

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2002-019

August 8, 2002

### ALBERTA LEARNING

Review Number 2118

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

**Summary:** The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to Alberta Learning for access to a copy of the Applicant's student's finance file. Alberta Learning disclosed the majority of the records to the Applicant, but withheld portions of the remaining records under section 17 [previously section 16], section 24(1)(b) [previously section 23(1)(b)], section 27(1)(b) [previously section 26(1)(b)], and section 27(1)(c) [previously section 26(1)(c)].

The Adjudicator found that Alberta Learning properly applied section 17 [previously section 16] and section 24(1)(b) [previously section 23(1)(b)] to the records and partially upheld the application of section 27(1)(b) [previously section 26(1)(b)]. In addition, the Adjudicator found that, although Alberta Learning correctly applied section 27(1)(c) [previously section 26(1)(c)], Alberta Learning did not properly exercise its discretion under that section. The Adjudicator therefore ordered Alberta Learning to reconsider its decision in regard to section 27(1)(c) [previously section 26(1)(c)].

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 1(n) [previously s. 1(1)(n)], 3, 17 [previously s. 16], 24(1)(b) [previously s. 23(1)(b)], 27(1) [previously s. 26(1)], 30 [previously s. 29], 31 [previously s. 30], 40(1)(v) [previously s. 38(1)(t)], 71 [previously s. 67], 72 [previously s. 68].

**Authorities Cited: AB:** Orders 96-006, 96-017, 97-002, 98-007, 98-016, 99-028, 2000-028, 2000-029

**Cases Cited:** *University of Alberta v. Pylypiuk* (2002) A.J. No. 445 (Alta. Q.B.); *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker, House of Assembly)* 100 D.L.R. (4<sup>th</sup>) 212 (S.C.C.)

## **I. BACKGROUND**

[para 1] On January 22, 2001, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Alberta Learning (the “Public Body”). The access request asked for a copy of the Applicant’s “Students’ Finance paper file” and a copy of the “complete Alberta Student Loan Guidelines”.

[para 2] On February 26, 2001, the Public Body responded to the access request. The Public Body disclosed 243 of 249 pages of the financial assistance file to the Applicant. The Public Body withheld portions of the remaining six records under section 17 [previously section 16], section 24(1)(b) [previously section 23(1)(b)] and section 27 [previously section 26]. In the Public Body’s response, the Public Body also told the Applicant that he could access the Alberta Student Loan Guidelines at the Public Body’s library.

[para 3] On February 28, 2001, the Applicant requested a review of the Public Body’s decision to withhold portions of his student’s finance file. The matter was set down for a written inquiry. The Applicant subsequently requested a four-month adjournment of the inquiry which I agreed to provide to the Applicant.

[para 4] The Public Body and the Applicant each submitted an initial and rebuttal submission to this Office. The Third Party did not submit an initial nor a rebuttal submission.

## **II. RECORDS AT ISSUE**

[para 5] The four records at issue consist of six pages of documents. Records 51, 53 and 90 each consist of one-page internal memos. Record 81 consists of a one-page memo from one lawyer to another lawyer at the Alberta Attorney General’s Office and a two-page attachment.

### III. PRELIMINARY ISSUES

#### A. Disclosure of the Applicant's Access Request

[para 6] The Applicant states that the Public Body breached the Applicant's privacy during the inquiry process by including a copy of the original access request in the Public Body's initial submission. The Applicant states that by including the access request, the Public Body disclosed, to the Third Party, a number of pieces of the Applicant's personal information found in the access request.

[para 7] I agree that the Applicant's access request contains a number of pieces of personal information as defined in section 1(n) [previously section 1(1)(n)] of the Act.

[para 8] It appears that the Public Body made a judgment call by including this personal information in its submission that was subsequently sent to the Third Party. I have reviewed this information and find that it falls within section 40(1)(v) [previously section 38(1)(t)] of the Act. Section 40(1)(v) [previously section 38(1)(t)] of the Act states that a public body may disclose an individual's personal information for use in a proceeding before a court or a quasi-judicial body. It reads as follows:

*40(1) A public body may disclose personal information only*

...

*(v) for use in a proceeding before a court or quasi-judicial body to which the Government of Alberta or a public body is a party*

[para 9] In order for this section to apply, three criteria must be fulfilled:

- 1) the disclosure must be for use in a proceeding;
- 2) the proceeding must be before a court or a quasi-judicial body; and
- 3) the Government of Alberta or a public body must be a party to the proceeding.

[para 10] I find that all three criteria are fulfilled in this inquiry. In this regard, I note that the access request is the document that begins the access process under the Act and, in my view, is an integral part of the review process. I do not think that the Act requires a Public Body, having responded to an access request, to then sever that same document before submitting the document to this Office as part of the review process. I also want to stress that, as part of this process, the access request was only disclosed to this Office and the Third Party. It was not disclosed to any other person.

#### B. Notice to the Third Party

[para 11] In the Applicant’s rebuttal submission, the Applicant states that the Public Body did not give the Third Party proper notice under section 31(2) [previously section 30(2)] of its decision to withhold the severed information.

[para 12] Section 30(3) [previously section 29(2)] states that if the public body does not intend to give access to this information, the public body “may” give written notice to a third party, or in other words, the public body has the option of whether to provide a written notice.

[para 13] The Public Body states that it did not send out, and section 30(3) [previously section 29(2)] did not require it to send out, a section 30 notice [previously a “section 29 notice”] to the Third Party as it did not intend to disclose the severed information. As the Public Body did not send out a section 30 notice [previously a “section 29 notice”], I agree that the Public Body was not required to provide a notice of its decision to the Third Party under section 31(2) [previously section 30(2)].

C. Applicant’s Request for an Investigation into the Students Finance Board

[para 14] The Applicant wants an investigation into (i) the funding provided by the Students Finance Board to a former private vocational school and (ii) the various representations made by that school to its students.

[para 15] My jurisdiction is limited to determining whether the Public Body properly applied the Act in refusing to provide the Applicant with access to the records. As such, I will not address these issues in this inquiry.

D. Application of the Rules of Court and the Common- Law Right of Access

[para 16] In the Applicant’s initial submission, the Applicant cited numerous cases about the right of access under the Rules of Court and at common-law. I find that none of these cases are relevant. The Act, as evidenced by section 3, has its own process for access which is in addition to the processes found under the Rules of Court and at common-law. It is the statutory rules and procedures under the Act that I must consider and which will determine whether the Applicant will be given access to the records at issue.

**IV. ISSUES**

[para 17] The inquiry notice outlined three issues:

- A. Does section 16 of the Act (third party personal information) apply to the information severed by the Public Body on pages 51 and 53?

B. Did the Public Body properly apply section 23(1)(b) of the Act (advice from officials) to the information severed at two points on page 90?

C. Did the Public Body properly apply sections 26(1)(b) and 26(1)(c) of the Act (privileged information) to the information severed from page 81 and the entire contents severed from pages 82 and 83?

[para 18] In the Public Body's submission, the Public Body states that wording of the issues in the inquiry notice is incorrect. The Public Body states that it did not number the pages of the Applicant's file but rather numbered the file by the Records contained therein. The Public Body states that the issues should refer to "Records" and not to "pages". In particular, the Public Body states that issue (C) should refer to "Record 81" and not to "pages 81-83". I have rephrased the issues in this Order to correct the wording.

[para 19] I also note that the Revised Statutes of Alberta (R.S.A. 2000) came into force on January 1, 2002. Although this did not result in substantive changes to the Act, various sections of the Act have been renumbered. Consequently, all section numbers referred to in this Order reflect the new numbering.

[para 20] Lastly, I have also reworded the issues so as to divide sections 27(1)(b) and 27(1)(c) [previously sections 26(1)(b) and 26(1)(c)] into two separate issues.

[para 21] The issues that I will address in this Order therefore read as follows:

A. Does section 17 [previously section 16] of the Act (third party personal information) apply to the information severed by the Public Body on Records 51 and 53?

B. Did the Public Body properly apply section 24(1)(b) [previously section 23(1)(b)] of the Act (advice from officials) to the information severed at two points on Record 90?

C. Did the Public Body properly apply section 27(1)(b) [previously section 26(1)(b)] of the Act (privileged information) to the information severed from Record 81?

D. Did the Public Body properly apply section 27(1)(c) [previously section 26(1)(c)] of the Act (privileged information) to the information severed from Record 81?

## V. BURDEN OF PROOF

[para 22] Section 71 [previously section 67] reads:

*71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

*(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.*

*(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*

*(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*

*(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

[para 23] The Public Body states that, pursuant to sections 71(2) and 71(3) [previously sections 67(2) and 67(3)] of the Act, the Applicant has the burden of proof in regard to section 17 [previously section 16]. The Applicant states that, pursuant to section 71(3)(b) [previously section 67(3)(b)], the Third Party has the burden of proof in regard to section 17 [previously section 16]. The Public Body and the Applicant did not address the burden of proof regarding the other sections of the Act.

[para 24] Section 71(1) [previously section 67(1)] states that if a public body refuses to give an applicant access to all or part of a record, the burden of proof rests with the public body. In this inquiry, the Public Body refused to give the Applicant access to the severed information in the records at issue. Therefore, the Public Body has the burden of proof for sections 24(1)(b) [previously section 23(1)(b)], 27(1)(b) [previously section 26(1)(b)] and 27(1)(c) [previously section 26(1)(c)].

[para 25] In addition, section 71(2) [previously section 67(2)] states that, despite section 71(1) [previously section 67(1)], if a public body refuses to give an applicant access to a record that contains personal information about a third party, the applicant has the burden of proving that the disclosure would not be an unreasonable invasion of a third party's personal privacy. As such, in this inquiry, I will review the Public Body's decision under section 17 [previously section 16]. However, the Applicant has the burden of proving that the disclosure of this information would not be an unreasonable invasion of the Third Party's personal privacy.

[para 26] I also note that, contrary to the arguments of the Public Body and the Applicant, section 71(3) [previously section 67(3)] does not apply to the records at issue. Section 71(3) [previously section 67(3)] addresses the burden of proof when a public body makes a decision to give an applicant access to information. In this inquiry, the Public Body did not make a decision to give the Applicant access to the severed information but instead decided to withhold this information from the Applicant.

## VI. DISCUSSION

### A. Does section 17 [previously section 16] of the Act (third party personal information) apply to the information severed by the Public Body on Records 51 and 53?

[para 27] Section 17 [previously section 16] is a mandatory (“must”) section of the Act. If section 17 applies, a public body must refuse to disclose the information. In order for this section to apply 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.

#### 1. Is the severed information “personal information” of a third party?

[para 28] Personal information is defined in section 1(n) [previously section 1(1)(n)]. This section reads:

*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,*

*(ii) the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,*

*(iii) the individual’s age, sex, marital status or family status,*

*(iv) an identifying number, symbol or other particular assigned to the individual,*

*(v) the individual's fingerprints, blood type or inheritable characteristics,*

*(vi) information about the individual's health and health care history, including information about a physical or mental disability,*

*(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 29] The Public Body states that the severed information in Records 51 and 53 consists of the Third Party's personal information. The Public Body states that severed information in these records contain the name and the opinions of the Third Party.

[para 30] The Applicant states that the severed information is not the Third Party's personal information. The Applicant states that if the severed information consists of an individual's personal views and opinions about the Applicant, this information would be excepted from definition of personal information under section 1(n)(ix) [previously section 1(1)(n)(ix)].

[para 31] I have reviewed Records 51 and 53. Contrary to what is argued by the Public Body, I find that the severed information in these records consists only of the Third Party's name. The information does not consist of an individual's views and opinions about someone else. As such, I find that the severed information falls within the definition of personal information under section 1(n)(i) [previously section 1(1)(n)(i)].

2. Would the disclosure of the personal information be an unreasonable invasion of a third party's personal privacy, as provided by section 17(1) [previously section 16(1)] or section 17(4) [previously section 16(4)]?

