to remind myself of dates that I referred, talked to parents, and case conferences, etc. Other students I note only the student's name and time and date I saw them. I also keep track of plans made for students and SB Team meetings. I don't feel that my system for record keeping or access is problematic.

I'm an assessment counsellor so my role is a little different.

Access to notes is not publicized or made known. When parent sign forms agreeing for counsellor to see child, they check off if they want to be able to have access upon request. I usually only document date of referral and sessions down, what was done, other people or agencies involved. The notes are usually destroyed when child moves to secondary school - my notes never go to secondary counsellor. I will forward my notes to another area counsellor within the district if the child moves or I change schools.

This survey muddies up my private counselling records and notes with official student records and school information. I am aware that there is a danger that my records could be demanded by parents, the court etc. and in certain cases, my answer would be that I don't keep such records.

No one seems to have a clear answer as to whose rights are considered first, when, for example, a 17 Ir old, not living with parents, wishes to keep school marks & attendance records from his/her parents.

Many concerns - the law does not seem clear - other counsellors are confused and we are not seeing much guidance from BCSCA.

I keep notes for my own benefit so I can keep track of what I've done--where I'm headed with individual students. If anyone were to come for my notes I'd trash them.

Freedom of Information and Public School Act conflicts re: access to records. I keep minimal records of contact only. This is error prone where many clients are seen. My memory is not fool proof.

We have not allowed access other than on a "need to know" basis & always with myself present to interpret. Language used is carefully monitored--"suggests, perhaps, may be indicative of". Concern is more notes on parent interviews, family session. Release of info. is necessary from parent if any outside agency requests info. General -- "form letter style" summation that a student has received Counselling Services goes out at the end of the school year to be placed on student's General Cumulative Record student file kept in his/her school.

Very little security.

Every school counsellor should be prepared before each new school year on guidelines for keeping records on clients, rights of clients etc. as they seem to change yearly or often enough.

Only in that the right to Freedom of Information means that my note taking has to be bare facts only -- this creates recall problems for me down the road occasionally anyway.

No. I have always maintained that student files were their property and ultimately they must give permission for information in them to be shared. I also feel it is important to discuss with students the type of information they want in their files. As a result, I have never put information of a highly-sensitive nature in the students' general files.

Good working relationships with other ministries. School counselling presents some unique challenges - who is the client? I consider the student to be and am very careful to maintain confidentiality, period. Any needed discussions with other ministries are discussed with the student ahead of time - similarly for info. shared with parent or school personnel. Students are informed at start of counselling that I must report abuse (or potential) of student or threat to other, or of harm to self. I would not share my counselling notes unless required by the court.

Yes! What to keep, what to keep unrecorded. Where are the guidelines. Too many counsellors are ignorant of how to keep records & the legal ramifications of keeping & not keeping them. If you can help out, we'd sure appreciate it.

APPENDIX C

SUMMARY OF COMMISSIONER'S ORDERS

ORDER NO. 1-1994

JANUARY 11, 1994

INQUIRY RE: Ministry of Finance and Corporate Relations/Public Service Employee Relations Commission

The applicant requested records regarding severance directives and was denied pursuant to Section 17; reasonable expectation of harm to economic interest. The Commissioner referred to Manual section C.4.8., p. 3, in stating that a "reasonable person" would expect releasing the records would result in harm to financial or economic interests of the Ministry.

ORDER NO. 2-1994

February 7, 1994

INQUIRY RE: A Request for Access to Ministry of Social Services Records

The applicant was a non-custodial parent, denied access to records of infant son, in order to prepare for legal case between parents. The Commissioner referred to the Manual appendix 6.2.3, page 3

> In cases where the parents are separated or divorced and only one parent has custody of the minor, only that person may exercise the minor's rights of access and correction.

and,

> Where only one parent has custody of the minor, the custodial parent should provide documentary proof that she or he has custody. In the case of separated or divorced parents with joint custody of the minor, the parent making the request should provide proof of joint custody.

The Commissioner also referred to the guidelines used by the Ministry of Health wherein if giving information to non-custodial parent could create an unsafe situation where non-

custodial parent has shown to have a history of harming child. The Ministry established that "giving information to the non-custodial parent could also hinder the willingness to share information with Ministry staff, such information could be necessary to their treatment." The Ministry of Education, it was noted, does not currently allow access to non-custodial parents without the permission of the custodial parent. The Commissioner referred to Section 66 of the Ontario Freedom of Information and Protection of Privacy Act

> Any right or power conferred on an individual by this Act may be exercised...
>
> (c) Where the individual is less than 16 years of age, by a person who has lawful custody of the individual.

The Commissioner concluded in his decisions to this order that,

> The present case involves access to the records of a child of the age of five. I am persuaded that an older child should be able to exercise more control over access to his or her personal records, especially if a dispute exists between a custodial and non-custodial parent. I fully agree with the Ombudsman's contention that a minor has privacy rights.

ORDER NO. 3-1994

February 23, 1994

> INQUIRY RE: A Request for Review by Mr. Gordon D. Frampton for Access to Survey Records held by the Department of Indian Affairs and Northern Development

The applicant desired information in regards to a contract for services with this department as it affected his company's economic situation. The department denied access on the basis of Section 22. The Commissioner allowed the denial in agreeing that the records contained personal data; and agreed that although the data was over 15 years old, unlike cabinet confidences which may be accessed after such a period, these records referred to personal information for which privacy still needs protection.

ORDER NO. 4

March 1, 1994

INQUIRY RE: A Request for Access to Psychological Records held by the BC Board of Parole, Ministry of Attorney General

The applicant, the victim, wanted access to a report pertaining to a stepfather, a convicted sexual offender for purposes of working through the data within a counselling situation. The third party, the offender, was present and asked that records not be disclosed. The Commissioner tried to work with obtaining consent with the third party on the basis of promoting the well-being of the applicant, however, the third party did not wish the information disclosed. The Commissioner, on reading the records, agreed that the documents contained "the most intimate details" and did not accept the fact that release so the applicant could access them would provide any psychological benefit; the commissioner agreed with the psychologist who was opposed to the release. On referring to Section 44 (4 b) the Commissioner felt that as the release was not benefiting a larger number than the one applicant, there was not a strong basis for allowing disclosure.

ORDER 5-1994

March 14, 1994

INQUIRY RE: A Request for a Report from the Insurance Corporation of British Columbia

An applicant, suing ICBC as a result of an accident, sought background information records made on behalf of ICBC by a private investigator. ICBC denied release of the records under Section 14; the record was created and obtained for existing or contemplated litigation. The Commissioner asked ICBC to reconsider its decision in that the information referred to was mostly over three years old and that "The presumption of greater openness in the Act is significant for public bodies."

ORDER NO. 6-1994

March 31, 1994

INQUIRY RE: A Request for a Report from the ICBC

An applicant sought access to information in a report in order to facilitate a lawsuit against ICBC for lost wages as a result of a motor vehicle accident. The records were refused under Section 14 of the Act; solicitor/client privilege. The Commissioner allowed the denial of disclosure in that the dominant purpose for the creation of the file was for contemplated litigation.

ORDER 7-1994

April 11, 1994

INQUIRY RE: A Request for Access to Records Relating to the Performance of Abortion Services for the Ministry of Health

The applicant asked for 49 records from Everywoman's Health Centre and the Elizabeth Bagshaw Women's Clinic. He received severed portions of some of the records. Other records requested were found not to be under the control or in the custody of the Ministry. The Commissioner read the applicant's submissions and decided that the severing was allowed on the basis of Section 19 (1); the Commissioner felt that if the applicant received the information requested the disclosure may endanger or bring harm to the persons whose information was contained therein.

ORDER NO. 8-1994

May 26, 1994

INQUIRY RE: A Request for Access to Records of the Ministry of Employment and Investment and the Office of the Premier

The applicant asked for release of cabinet submissions and was provided with 427 of the 450 lines of text severed; due to Section 12 stipulations. The Commissioner ordered reconsideration of release and disagreed with the governments "narrow interpretation" of the Act adding that this Section was intended to have a broad interpretation otherwise government would not be operating in the spirit of the Act thus making access to government information little better than prior to the Act's enactment.

ORDER NO. 9-1994

May 26, 1994

INQUIRY RE: A Request for Access to Records of the Ministry of Finance and Corporate Relations

The applicant requested Ministry information which would explain the Treasury Board's denial of cost-of-living increases for non-union managers. The Commissioner ordered release of certain portions he identified and offered a working definition of Section 12 (1) wording:

> "Advice" is a suggested course of action
> A "recommendation" is a favoured or preferred course of action
> "Policy considerations" are the issues that are to be considered before a decision can be reached.

ORDER NO. 10-1994

May 27, 1994

INQUIRY RE: A Request for Access to Records of the Ministry of Social Services

An applicant applied for access to the records held by the Ministry containing his child's personal information. Ministry denied access under Section 4. The child's mother has interim custody of the child pending court orders for final custody. The Commissioner agreed with not allowing access and referred to his decisions in Order 2-1994.

ORDER 11-1994

June 16, 1994

INQUIRY RE: A Request for Access to Records of the Ministry of Health and Dogwood Lodge

An applicant requested records that the Ministry of Health determined were not in their custody or under their control. The Commissioner agreed that the Lodge may have policies and procedures in place that the Ministry can monitor, but that these records were not sufficient to establish that the Ministry had control; the records were very specific to the day to day operations of that particular Lodge. Unlike the situation in Order 7-1994, no contractual language existed between the Ministry and the Lodge in regards to the policy and procedures manuals requested by the applicant.

ORDER 12-1994

June 22, 1994

INQUIRY RE: A Request for Access to Records of the Insurance Corporation of British Colombia

The applicant, a former employee of ICBC, requested files in his name in the custody or under the control of ICBC. ICBC released severed records and some records unsevered; withheld others and severed due to various exceptions under the Act; as well, noted that some records could not be located. The Commissioner confirmed the decision not to release parts of the records but directed ICBC to "make all reasonable efforts to locate allegedly missing records."

ORDER 13-1994

June 22, 1994

INQUIRY RE: A Request for Access to Records of the BC Police Commission

The applicant, a newspaper reporter, requested records of complaint files involving municipal police officers. The applicant was offered a limited summary at a cost of $241.80 for processing the information; the applicant rejected this offer. The applicant requested the Information and Privacy Commissioner review the decision on the basis of Section 25, in that the public interest in the information was clearly paramount in this case. The Commissioner ordered disclosure of the information with severed personal information that would avoid unreasonable invasions of privacy. The Commissioner concluded that "the public body considers the broader interest of public accountability that may be demonstrated by disclosure of the requested information."

ORDER 14-1994

June 24, 1994

INQUIRY RE: A Request to Review a Decision of the Ministry of Aboriginal Affairs

A MLA requested the "BC Financial Review" from the Ministry and received severed information. Under Section 16 and 17, the Commissioner stated that the Ministry had the right to sever and withhold information even though the data was two years old it was still relevant and meaningful.

ORDER NO. 15-1994

July 7, 1994

INQUIRY RE: A Request by Wellington Insurance Company for Access to Records of the Insurance Corporation of British Columbia

The applicant requested ICBC data on extended third party liability insurance and claims. The information was withheld by ICBC on the basis of economic harm. The Commissioner upheld the decision in stating that the records was both "commercial" and "financial."

ORDER NO. 16-1994

July 8, 1994

INQUIRY RE: A Request for Access to Records of the Insurance Corporation of British Columbia

An applicant requested an ICBC insurance claim file as there was a concern for its accuracy. Some information was withheld and some released severed; Sections 14, 15, 16, and 22 were given as the basis for denial of access. The Commissioner confirmed non-release and stated that "any work done by ICBC in settling claims must be done in view to litigation."

ORDER 17-1994

July 11, 1994

INQUIRY RE: A Decision to Release Records of the Ministry of Education

An applicant, a teacher, requested her own Ministry file and was provided with the file except for a third party letter written 20 years earlier by parents of a student the teacher had taught had written. The teacher desired access because she had subsequently lost her job after the letter had been written. The Ministry denied access in stating that the letter had been supplied in confidence; the third party objected to release, all parties lived in a small town and release of the information would make the situation awkward, the teacher already knew of the identity of the parents. The Ministry decided to disclose and sever portions. The BCTF argued that "personal information protected is the personal information of the third party not of the applicant. Disclosing personal information about the applicant to the applicant does no harm to the privacy of the third party. The Commissioner ordered the unsevered release of the record because, unlike order 14-1994, the record was largely about the applicant. The Commissioner noted, "Whatever the standards of the particular school district in 1973, the idea that persons complained against

should not receive copies of written allegations made against them does not accord with the standards of the 1990's."

ORDER 18-1994

July 21, 1994

INQUIRY RE: A Request for Access to Records of the Ministry of Health and Ministry Responsible for Seniors

The applicant requested copies of contracts between the Ministry of Health and the Ministry Responsible for Seniors and Everywoman's Health Centre and the Elizabeth Bagshaw Women's Clinic. The applicant received records with names of employees and clinics severed. The applicant felt that since the activities of the clinic involved public monies, then the activities therein were to be considered public activities. The Commissioner confirmed the decision not to disclose the information under Section 19 (1), in that the applicant could be perceived to threaten anyone associated with abortions as the applicant was involved in the anti-abortion movement.

ORDER NO. 19-1994

July 26, 1994

INQUIRY RE: A Request for Access to Records of BC Transit

An applicant requested copies of contracts between BC Transit and Bombardier Incorporated, a company that supplies parts and services for skirting. BC Transit denied access due to Section 21. The Commissioner agreed with denying access however noted, "I would prefer such claims of confidentiality to be more explicit in future so as to put all parties to a contract on appropriate notice."

ORDER NO. 20-1994

August 2, 1994

INQUIRY RE: A Request for Access to Records of the Ministry of Attorney General

A child counsellor, therapist, applied for records involving a case of suspected child abuse. The abuse was alleged against the owner of a day care centre wherein the child of the therapist's client attended. Included in the records was a report of the applicant's professional handling of the matter. The applicant argued that the document related to himself and the issue and asked for the return of copies of his resume and audiotape made by the child's mother of a therapy session between the child and the applicant. The Ministry denied access. The Commissioner agreed that the documents not be released pending an upcoming trial but asked the Ministry to reconsider access to the records prepared by the parents and who had already consented to the counsellor viewing the records. The Commissioner stated that the applicant should submit his version of the situation and that this submission be attached to the original Ministry record. The Commissioner noted "Upon review, the information appears to consist primarily of opinion. While one can correct factual information on which an opinion is based, one cannot "correct" an opinion."

ORDER 21-1994

August 15, 1994

INQUIRY RE: A Decision to Withhold Records of the Ministry of Health and the Ministry Responsible for Seniors

An applicant requested a copy of records regarding funding of the Inglewood Private Hospital. The applicant was concerned with the care provided therein, as accessed by his mother, in light of the large sums of public money provided to the hospital. The applicant felt that the owners were taking a large profit from the operation resulting in diminished levels of care for the persons within the facility. The information was withheld from the applicant on the basis of Section 21. The Commissioner confirmed the decision not to

release the records but noted that "in future cases I would hope to receive more explicit proof on this matter of expectations of confidentiality."

ORDER NO. 22-1994

September 1, 1994

INQUIRY RE: A Request for Access to Records of the Workers' Compensation Board of British Columbia

INQUIRY RE: A Request to Review a Decision by the Workers' Compensation Board of British Columbia to Disclose a Record

The United Food and Commercial Workers of BC requested access to records regarding WCB's position with Safeway and Overwaitea and Save On Foods stores. The information was denied under Section 21. The Commissioner ordered WCB provide access to all records requested by the applicant and stated that "the information was financial but not explicitly or implicitly supplied in confidence."

ORDER 23-1994

September 16, 1994

INQUIRY RE: A Request for Access to Records of the Criminal Justice Branch of the Ministry of Attorney General

A request by three separate parties for access to the background records used by a special prosecuting attorney, Mr. Richard Peck, in investigating Attorney General Colin Gablemann in regards to allegations of signing a false affidavit and attempting to obstruct justice. The files in consideration were used in preparation by Mr. Peck of a decision not to prosecute in this matter. Mr. Peck's sixteen page report was made public in an effort to retain public confidences in the office, but under Section 14 and 15, the investigative file

was not made public. The Commissioner confirmed nondisclosure as the file contained witness statements and documents.

ORDER 24-1994

September 27, 1994

INQUIRY RE: A Request for Access to Records of the Ministry of Health and the Ministry Responsible for Seniors

An applicant, a reporter, requested a list of severance packages awarded to non-union employees of University Hospital. The access was denied under Section 22 in that disclosure would be an unreasonable invasion of privacy. The applicant argued that Section 22 creates an absolute requirement to disclose as the Hospital, although not a public body under the Act, but was publicly funded through block funding and thus received 85% of its monies in public funding. The Commissioner agreed and ordered disclosure on the basis that the public has a interest in knowing how public money has been spent.

ORDER NO. 25-1994

September 27, 1994

INQUIRY RE: A Request for Access to Records of the Insurance Corporation of British Columbia

This was the second inquiry arising from a request by the applicant for a copy of the investigative report in the custody of ICBC. In Order 5-1993, the record was severed, now under Section 22, a third party objected to the disclosure of one document. ICBC severed personal information and released the severed version. The Commissioner confirmed nondisclosure in considering that the third party advanced a good case, "the applicant has received almost every word of the record in dispute, except for identifying

details of a particular 3rd party, who is concerned about vengeful actions and safety matters..."

ORDER NO. 26-1994

October 3, 1994

INQUIRY RE: A Request for Access to a Record of the BC Hydro and Power Authority

The Office & Technical Employees' Union requested access to a contract between BC Hydro and Westech Information Systems, Inc. Access was denied under Sections 17 and 21. The Commissioner agreed that severed information meets the requirements of non-disclosure under Section 21 exceptions.

ORDER NO. 27-1994

October 24, 1994

INQUIRY RE: A Request by The Province for Access to Suicide Records held by the Ministry of Health and the Ministry Responsible for Seniors

A reporter requested access to the investigation reports into the suicide of a female adolescent under the treatment of the Maples Adolescent Treatment Centre. Under Section 22, the Ministry withheld the majority of the record. When the reporter made another request, access was denied under Section 80 in that the coroner's report was pending. The applicant requested review of the Ministry's decisions in light of public interest in the matter. The Commissioner stated that the test set down in Order 24-1994 meets the concerns expressed by the applicant; the Commissioner agreed it was a matter of public concern, but stated that it does not "suffice for public scrutiny." The Commissioner severed the records himself and tried to "strike a balance between openness and privacy," adding that "the Act makes it quite clear that privacy rights do not automatically end when a person dies."

ORDER 28-1994

November 8, 1994

INQUIRY RE: A Request for Access to the Identify of the Author of a Letter to the Motor Vehicle Branch of the Ministry of Transportation and Highways

An applicant requested copies of his file, and was interested in a physician's letter that stated the applicant ought not be allowed to drive. The Ministry withheld some information on the basis of effect to the third party; all information was released except for the identity of the physician. The Commissioner stated that it is the responsibility of the Information and Privacy Commissioner to determine "whether 3rd party opposing disclosure has legitimate grounds for fearing a hostile response from an applicant...the standard of proof that I require is a balance of probabilities. Further, I do not require that the proof of violence be actual as opposed to potential." Like Order 18-1994, the Commissioner confirmed the decision not to disclose on this basis. The Commissioner further recommended the Motor Vehicle Branch develop a set of guidelines that sets out fair information practices for future dealings.

ORDER 29-1994

November 30, 1994

INQUIRY RE: A Request for Access to Records about Cypress Bowl Recreation Ltd., held by the Ministry of Environment, Lands and Parks and the Ministry Responsible for Human Rights and Multiculturalism

The applicant, the Planning and Program Manager of Cypress Bowl, requested a detailed list of records held by the Ministry in respect to its Park Use Permit. The Manager referred to the Attorney General's comments in introducing Bill 50 for second reading: "...The philosophy underlying the FOI provisions is that government is the public's business and the public has a right, with certain necessary exceptions, to have ready access to information in the hands of government or government agencies." In deciding the case,

the Commissioner allowed severance of one document and nondisclosure of another; adding, like Order 20-1994, that "a public body normally must undertake a line-by-line analysis of an entire record."

ORDER NO. 30-1995

January 12, 1995

INQUIRY RE: A Complaint from the Radio and Television News Directors Association of Canada concerning the handling of a request by the Ministry of Attorney General and the Search Fees that the Ministry Proposed to Charge

The Radio and Television News Directors Association requested information on alleged surveillance of the New Democratic Party convention; feeling that access to information stating that one political party was spending funds spying on the activities of another political party was important information for the public; as the RTNDA is a nonprofit society it stated that search fees should be waived. The Ministry was criticized for minimal efforts at searching for the information and extending over the time limit; 11 months later the Ministry said there were 309 additional boxes to search at a quote of a maximum fee of $6,900 if the entire search were necessary. The Commissioner admonished the Ministry of Attorney General for poor documentation of their search efforts. The Commissioner stated that in order for a fee to be waived, the appropriate waiver must be applied for and thus not in need of a remedy here. The Commissioner did add that he was of the belief that the records would not be found in existence anyway.

ORDER NO. 31-1995

January 24, 1995

INQUIRY RE: A Request for Access to Records of the Office of the Public Trustee of British Columbia

A deceased woman's mother requested access to information on her daughter's committee filed with the Office of Public Trustee. The executor and committee was the same-sex

partner of the deceased woman. Thus although the mother was the closest living relative of the deceased, she was not the executor as per Section 22, or the personal representative. The Commissioner ruled that a same sex relationship was like a marriage relationship thus the executor could also be considered the "nearest relative." The Commissioner ruled that the same-sex partner has the right to control the deceased woman's personal information because she was the executor. The Commissioner stated that "'The nearest relative' is not entitled to access a deceased person's information where a 'personal representative' has been chosen by the deceased." He also added, "This reflects the principle of information self-determination that is, and should be, at the heart of all privacy protection regimes."

ORDER NO. 32-1994

January 26, 1995

INQUIRY RE: A Request for Access to Complaint Records of the Employment Standard's Branch of the Ministry of Skills, Training and Labour

A company against which unfair labour practices were alleged requested records of the employees lodging the complaint. The records had personal information severed from them prior to being release to the company. The Commissioner withheld the documents under Sections 14, 15, 21, and 22; adding in reference to Section 22, that "the harm to the complainants' privacy more than outweigh the interests of the [company]."

ORDER NO. 33-1994

February 2, 1995

INQUIRY RE: A Request for Access to Records about the Premier's Council on Native Affairs

The applicant, a MLA, requested records held by the Premier's Council. Some records were released and some were released severed under Section 12, cabinet confidences. The

Public body severed only one or two words, the references to which part of government brought forward specific recommendations to Cabinet. The Commissioner upheld the decision but added his displeasure,

> I reluctantly accept that a strict interpretation of Section 12 (1) of the Act allows such a severance, but the actual severance is so non-revealing as to run the risk of bringing the process into disrepute. I would have wished for a less technical application that would be more in keeping with the spirit of the Act."

ORDER NO. 34-1995

February 3, 1995

> INQUIRY RE: A Request for Access to a Record held by the Ministry of Transportation and Highways, being a Letter of Complaint about the Applicant written by the Applicant's Neighbour

The applicant requested access to a letter written to the Ministry in complaining of his activities. The Ministry withheld the entirety of the letter although the third party's identification was known to all parties, the third party did not consent to disclosure. The Ministry stated that disclosure was withheld under Section 22 as the information provided by third parties was supplied in confidence. The Commissioner did not determine that the letter was supplied in confidence, stating "I prefer evidence that there were mutual expectations of confidentiality at the time of information collection and, furthermore, that public bodies had good reasons for accepting such information in confidence." The Commissioner, supported by the Manual, Section C.4.13, pp. 31-32, explained his strong feelings on this issue:

> I am of the opinion that individuals have, and should have, full rights of access to communications made about them to public bodies for the purposes of making a complaint...
>
> ...release of this letter may serve to escalate the conflict...but at least it will level the playing field...
>
> In my view, writers of letters of complaint should prepare their

contents with a normal and realistic expectation that their views may become known to the persons they are complaining about.

The Commissioner ordered full disclosure of the letter of complaint.

INVESTIGATION REPORT

INVESTIGATION P94-001

April 27, 1994

Public Service Employee Relations Commission

A MLA, in response to a request for information, was provided records by PSERC that disclosed information on nine persons that amounted to unreasonable invasions of personal privacy. The Information and Privacy Commissioner reviewed the documents released and agreed. Recommendations included: one staff person to review all outgoing correspondence and records for potential disclosures that might be unreasonable invasion of privacy; all requests are to be treated the same; inservice training needed; internal disciplinary measures be taken; and a general apology issued.

INVESTIGATION REPORT

INVESTIGATION P94-002

April 29, 1994

Insurance Corporation of British Columbia

BCTV obtained ICBC files found on site of a movie/TV production company in use as props for various productions. ICBC had contracted Paperboard Industries Corporation for destruction of the files containing personal information. North Shore Studios approached Paperboard Industries to obtain files for props and were given 36 boxes to be returned after use. North Shore Studios were found to have used the files in various movie and television productions and to have discarded some of the files; some of the boxes have been recovered other will never be recovered. The Commissioner's office on checking ICBC's current filing methods found a 10-12% inaccuracy of file placement;

therefore ICBC was not always certain which files had really been destroyed. Under Section 30, the office determined that each and every file ICBC originates should be tracked, not just the box into which files were supposedly placed. On the Commissioner's recommendations, ICBC has instituted a process of on-site shredding and thereafter off-site recycling. The Commissioner concluded:

> All public bodies should consider implementing on-site shredding of sensitive files and records...The difficulty of preventing future unauthorized disclosures of sensitive files requires public bodies to retain custody of files and records until the paper has been reduced to unreadable form, or arrange for other secure disposal methods.

INVESTIGATION REPORT

INVESTIGATION P94-003

May 5, 1994

> Release of Personal Information by the Forensic Psychiatric Services Commission of the Ministry Responsible for Seniors

A complainant requested his file and was released personal information about his victim from sexual assault. The files were released after two health care professionals reviewed them and decided that no harm would arise, the victim's personal information being outdated. The Commissioner reviewed the Ministry standards for access and protection of privacy through informal channels of requests for records. The Commissioner recommended: staff training, uncertain disclosures should be referred to an area contact person, records should be reviewed for unreasonable invasion of privacy not just in accordance with provisions of harm. The Commissioner concluded, "The thrust of the Act is to promote accessibility of information, and it is not my intention that the Act should replace informal processes for access to personal information that are working."

Dear Parent/Guardian:

This letter is being sent to you to let you know about changes to the process of collecting student information. As you know, information is collected on students when they enrol in schools and when they change schools. All of this information is collected by the school or the district and a very small amount is collected by the Ministry of Education. The information the Ministry collects from schools about students is authorized by the School Act (section 99) and Ministerial Order M288/92.

Information collected by the Ministry includes student name. gender, birth date and place of birth, primary language spoken at home, and program/grade participation. The Ministry uses this information to determine program level funding, to plan and evaluate programs, to prepare transcripts and forward them to post-secondary institutions on students' behalf, and to conduct periodic enrolment audits, to sample students for provincial assessments/ surveys, and other related research.

This year there are two changes you should know about. The first change is that all students in B.C. will be given a Personal Education Number (PEN). This number will be assigned by the Ministry, and the school should know the number for each of its new students about February, 1994. You will be told the number if you ask for it. The PEN will become a part of the information every school keeps for all of its students. It will be attached to every student's Permanent Student Record card.

The second change is that the new Freedom of Information and Protection of Privacy Act (Bill 50) regulates how student information is collected, how it is used, and how it is protected from mis-use. The legislation ensures that you are informed about the data being collected and the purposes for which it will be used; the student level data will be used for only those purposes stated. The School Act also contains strong provisions for the protection of student data. The attached brochure provides additional information on both Bill 50 and the PEN.

If you have any questions about the collection of student information, please contact:

district contact name, telephone #

Ministry of Education and Ministry Responsible for Multiculturalism and Human Rights

Appendix 2

Draft letter to parents and/or guardians of students

Dear Parent/Guardian:

This letter is being sent to you to let you know about changes to the process of collecting student information. As you know, information is collected on students when they enrol in schools and when they change schools. About 150,000 students (24%) change schools every year. All of this information is used by the school or the district and a very small amount is stored by the Ministry of Education, which provides transcripts (32,000 annually), grades, and program level funding.

This year, there are two changes you should know about. The first change is that all students in B.C. will be given a Personal Education Number (PEN). This number will be assigned by the Ministry of Education and Ministry Responsible for Multiculturalism and Human Rights. The school should know the number for each of its new students about February, 1994. You will be told the number if you ask for it. The PEN will become a part of the information every school keeps for all of its students. It will be attached to every student's Permanent Student Record card. Several other provinces (Alberta, Manitoba, Saskatchewan, Ontario, Quebec and Newfoundland) all use such a number.

The second change is that the new *Freedom of Information and Protection of Privacy Act* regulates not only how information is collected but also how it is to be protected from misuse. While the legislation does not formally affect school boards until next year, we act as agents of the Ministry in some aspects of record administration and management. In order to collect the information on students, you and they need to be told how the information will be used. The list below shows how the information is used. The legislation strictly prohibits the use of information for any purposes unrelated to, or inconsistent with, those listed below.

The school and/or district uses the information to:

- compile statistical analyses of student movement and performance using unidentifiable records;
- send student records to educational institutions and/or the Ministry; and
- perform administrative functions such as timetabling, attendance, emergency contacts, reporting, and generating transcripts and awards.

N.B.: other purposes to be completed by school/district.

[SEE OVER]

Province of British Columbia

Ministry of Education and
Ministry Responsible for
Multicultural[illegible]n and Human Rights

MEMO

June 25, 1993

District Contacts

RE: **Freedom of Information and Protection of Privacy Act (Bill 50)**

Further to the request for additional information on Bill 50 refer to the attached:

- A simplified sample letter to parents/guardians which should be used as notice in September of the annual data collection cycle. You may wish to make minor changes to this letter but Bill 50 requires this type of information to be sent to parents/guardians.
- A brochure of information to be included as an attachment to the above. The two pages can be copied back-to-back to make a single page brochure.
- A sample letter which should be used to notify teachers of the annual data collection (make minor changes if you wish).
- A backgrounder of information to be included as an attachment to the above letter to teachers.
- And finally, a sample covering letter which could be sent to school principals describing the three memos above.

If you require further assistance please do not hesitate to telephone Darryl Hammond @ 356-2440, Kathy Cordner @ 356-2441 or Eulala Mills-Diment @ 356-0255.

Respectfully yours,

Roy Emperingham
Assistant Director, Data Systems Management
Information Services Branch
telephone 356-2438: fax 356-0277

cc Sam Lim, Executive Director, Communications and Information Services
Derek Sturko, Director, Information Services
John FitzGibbon, Assistant Director, Information Reporting

MINISTRY OF EDUCATION AND MINISTRY RESPONSIBLE FOR MULTICULTURALISM AND HUMAN RIGHTS

Student records: Their Use and Protection

Since 1989, the Ministry of Education and Ministry Responsible for Multiculturalism and Human Rights has been collecting individual student data. This brochure describes two changes affecting the student data collection system this year.

What information is collected now?

The Ministry asks school districts to provide basic information (name, gender, place of birth and birth date) along with primary language spoken at home and program/grade participation.

What does the Ministry use the information for?

The data is used to improve the accuracy of funding decisions; the Ministry transfers funds to school districts based primarily on the number of students enrolled, including the number taking various programs of study. The Ministry also uses the data to plan and evaluate programs, to prepare transcripts and forward them to post-secondary institutions upon request of students, to conduct periodic enrolment audits, to sample students for Provincial assessments/surveys and other related research.

What authority does the Ministry have to collect this data?

The Ministry's collection of student information from schools is authorized by the School Act (section 99) and Ministerial Orders M152/89 and amendment M288/92.

How does the Ministry protect the individual student data?

The Ministry uses the latest technology in computer security to prevent unauthorized access to the database. In its three year existence, there has been no unauthorized access to the database.

Is there any other privacy protection?

The new *Freedom of Information an Protection of Privacy Act* sets out very strict provisions for the protection of personal information. This is the first of the two changes affecting the student data collection system this year.

The new law guarantees you the rights to see your own personal information held by the government (or that of your child) and prevents others from seeing the same information without your prior consent.

The Ministry uses the information to:

1. Purposes Involving Individuals' Records

   - forward transcripts of records and examination results to post-secondary institutions which the student identifies;
   - facilitate previous students' access to their historical records;
   - conduct occasional enrolment audits;
   - facilitate parents' access to their children's records when necessary;

2. Purposes Involving Anonymous Records

   - conduct random, anonymous sampling for provincial learning assessments and other assessments of student performance such as surveys (students, early school leavers and graduates);
   - compile the British Columbia Educational Records Linkage File (Link File), a database of anonymous student records used for research into student movement from secondary to post-secondary institutions;

3. Summary Analyses

   - analyse graduation rates, dropout and withdrawal rates, and the movement of students;
   - prepare summary files used to provide funding for districts and schools;
   - project enrolments in order to determine preliminary funding and plan facilities; and
   - prepare standard and other published reports. A list of Ministry Standard Reports is available upon request.

The information the Ministry collects from schools about students is authorized by the *School Act* (section 99) and Ministerial Order M288/92. If you have any questions about the collection of student information, please contact the person below.

(Name)
(Title)
(Business Address)
(Business telephone number)

Yours, etc.

June 25, 1993

To School Principals:

Re: Freedom of Information and Protection of Privacy Act, the Personal Education Number, and the Student Follow-Up Study.

As you are no doubt aware, the Provincial Government has passed the Freedom of Information and Protection of Privacy Act (Bill 50). This legislation provides for access to public records while also ensuring the protection of privacy of personal information. The legislation currently applies to the Ministry, but will be extended to school districts in 1994.

In order to comply with the legislation, the Ministry must advise students and parents regarding the information the Ministry is collecting on individual students, the legislative authority to collect the information, and what the data is used for.

A sample letter detailing this information has been attached. According to Bill 50, this letter, or something similar, must be distributed to students to take to their parents/guardians prior to the September 30 forms completion. An explanatory brochure is also provided, to accompany each letter.

The letter also discusses the implementation of the Personal Education Number later this year. The number itself resembles the one currently used in the transcripts and examinations system for students writing final Provincial examinations. The Ministry has initiated the vendor re-certification process to allow schools and/or districts who submit data electronically to adopt the new PEN with a minimum of inconvenience. Attached you will find a copy of the information package on the PEN which should answer many of your questions.

The Student Follow-Up Project is a seven-year longitudinal study that will collect information about students who leave school in 1993/94. The Ministry requires your assistance in identifying students who leave the traditional school setting during the year. Samples of the two forms and the instructions for this data collection are included for your information. One is the form to be filled out by the school on each student who leaves the school. The other is a voluntary form for the student to complete. Finalized forms and instructions will be distributed to schools in August through the district contact.

Should you require further information on PEN, the Freedom of Information and Protection of Privacy Act, or the Student Follow-up Project, please call your district contact.

district contact name, telephone number

The government must observe strict standards about how it collects, uses and discloses information about people. We must tell you what data we collect and what we are going to use it for. This is the reason for this brochure.

What is a Personal Education Number (PEN)?

This is the second change to the student data collection system this year.

The PEN is a nine digit number that will be assigned by the Ministry to every student in a B.C. elementary or secondary school. All students, including those taking correspondence and/or in an adult education program will be assigned a PEN. Every student will keep their PEN to help them access education services over time.

How does a student get a PEN?

The Ministry will provide a number for each student and the school districts will assign it to the appropriate school records, such as transcripts or the permanent student record. Students will keep the same PEN even if they leave school early and return some time later. The first batch of PENs will be assigned early in 1994.

What are he benefits of the PEN?

The PEN will have many uses. Students and their parents/guardians will be able to transfer academic records more efficiently when they change schools or apply to a post-secondary institution. About 150,000 B.C. students change school each year.

Many people in the workplace are returning to school to upgrade their qualifications, or retrain for a different career. A PEN will make planning future educational programs more effective and will allow easy access by students to their records as they leave and return to the system. This is particularly true for those students who leave school before graduation.

Will the student's PEN be confidential?

Yes, the same confidentiality provisions included in the *School Act* and the *Freedom of Information and Protection of Privacy Act* that protects other student data will apply to the PEN as well. Apart from very exceptional circumstances, no one will be given access to student's Personal Education Number except for the student and their parent or guardian.

Who can I talk to if I need more information?

In your school district, the following individual will be able to help you if you have any questions:

contact name, telephone number

What are the benefits of the study?

The Student Follow-Up Project will gather information in a number of key areas, including:

- the employment and education activities of former students, their movement in the province, their opinions of secondary and post-secondary education, and the influences that have helped shape their decisions in life;
- an assessment of school curriculum and programs, such as the Stay in School initiatives, designed to keep students in school;
- an assessment by respondents about how well education prepared them for life after secondary school;
- a comparison of the costs and benefits to students who left school early with the costs and benefits to students who graduated and went to work or enrolled in a post-secondary education;
- the rate at which students leave and enter various educational institutions or work over a period of time; and
- the relationship between various demographic factors, such as age and gender, dropping out, returning to school or going to work.

If I have questions, who can answer them?

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