ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-003

September 20, 2000

THE UNIVERSITY OF CALGARY

Review Number 1722

I. BACKGROUND

[para 1.] On September 1, 1999, The University of Calgary (the "University") received the Applicant's request for access under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Applicant asked for access to a September 1997 report entitled "Report to The Faculty Association of the University of Calgary and The University of Calgary Concerning the Faculty of Social Work".

[para 2.] The University refused to disclose the report, on the grounds that the report would reveal confidential labour relations information of a third party, and disclosure would reveal the report of a mediator or other person appointed to resolve or inquire into a labour relations dispute (section 15(1) of the Act). The University said that the following provisions of the Act also applied to support its refusal to disclose the report: section 4(1)(b) (a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity); 19(1)(a) (harm to a law enforcement matter, namely, an administrative investigation); section 16(1) (personal information of a third party); section 23(1)(a) ("advice"); and section 23(1)(b) (consultations or deliberations). The University subsequently did not rely on section 19(1)(a).

[para 3.] On October 15, 1999, the Applicant asked that I review the University's decision. Mediation was authorized, but was not successful. The matter was set down for an oral inquiry on February 29, 2000.

[para 4.] My Office identified a number of individual affected parties, who were notified of their right to participate in the inquiry. My Office also notified The Faculty Association of the University of Calgary (generally referred to by its acronym "TUCFA", but which I will refer to as the "Faculty Association") when the Faculty Association was subsequently determined to also be an affected party.

[para 5.] I received advance written submissions from the Applicant, the University, the Faculty Association and two other affected parties. Some of the parties' advance written submissions raised further issues for the inquiry.

[para 6.] At the conclusion of the oral portion of the inquiry, I asked the parties to provide additional written submissions to me, primarily because of the further issues raised in the advance written submissions. My Office exchanged those additional written submissions, and then allowed the parties an opportunity to rebut. I received the last of the parties' rebuttal submissions on April 19, 2000 and made my decision on May 4, 2000.

[para 7.] This Order proceeds on the basis of the Act as amended on May 19, 1999.

II. RECORD AT ISSUE

[para 8.] The record at issue is the September 1997 report entitled "Report to The Faculty Association of the University of Calgary and The University of Calgary Concerning the Faculty of Social Work".

[para 9.] In this Order, I will refer to the report as the "Record".

III. ISSUES

[para 10.] The Notice of Inquiry set out the following primary and secondary issues for the parties:

> Did the University of Calgary correctly determine that the requested record is excluded from the access provisions of the Act?

If the Act does apply to the requested record, has the University of Calgary correctly applied the mandatory exceptions to disclosure and reasonably applied the discretionary exceptions to disclosure?

[para 11.] For the purposes of this Order, I have defined those issues as follows:

A. Do I have jurisdiction over the Record?

1. Is the Record in the custody or under the control of the University, as provided by section 4(1) of the Act?

2. Even if the Record is in the custody or under the control of the University, as provided by section 4(1) of the Act, is the Record excluded from the application of the Act by section 4(1)(b) (a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity)?

3. Even if the Record is in the custody or under the control of the University, as provided by section 4(1) of the Act, is the Record excluded from the application of the Act by section 4(1)(f) (material that has been deposited in the Provincial Archives of Alberta or the archives of a public body by or for a person or entity other than a public body)?

4. Conclusion as to my jurisdiction over the Record

B. Even if I have jurisdiction over the Record, do any exceptions under the Act require or permit the University to withhold the Record?

1. Does section 15(1) of the Act (labour relations information of a third party) apply to the Record?

2. Does section 16 of the Act (personal information of a third party) apply to the Record?

3. Do section 26(1)(a) and section 26(2) of the Act (legal privilege that relates to a person other than a public body) apply to the Record?

4. Did the University properly refuse to disclose the Record, as provided by section 23(1)(a) of the Act ("advice") or section 23(1)(b) of the Act (consultations or deliberations)?

[para 12.] The Applicant raised a further issue:

> C. Does section 31(1)(b) of the Act (disclosure in the public interest) require the University to disclose the Record?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Do I have jurisdiction over the Record?

[para 13.] Under the Act, I have jurisdiction over a record that is in the custody or under the control of a public body, as provided by section 4(1) of the Act.

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

> *4(1) This Act applies to all records in the custody or under the control of a public body…*

[para 15.] Section 4(1) is a jurisdictional provision in that, if a record is not in the custody or under the control of a public body, the Act does not apply to that record, and I have no jurisdiction over that record. An applicant cannot obtain access to that record under the Act.

1. Is the Record in the custody or under the control of the University, as provided by section 4(1) of the Act?

a. Whether the University is a "public body" for the purposes of section 4(1)

[para 16.] The Act defines a "public body" to include a "local public body" (section 1(1)(p)(vi) of the Act), which is defined to include an "educational body" (section 1(1)(j)(i) of the Act). In turn, an "educational body" is defined in section 1(1)((d)(i) of the Act to include a university as defined in the *Universities Act*, R.S.A. 1980, c. U-5.

[para 17.] Section 1(h) and section 3 of the *Universities Act* define a "university" to include "The University of Calgary". Therefore, the University is a public body for the purposes of section 4(1) of the Act.

[para 18.] However, the Faculty Association and the other affected parties in this inquiry are not public bodies, as defined, for the purposes of section 4(1) of the Act.

b. The University's arguments as to custody or control

[para 19.] The University says that, in December 1997, in separate written agreements with an affected party and the Faculty Association, the University reached a resolution of the issues giving rise to grievances involving the affected party. *In camera*, the Faculty Association provided me with a copy of its agreement. The agreement is dated December 12, 1997.

[para 20.] The University maintains that a significant part of resolving the grievances was the agreement to seal the Record and place it in the University Archives. The Record was to remain sealed unless the three parties agreed otherwise or unless required by court order. The University says that this undertaking was entered into prior to the time that the Act applied to educational institutions such as the University. The University says that the University Archives was entrusted with the confidential safe keeping of the Record on behalf of all three parties and was made subject to obligations of confidentiality.

[para 21.] By requiring all copies of the Record to be destroyed, other than the one placed in the University Archives, and by restricting access to and use of the one remaining copy as the parties prescribed in the written agreements, the University argues that the Record is effectively not in the control of the University because the University does not have a right of access to the Record. The University says it is not able to manage the record through its life cycle. It is also not able to restrict, regulate or administer the use or disclosure of the Record. Citing Order 99-032, the University concludes that the December 1997 agreements resulted in the Record not being a record in the custody or under the control of the University, as discussed in Order 99-032.

[para 22.] The University acknowledges that the Act supersedes an agreement regarding how or when information will be disclosed, as discussed in Order 97-002. However, when the agreement was struck, the Act did not apply to the University. The University argues that, to have the legislation now retroactively impact upon a written agreement in a way that violates the spirit of that agreement, is to interpret section 90 of the Act in a manner contrary to accepted principles of statutory interpretation.

[para 23.] Finally, the University acknowledges that the parties cannot enter into agreements that limit the Commissioner's review. However, given the circumstances of the Record, the December 1997 agreements entered into before the Act came into force, and the consequent restrictions on how and when the parties can access the Record, the

University maintains that it does not have custody or control of the Record.

[para 24.] As to "custody" of the Record, the University argues that the Record is not properly "in the custody" of the University as the University cannot unseal the Record without the prior consent of the other two parties. It is the University's position that custody must entail a legal right of control over a record more than simple physical possession.

[para 25.] The University says that the Act clearly contemplates situations where custody would be in one body and control in another. Where the record is in the custody of a third party but control is in a public body, the control will govern to render the record subject to the Act. According to the University, the corollary is that, where the public body has simple possession of a record under conditions of trust imposed by a third party, it does not have sufficient legal custody for the record to fall under the Act.

c. Analysis of the University's arguments

[para 26.] I agree that the Act supersedes an agreement regarding how or when information will be disclosed: see Order 97-002. Of necessity, the Act must also supersede an agreement regarding the withholding of information, except where the Act itself permits that withholding.

[para 27.] Section 90 of the Act reinforces my view. Section 90 provides:

> *90 This Act applies to any record in the custody or under the control of a public body regardless of whether it comes into existence before or after this Act comes into force.*

[para 28.] I also agree that a public body cannot enter into an agreement that limits my review: see Order 98-006. Again, section 90 reinforces my view. I have the authority to decide whether a record is in the custody or under the control of a public body.

[para 29.] I acknowledge the circumstances of the creation of the Record and the December 1997 agreements entered into before the Act came into force, and the consequent restrictions on how and when the parties can access the Record. However, given the Act and section 90 in particular, the University must comply with the present law, which is the Act.

[para 30.] I must decide whether the University has custody or control of the Record, which is the wording of section 4(1).

[para 31.] I have said that the word "or" indicates that only one of "custody" or "control" is required to meet the requirements of section 4(1). Both custody and control are not required. If a public body has either custody or control of a record, the Act applies to that record.

[para 32.] "Custody" and "control" are not the same thing. If they were, there would be no need to have both words or to distinguish between them. A reference to "custody", as distinct from "control", is to recognize that it is conceivable that a public body might have custody, but not control of a record, or that a public body might have control of a record, but not custody. Of course, a public body may have both custody and control of a record.

[para 33.] In Order 99-032, I had to decide whether a public body had custody or control of records. I reviewed some criteria that would assist in making that determination.

[para 34.] In that case, the records were physically in the public body's file. That physical possession was sufficient for a finding of "custody".

[para 35.] Having found that the public body had custody of the records, it was not necessary to decide whether the public body also had control of the records. However, I also discussed control of the records. One of the criteria for control can also be physical possession (custody). But it is only one of a number of criteria for control. Alone, mere physical possession or custody is not sufficient for a finding of control.

[para 36.] The Record is in the physical possession of the University Archives. The evidence is that the University Archives is part of the University; it is not a separate body. Therefore, without anything further and without considering the Faculty Association's argument, since the Record is in the physical possession of the University Archives, I would find that the Record is in the custody of the University. I would not find it necessary to decide whether the Record is also under the control of the University.

[para 37.] Finally, even if the University Archives had custody of the Record under conditions of trust imposed by the affected party (and there is no evidence of this), that would still be custody for the purposes of the Act (although I might then have to consider an exclusion under section 4(1)(f), which I will discuss later).

[para 38.] The University nevertheless argues that custody must entail a legal right of control over a record, more than simple possession. I do not accept that argument. A legal right of control would be a criterion for control, not custody. Another criterion for control is whether a public body has a right to possession of the record, as set out in Order 99-032. In summary, a legal right of either control or possession would be criteria for control, not custody.

[para 39.] The University has a legal right of control because it has a say in unsealing the Record. The University also has a legal right of possession because the Record is in the University Archives, by agreement. If I had to decide the issue of control of the Record, I would also have found it significant to a finding of control that the University jointly paid for the Record and jointly decided to put the Record in the University Archives.

[para 40.] I would not attach any significance to the University's argument that, by its own actions, the record is now out of its control. If it were otherwise, a public body could put any record out of reach of the Act by entering into an agreement to restrict control.

d. The Faculty Association's arguments as to custody or control

[para 41.] The Faculty Association says that it and the University jointly requested the Record, jointly paid for the Record, and are joint owners of the Record. As a result of the agreement, both decided jointly what would happen to the Record. Neither can make unilateral decisions about the Record. At the heart of the agreement is that neither the Faculty Association nor the University could unilaterally access or deal with the Record in any way. The sealing of the Record was only one aspect of a very significant agreement made in the course of settlement of outstanding grievances.

[para 42.] The Faculty Association supports the University's argument that possession or custody must be interpreted as "legal possession", so that the fact that the Record is physically in the University Archives does not impact on the analyses of whether the University has legal custody or control.

[para 43.] As an example of legal possession, the Faculty Association quotes *Ringrose v. LeRiche* (1981), 36 A.R. 437 (Alta. Q.B.), as follows:

> The documents in question belong to the College of Physicians and Surgeons and are in the legal possession and control of the College of Physicians and Surgeons. While Dr. LeRiche, as Registrar, does have physical custody and access to these

> documents, there is nothing to suggest to me that may, as of right, demand possession of the documents from the College of Physicians and Surgeons for the purposes of delivering them to the plaintiff in an action brought against him personally. The documents are in his possession as Registrar of the College of Physicians and Surgeons and not in his personal custody.

[para 44.] The Faculty Association says that I should draw guidance from the approach taken in the *Ringrose* case and find that the University does not have custody or control of the Record.

e. Analysis of the Faculty Association's arguments

[para 45.] I have said that the right to possession of a record is one of the criteria in deciding whether a public body has control of a record, as opposed to custody. It seems to me that the right to demand possession of a record, as in the *Ringrose* case cited above, would also be a criterion in deciding control. Consequently, I decline to find that section 4(1) requires "legal possession" as opposed to physical possession, that is, custody.

[para 46.] Furthermore, in the *Ringrose* case, "legal possession" appears to be concerned with the capacity in which or authority under which a person has possession of a record. In my view, that capacity or authority are also criteria for deciding control, as set out in Order 99-032.

[para 47.] It further seems to me that the exclusions to custody or control, contained in sections 4(1)(a) to (o), in many ways incorporate capacity or authority for possession of records. For that reason and for other reasons I have already discussed, I do not find it necessary to establish criteria for custody, other than physical possession.

f. Conclusion as to custody or control of the Record

[para 48.] I find that the Record is in the custody of the University for the purposes of section 4(1) of the Act because the Record is in the physical possession of the University Archives, which is part of the University. Therefore, the Record is subject to the Act.

[para 49.] Having found that the Record is in the custody of the University, I do not find it necessary to decide whether the Record is also under the control of the University for the purposes of section 4(1).

2. Even if the Record is in the custody or under the control of the University, as provided by section 4(1) of the Act, is the Record excluded from the application of the Act by section 4(1)(b) (a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity)?

[para 50.] Even if a record is in the custody or under the control of a public body, as provided by section 4(1) of the Act, a record may be excluded from the application of the Act by section 4(1)(a) to (o). Section 4(1)(a) to (o) are exceptions to section 4(1).

[para 51.] The University and the Faculty Association argue that the Record is excluded from the application of the Act by section 4(1)(b).

[para 52.] Section 4(1)(b) reads:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *…*
>
> *(b) a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity including any authority designated by the Lieutenant Governor in Council to which the Administrative Procedures Act applies;*
>
> *…*

[para 53.] The University and the Faculty Association say that the Record was prepared with a view to sending it to an arbitrator if mediation failed. The University and the Faculty Association have provided me with case law that says that an arbitrator who determines the rights of parties is exercising a quasi-judicial function: see *Calgary General Hospital v. United Nurses of Alberta* (1983), 50 A.R. 250 (Alta. C.A.).

[para 54.] I have no doubt that an arbitrator would meet the requirements of acting in a quasi-judicial capacity because that person would have the authority to decide issues between and bind opposing parties.

[para 55.] However, in focusing on the words "judicial or quasi-judicial capacity", the parties have lost sight of the accompanying words "person who is acting [emphasis added] in a judicial or quasi-judicial capacity".

In my view, those words imply that a person is presently acting in such a capacity.

[para 56.] In this case, there is no arbitrator who was acting at the relevant time. I do not think that the intention to have an arbitrator act is sufficient for section 4(1)(b), which is an exclusion to the Act that should be interpreted narrowly.

[para 57.] I believe that section 4(1)(b) is designed to allow a person acting in a judicial or quasi-judicial capacity the freedom to make a decision and to remove from the application of the Act that which occurs during the decision-making process. Therefore, the fact that the parties may have intended that the Record would ultimately go to an arbitrator is irrelevant, particularly since the matters that would have been sent to the arbitrator have since been resolved by agreement between the University and the Faculty Association.

[para 58.] Having come to this conclusion, I do not find it necessary to decide whether the Record is a "personal note, communication or draft decision" or whether the Record has been "created by or for" a person who is acting in a judicial or quasi-judicial capacity.

[para 59.] I find that section 4(1)(b) does not apply to the Record. Consequently, the Record is not excluded from the application of the Act by section 4(1)(b).

3. Even if the Record is in the custody or under the control of the University, as provided by section 4(1) of the Act, is the record excluded from the application of the Act by section 4(1)(f) (material that has been deposited in the Provincial Archives of Alberta or the archives of a public body by or for a person or entity other than a public body)?

[para 60.] The University and the Faculty Association argue that the Record is excluded from the application of the Act by section 4(1)(f).

[para 61.] Section 4(1)(f) reads:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *…*
>
> *(f) material that has been deposited in the Provincial Archives of Alberta or the archives*

of a public body by or for a person or entity other than a public body;
…

[para 62.] The University and the Faculty Association gave evidence that the Record was deposited in the University Archives as part of separate written agreements between the University and the Faculty Association, and between the University and an individual affected party.

[para 63.] I have considered whether the University and the Faculty Association meet the requirements of the section, as follows.

[para 64.] The University Archives is the archives of the University, which is a public body. The record would be "material". On the evidence, there is a deposit of that material in the University Archives.

[para 65.] Has the Record been deposited "by or for" a person or entity other than a public body?

[para 66.] I interpret "for" in "by or for" in section 4(1)(f) to mean "on behalf of", as discussed in Order 97-007. Although the University and the Faculty Association argue that "for" should have a different meaning in section 4(1)(f), I see no reason to depart from the interpretation I have given to "for" when discussing "by and for" in Order 97-007.

[para 67.] The December 1997 agreement between the University and the Faculty Association says that the University will provide the affected party with confirmation that the University and the Faculty Association have deposited all copies of the Record in the sealed package in the University Archives. By this, I conclude that the Record was not deposited by or for (on behalf of) the affected party.

[para 68.] Was the Record deposited by or on behalf of the Faculty Association, which is not a public body? The agreement indicates that the Record was deposited jointly by the University and the Faculty Association. Is that the kind of deposit that section 4(1)(f) intended, in order to exclude a record from the application of the Act?

[para 69.] To decide this, I have considered the circumstances under which the Provincial Archives or the archives of a public body would accept a deposit from a person or entity other than a public body, and in what circumstances such a person or entity would deposit records in the Provincial Archives or the archives of a public body.

[para 70.] In the case of the Provincial Archives, it accepts personal documents through a private deposit agreement. The usual process for a

private deposit of personal documents into the Provincial Archives is for the person and the Provincial Archives to enter into the private deposit agreement. The person and the Provincial Archives determine access restrictions. The person can give written approval to lift the restrictions or remove them. There is often a period of restricted access.

[para 71.] In this case, there is not a deposit agreement as such. Instead, there are agreements between the University and the Faculty Association, and the University and the affected party, which contain clauses to keep the Record confidential. Is that sufficient to find that the Record is excluded from the Act by section 4(1)(f)?

[para 72.] Section 4(1)(f) specifically excludes a public body. I believe the intent of section 4(1)(f) is to prevent a public body from depositing its own records and thereby removing them from the application of the Act. Therefore, it seems to me that a public body cannot be involved in the deposit except as a recipient of the record deposited. If it were otherwise, any agreement between a public body and a non-public body could be deposited in the public body's archives and be removed from the application of the Act.

[para 73.] The Record is as much the University's record as it is the Faculty Association's. Both parties commissioned and paid for the Record. Given that Record is partly the University's, and the circumstances in which the Record was put in the University Archives, I find that section 4(1)(f) does not apply to the Record. Consequently, the Record is not excluded from the application of the Act by section 4(1)(f).

[para 74.] I do not find it necessary to decide whether the Record was deposited on conditions of trust. In any event, in this case, there is no evidence that the affected party or the Faculty Association imposed conditions of trust on the deposit.

4. Conclusion as to my jurisdiction over the Record

[para 75.] The Record is in the custody of the University, as provided by section 4(1) of the Act, and is not otherwise excluded from the application of the Act by section 4(1)(b) or section 4(1)(f). Therefore, the Act applies to the Record, and I have jurisdiction over the Record.

ISSUE B: Even if I have jurisdiction over the Record, do any exceptions under the Act require or permit the University to withhold the Record?

1. Does section 15(1) of the Act (labour relations information of a third party) apply to the Record?

a. General

[para 76.] The University argues that the Record contains labour relations information (section 15(1)(a)(ii) of the Act) that was supplied in confidence by various individuals in the Faculty of Social Work (section 15(1)(b)), the disclosure of which would reveal information supplied to, or the report of, a mediator or other person appointed to resolve or inquire into a labour relations dispute (section 15(1)(c)(iv)). The University also argues that disclosure of the Record may be harmful to the Faculty Association or individual members of the Faculty Association. Therefore, the University maintains that section 15(1) of the Act applies to the Record, and the Record should not be disclosed.

[para 77.] The Faculty Association maintains that release of the Record would reveal confidential labour relations information of the Faculty Association. The Faculty Association further says that disclosure of the Record could reasonably be expected to harm its competitive position or negotiating position (section 15(1)(c)(i)) and to result in similar information no longer being supplied to the University (section 15(1)(c)(ii)).

[para 78.] Under section 15(1)(c), the University and the Faculty Association focussed their arguments on section 15(1)(c)(iv). Consequently, in this Order, I have decided to consider section 15(1)(c)(iv) before considering section 15(1)(c)(i) and (ii).

[para 79.] The relevant portions of section 15(1) read:

> *15(1) The head of a public body must refuse to disclose to an applicant information*
>
> > *(a) that would reveal*
> >
> > > *…*
> > > *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
> >
> > *(b) that is supplied, explicitly or implicitly, in confidence, and*

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
…
(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[para 80.] For section 15(1) to apply in this case, the University must establish that:

(i) disclosure of the information would reveal labour relations information of a third party (section 15(1)(a)(ii));

(ii) the information was supplied, explicitly or implicitly, in confidence (section 15(1)(b)); and

(iii) disclosure of the information could reasonably be expected to reveal information supplied to, or the report of, a mediator or other person or body appointed to resolve or inquire into a labour relations dispute (section 15(1)(c)(iv)).

b. Would disclosure of the information reveal labour relations information of a third party (section 15(1)(a)(ii))?

i. "Labour relations information"

[para 81.] The Applicant argues that the main focus of the record is not labour relations, but governance in the Faculty of Social Work. The Applicant would therefore have me find that the Record does not contain labour relations information.

[para 82.] The Faculty Association argues that this case involves labour relations in the university context, as follows.

[para 83.] Under section 21.2(1) and (3) of the *Universities Act*, a university must have an academic staff association that has the exclusive authority, on behalf of the academic staff members, to negotiate and enter into an "agreement" with that university. The Faculty Association says it is the academic association established for the University by section 21.3(1)(b) of the *Universities Act*.

[para 84.] In its simplest terms, the Faculty Association is the union that has the exclusive authority to represent the academic staff members of the University in all matters set out in the collective agreement between the Faculty Association and the University.

[para 85.] "Agreement" is defined in section 21.1(2) of the *Universities Act* to mean an agreement in writing between a university and an academic staff association under section 21.5. Under section 21.5(2), that agreement is with respect to the employment of academic staff members. The Faculty Association and the University have entered into such an agreement, referred to in this Order as the "collective agreement".

[para 86.] I have reviewed a copy of the collective agreement that was in force at the relevant time, which the Faculty Association provided during the inquiry. The collective agreement is also on the University's website at *www.ucalgary.ca/UofC/departments/TUCFA/ca.htm*.

[para 87.] The agreement deals with matters such as the bargaining unit, management rights, non-discrimination, harassment, assignment of duties, salaries, discipline, mediation, grievance procedures and arbitration, to mention a few of the matters.

[para 88.] The Faculty Association says that, in 1995-1996, academic staff members of the Faculty of Social Work filed a number of grievances against management and other academic staff members. The grievances alleged, among other things, uneven treatment and harassment of academic staff members by management.

[para 89.] To resolve the grievances, the Faculty Association and the University jointly retained the services of an experienced labour mediator. In this Order, I will refer to that individual as "X" rather than as the mediator, because there is some issue as to whether the individual was a mediator for the purposes of section 15(1), given the events that transpired in the course of that individual's employment.

[para 90.] X was given the mandate to attempt to reach a mediated resolution to the grievances. If the grievances could not be mediated, then X was to prepare a report that the Faculty Association and the University could use at the arbitration of any grievances.

[para 91.] X interviewed management, as well as academic staff members, including the Applicant. I have reviewed the Record, which discusses the information X obtained from those interviews.

[para 92.] Ultimately, X could not reach a mediated resolution. The Faculty Association says that it and the University agreed that X should nevertheless proceed to prepare a report (the Record) on the operations of the Faculty of Social Work, to assist in identifying necessary changes to improve working conditions within the Faculty for all academic staff members, and to be used in arbitration. The Record was completed in September 1997.

[para 93.] The Faculty Association argues this case involves one aspect of labour relations, namely, the grievance procedure and the dispute resolution mechanisms that fall under the grievance procedure in the management and administration of the collective agreement. The Faculty Association says that the Record was a piece of the ultimate dispute resolution process under the grievance procedure.

[para 94.] The Faculty Association urges me to define labour relations as the collective relationship between an employer and an employee, in order to protect the information related to settlement or resolution of disputes between the parties to a collective agreement. The Faculty Association cites Ontario Order P-1223 to support its view. Based on its definition of labour relations, the Faculty Association concludes that the Record is labour relations information.

[para 95.] In Order 99-030, I said that, in the context of section 15(1), "labour relations information" is information about the relations between management and employees. That case concerned a union's request for access to the Alberta Labour Relations Board for a petition signed by union members.

[para 96.] Since the Faculty Association is arguing that I add the "nuance" of "collective relations" to my previous interpretation of "labour relations", and since this case is different from Order 99-030, I have decided to revisit my interpretation of "labour relations", as set out in Order 99-030.

[para 97.] The term "labour relations" has been defined by a number of other sources:

- Sack and Poskanzer, *Labour Law Terms, A Dictionary of Canadian Labour Law*, defines labour relations as "employer-employee relations including especially matters connected with collective bargaining and associated activities".

- Webster's Third New International Dictionary defines labour relations as "relations between management and labour, especially as involved in collective bargaining and maintenance of contract".

- Arthur Mash, *Concise Encyclopedia of Industrial Relations*, defines labour relations within the context of industrial relations, as follows: "…relationships within and between workers, working groups and their organizations and managers, employers and their organization…'Labour relations' are sometimes abstracted from 'industrial relations' as describing organized or institutionalized relationships within the whole, though sometimes the two terms are used as if they were interchangeable..."

[para 98.] Given these definitions, I agree that "labour relations" would include "collective relations", such as collective bargaining and related activities.

[para 99.] However, I do not think that "labour relations" should be limited to "collective relations", as that would unduly limit the scope of labour relations. For the purposes of section 15(1), I favour a more comprehensive definition, such as that set out in the *Concise Encyclopedia of Industrial Relations*.

[para 100.] In this case, the Record contains information first and foremost about relations between a management employee, who is represented by the University, and academic staff employees in the Faculty of Social Work, who are represented by the Faculty Association. Secondly, the Record contains information about relations within and between academic staff employees, as represented by the Faculty Association. The information arises in the context of grievances by some academic staff employees against the management employee and other academic staff employees.

[para 101.] Based on the latter definition of "labour relations", I find that the Record contains and would reveal labour relations information.

[para 102.] I want to deal briefly here with the Applicant's argument that the Record is about governance in the Faculty of Social Work, and does not contain labour relations information.

[para 103.] In this case, the governance issue and the labour relations issue cannot be neatly divorced from each other because the academic staff filed harassment grievances, which invoked the process under the collective agreement. Therefore, the fact that there may also be a governance issue does not make this any less a labour relations case or any less labour relations information.

ii. Labour relations information of a "third party"

[para 104.] Section 15(1)(a)(ii) requires that there be labour relations information of a "third party", which is defined in section 1(1)(r) of the Act, as follows:

> *1(1) In this Act,*
>
> *…*
>
> *(r) "third party" means a person, a group of persons or an organization other than an applicant or a public body;*
>
> *…*

[para 105.] Based on the definition of "third party", the University cannot be a third party because it is a public body. Therefore, there cannot be labour relations information of the University for the purposes of section 15(1)(a)(ii).

[para 106.] However, the individual management employee who was employed by the University is not a public body and can therefore be a third party for the purposes of section 15(1)(a)(ii), even though that individual was represented by the University in the grievances. The Record contains and would reveal labour relations information of the individual management employee against whom grievances were filed.

[para 107.] Based on the definition of "third party", the Applicant cannot be a third party. Therefore, there cannot be labour relations information of the Applicant. In any event, the Applicant is not named or otherwise identified in the Record.

[para 108.] The individual academic staff employees may be third parties for the purposes of section 15(1)(a)(ii), even though they are represented by the Faculty Association in the grievances. The Record contains and

would reveal labour relations information of individual academic staff employees who filed grievances or had grievances filed against them.

[para 109.] The Faculty Association can be a third party because it is a group of persons or an organization other than an applicant or a public body: see section 1(1)(r).

[para 110.] The Faculty Association argues that the information is the Faculty Association's labour relations information during the grievance process, as it has the exclusive authority, on behalf of the academic staff of the University, to negotiate and enter into a collective agreement with the University.

[para 111.] I have reviewed the Record, which discusses information obtained from interviews with various members of the academic staff of the Faculty of Social Work, regarding the grievances against management and other academic staff. That information was gathered from individual academic staff. Consequently, I find that the Record contains and would reveal labour relations information of individual academic staff as third parties. The Record does not contain and would not reveal the labour relations information of the Faculty Association representing the individual academic staff.

[para 112.] That is not to say there can never be labour relations information of a faculty association or union acting in a representative capacity. However, in this case, the record contains labour relations information of the individuals involved in the grievances.

[para 113.] In arguing that the information is the labour relations information of the Faculty Association, the Faculty Association may be confusing the information contained in the Record with the Record itself, which it paid for jointly with the University.

[para 114.] As a final unrelated matter, the University argues that, since the Applicant is represented by the Faculty Association under the collective agreement, the Applicant has no right to commence the "within proceedings" against the University, which I take to mean that the Applicant has no right to make an access request for the Record and then to ask me to review the University's refusal to provide access.

[para 115.] In my view, the Faculty Association's exclusive authority to represent the Applicant in matters set out in the collective agreement does not prevent the Applicant from making an access request under the Act or for asking for a review of the University's refusal to provide access. Furthermore, the Act contains its own scheme for representation under the Act. The Applicant would have to have given written authority under

section 79(1)(e) of the Act for the Faculty Association to represent the Applicant under the Act. Moreover, the Act is in addition to and does not replace existing procedures for access to information or records: see section 3(a).

c. Was the information supplied, explicitly or implicitly, in confidence (section 15(1)(b))?

[para 116.] Section 15(1)(b) requires that a third party supply the information to a public body, in confidence.

[para 117.] As to supplying the information to a public body, I find that the Faculty Association did not supply labour relations information to the University. Again, the information is not to be confused with the Record itself.

[para 118.] The individual academic staff members supplied labour relations information to X, who used that information to prepare the Record. X then supplied the information to the University and the Faculty Association, in the form of a report (the Record). The individual academic staff did not supply labour relations information to the University.

[para 119.] In a number of Orders, and most recently in Order 2000-005, I said that the criteria under section 15(1)(b) to "supply" information to a public body can be met even though someone other than the third party supplied the information to the public body.

[para 120.] In this case, X supplied the individual academic staff's labour relations information to the University by way of the Record. The information contained in the Record is inextricably linked with the labour relations information supplied by the individual academic staff. The Record would not exist if the individual academic staff had not supplied the labour relations information to X. Furthermore, disclosure of the information contained in the Record would permit the Applicant to make accurate inferences about the labour relations information supplied by individual academic staff that would not itself be disclosed under the Act.

[para 121.] Since the disclosure of the information contained in the Record would reveal the labour relations information supplied by the individual academic staff to X, who supplied it to the University, the criterion of supplying the information to a public body has been met.

[para 122.] As to supplying the information in confidence, there is both oral and written evidence that the labour relations information supplied

by individual academic staff was supplied in confidence. X promised academic staff that they would not be identified by having said anything. X was expected to conduct the interviews in a confidential setting.

[para 123.] The academic staff were told that the Record would be available to them. However, the initial intention to release the Record to the academic staff is irrelevant if, as here, the Record would reveal the labour relations information the academic staff supplied explicitly in confidence. A distinction must be made between the Record, which was not originally intended to be confidential, and the labour relations information supplied by individual academic staff, which was intended to be confidential. The Record would reveal the labour relations information supplied in confidence.

[para 124.] Furthermore, in the circumstances of an attempt to mediate grievances, I accept that academic staff would have provided the labour relations information in confidence. The purpose of confidentiality would be to encourage the academic staff to willingly provide complete information in confidence during the mediation process.

[para 125.] Therefore, I find that all the requirements of section 15(1)(b) have been met.

d. Could disclosure of the information reasonably be expected to reveal information supplied to, or the report of, a mediator or other person appointed to resolve or inquire into a labour relations dispute (section 15(1)(c)(iv))?

[para 126.] Section 15(1)(c)(iv) contains several requirements, discussed below.

i. Was there a labour relations dispute?

[para 127.] In keeping with the definition of "labour relations", I believe that a "labour relations dispute" would refer to any conflict related to labour relations.

[para 128.] The evidence is that academic staff filed grievances against management and other academic staff. Grievances concern conflict related to labour relations. Therefore, there is a "labour relations dispute" for the purposes of section 15(1)(c)(iv).

ii. Was X a mediator or other person appointed to resolve or inquire into a labour relations dispute?

[para 129.] The evidence is that the University and the Faculty Association agreed to hire X to mediate a labour relations dispute. X interviewed numerous members of the Faculty of Social Work. Some distance into the mediation process, X determined that the dispute could not be mediated. The University and the Faculty Association nevertheless asked X to produce a report, which is the Record.

[para 130.] There is some question as to whether X was a mediator. I have reviewed the mediation process set out under the collective agreement. I believe that X was not a mediator as contemplated by that process. However, I acknowledge that there can be a mediator appointed other than as specified under a collective agreement.

[para 131.] X likens his role to "like that of a mediator appointed…". I do not believe it is significant that X was ultimately not able to mediate and that mediation broke off. It cannot be that there is mediation only when mediation is successful.

[para 132.] However, I do not need to decide whether X was a mediator because the evidence is that the Faculty Association and the University jointly retained X to resolve the grievances. X was a person appointed to resolve or inquire into a labour relations dispute, although X ultimately could not resolve the grievances.

[para 133.] Even if it cannot be said that the Record is the report of a mediator, then the Record is the report of a person appointed to resolve or inquire into a labour relations dispute.

iii. Could the information contained in the Record reasonably be expected to reveal information supplied to, or the report of, X?

[para 134.] X says he reviewed the grievances and met individually with each member of the academic staff. The grievance issues were put on hold during mediation.

[para 135.] The Record, which is X's report, would not exist but for the information the academic staff supplied to X. That information would not only reveal the information supplied to X, but also X's report.

[para 136.] Therefore, I find that disclosure of the Record could reasonably be expected to reveal information supplied to, or the report of, X, who is a person appointed to resolve or inquire into a labour relations

dispute. Therefore, section 15(1)(c)(iv) applies. Since section 15(1)(c)(iv) applies, as well as section 15(1)(a)(ii) and (b), the entire Record is excepted under section 15(1).

[para 137.] As I have found that section 15(1)(c)(iv) applies, I do not find it necessary to decide whether section 15(1)(c)(i) or (ii) also apply.

e. Conclusion under section 15(1)

[para 138.] The information contained in the Record meets all the criteria of section 15(1) of the Act. Therefore, section 15(1) applies to the Record. Consequently, I uphold the Public Body's decision to refuse to disclose the Record under section 15(1). I intend to order the Public Body not to disclose the Record to the Applicant.

[para 139.] As a final comment, I agree with the Faculty Association that section 15(1) respects the dispute resolution mechanisms in the labour relations context.

2. Does section 16 of the Act (personal information of a third party) apply to the Record?

[para 140.] As I have found that section 15(1) applies to the Record, I do not find it necessary to decide whether section 16 also applies to the Record.

3. Do section 26(1)(a) and section 26(2) of the Act (legal privilege that relates to a person other than a public body) apply to the Record?

[para 141.] The University did not raise this exception. The Faculty Association did. Because it's a mandatory provision, I would consider it regardless of which party raised it or even if no party raised it.

[para 142.] The Faculty Association argues that the privilege is that attaching to communications made in furtherance of settlement during the grievance procedure.

[para 143.] However, as I have found that section 15(1) applies to the Record, I do not find it necessary to decide whether section 26(1)(a) and section 26(2) also apply to the Record.

4. Did the University properly refuse to disclose the Record, as provided by section 23(1)(a) of the Act ("advice") or section 23(1)(b) of the Act (consultations or deliberations)?

[para 144.] As I have found that section 15(1) applies to the Record, I do not find it necessary to decide whether the University properly refused to disclose the Record, as provided by section 23(1)(a) or section 23(1)(b).

ISSUE C: Does section 31(1)(b) of the Act (disclosure in the public interest) require the University to disclose the Record?

[para 145.] The Applicant argues that section 31(1)(b) requires the University to disclose the Record.

[para 146.] Section 31(1)(b) 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*
>
> *…*
>
> *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*

[para 147.] The Applicant says that disclosure is in the public interest because public money was spent for the Record, and there is interest in how the Faculty resolved its governance issues. Furthermore, in the Applicant's view, disclosure is necessary to encourage further collaborative processes with the University and to vindicate the Applicant's reputation.

[para 148.] In Order 96-011, I said that, for section 31(1)(b) to apply, the matter must be of "compelling public interest". Furthermore, in Order 96-014, Mr. Justice Cairns made an important distinction between information that "may well be of interest to the public" and information that is "a matter of public interest".

[para 149.] The burden is on the Applicant to prove that there is a matter of compelling public interest, such that the University should disclose information under section 31(1)(b).

[para 150.] In this case, although the information may well be of interest to the public, it cannot be considered a matter of public interest under section 31(1)(b). I am mindful about the Applicant's concern about

vindicating the Applicant's reputation, but to date I have taken a narrow view of section 31(1)(b) that would not encompass such a consideration. I do note that the Record does not name the Applicant or otherwise identify the Applicant.

[para 151.] I find that the Applicant has not established that this is a matter of compelling public interest. Therefore, section 31(1)(b) of the Act does not require the University to disclose the Record that I have found that the University is not required to disclose under section 15(1).

V. ORDER

[para 152.] I make the following Order under section 68 of the Act.

ISSUE A: Do I have jurisdiction over the Record?

1. Custody or control of the Record (section 4(1))

[para 153.] The Record is in the custody of the University for the purposes of section 4(1) of the Act. Therefore, the Record is subject to the Act.

[para 154.] Having found that the Record is in the custody of the University, I do not find it necessary to decide whether the Record is also under the control of the University for the purposes of section 4(1).

2. Personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity (section 4(1)(b))

[para 155.] Section 4(1)(b) does not apply to the Record. Consequently, the Record is not excluded from the application of the Act by section 4(1)(b).

3. Material that has been deposited in the Provincial Archives of Alberta or in the archives of a public body by or for a person or entity other than a public body (section 4(1)(f))

[para 156.] Section 4(1)(f) does not apply to the Record. Consequently, the Record is not excluded from the application of the Act by section 4(1)(f).

4. Conclusion as to my jurisdiction over the Record

[para 157.] The Record is in the custody of the University, as provided by section 4(1) of the Act, and is not otherwise excluded from the application of the Act by section 4(1)(b) or section 4(1)(f). Therefore, the Act applies to the Record, and I have jurisdiction over the Record.

ISSUE B: If I have jurisdiction over the Record, do any exceptions under the Act require or permit the University to withhold the Record?

1. Labour relations information of a third party (section 15(1))

[para 158.] Section 15(1) of the Act applies to the Record. Therefore, the University must refuse to disclose the Record, as provided by section 15(1).

[para 159.] I uphold the University's decision to refuse to disclose the Record under section 15(1). I order the University not to disclose the Record to the Applicant.

2. Personal information of a third party (section 16)

[para 160.] As I have found that section 15(1) applies to the Record, I do not find it necessary to decide whether section 16 also applies to the Record.

3. Legal privilege that relates to a person other than a public body (section 26(1)(a) and section 26(2))

[para 161.] As I have found that section 15(1) applies to the Record, I do not find it necessary to decide whether section 26(1)(a) and section 26(2) also apply to the Record.

4. Advice (section 23(1)(a)) or consultations or deliberations (section 23(1)(b))

[para 162.] As I have found that section 15(1) applies to the Record, I do not find it necessary to decide whether the University properly refused to disclose the Record, as provided by section 23(1)(a) or section 23(1)(b).

ISSUE C: Does section 31(1)(b) of the Act (disclosure in the public interest) require the University to disclose the Record?

[para 163.] Section 31(1)(b) of the Act does not require the University to disclose the Record that I have found that the University is not required to disclose under section 15(1).

Robert C. Clark
Information and Privacy Commissioner