ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-011

September 1, 1998

ALBERTA FAMILY AND SOCIAL SERVICES

Review Number 1346

I. BACKGROUND

1. On March 19, 1997, the Assistant Deputy Minister of Alberta Family and Social Services (the "Public Body") distributed a Children's Services Staff Survey (the "survey") to the following employees of the Public Body: Child Welfare Workers, Handicapped Children's Services Workers, Day Care Program Workers, Supervisors, District Office Managers, Regional Managers, Regional Program Specialists, Regional Directors, Child Care Counsellors and Managers, Children's Services Staff, and Headquarters and Child Welfare Administrative Support Staff (the "staff").

2. In the survey, the staff were asked to respond to the following: (1) "I believe that I have been, or am currently, 'meaningfully involved' in the Redesign of Children's Services." (the "redesign", a community-based system for delivery of Child and Family Services); (2) "Are you interested in contributing to this redesign process now or in the future?"; and, (3) "Do you have any suggestions on what would encourage staff to be 'meaningfully involved' in this initiative?". "Meaningfully involved" was defined as "having attended one or more working group meetings, focus groups or consultations on the redesign and believe that your comments were respected and heard". Question 1 and Question 2 required a yes/no response, and Question 3 provided space for comments.

3. The survey also asked for the region in which the individual worked and the regional authority number. Optional information that could be provided included the name, district office, and type of employment position of the individual who responded.

4. The survey was distributed to approximately 1700 staff, of which 387 responded.

[para 5] On July 17, 1997, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Public Body for access to the following:

> *Copies of all survey responses in the custody or control of the Department in response to the Children's Services Staff Survey on the redesign of Children's Services. (These responses were referred to in the June, 1997 issue of "Redesign Update" which indicated that 387 such responses had been received.*)

[para 6] In the access request, the Applicant said that "I understand that the names of the individual employees and other identifying information may need to be severed from the copies of these responses in order to protect personal privacy." The Applicant was referring to section 16 of the Act (personal information).

[para 7] On August 18, 1997, the Public Body replied to the Applicant, as follows:

> *The original survey sheets were keyed into a word processing system word for word and subsequently disposed of. Although the original survey sheets do not exist, an exact replica of the information does exist in electronic form.*

[para 8] The Public Body refused to disclose the transcribed survey responses (the "survey responses") in their entirety, claiming that the information requested fell within the exception to disclosure contained in section 23(1)(a) of the Act (advice, proposals, recommendations, analyses or policy options) and section 23(1)(b)(i) (consultations or deliberations involving officers or employees of a public body).

[para 9] On September 5, 1997, the Applicant requested that my Office review the Public Body's refusal to disclose the survey responses. Mediation was authorized but was not successful. The matter was set down for inquiry on May 21, 1998.

[para 10] I permitted the Edmonton Social Planning Council to participate as an intervenor at the inquiry in support of the public interest in disclosing the survey responses. I allowed the intervenor to make representations during closing arguments.

[para 11] At the beginning of the inquiry, I asked the parties to provide supplementary written submissions on whether the survey responses fell within section 23(2)(d) of the Act (statistical survey). If so, section 23(1) would not apply. Written submissions on this point were provided to my Office by the Public Body on May 26, 1998, and by the Applicant on May 29, 1998.

[para 12] As a result of the Public Body's evidence that, to protect the confidentiality of the information received, it had destroyed all the original responses after those responses had been transcribed from written text to electronic format, I asked the Public Body to provide my Office with its records retention schedule and written submissions on the applicability of section 34(b)

of the Act (retention of personal information). The Public Body complied with my request and provided this information, in affidavit form, in its supplementary written submission on May 26, 1998.

II. RECORD AT ISSUE

[para 13] The record consists of the 58-page transcription of the individual survey responses. The transcription is set out in a table, which has five columns. Under the headings of each column, the Public Body has recorded the information from the survey responses, as follows:

(i) "Region", recorded by number of the region in which the individual works;

(ii) "Question 1", recorded by "yes" or "no" response or left blank if no response was given;

(iii) "Question 2", recorded by "yes" or "no" response or left blank if no response was given;

(iv) "Comments", recorded word-for-word or left blank if no response was given; and

(v) "Position Type", recorded by numerical coding as to type of employment position.

[para 14] The Public Body said that the individual survey responses were keyed in word-for-word, and that the only information that was not keyed in was the names of the individuals, where those names were given. With the exception of one transcribed response that contains both a name and a telephone number (page 57 of the Record), I confirm that the transcription does not contain names.

[para 15] Although the Public Body maintains that the transcription is word-for-word, except for names, the transcription also does not include information from the following lines of the survey: regional authority number; the district office of those individuals who responded; and the type of employment position, as may have been stated rather than as coded in the transcription.

[para 16] In this Order, I will refer to the transcription as the "Record".

III. ISSUES

[para 17] There are five issues in this inquiry:

A. Did the Public Body destroy records in breach of section 34(b) of the Act and in breach of its Administrative Records Disposition Authority?

B. Did the Public Body correctly apply section 23(1)(a) ("advice") and (b)(i) (consultations or deliberations) to the Record?

C. Does section 23(2)(d) (statistical survey) apply to the information contained in the Record?

D. Does section 31(1) (disclosure of information about a risk of significant harm to heath or safety, or disclosure in the public interest) apply to the information contained in the Record?

E. Do I permit the Public Body to apply any mandatory ("must") exceptions, such as section 16 (personal information), to the Record?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body destroy records in breach of section 34(b) of the Act and in breach of its Administrative Records Disposition Authority?

[para 18] The Public Body provided a sworn affidavit concerning its destruction of the survey responses. In summary, the affidavit states the following: (i) that the survey responses were submitted for word-processing to capture the responses word-for-word, other than the names of the individuals who responded, if names were given; (ii) that the survey responses were shredded approximately May 1, 1997, as they were then deemed to be transitory; and (iii) that the information that was entered into an electronic format (word-processing) has been preserved and, as such, meets the requirements of section 34 of the Act.

[para 19] The Public Body said it excluded the names for two reasons: to maintain confidentiality, and because the names were not seen as a necessary part of the response to the survey.

[para 20] To justify its decision to destroy the original survey responses, the Public Body made four arguments.

[para 21] First, the Public Body said that, in its decision-making process under section 23(1)(a) and (b)(i), it considered the opinions, but did not consider the names because the names were not a factor involved in that decision-making process. Since section 34(b) of the Act requires that personal information be used to make a decision that directly affects the individual, it appears that the Public Body believes it is not in breach of section 34(b) because it did not use the names.

[para 22] Section 34(b) of the Act reads:

> *34 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must*
>
> *...*

(b) retain the personal information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

[para 23] Section 34(b) requires that there be an individual's personal information and that the Public Body use that personal information to make a decision directly affecting the individual. In the original survey responses, both the name of an individual who responded and any opinion of that individual would be personal information, as set out in section 1(1)(n)(i) and (ix) of the Act, respectively.

[para 24] Although the Public Body may have made decisions based on the opinions provided, there is no evidence that any individual's personal information was used to make a decision directly affecting that individual. Therefore, section 34(b) does not apply to the original survey responses. Consequently, the Public Body did not destroy the original survey responses in breach of section 34(b) of the Act.

[para 25] Second, the Public Body says that the Public Body's Administrative Records Disposition Authority ("ARDA"), to which the Public Body is subject, requires that the Public Body keep the master copy of surveys for a five-year period. Although the disposal of the original survey responses was not in compliance with its ARDA, the Public Body maintains that it did not have any improper motive when it destroyed the survey responses.

[para 26] The authority for records retention and disposition schedules, which includes the Public Body's ARDA, is contained in the *Government Organization Act*, S.A. 1994, c. G-8.5, Schedule 12, section 14(2), as follows:

14(2) The Lieutenant Governor in Council may make regulations

(a) respecting the management of records in the custody or under the control of a department, including their creation, handling, control, organization, retention, maintenance, security, preservation, disposition, alienation, destruction and their transfer to the Provincial Archives of Alberta.

[para 27] "Department" is defined in section 14(1) of Schedule 12 to the *Government Organization Act*, and includes the Public Body.

[para 28] The regulation made by the Lieutenant Governor in Council under section 14(2) of Schedule 12 to the *Government Organization Act* is the *Records Management Regulation*, Alta. Reg. 57/95 (Order in Council 205/95). The following section of that Regulation is relevant:

10(1) The deputy head of a department must ensure that the department prepares records retention and disposition schedules for all records under the control of the department.

(2) The records retention and disposition schedule must

(a) describe the records under the control of the department,

(b) specify how long the department must keep the records,

(c) specify where the records must be kept,

(d) specify the format in which records must be stored, and

(e) describe what the final disposition of the records will be.

...

(4) Records may be disposed of only in accordance with the approved records retention and disposition schedule.

[para 29] The Public Body's ARDA requires that master copies of surveys be kept for five years. The Public Body did not keep the survey responses for that required length of time. Consequently, the Public Body destroyed records in breach of its ARDA. Therefore, lack of an improper motive is not relevant. The Public Body has acknowledged its breach of its ARDA. I commend the Public Body for being forthright in this regard.

[para 30] In passing, I note that the Public Body's ARDA is dated April 1986. Despite that date, since the Public Body provided me with the ARDA, I am going to assume that that ARDA is the one the Public Body is currently following, and that it complies with the *Records Management Regulation*, Alta. Reg. 57/95, which superseded the *Public Records Regulation*, Alta. Reg. 373/83, on April 1, 1995.

[para 31] Third, the Public Body argues that because the survey responses were transcribed word-for-word from written text to electronic format, the information was still maintained, albeit in a different format. To this argument, I would say two things: (i) the Public Body cannot argue that the information has been transcribed word-for-word, excluding names, when certain information was not transcribed, namely, the regional authority numbers; the district office of those individuals who responded; and the type of employment position, as may have been stated rather than as coded in the transcription; and (ii) since the Public Body must comply with its ARDA, it is immaterial that the Public Body otherwise transcribed the survey responses.

[para 32] Finally, the Public Body argues that survey responses were disposed of prior to the Public Body's receiving the Applicant's request for access. However, since the Public Body must comply with its ARDA, it is also immaterial that the Public Body destroyed the survey responses prior to receiving the access request.

[para 33] Under section 51(1)(a)(i) of the Act, I have the authority to conduct investigations to ensure compliance with rules relating to the destruction of records set out in any other enactment of Alberta. Therefore, at a date to be determined, the Public Body and I will review compliance with its ARDA respecting survey response records in particular. My intention is to ensure the best possible public administration of those records.

ISSUE B: Did the Public Body correctly apply section 23(1)(a) ("advice") and (b)(i) (consultations or deliberations) to the Record?

1. General

[para 34] The relevant parts of section 23(1) read:

> *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;*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body.*

[para 35] The Public Body claims that section 23(1)(a) and (b)(i) apply to the entire Record. Because the Public Body has refused to give the Applicant access to the Record, section 67(1) requires that the Public Body prove that the Applicant has no right of access to any portion of the Record.

2. Section 23(1)(a) ("advice")

a. General

[para 36] In Order 96-006, I set out the criteria for "advice" (which includes advice, proposals, recommendations, analyses and policy options) under section 23(1)(a). I said that "advice" should be:

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

2. directed toward taking an action, and

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

[para 37] The Public Body says that the Record contains "advice", in the form of opinions, and recommendations. The Public Body submits that the Record meets all the criteria for "advice" and therefore should be withheld from the Applicant under section 23(1)(a).

[para 38] I have reviewed a copy of the survey, as well as the Record. The first column ("Region") and fifth column ("Position Type") of the Record contain numbers, which are not advice (opinions) or recommendations, as I have previously defined those terms. Therefore, the

Public Body did not correctly apply section 23(1)(a) to the information contained in those two columns.

[para 39] Only the information in the second column (“Question 1"), third column (“Question 2"), and fourth column (“Comments”) remains to be considered as to whether it meets all three criteria for “advice”.

b. Was the "advice" sought or expected, or part of the responsibility of a person by virtue of that person's position?

[para 40] The Public Body says that the survey was developed to fulfill the purpose of obtaining information about staff involvement in the redesign of Children's Services, and included an opportunity to provide suggestions as to how to involve staff in the redesign. The Public Body says that it has been involved in developing the community-based model for delivering children's services for approximately three-and-one-half years. Some staff have viewed the redesign as offloading or privatization of those services, and there were concerns that staff were not involved in the process. Consequently, the Executive Committee decided to collect input from staff. The Public Body says it used the survey as an "internal management tool".

[para 41] With regard to Question 1 and Question 2, I am not convinced that the Public Body sought or expected advice or recommendations. I believe that the Public Body sought or expected to gather information, hence, the use of a "yes/no" response format as the method for gathering the information. In my view, gathering information does not meet the criterion of seeking or expecting advice or recommendations.

[para 42] With regard to Question 3, a review of the wording alone suggests that the Public Body sought or expected advice or recommendations on encouraging staff to be "meaningfully involved" in the redesign. "Meaningfully involved" is defined as "having attended one or more working group meetings, focus groups or consultations on the redesign and believe that your comments were respected and heard". That definition suggests that the Public Body was seeking advice or recommendations about how to get the staff to attend working group meetings, focus groups or consultations on the redesign.

[para 43] The responses contained in the Record reveal that many staff have already attended working group meetings, focus groups or consultations on the redesign, and were complaining because their views were either ignored or not taken seriously. Given this finding, I am not convinced that the Public Body sought advice or recommendations on encouraging the staff to be "meaningfully involved" in the redesign, when the staff have already attempted to be involved and, judging from their comments, appear to have been rebuffed to a large extent. I conclude that Question 3 was designed to allow the Public Body to gather an impression of the opinions of staff, to gauge the "opinions of the day", and to allow staff to air their grievances about the redesign.

[para 44] Furthermore, even if it could be said that the Pubic Body sought or expected advice or recommendations, it could not be said that the advice or recommendations were part of the responsibility of a person by virtue of that person's position when the survey was sent essentially to all staff, and when the Assistant Deputy Minister's instructions for completing the survey state that it is not necessary that individuals identify themselves or their district office. Information about the individual's type of employment position is also optional in the survey.

[para 45] I find that the information contained in the Record does not meet the first criterion for "advice".

c. Was the "advice" directed toward taking an action?

[para 46] The Public Body says that the second criterion has been met because the action for which it was seeking "advice" was how to involve staff in the redesign. The letter accompanying the survey said that the Public Body's intent was to "involve staff in the active planning of the Redesign of Children's Services".

[para 47] I find it necessary to determine whether the Public Body sought advice related to a suggested course of action, and whether the Public Body got advice related to that suggested course of action.

[para 48] I am not convinced that involving staff in the redesign can be said to be a suggested course of action for which the Public Body was seeking "advice". Question 1 asks only for a "yes" or "no" response as to whether the individual believes that he or she has been, or is currently, "meaningfully involved" in the redesign. Clearly, neither the question nor the response relate to any suggested course of action. Question 2 asks only for a "yes" or "no" response as to whether the individual is interested in contributing to the redesign process, now or in the future. Here again, there is no suggested course of action. Finally, Question 3, which asks for suggestions about what would encourage staff to become "meaningfully involved" in the redesign process, also does not suggest any particular course of action for which the advice is being sought. Again, this is all information gathering.

[para 49] If I were to accept that "involving staff in the redesign process" was the suggested action for which the Public Body was seeking advice, then it becomes necessary to examine Question 3 to determine what "advice" was sought. Question 3 asks for suggestions on what would encourage staff to be "meaningfully involved" in the redesign. I have already discussed the definition of "meaningfully involved". In the context of a suggested action, that definition requires that any action for which the Public Body is seeking "advice" must relate to getting the staff to attend working group meetings, focus groups or consultations on the redesign.

[para 50] Did the Public Body get advice related to that suggested course of action?

[para 51] I have reviewed all the responses to Question 3, and determined that:

(i) 56 individuals did not respond, as determined by the blank spaces in the "Comments" column of the Record. Non-responses would not be "advice".

(ii) 2 individuals responded to the question with only the word "No". Those responses would not be "advice".

(iii) 108 individuals responded to the question alone, and did not make any other comments. Those responses would be "advice".

(iv) 116 individuals both responded to the question and added comments not related to the question. Those responses would be mixed "advice"/other comments.

(v) 105 individuals did not respond to the question, but made other comments instead. Those responses would not be "advice".

[para 52] Only 108 (28%) of the total (387 responses) would be "advice", another 116 (30%) would be partly "advice", and 163 (42%) would not be "advice".

[para 53] In Order 96-012, I said that section 23(1)(a) was intended to protect information generated during the decision-making process. Therefore, there is a need to separate the decision to redesign, which had already been made, and the survey involving staff in the redesign. The decision to redesign would not be protected by section 23(1)(a) because that decision had already been taken. Approximately 61 of the foregoing responses commented on the redesign decision itself.

[para 54] Furthermore, in Order 97-007, I said that if the disclosure of the information would divulge the basis for the action or decision, section 23(1)(a) would apply to that disclosure, but not otherwise. I asked the Public Body to tell me what decisions were made or actions taken as a result of the "advice" obtained from the survey.

[para 55] The Public Body said that, partly as a result of the survey, it was decided that departmental staff would retain their status as government employees, and would be seconded to community agencies. That change occurred, partially as a result of the feedback received. The feedback indicated that staff morale was low, that staff had concerns about how they fit into the new design, and that staff had a feeling of non-involvement in the process.

[para 56] The Public Body also says that, as a result of the survey, there was a decision to involve staff more and an effort made to ensure that the working groups are open to involvement.

[para 57] I further asked the Public Body whether there was anything in writing to demonstrate the changes that resulted from the survey. The Public Body said there was nothing written because this was not a formal process. The Public Body referred to comments contained in the June 1997 Redesign Update newsletter, with respect to provincial and regional actions and on how to better develop the community process. The Public Body emphasizes that action was taken as a result of the survey.

[para 58] Several of the comments to Question 3 refer to job loss and job security of the staff. The fact that the Public Body changed the redesign to retain staff as government employees is not evidence that the decision was solely or even largely the result of the survey comments or some other "advice", particularly since Question 3 did not ask for advice on changing the redesign, but on staff involvement in the redesign process. The Public Body cannot now say that the suggested action for which it was seeking advice was to change the redesign, after it received those comments.

[para 59] In my view, disclosure of the Record would not divulge the basis for the decision to change the redesign. Furthermore, disclosure would not divulge how to better involve staff, when there is no evidence of what action has been taken to allow staff to be better involved.

[para 60] In this case, if the Public Body were to ask itself "What would the disclosure of the survey responses reveal?", I believe that, at most, it could be said that disclosure might reveal that the staff were unhappy with the redesign and did not feel that they were involved in the decision-making process.

[para 61] It is also doubtful that the disclosure could reasonably be expected to reveal "advice", given the fact the Public Body has already published some of that "advice" in a summary of the survey responses, including the responses to Question 3, in its June 1997 Redesign Update newsletter.

[para 62] Finally, even if the information contained in the Record is not "advice", could disclosure of the information contained in the Record nevertheless be reasonably expected to reveal some other "advice". I answer that question in the negative, as there is no evidence before me as to what that other "advice" would be.

[para 63] I doubt that the information contained in the Record meets the second criterion for "advice". However, that is not determinative.

d. Was the "advice" made to someone who can take or implement the action?

[para 64] According to the Public Body, the decision-maker in this case is the Executive Committee, which includes the Deputy Minister, who is the chair.

[para 65] If I were to assume that the "advice" that was sought related to a suggested course of action, and that the Public Body got advice directed toward taking that action, there is no clear evidence of what "advice" went to the decision-maker. The Public Body's evidence is that the Record itself did not go to the Executive Committee.

[para 66] The Public Body says that when the survey responses came in, they went to the Public Body's executive director. The Public Body's word-processing branch keyed the survey responses into the computer, word-for-word (except for names). The evidence is that the executor director used a person knowledgeable in research and analysis (the "researcher") to put the information into an appropriate format. There is no evidence before me as to whether the researcher summarized the information.

[para 67] The Public Body provided me with a copy of its June 1997 Redesign Update newsletter, which contains a summary of the survey responses. However, the Public Body did not know who prepared the summary for the newsletter. The Public Body thinks that that summary may have been contracted out.

[para 68] The Public Body says that the Executive Committee got the statistical analysis of the yes/no questions and a summary of the kind of information and recommendations received. However, when I asked the Public Body what summary the Executive Committee got, it did not know. The Public Body was not able to say whether the Executive Committee got an internal summary (the researcher's summary, if the researcher did one), the newsletter summary, or something else. The Public Body believes that the summary the Executive Committee got would have been similar to the newsletter summary, but says there may have been more detail. If the Executive Committee got only the summary contained in the June 1997 Redesign Update newsletter, it did not get "advice" about changing the redesign to permit the staff to remain as government employees, as the newsletter does not mention that "advice".

[para 69] In my view, it cannot be said that the "advice" was made to someone who could take or implement the action, when the Public Body cannot say, with any certainty, what "advice" the Executive Committee got. That evidence alone is determinative.

[para 70] It is for that reason that I find that the information contained in the Record does not meet the third criterion for "advice".

e. Conclusion

[para 71] I have found that the information contained in the Record does not meet all three criteria for "advice". What is determinative in this case is that the Public Body did not provide clear evidence of what "advice" the decision-maker got. Therefore, the Public Body did not correctly apply section 23(1)(a) ("advice") to the Record.

3. Section 23(1)(b)(i) (consultations or deliberations)

[para 72] In Order 96-006, I defined "consultation" and "deliberation". I said that a "consultation" occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions. I found that a "deliberation" is a discussion or consideration, by the individuals described in the section, of the reasons for and against an action. I also said that the criteria for "advice" applies to section 23(1)(b).

[para 73] Furthermore, in Order 96-012, I stated that the purpose of section 23(1)(b) is to protect the consultations or deliberations occurring during the decision-making process.

[para 74] The information contained in the first column ("Region") and the fifth column ("Position Type") is numeric only, and is not consultations or deliberations as I have previously defined those terms. Therefore, the Public Body did not correctly apply section 23(1)(b)(i) to the information contained in those two columns.

[para 75] The only information relevant to this discussion is contained in second column ("Question 1"), the third column ("Question 2") and the fourth column ("Comments") of the Record. The "Comments" column contains the responses to Question 3.

[para 76] I find that the responses to Question 1, Question 2 and Question 3 are not "consultations" or "deliberations" because staff were not being canvassed for their views about the appropriateness or the reasons for or against a particular proposal or suggested course of action. Furthermore, the information does not meet all three criteria for "advice", discussed above.

[para 77] Therefore, the Public Body did not correctly apply section 23(1)(b)(i) to the Record.

4. Exercise of discretion under section 23(1)

[para 78] Because of my finding that the Public Body did not correctly apply section 23(1)(a) and (b)(i) to the information contained in the Record, I do not find it necessary to consider whether the Public Body exercised its discretion properly under section 23(1).

ISSUE C: Does section 23(2)(d) (statistical survey) apply to the information contained in the Record?

[para 79] The only information relevant to this discussion is contained in the second and third columns of the Record. Those two columns record the yes/no responses to Question 1 and Question 2 of the survey.

[para 80] Section 23(2)(d) reads:

> *23(2) This section does not apply to information that*
>
> *(d) is a statistical survey.*

[para 81] Section 23(2) of the Act sets out several kinds of information which specifically must not be withheld, even though that information might otherwise fall within section 23(1).

[para 82] I have already found that the Public Body did not correctly apply section 23(1)(a) and (b)(i) to the Record. Consequently, I do not find it necessary to consider section 23(2)(d).

[para 83] I understand the Applicant is of the opinion that the yes/no responses to Question 1 and Question 2, contained in the second and third columns, respectively, of the Record, are information that is a statistical survey, that section 23(2)(d) applies to that information, and that that information may not be withheld from the Applicant under section 23(1). However, the Public Body maintains that this was an opinion-based survey and was not intended to gather statistics, but to gather opinion. The Public Body maintains that it has already released the statistical portion of the survey results.

ISSUE D: Does section 31(1) (disclosure of information about a risk of significant harm to health or safety, or disclosure in the public interest) apply to the information contained in the Record?

[para 84] In the Applicant's submission, the Applicant argued that section 31(1)(b) of the Act (disclosure of information that is clearly in the public interest) applied to the information contained in the Record. During the inquiry, the Applicant also argued that section 31(1)(a) (disclosure of information about a risk of significant harm to health or safety) applied to the information contained in the Record. Consequently, I will consider section 31(1) in its entirety.

[para 85] Given my decision that section 23(1)(a) and (b)(i) do not apply to prevent disclosure of the information contained in the Record, I would normally not find it necessary to also consider whether section 31(1) requires disclosure. However, the Public Body has said that if I find that section 23(1)(a) and (b)(i) do not apply, it must be permitted to consider whether any mandatory ("must") exceptions apply to prevent disclosure of information, such as section 16 (personal information). Consequently, because there is a possibility that some information may be withheld from the Applicant under section 16, and because section 31(2) of the Act says

that section 31(1) applies despite any other provision of the Act, I find it necessary to consider section 31(1).

[para 86] Section 31(1) reads:

> *31(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*
>
> *(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, or the person or of the applicant, or*
>
> *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*

[para 87] During the inquiry, the Applicant stated that the redesign imposes risks because the process of redesign has not been tried or piloted in any other jurisdiction. The Applicant says that child welfare caseloads are increasing, and that taking an accelerated approach to changing structures at such a time will affect the health and safety of the public, as set out in section 31(1)(a). The Applicant therefore submits that the Record should be released.

[para 88] In the Applicant's submission, the Applicant maintained that some of the withheld information consists of comments of frontline workers who have concerns with how the services to children will suffer under the redesign process, and that this makes the withheld information a matter of compelling public interest, as set out in section 31(1)(b). The Applicant believes that the criteria for public interest under section 87(4)(b) (fee waiver), as set out in Order 96-002, may also be used to determine the public interest under section 31(1)(b).

[para 89] First of all, I disagree that the criteria for the public interest under section 87(4)(b) of the Act, as set out in Order 96-002, should also apply to section 31(1). The criteria for the public interest under section 87(4)(b) were developed in the context of matters relating to waiver of fees. The criteria for the public interest in the context of section 31(1) have been dealt with separately in Order 96-011.

[para 90] In Order 96-011, I said that because section 31 is an "override" provision in the Act, the definition of what is "caught" by the provision must be defined narrowly. Section 31 imposes a statutory obligation on the head of a public body to release information of certain risks under "emergency-like" circumstances (i.e., "without delay").

[para 91] In any review of section 31, I must first consider whether one of the pre-conditions set out in section 31 has occurred. The Applicant has the burden of proof in this regard, and it is a burden of proof that will not easily be met. The pre-conditions are:

> (i) risk of significant harm to the environment,

(ii) risk of significant harm to the health or safety of the public, etc. or

(iii) release is clearly in the public interest.

[para 92] Only the pre-conditions in (ii) and (iii) above are at issue.

[para 93] As to pre-condition (ii), in Order 96-011, I said that there must be some actual risk and there must be some evidence that the harm in question is significant. The Applicant stated that "Some of the withheld information consists of comments of frontline workers who have concerns with how the services to these children will suffer under the redesign process." However, that statement is not evidence of a risk of significant harm.

[para 94] As to pre-condition (iii), the Applicant has also not demonstrated any emergency-like circumstances that would make disclosure of the information contained in the Record a matter of compelling public interest.

[para 95] Therefore, I find that section 31(1) does not apply to the information contained in the Record.

ISSUE E: Do I permit the Public Body to apply any mandatory ("must") exceptions, such as section 16 (personal information), to the Record?

[para 96] The Public Body maintains that if I find that it has not properly applied section 23(1)(a) and (b)(i) to the Record, it must nevertheless be permitted to consider whether any of the mandatory ("must") exceptions, such as section 16 (personal information), apply to the Record. The Public Body did not consider the applicability of any mandatory exceptions before the inquiry.

[para 97] In most cases in which a Public Body has not considered mandatory exceptions such as section 16, I would consider those exceptions because it is my duty to ensure that information is not disclosed in breach of the Act. However, given the nature of the information contained in the Record, I believe that the Public Body is in a better position than I am to determine the applicability of any mandatory exceptions, particularly section 16 in this case. Consequently, I intend to permit the Public Body to apply any mandatory exceptions, particularly section 16, subject to my review if the Applicant subsequently requests a review. I note that the Applicant, in the access request, acknowledged that some of the information may be subject to section 16.

[para 98] It is my preference that public bodies consider the applicability of both mandatory and discretionary exceptions under the Act, prior to an inquiry.

V. ORDER

[para 99] I make the following Order under section 68 of the Act.

[para 100] The Public Body did not destroy records in breach of section 34(b) of the Act. However, the Public Body destroyed records in breach of its Administrative Records Disposition Authority.

[para 101] Under section 51(1)(a)(i) of the Act, at a date to be determined, the Public Body and I will review compliance with its Administrative Records Disposition Authority respecting survey response records in particular.

[para 102] The Public Body did not correctly apply section 23(1)(a) and (b)(i) to the Record. Therefore, the Public Body is not authorized to refuse access on those grounds. Under section 68(2)(a) of the Act, I order that the Public Body give the Applicant access to the Record, subject to paragraph 105 below.

[para 103] Because of my finding that the Public Body did not correctly apply section 23(1)(a) and (b)(i) to the Record, I do not find it necessary to consider whether section 23(2)(d) (statistical survey) applies to the Record.

[para 104] Section 31(1) (disclosure of information about a risk of significant harm to health or safety, or disclosure in the public interest) does not apply to the information contained in the Record.

[para 105] I permit the Public Body to apply any mandatory ("must") exceptions, particularly section 16 (personal information), to the Record, subject to my review if the Applicant subsequently requests a review. I order that the Public Body provide the Applicant and my Office with a copy of the Record, as severed.

[para 106] I order that the Public Body notify me in writing, not later than 30 days after being given a copy of this Order, that the Public Body has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner