ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-032

May 1, 2001

UNIVERSITY OF ALBERTA

Review Numbers 1833/1938

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

Summary: The Applicant is a professor at the University of Alberta. The Applicant sent an access request under the *Freedom of Information and Protection of Privacy Act* to the University of Alberta. In the access request, the Applicant requested access to all relevant materials from May 1, 1997 to October 18, 1999 concerning a decision by one of the U of A Faculties to remove her from a graduate committee. The request specifically identified, among others, certain records authored by three former graduate students and notes and chronological summaries about the case prepared by the former Associate Dean at the Faculty. The University of Alberta responded to the request by withholding two pages of records that it claimed were non-responsive to the request. In addition, the University of Alberta partially or entirely withheld 22 pages of records that were responsive to the request. The University cited section 16 and public interest privilege (section 26(1)(a) and section 26(2)) as its authority to withhold these records.

The Commissioner held that the two pages of records were responsive to the request. The Commissioner also held that, with the exception of a small portion of information, sections 16, 26(1)(a) and 26(2) did not apply to the information in the records, and ordered the University of Alberta to disclose the majority of the records to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* S.A. 1994, c.F-18.5, ss. 1(1)(n), 16(1), 16(4)(d), 16(4)(g)(i), 16(5)(a), 16(5)(c), 16(5)(f), 26(1)(a), 26(2), 31(1)(b), 35, 62(1), 67.

Authorities Cited: AB: Orders 96-011, 96-014, 96-020, 96-021, 97-002, 97-020, 99-028.

Cases Cited: *Slavutych v. Baker* [1976], 1 S.C.R. 254, *Seager v. Copydex* [1967] 2 All E.R. 415, *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd. et al.* [1960] R.P.C. 128, *A.M. v. Ryan* (1997) 1 S.C.R. 157.

I. BACKGROUND

[para 1.] The Applicant is a Professor at the University of Alberta (the "U of A").

[para 2.] On October 18, 1999, the Applicant made an access request (#1833) under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the U of A. In that letter, the Applicant requested access to all relevant materials from May 1, 1997 to October 18, 1999, concerning a decision by one of the U of A Faculties to remove her from a graduate committee. The request specifically identified, among others, certain records authored by three former graduate students and notes and chronological summaries prepared by the former Associate Dean at that Faculty.

[para 3.] On January 4, 2000, the U of A responded to access request #1833, partially or entirely withholding 22 pages of records responsive to the request. In addition, the U of A identified another two pages of records, but stated that they were not responsive to the request.

[para 4.] On February 22, 2000, the Applicant requested a review of the U of A's decision in regard to request #1833.

[para 5.] On February 22, 2000, the Applicant also made a second access request (#1938) for additional information.

[para 6.] On April 25, 2000, the U of A responded to access request #1938 and informed the Applicant that, pursuant to section 16(1) of the Act, certain documents would not be disclosed.

[para 7.] On June 21, 2000, the Applicant requested a review of the U of A's decision in regard to request #1938.

[para 8.] As of the date of the inquiry, 24 pages of records remain at issue under request #1833. The U of A states that two pages of records are not responsive to the request. In addition, the U of A states that all of the records must be withheld under sections 16(1), 16(4)(d), 16(4)(g)(i) and 16(5)(f). Furthermore, the U of A stated that the principle of public interest privilege applies to the records. As such, I have addressed whether the records must be withheld under section 26(2).

[para 9.] Mediation was successful in regard to request #1938. Therefore, as of the date of inquiry, no records remain at issue under request #1938.

[para 10.] I note that in the Applicant's submission, the Applicant also requested that the U of A make corrections to her personal information under section 35.

[para 11.] Section 62(1) states that a person who makes a request to a public body for a correction of personal information may ask the Commissioner to review any decision, act or failure to act that relates to the request. In this case, there is no evidence before me that the Applicant made a formal request for a correction to the Public Body under section 35 of the Act. As such, in this inquiry, I do not have the jurisdiction to address whether the Public Body correctly applied section 35.

[para 12.] The Applicant also stated that the records relate to the public interest under section 31(1)(b). As section 31(1)(b) is a mandatory section of the Act, I will address whether section 31(1)(b) applies to the records.

[para 13.] This Office identified four Affected Parties in this inquiry. They consist of three former graduate students and the former Associate Dean at the Faculty.

[para 14.] The U of A and the Applicant each submitted an initial submission and a rebuttal. Three of the Affected Parties submitted an initial submission to this Office. None of the Affected Parties submitted a rebuttal.

[para 15.] This inquiry proceeds on the basis of the Act after the amendments to the Act came into force on May 19, 1999.

II. RECORDS AT ISSUE

[para 16.] There are 24 pages of records at issue. They consist of letters and e-mails authored by three former graduate students as well as the notes and chronological summaries of the former Associate Dean at one of the U of A Faculties. I have numbered all of the records at issue from 1 to 24.

III. ISSUES

[para 17.] There are four issues in this inquiry:

A) Are records 23 and 24 responsive to the access request?

B) Does section 16 apply to the records?

C) Does section 26(1)(a) and section 26(2) apply to the records?

D) Does section 31(1)(b) require the U of A to disclose the information in the records?

IV. DISCUSSION

Issue A: Are records 23 and 24 responsive to the access request?

[para 18.] The U of A states that records 23 and 24 are not responsive to the access request. Conversely, the Applicant states that these records are responsive to the access request, as they directly relate to the U of A's decision to remove the Applicant from the graduate committee.

[para 19.] In Order 97-020, I said that information or records will be responsive to an access request if they are reasonably related to the request.

[para 20.] The access request asked for all relevant materials concerning the Applicant's "case" between May 1, 1997 and October 18, 1999. The Applicant specifically requested letters written by one of her former graduate students.

[para 21.] In my opinion, records 23 and 24 are reasonably related to the access request. These records consist of a letter, dated January 11, 1998, written by the former graduate student who was specifically identified in the Applicant's access request. In that letter the former graduate student refers to her dispute with the Applicant regarding an authorship and copyright issue and criticizes the Applicant's competence to teach and publish. Given the nature and content of these letters, I find that they are responsive to the request.

[para 22.] In making this decision, I want to emphasize that I am not making a decision about whether the authorship and copyright dispute or the Applicant's ability to teach and publish was a factor that the U of A took into account when it removed the Applicant from the graduate committee. This is not an issue within my jurisdiction and should be decided within another forum. However, the Applicant clearly states that she believes these factors were related to her removal from this committee. As such, I find that the information in this letter is reasonably relevant to the access request.

Issue B: Does section 16 apply to the records?

1. General

[para 23.] 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 24.] In order for section 16 to apply to the information, two criteria must be fulfilled:

(a) the severed information must be "personal information" of a third party; and

(b) the disclosure of the personal information must be an unreasonable invasion of a third party's personal privacy.

[para 25.] Pursuant to section 67, the burden of proof for section 16 is two-fold. The Public Body must first prove that section 16 does, in fact, apply to the records. The Applicant must then prove that the disclosure would not be an unreasonable invasion of the third party's personal privacy.

2. Personal information of a third party

[para 26.] Personal information is defined in section 1(1)(n) of the Act. The relevant portions read:

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

[para 27.] The list of personal information in section 1(1)(n) is not exhaustive. In Orders 96-020, 96-021 and 97-002, I said that facts and events discussed, observations made, the circumstances (context) in which information was given, as well as the nature and content of the information, may also be personal information if it is shown to be recorded information about an identifiable individual set out in the initial part of section 1(1)(n).

[para 28.] After a review of the records, I find that the information in the records consists of personal information of several Third Parties. This personal information consists primarily of the Third Parties' names, e-mail addresses, telephone numbers, educational and employment history and opinions about several Third Parties. These records also contain facts, events and observations about several Third Parties.

[para 29.] I also find that some of the information in the records consists of the Applicant's personal information. As the Applicant cannot be a third party under the Act, section 16 does not apply to the Applicant's personal information. The Applicant would normally have a right of access to her personal information as provided by section 6(1).

[para 30.] However, the Applicant's personal information is intertwined with the personal information of the Third Parties and cannot reasonably be separated. As such, in deciding whether the personal information of the Third Parties can be disclosed, I must also decide whether some or none of the Applicant's personal information can be disclosed.

3. Presumptions under section 16(4)

[para 31.] Section 16(4) lists a number of circumstances where a disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy.

[para 32.] The U of A states that sections 16(4)(d) and 16(4)(g)(i) apply to the records. These sections read:

> *16(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
> ...
>
> > *(d) the personal information relates to employment or educational history,*
> ...
>
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party ...*

[para 33.] I find that the criteria for section 16(4)(d) and 16(4)(g)(i) are fulfilled. The Third Parties' personal information in the records relates to the Third Parties' educational history and consists of the Third Parties' names along with other personal information about the Third Parties.

4. Relevant circumstances under section 16(5)

[para 34.] In deciding whether there is an unreasonable invasion under sections 16(1) or 16(4), a public body must consider the relevant circumstances including those set out in section 16(5) of the Act. The relevant portions of section 16(5) read:

16(5) In determining under subsection (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 of the relevant circumstances, including whether

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

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(f) the personal information has been supplied in confidence ...

a. Section 16(5)(a) – Public Scrutiny

[para 35.] If applicable, section 16(5)(a) weighs in favour of disclosing the Third Parties' personal information.

[para 36.] The Applicant states that section 16(5)(a) is a relevant circumstance in this inquiry. The Applicant states that the disclosure of the information is desirable for the purpose of subjecting the activities of the U of A to public scrutiny.

[para 37.] Conversely, one of the former graduate students states that section 16(5)(a) does not apply to the records. He states that the disclosure of the information would not subject the U of A to public scrutiny. He states that the records in this case are not "official information" about a government agency, but a third party's private and confidential correspondence to the U of A.

[para 38.] In Order 97-002, I said that in order to fulfill section 16(5)(a), there must be evidence that the activities of the Government of Alberta or a public body have been called into question which necessitates the disclosure of personal information. I also said that:

(i) It is not sufficient for one person to decide that public scrutiny is necessary;

(ii) The applicant's concerns must be about the actions of more than one person within the public body; and

(iii) If the public body had previously disclosed a substantial amount of information, the release of further personal information would not likely be desirable. This is particularly so if the public body had already investigated the matter.

[para 39.] It is my opinion that, on balance, section 16(5)(a) is a relevant circumstance in this inquiry that weighs in favour of disclosing the Third Parties' personal information in records 1-15, record 16 (line 1, portion of line 2, portion of line 17, lines 18-34), record 17 (portion of line 24, lines 25-36) and records 18-24. Although the evidence shows that the Applicant is the only person that has decided public scrutiny is necessary, the Applicant's concerns are about more than one person within the U of A. Furthermore, I find that the U of A has not disclosed a substantial amount of information to the Applicant which addresses the Applicant's concerns.

[para 40.] However, I do not think that section 16(5)(a) is a relevant circumstance in regard to the Third Parties' personal information in record 16 (portion of line 2, lines 3-16, portion of line 17, line 35) and record 17 (lines 1-23, portion of line 24). This information either praises or criticizes other professors at the University. This information does not relate to the Applicant's supervision of the former graduate students, nor the Applicant's participation on the graduate committee.

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

[para 41.] If applicable, section 16(5)(c) weighs in favour of disclosing the Third Parties' personal information.

[para 42.] The Applicant states that section 16(5)(c) is a relevant circumstance in this inquiry. The Applicant states that the information is relevant to a fair determination of the Applicant's rights. The Applicant states that she was removed from a graduate committee for unjust reasons. She states that although the U of A states that she was removed for the comfort of the student being examined and to achieve greater balance and breadth on the committee, she believes she was removed because of her involvement in a lawsuit regarding a copyright issue between her and a former graduate student. The Applicant also states that her removal from the committee could negatively affect her salary, teaching and promotion.

[para 43.] The U of A states that it is not uncommon for students to informally ask for a change in the composition of a graduate committee. The U of A states that when this type of request is made, the Faculty often meets with students and professors separately and together. The U of A emphasizes that it imposes no disciplinary or employment consequences when a professor is removed from a committee. A professor may be removed for a number of reasons either related to the student, the professor, the nature of the work and the time commitments of the parties.

[para 44.] In Order 99-028, I said that all four of the following criteria must be fulfilled under section 16(5)(c):

> (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;

(b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

(c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[para 45.] After a review of the records, submissions and evidence in this inquiry, I do not find that section 16(5)(c) is a relevant circumstance in this inquiry. Although this access request relates to the Applicant's removal from a graduate committee, there is insufficient evidence that the information in the records is relevant to a legal right drawn from the concepts of common law or statute law, or that it is related to an existing or contemplated proceeding. There is also insufficient evidence that the Third Parties' personal information will have a bearing on or is significant to the determination of the right, or whether that information is required in order to prepare for the proceeding or to ensure an impartial hearing. In order to apply section 16(5)(c) as a relevant circumstance, evidence regarding the applicability of this section must be placed before me. The Applicant has not done that. I cannot assume that these four criteria are fulfilled.

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

[para 46.] If applicable, section 16(5)(f) weighs in favour of not disclosing the Third Parties' personal information.

[para 47.] The U of A, two of the former graduate students and the former Associate Dean at the Faculty state that section 16(5)(f) is a relevant circumstance in this inquiry. These parties argue that the records were created, sought or submitted in confidence.

[para 48.] The Applicant states that that section 16(5)(f) does not apply to the records. The Applicant states that the other parties are claiming that the records are confidential in an attempt to shield defamatory statements.

[para 49.] I find that all of the Third Parties' personal information was submitted in confidence under section 16(5)(f). In coming to this conclusion, I took into account the fact that records 1-18 state, on their face, that they are "confidential" or "personal and confidential". I also took into account the affidavit submitted by the former Associate Dean at the Faculty that states that the communications in her notes were confidential. In addition, I took into account the fact that the former graduate students have strenuously objected to the disclosure of these records. As such, I find that section 16(5)(f) is a relevant circumstance in this inquiry that weighs in favour of withholding the Third Parties' personal information.

d. The common law doctrine of confidential communications

[para 50.] The U of A argued that the common law doctrine of confidential communications applies to the records and should be considered as a relevant circumstance under section 16(5). The U of A referred to the Supreme Court of Canada decision of *Slavutych v. Baker* [1976], 1 S.C.R. 254 where the court held that the documents at issue had been created with the expectation of confidentiality.

[para 51.] I find that the doctrine of confidential communications does not apply in this case. In the *Slavutych* decision, Justice Spence considered the following reasoning regarding the doctrine of confidentiality. He stated that Lord Denning's decision in *Seager v. Copydex* [1967] 2 All E.R. 415 at 417, (who, in turn had adopted the statement of Roxburgh J. in *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd. et al.* [1960] R.P.C. 128), was a sound statement of the doctrine as to revelation of confidential communications when it deals with the actions of those who are parties to the confidence. It reads:

> "As I understand it, the essence of this branch of law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public."

[para 52.] In this case, there is insufficient evidence before me that disclosing the Third Parties' personal information to the Applicant will be a "springboard" detrimental to the former graduate students who supplied the confidential information. Therefore I do not find that the doctrine of confidential communications is a relevant circumstance that weighs in favour of withholding this information under section 16.

e. Power imbalance between a professor and student

[para 53.] The U of A, two of the former graduate students and the former Associate Dean at the Faculty state that the power imbalance between the student and the professor should be viewed as a relevant circumstance which weighs in favour of withholding the Third Parties' personal information in the records. They state that a professor has the ability to influence the academic outcome of a student. They argue that students may be reluctant to come forward with a complaint unless there is a promise of confidentiality.

[para 54.] Conversely, the Applicant states that the U of A's concern about an imbalance of power between students and the professors is exaggerated. The Applicant also states that the protection of students should not be achieved by harming a professor's employment and reputation. The Applicant states that, in any event, the Applicant no longer has the ability to influence the graduate students' academic outcome, as all the graduate students involved in this inquiry have finished their programs at the U of A.

[para 55.] I agree that the power imbalance between a student and a professor may, depending on the set of circumstances, be a relevant circumstance that weighs in favour of withholding a third party's personal information. This may be the case where a student is currently enrolled in the same faculty or even, in some cases, the same University as the professor. I agree that a professor has the ability to negatively influence the academic outcome of a student and that many students would be reluctant to come forward with a complaint if they knew that the information would be disclosed to the professor. In addition, there may be some situations were the power imbalance extends past the student's graduation date. For example, if a student's complaints are disclosed to a professor immediately after graduation, a professor may negatively impact a student's employment prospects for a short period of time after graduation.

[para 56.] However, in this case, at the date of the inquiry, the former graduate students are no longer students in the professor's department nor is there sufficient evidence that the Applicant is in a position to negatively impact the former graduate students in another manner. A power imbalance no longer exists between the students and the Applicant. I find that the power imbalance between a student and professor is not a relevant circumstance that weighs in favour of withholding the Third Parties' personal information in this inquiry.

f. Nature and content of the records

[para 57.] The Applicant states that the nature and content of the records is a relevant circumstance that weighs in favour of disclosing the Third Parties' personal information in the records.

[para 58.] I find that the nature and content of the Third Parties' personal information in the records 1-15, record 16 (line 1, portion of line 2, portion of line 17, lines 18-34), record 17 (portion of line 24, lines 25-36) and records 18-24 is a relevant circumstance that weighs in favour of disclosing all this information. This information contains some background information about the Third Parties and, in my view, relates to allegations made against the Applicant. Although a professor may not be disciplined because of these allegations, it is my view that they could, albeit indirectly, affect a professor's reputation and employment within the University.

[para 59.] Conversely, I find that the nature and content of the Third Parties' personal information in record 16 (portion of line 2, lines 3-16, portion of line 17, line 35) and record 17 (lines 1-23, portion of line 24) is not a relevant circumstance that weighs in favour of disclosing this information but, rather, is a relevant circumstance that weighs in favour of withholding this information. This information either praises or criticizes other professors at the U of A and is not relevant to the allegations made against the Applicant.

[para 60.] I emphasize that in determining whether the nature and content of the records weigh in favour of disclosing the information, every case must be reviewed

individually. There may be some unique situations where the sensitivity of allegations may be a relevant circumstance. In such a situation, a public body would have to weigh the sensitivity of the information against all the other relevant circumstances.

g. Conclusion under section 16(5)

[para 61.] The U of A states that in weighing the relevant circumstances under section 16(5), it decided that the preservation of confidentiality outweighed the disclosure of the Third Parties' personal information. The U of A says that the preponderance of weight goes to the protection of personal information.

[para 62.] After weighing all of the relevant circumstances under section 16(5), I find that section 16 applies to the Third Parties' personal information in record 16 (portion of line 2, lines 3-16, portion of line 17, line 35) and record 17 (lines 1-23, portion of line 24). The fact that this information was submitted in confidence under section 16(5)(f) and the nature and content of the information weigh in favour of withholding the information.

[para 63.] Conversely, I find that section 16 does not apply to the Third Parties' personal information in records 1-15, record 16 (line 1, portion of line 2, portion of line 17, lines 18-34) record 17 (portion of line 24, lines 25-36) and records 18-24. Although the Third Parties submitted this information to the U of A in confidence under section 16(5)(f), other relevant circumstances shift the preponderance of weight in favour of disclosing the personal information to the Applicant. I find that public scrutiny under section 16(5)(a), and the nature and content of the records are relevant circumstances that weigh heavily in favour of disclosing this information.

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

[para 64.] Section 67(2) states that if a record or part of a record to which the applicant is refused access contains personal information about a third party, it is up to the applicant to prove that the disclosure of the information would not be an unreasonable invasion of a third party's personal privacy.

[para 65.] I have decided that section 16 does not apply to the Third Parties' personal information in records 1-15, record 16 (line 1, portion of line 2, portion of line 17, lines 18-34), record 17 (portion of line 24, lines 25-36) and records 18-24. Consequently, the Applicant does not have to prove that it is not an unreasonable invasion of a Third Party's personal privacy to disclose this information.

[para 66.] However, I have found that section 16 applies to the Third Parties' personal information in record 16 (portion of line 2, lines 3-16, portion of line 17, line 35) and record 17 (lines 1-23, portion of line 24). Consequently, the Applicant must prove that it is not an unreasonable invasion of a Third Party's personal privacy to disclose this information.

[para 67.] After reviewing the Applicant's submission, including the arguments regarding the relevant circumstances under section 16(5), I find that the Applicant has not met this burden of proof.

6. Conclusion

[para 68.] Section 16 applies to the Third Parties' personal information in record 16 (portion of line 2, lines 3-16, portion of line 17, line 35) and record 17 (lines 1-23, portion of line 24). Disclosure of this information would be an unreasonable invasion of the Third Parties' personal privacy as provided by section 16(1) and section 16(4) and must not be disclosed. The Applicant's personal information is intertwined with the personal information of the third parties, and cannot be separated. Consequently, the Applicant's personal information cannot be disclosed. However, the Applicant said that section 31(1)(b) applies to the Third Parties' personal information and to the Applicant's personal information that is intertwined in these records. I will, therefore, consider all of this information under that section.

[para 69.] Section 16 does not apply to the personal information in records 1-15, record 16 (line 1, portion of line 2, portion of line 17, lines 18-34), record 17 (portion of line 24, lines 25-36) and records 18-24. Disclosure of that personal information would not be an unreasonable invasion of a third party's personal privacy. However, the U of A applied public interest privilege (section 26(1)(a) and section 26(2)) to the Third Parties' personal information and to the Applicant's personal information that is intertwined in these records. I will, therefore, subsequently consider all of this information under that section.

Issue C: Does section 26(1)(a) and section 26(2) apply to the records?

[para 70.] In its submission, the U of A stated that the principle of public interest privilege applies to the records and referred to the *Slavutych* decision by the Supreme Court of Canada. In Order 96-020, I considered public interest privilege under sections 26(1)(a) and 26(2). Although the U of A did not specifically refer to sections 26(1)(a) and 26(2) in its submission, given the content of its submission, and the fact that 26(1)(a) combined with section 26(2) is a mandatory provision of the Act, I will address the application of these provisions to the records.

[para 71.] Section 26(2) states that a public body must refuse to disclose information subject to a legal privilege described in section 26(1)(a) if that information relates to a person other than a public body. Section 26(1)(a) and 26(2) read as follows:

> *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,*
>
> ...

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

[para 72.] Pursuant to section 67(1), the burden of proof for section 26(1)(a) and section 26(2) rests with the U of A.

[para 73.] In Order 96-020, I addressed "public interest" privilege and adopted the criteria that are set out in the *Slavutych* decision. In that case, the Supreme Court of Canada outlined the "Wigmore test" and held that there are four criteria that must be fulfilled in order for public interest privilege to apply:

> (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 in 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 74.] After a review of the records and submissions of the parties, I find that the information does not fulfill all of four of the Wigmore criteria. Only the first criterion is fulfilled.

[para 75.] I find that the information in the records originated in confidence. In coming to this conclusion, I took into account the same factors mentioned in my discussion under section 16(5)(f). I took into account that records 1-18 state, on their face, that they are "confidential" or "personal and confidential". I also took into account the affidavit submitted by the former Associate Dean at the Faculty. In addition, I took into account the fact that the former graduate students have strenuously objected to the disclosure of these records.

[para 76.] However, I am not satisfied that the element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties or that this confidential relation is one in which in the opinion of the community ought to be sedulously fostered. I am not satisfied that students would be deterred from making allegations or raising concerns about a professor if they knew these concerns would be disclosed after they have left the faculty, or in some cases the University. In fact, it is my view that disclosing this information, albeit after the students have left the faculty or University, may improve the relation between the parties by ensuring that parties can no

longer make serious allegations and then remain anonymous for an indefinite period of time. This is particularly important where allegations, whether legitimate or not, have the potential to affect the reputation of the professor. However, I want to emphasize that my comments in this regard are limited to the case at hand. There may be other situations, which deal with sensitive subject matter, where students may be deterred from making allegations even if the information were only disclosed after the students left the faculty or University. However, this is not the case in this inquiry.

[para 77.] Lastly, I do not find that the injury that would occur to the relation from the disclosure of the information is greater than the applicant's right of access. In Order 96-020, I stated that this fourth criterion requires an assessment of the interests served by protecting the communications from disclosure, including privacy interests and the inequalities which may be perpetuated by the absence of protection: *A.M. v. Ryan* (1997) 1 S.C.R. 157. Moreover, the balancing exercise under the fourth criterion is essentially one of common sense and good judgment. The balance I need to strike under this fourth criterion is whether the injury to the relation from the disclosure of the information is greater than an applicant's right of access to the information under section 6(1) of the Act. I find that the injury to the relation is not greater than the Applicant's right of access.

[para 78.] As previously mentioned, it is my view that disclosing the information would not harm the relation between students and professors but may improve the relation by ensuring that parties can no longer make allegations and then remain anonymous for an indefinite period of time. Allegations, whether legitimate or not, have the potential to affect the reputation of the professor. I also note that the power imbalance between a professor and student does not exist in this case because all of the former graduate students are no longer enrolled in the same faculty as the Applicant. There is also insufficient evidence that the Applicant is in a position to negatively impact the former graduate students in any other manner.

[para 79.] Therefore, I find that section 26(1)(a) and section 26(2) does not apply to records 1-15, record 16 (line 1, portion of line 2, portion of line 17, lines 18-34), record 17 (portion of line 24, lines 25-36) and records 18-24. Furthermore, since no mandatory exceptions apply to the information and since the U of A did not claim any discretionary exceptions in regard to the records, I order the U of A to disclose this information to the Applicant.

Issue D: Does section 31(1)(b) require the U of A to disclose the information in the records?

[para 80.] The Applicant argued that section 31(1)(b) requires the U of A to disclose the information in the records. The only information that remains at issue under section 31(1)(b) is record 16 (portion of line 2, lines 3-16, portion of line 17, line 35) and record 17 (lines 1-23, portion of line 24).

[para 81.] Section 31(1)(b) states:

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 82.] In Order 96-011, I said that under section 31(1)(b), a matter must be of a compelling public interest to qualify as "clearly in the public interest". Furthermore, in Order 96-014, Mr. Justice Cairns considered what type of information would qualify as "clearly in the public interest". He made an important distinction between information that "may well be of interest to the public" and information that is "a matter of public interest". In this case, the Applicant has not established that the information relates to a compelling public interest. As such, I find that section 31(1)(b) does not require the Public Body to disclose record 16 (portion of line 2, lines 3-16, portion of line 17, line 35) and record 17 (lines 1-23, portion of line 24) to the Applicant.

V. ORDER

[para 83.] I make the following Order under section 68 of the Act.

A) Are records 23 and 24 responsive to the access request?

[para 84.] I find that records 23 and 24 are responsive to the access request.

B) Does section 16 apply to the records?

[para 85.] I find that section 16 applies to the Third Parties' personal information in record 16 (portion of line 2, lines 3-16, portion of line 17, line 35) and record 17 (lines 1-23, portion of line 24). Disclosure of this information would be an unreasonable invasion of the Third Parties' personal privacy as provided by section 16(1) and section 16(4) and must not be disclosed. The Applicant's personal information in these records is intertwined with the personal information of the third parties, and cannot be separated. Consequently, the Applicant's personal information cannot be disclosed. However the Applicant said that section 31(1)(b) applies to the Third Parties' personal information and the Applicant's personal information that is intertwined in these records. I have, therefore, considered all of this information under that section.

[para 86.] I find that section 16 does not apply to the Third Parties' personal information in records 1-15, record 16 (line 1, portion of line 2, portion of line 17, lines 18-34), record 17 (portion of line 24, lines 25-36), and records 18-24. However, the U of A applied public interest privilege (sections 26(1)(a) and 26(2)) to the Third Parties'

personal information and the Applicant's personal information that is intertwined in these records. I have, therefore, considered all of this information under sections 26(1)(a) and 26(2).

C) Does section 26(1)(a) and section 26(2) apply to the records (public interest privilege)?

[para 87.] I find that section 26(1)(a) and section 26(2) do not apply to records 1-15, record 16 (line 1, portion of line 2, portion of line 17, lines 18-34), record 17 (portion of line 24, lines 25-36) and records 18-24. Furthermore, since no mandatory exceptions apply to the information in the records and since the U of A did not claim any discretionary exceptions in regard to this information, I order the U of A to disclose these records to the Applicant.

D) Does section 31(1)(b) require the U of A to disclose the information in the records?

[para 88.] I find that section 31(1)(b) does not require the U of A to disclose record 16 (portion of line 2, lines 3-16, portion of line 17, line 35) and record 17 (lines 1-23, portion of line 24) to the Applicant. As such, I order the U of A to withhold this information from the Applicant. Along with this Order, I will provide the U of A with a copy of the records which highlight the information that is to be withheld on pages 16 and 17.

[para 89.] I further order the U of A to notify me, in writing, within 50 days of receiving a copy of this Order, that the U of A has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner