ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-019

March 6, 1997

ALBERTA MUNICIPAL AFFAIRS

Review Number 1081

BACKGROUND:

[1.] On November 16, 1995, the Applicant, through its solicitor, applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Municipal Affairs (the "public body") for access to any information with respect to an investigation undertaken by the former Department of Consumer and Corporate Affairs (now Alberta Municipal Affairs) concerning the Applicant's involvement in a charitable fundraising campaign conducted under the *Public Contributions Act*.

[2.] On February 28, 1996, the public body released 420 pages of records to the Applicant. Of these 420 pages, 146 pages were released with portions severed. The public body cited the following sections of the Act to support non-disclosure of the severed information: section 16 (personal information), section 19 (law enforcement), section 23 (advice), and section 26 (privilege).

[3.] On March 15, 1996, the Applicant requested that my Office review the public body's response. Mediation was authorized but was not successful. The matter was scheduled for inquiry on September 24, 1996.

RECORDS AT ISSUE:

[4.] The records consist of the 420 pages that were released to the Applicant; 146 of those pages were released with portions severed. Of those 146 pages on which information was severed, 78 pages were subject to major severing.

[5.] The public body produced an *Index of Records Categorized by Severing Guide Note Number*, which it provided to the Applicant and to this Office. In correlating the records with this Index, I have made the following two changes to the Index:

> (i) There is no severing on page 92 (Note 1), which is the same as page A-72.
>
> (ii) Page 205 was not listed in the Index, but is contained in the records provided, and has been severed under Note 5.

[6.] This Order reflects the foregoing changes to the Index.

ISSUES:

[7.] There are four issues in this inquiry.

> A. Did the public body correctly apply section 19 (law enforcement) to the records?
>
> B. Did the public body correctly apply section 16 (personal information) to the records?
>
> C. Did the public body correctly apply section 26 (privilege) to the records?
>
> D. Did the public body correctly apply section 23 (advice) to the records?

[8.] Initially, the Applicant also questioned the adequacy of the search for responsive records. When the pubic body provided an explanation of the search and a Statutory Declaration relating to the search, the Applicant did not pursue this issue any further.

DISCUSSION:

Issue A: Did the public body correctly apply section 19 (law enforcement) to the records?

[9.] The public body applied section 19(1)(d) (identity of confidential source) and section 19(2)(a) (exposure to civil liability) to the following pages of the records:

> A-3, A-6, A-10, A-11, A-12, A-16, A-17, A-18, A-19, A-20, A-21, A-22, A-23, A-24 to A-59, A-60, A-69, A-70, A-73, A-74, A-75, A-77, A-78, A-80, A-81, A-133, A-135, A-136, A-137, A-138, A-139, A-140, A-142
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> 1, 2, 8, 14, 24, 36-42, 70, 71, 73, 77, 80, 81, 82, 83, 90, 91, 93, 94, 337-369, 382

[10.] I do not intend to consider the following pages of the records under section 19 of the Act, since I intend to consider those pages under the sections indicated:

section 16(2)(b)	pages A-135
section 23(1)(a)	page A-3
section 26(1)(a)	pages A-18 to A-22, 37-40

(a) Application of section 19(1)(d) (identity of confidential source):

[11.] Section 19(1)(d) of the Act reads:

> *s. 19(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> > *(d) reveal the identity of a confidential source of law enforcement information.*

[12.] To correctly apply section 19(1)(d) of the Act, the public body must establish that (i) law enforcement information is involved, (ii) there is a confidential source of law enforcement information, and (iii) the information in question could reasonably be expected to reveal the identity of that confidential source.

(i) What is "law enforcement" information?

[13.] The public body referred to one of the definitions of "law enforcement" under section 1(1)(h)(ii): "investigations that lead or could lead to a penalty or sanction being imposed." According to the public body, it launched an investigation under the *Public Contributions Act* after receiving certain information from the informant(s). The public body submits that section 10 of the *Public Contributions Act* provides the authority to investigate fund-raising campaigns, primarily to inspect the accounting records of such projects. The investigation may include examining records, conducting on-site inspections, or interviewing individuals. The investigation is used to determine if either section 8 (accounting for funds) or section 15 (unauthorized solicitation) of the *Public Contributions Act* has been contravened.

[14.] The Applicant claimed that for it to be an investigation, there must exist the possibility of charges being laid; consequently, the offence has to be sufficiently identified. The Applicant questioned whether there was in fact an investigation, since only minor matters were identified at the conclusion of the investigation and the allegations were unfounded. The Applicant argued that an investigation is not a general overview. Because there was nothing that could be investigated, and no evidence of wrongdoing was found, the Applicant contends that there was no investigation.

[15.] Black's Law Dictionary defines "investigation" as follows:

> *To follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry.*

[16.] Based on the foregoing definition of "investigation", I do not think that whether a charge is laid or not makes any difference as to whether there is an investigation. In Order 96-006, I stated that the definition of "law enforcement" is limited by the phrase "penalty or sanction". To fall within the definition, an investigation must have the *potential* [my emphasis] to result in a penalty or sanction being imposed under the particular statute or regulation under consideration. It is not possible to determine in advance of an investigation whether a penalty or sanction will be imposed. Therefore, I do not see how it can be said that because a penalty or sanction wasn't imposed at the conclusion of an investigation, that there was no investigation. The outcome of an investigation does not determine whether an investigation is an "investigation" for the purposes of the definition of "law enforcement".

[17.] I also question the Applicant's contention that for it to be an investigation, an offence has to be sufficiently identified. In Order 96-006, I stated that to

meet the definition of "law enforcement", the relevant legislation must grant the authority to investigate and must also set out penalties or sanctions. If those requirements are met, it would seem to me that the connection between the investigative authority and the penalties or sanctions would sufficiently identify the potential offence. In any event, the public body's submission, which was also provided to the Applicant, identified section 8 and section 15 of the *Public Contributions Act* as matters and, thereby, potential offences that may be investigated.

[18.] In order to characterize information as resulting from law enforcement, the public body must establish that it has a law enforcement mandate: see Ontario Order P-416 and British Columbia Order No. 36-1995. In other words, to meet the definition of "law enforcement", the public body must show that it has specific statutory authority to conduct the investigation in question. There must also be a penalty or sanction that can be imposed under that same statute or regulation: see Order 96-006.

[19.] Under section 10 of the *Public Contributions Act*, the public body has the authority to inspect. In my view, the authority to inspect falls within the definition of "investigate".

[20.] Under section 3 of the *Public Contributions Act*, authorization must be obtained to undertake certain activities. Section 6 of the *Public Contributions Act* allows the public body to revoke an authorization under the Act, which is clearly statutory authority to impose a penalty or sanction. Furthermore, under sections 14 and 15, fines for contraventions of the *Public Contributions Act* may be imposed on either an organization or individual, respectively.

[21.] Having shown that it has specific statutory authority to conduct the investigation and that there are penalties or sanctions that may be imposed under the same statute, the public body has established that is has a law enforcement mandate. Consequently, the information related to the execution of that mandate is law enforcement information.

[22.] The Applicant stated that the information from the informant was the "triggering event" for the investigation, and that there was no investigation in progress until the informant came forward with allegations. The Applicant contends that page A-142 of the records, which refers to a phone call that allegedly triggered the investigation, did not make that page of information part of the investigation; the informant merely gave some information that caused investigators to get further information. Other than what the informant told the department, the Applicant states that there was no basis for an investigation. On this reasoning, in the Applicant's view, the draft version and final version of the transcripts of the interview with the informant are also not part of the investigation.

[23.] I would accept the Applicant's argument that law enforcement information does not include information that triggers an investigation, or information compiled in anticipation of an investigation: see British Columbia Order 36-1995. Consequently, page A-142 of the records would not be law enforcement information because the information on that page was one of the triggering events for the investigation and was compiled before the investigation started. Furthermore, the information on pages A-80 and A-81 was compiled before the investigation started; therefore, that information is also not law enforcement information.

[24.] The information on pages A-10 and A-11 is the same as the information on pages A-80 and A-81, with one difference. The heading on page A-80 and the corresponding page A-10 indicates that pages A-80 and A-81 were forwarded by E-mail during the course of the investigation, thus becoming pages A-10 and A-11 of the records. Does the act of forwarding non-law enforcement information make that information "law enforcement information" merely because it has been brought into the investigation? In my view, the answer is no. If the original information is not law enforcement information, I fail to see how that information can suddenly become law enforcement information merely because it has been passed on during the course of the investigation. Therefore, pages A-10 and A-11 are not law enforcement information.

[25.] However, the draft version and final version of the interview transcripts are a different matter. Those versions of the transcripts were produced during the course of the investigation and are therefore law enforcement information. Whether or not there was a basis for the investigation is irrelevant to the issue of whether the transcripts are law enforcement information.

(ii) What constitutes a "confidential source" of law enforcement information?

[26.] The Applicant claimed that because the information on page A-142 of the records triggered the investigation and was therefore not part of the investigation, it could not be said that a confidential source was involved. As to the other pages of the records, the Applicant contends that a confidential source refers to an habitual informant, and not to a one-time source who may possibly be providing information maliciously.

[27.] Again, I agree with the Applicant's submission that the issue of confidential source cannot arise if the public body has not established that law enforcement information is involved: see my comments regarding pages A-10, A-11, A-80, A-81 and A-142 of the records, which I have already dealt with under the preceding subheading (i).

[28.] However, I am intrigued by the Applicant's submission that a confidential source in section 19(1)(d) refers to an habitual informant (such as a person used routinely as an informant), as opposed to a one-time informant. A one-time informant's information may trigger an investigation. As discussed, that information wouldn't be "law enforcement information" because, at the time the information is given, there is no investigation then in progress. Consequently, that informant wouldn't be a confidential source of law enforcement information.

[29.] However, that same informant who provided information that triggered the investigation may subsequently provide further information once the investigation is underway. I prefer to think of such an informant as a "continuing" informant for the purposes of the one investigation, as opposed to an "habitual" informant who provides information for a number of investigations.

[30.] If the informant has either been promised confidentiality or the public body gives evidence of the circumstances in which the information was provided, thereby establishing a "confidential source", I am of the view that the requirements for "confidential source" would be met under section 19(1)(d). I can find no basis upon which to hold that an informant must be an habitual, professional informant in order to be protected. As I stated in Order 96-003, there do not have to be explicit assurances of confidentiality to meet the test for "confidential source" under section 19(1)(d).

[31.] To establish the confidential source(s) of law enforcement information, the public body not only provided evidence of its policy and practice regarding confidentiality, but also provided evidence of requests for confidentiality, promises of confidentiality and the circumstances in which the law enforcement information was provided. The public body's evidence satisfies the requirements for "confidential source(s)" of law enforcement information for all the relevant records except pages A-10, A-11, A-80, A-81 and A-142, previously mentioned.

(iii) Could the information reasonably be expected to reveal the identity of a confidential source of law enforcement information?

[32.] Under this part of the test, the public body may refuse to disclose information that could reasonably be expected to reveal the identity of the confidential source. Section 19(1) does not say that the information that could reveal the identity has to be law enforcement information; it just says *information* [my emphasis]. Consequently, under section 19(1)(d), the identity of the confidential source of law enforcement information can be contained in any other information, whether that information is in a document produced

during the course of the investigation or afterward. The identity does not have to be contained in the law enforcement information itself. The only limitations are that disclosure of the information could reasonably be expected to reveal the identity, and there must be a confidential source of law enforcement information.

[33.] To interpret section 19(1) as referring to disclosure of only law enforcement information would potentially allow for disclosure of the identity of a confidential source by including that identity in non-law enforcement information (that is, in information produced outside the law enforcement context). I do not think that is the intent of section 19(1)(d), especially given that the information in the post-investigation records has come into being by virtue of the information produced during the course of the investigation.

[34.] Having reviewed the records for which the public body claimed an exception under section 19(1)(d), I have found that the information in those records (including records created during both the investigation and post-investigation periods) could reasonably be expected to reveal the identity of a confidential source of law enforcement information.

[35.] I intend to deal with the draft version and final version of the transcripts of the interview with the informant(s) separately under this subheading, because both the public body and the Applicant expressed concern about severing the entire transcripts.

[36.] The public body argued that the transcripts should be severed in their entirety under both section 19 (law enforcement) and section 16 (personal information). The Applicant argued that severing could only be done to protect identity, not the entire record. Even though both the public body's and the Applicant's arguments concerning the transcripts focused primarily on section 16, I intend to discuss the transcripts under section 19(1)(d) because I believe the arguments are relevant for both section 19(1)(d) and section 16. I intend that my comments in relation to the transcripts will also be applicable to another lengthy document that has been fully severed under section 19(1)(d), namely, pages A-136 to A-139 of the records.

[37.] The public body indicated that because the transcripts contained eye-witness accounts and described events and observations, it might be possible for the Applicant to put those comments together to determine which informant(s) had that knowledge. The transcripts contain information relating to events, observations, and occurrences which only a few people would possess. Cumulatively, the information could identify the informant(s). Within the transcripts, the nature and content of the information would have an aggregate effect that would identify the informant(s). To support severing of the entire transcripts, the public body cited Order 96-010, in which I noted that

the contents of a document could identify the informant, and upheld the public body's decision to refuse disclosure of the entire document under section 16.

[38.] The Applicant claimed that the two-page document discussed in Order 96-010 is different from the transcripts, one of which is 33 pages long. Presumably the Applicant was arguing that length of a document should make a difference when it comes to severing the entire document. The public body responded that it was not only relying on section 16, but that section 19 also applied to the transcripts.

[39.] At this point, I believe I need to discuss the similarities and differences between section 16 and section 19 because the public body stated that it severed the transcripts under both section 16 and section 19, for the same reasons.

[40.] Order 96-010 was decided under section 16. In that case, the public body and the Applicant are referring to a two-page record to which section 16(2)(g) of the Act applied. In that Order, I said that section 16(2)(g) was relevant because the record not only contained the name and address of the third party, but it also described events, circumstances and facts. Because those events, circumstances and facts would clearly identify the third party, they fell within the definition of "personal information", namely, recorded information about an identifiable individual (section 1(1)(n)).

[41.] The focus of section 16 is "personal information", as defined. Section 16(1) says that disclosure of the personal information is prohibited if it would be an unreasonable invasion of a third party's personal privacy. Section 16(2) presumes an unreasonable invasion of a third party's personal privacy if any of the requirements of section 16(2) are met.

[42.] Section 19(1)(d) focuses not on personal information generally, but solely on identity, and has different requirements. Those requirements include that the information be law enforcement information, and that it come from a confidential source, as previously discussed. When those two requirements have been met, the public body may refuse to disclose *any* [my emphasis] information that could reasonably be expected to reveal that identity.

[43.] Although the requirements under section 16(1) and 19(1)(d) are different, the evidentiary arguments related to the information may be the same. In other words, events and facts discussed, observations made, and the circumstances in which information is given, as well as the nature and the content of the information, may be shown to be either personal information of an identifiable individual, the disclosure of which would be an unreasonable invasion of a third party's personal privacy under section 16(1), or may be

shown to be information that could reasonably be expected to identify a confidential source of law enforcement information under section 19(1)(d).

[44.] Consequently, the length of the document in which information appears is not significant. To determine whether information, in any document of any length, meets the requirements under either section 16(1) or section 19(1)(d), it is necessary to examine the document in its entirety.

[45.] To make a determination under section 19(1)(d), I have carefully examined both the draft version and final version of the transcripts. I find that the transcripts primarily relate issues and events of which only a very few persons would be aware. The circumstances surrounding the events and the informant's(s') observations are also discussed. I am of the opinion that, if released, the nature, context, and aggregate of information in the transcripts would identify the informant(s). Therefore, since the release of the information contained in the transcripts could reasonably be expected to reveal the identity of a confidential source of law enforcement information, I uphold the public body's decision to refuse disclosure of that information in its entirety under section 19(1)(d).

[46.] The Applicant questioned whether all the information in the transcripts should have been severed. The Applicant cited section 6(2) of the Act, which provides that if information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[47.] I have carefully reviewed the transcripts to see whether any additional information could have been provided to the Applicant. I have identified only seven sentences (one on page A-25; one on page A-33; one on page A-40, and part of one sentence on the same page; one on page A-51; and two on page A-54) that potentially could have been disclosed to the Applicant. However, disclosure of those few sentences out of context would have provided meaningless information to the Applicant and would have been worthless: see *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs*, [1989] 1 F.C. 143 (T.D.), and Order 96-010. Consequently, I hold that the public body reasonably severed those sentences, and I do not order that those sentences be disclosed.

[48.] I have also carefully reviewed pages A-136 to A-139 of the records. Because the other information contained in these pages is so intertwined with the identity(ies) of the informant(s), I find that the information on these pages could also reasonably be expected to reveal the identity of a confidential source of law enforcement information under section 19(1)(d). Therefore, I uphold the public body's decision to refuse to disclose the information on these pages.

(iv) Did the public body exercise its discretion properly under section 19(1)(d)?

[49.] Section 19(1) contains discretionary ("may") exceptions. As such, the public body must exercise its discretion according to the access principles of the Act. However, the Commissioner may not exercise the discretion for the public body, but is limited to requiring the head of the public body to reconsider, if the public body has improperly exercised the discretion: see Order 96-017.

[50.] The public body stated that it exercised its discretion according to the access principles of the Act by disclosing information which would not reveal the identity of the confidential source of law enforcement information. I have reviewed the pages of the records to verify the public body's statement. I find that minimal severing on pages such as 73, 77 and 80 supports the public body's contention that it exercised its discretion properly.

[51.] Therefore, I hold that the public body exercised its discretion properly under section 19(1)(d).

(v) Conclusions under section 19(1)(d)

[52.] The public body correctly applied section 19(1)(d) to the following pages of the records, and I uphold the public body's decision to refuse disclosure to the information contained in those pages:

> A-6, A-12, A-16, A-17, A-23, A-24 to A-59, A-60, A-69, A-70, A-73, A-74, A-75, A-77, A-78, A-133, A-136, A-137, A-138, A-139, A-140
>
> 1, 2, 8, 14, 24, 36, 41, 42, 70, 71, 73, 77, 80, 81, 82, 83, 90, 91, 93, 94, 337-369, 382

[53.] The public body did not correctly apply section 19(1)(d) to the following pages of the record, and I do not uphold the public body's decision to refuse disclosure to information contained in those pages:

> A-10, A-11, A-80, A-81, A-142

(b) Application of section 19(2)(a) (exposure to civil liability):

[54.] The public body applied section 19(1)(d) and section 19(2)(a) to the same pages of the record. Because I have already held that the public body correctly applied section 19(1)(d) to withhold all but pages A-10, A-11, A-80, A-81 and A-

142 of the records, I intend to deal with only those five pages under section 19(2)(a).

[55.] Section 19(2)(a) of the Act reads:

> *s. 19(2) The head of a public body may refuse to disclose information to an applicant if the information*
>
> > *(a) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or an individual who has been quoted or paraphrased in the record.*

[56.] To correctly apply section 19(2)(a), the public body must establish that (i) the information is in a law enforcement record, and (ii) disclosure of the information in the law enforcement record could reasonably be expected to expose to civil liability either the author of or a person quoted or paraphrased in the record.

(i) Is the information in a "law enforcement record"?

[57.] The public body cited "investigations that lead or could lead to a penalty or sanction being imposed" as the definition of "law enforcement". In keeping with that definition, a "law enforcement record" must therefore be a record of information produced during the course of an investigation. Consequently, the requirement that the information be in a law enforcement record under section 19(2)(a) is a much stricter requirement than section 19(1), which simply speaks of disclosure of "information".

[58.] The information contained in pages A-10, A-11, A-80, A-81 and A-142 of the records was the information that triggered the investigation. That information was not produced during the course of the investigation. Consequently, the information contained in those pages is not in a "law enforcement record", and section 19(2)(a) can have no application to that information.

(ii) Could disclosure of the information contained in the law enforcement record reasonably be expected to expose to civil liability either the author of or a person quoted or paraphrased in the record?

[59.] Having determined that the information contained in pages A-10, A-11, A-80, A-81 and A-142 of the records is not in a law enforcement record, I do not find it necessary to consider the issue of exposure to civil liability.

(iii) Conclusions under section 19(2)(a)

[60.] The public body did not correctly apply section 19(2)(a) to the following pages of the records, and I do not uphold the public body's decision to refuse disclosure to the information contained in those pages:

A-10, A-11, A-80, A-81, A-142

Issue B: Did the public body correctly apply section 16 (personal information) to the records?

[61.] Relying on the definition of "personal information" contained in section 1(1)(n) of the Act, the public body applied section 16(1) (unreasonable invasion of third party's personal privacy), section 16(2)(b) (personal information compiled and identifiable as part of investigation into possible violation of law), section 16(2)(g)(ii) (disclosure of name revealing personal information), and section 16(3)(f) (personal information supplied in confidence) to the pages of the records, as follows:

Section 16(1) and section 16(2)(g)(ii):

A-6, A-10, A-11, A-12, A-16, A-17, A-18, A-20, A-21, A-22, A-23, A-24 to A-59, A-60, A-69, A-70, A-73, A-74, A-75, A-77, A-78, A-80, A-81, A-124, A-132, A-133, A-135, A-136, A-137, A-138, A-139, A-140, A-142

1, 2, 8, 14, 24, 36-42, 59, 60, 61, 70, 71, 73, 76, 77, 78, 80, 81, 82, 83, 90, 91, 93, 94, 199, 202, 204, 205, 207, 208, 231, 243, 249, 312, 316, 337-369, 382

Section 16(2)(b) and section 16(3)(f):

A-6, A-10, A-11, A-12, A-16, A-17, A-18, A-19, A-20, A-21, A-22, A-23, A-24 to A-59, A-60, A-69, A-70, A-73, A-74, A-75, A-77, A-78, A-80, A-81, A-133, A-135, A-136, A-137, A-138, A-139, A-140, A-142

1, 2, 8, 14, 24, 36-42, 70, 71, 73, 77, 80, 81, 82, 83, 90, 91, 93, 94, 337-369, 382

[62.] The public body applied section 16(2)(b) and section 16(3)(f) to the same pages of the records to which it applied section 19(1)(d). I did not consider page A-135 of the records under section 19(1)(d) because I stated that I would consider that page under section 16(2)(b).

[63.] Furthermore, the public body applied section 16(1) and section 16(2)(g)(ii) to the same pages of the record to which it applied section 19(1)(d), but withheld the following additional pages under section 16(1) and section 16(2)(g)(ii):

A-124, A-132

59, 60, 61, 76, 78, 199, 202, 204, 205, 207, 208, 231, 243, 249, 312, 316

[64.] I have already held that the public body correctly applied section 19(1)(d) to all but pages A-10, A-11, A-80, A-81, and A-142. Consequently, I intend to deal with only the following pages under section 16:

A-10, A-11, A-80, A-81, A-124, A-132, A-135, A-142

59, 60, 61, 76, 78, 199, 202, 204, 205, 207, 208, 231, 243, 249, 312, 316

(a) Do the foregoing pages of the records contain "personal information", as defined by section 1(1)(n) of the Act?

[65.] The relevant portions of section 1(1)(n) of the Act read:

s. 1(1)(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone

(iii) the individual's age, sex, marital status or family status

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given.

(viii) anyone else's opinions about the individual

(ix) the individual's personal views or opinions, except if they are about someone else

[66.] I have reviewed all the foregoing pages. All the pages contain "personal information" of one or more identifiable individuals.

[67.] The Act does not define "individual". Therefore, I intend to give "individual" its ordinary meaning. For the purposes of the Act, I would define "individual" to mean a single human being.

[68.] The Act also uses the word "person", which is not defined in the Act. However, "person" is defined in section 25(1)(p) of the *Interpretation Act*, R.S.A. 1980, c. I-7 to include a corporation. "Person" and "individual" are not synonymous. Although "person" can include an "individual", "individual" cannot include a corporation or any entity other than a single human being.

[69.] Because the Applicant is not an "individual" under the Act, section 1(1)(n) is not applicable to the Applicant. In other words, there is no "personal information" to which the Applicant would have a right of access under section 6(1) of the Act.

(b) Would disclosure of the personal information be an unreasonable invasion of a third party's personal privacy under section 16(1) of the Act?

[70.] Section 16(1) of the Act reads:

> *s. 16(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.*

(i) Who is a "third party" under section 16(1)?

[71.] As a preliminary issue, the Applicant questioned whether an employee of a government body is a "third party" for the purposes of section 16(1).

[72.] "Third party" is defined in the Act to mean "a person, a group of persons or an organization other than an applicant or a public body". A public body is therefore excluded from the definition of "third party". Is there anything to suggest that an employee of a public body should also be excluded?

[73.] To make this determination, I intend to look first to the purposes of the Act. One of the purposes under section 2(a) is "to allow any person a right of access to the records in the custody or under the control of a public body, *subject to limited and specific exceptions*" [my emphasis] set out in the Act. One of those "limited and specific exceptions" is personal information, which is defined as recorded information about an identifiable individual, including

such information as the individual's name, and home or business telephone number or address.

[74.] If disclosure of personal information would be an unreasonable invasion of a "third party's" personal privacy, the Act requires that the public body refuse to disclose that information. By defining "third party", the Act specifically limits who can be a third party under section 16(1). Neither a public body nor an applicant can be a third party. The definition does not specifically say that an employee of a public body cannot be a third party. I do not think that the plain words of the definition can be interpreted so that an employee of a public body cannot be a third party.

[75.] Furthermore, if an employee of a public body cannot be a "third party", absurd consequences result: there cannot be any "personal information" for that employee under the Act. Consequently, the public body would not be prohibited from disclosing personal information such as an employee's home address or telephone number, educational, financial or employment history, and personnel evaluations. I do not think the Act intended such a consequence, which would be contrary to the purpose of protecting personal information under the Act.

[76.] An interpretation excluding an employee from the definition of "third party" would also make it unnecessary to specifically allow for the disclosure of information as provided by section 16(4)(e) (disclosure of third party's classification, salary range, discretionary benefits or employment responsibilities as officer, employee or member of public body). This is a further indication that the definition of "third party" does not exclude an employee of a public body.

[77.] In my view, an employee of a public body can be compared with an employee of a corporation. An employee of a corporation is considered to be a person separate from the corporate entity; similarly, an employee of a public body is a person separate from the public body itself.

[78.] Consequently, an employee's personal information is to be treated in the same manner as any other individual's personal information under the Act. As such, the public body would consider section 16(2), section 16(3) and section 16(4) to determine whether release of an employee's personal information would be an unreasonable invasion of the employee's personal privacy.

(ii) What presumptions apply under section 16(2)?

[79.] The public body submits that the presumptions contained in section 16(2)(b) (personal information compiled and identifiable as part of investigation into possible violation of law) and section 16(2)(g)(ii) (disclosure of name

revealing personal information) are relevant to its refusal to disclose under section 16(1).

[80.] Section 16(2)(b) and section 16(2)(g)(ii) of the Act read:

> *s. 16(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation*
> >
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party.*

[81.] As previously indicated, the only pages remaining to be dealt with under section 16(2)(b) are pages A-10, A-11, A-80, A-81, A-135, and A-142 of the records. As determined under the discussion of section 19(1)(d), the information on pages A-10, A-11, A-80, A-81 and A-142 was not compiled during the course of an investigation, but was the information that "triggered" the investigation. Consequently, the information on those five pages also does not meet the test under section 16(2)(b). In other words, the personal information on those five pages was not compiled and identifiable as part of an investigation into a possible violation of law. Accordingly, for those five pages, I do not uphold the public body's decision to refuse disclosure of that personal information under section 16(2)(b).

[82.] Page A-135 is another matter. The personal information on that page was compiled and is identifiable as part of an investigation into a possible violation of law. Consequently, I uphold the public body's decision to refuse disclosure of that personal information under section 16(2)(b).

[83.] As to the remaining pages of the records, except for the information in the second column and third column on page A-132, I find that the personal information on those pages consists of a third party's name and, under section 16(2)(g)(ii), the disclosure of the name itself would reveal personal information about the third party. Therefore, under section 16(2)(g)(ii), I uphold the public

body's decision to refuse disclosure of that personal information contained in the following pages of the records:

> A-10, A-11, A-80, A-81, A-124, A-132 (first column only), A-142
>
> 59, 60, 61, 76, 78, 199, 202, 204, 205, 207, 208, 231, 243, 249, 312, 316

[84.] The information in the second column and third column on page A-132 does not meet the criteria under section 16(2)(g)(ii). However, that information does meet the criteria under section 16(2)(g)(i), namely, the personal information consists of the third party's name when it appears with other personal information about the third party. Because section 16 is a mandatory ("must") section, I will apply that section or any part of it, even if the public body does not: see Order 96-008 for my general statement about applying a mandatory section. Therefore, I am applying section 16(2)(g)(i) to exclude, under section 16(1), the personal information in column two and column three on page A-132 of the records.

(iii) What "relevant circumstances" did the public body consider under section 16(3)?

[85.] To determine whether disclosure of personal information would be an unreasonable invasion of a third party's personal privacy under section 16(1) and section 16(2), the public body applied section 16(3)(f) (personal information supplied in confidence). That section of the Act reads:

> *s. 16(3) In determining under subsection (1) or (2) 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*
>
> > *(f) the personal information has been supplied in confidence.*

[86.] In support of section 16(3)(f), the public body provided evidence of the circumstances in which personal information was supplied. That evidence showed that certain personal information was supplied implicitly in confidence. Furthermore, the public body gave evidence that certain persons refused to allow disclosure of their personal information, which also supports the public body's position that certain other personal information was supplied implicitly in confidence.

[87.] The Applicant contends that the public body did not consider all the relevant circumstances under section 16(3). The Applicant states that the public body should have considered section 16(3)(a), namely, whether the disclosure of the personal information "is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny". According to the Applicant, the public body should have considered the Applicant's side of the story and gone to the Applicant when there was an allegation. In this case, the Applicant believes that the public body should have asked the Applicant for a response to the allegations.

[88.] The public body did state that it considered section 16(3)(c) (whether the personal information is relevant to a fair determination of the applicant's rights), but decided that section 16(3)(c) did not apply since the public body had not taken any action that affected the conduct of the charitable fundraising campaign. After considering section 16(4)(g) (no unreasonable invasion of personal privacy if disclosure revealing details of a licence granted to a third party by a public body), the public body released one page of the records.

[89.] If, after considering all the relevant circumstances, including those listed in section 16(3), the public body has determined that there is an unreasonable invasion of a third party's personal privacy, the public body is required to refuse access. Given the public body's evidence of what it considered to be the relevant circumstances under section 16(3), I cannot find fault with the public body's determination that disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy.

(c) Did the Applicant meet the burden of proof under section 67(2)?

[90.] In cases such as this in which the public body has refused access to a record or part of a record containing personal information about a third party, section 67(2) of the Act places the burden of proof on the Applicant to prove that disclosure of personal information would not be an unreasonable invasion of the third party's personal privacy.

[91.] According to the Applicant, during the public body's "review", allegations were made against the Applicant. The allegations were part of a campaign to discredit the Applicant. The Applicant does not know the nature of the allegations made against it during the "review", but "everyone else" does. The Applicant believes that the allegations are widely known to government employees, the Applicant's employees, former employees and to the general public. The Applicant stated that the public body's "review" damaged the Applicant and continues to cause damage because a cloud of suspicion continues to hang over the Applicant.

[92.] Because the Applicant believes allegations were made to discredit it, the Applicant says it wants names and information to meet its accuser, namely, the person who made the allegations. The Applicant claims that too much weight was given to the interests of the accuser; it is necessary to balance the interests of the parties so that there is not a stronger emphasis on the accuser's rights than on the rights of the accused. The Applicant stated that if a public body uses taxpayer dollars to investigate citizens, the public body should release as much information as possible. The Applicant concluded that the public body should sever names and release the rest of the documents.

[93.] In response to the Applicant, the public body emphasized that it was investigating the charitable fundraising campaign, not the organizations involved. It happened that a number of principals of the Applicant were involved in the campaign, so the public body talked to many people. Officials of the campaign were notified at the conclusion of investigation, but the public body itself didn't cause unfavourable publicity. The public body takes the view that if other people talked publicly, that is irrelevant to the public body. The public body stated that it is not aware of any damage done to the Applicant; in any event, the public body did not cause any damage itself.

[94.] I do not accept the Applicant's analogy of accuser and accused. I do accept the public body's statement that a complaint itself cannot lead to a penalty or sanction. In Order 96-010, I made it clear that an informant's complaint merely triggers a public body's investigation. It is the public body that conducts the investigation and decides whether to make an accusation as a result of the investigation. Any accusation made against and penalty or sanction imposed on an applicant is that of the public body, not the informant.

[95.] The Applicant stated generally that it has suffered damage and continues to be damaged by the investigation, but the Applicant did not provide me with any evidence to show how the investigation has had a negative impact on its business. On the contrary, the Applicant's summary of its business would seem to suggest that the Applicant is prospering.

[96.] The Applicant's statement that it has had difficulty attracting and keeping employees as a result of the investigation was also unsupported. Since the Applicant provided no evidence, such as comparative figures related to staff turnover for the pre- and post-investigation periods, I am unable to accept the Applicant's statement that staffing difficulties are the result of this investigation.

[97.] I find that the Applicant's case does not meet the burden of proof under section 67(2).

(d) Conclusions under section 16

[98.] The public body correctly applied section 16(2)(b) to page A-135 of the records, and I uphold the public body's decision to refuse disclosure to page A-135 under section 16(1) of the Act.

[99.] The public body correctly applied section 16(2)(g)(ii) to the following pages of the records, and I uphold the public body's decision to refuse disclosure to those pages of the records under section 16(1) of the Act:

> A-10, A-11, A-80, A-81, A-124, A-132 (first column only), A-142
>
> 59, 60, 61, 76, 78, 199, 202, 204, 205, 207, 208, 231, 243, 249, 312, 316

[100.] I have applied section 16(2)(g)(i) to exclude the information in column two and column three on page A-132 of the records. The information in column two and column 3 is not to be disclosed under section 16(1).

Issue C: Did the public body correctly apply section 26 (privilege) to the records?

[101.] The public body applied section 26(1)(a), (b) and (c) to the following pages of the record:

> A-18, A-19, A-20, A-21, A-22
>
> 20, 21, 37, 38, 39, 40, 52

[102.] Section 26(1) reads:

> *s. 26(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
> >
> > *(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney General or a public body in relation to a matter involving the provision of legal services, or*

> *(c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer.*

(a) Did the public body meet the tests for solicitor-client privilege under section 26(1)(a)?

[103.] To except the foregoing pages of the records, the public body relies on solicitor-client privilege under section 26(1)(a). In Order 96-017, I stated that to correctly apply solicitor-client privilege under section 26(1)(a), the public body must meet the common law criteria for that privilege. Those criteria are set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. In that case, the Supreme Court of Canada stated that solicitor-client privilege must be claimed document by document, and each document must meet the following criteria for the privilege: (i) it is a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[104.] Pages A-18 to A-22 and pages 37-40 of the records meet all the tests for solicitor-client privilege. I would uphold the public body's decision to refuse disclosure of those pages under section 26(1)(a).

[105.] Page 52 of the records meets the first two tests for solicitor-client privilege: it is a communication between solicitor and client, which entails the seeking or giving of legal advice. However, the public body did not provide me with any evidence that the parties intended the communication to be confidential. Consequently, I do not uphold the public body's decision to refuse disclosure of page 52 under section 26(1)(a).

[106.] I note that the information contained in page 52 relates to a person other than a public body. Section 26(2) of the Act states that "The head of a public body *must* [my emphasis] refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body".

[107.] Because section 26(2) is a mandatory ("must") section, I would normally consider whether that section applied, even if the public body did not raise the section. However, I believe that before section 26(2) can apply, all the criteria in section 26(1)(a) must be met. The distinction between section 26(1)(a) and section 26(2) is that section 26(1)(a) is discretionary (the public body "may" disclose the information, even if the criteria are met), but section 26(2) is mandatory (the public body must not disclose the information, if the criteria in section 26(1)(a) and 26(2) are met).

[108.] Since the criteria in section 26(1)(a) have not been met, there is no privilege, and section 26(2) cannot apply to page 52 of the records.

[109.] Pages 20 and 21 of the records must also be considered under section 26(1)(a). Page 20 is a photocopy of a "post-it" note attached to page 19 of the records (page 19 was released to the Applicant, but the "post-it" note was not). Page 21 is the photocopy of page 19, including the "post-it" note attached. The "post-it" note contains a message from one employee of the public body to another. The message summarizes a conversation between the employee and the public body's lawyer.

[110.] The information in the "post-it" note does not meet the criterion that it be a communication between a solicitor and client. Consequently, I do not uphold the public body's decision to refuse disclosure of pages 20 and 21 of the records under section 26(1)(a).

(b) Did the public body meet the tests for section 26(1)(b) (legal services) or section 26(1)(c) (advice or other services)?

[111.] I have already upheld the public body's decision under section 26(1)(a) to refuse disclosure of the information on pages A-18 to A-22 and pages 37 to 40. Therefore, the only remaining pages of the record to be considered under section 26(1)(b) and 26(1)(c) are pages 20, 21 and 52.

[112.] The public body did not present any arguments related to section 26(1)(b) or section 26(1)(c), but had originally stated that it applied those sections to pages 20, 21 and 52, as well as to other pages of the records. Because there is no evidence that the public body intended to abandon its application of section 26(1)(b) and section 26(1)(c), I intend to consider those sections.

[113.] I do not think that section 26(1)(b) applies to pages 20, 21 or 52 of the records. However, section 26(1)(c) would seem to apply. The information contained in the "post-it" note (pages 20 and 21) is "information in correspondence between…a public body and any other person in relation to a matter involving the provision of advice…by the lawyer". The information contained in page 52 also meets this criteria. Therefore, I uphold the public body's decision to refuse disclosure of pages 20, 21 and 52 of the records under section 26(1)(c).

(c) Did the public body exercise its discretion properly under section 26?

[114.] Section 26 is another discretionary ("may") exception.

[115.] The public body gave evidence that it did not always claim solicitor-client privilege: it released page 19 of the records, which was another solicitor-client communication. Furthermore, it did not claim that the information on page A-23 of the records (another solicitor-client communication) was excepted under section 26(1)(a), although it did claim that other sections of the Act excepted the information on that page. This indicates that the public body "turned its mind" to the information and the application of the section to that information.

[116.] Given the public body's evidence, I hold that the public body exercised its discretion properly under section 26.

(d) Conclusions under section 26

[117.] The public body correctly applied section 26(1)(a) to pages A-18 to A22 and pages 37-40 of the records, and I uphold the public body's decision to refuse disclosure of those pages of the records under section 26(1)(a). The public body also correctly applied section 26(1)(c) to pages 20, 21 and 52 of the records, and I uphold the public body's decision to refuse disclosure of those pages under section 26(1)(c).

Issue D: Did the public body correctly apply section 23 (advice) to the records?

[118.] The public body applied section 23(1)(a) (advice) to page A-3 of the record.

[119.] Section 23(1)(a) reads:

> *s. 23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council.*

(a) Did the public body meet the tests for section 23(1)(a)?

[120.] In Order 96-006, I set out the criteria for "advice" (which includes advice, proposals, recommendations, analyses or policy options) under section 23(1)(a). The "advice" should be:

> 1. sought or expected, or be part of the responsibility of a person by virtue of that person's position,

2. directed toward taking an action (this includes making a decision),

3. made to someone who can take or implement the action.

[121.] The information on page A-3 of the records is a recommendation that meets all the above criteria. Therefore, I uphold the public body's decision to refuse disclosure of that information under section 23(1)(a).

(b) Did the public body exercise its discretion properly under section 23(1)(a)?

[122.] Section 23(1) is another discretionary ("may") exception.

[123.] The public body gave evidence that it only severed information on one page of the records, page A-3, under section 23(1)(a). The public body stated that it could also have severed its final report (pages 66-72) and the high-level briefing notes (pages 72-79) under section 23(1)(a), but chose instead to release that information because section 23(1) is discretionary. The public body stressed that it exercised its discretion judiciously.

[124.] Based on the public body's evidence, I hold that that the public body exercised its discretion properly under section 23(1)(a).

(c) Conclusion under section 23(1)(a)

[125.] The public body correctly applied section 23(1)(a) to page A-3 of the records, and I uphold the public body's decision to refuse disclosure of that information under section 23(1)(a).

ORDER:

[126.] I uphold the public body's decision to refuse disclosure of the information contained in all the pages of the records in which the public body severed information, except the information in column two and column three on page A-132 of the records. I have applied section 16(2)(g)(i) of the Act to except from disclosure under section 16(1) of the Act the personal information contained in column two and column three on page A-132 of the records.

[127.] The following table summarizes my decisions, by section number of the Act and page number of the records. The order of this summary follows the order that the sections numbers of the Act were considered in the inquiry.

Section number of the Act	Uphold public body's decision - page number
s. 19(1)(d)	A-6, A-12, A-16, A-17, A-23, A-24 to A-59, A-60, A-69, A-70, A-73, A-74, A-75, A-77, A-78, A-133, A-136, A-137, A-138, A-139, A-140 1, 2, 8, 14, 24, 36, 41, 42, 70, 71, 73, 77, 80, 81, 82, 83, 90, 91, 93, 94, 337-369, 382
s. 16(1) and s. 16(2)(b)	A-135
s. 16(1) and s. 16(2)(g)(i)	A-132 (second and third columns only)**
s. 16(1) and s. 16(2)(g)(ii)	A-10, A-11, A-80, A-81, A-124, A-132 (first column only), A-142 59, 60, 61, 76, 78, 199, 202, 204, 205, 207, 208, 231, 243, 249, 312, 316
s. 26(1)(a)	A-18 to A-22 37-40
s. 26(1)(c)	20, 21, 52
s. 23(1)(a)	A-3

**Commissioner's decision, not public body's decision

Robert C. Clark
Information and Privacy Commissioner