ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 97-002

June 12, 1997

FAMILY AND SOCIAL SERVICES

Review Number 1122

BACKGROUND:

[1.] The first Applicant had made numerous complaints to the Public Body about the manner in which a child welfare case was handled. The case involved the second Applicant's children, who were allegedly abused by the second Applicant's former spouse. As a result of the complaints, the Public Body directed that the case be reviewed by a person (the "reviewer") who was employed by the Public Body, but not employed in the region in which the Applicants made their complaint. The purpose of the review was to determine whether the case had been investigated adequately, and whether the Public Body's staff followed up the investigation with appropriate supports to the family. The reviewer submitted a report, which included appendices (supporting information).

[2.] On June 10, 1996, the Public Body provided the Applicants with a severed copy of the report and the appendices. However, the Public Body withheld certain information, as provided by the following sections of the *Freedom of Information and Protection of Privacy Act* (the "Act"): section 5(1) (disclosure prohibited by another Act), section 16 (personal information), section 23 (advice) and section 26 (privilege).

[3.] On June 15, 1996, this Office received a request for review from the Applicants. The Applicants questioned the Public Body's decision not to disclose certain information under sections 5, 16 and 23 of the Act. The

Applicants were specific about the severed information they wanted reviewed; they did not ask for a review of all the information the Public Body withheld.

[4.] Mediation was authorized but was not successful. The matter was scheduled for inquiry on January 15, 1997. Before the date scheduled for the inquiry, the Court of Queen's Bench issued its decision on judicial review of Order 96-006, issued by this Office. That Order dealt with the interpretation of section 23 of the Act. The Public Body subsequently waived section 23, and provided the Applicants with additional pages of the report and the appendices. Section 16 was substituted for section 23 in three places in the report where the Public Body had previously withheld information.

[5.] In their request for review, the Applicants did not question the information withheld under section 26(1)(a) (solicitor-client privilege) on one page of the supporting information. However, during the inquiry, the first Applicant (the "Applicant") asked for and received an explanation of why this section was used. Since the Applicants did not otherwise ask that I review the application of section 26(1)(a) (solicitor-client privilege), I do not intend to do so in this Order.

RECORD AT ISSUE:

[6.] The record at issue consists of nine pages. Seven pages (pages 10, 17, 22, 25, 28, 31 and 33) are from the report submitted by the reviewer. The other two pages (pages 8 and 9) are from the appendices which were included with the report. In this Order, I will refer to these nine pages collectively as the "Record". The page numbers I have used are the numbers on those pages which were disclosed, in part, to the Applicants.

ISSUES:

[7.] There are two issues in this inquiry:

> Issue A: Did the Public Body correctly apply section 5(1) (disclosure prohibited by another Act)?
>
> Issue B: Did the Public Body correctly apply section 16 (personal information)?

DISCUSSION:

Issue A: Did the Public Body correctly apply section 5(1) (disclosure prohibited by another Act)?

[8.] The Public Body applied section 5(1) of the Act to page 33 of the report (recommendation #7, information deleted in the second line).

[9.] Section 5(1) reads:

> *s. 5(1) The head of a public body must refuse to disclose information to an applicant if the disclosure is prohibited or restricted by another enactment of Alberta.*

[10.] The Public Body says that it must refuse to disclose the information deleted in the second line under recommendation #7 on page 33 of the report because disclosure is restricted by section 91(4) of the *Child Welfare Act*, S.A. 1984, c. C-8.1. Section 91(4) reads:

> *s. 91(4) Notwithstanding subsection (2), the name of a person who reports to the Minister pursuant to section 3* [reporting a child in need of protection] *or* 4 [peace officer reporting a person under the age of 12 who has committed an offence] *shall not be disclosed or communicated to any person without the consent in writing of the Minister.*

[11.] I have reviewed the information withheld on page 33. I believe that the information meets the requirements of section 91(4) of the *Child Welfare Act*. Therefore, I find that the Public Body correctly applied section 5(1) of the Act to this information.

[12.] To obtain disclosure of this information, the Minister's written consent is required. There is no evidence before me that the Minister has given written consent. Consequently, the Public Body must refuse to disclose this information.

Issue B: Did the Public Body correctly apply section 16 (personal information)?

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

> *s. 1(1)(n) "personal information" means recorded information about an identifiable individual, including*
>
> > *(i) the individual's name, home or business address or home or business telephone number,*
> >
> > *(iii) the individual's age, sex, marital status or family status*
> >
> > *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
> >
> > *(viii) anyone else's opinions about the individual,*
> >
> > *(ix) the individual's personal views or opinions, except if they are about someone else.*

[14.] "Personal information" also includes any recorded information that can identify an individual, including facts and events discussed, observations made, and the circumstances (context) in which information is given, as well as the nature and content of the information: see Order 96-019 for a discussion of this issue.

[15.] In the Public Body's view, all nine pages of the Record contain personal information. I have reviewed pages 10, 17, 22, 25, 28, 31 and 33 of the report, and pages 8 and 9 of the appendices. I find that the information withheld on all these pages of the Record is personal information of the kinds listed above under section 1(1)(n) of the Act, or other recorded information that can identify an individual.

[16.] As required by section 16(1) of the Act, the Public Body said it refused to disclose the personal information contained in the Record.

[17.] Section 16(1) reads:

> *s. 16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

[18.] The Public Body also said that it applied certain presumptions under section 16(2) of the Act to support its refusal to disclose the personal information in the Record.

[19.] Under section 16(2), disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information meets any of the criteria set out in section 16(2). The Public Body applied section 16(2)(b) (personal information compiled and identifiable as part of an investigation into a possible violation of law), section 16(2)(f) (personal information consisting of "personal evaluations" or "personnel evaluations"), and section 16(2)(g)(i) (personal information consisting of the third party's name when it appears with other personal information about the third party).

[20.] The Public Body said it applied section 16(2)(b) and section 16(2)(g)(i) only to personal information about individuals who were not employees of the Public Body. Section 16(2)(f) was applied only to the Public Body's employees.

[21.] In the table following, I have summarized the information severed and withheld under section 16(1) and section 16(2).

Section of the Act	Report - page number and item withheld	Appendices - page number and item withheld
section 16(1) and section 16(2)(b)	28: last 3 bullets*	
section 16(1) and section 16(2)(f)	10: issue #3, 2nd bullet 10: issue #4, first 3 bullets 17: issue #2, all information following title 22: issue #2, 1st and 3rd sentences 22: last paragraph 28: all information preceding issue #2 28: issue #2, all information following title 31: lines 14 through 17 31: information deleted in line 23 33: recommendation #1, 2nd sentence and bullets following	8: information deleted under "Author's Comments" 9: information deleted under "Author's Comments"
section 16(1) and section 16(2)(g)(i)	22: issue #3, deleted words in 3rd bullet 25: deleted information in paragraph entitled "Telephone conversation..."** 28: deleted information in the 3rd bullet under "Events Following..."** 28: last three bullets 31: information deleted in line 26*** 33: recommendation #7, information deleted in 1st line	8: information deleted under "Author's Comments" 9: information deleted under "Author's Comments"

Legend for Table

*I do not intend to deal with this information under section 16(2)(b). Instead, I intend to deal with this information under section 16(2)(g)(i) only.

**The Public Body did not apply a presumption under section 16(2). There is no requirement that the Public Body do so. However, I believe that the presumption under section 16(2)(g)(i) applies, and I have applied it. Because section 16 is a mandatory section, I may consider the information under any relevant part of the section: see Order 96-008 regarding my jurisdiction to apply mandatory exceptions.

***Presumed error. The Public Body applied section 16(2)(f) to this information. I have instead applied the presumption under section 16(2)(g)(i).

(a) Did the public body correctly apply section 16(2)(f) (personal information consisting of "personal evaluations" or "personnel evaluations")?

[22.] Section 16(2)(f) reads:

> *s. 16(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations.*

[23.] Until now, I have not yet had occasion to interpret section 16(2)(f) in an Order. Consequently, I have canvassed Ontario and British Columbia to see how those jurisdictions have interpreted the equivalent of section 16(2)(f) of the Act.

[24.] In Ontario Order 171, the equivalent of section 16(2)(f) has been interpreted as raising a presumption concerning recommendations, evaluations or references *about* [my emphasis] the identified individual in question, rather than *by* [my emphasis] the individual. This interpretation is in keeping with the definition of personal information, which means information *about* [my emphasis] an identifiable individual.

[25.] In British Columbia, the equivalent of section 16(2)(f) has been interpreted in the same manner as in Ontario. In British Columbia Order 81-1996, the Information and Privacy Commissioner stated that the personal information about the third party must be provided by someone other than the third party.

[26.] In order to fall within section 16(2)(f) of the Act, the recommendations, evaluations or references must be about an identifiable individual (the third party), and must be provided by someone other than that identifiable individual (that third party).

(i) Does the information constitute "personal evaluations" or "personnel evaluations"?

[27.] The Public Body claims that "personal evaluations" or "personnel evaluations" of the Public Body's employees are contained in the Record. The Public Body says that such information is "personal information" which must not be disclosed. The Applicants claim that the information in the Record does not constitute evaluations, but "facts". In the Applicants' view, the information relates to the normal employment responsibilities or positions of the Public Body's employees, and therefore that information cannot be "personal information".

[28.] The Concise Oxford Dictionary defines "evaluate" to mean "assess; appraise; find or state the number or amount of; find a numerical expression for".

[29.] Based on this definition, the Information and Privacy Commissioner of Ontario has said that "personal evaluations" or "personnel evaluations" must refer to assessments made according to measurable standards: see Ontario Order P-447 and Order P-470. In Order P-447, comments, opinions and observations made during the course of an investigation were held not to be evaluations because there was no assessment according to any measurable standard. Furthermore, in Order P-470, information that was not sufficiently detailed, and generalized comments made by reviewers who were considering candidates' performance during competitions, were also not considered to be evaluations, for the same reason.

[30.] Although I accept that "personal evaluations" or "personnel evaluations" may be made according to measurable standards, I do not want to ignore the role and, moreover, the validity of professional judgment and experience in making an evaluation. An evaluation by a professional does not necessarily involve the direct application of scientific or mathematical criteria, but can also be made by applying knowledge, training and experience. That is the reason we pay "experts" for their expertise.

[31.] To determine whether personal information constitutes "personal evaluations" or "personnel evaluations", I intend to apply the following criteria:

> (i) Was an assessment either made according to measurable standards or based upon professional judgment?
>
> (ii) Was the particular evaluation done by a person who had the authority to do that evaluation?

[32.] The Act is not concerned with whether a person is qualified to do an evaluation or whether an evaluation is good or bad.

[33.] In this case, the Public Body stated that it asked for the report to determine whether proper case practice was being followed. The reviewer describes the report as a "Child Welfare Case Review". The reviewer said, on page one of the report, that the review focused on the actions taken and decisions made regarding the case situation, and not on challenging the decisions made or actions taken by employees of the Public Body.

[34.] The Public Body stated that the report was more of a reporting of what went wrong. The Public Body says that the reviewer purports to evaluate the knowledge and skills of the Public Body's employees, but no standards or policies were included against which those evaluations were made. Although the Public Body admits that, at the time the report was written, there was no standard identified for casework reviews, nevertheless the report had no tie to then current standard practice, policy, or legislation, and, further, no standards were mentioned against which the casework was measured. The Public Body stated that, as a result of this case, there is now a standard identified for casework reviews.

[35.] I am somewhat mystified by the Public Body's statements about a lack of standards since, by its own admission, the Public Body said that the reviewer was selected because the reviewer would understand the standards employed by caseworkers, given the reviewer's child welfare background and the fact that the reviewer had been involved in at least one other case review. It would seem to me that if a person has been picked to do a review, someone (that is, the Public Body) has determined that the person has the necessary knowledge, training and experience.

[36.] I have carefully reviewed the entire Record. I agree with the Public Body that the information withheld reflects on employees' knowledge and skills. Even though the reviewer may not have made an assessment according to *measurable* [my emphasis] standards, I find that the reviewer made an assessment based upon professional judgment. The reviewer's questions and comments indicate that knowledge, training and experience has been applied in making the assessment. I also find that the reviewer had the authority to do this particular evaluation. Therefore, the information produced on the review constitutes "personal evaluations" or "personnel evaluations". The Public Body correctly applied section 16(2)(f) to the information it withheld under that section, as set out in the table at the beginning of this discussion.

(ii) Even if the information did not constitute "personal evaluations" or "personnel evaluations", would the information nevertheless be "personal information"?

[37.] The Applicants say that information about how an employee handles a job is not an evaluation, but a "fact" which must be disclosed. By implication, I believe that the Applicants are also saying that such "facts" do not constitute "personal information" for the purposes of section 16 of the Act.

[38.] The Applicants' presumed rationale for saying this is "factual" information is that if a review is done at the request of the public, it is done to find out facts, that is, to find out what happened. The Applicants argue that if the information shows that certain persons did not know the law or the regulations, that is a fact that they did not know their jobs. The Applicants say that the reviewer is stating facts in the form of questions, is noting that everyone was aware of what happened, and is asking why things were not done. The Applicants also argue that where the information involves facts that an employee is not doing his or her job, it is not unfair for that information to be released.

[39.] The Public Body said it released factual statements that may or may not show competence. Information that did not contain factual statements was not released if that information was presented as questions which the Public Body considered were rhetorical or inflammatory.

[40.] The Public Body says that evaluations or opinions about how an employee does a job are nevertheless personal information and must not be disclosed.

[41.] I have already said that the information withheld under section 16(2)(f) constitutes "evaluations". However, if it did not constitute "evaluations", would it constitute "facts" or "opinions"?

[42.] The Concise Oxford Dictionary defines "fact", in part, to mean "a thing that is known to have occurred, to exist, or to be true; an item of verified information". An "opinion" is defined, in part, to mean "a belief or assessment based on grounds short of proof; a view held as probable." As an example of each, a "fact" would be a person's employment position, date of employment, or reason for leaving employment. An "opinion" would be a belief that a person would be a suitable employee, based on that person's employment history.

[43.] By definition, a "fact" may be determined objectively. An "opinion" is subjective in nature, and may or may not be based on facts.

[44.] I have reviewed the Record to determine whether the information the Public Body withheld under section 16(2)(f) would constitute "facts" or

"opinions". Much of the information is in the form of the reviewer's questions or comments about the practices of certain identifiable individuals employed by the Public Body. The questions are worded so that a reader may readily infer that the reviewer is expressing an opinion about the competence of those identifiable individuals. Therefore, the information the Public Body withheld under section 16(2)(f) would constitute "opinions" rather than "facts".

[45.] Under section 1(1)(n)(viii), anyone else's opinion about an individual constitutes the personal information of the identifiable individual to whom the opinion relates. The Public Body concluded that the "opinions" are "personal information". I agree with the Public Body's conclusion.

(iii) Even if opinions constitute "personal information", is that information about the "employment responsibilities" of an employee of a public body and therefore disclosable, as contemplated by section 16(4)(e)?

[46.] The Applicant also seemed to question whether information related to employment responsibilities of the Public Body's employees can be "personal information" under the Act.

[47.] To discuss this issue, I believe that I should begin with section 16(1) of the Act, which says that the Public Body must refuse to disclose personal information if disclosure would be an unreasonable invasion of a third party's personal privacy. "Third party" is defined in section 1(1)(r) of the Act to exclude the Applicant and the Public Body, but that section says nothing about the Public Body's employees.

[48.] In Order 96-019, I said that section 1(1)(r) of the Act and, consequently, section 16(1), did not exclude an employee of a public body. An employee would also have "personal information" which a Public Body could refuse to disclose if disclosure would be an unreasonable invasion of that employee's personal privacy under section 16(1).

[49.] However, section 16(4)(e) of the Act sets out a circumstance in which disclosure of an employee's personal information is not considered to be an unreasonable invasion of that employee's personal privacy, namely, if the information is about the employee's employment responsibilities as an employee of a public body.

[50.] Does the information meet the requirements of section 16(4)(e)? In other words, do "opinions" constitute information about an employee's "employment responsibilities", as contemplated by section 16(4)(e), the disclosure of which would not be an unreasonable invasion of that employee's personal privacy?

[51.] In Ontario Orders M-619, M-774 and P-721, an evaluation of an employee's performance or an investigation into conduct was considered to be the employee's personal information, and not subject to disclosure. In Ontario Order M-486, opinions about an employee's job performance were also held not to be employment-related information, but rather the personal information of the employee.

[52.] Whether characterized as an "evaluation" or "opinion", information about an employee's performance or conduct is not information about an employee's employment responsibilities as contemplated by section 16(4)(e). I find that that information is "personal information" under the Act, and that section 16(1) applies to that information.

(b) Did the Public Body correctly apply section 16(2)(g)(i) (personal information consisting of third party's name when it appears with other personal information about the third party)?

[53.] The Public Body applied section 16(2)(g)(i) of the Act, as indicated in the table preceding this discussion.

[54.] Section 16(2)(g)(i) reads:

> *s. 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.*

[55.] I have reviewed the relevant pages of the Record, and I find that the Public Body correctly applied section 16(2)(g)(i) to all of that information listed under section 16(2)(g)(i) in the table. In addition, I have applied section 16(2)(g)(i) to that information which I've indicated in the table.

(c) What relevant circumstances did the Public Body consider under section 16(3) in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy?

[56.] In its submission for the inquiry, the Public Body said that in making its determination under section 16(1) and section 16(2), it considered that section 16(3)(g) (personal information likely to be inaccurate or unreliable) and section

16(3)(h) (disclosure unfairly damaging reputation) were relevant circumstances. In its oral argument, the Public Body also indicated that section 16(3)(a) (public scrutiny) was a relevant circumstance. Those sections of the Act read:

> *s. 16(3) In determining under subsection (1) or (2) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
> >
> > *(g) the personal information is likely to be inaccurate or unreliable,*
> >
> > *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.*

(i) Is the personal information likely to be inaccurate or unreliable (section 16(3)(g))?

[57.] The Public Body said that section 16(3)(g) was a relevant circumstance that applied to the Record, as follows:

> Report, page 10: issue #4, first 3 bullets
> Report, page 17: issue #2, all information following the title
> Report, page 22: issue #2, 1st and 3rd sentences

[58.] I have said in this Order that the reviewer's opinions (which I said are "evaluations" for the purposes of section 16(2)(f)) are the personal information of the identifiable individuals to whom the opinions relate.

[59.] The Public Body says that the opinions are in the form of rhetorical or inflammatory questions from which certain inferences can be made about the skills and knowledge of identifiable employees of the Public Body. Because these rhetorical questions are not answered or backed up by anything, the Public Body is of the view that the opinions inherent in these unanswered rhetorical questions are potentially inaccurate or unreliable, and more so because the reviewer made sweeping generalizations about the employees, based on one case. Furthermore, the Public Body says the report was not presented against any standard of casework practice or care.

[60.] The Public Body claims that its Executive Committee reviewed the report and found the opinions to be inaccurate and unreliable, but the Public Body did not provide any further evidence in this regard.

[61.] The Public Body also emphasized that it is only the opinions it withheld that are potentially inaccurate and reliable, and not the entire report.

[62.] The Applicant counters by saying the Public Body told the Applicant that the reviewer had been picked because the reviewer was competent and could put together an accurate report. The Applicant wonders how the Public Body, which hired a person who was qualified to conduct the review, can now say that the reviewer's opinions are inaccurate and unreliable.

[63.] I asked the Applicant to tell me what rationale would support releasing findings if the information on which the findings are based is not considered reliable. The Applicant says that findings should indicate what was found. If the findings are attached to the report, and the report indicates why some results were accepted and some not, the reader can assess the justification for not accepting the results.

[64.] The Public Body said that it did not use the report because the report contained too many unanswered questions, the information was not backed up, and it felt that it did not have enough information from the report to substantiate some of the things said. However, because there was a need for an in-depth analysis and an explanation of why things happened, the Public Body said it did a second review to obtain enough information to address the personnel issues. The Public Body said it intends to use the report produced on the second review to discuss issues with its employees.

[65.] To determine whether the opinions are likely to be inaccurate or unreliable, I must consider the interpretation of section 16(3)(g), which I have not previously interpreted in an Order.

[66.] In Ontario Orders M-615 and M-619, the equivalent of section 16(3)(g) was held to refer to the accuracy of the transcription, not the accuracy of the comments recorded. In other words, accuracy refers to a correct reflection of the information received or provided. In British Columbia Order 63-1995, the Commissioner said to look at the accuracy of the specific information that would be disclosed.

[67.] However, there may be difficulties with determining accuracy and reliability. In British Columbia Order 71-1995, the Information and Privacy Commissioner said that if evidence is only from one party in an unresolved dispute, the Commissioner should not assume accuracy or reliability. This is particularly so when the person to whom the information relates is not given

an opportunity to review the record. There is no way for the Commissioner to determine accuracy or reliability short of conducting a full adversarial hearing, which he has no jurisdiction to do.

[68.] Furthermore, in Ontario Order P-447, evidence that the public body discounted the information or did not rely on the information is relevant. Moreover, in Ontario Order 151, the public body's suggestion that there was "room for interpretation" was sufficient reason to question accuracy or reliability.

[69.] Having reviewed these orders from other jurisdictions, I accept that accuracy must refer to a correct reflection of the personal information received or, in this case, provided.

[70.] However, determining whether recorded opinions are inaccurate or unreliable for the purposes of section 16(3)(g) is difficult. Only the Public Body appeared before me at the inquiry. The reviewer did not appear, and neither did the persons to whom the opinions relate, who were notified of the inquiry.

[71.] I am prepared to accept that the reviewer believed the opinions to be accurate and reliable at the time they were recorded, but I do not think it makes any difference whether the persons to whom the opinions relate are given an opportunity to review the Record for accuracy or reliability. Even if those persons disagree with the opinions, I do not see how any disagreement would necessarily make the opinions inaccurate or unreliable. It is up to the head of a public body to decide on accuracy or reliability of opinions. One can assume that if the head of a public body hired the expert to give the opinion, the head can decide if the opinion is accurate or reliable.

[72.] In this case, it is significant that the Public Body did not rely on the opinions set out in the Record, and that the Public Body did a second review.

[73.] Consequently, I find that the personal information is likely to be inaccurate or unreliable. Therefore, the Public Body was correct when it said that section 16(3)(g) is a relevant circumstance in determining whether disclosure of personal information, as contained in those pages of the Record listed at the beginning of this discussion, would be an unreasonable invasion of a third party's personal privacy. Section 16(3)(g) weighs in favour of non-disclosure of the personal information.

(ii) Would disclosure unfairly damage reputation (section 16(3)(h))?

[74.] The Public Body said that section 16(3)(h) was a relevant circumstance that applied to the Record, as follows:

Report, page 10: issue #4, first 3 bullets
Report, page 17: issue #2, all information following the title
Report, page 22: issue #2, 1st and 3rd sentences

[75.] The focus of section 16(3)(h) is "unfair" damage to reputation. Consequently, it is not necessary to prove that the damage is present or foreseeable: see Ontario Order P-256.

[76.] The Public Body said that the reviewer looked at one case and made broad generalizations about the Public Body's employees. Because those employees are employed in a small, close-knit community and work on interagency teams, the release of the personal information (the opinions) would unfairly damage the employees' reputations.

[77.] The Applicant argues that the information would not unfairly damage reputation because if someone does something that results in charges being laid, then it is not unfairly damaging that their own stupidity is responsible. It is the Applicant's position that consequences must be faced and that public servants must stay within the law and the rules.

[78.] The Applicant also says that most people in this community already know about the case; furthermore, what is in the report is known to 90 per cent of the community, so employees' reputations cannot be damaged further. The Public Body counters that the small community might know the facts, but it does not know the opinions expressed about the employees.

[79.] The Public Body also described the report as a "preliminary" or "interim" report, which does not recommend that any specific action be taken by the Public Body. According to the Public Body, the only action resulting from the report was the initiation of a formal review of the case.

[80.] To determine whether disclosure of the opinions would unfairly damage the reputation of any person referred to in the Record, I must consider the interpretation of section 16(3)(h), which is another section I have not previously interpreted in an Order.

[81.] When considering the equivalent of section 16(3)(h) of the Act, Ontario Order P-634 held that it was relevant to consider the outcome of an investigation which judged the conduct of an individual. Furthermore, it was also necessary to consider (i) the nature of the allegations raised, (ii) the type of records at issue, and (iii) the position occupied by the government employee whose conduct was being questioned. In Order P-634, unfair damage to reputation was shown because the investigation found that the person had not violated any legislation or regulations, the person was exonerated, and no formal action had been or would be taken.

[82.] In Ontario Order P-602, it was determined that disclosure would unfairly damage reputation because opinions expressed in the record were preliminary in nature, and there were no indications from the representations or from the face of the record that the person was found to have acted inappropriately.

[83.] Furthermore, disclosure of comments about individuals referred to in records, which comments primarily reflected the views of the public body's staff and were critical of the performance of individuals, could also unfairly damage the reputation of the individuals referred to: see Ontario Order P-964.

[84.] Moreover, if there is sufficient reason to question the accuracy or reliability of personal information, there may also be sufficient reason to believe that disclosure may unfairly damage the reputation of the identifiable individual: see Ontario Order 151.

[85.] In British Columbia Order 71-1995, the Information and Privacy Commissioner held that disclosure of records containing unsubstantiated allegations would unfairly damage reputation. In British Columbia Order 63-1995, the Commissioner also held that disclosure would unfairly damage reputation because the record would be used to impute actions that the record couldn't provide data to support. Furthermore, there would be unfair damage to reputation from being unfairly stigmatized.

[86.] In this case, the report produced from the "review" allowed certain inferences to be made about the conduct of the Public Body's employees. However, there were no actual findings that the employees acted inappropriately. I would think before such a report is released, fairness would demand that these employees be allowed to defend themselves, or at the very least would be given an opportunity to explain why the information unfairly damages their reputations.

[87.] Furthermore, the Public Body said that this was a "preliminary" or "interim" report, and treated it as such.

[88.] Based on the evidence, I find that disclosure may unfairly damage the reputation of persons referred to in the Record. Therefore, the Public Body was correct when it said that section 16(3)(h) is a relevant circumstance in determining whether disclosure of personal information, as contained in those pages of the Record listed at the beginning of this discussion, would be an unreasonable invasion of a third party's personal privacy. Section 16(3)(h) weighs in favour of non-disclosure of the personal information.

(iii) Is disclosure desirable for the purpose of public scrutiny (section 16(3)(a))?

[89.] The Public Body and the Applicants both said that public scrutiny under section 16(3)(a) was a relevant circumstance. The Public Body discussed public scrutiny in a general way, without any specific reference to pages of the Record.

[90.] The Public Body's evidence was that, at the time of this case, it was not normal practice to do a case review when complaints were received that a person was not receiving support from the Public Body. However, in the circumstances of this case, this method was used, and there is now a process in place. The process has changed so that someone from personnel is now available when a review is done.

[91.] The Public Body also said that persons who reviewed the report agreed that the report as written was inappropriate and that a broader review of the Public Body's office in question was needed before the Public Body could deal with the employees. The report was considered to contain judgmental comments, and the Public Body felt that it needed more of an explanation than was in the report.

[92.] The Public Body claims that by disclosing more than 95 per cent of the Record, it has met its obligation regarding public scrutiny. The Public Body also stated that the release of potentially unreliable or inaccurate personal information could jeopardize public scrutiny.

[93.] Once again, I have not previously interpreted section 16(3)(a) in an Order, so I have looked to other jurisdictions for interpretation of the equivalent of that section.

[94.] In Ontario Order P-634, it was held that to establish the relevance of the equivalent of section 16(3)(a), 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. In Ontario Order P-347, it was held that it was not sufficient for one person to have decided that public scrutiny was necessary. Furthermore, the applicant's concern about the actions of one person within the public body are also not sufficient in this regard: see Ontario Order M-84.

[95.] 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: see Ontario Order P-673. This was particularly so if the public body had also investigated the matter in issue.

[96.] In this case, the Applicant has provided evidence to demonstrate that the activities of the Public Body have been called into question. The actions of more than one person within the Public Body are involved. The Public Body agreed that public scrutiny was necessary, conducted two case reviews and did two reports. Consequently, I find that disclosure is desirable for the purpose of subjecting the activities of the Public Body to public scrutiny. Therefore, the Public Body and the Applicant were both correct when they said that section 16(3)(a) is a relevant circumstance in determining whether disclosure of personal information would be an unreasonable invasion of a third party's personal privacy.

[97.] Section 16(3)(a) would normally weigh in favour of disclosure of personal information. However in this case, I agree that the Public Body has met its public scrutiny duty under section 16(3)(a) of the Act by releasing the bulk of the report and appendices. I agree with the Public Body's position that the invasion of the personal privacy of the Public Body's employees in this case would not enhance the public scrutiny of the Public Body.

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

[98.] Section 67(2) of the Act provides that if a public body refuses access to a record, and that record contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

[99.] The Applicants outlined seven arguments for the purposes of the inquiry. I have summarized these arguments, and I intend to deal with them in the order stated by the Applicants.

1. The disclosure of the personal information is not unreasonable because it shows that the Public Body knowingly and willingly left certain named children's health and safety at risk.

[100.] An applicant may meet the burden of proof under section 67(2) by showing that one of the circumstances listed in section 16(4) of the Act applies. I believe that the Applicants are saying that section 16(4)(b) applies. Section 16(4)(b) reads:

> *s. 16(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *(b) there are compelling circumstances affecting anyone's health or safety and notice of the*

disclosure is mailed to the last known address of the third party.

[101.] The Applicants claim they have a right to know what people did wrong in order to protect children.

[102.] Section 16(4)(b) is worded in the present tense. I would interpret the words "there are compelling circumstances" to mean circumstances existing at the present time that are affecting anyone's health or safety. I believe that section 16(4)(b) is intended to capture only immediate circumstances affecting health or safety in order to justify disclosing personal information.

[103.] The Applicants say that certain named children's health and safety have been affected. Although I am prepared to accept that the health and safety of these children have been affected in the past, I am unable to determine what present circumstances exist that are currently affecting the children's health or safety.

[104.] It is not sufficient, for the purposes of section 16(4)(b), that the personal information reveals past circumstances that affected the health or safety of the children. Nor is it sufficient that the Applicants wish to protect children in the future. The Applicants must show present compelling circumstances affecting anyone's health or safety, which they have not done.

2. The information in the report cannot be considered personal recommendations or evaluations, nor can it be considered character references or personnel evaluations, since the report is the findings of an investigation and therefore the information in the report can only be considered fact.

[105.] I have disagreed with the Applicants on this issue, as I have indicated in the discussion under section 16(2)(f) of the Act. Even if the information were not "personal evaluations" or "personnel evaluations", it would nevertheless be "opinions" and therefore "personal information" under the Act. On this issue, the Applicants have not met the burden of proof under section 67(2).

3. Under section 38(1)(b) of the Act, the Public Body should disclose the personal information because that would be consistent with the purpose for which it was collected or compiled or would be consistent with the use for which it was collected or compiled.

[106.] The Applicants said that the information was compiled to show them that no mistakes had been made, the report shows that mistakes were made, and therefore there was a cover-up.

[107.] To answer the Applicants' contention regarding section 38(1)(b), I need to comment on the relationship between section 16 (under which the Public Body withheld the personal information) and section 38 of the Act.

[108.] Section 16 is under Part 1 of the Act. Part 1 concerns access to information, and how to obtain access. Section 38, on the other hand, is under Part 2 of the Act. Part 2 concerns the collection, retention, use and disclosure of personal information by public bodies while carrying out their public duties. Consequently, Section 38 is not relevant to a request for access under the Act. The right to access information is under Part 1 of the Act only.

[109.] The result is that section 38(1)(b) is not a relevant consideration in determining whether the release of personal information constitutes an unreasonable invasion of a third party's personal privacy under section 16: see Ontario Order P-679 for a similar decision. It follows that section 38(1)(b) is also not a consideration when, as here, an applicant is attempting to meet the burden of proving that disclosure of personal information would not constitute an unreasonable invasion of a third party's personal privacy.

4. The Public Body should disclose the personal information for the purpose of enforcing a legal right that a public body has against any person, as stated in section 38(1)(h) of the Act. The Applicants say they are "public bodies" for the purposes of section 38(1)(h).

[110.] "Public body" is defined in section 1(1)(p) of the Act. An applicant cannot be a "public body" under the Act. For this reason, section 38(1)(h) is not relevant to the Applicants. Furthermore, section 38(1)(h) would not be relevant for the same reason I stated in the discussion of the Applicants' third argument above.

5. There is inconsistent severing of information in the report.

[111.] The Applicants say that information related to one employee's practice has not been released but where the information relates to other employees, it has been released. The Public Body counters that if the information was evaluative, it was withheld whether or not the evaluation of the employee was positive or negative.

[112.] I did not find the inconsistency of which the Applicants complain. The Applicants are not assisted here in meeting the burden of proof.

6. The Public Body is trying to hide facts concerning the incompetence of its employees.

[113.] The Applicants argued that section 16 should not be used to hide a fact that overrules the safety of the public. The public has a right to know what is going on and why things are not being changed or corrected. The Applicants suggest that practice issues are facts and therefore not personal information.

[114.] I have already found that the information withheld under section 16(2)(f) does not constitute "facts", but is "personal information", so I do not find it necessary to deal with this issue any further.

7. The Applicants were promised they would have everything in the report, except the information that absolutely could not be released under legislation.

[115.] The Applicants state that they had an agreement with the Public Body that the Public Body would conduct an investigation and that anything that was a fact should have been made available. They therefore argue that section 16, except for the severing of names, is not applicable. The Applicants believe that the report was done for them because they initiated the request for the investigation.

[116.] The Public Body confirmed that it agreed to share as much information as possible when the report was done, but stressed that the report was done solely for the purpose of managing the Public Body internally.

[117.] The Applicants also claim that the commitment to share as much information as possible has not been upheld. The Public Body stated that it disclosed more than 95 per cent of the information to the Applicants, and it withheld only that personal information which it believed it must withhold under the Act.

[118.] It is apparent that the Applicants' expectations arising from the deal to disclose the report were not met, and the Applicants believe this is unfair. However, a public body's obligation under the Act to protect personal information must override any deal regarding disclosure of information. Furthermore, I do not intend to referee deals made between public bodies and applicants. In this case, I have found it significant that the Public Body withheld only a small amount of information (approximately 5 per cent). In any event, the Applicants have not demonstrated how withholding approximately 5 per cent of the information in the Record assists them in meeting the burden of proof under section 67(2).

Other arguments:

[119.] The Applicants indicated that they would concede information severed under section 16(2)(g)(i), but ask that I release that information so it can be produced at a parole hearing. The Applicants stress that they are not asking for the information for the purpose of sanctions against the Public Body, but for the protection of children. The Applicants say that the Act allows information to be released if used for criminal matters, so that is why they are asking.

[120.] I believe the Applicants are referring to section 16(2)(b) in this regard, but that section refers to the Public Body releasing the personal information to prosecute a violation or to continue an investigation. The Commissioner does not release personal information under section 16(2)(b). Furthermore, the purpose for which information is to be used is not relevant to the decision I must make with respect to disclosure of that information. Although I am sympathetic to the Applicants' reasons for wanting the personal information, I am not able to consider that reason in making my decision. I must apply the Act.

[121.] The Applicants say that section 16 was not relied on originally for some of the information withheld, so only the name should have been severed from that information. As I said in Order 96-008, section 16 is a mandatory ("must") section under which a public body must sever and withhold personal information. If a public body does not do so, as Commissioner, I must sever that information.

Conclusion as to burden of proof:

[122.] However noble the Applicants' intentions are with respect to the use of the personal information, I find that the Applicants have not met the burden of proof under section 67(2).

(e) Conclusions under section 16

[123.] The Public Body correctly applied section 16(2)(f) and section 16(2)(g)(i) of the Act.

[124.] I must now consider whether the Public Body correctly refused to disclose the personal information under section 16(1) and section 16(2), regardless of whether the Public Body correctly applied a presumption under section 16(2). This requires that I look at the circumstances under section 16(3), which the Public Body said were relevant to this case.

[125.] Section 16(3) sets out a non-exclusive list of relevant circumstances for determining whether disclosure of personal information would be an unreasonable invasion of a third party's personal privacy under either section 16(1) or section 16(2).

[126.] I have already said that section 16(3)(f) and section 16(3)(g) are relevant circumstances that weigh in favour of protecting personal information. I have also said that section 16(3)(a) is a relevant circumstance that weighs in favour of disclosing personal information. However, I have said that because the Public Body has already disclosed more than 95 per cent of the Record, the Public Body has met its public scrutiny duty under section 16(3)(a).

[127.] Since the remaining relevant circumstances (section 16(3)(f) and section 16(3)(g)) weigh in favour of protecting personal information, and since the Applicants did not meet the burden of proof under section 67(2), I uphold the Public Body's decision to refuse to disclose all the personal information that it has severed under section 16(1) and section 16(2). In summary, I uphold the Public Body's decision to sever and withhold the information as follows:

Report:
page 10: issue #3, 2nd bullet
page 10: issue #4, first 3 bullets
page 17: issue #2, all information following title
page 22: issue #2, 1st and 3rd sentences
page 22: issue #3, deleted words in 3rd bullet
page 22: last paragraph
page 28: all information preceding issue #2
page 28: issue #2, all information following title
page 28: last 3 bullets
page 31: lines 14 through 17
page 31: information deleted in line 23
page 33: recommendation #1, 2nd sentence and bullets following
page 33: recommendation #7, information deleted in 1st line

Appendices:
page 8: information deleted under "Author's Comments"
page 9: information deleted under "Author's Comments"

[128.] I have applied section 16(2)(g)(i) to withhold the information severed, as follows:

Report:
page 25: deleted information in paragraph entitled "Telephone conversation..."

page 28: deleted information in the 3rd bullet under “Events Following…”
page 31: information deleted in line 26

ORDER:

[129.] I have upheld the Public Body’s decision to refuse to disclose the information it has severed under section 5(1) of the Act, and all the personal information it has severed under section 16(1) and section 16(2).

[130.] Therefore, under section 68(2)(c) of the Act, I require the head of the Public Body to refuse access to all the information it has severed in the Record.

[131.] Since the Applicants asked only for an explanation of why information was severed under section 26, and did not take further issue with section 26, I did not find it necessary in this Order to consider section 26 or the information severed and withheld under that section.

Robert C. Clark
Information and Privacy Commissioner