ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-019

May 1, 2001

ALBERTA HEALTH AND WELLNESS

Review Number 1790

Office URL: http://www.oipc.ab.ca

Summary: In 1992, the Applicant's employment with Alberta Health and Wellness (the "Public Body") was terminated. In 1999, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") for access to records of (i) the investigation that resulted in the termination, and (ii) the Applicant's subsequent grievance. Some records of the investigation were located at Alberta Justice and transferred to the Public Body. The Commissioner ordered the Public Body to disclose the Applicant's personal information that was not intertwined with the personal information of other third parties. The Commissioner also ordered the Public Body to disclose some personal information of the Public Body's employees and other third parties that would not be an unreasonable invasion of those third parties' personal privacy to disclose. However, the Commissioner agreed with the Public Body that most of the other personal information related to the investigation should not be disclosed because disclosure would be an unreasonable invasion of the third parties' personal privacy.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss. 1(1)(n), 1(1)(n)(viii), 2(e), 9(1), 16(1), 16(4)(a), 16(4)((b), 16(4)(g)(i), 16(5), 19, 19(1)(d), 26, 26(1)(a), 26(1)(b), 26(2), 29, 67(2), 68; *Mental Health Act*, S.A. 1988, c. M-13.1, s. 17(4); *Public Service*

Act, R.S.A. 1980, c. P-31, s. 25; *Public Service Employee Relations Act*, R.S.A. 1980, c. P-33.

Authorities Cited: AB: Orders 96-006, 96-020, 98-004, 2000-002; **BC:** Order 00-08.

Cases Cited: *Balabel v. Air India*, [1988] 2 All E.R. 246 (C.A.).

I. BACKGROUND

[para 1.] In 1992, the Manager, Employee Relations for Alberta Health and Wellness (the "Public Body"), as part of a team, investigated allegations about the Applicant's unprofessional conduct in relation to services the Applicant was providing to clients of a mental health clinic. Following the investigation, the Applicant's employment was terminated. The Applicant subsequently filed a grievance, which was resolved in early 1993 by agreement between the Applicant, the Alberta Union of Provincial Employees and the Public Body.

[para 2.] On July 12, 1999, and again on August 9, 1999, the Applicant applied to the Public Body for access to the Applicant's own personal information under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The first access request was for personnel records to 1992, and the second access request was generally for records relating to the investigation of the Applicant and the Applicant's grievance in 1992.

[para 3.] On the second access request, the Public Body did not locate any additional records. However, the Public Body informed the Applicant that there were responsive records at Alberta Justice.

[para 4.] On September 30, 1999, the Applicant applied to Alberta Justice for records. Alberta Justice transferred the request and 35 pages of records concerning the investigation to the Public Body, on the ground that the Public Body had previously provided the records to Alberta Justice.

[para 5.] The Public Body withheld the 35 pages of records in their entirety, claiming that section 26 (privilege) applied to the records. Alternatively, the Public Body said that section 16 (personal information of third parties) and section 19 (law enforcement) applied to portions of the records.

[para 6.] On December 17, 1999, the Applicant asked me to review the Public Body's decision to withhold the 35 pages of records.

Mediation was authorized but was not successful. The matter was set down for a written inquiry. In addition to the issues related to severing under the Act, the Applicant asked me to consider the Public Body's statement that "all other documents relating to the investigation and grievance were removed and destroyed".

[para 7.] The Notice of Inquiry stated that the issues for the inquiry concerned information severed under section 19 and section 26. On reviewing the records, my Office noticed that the Public Body had also severed information under section 16. My Office therefore notified the parties that section 16 was a further issue in the inquiry. As the Applicant had a burden of proof under section 16, the Applicant provided an additional written submission.

[para 8.] The Applicant's rebuttal submission raised section 9(1) (duty to assist) as an issue, based on the Public Body's not having advised the Applicant in writing under which particular portion of section 16 the Public Body was refusing to disclose information. I do not intend to consider section 9(1) with respect to the Applicant's particular issue because I have an independent power to review a public body's decision, as provided by section 2(e). I will review the Public Body's decision under section 16 in this case.

[para 9.] This Order proceeds on the basis of the Act as amended on May 19, 1999.

II. RECORDS AT ISSUE

[para 10.] The Public Body says that there are 35 pages of records at issue. The Public Body numbered the pages consecutively.

[para 11.] However, on reviewing the records, I discovered that some of the information appeared to fall within section 17(4) of the *Mental Health Act*, S.A. 1988, c. M-13.1, which reads:

> *17(4) Information obtained from records maintained in a diagnostic and treatment centre or from persons having access to them shall be treated as private and confidential information in respect of the person receiving diagnostic and treatment services in the centre and shall be used solely for the purposes described in subsection (3), and the information shall not be published, released or disclosed in any manner that would be detrimental to the personal interest, reputation or privacy of that person or that*

> *person's attending physician or any other person providing diagnostic or treatment services to that person.*

[para 12.] In Order 2000-002, I said that a public body's use and disclosure of information obtained from records maintained in a diagnostic and treatment centre (a mental health clinic) or from persons having access to the records, in respect of a person receiving diagnostic and treatment services in the mental health clinic, was outside of my jurisdiction. In Order 2001-012, which was released before this Order, I further said that I did not have jurisdiction over an applicant's access to that information. An applicant could not get access to that information under the Act.

[para 13.] The matter of my jurisdiction is always an issue for me to decide. I therefore proceeded to determine what information fell within section 17(4) of the *Mental Health Act*.

[para 14.] I find that the following information falls within section 17(4) of the *Mental Health Act*:

> pages 2 and 3; page 5 (the last paragraph); pages 6 and 7; page 9 (lines 12-13); page 10 (line 1); page 24 (lines 11-13)

[para 15.] Consequently, access to and disclosure of that information is outside my jurisdiction. The Applicant cannot get access to that information under the Act.

[para 16.] I find that the information contained in the remainder of the 31 pages does not fall within section 17(4) of the *Mental Health Act*. I have jurisdiction over the information contained in those pages. I will refer to those pages individually by page number, as required, and collectively as the "Records".

[para 17.] The Public Body's submission and the records themselves contain differences in what the Public Body says are the section numbers it used to withhold information from the Records.

[para 18.] The Public Body's submission says that section 16 applies to all the Records, but pages 20, 21, 22 and 26 of the Records do not have section 16 indicated on them and do not have any information severed. Those pages are letters and a fax cover sheet from the Applicant's solicitor to the Public Body.

[para 19.] Section 16 is a mandatory ("must") provision. Consequently, I intend to consider section 16 for those records because the Public Body's submission says that section 16 applies.

[para 20.] The Public Body's submission also says that section 19 applies to pages 12-15 and 16-19, but the Records do not have section 19 indicated on them. However, I have decided to consider section 19 for pages 12-15 and 16-19, as well as for the records on which section 19 is indicated, because it is evident that the Public Body was relying on section 19 in conjunction with section 16.

III. ISSUES

[para 21.] There are four issues in this inquiry:

A. Do I have jurisdiction over the Public Body's destruction of records?

B. Did the Public Body properly apply section 26 to the Records?

C. Did the Public Body properly apply section 19 to the Records?

D. Does section 16 apply to the Records?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Do I have jurisdiction over the Public Body's destruction of records?

[para 22.] The Public Body provided an affidavit from one of its employees who, in 1992, was part of the team investigating allegations against the Applicant. The employee says that, in 1992, it was standard office practice to establish a working file, separate from an employee's official personnel file, related to a matter under investigation.

[para 23.] The employee further says that, in 1993, he destroyed the working file related to the Applicant's investigation and grievance. The working file was destroyed after the termination of employment agreement was signed because the working file was no longer required for any legal, administrative or financial purposes (Clause 15 of the affidavit). The employee maintains that that was standard practice at the time, and that the parties understood that the information would be destroyed so that it would not be shared with prospective government employers (Clause 16 of the affidavit).

[para 24.] The Applicant wants evidence of that destruction. The Public Body says it has no evidence, other than the employee's statement under oath that he destroyed the file.

[para 25.] Destruction of records is governed by public bodies' records retention and disposition schedules, which I have reviewed in a number of cases. However, those cases concerned records destroyed after the Act came into force on October 1, 1995.

[para 26.] In this case, records were destroyed in 1993, well before the Act came into force. Consequently, I do not have any jurisdiction over the Public Body's destruction of records in this case.

ISSUE B: Did the Public Body properly apply section 26 to the Records?

[para 27.] The Public Body says that the following provisions of section 26(1) apply to the records: section 26(1)(a) (solicitor-client privilege), section 26(1)(a) (public interest privilege) and section 26(1)(b) (information prepared in relation to a matter involving the provision of legal services).

1. Application of section 26(1)(a) (solicitor-client privilege)

[para 28.] Section 26(1)(a) reads:

> *26(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege…*

[para 29.] The Public Body argues that solicitor-client privilege applies to all the Records.

[para 30.] The Records include letters from the Applicant's solicitor to the Public Body. The Public Body says that all the records, including the Applicant's solicitor's letters, were sent to the Public Body's solicitor for legal advice in preparation for the Applicant's grievance hearing and the subsequent termination of employment agreement.

[para 31.] For solicitor-client privilege to apply to a document, the document must meet the following three criteria:

(i) it must be a communication between a solicitor and client,

(ii) which entails the giving or seeking of legal advice, and

(iii) which the parties intend to be confidential.

[para 32.] The Records themselves are not a communication between the Public Body and its solicitor. There is no evidence contained within the Records that the Public Body communicated with its solicitor in relation to the Records or that legal advice was given to or sought by the Public Body in relation to the Records.

[para 33.] In his affidavit, the Public Body's employee deposes that he took the Records over to the Public Body's solicitor at Alberta Justice, for the purpose of seeking legal advice. The employee says that, throughout the investigation, he provided the Records directly to the Public Body's solicitor in person and therefore did not create transmittal documents. All documentation provided to the solicitor was provided in the context of seeking legal advice regarding disciplinary action, the pending grievance hearing and the development of the termination agreement (Clause 8 of the affidavit).

[para 34.] I believe that the Public Body is arguing that there was a continuum of communications between it and its solicitor.

[para 35.] In previous Orders, I have followed *Balabel v. Air India*, [1988] 2 All E.R. 246 (C.A.), which states:

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

[para 36.] However, in those Orders, there was evidence before me as to whom within the public body the legal advice was given or by whom sought, and evidence of the particular legal advice that was given or sought. The employee's affidavit says only that the Department consulted with a solicitor, but does not say who within the Department sought or got legal advice from the solicitor. In particular, the employee does not say that he sought or got the legal advice.

[para 37.] The employee's affidavit says that the Records were provided in the context of seeking legal advice regarding disciplinary action, the pending grievance hearing and development of the termination agreement. However, there is no evidence before me, either in the

Records or otherwise, of the particular legal advice that was given or sought. I also note that letters from the Applicant's solicitor are addressed to individuals within the Public Body, not to the Public Body's solicitor.

[para 38.] In my view, it is not sufficient for a finding of solicitor-client privilege that a public body gave records to the public body's solicitor. Without any evidence as to the confidential legal advice that was sought or given and who sought or to whom the legal advice was given, I am not prepared to find that every record dropped off or otherwise given to a public body's solicitor has been given in confidence for the purpose of giving or seeking legal advice.

[para 39.] If it were otherwise, many of a public body's records could be run by or funneled through a public body's solicitor and be excepted under the Act, thereby ripping the heart out of solicitor-client privilege. Just because a solicitor may have been involved is not enough to find that solicitor-client privilege applies to records: see B.C. Order 00-08.

[para 40.] Consequently, I find that section 26(1)(a) (solicitor-client privilege) does not apply to the Records.

[para 41.] Section 26(1) is a discretionary ("may") provision. Even if the provision applies, a public body may exercise its discretion to disclose the information.

[para 42.] I have found that section 26(1)(a) (solicitor-client privilege) does not apply. Having made this finding, I do not find it necessary to consider whether the Public Body exercised its discretion properly under section 26(1)(a).

2. Application of section 26(1)(a) (public interest privilege)

[para 43.] In Order 96-020, I said that a case-by-case public interest privilege applies (i) in cases similar to police informer cases in which informers' communications are protected to enable government agencies to obtain information necessary for administration of the law, or (ii) where the four Wigmore criteria have been met.

[para 44.] The Public Body says that public interest privilege applies to the Records. The Public Body says that this is a case involving the level of care to vulnerable members of society, namely, clients in a mental health services clinic. The Public Body maintains that this case closely parallels Order 96-020, which concerned patients in a health facility and persons who reported on their level of care. The Public Body submits that the public interest dictates that individuals who provide information

as to patient care and in the context of a law enforcement investigation must be protected from being identified.

[para 45.] I do not agree with the Public Body's characterization of this case as being law enforcement or that this case is parallel to Order 96-020. This case and the records concern an investigation of the Applicant's conduct as an employee. To the extent that there are comments on the care provided to clients, those comments are within the context of the investigation into the Applicant's conduct. I will discuss the "law enforcement" issue later in this Order. For now, it is sufficient to say that I do not consider this case to be a law enforcement matter.

[para 46.] I find that this case is not similar to police informer cases, as discussed in Order 96-020.

[para 47.] To decide whether public interest privilege applies, I must therefore consider the Wigmore criteria, all four of which must be met:

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

[para 48.] I find that only pages 30-35 of the Records concern communications between individuals and the Public Body that could be considered as having originated in a confidence that they would not be disclosed.

[para 49.] In his affidavit, the Public Body's employee says that a number of persons were interviewed in the course of the investigation and, with one exception, confidentiality was promised to all, unless the matter progressed to a court of law. The only exception was the individual whose actions precipitated the investigation. The individual and the incident that precipitated the investigation were made known to the Applicant at the time (Clause 11 of the affidavit).

[para 50.] In my view, there was a qualified promise of confidentiality. Individuals were promised confidentiality only if there were no legal proceedings, and were told that the communications would be disclosed if there were legal proceedings. Therefore, I am unable to find that the

communications originated in a confidence that they would not be disclosed. The first of the Wigmore criteria has not been met. As a result, I do not find it necessary to consider the other three criteria.

[para 51.] It is significant that, as part of the grievance process, the Applicant received a list of the names of the Public Body's potential witnesses. Had the grievance taken place, the witnesses would have been called to present evidence.

[para 52.] Public interest privilege is intended to protect the identity of an individual. The Public Body gave the Applicant a list of the names of potential witnesses for the grievance. Although the Applicant did not provide me with the list, I accept that the Public Body would have disclosed the identities for the grievance hearing. That fact would lead me to conclude that the fourth of the Wigmore criteria had not been met, if I had to decide the matter.

[para 53.] I find that section 26(1)(a) (public interest privilege) does not apply to the Records.

[para 54.] Having made this finding, I do not find it necessary to consider whether the Public Body exercised its discretion properly under section 26(1)(a), or whether the privilege is that of a person other than a public body, as provided by section 26(2).

3. Application of section 26(1)(b) (information prepared in relation to a matter involving the provision of legal services)

[para 55.] Section 26(1)(b) reads:

> *26(1) The head of a public body may refuse to disclose to an applicant*
>
> *…*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Attorney General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services…*

[para 56.] The requirements of section 26(1)(b) have not been met. There is no evidence that the information in the Records was prepared by or for any of the persons listed in section 26(1)(b)(i) to (iii) in relation to a matter involving the provision of legal services. Part of the information was prepared by the Public Body's employees in relation to the matter involving the investigation of allegations of unprofessional conduct against the Applicant. The other part of the information was prepared by the Applicant's solicitor in response to the investigation.

[para 57.] I find that section 26(1)(b) does not apply to the Records.

[para 58.] Having made this finding, I do not find it necessary to consider whether the Public Body exercised its discretion properly under section 26(1)(b).

4. Conclusion under section 26

[para 59.] I find that the Public Body did not properly apply section 26 to the Records.

ISSUE C: Did the Public Body properly apply section 19 to the Records?

[para 60.] The Public Body applied section 19(1)(d) to the Records, except pages 20-21, 22-25, and 26-29. Section 19(1)(d) reads:

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

[para 61.] "Law enforcement" is defined in section 1(1)(h) of the Act. Only section 1(1)(h)(ii) is relevant. Before May 19, 1999, section 1(1)(h)(ii) read:

> *1(1) In this Act,*
>
> *(h) "law enforcement" means*
>
> *…*
>
> *(ii) investigations that lead or could lead to a penalty or sanction being imposed…*

[para 62.] As of May 19, 1999, the definition of "law enforcement" was amended. The amended provision, which applies in this case, reads:

> *1(1) In this Act,*
>
> > *(h) "law enforcement" means*
> >
> > > *…*
> > > *(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred…*

[para 63.] The Public Body says that this case involved an investigation that was administrative in nature under section 25 of the *Public Service Act*, R.S.A. 1980, c. P-31. The relevant portion of section 25 reads:

> *25(1) Subject to any collective agreement between the Crown in right of Alberta and a bargaining agent under the Public Service Employee Relations Act an employee may be dismissed, suspended or subjected to other disciplinary action by his department head*
>
> > *(a) if he is unable to satisfactorily perform his duties, or*
> >
> > *(b) for misconduct, improper conduct or negligence.*

[para 64.] The Public Body's submission says that the investigation was also under the *Public Service and Employee Relations Act* [sic] and the Collective Agreement, but says nothing further about that legislation or agreement. The Public Body's affidavit says only that the investigation was under the section 25 of the *Public Service Act*. Therefore, I have considered only the *Public Service Act*.

[para 65.] The Public Body says that the sanction imposed as a result of the investigation was termination of employment.

[para 66.] In Order 96-006, which was decided before the definition of "law enforcement" was amended, I said that both "law" and "law enforcement" should encompass the notion of a violation of a statute or regulation. A breach of employment duties that would render an applicant subject to disciplinary action would not be a violation of "law" because those duties are not set out by a law that provides for penalties or sanctions if the duties are breached. A penalty or sanction would be imposed pursuant to conditions of employment rather than a "law".

[para 67.] I do not believe that amending the definition of "law enforcement" to specify the kinds of investigations and to include an "administrative investigation" changes this basic principle that "law enforcement" should encompass the notion of a violation of "law", that is, a statute or regulation.

[para 68.] I find that the information does not meet the definition of "law enforcement". Therefore, there cannot be "law enforcement information" for the purposes of section 19(1)(d). Section 19(1)(d) of the Act does not apply to the information.

[para 69.] I find that the Public Body did not properly apply section 19 to the Records.

ISSUE D: Does section 16 apply to the Records?

1. General

[para 70.] The Public Body applied section 16 to the Records.

[para 71.] Section 16(1) reads:

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

[para 72.] For section 16 to apply, there must be (i) personal information of a third party, and (ii) disclosure of the personal information must be an unreasonable invasion of the third party's personal privacy. In deciding these two matters, I have considered the information in each record and the information in the Records as a whole.

2. Is there "personal information" of a third party?

[para 73.] "Personal information" is defined in section 1(1)(n) of the Act to mean "recorded information about an identifiable individual", including those kinds of personal information listed in section 1(1)(n)(i) to (ix).

[para 74.] I have reviewed all the records and find that they all contain personal information consisting of one or more kinds set out in section 1(1)(n). In addition, there is information the context of which would identify one or more third parties. That information is recorded information about identifiable individuals and is therefore personal information.

[para 75.] I also find that some of the information severed is the Applicant's personal information, including opinions about the Applicant (section 1(1)(n)(viii)). As the Applicant is not a third party for the purposes of section 16, section 16 does not permit the Public Body to withhold the Applicant's personal information. Since no other exceptions under the Act apply to the Applicant's personal information, the Applicant has a right of access to that personal information. I intend to order the Public Body to disclose the Applicant's personal information, as follows:

> Page 20: the body of the letter, except the last three lines
> Page 21: the body of the letter and the "cc" line
> Page 22: the body of the letter and the "cc" line

[para 76.] However, in other places in the Records, the Applicant's personal information, including opinions about the Applicant, is intertwined with the personal information of other third parties. The third parties' personal information consists of a number of those kinds of personal information listed in section 1(1)(n), contextual information that identifies third parties, and handwriting. Consequently, it becomes necessary to decide whether some or none of the Applicant's personal information can be disclosed in situations in which the disclosure of a third party's personal information would be an unreasonable invasion of a third party's personal privacy and must not be disclosed.

3. Would disclosure of the third parties' personal information be an unreasonable invasion of a third party's personal privacy?

a. Presumptions under section 16(4)

[para 77.] The Public Body says that sections 16(4)(a), (b) and (g)(i) apply to various parts of the records that have been withheld from the Applicant. Those provisions read:

> *16(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
> >
> > *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
> > *…*
> > *(c) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party…*

i. Section 16(4)(b) – personal information is an identifiable part of a law enforcement record

[para 78.] The Public Body says that the personal information is an identifiable part of a law enforcement record, as provided by section 16(4)(b).

[para 79.] The Public Body applied section 16(4)(b) to the same information to which it also applied section 19(1)(d). I have found that the information does not meet the definition of "law enforcement" for the purposes of section 19(1)(d) because an investigation of an employee's performance as an employee is not "law enforcement".

[para 80.] Section 16(4)(b) also contains the term "law enforcement". Since I have found that there is not "law enforcement", there cannot be "law enforcement" for the purpose of section 16(4)(b). Therefore, the

information cannot be an identifiable part of a "law enforcement record", as provided by section 16(4)(b). Consequently, section 16(4)(b) does not apply to the personal information.

[para 81.] The Public Body has applied section 16(4)(a) and section 16(4)(g) to some of the information to which it applied section 16(4)(b). I will consider the information under section 16(4)(a) and section 16(4)(g). The information to which section 16(4)(b) does not apply and to which the Public Body did not apply any other provision under section 16(4) nevertheless remains to be considered under section 16(1).

ii. Section 16(4)(a) – Medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation

[para 82.] I have reviewed the information to which the Public Body applied section 16(4)(a). I find that section 16(4)(a) applies to the following:

Page 1: first seven words of the first severed item
Page 4: first four words in line 6; lines 9-23
Page 10: fourth and fifth words in line 4
Page 13: last two words in line 4
Page 17: last two words in line 4
Page 24: first two words in line 17
Page 28: to the end of the sentence in line 1; second and third words in line 15; third and fourth words in line 17; first three words in line 35

[para 83.] I find that section 16(4)(a) does not apply to any other information.

iii. Section 16(4)(g)(i) – Name and other personal information

[para 84.] I have reviewed the information to which the Public Body applied section 16(4)(g)(i). I find that section 16(4)(g)(i) applies to all the information to which the Public Body applied section 16(4)(g)(i) on the following pages: 11, 12, 14, 16 and 18.

[para 85.] I also find that section 16(4)(g)(i) applies to all the information to which the Public Body said that section 16(4)(a) and 16(4)(b) applies. I further find that section 16(4)(g)(i) applies to the personal information to which the Public Body says generally that section 16 applies (pages 20, 21, and 22, excluding the Applicant's personal information, and page 26 of the Records).

b. Relevant circumstances under section 16(5)

[para 86.] In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy under section 16(1) and section 16(4), section 16(5) requires a public body to consider all the relevant circumstances, including any of those relevant circumstances listed in section 16(5)(a) to (i).

[para 87.] The Public Body did not specifically identify what relevant circumstances it considered under section 16(5). However, the Public Body's and the Applicant's submissions raise a number of relevant circumstances listed in section 16(5): section 16(5)(c), section 16(5)(e), section 16(5)(f), and section 16(5)(i). Those provisions read:

> *16(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> > *…*
> > *(c) the personal information is relevant to a fair determination of the applicant's rights,*
> > *…*
> > *(e) the third party will be exposed unfairly to financial or other harm,*
> >
> > *(f) the personal information has been supplied in confidence,*
> > *…*
> > *(i) the personal information was originally provided by the applicant.*

[para 88.] The parties' submissions raise other relevant circumstances that I will also consider under section 16(5).

i. Section 16(5)(c) – Fair determination of Applicant's rights

[para 89.] If applicable, section 16(5)(c) is a relevant circumstance that weighs in favour of disclosing a third party's personal information.

[para 90.] The Public Body in effect argues that section 16(5)(c) is not a relevant circumstance because the Applicant's access interests were adequately protected in 1992/93 when, represented by counsel and the

Alberta Union of Provincial Employees, the Applicant signed a termination of employment agreement, which provided that the Applicant (i) resigned employment; (ii) waived any right under the collective agreement regarding termination of employment; (iii) abandoned all outstanding grievances; and (iv) released the Government, its officers and employees from any and all claims arising out of the Applicant's employment.

[para 91.] The Applicant says that the Applicant wants the information to obtain closure with respect to a very traumatic period in the Applicant's life. To do so, the Applicant requires the information upon which the decisions to suspend and terminate the Applicant's employment were based.

[para 92.] Given the Applicant's submission, there do not appear to be any rights the Applicant wants determined. Consequently the personal information of third parties is not relevant to a fair determination of the Applicant's rights.

[para 93.] I find that section 16(5)(c) is not a relevant circumstance weighing in favour of disclosing the third parties' personal information.

ii. Section 16(5)(e) – Unfair exposure to financial or other harm

[para 94.] If applicable, section 16(5)(e) is a relevant circumstance that weighs in favour of not disclosing a third party's personal information.

[para 95.] The Public Body says that, in not releasing the information, it considered the harm that may result to individuals identified in the Records. The Public Body believes that, as no further action can be taken against it by the Applicant, the only reasonably foreseeable use of the information for the Applicant would be against the individuals identified or referenced in the Records.

[para 96.] The Applicant says the Public Body does not specify what type of harm might result. The Applicant maintains that the limitations legislation applies to prevent any claims the Applicant may have had against any individuals. The Applicant further submits that the individuals in question were either employees of the Public Body or under contract to the Public Body and would therefore be entitled to the protection of the complete release signed by the Applicant, in which the Applicant waived any rights to further legal action. The Applicant does not intend to take any action against anyone, but requires the information for peace of mind.

[para 97.] I agree with the Applicant that there is no evidence of harm to third parties. Consequently, I am unable to consider how disclosure of the third parties' personal information would expose the third parties unfairly to harm.

[para 98.] I find that section 16(5)(e) is not a relevant circumstance that weighs in favour of not disclosing the third parties' personal information.

iii. Section 16(5)(f) – Personal information supplied in confidence

[para 99.] If applicable, section 16(5)(f) is a relevant circumstance that weighs in favour of not disclosing a third party's personal information.

[para 100.] The Public Body says that individuals who provided the information came forward only with the assurance of confidentiality and would not have come forward without such assurances. One individual appeared to lose confidence that their confidentiality would be protected and subsequently withdrew statements provided.

[para 101.] I have already found that there was a qualified promise of confidentiality. Individuals were promised confidentiality only if there were no legal proceedings. Also, the Public Body gave the Applicant the names of witnesses. Furthermore, there are a number of other records in which it is evident that the personal information was not supplied in confidence.

[para 102.] Consequently, I find that the personal information was not supplied in confidence with respect to certain personal information of third parties, for example, page 5 (lines 7- 9, the first three words of line 10, and lines 16-19), page 12, page 16, page 20 (all the information in the headings, and the last three lines), 21 (the closing information), 22 (all the information in the headings, and the closing information), 26 (all the information). I find that section 16(5)(f) is not a relevant circumstance that weighs in favour of not disclosing that personal information.

[para 103.] However, certain clients' personal information was supplied in confidence to the Public Body. In some cases, the personal information of the Public Body's employees is intertwined with and cannot be separated from the client's personal information that was supplied in confidence. I find that section 16(5)(f) is a relevant circumstance that weighs in favour of not disclosing that personal information.

iv. Section 16(5)(i) – Personal information originally supplied by Applicant

[para 104.] Section 16(5)(i) is a new provision added to the Act on May 19, 1999. Before that time, I had considered personal information of a third party supplied by an applicant as a relevant circumstance weighing in favour of disclosing personal information under section 16: see Order 98-004.

[para 105.] In Order 98-004, I also said that where the circumstances between the applicant and the third party had changed from the time of supplying the personal information, such that there were now adverse interests between the applicant and the third party, that relevant circumstance weighed in favour of not disclosing the third party's personal information to the applicant.

[para 106.] I see no reason to depart from my interpretation set out in Order 98-004. I intend to consider a change of circumstances under section 16(5)(i) in deciding whether that change weighs in favour of not disclosing a third party's personal information.

[para 107.] The Applicant supplied the personal information of one third party in particular to the Public Body. That information is contained in pages 13-15, 17-19, 23-25, and 27-29.

[para 108.] However, there has been a change in circumstances between the Applicant and that third party. In my view, the change in circumstances has resulted in adverse interests between the Applicant and the third party.

[para 109.] Consequently, I find that the change in circumstances weighs in favour of not disclosing the third party's personal information under section 16(5)(i).

v. Other relevant circumstances under section 16(5)

[para 110.] Section 16(5) is not exhaustive. There may be other relevant circumstances to consider in deciding whether disclosure of personal information would be an unreasonable invasion of a third party's personal privacy.

[para 111.] The Applicant asks me to consider a number of relevant circumstances. I have also considered other relevant circumstances.

[para 112.] The Applicant says that the Applicant is aware of identities of third parties and already knows the personal information of one third

party in particular. In previous Orders, I have said that that is not a relevant circumstance weighing in favour of disclosing a third party's personal information.

[para 113.] The Applicant points out that the Applicant was previously given information for the grievance hearing. It is also evident from the Records that, in 1992, the Applicant was given some of the Records (pages 2 and 3) and some of the information contained in the Records (the questions on page 8).

[para 114.] However, the Act now applies. I have found that I do not have jurisdiction over pages 2 and 3. The fact that the Applicant was previously given some other information is a relevant circumstance that weighs in favour of disclosing the information, unless some other relevant circumstances outweigh disclosure, as here.

[para 115.] The Applicant complains about the inability to discharge the burden under section 16 because the Public Body has not provided enough information about the parts of section 16 on which it is relying. I do not consider that to be a relevant circumstance weighing in favour of disclosing a third party's personal information. My independent power of review of the Public Body's decision under section 2(e) is intended to ensure that the Applicant is not penalized by not having specific information about section 16 or about the information contained in the Records.

[para 116.] In a different context, the Applicant argues that much of the information was supplied by employees or contractors in the course of their employment and should not, therefore, be protected by the Act. The Applicant believes that the Act is not intended to protect third parties from being identified when they are the Public Body's employees or contractors who are performing their job duties.

[para 117.] I do not consider that, in itself, to be a relevant circumstance weighing in favour of disclosing an employee's or contractor's personal information. I have said before that an employee is a third party for the purposes of section 16. In most cases in which a public body discloses the employee's personal information, the public body has decided that it is not an unreasonable invasion of the employee's personal privacy to do so. In other cases in which a public body has not disclosed the personal information, the public body has decided that disclosure would be an unreasonable invasion of personal privacy. I do not intend to foreclose a public body's ability to make a decision either way.

[para 118.] The Applicant also points out that presumably all the third parties were notified of the access request under section 29 of the Act,

and none of them raised any objection to disclosure. However, there is no evidence before me that the Public Body gave notices to third parties under section 29. It is likely that the Public Body did not because it refused to disclose the information. Section 29 does not require notification if a public body determines that it will not disclose.

[para 119.] I am not prepared to find that not giving notice under section 29 is, of itself, a relevant circumstance weighing in favour of not disclosing a third party's personal information. I am prepared to consider as a relevant circumstance why it may not have been practicable to give notice.

[para 120.] In this case, I find that it was not practicable to give notice, for the following reasons: the medical status of some of the third parties, the circumstances in which the investigation arose and the length of time that has passed. I find that those matters are relevant circumstances weighing in favour of not disclosing the personal information of a number of the third parties.

c. Conclusion under section 16(5)

[para 121.] The relevant circumstances weigh in favour of not disclosing the third parties' personal information severed from the following pages of the Records:

> 1, 4, 5 (excluding lines 7-9, the first three words of line 10, lines 16-19, and the last paragraph over which I have no jurisdiction), 8, 9 (excluding lines 12-13 over which I have no jurisdiction), 10 (excluding line 1 over which I have no jurisdiction), 11, 13-15, 17-19, 23, 24 (excluding lines 11-13 over which I have no jurisdiction), 25, 27-35

[para 122.] Disclosure of the foregoing personal information would be an unreasonable invasion of the third parties' personal privacy.

[para 123.] The relevant circumstances weigh in favour of disclosing the third parties' personal information severed from the following pages of the Records:

> 5 (lines 7-9, the first three words of line 10, and lines 16-19), 12, 16, 20-22, 26

[para 124.] Disclosure of the foregoing personal information would not be an unreasonable invasion of the third parties' personal privacy.

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

[para 125.] Section 67(2) puts the burden of proof on the Applicant to show that the disclosure of the third parties' personal information would not be an unreasonable invasion of the third parties' personal privacy. The Applicant has the burden of proof only for the personal information the disclosure of which I have found would be an unreasonable invasion of the third parties' personal privacy. The Applicant does not have the burden of proof for the personal information the disclosure of which I have found would not be an unreasonable invasion of the third parties' personal privacy.

[para 126.] I have considered the Applicant's arguments in the context of section 16(5). I find that the Applicant has not met the burden of proving that disclosure of the third parties' personal information would not be an unreasonable invasion of the third parties' personal privacy.

5. Conclusion under section 16

[para 127.] Section 16 applies to the third parties' personal information severed from the following pages of the Records:

> 1, 4, 5 (excluding lines 7-9, the first three words of line 10, lines 16-19, and the last paragraph over which I have no jurisdiction), 8, 9 (excluding lines 12-13 over which I have no jurisdiction), 10 (excluding line 1 over which I have no jurisdiction), 11, 13-15, 17-19, 23, 24 (excluding lines 11-13 over which I have no jurisdiction), 25, 27-35

[para 128.] Disclosure of the foregoing personal information would be an unreasonable invasion of the third parties' personal privacy, as provided by section 16(1) and section 16(4). I intend to order the Public Body not to disclose the foregoing personal information to the Applicant. Because some of the Applicant's personal information is intertwined with the third parties' personal information, the Applicant's personal information cannot be disclosed to the Applicant.

[para 129.] Section 16 does not apply to the Applicant's personal information that is not intertwined with the personal information of third parties, and does not apply to the third parties' personal information severed from the following pages of the Records:

> 5 (lines 7-9, the first three words of line 10, and lines 16-19), 12, 16, 20-22, 26

[para 130.] Disclosure of the foregoing personal information would not be an unreasonable invasion of the third parties' personal privacy. I intend to order the Public Body to disclose the foregoing personal information to the Applicant.

V. ORDER

[para 131.] I make the following order under section 68 of the Act.

[para 132.] The following information falls within section 17(4) of the *Mental Health Act*:

> pages 2 and 3; page 5 (the last paragraph); pages 6 and 7; page 9 (lines 12-13); page 10 (line 1); page 24 (lines 11-13)

[para 133.] Consequently, that information is outside my jurisdiction. The Applicant cannot get access to that information under the Act.

A. Destruction of records

[para 134.] Records in the working file concerning an investigation of the Applicant and the Applicant's grievance were destroyed in 1993, before the Act came into force on October 1, 1995. Consequently, I do not have any jurisdiction over the Public Body's destruction of records in this case.

B. Application of section 26

[para 135.] The Public Body did not properly apply section 26 to the Records.

C. Application of section 19

[para 136.] The Public Body did not properly apply section 19 to the records.

D. Application of section 16

[para 137.] Section 16 applies to the third parties' personal information severed from the following pages of the Records:

> 1, 4, 5 (excluding lines 7-9, the first three words of line 10, lines 16-19, and the last paragraph over which I have no jurisdiction), 8, 9 (excluding lines 12-13 over which I have no jurisdiction), 10 (excluding line 1 over which I have no jurisdiction), 11, 13-15, 17-

19, 23, 24 (excluding lines 11-13 over which I have no jurisdiction), 25, 27-35

[para 138.] Disclosure of the foregoing personal information would be an unreasonable invasion of the third parties' personal privacy, as provided by section 16(1) and section 16(4). I order the Public Body not to disclose the foregoing personal information to the Applicant. Because some of the Applicant's personal information is intertwined with the third parties' personal information, the Applicant's personal information cannot be disclosed to the Applicant.

[para 139.] Section 16 does not apply to the Applicant's personal information that is not intertwined with the personal information of third parties, and does not apply to the third parties' personal information severed from the following pages of the Records:

5 (lines 7-9, the first three words of line 10, and lines 16-19), 12, 16, 20-22, 26

[para 140.] Disclosure of the foregoing personal information would not be an unreasonable invasion of the third parties' personal privacy. I order the Public Body to disclose the foregoing personal information to the Applicant.

[para 141.] Along with this Order, I have provided the Public Body with a highlighted copy of the foregoing personal information that the Public Body is to disclose to the Applicant.

[para 142.] To be clear, I also order the Public Body to disclose to the Applicant all that information the Public Body did not sever from the copy of the Records provided for the inquiry. That unsevered information appears on pages 1, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 27, 28 and 29.

[para 143.] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that the Public Body has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner