ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-020

December 15, 1997

ALBERTA HEALTH FACILITIES REVIEW COMMITTEE

Review Number 1084

BACKGROUND

[1.] The Alberta Health Facilities Review Committee (the "Public Body") conducted an investigation of the Applicant's health facility. The investigation was conducted under the authority of the *Health Facilities Review Committee Act*, R.S.A. 1980, c. H-4.

[2.] At the same time, Alberta Health, another public body, conducted an investigation of the Applicant's health facility under the *Hospitals Act*, R.S.A. 1980, c. H-11 and the *Nursing Homes Act*, S.A. 1985, c. N-14.1. The Public Body and Alberta Health said that this was a joint investigation. Although the records in Alberta Health's custody are the subject of a separate request for review by the Applicant, I conducted both inquiries simultaneously because each public body had in its custody some of the other public body's records or information. Furthermore, most of the legal arguments were applicable to the records in the custody of both public bodies. However, the records in Alberta Health's custody are the subject of a separate Order.

[3.] On November 2, 1995, the Applicant applied to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the "Act") for access to records concerning the Public Body's investigation. The

Applicant asked "...to examine all records relating to this investigation including the entire contents of your files pertaining to this investigation."

[4.] On March 18, 1996, the Public Body provided access to the records, but severed information in many of those records. The Public Body also refused to disclose some records. The Public Body cited the following sections of the Act to support its non-disclosure of the severed information and its refusal to disclose other records:

- Section 4 (records to which the Act does not apply)
- Section 16 (personal information)
- Section 17 (safety or health)
- Section 19 (law enforcement)
- Section 23 (advice)
- Section 26 (privilege)

[5.] On March 22, 1996, the Applicant requested that my Office review the manner in which the Public Body severed the records. Although I authorized mediation, the Applicant subsequently asked for and was granted the right to proceed directly to inquiry rather than go through mediation.

[6.] The Applicant and the Public Body were notified that an inquiry would be held on October 1 and 2, 1996. My office received the Public Body's submission on September 18, 1996 and the Applicant's submission on September 26, 1996.

RECORDS AT ISSUE

[7.] The records at issue include approximately 583 pages relating to the Public Body's investigation. Of these 583 pages, the Public Body says that approximately 359 pages are subject to review because it has released the remainder of the pages in their entirety to the Applicant. On the Public Body's page count, approximately 224 pages were released in their entirety. I emphasize that these are approximate page counts because my own page count of the number of pages released in their entirety to the Applicant is 251.

[8.] The Public Body said that three pages (pages 348-350) were determined to be not responsive to the Applicant's request. The Public Body therefore removed those pages from the records. I have reviewed pages 348-350 and agree with the Public Body's conclusion.

[9.] In this Order, I will refer to each page individually by page number, and to all the pages collectively as "the Records".

ISSUES

[10.] There are six issues in this inquiry:

A. Does section 4 exclude certain records from the application of the Act?

B. Did the Public Body correctly apply section 26 (privilege) to the records?

C. Did the Public Body correctly apply section 16 (personal information) to the records?

D. Did the Public Body correctly apply section 19 (law enforcement) to the records?

E. Did the Public Body correctly apply section 17 (safety or health) to the records?

F. Did the Public Body correctly apply section 23 (advice) to the records?

DISCUSSION

Issue A: Does section 4 exclude certain records from the application of the Act?

[11.] Section 4 marks out the jurisdiction of the Act and my jurisdiction as well. Consequently, the standard in determining that jurisdiction must be a standard of correctness. In other words, a record is either subject to the Act or not subject to the Act; there is no discretion involved.

[12.] The Public Body claimed that section 4(1)(c) (record created by or in the custody or under the control of an officer of the Legislature) and section 4(1)(l) (record created by or for a member of the Executive Council) excluded certain records from the application of the Act.

1. Application of section 4(1)(c)

[13.] The Public Body applied section 4(1)(c) to pages 301-303 of the Records.

[14.] Section 4(1)(c) reads:

> *4(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:*
>
> > *(c) a record that is created by or is in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer's functions under an Act of Alberta.*

[15.] In Order 97-008, which was issued before this Order, I discussed the interpretation of section 4(1)(c). In that Order, I said that for a record to be excluded under section 4(1)(c), three criteria must be met. There must be:

(a) a record
  (i) created by, or
  (ii) in the custody of, or
  (iii) under the control of
(b) an officer of the Legislature, and
(c) relating to the exercise of that officer's functions under an Act of Alberta

[16.] Section 1(1)(m) of the Act defines "officer of the Legislature" to mean the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner or the Information and Privacy Commissioner.

[17.] For the purposes of section 4(1)(c) in this case, the officer of the Legislature is the Ombudsman.

[18.] Pages 301-303 are a record originating outside the office of the Ombudsman. The Ombudsman received the record. The record relates to the exercise of the Ombudsman's functions under the Ombudsman Act, R.S.A. 1980, c. O-7. Furthermore, I have no doubt that the record received by the Ombudsman is the original record which is in the custody or under the control of the Ombudsman. Therefore, the original record meets the requirements of section 4(1)(c) of the Act and is excluded from the application of the Act.

[19.] However, the Public Body has a copy of this record, and claims that section 4(1)(c) nevertheless applies to this record. If the original record is excluded under section 4(1)(c) of the Act, can a copy also be excluded under section 4(1)(c) if the copy is in the custody or under the control of a public body?

[20.] I considered this same issue in Order 97-008. In that Order, I said:

> *In the Act, "record" means a record of information in any form. In other words, the same information can appear in several different forms of record. A record is merely a conduit for the information. I believe the form in which information appears is secondary to the essence of the information the Act seeks to exclude. The purpose of section 4(1)(c) is to exclude a certain type of information. Presumably, the intent of the Legislature is to exclude that type of information in all its forms.*

[21.] I then went on to say that because the same information appeared in two different forms of records (the original and the copy), I saw no reason to treat the copy differently from the original. Consequently, I held that since the original record was in the custody or under the control of the Ombudsman, section 4(1)(c) applied to exclude the copy from the application of the Act.

[22.] To support this interpretation, I cited the statutory principles of avoiding absurd consequences and keeping with the legislative intent of the Ombudsman Act regarding confidentiality.

[23.] In the concluding part of Order 97-008, I said:

> *In accordance with the statutory interpretation principle that both Acts* [the *Freedom of Information and Protection of Privacy Act*, and the *Ombudsman Act*] *be interpreted harmoniously and consistently, I interpret "custody and control" to include file copies of an original record. Consequently, a record need not be held by the Ombudsman to be "in the custody and under the control" of the Ombudsman. This interpretation of section 4(1)(c) reflects the unique role of the Ombudsman.*

[24.] The principles stated in Order 97-008 apply to the record in this case. Therefore, since pages 301-303 are a record which meets the requirements of section 4(1)(c), that record is excluded from the application of the Act, and I have no jurisdiction over it.

2. Application of section 4(1)(l)

[25.] The Public Body applied section 4(1)(l) to the following pages of the records:

183-205, 235, 294-300, 310a-310f, 378-381, 391-414(a)

[26.] Section 4(1)(l) reads:

> *4(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:*
>
> *(l) a record created by or for*
>
> *(i) a member of the Executive Council,*
> *(ii) a Member of the Legislative Assembly, or*
> *(iii) a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly*
>
> *that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial Agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly.*

[27.] In Order 97-007, which was issued before this Order, I discussed the interpretation of section 4(1)(l). I said that for a record to fall outside the Act by reason of section 4(1)(l), the record must be created by or *on behalf of* any of those classes of persons listed in section 4(1)(l)(i) to (iii). I interpreted *for* to mean *on behalf of,* and said that *for* did not mean *intended to go to* or *destined for* because that interpretation would allow a record created by anyone in the world at large to be excluded from the application of the Act. The concluding part of section 4(1)(l) requires that the record "has been sent or is to be sent" to one of the same three classes of persons listed in section 4(1)(l)(i) to (iii). Therefore, section 4(1)(l) is intended to exclude from the application of the Act communications among only those persons listed in section 4(1)(l)(i) to (iii).

[28.] I would add that if a record is created by a person who acts on behalf of one of the classes of persons listed in section 4(1)(l)(i) to (iii),

either the record must indicate that the individual is acting on that person's behalf, or it must be evident in some other way.

[29.] During an *in camera* discussion about the applicability of section 4(1)(l), the Public Body submitted an Executive Council directive regarding the interpretation of section 4. Using that interpretation, the Public Body claimed that, by virtue of section 4(1)(l), page 183 of the records was excluded from the application of the Act. Page 183 is a record created by the vice-chairman of a Provincial agency, as defined in the *Financial Administration Act*, and sent to the executive assistant of a member of the Executive Council. Page 183 accompanies a report sent to that member of the Executive Council. The Public Body said that it considered that the letter was from the chair to the Minister, even though staff actually transmitted the letter.

[30.] To determine whether section 4(1)(l) applies to page 183, I must decide whether the vice-chairman of the Provincial agency, who created page 183, was acting on behalf of the chair (the chair must also be a Member of the Legislative Assembly), as required by section 4(1)(l)(iii), and whether sending a record to the executive assistant of a member of the Executive Council constitutes sending the record to the member of the Executive Council, as required by the concluding part of section 4(1)(l).

[31.] Was the vice-chairman acting on behalf of the chair? Since the answer to this question is not evident on the face of page 183, I have reviewed the *Health Facilities Review Committee Act*, R.S.A. 1980, c. H-4. Under that legislation, the Minister of Health appoints members to the Alberta Health Facilities Review Committee (the "Committee"). The Committee is a Provincial agency, as defined in the *Financial Administration Act*. The Minister also designates one member of the Committee as chairman and another as vice-chairman. The vice-chairman acts as chairman in certain situations.

[32.] The Committee has three statutory functions: to visit hospitals, to investigate, and to report to the Minister. It has no other function. The role of the chairman is to ensure that the statutory mandate of the Committee is carried out. As "second in command", the role of the vice-chairman is to act on behalf of the chairman to ensure that this same mandate is carried out.

[33.] Page 183 concerns the statutory mandate relating to reporting to the Minister, which the chairman and the vice-chairman must oversee. As such, it can be said that the vice-chairman was acting on behalf of the chair (who is a member of the Legislative Assembly) when the vice-

chairman created page 183. Given the contents of page 183, the vice-chairman has no other reason to create this document. Therefore, page 183 was created on behalf of the chair, for the purposes of section 4(1)(l)(iii).

[34.] Does sending a record to the executive assistant of a member of the Executive Council constitute sending the record to the member of the Executive Council? To answer this question, I must look at the role of an executive assistant generally.

[35.] A member of the Executive Council (a Minister) chooses a person to act as his or her executive assistant. An executive assistant's sole function is to serve the member of the Executive Council. The position of executive assistant has no statutory basis. That person is not a member of the public service. That person ceases to be employed "at pleasure".

[36.] Accordingly, the position of executive assistant is unique. By the nature of the position, an executive assistant necessarily acts on behalf of a member of the Executive Council. Therefore, if there is no reason to send such a record to an executive assistant in his own right, as here, sending a record to an executive assistant of a member of the Executive Council constitutes sending the record to the member of the Executive Council for the purposes of the concluding part of section 4(1)(l).

[37.] Having come to these conclusions, I find that page 183 of the records meets the criteria under section 4(1)(l) of the Act and is excluded from the application of the Act. If a record such as page 183 is properly excluded from the application of the Act, I have no jurisdiction over it.

[38.] Pages 184-205 of the records are a report sent to a member of the Executive Council. The heading of the report indicates that the report was created by a Provincial agency (the Committee). Can the chair be viewed as creating the report on the advice of the Committee, to meet the requirements of section 4(1)(l)(iii)?

[39.] As previously discussed, one of the Committee's statutory functions is to report to the Minister. As the chair oversees the Committee, reporting to the Minister is also the function of the chair, who represents the Committee when reporting to the Minister. Therefore, the chair creates the report on the advice of the Committee, and the chair then reports to the Minister. Consequently, pages 184-205 meet the criteria under section 4(1)(l)(iii), and are excluded from the application of the Act under section 4(1)(l).

[40.] Pages 378-381 and pages 391-409 of the Record are drafts of pages 184-205. In Order 97-008 (previously discussed), I have said that if the original record (in this case, pages 184-205) is excluded from the application of the Act, then the same information appearing in another form of record (for instance, a copy of the original record) should not be treated any differently than the original record. Since the draft pages are another form of record containing the same information as the original record that is excluded under the Act, then the draft pages 378-381 and 391-409 are also excluded under section 4(1)(l).

[41.] Alternatively, it could be said that the draft pages 378-381 and 391-409 are a record that "is to be sent", when rewritten in final form, to a member of the Executive Council (the Minister). If "is to be sent" can be interpreted in this way, then it can be said that the drafts are a record created by the chair of a Provincial agency, as defined in the *Financial Administration Act* (the chair is also a Member of the Legislative Assembly), on the advice of the Committee, and those drafts meet the requirements of section 4(1)(l). Section 4(1)(l) would then specifically exclude those draft pages from the application of the Act, without any consideration as to whether those draft pages contained the same information as the original pages (pages 184-205) of the Record.

[42.] Page 235 of the Records is a letter created by a member of the Executive Council and sent to the chair of a Provincial agency, as defined in the *Financial Administration Act* (the chair is also a Member of the Legislative Assembly). Page 235 meets the criteria under section 4(1)(l) and is excluded from the application of the Act.

[43.] Pages 310a-310f of the records are a letter created by the chair of a Provincial agency, as defined in the *Financial Administration Act* (the chair is also a Member of the Legislative Assembly), and sent to a member of the Executive Council. That record meets the criteria under section 4(1)(l) and is excluded from the application of the Act.

[44.] Pages 294-300 of the Records are a draft of pages 310a-310f. Because pages 294-300 contain the same information as the original pages 310a-310f, section 4(1)(l) also excludes pages 294-300 from the application of the Act.

[45.] Alternatively, pages 294-300 could be said to be a record created by the chair of a Provincial agency, as defined in the *Financial Administration Act* (the chair is also a Member of the Legislative Assembly), on the advice of the Committee. The record "is to be sent", when rewritten in final form, to a member of the Executive Council. If "is to be sent" can be interpreted in this way, section 4(1)(l) of the Act would specifically

exclude pages 294-300 from the application of the Act, without any consideration as to whether those pages contained the same information as the original pages (pages 310a-310f) of the Record.

[46.] Finally, pages 410-414a, which are handwritten notes, do not meet any of the criteria under section 4(1)(l) and are not excluded from the application of the Act.

3. Conclusions under section 4

[47.] Section 4(1)(c) excludes pages 301-303 of the records from the application of the Act. Therefore, I have no jurisdiction over pages 301-303.

[48.] Section 4(1)(l) excludes pages 183-205, 235, 294-300, 310a-310f, 378-381, and 391-409 of the records from the application of the Act. Therefore, I have no jurisdiction over those pages of the records.

[49.] However, section 4(1)(l) does not exclude pages 410-414a of the records from the application of the Act. Those pages are subject to the Act.

[50.] The Public Body did not claim any exception for pages 410-414a under the Act. However, I intend to consider pages 410-414a under section 16 (personal information), which is a mandatory ("must") exception under the Act. In Order 96-008, I set out my jurisdiction to consider a mandatory section of the Act, such as section 16, whether or not a public body raises it.

Issue B: Did the Public Body correctly apply section 26 (privilege) to the records?

[51.] The Public Body said that section 26(1)(a) (legal privilege) applied to certain pages of the Records.

[52.] Section 26(1)(a) reads:

> *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.*

1. "Public interest privilege"

a. Public Body's argument

[53.] The Public Body says that under section 26(1)(a), "public interest privilege" applies to the following pages of the Records:

> 10, 12-19, 23, 24, 27-33, 37-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 161-163, 181, 240-243, 332, 333, 335, 351-358, 361, 366, 369-374, 376, 377, 383-389 (including 386a)

[54.] The Public Body says that under section 26(1)(a) of the Act , the Public Body may refuse to disclose information that is subject to any type of legal privilege. The Public Body argues that section 26(1)(a) does not limit the types of legal privilege, and that another type of legal privilege is "police informant privilege". Citing, in support, the text by John Sopinka, Sidney N. Lederman and Alan W. Bryant entitled *The Law of Evidence in Canada* (Toronto, Ontario: Butterworths Canada Ltd., 1992), and the British case, *D. v. National Society for Prevention of Cruelty to Children*, [1978] A.C. 171 (H.L.), the Public Body says that "police informant privilege" has been extended to statements made by informers in other than a police informant relationship, such as statements made by informants to a local children's aid society. As in *D. v. National Society for Prevention of Cruelty to Children*, the Public Body urges me to find a "public interest privilege" in this case, analogous to "police informant privilege".

[55.] The Public Body argues that "police informant privilege" has already been extended to informants in civil law cases in Canada. In *Director of Investigation and Research, Competition Act v. D & B Companies of Canada Ltd.* (1994), 176 N.R. 62 (Fed. C.A.), the court found that a "public interest privilege" existed, such that the Director was not required to disclose documents concerning a complaint and investigation under the *Competition Act*.

[56.] The Public Body argues that the situation in the present case is stronger than that of a complaint under the *Competition Act* which involves only commercial harm, and is analogous to the situation in *D. v. National Society for Prevention of Cruelty to Children*. Specifically, the Public Body says that both the present case and *D. v. National Society for Prevention of Cruelty to Children* involve complaints about the care of vulnerable members of society: in the latter case, children, and in the present case, patients in a health facility. As in the latter case, the

Public Body argues that the public interest dictates that informants who provide information as to patient care must be protected from being identified.

b. What is "legal privilege"?

[57.] Section 26(1)(a) of the Act excepts from disclosure information that is subject to any type of "legal privilege". If information is "privileged", it does not have to be disclosed. Since the Act does not define "privilege", I must apply the common law: see *British Columbia (Minister of Environment, Lands & Parks) v. British Columbia (Information & Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.).

[58.] Black's Law dictionary defines "legal" as follows: "conforming to the law; according to law; required or permitted by law". Therefore, a "legal privilege" can be a privilege established by a statute, for example.

[59.] A "legal privilege" can also be a privilege at common law. In both *L.L.A. v. A.B.*, [1995] 4 S.C.R. 536 and *R. v. Gruenke*, [1991] 3 S.C.R. 263, the Supreme Court of Canada has said that there are two categories of privilege at common law: a "class privilege" and a "case-by-case privilege".

[60.] A "class privilege" is a privilege already recognized by the common law for a certain kind of information. Solicitor-client privilege and police informer privilege are examples of a class privilege recognized by the common law for solicitor-client communications and for information provided to the police by informers, respectively. A "case-by-case privilege" is a privilege found by a decision-maker to exist for information in a particular case.

[61.] As section 26(1)(a) refers to "any type of legal privilege", I find that section 26(1)(a) encompasses both a "class privilege" and a "case-by-case privilege" at common law.

[62.] Under section 26(1)(a), I have jurisdiction to decide whether an established class privilege applies to prevent disclosure of information. Moreover, I believe that section 26(1)(a) does not preclude my finding that a case-by-case privilege exists in a given case in which one of the parties has said that a "public interest privilege" prevents disclosure of information under the Act. I will discuss "public interest privilege" and how it bears on "class privilege" and "case-by-case privilege", but it is sufficient for now to say that my jurisdiction under the Act includes deciding all questions of fact and law arising in the course of an inquiry (section 66(1)), including whether a case-by-case privilege exists.

[63.] Furthermore, section 56 of the Act supports this view. Section 56 reads:

> *56 Anything said, any information supplied or any record produced by a person during an investigation or inquiry by the Commissioner is privileged in the same manner as if the investigation or inquiry were a proceeding in a court.*

[64.] I agree with *Director of Investigation and Research, Competition Act v. D & B Cos. of Canada Ltd.*, (1994), 176 N.R. 62 (Fed. C.A.) at p. 65, where the court expresses its view that a tribunal has the jurisdiction to determine whether documents are privileged and do not have to be disclosed in the particular context of a proceeding under that tribunal's legislation.

[65.] As to information that is subject to a "class privilege", I have dealt at length with solicitor-client privilege in Order 96-017. I have not yet considered "police informer privilege".

c. What is "police informer privilege"?

[66.] In *R. v. Leipert*, [1997] 1 S.C.R. 281, the Supreme Court of Canada affirmed that "informer privilege", historically known as "police informer privilege", is a legal privilege. The court said that this rule against disclosure of information which might identify an informer was developed to protect citizens who assist in law enforcement and to encourage others to do the same. The privilege applies in civil as well as criminal proceedings. The court or anyone may raise the privilege without formality: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60.

[67.] Although the privilege belongs to the Crown, the privilege also belongs to the informer, such that the only way the privilege can be waived is with the informer's consent. The privilege prevents not only disclosure of the name of an informer, but also any information that might implicitly reveal identity. The Court acknowledged that the smallest details may be sufficient to reveal identity. The Court said that, in many cases, the Crown will be able to contact the informer to determine the extent of information that can be released without jeopardizing anonymity, but the informer is the only person who knows the potential danger of releasing the information to the accused. In the case of an anonymous informer, the Court agreed that the Crown may claim privilege for all the information provided by the informer.

[68.] The Court said that police informer privilege is subject to only one exception: "innocence at stake". In order to raise the "innocence at stake" exception, there must be a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused in a criminal proceeding.

[69.] In *R. v. Leipert*, the Court also identified police informer privilege as a privilege separate from "Crown privilege" and "privileges based on Wigmore's four-part test". Consequently, I have reviewed a number of cases from the Supreme Court of Canada and other courts to determine what these privileges are and whether they apply to this case. What I have discovered is that these three separate privileges are all part of the larger concept of "public interest immunity" or "public interest privilege".

d. What is "public interest privilege"?

[70.] Although there is no consistency of use of the terms "public interest immunity" and "public interest privilege" in the case law, the terms nevertheless mean the same thing. Therefore, I will use the term "public interest privilege".

[71.] In general, "public interest privilege" refers to a determination of whether information should or should not be disclosed. That determination requires that a decision-maker balance two competing public interests: the public interest in maintaining the confidentiality of certain information, and the public interest in disclosing the information for the administration of justice: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60.

[72.] In the case of a class privilege, such as solicitor-client privilege or police informer privilege, this balancing of the two competing public interests has been decided in favour of the public interest in maintaining the confidentiality of the information. This means there are overriding policy reasons for maintaining that confidentiality. In *R. v. Gruenke*, the Court said that a class privilege exists for solicitor-client communications because the relationship and communications between solicitor and client are essential to the effective operation of the legal system, and such communications are inextricably linked with the very system which desires the disclosure of the communication. In *R. v. Leipert*, the Court said that the policy behind police informer privilege is to protect citizens who assist in law enforcement and to encourage others to do the same. The Court was of the view that police informer privilege is of fundamental importance to the workings of a criminal justice system.

[73.] On the other hand, for a "case-by-case privilege" to exist, a decision-maker must determine whether the public interest favours disclosure or

non-disclosure of information in a particular case. In *R. v. Gruenke*, the Court said that the case-by-case analysis requires that the policy reasons for maintaining confidentiality have to be weighed in each particular case.

[74.] The cases I have reviewed concerning case-by-case privilege distinguish between "private records" and "Crown records". "Private records" are defined by the Court in *L.L.B. v. A.B.* to mean a third party's records not in the hands of the Crown (government). The Court says that the term "private records" generally extends to any record in the hands of a third party, in which a reasonable expectation of privacy lies. Examples given by the Court include medical or therapeutic records, school records, private diaries, and social worker activity logs.

[75.] In *R. v. Gruenke*, which concerned "private records", the Court said that the case-by-case analysis has generally involved an application of the "Wigmore criteria", which provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court.

[76.] The Court went on to say that for a case-by-case privilege to apply to private records, the party opposing disclosure must show that the private records meet the four criteria set out by Wigmore in *Evidence in Trials at Common Law*, Vol. 8 (McNaughton rev.) (Boston: Little, Brown & Co, 1961), and adopted by the Supreme Court of Canada in *Slavutych v. Baker* (1976), 55 D.L.R. (3d) 224 (S.C.C.):

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

[77.] The other kind of case-by-case privilege involves "Crown records". From my reading of the cases, "Crown records", that is, government records, includes records containing information relating to government activities or operations, and decisions at the highest level of government,

such as Cabinet decisions concerning national security: see *Carey v. Ontario*, [1986] 2 S.C.R. 637. Historically, the privilege claimed for such records has been called "Crown privilege".

[78.] The historic development of "Crown privilege" is discussed in *Carey v. Ontario*. In that case, the Supreme Court of Canada said that the public interest favouring non-disclosure of a Crown record is not a "Crown privilege", but is more properly called a "public interest immunity" because the court must balance two competing public interests: the public interest in non-disclosure to maintain government secrecy and the public interest in disclosure for the proper administration of justice.

[79.] For a case-by-case privilege to attach to Crown records, the Court in *Carey v. Ontario* said that the Crown must put forth a proper claim based on the criteria for public interest immunity. Those criteria, which have been adopted by *Leeds v. Alberta (Minister of the Environment)* (1990), 69 D.L.R. (4th) 681 (Alta. Q.B.), are:

> (1) The nature of the policy concerned.
>
> (2) The particular contents of the documents.
>
> (3) The level of the decision-making process.
>
> (4) The time when a document or information is to be revealed.
>
> (5) The importance of producing the documents in the administration of justice, with particular consideration to:
>
> > (i) the importance of the case
> > (ii) the need or desirability of producing the documents to ensure that the case can be adequately and fairly represented
> > (iii) the ability to ensure that only the particular facts relating to the case are revealed.
>
> (6) Any allegation of improper conduct by the executive branch towards a citizen.

[80.] In *Carey v. Ontario*, the Court also said that it may itself raise the issue of the application of public interest immunity for Crown records, as indeed counsel may, but the most usual and appropriate way to raise it is by means of a certificate of a Minister or, where permitted by statute, of a senior public servant. In Alberta, section 11 of the *Proceedings Against the Crown Act*, R.S.A. 1980, c. P-18 and section 35 of the *Alberta*

Evidence Act, R.S.A. 1980, c. A-21 govern the procedure for raising public interest privilege for Crown records. In Order 97-010, which was issued before this Order, I have discussed public interest privilege or public interest immunity (formerly, "Crown privilege") as it relates to specific Crown records, namely, Cabinet confidences.

[81.] In this case, the information appears to be both "private records" and "Crown records", as those terms have been defined above. In other words, the information is the informer's information, but it is in the possession of the Crown. The dilemma I am faced with is whether to apply the criteria for "private records" or "Crown records" to determine whether a case-by-case privilege exists for that information. It is clear that since the information in the Records was not provided to the police, police informer privilege, which is a class privilege, does not apply to the information.

[82.] If, as required by the definitions of "private records" and "Crown records", I were to consider only the fact of who possesses the information, neither the Wigmore criteria nor the criteria in *Carey v. Ontario* could be applied to find a case-by-case privilege for such information. That would be absurd.

[83.] Consequently, in considering whether a case-by-case privilege applies to the information, I do not think it matters who has possession of the information. What matters is whose information it is. It is the informers' information. Because it is the informers' information, I believe that the appropriate criteria to apply is that reserved for "private records". Therefore, I intend to apply the Wigmore criteria.

[84.] However, before considering whether a case-by-case privilege applies to the information in this case, I first want to discuss the case law concerning whether a new class privilege can be created for the information. It is clear that the information does not fit within an existing class privilege (it is neither solicitor-client privilege nor police informer privilege).

[85.] The Court in *L.L.A. v. A.B.* has said that to find a class privilege for private records, compelling policy reasons must exist, similar to those underlying the privilege for solicitor-client communications, and the relationship must be inextricably linked with the justice system. The majority of the Court in *R. v. Gruenke* has also said that the Wigmore criteria do not preclude the identification of a new class of privilege on a principled basis.

[86.] However, citing the *Law of Evidence in Civil Cases*, the minority of the Court in *R. v. Gruenke* was of the view that:

> *The extension of the doctrine of privilege consequently obstructs the truth-finding process, and, accordingly, the law has been reluctant to proliferate the areas of privilege unless an external social policy is demonstrated to be of such unequivocal importance that it demands protection.*

[87.] Consequently, I would resist creating a new class of privilege. Instead, I have looked to the following three cases for guidance as to how to proceed in this case: *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records)*, [1981], 2 S.C.R. 494; *Director of Investigation and Research, Competition Act v. D & B. Cos. of Canada Ltd.* (1994), 176 N.R. 62 (Fed. C.A.); and *Dudley v. Doe*, [1997] A.J. No. 847 (Alta. Q.B.).

[88.] In all three of the foregoing cases, the courts have discussed extending police informer privilege, by way of analogy, to similar situations. The majority of the Supreme Court of Canada in *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records)*, and the courts in the other two cases, cited, with approval, *D. v. National Society for Prevention of Cruelty to Children*. In the latter case, Lord Diplock, speaking for the House of Lords, had this to say:

> *I would extend to those who give information about neglect or ill-treatment of children to a local authority or the N.S.P.C.C. a similar immunity from disclosure of their identity in legal proceedings to that which the law accords to police informers. The public interests served by preserving the anonymity of both classes of informants are analogous; they are of no less weight in the case of the former than in that of the latter class...*

[89.] The Court in *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records)* discussed *D. v. National Society for Prevention of Cruelty to Children* in the context of the conduct of the informer, who had provided information in breach of confidentiality provisions under legislation. Nevertheless, the Court was of the view that the public policy which required that the National Society for Prevention of Cruelty to Children, in order to carry out its objects, be

enabled to obtain information from any source under an assurance of confidentiality, also applied to the information obtained by the Crown under an assurance of confidentiality in the case under consideration.

[90.] In *Director of Investigation and Research, Competition Act v. D & B. Cos. of Canada Ltd.*, the court said that policy for not disclosing the complaint and investigation information under the *Competition Act* was "the public interest in protecting...confidentiality, in order to allow complainants to come forward in an uninhibited fashion". The court was of the view that communications to government agencies by informers should be protected in order to enable those agencies to obtain information necessary to the administration of laws.

[91.] In *Dudley v. Doe*, the court said that to extend the reasoning behind police informer privilege and the privilege accorded to those who give information about child abuse, there must be a compelling sense of urgency or a sense of immediacy to the situation, and information must be provided so that immediate action can be taken to address a pressing problem. The court went on to say that if it could not be established that a factual situation clearly granted an individual the protection of a police informer or child abuse reporter, the Wigmore criteria could be used to claim a privilege.

[92.] In this case, the Public Body has asked me to extend to the facts before me the reasoning behind the privilege given to police informers and child abuse reporters.

[93.] In considering whether the situation is analogous, I would ask: Is this a pressing problem in the same way that information given to police or child welfare authorities addresses a pressing problem? This requires that I determine whether the "public interest" weighs in favour of disclosing or not disclosing the information. In the alternative, I intend to consider whether a case-by-case privilege exists under the Wigmore criteria, which also considers the "public interest".

[94.] If the public interest weighs in favour of non-disclosure of the information in this case, the following information does not have to be disclosed: information provided by the informers (see *Director of Investigation and Research, Competition Act v. D & B Cos. of Canada Ltd.*), the names of informers, and any information that would reveal informers' identities (see *R. v. Leipert*). In this Order, "informers' information" refers to any or all of the above kinds of information.

e. Does the "public interest" weigh in favour of disclosing or not disclosing the informers' information to the Applicant?

[95.] As stated in *Dudley v. Doe*, the privilege afforded to police informers has been granted in order to give protection to a category of individuals who may very well be vulnerable to reprisals from those against whom they inform. The policy reason behind the privilege is to protect this source of information since, without the privilege, the information would likely vanish and the end result would be that policing agencies would be impaired in their efforts to detect and prevent crime.

[96.] The court in *Dudley v. Doe* noted that courts in England and in Canada have applied the rationale behind the police informer rule to somewhat similar situations, such as *D. v. National Society for Prevention of Cruelty to Children*. The court went on to say that in that case, the House of Lords noted that the principle source of such information is generally those who are close to the family, such as neighbours, relatives, educators or health care professionals, who maintain their relationship with the family. The House of Lords was of the view that the policy behind extending the privilege was that without an effective protection of confidentiality in relation to information provided, these types of individuals would be very hesitant to come forward to report abuse and neglect, and the Society's ability to learn of such cases would be drastically reduced.

[97.] The facts in the case before me are that informers provided the Public Body with information about potential breaches of the *Hospitals Act* and the *Nursing Homes Act*. The Public Body is one of the investigative and reporting arms of the Minister of Health, who has authority under both the *Hospitals Act* and the *Nursing Homes Act* to require that matters be investigated. Based on the Public Body's investigation and report, the Minister of Health may order a further investigation by Alberta Health, and may suspend or reduce payments under the *Hospitals Act*, and also may order a correction plan, suspend or reduce payments, cancel a contract, or restrict or prohibit admissions to a facility under the *Nursing Homes Act*.

[98.] On the evidence, I find that when the informers gave information to the Public Body, there was a sense of urgency about the situation, such that information needed to be provided so that immediate action could be taken to address a pressing problem. The sense of urgency in this case is similar to that which impels someone to give information to the police about a possible crime or to give information to a children's society about possible child abuse.

[99.] I accept the Public Body's evidence that the informers' information was provided with an assurance of confidentiality.

[100.] Finally, I accept the view of the court in *Director of Investigation and Research, Competition Act v. D & B Cos. of Canada Ltd.* that the public interest in protecting communications to government agencies by informers in order to enable those agencies to obtain information necessary for administration of the law outweighs the public interest in requiring that the information be produced in proceedings under the relevant legislation, in this case, *the Freedom of Information and Protection of Privacy Act*.

[101.] By analogy to police informer privilege, I find that the public interest weighs in favour of not disclosing the informers' information to the Applicant.

f. Does a case-by-case privilege exist under the Wigmore criteria?

[102.] In the alternative, I will now consider whether a case-by-case privilege exists under the Wigmore criteria. For ease of reference, I set out the Wigmore criteria once again:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

[103.] The evidence clearly establishes that the communications to the Public Body originated in a confidence that they would not be disclosed. This meets the first criterion.

[104.] The second criterion has also been met. The evidence is that the informers would not have provided the information without the guarantees of confidentiality. These guarantees of confidentiality established the relationships between the informers and the Public Body, and were necessary for the full and satisfactory maintenance of the relationships: *see Dudley v. Doe*, [1997] A.J. No. 847 (Alta. Q.B.).

[105.] Furthermore, the third criterion has been met, in that I have found that the public interest weighs in favour of protecting informers' communications to government agencies, in order to enable those agencies to obtain information necessary for administration of the law.

[106.] The fourth criterion requires an assessment of the interests served by protecting the communications from disclosure, including privacy interests and the inequalities which may be perpetuated by the absence of protection: *A.M. v. Ryan*, [1997] 1 S.C.R. 157. Moreover, the balancing exercise under the fourth criterion is essentially one of common sense and good judgment: *A.M. v. Ryan*.

[107.] As to Wigmore's fourth criterion, it must be kept in mind that a request for access to a record and an inquiry under the *Freedom of Information and Protection of Privacy Act* is not litigation. Consequently, under Wigmore's fourth criterion, the balance I need to strike is that the injury to the relationship from the disclosure of the information must be greater than an applicant's right of access to the information under section 6(1) of the Act. That right itself is subject to the exceptions under the Act. The purpose for which an applicant wants access to information is not a relevant consideration under the Act.

[108.] What is at issue then is the informers' privacy interests in the context of their relationships with the Public Body, and whether those privacy interests should, in the circumstances of the case, prevail over the Applicant's right of access under the Act.

[109.] Based on the evidence provided, I find that under Wigmore's fourth criterion, the injury to the informers' relationships with the Public Body is greater than the Applicant's right of access to that information under the Act.

[110.] In *A.M. v. Ryan*, the Supreme Court of Canada said:

> *[T]he balance between the interest in disclosure and the complainant's interest in privacy may be struck at a different level in the civil and criminal case; documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant's interest in production.*

[111.] So too I believe that an informer's privacy interests are struck at a different level in a proceeding under the *Freedom of Information and*

Protection of Privacy Act than in civil proceedings, and more easily outweigh an applicant's right of access under the Act. I find that to be the case here.

[112.] Consequently, I find that, under Wigmore's four criteria, the public interest weighs in favour of not disclosing the informers' information to the Applicant.

g. Conclusion as to "public interest privilege"

[113.] I have found that the public interest favours not disclosing the informers' information to the Applicant, and that the public interest privilege for this information is a type of legal privilege under section 26(1)(a). Therefore, the Public Body correctly applied section 26(1)(a) (public interest privilege) to the following pages of the Records:

> 10, 12-19, 23, 24, 27-33, 37-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 161-163, 181, 240-243, 332, 333, 335, 351-358, 361, 366, 369-374, 376, 377, 383-389 (including 386a)

h. Application of section 26(2) of the Act

[114.] Having found that section 26(1)(a) (public interest privilege) applies, I turn to section 26(2).

[115.] Section 26(2) reads:

> *26(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*

[116.] Section 26(2) is a mandatory ("must") section of the Act. In other words, if there is information described in section 26(1)(a) that relates to a person other than a public body, a public body must not disclose that information; it does not have any discretion.

[117.] I have found that section 26(1)(a) (public interest privilege) applies to the foregoing pages of the Records. The information to which section 26(1)(a) (public interest privilege) applies in this case relates to persons other than the Public Body. The information "relates to" those persons because they supplied the information and the information can identify them. Consequently, section 26(2) applies, and the Public Body must refuse to disclose that information to the Applicant.

i. Is section 26(1)(a) ("public interest privilege") incorporated in section 16(2)(b) (personal information) and section 19(1)(d) (law enforcement)?

[118.] I reproduce section 16(2)(b), section 19(1)(d) and section 26(1)(a) here for ease of reference.

> *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.*
>
> *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.*
>
> *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.*

[119.] The issue is whether section 16(2)(b) and section 19(1)(d) of the Act already incorporate public interest privilege for "private records" in the custody of the Crown, such that section 26(1)(a) cannot also include a public interest privilege for those "private records".

[120.] In Order 97-010, which was issued before this Order, I commented that section 21 of the Act does not appear to incorporate the common law as to public interest privilege or public interest immunity (formerly, "Crown privilege") for certain specific Crown documents, namely, Cabinet confidences.

[121.] Consequently, I have reviewed section 16(2)(b), section 19(1)(d) and section 26(1)(a) (public interest privilege) to see whether there are any

differences that would support a public interest privilege for "private records" in the custody of the Crown under section 26(1)(a).

[122.] The most obvious difference is that both section 16(2)(b) and section 19(1)(d) have been limited to information obtained in the "law enforcement" context, as that term is defined in the Act and interpreted in my Orders. Consequently, information that "triggers" an investigation is not protected under either section 16(2)(b) or section 19(1)(d). However, that information would be protected under section 26(1)(a) (public interest privilege), which incorporates into the Act the privilege as it exists at common law. That privilege does not include the "law enforcement" limitation as defined by the Act or my Orders.

[123.] Police informer privilege aside, public interest privilege requires a balancing of the two competing public interests in disclosure and non-disclosure. I have already discussed that balancing. On the other hand, there is no balancing required in making a decision under section 19(1)(d). Although section 16(2)(b) requires that relevant circumstances be considered (section 16(3)) when making a decision under section 16(1) or section 16(2), this consideration of relevant circumstances is not a strict balancing of competing public interests because the Act favours the protection of personal information.

[124.] Moreover, section 26(1)(a), combined with section 26(2), prohibits disclosure of the information. Although section 16(2)(b) is also a mandatory ("must") provision, section 19(1)(d) is discretionary ("may").

[125.] Finally, the Act appears to provide for different levels of protection of information from disclosure: section 16(2)(b) protects personal information, as defined; section 19(1)(d) protects identity, which may include personal information; and section 26(1)(a) (public interest privilege) protects any information provided by an informer, which may include personal information and identity.

[126.] Without having to go further, I conclude from these differences that section 16(2)(b) and section 19(1)(d) have not already incorporated into the Act a public interest privilege for "private records" in the custody of the Crown. Consequently, the Act does not preclude section 26(1)(a) from incorporating the common law public interest privilege for these "private records".

2. Solicitor-client privilege

a. General

[127.] The Public Body says that section 26(1)(a) (solicitor-client privilege) applies to the following pages of the Records:

> 96-98, 109-111, 182, 183, 207-231, 304-310, 311-330, 336-340, 346, 550-583

[128.] Page 183 of the Records was not included in the Public Body's list of exceptions under section 26(1)(a) (solicitor-client privilege), but I noted that section 26(1)(a) was cited on page 183. However, I have already held that page 183 is excluded under section 4(1)(l) of the Act. Consequently, I do not find it necessary to consider page 183 under section 26(1)(a) (solicitor-client privilege).

[129.] In Order 96-017, I discussed section 26(1)(a) (solicitor-client privilege). To correctly apply solicitor-client privilege, a public body must meet the criteria for that privilege, as 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:

> (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.

[130.] I have reviewed all the documents to which the Public Body applied solicitor-client privilege. The documents comprising pages 96-98, 109-111, 182, 207-231, 304-309, 336-340, and 346 clearly meet the criteria for solicitor-client privilege. I have also checked whether these documents were "cc'd" (copied), and to whom, to determine whether the privilege has been waived. I find that certain documents were copied internally to the Public Body; to lawyers in the Attorney General's Department, which provided the solicitors to represent the Public Body; or to the Minister to whom the Public Body reported. Consequently, I find that solicitor-client privilege has not been waived.

[131.] The documents comprising pages 310, 311-330 and 550-583 need to be discussed separately because they differ from the above documents.

[132.] Page 310 is a fax cover sheet. I regard a fax cover sheet as a separate document because it exists independently of the documents it covers, and may itself contain information to which section 26(1)(a) (solicitor-client privilege) applies. Therefore, page 310 is a document separate from pages 304-309. In Order 96-017, I said that solicitor-client privilege cannot apply to a fax cover sheet when the information in that document does not entail the seeking or giving of legal advice. In this case, solicitor-client privilege does not apply to page 310 for the same reason. However, as in Order 96-017, the personal information (names and business telephone numbers) is to be severed from page 310 under section 16(2)(g)(i). See Order 96-008 in which I set out my jurisdiction to apply mandatory ("must") provisions of the Act, such as section 16 (personal information).

[133.] The document comprising pages 311-330 is a communication between employees of the Public Body, who are discussing the application of the legal advice given by the Public Body's solicitor. I have traced that legal advice directly to pages 207-231, a document to which solicitor-client privilege applies.

[134.] In *Mutual Life Assurance Co. of Can. v. Canada (Deputy A.G.)* (1988), 28 C.P.C. (2d) 101 (Ont. H.C.), the court held that a document between employees of a company that transmits or comments on a privileged communication with the company's solicitor was privileged. Privilege for this kind of communication has also been discussed by Ronald D. Manes and Michael P. Silver in *Solicitor-Client Privilege in Canadian Law* (Toronto, Ontario: Butterworths Canada Ltd., 1993), at p. 59. Relying on *Mutual Life Assurance Co. of Can. v. Canada (Deputy A.G.)*, I find that solicitor-client privilege applies to pages 311-330.

[135.] Pages 550-551 are a letter from an employee of the Public Body to the Public Body's solicitor. Pages 552-583 are attachments to pages 550-551. The attachments provide information to the solicitor about ongoing matters concerning which the Public Body has sought legal advice from that solicitor and from another solicitor in the Attorney General's Department.

[136.] Does solicitor-client privilege also apply to that letter and to the attachments?

[137.] In *Solicitor Client Privilege in Canadian Law*, the authors discuss, at p. 27, the view that where a communication between a solicitor and client constitutes a continuum of advice, such communication is privileged. The authors cite, with approval, *Balabel v. Air India*, [1988] 2 All E.R. 246 (C.A.) at p. 254, which states:

> *There will be a continuum of communications between solicitor and client... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.*

[138.] Consequently, I hold that solicitor client privilege applies to pages 550-583.

[139.] Furthermore, in Order 96-015, I said that once I have held that a document meets the criteria for solicitor-client privilege, as set out in *Solosky v. The Queen*, I do not have jurisdiction to apply the Rules of Court relating to discovery of a document. In other words, once I have found that solicitor-client privilege applies to a document, I do not have jurisdiction to delve into that document to determine what part relates to the giving or seeking of legal advice, and therefore is privileged, and what part is merely factual, and must be disclosed. In this regard, I have followed *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)*, [1997] O.J. 1465 (Div. Ct.).

[140.] Moreover, in Order 96-017, I have said that severing under the Act is not a concept applicable to solicitor-client privilege. In this regard, I have followed *British Columbia (Minister of Environment, Lands & Parks) v. British Columbia (Information & Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.).

[141.] Pages 550-583 comprise one document to which I have found that solicitor-client privilege applies. Consequently, the entire document is privileged, and I have no jurisdiction to either determine the factual component under the Rules of Court, or to require that the Public Body sever that document under the Act.

b. Conclusion as to section 26(1)(a) (solicitor-client privilege)

[142.] The Public Body correctly applied section 26(1)(a) (solicitor-client privilege) to the following pages of the Records:

> 96-98, 109-111, 182, 207-231, 304-309, 311-330, 336-340, 346, 550-583

[143.] The Public body did not correctly apply section 26(1)(a) (solicitor-client privilege to page 310. That page is to be disclosed to the Applicant. However, before disclosing that page, the Public Body must first sever the personal information (names and business telephone numbers).

c. Exercise of discretion under section 26(1)(a) (solicitor-client privilege)

[144.] Section 26(1)(a) (solicitor-client privilege), by itself, is a discretionary ("may") exception under the Act. In other words, even though section 26(1)(a) (solicitor-client privilege) applies to information, a public body may nevertheless decide to disclose that information.

[145.] In Order 96-017, I said that to exercise its discretion properly, a public body must show that it took into consideration the access provisions of the Act. In this case, the Public Body provided evidence that it disclosed as much information as it could to the Applicant, other than informers' information which was shared with legal advisors. The Public Body's evidence as to disclosure of information is also supported by the number of pages released in whole or in part to the Applicant.

[146.] Therefore, I find that the Public Body exercised its discretion properly under section 26(1)(a) (solicitor-client privilege).

Issue C: Did the Public Body correctly apply section 16 (personal information) to the records?

1. General

[147.] The Public Body applied section 16 to the following pages of the record:

s. 16(1)	1, 7, 10, 12-19, 22-34, 36-41, 46-53, 55-59, 62, 63, 65-70, 77-83, 99-105, 138-145, 147-155, 158, 160-163, 181, 239-243, 332-335, 351-358, 361-364, 366, 369-374, 376, 377, 382-390 (including 386a), 474-500, 545-549
s. 16(2)(a)	58, 59, 139-145, 160, 240, 242, 390, 474-500
s. 16(2)(b)	10, 12-19, 22-24, 27-33, 37-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 161-163, 181, 240-243, 332, 333, 335, 351-358, 361, 366, 369-374, 376, 377, 383-389 (including 386a)
s. 16(2)(d)	22, 239, 355

s. 16(2)(g)	1, 7, 10, 12-19, 22-34, 36, 37, 40, 41, 47-53, 55-59, 62, 63, 65-70, 77-83, 99-105, 138-145, 147-155, 158, 160-163, 181, 239-243, 332-335, 351-358, 361-364, 366, 369-374, 376, 377, 382-390 (including 386a), 474-500, 545-549
s. 16(3)(e)	10, 12-19, 23, 24, 27-33, 38-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 160-163, 181, 240-243, 332, 333, 335, 351-358, 361-364, 366, 369-374, 376, 377, 383-389 (including 386a)
s. 16(3)(f)	10, 12-19, 23, 24, 27-33, 38-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 160-163, 181, 240-243, 332, 333, 335, 351-358, 361-364, 366, 369-374, 376, 377, 383-389 (including 386a)

[148.] I also intend to consider the following pages of the Records under section 16(1) and section 16(2)(g): 410-414a (including 413a).

[149.] Having reviewed the Records, I have discovered that the Public Body has excepted personal information on the following pages, which are not listed in the Public Body's submission:

94, 107, 119, 123, 347

[150.] The Public Body lists section 16(1) on page 94 of the Records, but pages 107, 119, 123 and 347 except personal information without any indication of the applicable section. Consequently, I intend to consider page 94 and page 347 under section 16(1), and pages 107, 119, and 123 under section 16(1) and section 16(2)(g).

[151.] I have already found that section 26(1)(a) (public interest privilege) applies to the following pages of the Records to which the Public Body also applied section 16:

10, 12-19, 23, 24, 27-33, 37-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 161-163, 181, 240-243, 332, 333, 335, 351-358, 361, 366, 369-374, 376, 377, 383-389 (including 386a)

[152.] Nevertheless, in this case, I intend to consider the application of section 16 to those same pages.

2. Do the foregoing pages of the records contain "personal information"?

[153.] “Personal information” is defined in section 1(1)(n) of the Act. The relevant portions of section 1(1)(n) read:

> *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 number,*
>
> *(iii) the individual's age, sex, marital status or family status,*
>
> *(vi) information about the individual’s health and health care history, including information about a physical or mental disability,*
>
> *(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.*

[154.] The Public Body stated that it not only severed those kinds of personal information listed in section 1(1)(n), but also severed any information that may have identified an individual because it considers such information to be “personal information”. The Applicant objects to severing any information that could identify an individual, because the Applicant believes that is too broad an interpretation of "personal information".

[155.] In Order 96-002, I said that the list of personal information is not exhaustive, and that any recorded information about an identifiable individual can be "personal information" for the purposes of section 1(1)(n).

[156.] In Order 96-010, I said that "recorded information about an identifiable individual" in section 1(1)(n) can include information about

events, circumstances and facts that would identify an individual. Furthermore, in Order 96-019, I discussed Order 96-010, and stated once again that 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 personal information because it can be shown to be "recorded information about an identifiable individual".

[157.] Furthermore, I find that handwriting is personal information because it is "recorded information about an identifiable individual".

[158.] Consequently, I find that all of the information severed by the Public Body under section 16(1) is "personal information", except the information severed on pages 46, 78, 361, and 366 (last two severed lines).

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

[159.] Section 16(1) reads:

> *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.*

[160.] I will come back to section 16(1) when I have considered the other provisions of section 16.

4. What presumptions apply under section 16(2)?

[161.] Under section 16(2) of the Act, a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if any of the presumptions under section 16(2) are met.

[162.] The Public Body said that a number of presumptions applied to the personal information under section 16(2). I have considered these presumptions, although not in the order set out by the Act.

a. Application of section 16(2)(g)

[163.] The Public Body said that section 16(2)(g) applies to the following pages of the Records:

1, 7, 10, 12-19, 22-32, 33 (third severed item only), 34, 36, 37, 40, 41, 47-53, 55-59, 62 (first and second bullets only), 63, 65-70, 77-83, 99-105, 138-145, 147-155, 158, 160-163, 181, 239-243, 332-335, 351-354, 355 (second to fourth severed items only), 356-358, 361-364, 366, 369-374, 376, 377, 382-390 (including 386a), 474-500, 545-549

[164.] I note that the Public Body's submission is in error with respect to page 37, as the Records do not indicate that section 16(2)(g) was applied to page 37, nor is section 16(2)(g) applicable in my opinion. Consequently, I have deleted page 37 from consideration under section 16(2)(g).

[165.] Also, the Public Body's submission did not indicate that it severed the last item on page 39 under section 16(2)(g). I have included that item under section 16(2)(g).

[166.] I have also said that I will consider the following pages under section 16(2)(g):

107, 119, 123, 410-414a (including 413a)

[167.] Section 16(2)(g) reads:

> *16(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party, or*
> > >
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party.*

[168.] I have carefully reviewed the records, and find that the Public Body correctly applied section 16(2)(g) to the following pages of the Records:

1, 7, 10, 12-19, 22-24, 25 (second severed item only), 26-32, 33 (third severed item only), 34, 36, 40, 41, 47-51, 52 (fifth severed item only), 53, 55,

77, 79-83, 99-105, 138-145, 147-155, 158, 161-163, 181, 239, 240 (second severed item), 241, 242 (second severed item), 243, 332-335, 351-354, 355 (second to fourth severed items only), 356-358, 362-364, 366 (everything severed except the last two severed lines), 382-390 (including 386a), 474-500, 545-549

[169.] I also find that section 16(2)(g) applies to the following pages of the Records:

107, 119, 123, 410-414a (including 413a)

[170.] In determining whether section 16(2)(g) applies, I have looked at each document, as well as individual pages within a document. If a third party's name appeared in the document, and the other personal information consisted of handwriting, or information, the context of which identified that third party throughout the document, I determined that section 16(2)(g) was properly applied to that document, even if the third party's name did not appear on each page of the document. This contextual approach to determining whether there is personal information is consistent with Order 96-010 and Order 96-019.

[171.] The Public Body did not correctly apply section 16(2)(g) to the following pages of the Records:

25 (first severed item only), 39 (last severed item only), 52 (everything severed, except the fifth severed item), 56-59, 62 (first and second bullets only), 63, 65-70, 78, 160, 240 (first severed item), 242 (first severed item), 361, 366 (last two severed lines), 369-374, 376, 377

[172.] The first requirement under section 16(2)(g) is that there be a third party's name. The Public Body incorrectly applied section 16(2)(g) to the above pages because the documents comprising those pages do not contain a name, which must appear with the third party's other personal information. Nevertheless, all these pages, except pages 78, 361 and 366 (last two severed lines) contain other personal information of third parties.

b. Application of section 16(2)(d)

[173.] The Public Body said that section 16(2)(d) applies to the following pages of the Records:

22, 239, 355 (second severed item only)

[174.] Section 16(2)(d) reads:

> *16(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(d) the personal information relates to employment or educational history.*

[175.] I have already found that section 16(2)(g) applies to the personal information severed on pages 22, 239 and 355 (second to fourth severed items only). Consequently, I do not find it necessary to decide whether section 16(2)(d) also applies to that same information.

[176.] Although the Public Body, in its submission, withdrew the application of section 16(2)(d) to page 25 (first severed item only), in fact, section 16(2)(d) applies because the personal information relates to employment history. Consequently, I have applied section 16(2)(d) to that personal information on page 25 (first severed item only). Moreover, I would sever that personal information under section 16(1) even if section 16(2)(d) did not apply.

c. Application of section 16(2)(a)

[177.] The Public Body said that section 16(2)(a) applies to the following pages of the Records:

> 58, 59, 139-145, 160 (third and fifth paragraphs only), 240, 242, 390, 474-500

[178.] Section 16(2)(a) reads:

> *16(2) 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.*

[179.] I have already found that the Public Body correctly applied section 16(2)(g) to pages 139-145, 240 (second severed item), 242 (second

severed item), 390, and 474-500. Consequently, I do not find it necessary to consider whether section 16(2)(a) also applies to that same information.

[180.] Of the remaining pages, I find that the Public Body correctly applied section 16(2)(a) to page 160 (third and fifth paragraphs only).

[181.] I find that the Public Body did not correctly apply section 16(2)(a) to pages 58, 59, 240 (first severed item), and 242 (first severed item).

d. Application of section 16(2)(b)

[182.] The Public Body said that section 16(2)(b) applies to the following pages of the Records:

> 10, 12-19, 22-24, 27-32, 33 (first and second severed items), 37-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 161-163, 181, 240-243, 332, 333, 335, 351-358, 361, 366, 369-374, 376, 377, 383-389 (including 386a)

[183.] Section 16(2)(b) reads:

> *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.*

[184.] I have already found that section 16(2)(g) applies to personal information on the following pages of the Records:

> 10, 12-19, 22-24, 27-32, 33 (third severed item only), 40, 41, 47-49, 51, 52 (fifth severed item only), 55, 77, 79-83, 99-104, 147-155, 158, 161-163, 181, 240 (second severed item), 241, 242 (second severed item), 243, 332, 333, 335, 351-354, 355 (second to fourth severed items only), 356-358, 366 (everything severed except the last two severed lines), 383-389 (including 386a)

[185.] I intend to consider the following pages of the Records under section 19(1)(d):

> 37-39, 46, 52 (everything other than the fifth severed item), 58-59, 62, 63, 65-70, 78, 240 (first severed item), 242 (first severed item), 355 (first severed item), 361, 366 (last two severed lines), 369-372, 376, 377

[186.] That leaves me with only the following pages of the Records to consider under section 16(2)(b):

> 33 (first and second severed items), 56, 57, 373, 374

[187.] The Public Body argued that it correctly applied section 16(2)(b) because it compiled the personal information as part of its investigation. The Public Body points to its authority to investigate under section 7 and section 8 of the *Health Facilities Review Committee Act*.

[188.] However, the *Health Facilities Review Committee Act* does not contain any penalties or sanctions. In Order 96-006, I discussed the application of section 16(2)(b):

> *In applying section 16(2)(b) I believe that I should interpret "law" in the same way as "law" in the definition of "law enforcement", contained in section 1(1)(h)(ii) and applied in section 19(1). Both "law" and "law enforcement" should encompass the notion of a violation of a statue or regulation, and a penalty or sanction imposed under the same statute or regulation.*

[189.] The Public Body nevertheless argues that although there is no penalty or sanction under its own legislation, the Public Body's legislation works in conjunction with a "bundle" of health care legislation which does contain penalties or sanctions. The Public Body says that its investigation is a precursor to further investigations. The Public Body reports the results of its investigation to the Minister of Health, who may authorize a further investigation to be carried out by Alberta Health under the authority of the *Hospitals Act* and the *Nursing Homes Act*, which contain penalties or sanctions. Consequently, the Public Body is of the view that the penalties or sanctions contained in the *Hospitals Act* and the *Nursing Homes Act* are sufficient to bring it within the definition of "law" and "law enforcement" under the Act.

[190.] I do not agree with the Public Body's argument. I accept the statement of the British Columbia Information and Privacy Commissioner, in Order 36-1995, when he said: "A public body cannot rely on the statutory mandate of another body to impose sanctions in order to locate its actions within the Act's definition of law enforcement." Furthermore, my interpretation of "law" and "law enforcement" in Order 96-006 has been upheld on judicial review: see *Her Majesty the Queen in Right of Alberta and The Minister of Justice v. Richard Roy and the Information and Privacy Commissioner*, (December 3, 1996), Doc. Edmonton 9603-16335 (Alta. Q.B.). Consequently, the Public Body did not correctly apply section 16(2)(b) to the following pages of the Records:

> 33 (first and second severed items), 56, 57, 373, 374

5. What if no presumptions apply under section 16(2)?

[191.] I have found that no presumptions under section 16(2) apply to the personal information severed on the following pages of the Records:

> 33 (first and second severed items), 56, 57, 94, 160 (everything severed except the third and fifth paragraphs), 347, 373, 374

[192.] The information on these pages is nevertheless personal information for the purposes of section 16(1). In considering whether disclosure of personal information would be an unreasonable invasion of a third party's personal privacy, I do not think it is necessary that the personal information also meet one of the presumptions under section 16(2). I am reinforced in this view by section 16(3), which is worded so that consideration of all the relevant circumstances applies to either section 16(1) or section 16(2).

[193.] Consequently, I find that section 16(1) applies to the following pages of the Records:

> 33 (first and second severed items), 56, 57, 94, 160 (everything severed except the third and fifth paragraphs), 373, 374

[194.] However, I do not think that disclosure of the personal information on page 347 of the Records constitutes an unreasonable invasion of the third party's personal privacy section 16(1). That personal information is a Minister's name, and it is clear from the Record that the name appears because the Minister is acting in the Minister's official capacity.

Consequently, I find that section 16(1) does not apply to that information, and page 347 of the Records is to be disclosed unsevered to the Applicant.

6. What "relevant circumstances" did the Public Body consider under section 16(3)?

[195.] To determine whether disclosure of personal information would be an unreasonable invasion of a third party's personal privacy, section 16(3) of the Act requires that the Public Body consider all the relevant circumstances, including those listed in section 16(3). Section 16(3) is a non-exhaustive list.

[196.] The Public Body said it considered section 16(3)(e) (unfair exposure to financial or other harm) and section 16(3)(f) (personal information supplied in confidence). The Applicant says the Public Body should also have considered section 16(3)(a) (public scrutiny).

a. Section 16(3)(e) as a relevant circumstance

[197.] The Public Body said it considered that section 16(3)(e) was a relevant circumstance for the following pages of the Records:

> 10, 12-19, 23, 24, 27-33, 38-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 160-163, 181, 240-243, 332, 333, 335, 351-358, 361-364, 366, 369-374, 376, 377, 383-389 (including 386a)

[198.] I intend to review section 16(3)(e) as it concerns only those pages remaining to be considered under section 16.

[199.] Section 16(3)(e) reads:

> *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*
>
> > *(e) the third party will be exposed unfairly to financial or other harm.*

[200.] The "harm" in this case concerns the retribution the third parties believe will be taken against them if they are found out. The evidence is

that the third parties are apprehensive, and in some cases fearful, of the following kinds of harm: changes in patient care, changes in patient residence, loss of hours of employment, loss of employment, and mental and emotional distress. The Public Body says it also considered exposure to civil liability under section 16(3)(e).

[201.] The Applicant argues that exposure to civil liability cannot be considered as "harm" for the purposes of section 16(3)(e). The Applicant maintains that exposure to a lawsuit is not unfair, and that whether a lawsuit is unfair is for the courts to decide.

[202.] I do not find any limitation on the kinds of harm that can be considered under section 16(3)(e). While I believe that exposure to civil liability can constitute "harm" because it can place a person in a financially precarious position or cause mental or emotional distress, section 16(3)(e) does not focus solely on the kind of harm. The focus of section 16(3)(e) is whether there is *unfair* [my emphasis] exposure to harm. It is up to the Public Body to decide that issue, based on a consideration of the circumstances.

[203.] The evidence is that third parties were promised confidentiality if they came forward with their complaints and information relating to patient care and other matters. In these circumstances, the third parties would be exposed unfairly to financial or other harm if their personal information were disclosed. Even if exposure to civil liability does not constitute "harm", the Public Body has presented evidence of many other kinds of harm which it took into consideration under section 16(3)(e). Therefore, I find that section 16(3)(e) is a relevant circumstance to consider when deciding whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy.

b. Section 16(3)(f) as a relevant circumstance

[204.] The Public Body said it considered that section 16(3)(f) was a relevant circumstance for the following pages of the Records:

> 10, 12-19, 23, 24, 27-33, 38-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 160-163, 181, 240-243, 332, 333, 335, 351-358, 361-364, 366, 369-374, 376, 377, 383-389 (including 386a)

[205.] I intend to review section 16(3)(f) as it concerns only those pages remaining to be considered under section 16.

[206.] Section 16(3)(f) reads:

> *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.*

[207.] I am satisfied by the evidence that the personal information was supplied in confidence. An explicit assurance of confidentiality was given to all the third parties who came forward with information.

[208.] Furthermore, the Public Body gave evidence that it contacted all those third parties that it could to determine whether the Public Body could disclose the personal information. The Public Body's evidence is that all those third parties who were contacted refused to consent to the disclosure of their personal information.

[209.] I find that section 16(3)(f) is a relevant circumstance to consider when deciding whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy.

c. Section 16(3)(a) as a relevant circumstance

[210.] The Applicant says that the Public Body should have considered section 16(3)(a) as a relevant circumstance.

[211.] Section 16(3)(a) reads:

> *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*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny.*

[212.] I asked the Applicant to tell me whose actions were being scrutinized here: the Public Body's actions or the actions of the third parties who gave information to the Public Body. The Applicant says that

the two cannot be separated since the Public Body acted on the third parties' information. Furthermore, the Applicant says that it does not know the allegations made against it, and that the character of the persons who made the allegations has to be looked at. The Applicant believes that the allegations were unfounded.

[213.] The Applicant also objects to the fact that, when deciding what information to sever from the Records, the Public Body consulted with a certain employee of the Public Body whose conduct the Applicant says is the subject of this inquiry. The Applicant argues that such consultation injects a note of subjectivity into the process. The Applicant says that severing should be looked at by persons who have no interest in the severing. The Applicant believes that the review of the records needs to be undertaken from a greater distance because a person who is the subject of an inquiry would like to avoid scrutiny.

[214.] In Order 97-002, which was issued before this Order, I considered the interpretation of section 16(3)(a). In that Order, I said that evidence had to be provided to demonstrate that the activities of the public body had been called into question, necessitating disclosure of personal information to subject the activities of the public body to scrutiny. I followed the following Ontario Orders: (i) Ontario Order P-347, which held that it was not sufficient for one person to have decided that public scrutiny was necessary; (ii) Ontario Order M-84, which held that the applicant's concerns had to be about the actions of more than one person within the public body; and (iii) Ontario Order P-673, which held that where the public body had previously disclosed a substantial amount of information, the release of personal information was not likely to be desirable for the purpose of subjecting the activities of a public body to public scrutiny. This was particularly so if the public body had also investigated the matter in issue.

[215.] In this case, I find that (i) only the Applicant has decided that public scrutiny is necessary; (ii) the Applicant appears to be focusing on the actions of the third parties, as opposed to the actions of the Minister or potentially one of the Public Body's employees; however, if the Applicant is focusing on one of the Public Body's employees, that does not meet the requirements of section 16(3)(a); (iii) the Public Body has provided evidence that it disclosed a substantial amount of information to the Applicant, and that it investigated the third parties' complaints against the Applicant. Ultimately, after both the Public Body and Alberta Health investigated the complaints, the Minister of Health required that the Applicant submit a correction plan under section 20 of the *Nursing Homes Act*. A correction plan is a plan of action which must be

submitted to the Minister to correct anything found to be in contravention of the *Nursing Homes Act* or regulations.

[216.] Furthermore, I find nothing unusual about a public body's consulting with any one of its employees about information to be severed in records, even if, as here, the employee has particular knowledge about the circumstances surrounding the records. In any event, I have the responsibility to provide for an independent review of any decision made by a public body under the Act, including a decision to sever records.

[217.]Consequently, I find that section 16(3)(a) is not a relevant circumstance to consider when deciding whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy in this case.

d. Other relevant circumstances

[218.] The Public Body gave evidence that it contacted as many of the third parties that it was able to contact. Certain third parties could not be contacted for the following reasons: the third parties were patients in the Applicant's health facility, and contacting those third parties would breach their confidentiality; the third parties' phone numbers were no longer in service; or the Public Body had incomplete addresses for third parties. However, in all cases in which the Public Body contacted third parties, the third parties refused to consent to the disclosure of their personal information.

[219.] Consequently, I find that the third parties' refusal to consent to the disclosure of their personal information is, of itself, a relevant circumstance to consider when deciding whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy in this case.

e. My role under section 16(3)

[220.] 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. My role under section 16(3) is to determine whether the Public Body used the right process. I find that the Public Body used the right process in this case.

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

[221.] 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 a third party's personal privacy.

[222.] Certain information supplied by individuals during the Public Body's investigation can be described as those individuals' personal views or opinions about the Applicant. The Applicant says that those personal views or opinions are its "personal information", and it is entitled to its "personal information" under the Act.

[223.] Under section 1(1)(n)(ix) of the Act, an individual's personal views or opinions are considered to be that individual's personal information, *unless the individual's personal views or opinions are about someone else* [my emphasis]. Since the context of section 1(1)(n) is "personal information" about an "identifiable individual", the personal views or opinions about "someone else" must be that "someone else's" personal information, and that "someone else" must be an individual. Even though the wording of section 1(1)(n)(viii) is slightly different from section 1(1)(n)(ix) (under section 1(1)(n)(viii), anyone else's opinions about the individual are considered to be that individual's personal information), section 1(1)(n)(viii) must nevertheless be interpreted as referring to an individual. Such an interpretation accords with the initial wording of section 1(1)(n), namely, "recorded information about an identifiable individual".

[224.] In Order 96-019, I said that "personal information" is that information about an identifiable individual, and that "individual" can only mean a single human being. Since the Applicant is not an "individual", the Applicant has no "personal information" to which the Applicant would have a right of access under section 6(1) of the Act.

[225.] However, the Applicant contends that since it is run by individuals, it is therefore "someone else" for the purposes of section 1(1)(n)(ix). On this basis, the Applicant claims that it is entitled to know individuals' personal views or opinions about itself.

[226.] I have already said that "someone else" in the context of the definition of "personal information" must be an individual. I agree that an employee who works for the Applicant is "someone else" under section 1(1)(n)(ix) because that employee is an individual. However, the Applicant is not "someone else" because the Applicant itself is not an "individual". Nor can the Applicant shelter under the umbrella of any or all of its individual employees in order to be "someone else" under section

1(1)(n)(ix). The Applicant and its employees are not one and the same for the purposes of access to personal information under the Act. I regard the Applicant's employees as separate from the Applicant in the same way as I would regard any employees of a corporate entity as separate from the corporate entity.

[227.] Consequently, section 1(1)(n) in general and section 1(1)(n)(ix) in particular are not applicable to the Applicant. In other words, the personal views and opinions about the Applicant are not the Applicant's "personal information" to which the Applicant would have a right of access under section 6(1) of the Act.

[228.] The Applicant argues that, since it already has in its possession and knows the personal information of its employees and patients in its health facility, that personal information should not be severed under the Act. The Applicant says that a public body should consider who the applicant is when deciding whether to sever personal information under section 16(2)(a) and section 16(2)(d) of the Act.

[229.] I do not accept the Applicant's argument. In Order 96-008, I commented that "…there is a difference between knowing a third party's personal information and having the right of access to that personal information under the Act." A right of access to personal information under the Act is not concerned with who the applicant is when the issue to be decided is access to a third party's personal information. The Applicant must still prove that disclosure of the personal information would not be an unreasonable invasion of the third party's personal privacy under the Act.

[230.] The Applicant also argues that it should be given access to the personal information because it does not know the complaints made against it in this investigation.

[231.] To decide whether this is the case, I have reviewed all the Records, including those to which the Applicant was given access to in their entirety. Pages 118-127, which are the minutes of a meeting of the Applicant's board and the Public Body, clearly set out the substance of the complaints made against the Applicant. Pages 165-180, which are the Public Body's investigation report to the Applicant, also sets out those complaints. Consequently, I do not accept the Applicant's argument that it should have the personal information because it does not know the complaints made against it in this investigation.

[232.] The Applicant says that it has suffered damages as a result of the Public Body's investigation and that it continues to suffer damages. The Applicant has not provided any evidence of those damages.

[233.] I find that the Applicant has not met the burden of proof under section 67(2).

7. Conclusions under section 16

[234.] The Public Body correctly applied section 16(1) to page 94 of the Records.

[235.] The Public Body correctly applied section 16(1) and section 16(2) to the following pages of the Records:

> 1, 7, 10, 12-19, 22-32, 33 (third severed item only), 34, 36, 40, 41, 47-51, 52 (fifth severed item only), 53, 55, 77, 79-83, 99-105, 138-145, 147-155, 158, 160 (third and fifth paragraphs only), 161-163, 181, 239, 240 (second severed item), 241, 242 (second severed item), 243, 332-335, 351-354, 355 (second to fourth severed items only), 356-358, 362-364, 366 (everything except the last two severed lines), 382-390 (including 386a), 474-500, 545-549

[236.] I have applied section 16(1) to the following pages of the Records:

> 33 (first and second severed items), 56, 57, 94, 160 (everything severed except the third and fifth paragraphs), 373, 374

[237.] I have applied section 16(1) and section 16(2) to the following pages of the Records:

> 107, 119, 123, 410-414a (including 413a)

[238.] I intend to consider the following pages of the Records under section 19(1)(d):

> 37-39, 46, 52 (everything other than the fifth severed item), 58-59, 62, 63, 65-70, 78, 240 (first severed item), 242 (first severed item), 355 (first severed item), 361, 366 (last two severed lines), 369-372, 376, 377

[239.] Section 16(1) does not apply to page 347 of the Records. The Public Body must disclose page 347, unsevered, to the Applicant.

[240.] Other than the pages of the Records I intend to consider under section 19(1)(d), and other than page 347, which is to be disclosed, unsevered, to the Applicant, the Public Body must refuse to disclose to the Applicant the personal information severed on all the pages of the Records to which section 16 has been applied, namely:

> 1, 7, 10, 12-19, 22-34, 36, 40, 41, 47-51, 52 (fifth severed item only), 53, 55-57, 77, 79-83, 94, 99-105, 107, 119, 123, 138-145, 147-155, 158, 160-163, 181, 239, 240 (second severed item), 241, 242 (second severed item), 243, 332-335, 347, 351-354, 355 (second to fourth severed items only), 356-358, 362-364, 366 (everything severed except the last two severed lines), 373, 374, 382-390 (including 386a), 410-414a (including 413a), 474-500, 545-549

Issue D: Did the Public Body correctly apply section 19 (law enforcement) to the records?

1. Application of section 19(1)(d)

[241.] The Public Body said that section 19(1)(d) applies to the following pages of the Records:

> 10, 12-19, 23, 24, 27-33, 37-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 161-163, 181, 240-243, 332, 333, 335, 351-358, 361, 366, 369-374, 376, 377, 383-389 (including 386a)

[242.] Section 19(1)(d) reads:

> *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.*

[243.] I intend to consider only the following pages of the Records under section 19(1)(d) because I have already considered the remainder of the foregoing pages under section 16:

> 37-39, 46, 52 (everything other than the fifth severed item), 58-59, 62, 63, 65-70, 78, 240 (first severed item), 242 (first severed item), 355 (first severed item), 361, 366 (last two severed lines), 369-372, 376, 377

[244.] For section 19(1)(d) to apply, there must be (i) law enforcement information, (ii) a confidential source of law enforcement information, and (iii) information that could reasonably be expected to reveal the identity of that confidential source.

[245.] In this case, "law enforcement" means "investigations that lead or could lead to a penalty or sanction being imposed": see section 1(1)(h)(ii). In Order 96-019, I accepted that the definition of "investigation" is "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".

[246.] The case before me is unusual in that the information relating to the Public Body's investigation does not meet the requirements for "law enforcement". In the discussion under section 16(2)(b) in this Order, I said that "law" and "law enforcement" requires that both the public body's investigative authority and the penalty or sanction be under the same statute, which is not the case for the Public Body.

[247.] However, the Public Body has in its custody information and documents of two other public bodies. One of those public bodies, Municipal Affairs, has been the subject of Order 96-019, in which I held that certain of Municipal Affairs' information was "law enforcement information", that there was a confidential source(s) of law enforcement information, and that there was information that could reasonably be expected to reveal the identity of that confidential source(s). I also said that section 19(1)(d) was to be interpreted so that the information that could reasonably be expected to reveal the identity of the confidential source(s) did not itself have to be law enforcement information, but could be any information that could reasonably be expected to reveal the identity of that confidential source(s) of law enforcement information.

[248.] I have identified certain information in the Public Body's custody that could reasonably be expected to reveal the identity of the confidential source(s) of law enforcement information, as determined in

Order 96-019. Consequently, I find that that same information in the Public Body's custody in this case meets the requirements of section 19(1)(d) because it is information that could reasonably be expected to reveal the identity of a confidential source(s) of law enforcement information, as determined in Order 96-019. Therefore, the Public Body correctly applied section 19(1)(d) to except that information.

[249.] The Public Body also has information and documents obtained by Alberta Health in Alberta Health's investigation of the Applicant's health facility. Therefore, I must first determine whether the information obtained by Alberta Health meets the requirements of section 19(1)(d).

[250.] The evidence is that Alberta Health conducted an investigation under the authority of section 42 and section 43 of the *Hospitals Act* and section 19 of the *Nursing Homes Act*. The penalties or sanctions are contained in section 52 and section 66 of the *Hospitals Act* (and Alta. Reg. 247/90 under the *Hospitals Act*) and in section 20, section 21 and section 29 of the *Nursing Homes Act* (and Alta. Reg. 258/85 under the *Nursing Homes Act*). Because the authority to investigate and the penalties or sanctions are contained in the same legislation, the information obtained by Alberta Health in its investigation meets the definition of "law enforcement information".

[251.] In coming to the conclusion that this is "law enforcement information", I have also checked the dates when Alberta Health obtained the information. The complaints that triggered the investigation occurred at the end of July 1992. I have determined that the information excepted under section 19(1)(d) was obtained after the July 1992 complaints, and before February 1993, when Alberta Health was instructed to conclude its investigation.

[252.] There is ample evidence that the information was provided in confidence. Furthermore, I find that the information could reasonably be expected to reveal the identity of the confidential source(s) of law enforcement information. Therefore, the Public Body correctly applied section 19(1)(d) to except the information in its custody, which was obtained by Alberta Health in Alberta Health's investigation.

[253.] In reviewing the Records to decide whether the information related to the Public Body's investigation or to Alberta Health's investigation for the purposes of section 19(1)(d), I examined the investigative authority of each of these public bodies. Only two kinds of information were considered to be related to Alberta Health's investigation for the purposes of section 19(1)(d): information related to Alberta Health's authority to

investigate, and common information obtained by both Alberta Health and the Public Body in their investigations.

[254.] Therefore, the Public Body correctly applied section 19(1)(d) to the following pages of the Records:

> 37-39, 46, 52 (all severed items including the fifth severed item), 58-59, 62, 63, 65-70, 78, 240 (first severed item), 242 (first severed item), 355 (first severed item), 361, 366 (last two severed lines), 369-372, 376, 377

2. Application of section 19(2)(a)

[255.] The Public Body applied section 19(2)(a) to the following pages of the Records:

> 10, 12-19, 23, 24, 27-32, 40, 41, 47-49, 51, 52,
> 55-57, 65-68, 77, 79-83, 99-104, 147-155, 158,
> 161-163, 181, 240-243, 332, 333, 335, 351-358,
> 366, 369-374, 383-389 (including 386a)

[256.] Having decided that section 19(1)(d) applies those pages of the Records set out under section 19(1)(d) above, and to which the Public Body has also applied section 19(2)(a), and that section 16 applies to the remainder of the pages of the Records to which the Public Body applied section 19(2)(a), I do not find it necessary to consider whether section 19(2)(a) also applies to those same pages of the Records.

3. Exercise of discretion under section 19(1)(d)

[257.] Section 19(1) is another discretionary ("may") provision of the Act. Even if the section applies, the Public Body may still decide to disclose the information. The Public Body must take into consideration the access provisions of the Act when exercising its discretion.

[258.] The Public Body's evidence is that is disclosed what information it could to the Applicant, without revealing the identify of the confidential sources of law enforcement information. The Records confirm that evidence.

[259.] Therefore, I find that the Public Body exercised its discretion properly under section 19(1)(d).

Issue E: Did the Public Body correctly apply section 17 (safety or health) to the records?

[260.] The Public Body applied section 17(1)(a) (individual safety or health) and section 17(1)(b) (public safety) to the following pages of the record:

s. 17(1)(a)	10, 12-19, 23, 24, 27-32, 40, 41, 47-49, 51, 52, 55, 65-70, 77, 79-83, 99-104, 147-155, 158, 161-163, 181, 240-243, 332, 333, 335, 351-358, 366, 383-389 (including 386a)
s. 17(1)(b)	10, 12-19, 23, 24, 27-33, 37-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 161-163, 181, 240-243, 332, 333, 335, 351-358, 361-364, 366, 369-374, 376, 377, 383-389 (including 386a)

[261.] I have already found that section 26(1)(a) (public interest privilege) applies to all those same pages, and that either section 16(1) or section 19(1)(d) also applies to those same pages. Consequently, I do not find it necessary to consider whether section 17(1)(a) or section 17(1)(b) also applies.

Issue F: Did the Public Body correctly apply section 23(1)(a) (advice) to the records?

1. General

[262.] The Public Body applied section 23(1)(a) (advice) to the following pages of the Records: 65-68, 237, and 238

[263.] I have already found that section 19(1)(d) applies to pages 65-68 of the Records. Consequently, I do not find it necessary to consider whether section 23(1)(a) also applies to those same pages.

[264.] The only pages remaining to be considered under section 23(1)(a) are pages 237 and 238.

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

> *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*

[266.] In Order 96-006, I said that to correctly apply section 23(1)(a), a public body must show that there is advice, proposals, recommendations, analyses or policy options ("advice"), and that the "advice" must 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, and
>
> (3) made to someone who can take or implement the action

[267.] I have reviewed pages 237 and 238, and find that they are not "advice", nor do they meet any of the above three criteria for "advice". Consequently, I find that the Public Body did not correctly apply section 23(1)(a) to pages 237 and 238. Those pages are to be released to the Applicant.

[268.] However, those pages also contain personal information. Consequently, under section 16(1), before releasing those pages to the Applicant, the Public Body must sever the following personal information: the note and initials at the top right-hand corner of page 237, the five address lines, the one salutation line, the last two lines of the second paragraph, the second to fourth lines of the third paragraph, and the name at the top left-hand corner of page 238.

2. Exercise of discretion under section 23(1)(a)

[269.] Because I have found that the Public Body did not correctly apply section 23(1)(a) to pages 237 and 238 of the Records, I do not find it necessary to consider whether the Public Body exercised its discretion properly under section 23(1)(a).

ORDER

[270.] I make the following Order under section 68 of the Act.

A. Application of section 4 (exclusion of records from the Act)

[271.] **1.** Section 4(1)(c) of the Act excludes pages 301-303 of the Records from the application of the Act. Consequently, I have no jurisdiction over those pages of the Records.

[272.] **2.** Section 4(1)(l) of the Act excludes the following pages of the Records from the application of the Act:

> 183-205, 235, 294-300, 310a-310f, 378-381, 391-409

[273.] Consequently, I have no jurisdiction over those pages of the Records.

[274.] **3.** Section 4(1)(l) of the Act does not exclude pages 410-414a of the Records from the application of the Act. Those pages are subject to the Act.

B. Application of section 26 (privilege)

[275.] **1.** The Public Body correctly applied section 26(1)(a) (public interest privilege) to the following pages of the Records:

> 10, 12-19, 23, 24, 27-33, 37-41, 46-49, 51, 52, 55-59, 62, 63, 65-70, 77-83, 99-104, 147-155, 158, 161-163, 181, 240-243, 332, 333, 335, 351-358, 361, 366, 369-374, 376, 377, 383-389 (including 386a)

[276.] I uphold the Public Body's decision to refuse to disclose the information severed under section 26(1)(a) (public interest privilege) on those pages of the Records.

[277.] **2.** The Public Body correctly applied section 26(1)(a) (solicitor-client privilege) to the following pages of the Records:

> 96-98, 109-111, 182, 207-231, 304-309, 311-330, 336-340, 346, 550-583

[278.] I uphold the Public Body's decision to refuse to disclose the information severed under section 26(1)(a) (solicitor-client privilege) on those pages of the Records.

[279.] **3.** The Public Body did not correctly apply section 26(1)(a) (solicitor-client privilege to page 310. The Public Body must disclose that page to the Applicant. However, before disclosing that page, the Public Body must first sever the personal information (names and business telephone numbers).

C. Application of section 16 (personal information)

[280.] **1.** The Public Body correctly applied section 16(1) to page 94 of the Records. I uphold the Public Body's decision to refuse to disclose the information severed under section 16(1) on that page of the Records.

[281.] **2.** The Public Body correctly applied section 16(1) and section 16(2) to the following pages of the Records:

> 1, 7, 10, 12-19, 22-32, 33 (third severed item only), 34, 36, 40, 41, 47-51, 52 (fifth severed item only), 53, 55, 77, 79-83, 99-105, 138-145, 147-155, 158, 160 (third and fifth paragraphs only), 161-163, 181, 239, 240 (second severed item), 241, 242 (second severed item), 243, 332-335, 351-354, 355 (second to fourth severed items only), 356-358, 362-364, 366 (everything except the last two severed lines), 382-390 (including 386a), 474-500, 545-549

[282.] I uphold the Public Body's decision to refuse to disclose the information severed under section 16(1) and section 16(2) on those pages of the Records.

[283.] **3.** I have applied section 16(1) to the following pages of the Records:

> 33 (first and second severed items), 56, 57, 94, 160 (everything severed except the third and fifth paragraphs), 373, 374

[284.] The Public Body must not disclose the information severed under section 16(1) on those pages of the Records.

[285.] **4.** I have applied section 16(1) and section 16(2) to the following pages of the Records:

> 107, 119, 123, 410-414a (including 413a)

[286.] The Public Body must not disclose the information severed under section 16(1) and section 16(2) on those pages of the Records.

[287.] **5.** Section 16(1) does not apply to page 347 of the Records. Consequently, I order the Public Body to disclose page 347, unsevered, to the Applicant.

D. Application of section 19 (law enforcement)

[288.] The Public Body correctly applied section 19(1)(d) to the following pages of the Records:

> 37-39, 46, 52 (all severed items including the fifth severed item), 58-59, 62, 63, 65-70, 78, 240 (first severed item), 242 (first severed item), 355 (first severed item), 361, 366 (last two severed lines), 369-372, 376, 377

[289.] I uphold the Public Body's decision to refuse to disclose the information severed under section 19(1)(d) on those pages of the Records.

E. Application of section 17 (safety or health)

[290.] I do not find it necessary to decide whether section 17 applies to the Records.

F. Application of section 23 (advice)

[291.] The Public Body did not correctly apply section 23(1)(a) to pages 237 and 238 of the Records. The Public Body must disclose those pages to the Applicant, after it has severed the following personal information: the note and initials at the top right-hand corner of page 237, the five address lines, the one salutation line, the last two lines of the second paragraph, the second to fourth lines of the third paragraph, and the name at the top left-hand corner of page 238.

[292.] I ask that the Public Body notify me in writing, within 30 days of receiving a copy of this Order, that this Order has been complied with.

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Robert C. Clark
Information and Privacy Commissioner