Section 17(1) [previously section 16(1)]

[para 32] Section 17(1) [previously section 16(1)] states that the head of a public body must refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. This section reads:

*17(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.*



Section 17(4) [previously section 16(4)]

[para 33] Section 17(4) [previously section 16(4)] lists a number of circumstances where a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. The relevant portions of this section read:

*17(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, or*

*(ii) the disclosure of the name itself would reveal personal information about the third party*

[para 34] The Public Body states that the presumptions under section 17(4)(d) [previously section 16(4)(d)], 17(4)(g)(i) [previously section 16(4)(g)(i)] and 17(4)(g)(ii) [previously section 16(4)(g)(ii)] apply to the severed information.

[para 35] After examining the records at issue and all of the arguments of the parties, I find that section 17(4)(g)(i) [previously section 16(4)(g)(i)] applies to the severed information on Records 51 and 53. The severed information consists of the Third Party's name which appears with other personal information about the Third Party. The severed information therefore fulfills the criteria under section 17(4)(g)(i) [previously section 16(4)(g)(i)].

[para 36] As I have found that section 17(4)(g)(i) [previously section 16(4)(g)(i)] applies to the information, I will not examine the Public Body's alternate claims for section 17(4) [previously section 16(4)].

Section 17(5) [previously section 16(5)]

[para 37] In determining whether the disclosure of personal information would constitute an unreasonable invasion under sections 17(1) and 17(4) [previously sections 16(1) and 16(4)], a public body must consider the relevant circumstances under section 17(5) [previously section 16(5)]. The relevant portions of section 17(5) [previously section 16(5)] read:

*17(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*

*(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,*

...

*(e) the third party will be exposed unfairly to financial or other harm,*

#### Section 17(5)(a) [previously section 16(5)(a)] – Public Scrutiny

[para 38] If section 17(5)(a) [previously section 16(5)(a)] applies, it is a relevant circumstance that weighs in favour of disclosure.

[para 39] The Public Body states that this section is not a relevant circumstance in this inquiry. The Public Body states that the disclosure of the severed information is not necessary to subject the Public Body to public scrutiny.

[para 40] The Applicant states that this section is a relevant circumstance in this inquiry. The Applicant states that the three-part test under this section is fulfilled. In support of his argument under this section, the Applicant provided me with a tape of various telephone conversations that he taped during his conversations with other individuals.

[para 41] In Order 97-002, the Commissioner stated that in order to fulfill section 17(5)(a) [previously 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. The Commissioner 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 42] In *University of Alberta v. Pylypiuk* (2002) A.J. No. 445 (Alta. Q.B.), Justice Gallant elaborated on the three-part test and stated that in order for this section to apply, there must be some public component present, such as public accountability, public interest and public fairness. This is particularly so where a person's rights are not affected by disclosure under section 17(5)(c) [previously section 16(5)(c)].

[para 43] After a review of the records and all the arguments of the parties, including the taped evidence submitted by the Applicant, I find that the severed information does not fulfill the requirements of section 17(5)(a) [previously section 16(5)(a)].

[para 44] Although the Applicant states that more than one person believes public scrutiny is necessary, the Applicant has not specifically identified these individuals. The Applicant only refers to the names written in the "book of complaints" allegedly kept by one of the Public Body employees.

[para 45] In addition, although the Applicant states that his concerns are about more than one person within the Public Body, the Applicant has not specifically identified these individuals.

[para 46] Furthermore, I find that the Public Body has disclosed a substantial amount of information in response to the access request. The Public Body disclosed 243 of 249 pages of records to the Applicant and only severed a small portion of the remaining six pages of records.

[para 47] Lastly, I want to emphasize that, notwithstanding the above criteria, the severed information does not relate to the global issue of public scrutiny. The only information at issue on Records 51 and 53 is the severed name of the Third Party. The Public Body has given the Applicant all of the other information on these pages. In my view, the disclosure of the name is not desirable for the purpose of subjecting the Public Body to public scrutiny. As such, I find that section 17(5)(a) [previously section 16(5)(a)] is not a relevant circumstance.

#### Section 17(5)(c) [previously section 16(5)(c)] – Fair determination of the Applicant's rights

[para 48] If section 17(5)(c) [previously section 16(5)(c)] applies, it is a relevant circumstance that weighs in favour of disclosure.

[para 49] The Public Body states that this section is not a relevant circumstance in this inquiry.

[para 50] The Applicant states that this section is a relevant circumstance in this inquiry.

[para 51] In Order 99-028, the Commissioner stated that all four of the following criteria must be fulfilled under section 17(5)(c) [previously section 16(5)(c)]:

- (a) the right in question must be 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 must be 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 must have some bearing on or be significant to the determination of the right in question; and
- (d) the personal information must be required in order to prepare for the proceeding or to ensure an impartial hearing.

[para 52] After a review of the records and all of the arguments of all of the parties, I find that these four criteria are not fulfilled in this inquiry. There is insufficient evidence to prove that the severed information is relevant to a legal right drawn from the concepts of common law or statute law, that it is related to an existing or contemplated proceeding, that the personal information will have a bearing on or is significant to the determination of the right, or that the information is required in order to prepare for the proceeding or to ensure an impartial hearing. As such, I find that section 17(5)(c) [previously section 16(5)(c)] is not a relevant circumstance in this inquiry.

Section 17(5)(e) [previously section 16(5)(e)]– Unfair Exposure to Financial or other Harm

[para 53] If section 17(5)(e) [previously section 16(5)(e)] applies, it is a relevant circumstance that weighs in favour of withholding the severed information.

[para 54] The Public Body states that this section is a relevant circumstance in this inquiry. The Public Body states that disclosing the name of the Third Party to the Applicant will unfairly expose the Third Party to harm.

[para 55] The Applicant states that that the disclosure of the severed personal information would not be considered “harmful personal information”.

[para 56] In Order 2000-029, the Commissioner stated that the focus of section 17(5)(e) [previously section 16(5)(e)] is unfair exposure to harm. The kinds of harm that fall under this section could include, among others, concern for safety, damage to familial relationships and damage to reputation (Orders 98-007, 2000-028).

[para 57] After a review of the information and the arguments of all of the parties, I find that the severed information does not fall within section 17(5)(e) [previously section 16(5)(e)]. There is insufficient evidence before me that the Third Party will be exposed

to harm. In addition, there is insufficient evidence before me that any harm that may accrue would be unfair.

#### Other relevant circumstances

[para 58] In the Applicant's submission, the Applicant states that if the severed information consists of the name of a certain individual, then this individual's lack of credibility would also be a relevant circumstance that weighs in favour of disclosure. The Applicant states that this individual's "lack of credibility goes to any comments he has placed or caused to be placed on the Applicant's file". It appears that the Applicant's argument is that it would not be an unreasonable invasion of privacy to disclose the name of this individual because information regarding the identity of this individual would assist the Applicant in determining the credibility of the information found with the records.

[para 59] After a review of the records and all the arguments of all the parties, I do not find that this factor is a relevant circumstance in this inquiry. I am not convinced that this factor would be a relevant circumstance that would weigh in favour of disclosure. This is particularly so as I have found that the disclosure would not be desirable for the purposes of public scrutiny under section 17(5)(a) [previously section 16(5)(a)] or relevant to the fair determination of the Applicant's rights under section 17(5)(c) [previously section 16(5)(c)].

#### Conclusion under section 17(5) [previously section 16(5)]

[para 60] After considering all of the arguments under section 17(5) [previously section 16(5)], I find that there are no relevant circumstances that weigh in favour of disclosing the severed information. Therefore, I find that disclosure of the severed information is presumed to be an unreasonable invasion of a Third Party's personal privacy under section 17(1) [previously section 16(1)] and section 17(4)(g) [previously section 16(4)(g)].

#### Did the Applicant meet the burden of proof under section 71(2) [previously section 67(2)]?

[para 61] Section 71(2) [previously section 67(2)] directs that the Applicant bear the burden of proving that the disclosure of third party personal information would not be an unreasonable invasion of privacy under the Act.

[para 62] After carefully considering all of the submissions and the records, I conclude that the Applicant has not discharged this burden.

#### Conclusion under section 17 [previously section 16]

[para 63] I find that the severed information in Records 51 and 53 consists of personal information of a third party, the disclosure of which would be an unreasonable

invasion of privacy under sections 17(1) and 17(4) [previously sections 16(1) and 16(4)]. As such, I uphold the Public Body's decision to withhold this information from the Applicant under this section.

**B. Did the Public Body properly apply section 24(1)(b) [previously section 23(1)(b)] of the Act (advice from officials) to the information severed at two points on Record 90?**

[para 64] Section 24(1)(b) [previously section 23(1)(b)] states:

*24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*

...

*(b) consultations or deliberations involving*

*(i) officers or employees of a public body,*

*(ii) a member of the Executive Council, or*

*(iii) the staff of a member of the Executive Council*

[para 65] The Public Body states that this section applies to the severed information on Record 90. The Public Body states that the severed information consists of deliberations of Public Body officers or employees.

[para 66] The Applicant states that the records cannot fall with this section because the Applicant believes that public body employees have no authority to deliberate or develop policy. The Applicant states only the Legislative Assembly and the "Crown of the Legislature" possess this authority. In this regard, the Applicant referred to the Supreme Court of Canada case of *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker, House of Assembly)* 100 D.L.R. (4<sup>th</sup>) 212 (S.C.C.).

[para 67] In the Applicant's submission, the Applicant also states that if the information severed from the records refers to a "October 17, 1997" letter, the severed information would be relevant and material to the following:

- a) whether the Alberta Student Loan Guidelines existed as stated and if so, whether they were knowingly invalid or unconstitutional;
- b) whether the Applicant was being targeted personally or as a member of a class of students treated differently in Alberta;
- c) evidence as to whether the proper law was considered or applied; and

d) whether the “factors” were considered relevant only to Canada Student Loan Guidelines or also to Alberta Student Loan Guidelines and to which Canada Student Loan Guidelines the “October 17, 1997 letter” refers.

[para 68] In Order 96-006, the Commissioner defined the terms “consultation” and “deliberation”. In that Order, the Commissioner said that a “consultation” occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions. The Commissioner said that a “deliberation” is a discussion or consideration, by the individuals described in the section of the reasons for or against the action. In addition, the Commissioner said that the views must either be sought or be the responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something such as taking an action, making a decision or a choice. The Commissioner also stated that the bare recitation of facts without anything further would not constitute a consultation or deliberation.

[para 69] I also note that section 24(1)(b) [previously section 23(1)(b)] is a discretionary exception. Consequently, even if this section applies to the information in the records, a public body may nevertheless decide to disclose the information. To properly exercise this discretion a public body must consider the purposes of the Act, one of which is to allow access to the information.

[para 70] After a review of Record 90 and all the arguments of the parties, I find that the severed information meets the criteria under section 24(1)(b) [previously section 23(1)(b)]. I find that the severed information consists of a discussion or consideration by officers or employees of a public body of the reasons for or against a future action by the public body. I also find that the Public Body properly exercised its discretion under this section. In this inquiry, the Public Body provided as much information as possible to the Applicant. The Public Body disclosed 243 of a possible 249 pages of records to the Applicant. Of the six records that were severed, the Public Body applied this section to only a portion of the information on one page.

[para 71] In addition, I find that the Applicant’s submission regarding the “October 17, 1997” letter is not relevant to a determination under section 24(1)(b) [previously section 23(1)(b)]. My jurisdiction under this section is to determine whether the Public Body properly applied this section. The factors outlined by the Applicant in regard to the “October 17, 1997” letter do not address whether the criteria under section 24(1)(b) [previously section 23(1)(b)] are fulfilled. They do not address whether the record contains consultations or deliberations nor whether any consultations or deliberations involve the individuals listed under section 24(1)(b) [previously section 23(1)(b)].

[para 72] Lastly, I find that the *New Brunswick Broadcasting Co.* decision is irrelevant in this inquiry. The *New Brunswick Broadcasting Co.* decision dealt with the application of parliamentary privilege. The Public Body did not claim parliamentary privilege over the records and this type of privilege is therefore not at issue in this inquiry.

**C. Did the Public Body properly apply section 27(1)(b) [previously section 26(1)(b)] of the Act (privileged information) to the information severed from Record 81?**

[para 73] Section 27(1)(b) [previously section 26(1)(b)] reads:

*27(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 74] The Public Body states that this section applies to Record 81. The Public Body states that the records consist of correspondence from one lawyer to another lawyer which was prepared in relation to a matter involving the provision of legal services.

[para 75] The Applicant did not address the specific criteria under this section. Instead the Applicant focused on the various types of privilege found under section 27(1)(a) [previously section 26(1)(a)] such as solicitor-client privilege, litigation privilege and public interest privilege and referred to a number of court decisions that addressed these various types of privilege. After a review of these decisions, I find that, although these decisions may be relevant to a determination under section 27(1)(a) [previously section 26(1)(a)], they are not relevant to a determination under section 27(1)(b) [previously section 26(1)(b)].

[para 76] In support of his arguments, the Applicant also provided me with a tape of telephone conversations that he had with various individuals. After a review of the tape, I do not find that the content of the tape is relevant to my decision under section 27(1)(b) [previously section 26(1)(b)].

[para 77] There are three criteria under section 27(1)(b) [previously section 26(1)(b)]:

- (i) The information must be prepared by or for one of the individuals listed in section 27(1)(b) [previously section 26(1)(b)];



- (ii) The information must be prepared in relation to a matter involving the provision of legal services; and
- (iii) The Public Body must show that it properly exercised its discretion.

[para 78] In Orders 96-017 and 98-016, the Commissioner defined the term “legal services” by its ordinary dictionary meaning. He stated that the term “legal services” would include any law-related service performed by a person licensed to practice law. As such, the section is broader than solicitor-client privilege.

[para 79] After a review of the records and the all the arguments of all the parties, I find that the information severed on page 1 of Record 81 falls under section 27(1)(b) [previously section 26(1)(b)]. The information was prepared by a lawyer of the Minister of Justice and Attorney General in relation to a matter involving the provision of legal services. I also find that the Public Body properly exercised its discretion in regard to these pages. In this inquiry, the Public Body selectively applied section 27(1)(b) to the information. As previously mentioned, the Public Body also disclosed a great deal of information to the Applicant. The Public Body disclosed 243 of a possible 249 pages of records to the Applicant and only severed a portion of page 1 of Record 81.

[para 80] I do not, however, find that the Public Body properly applied section 27(1)(b) [previously section 26(1)(b)] to pages 2 and 3 of Record 81. Pages 2 and 3 consist of a letter authored by the Applicant. Although pages 2 and 3 were attached to page 1, pages 2 and 3 were not prepared by or for one of the individuals listed in section 27(1)(b) [previously section 26(1)(b)]. I therefore do not uphold the Public Body’s decision to withhold the severed information on pages 2 and 3 under this section. I will, however, address whether this information falls under section 27(1)(c) [previously section 26(1)(c)].

**D. Did the Public Body properly apply section 27(1)(c) [previously section 26(1)(c)] of the Act (privileged information) to the information severed from Record 81?**

[para 81] Section 27(1)(c) [previously section 26(1)(c)] states:

*27(1) The head of a public body may refuse to disclose to an applicant*

*(c) information in correspondence between*

*(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,*

*and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.*

[para 82] As I have found that the Public Body properly withheld the information severed on page 1 of Record 81 under section 27(1)(b) [previously section 26(1)(b)], I will not consider whether the Public Body properly applied section 27(1)(c) [previously section 26(1)(c)] to that same information. I will, however, address whether the Public Body properly applied section 27(1)(c) [previously section 26(1)(c)] to pages 2 and 3 of Record 81.

[para 83] The Public Body states that section 27(1)(c) [previously section 26(1)(c)] applies to Record 81. The Public Body states that Record 81 consists of information in correspondence between a lawyer of the Minister of Justice and Attorney General and another person in relation to a matter involving the provision of advice or other services by the lawyer.

[para 84] The Applicant did not address the specific criteria under section 27(1)(c) [previously section 26(1)(c)]. Instead the Applicant focused on the various types of privilege found under section 27(1)(a) [previously section 26(1)(a)] such as solicitor-client privilege, litigation privilege and public interest privilege and referred to a number of decisions that addressed these various types of privilege. Although these decisions may be relevant to a determination under section 27(1)(a) [previously section 26(1)(a)], they are not relevant to a determination under section 27(1)(c) [previously section 26(1)(c)].

[para 85] In support of his arguments, the Applicant also provided me with a tape of telephone conversations that he had with various individuals. After a review of the tape, I do not find that the content of the tape is relevant to my decision under section 27(1)(c) [previously section 26(1)(c)].

[para 86] There are three criteria under section 27(1)(c) [previously section 26(1)(c)]:

- a) the information must be in correspondence between the individuals listed in section 27(1)(c) [previously section 26(1)(c)] and any other person;
- b) the information must be in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer; and
- c) the public body must show that it properly exercised its discretion.

[para 87] I note that section 27(1)(c) [previously section 26(1)(c)] is different from section 27(1)(b) [previously section 26(1)(b)] as there is no requirement under section

27(1)(c) [previously section 26(1)(b)] that the correspondence be prepared by or for one of the individuals listed in that section. It must only be part of the “correspondence” between an individual listed in that section and any other person.

[para 88] After a review of the records and all the arguments of the parties, I find that pages 2 and 3 of Record 81 fulfill the first two criteria under section 27(1)(c) [previously section 26(1)(c)]. I find that these pages consist of a letter that was attached to, and formed part of, an internal memo sent from one lawyer of the Minister of Justice and Attorney General to another and therefore comprises part of the correspondence sent between these lawyers. Furthermore, I find that this correspondence relates to a matter involving the provision of advice or other services.

[para 89] However, I do not find that the Public Body properly exercised its discretion under this section in regard to pages 2 and 3 of Record 81.

[para 90] Section 27(1)(c) [previously section 26(1)(c)] is a discretionary exception because it authorizes a public body to refuse access to information, but does not require a public body to do so. In Order 96-017, the Commissioner discussed the two-step decision-making process a public body must complete when claiming a discretionary exception. A public body must first provide evidence on how a particular exception applies; and second, on how the public body exercised its discretion. A public body must show that it took into consideration all the relevant factors when deciding to withhold information, including the purposes of the Act, one of which allows access to information.

[para 91] In this case, I find that the Public Body did not take all of the relevant factors into account when exercising its discretion to withhold the severed information on pages 2 and 3 of Record 81. One of the relevant factors that should have been considered was the fact that it was the Applicant who authored these pages and that no alterations or additions had been made to these pages except for the addition of a date stamp. Another relevant factor is the fact that the Public Body had already agreed to disclose the subject matter of these pages to the Applicant. The subject line on page 1 of Record 81 clearly states that the subject matter of the correspondence is the Applicant’s letter. After taking into consideration these factors, I do not find that the Public Body properly exercised its discretion in regard to the severed information on pages 2 and 3 of Record 81.

[para 92] Since I may not exercise the discretion de novo (that is, in the place of the head of the Public Body), I must return the decision to the Public Body under section 72(2)(b) [previously section 68(2)(b)].

## **VII. ORDER**

[para 93] I make the following Order under section 72 [previously section 68]:

**A. Does section 17 [previously section 16] of the Act (third party personal information) apply to the information severed by the Public Body on Records 51 and 53?**

[para 94] I find that the severed information in Records 51 and 53 consists of personal information of a third party, the disclosure of which would be an unreasonable invasion of privacy under section 17(1) [previously section 16(1)] and 17(4) [previously section 16(4)]. As such, I uphold the Public Body's decision not to disclose this information to the Applicant under section 17 [previously section 16].

**B. Did the Public Body properly apply section 24(1)(b) [previously section 23(1)(b)] of the Act (advice from officials) to the information severed at two points on Record 90?**

[para 95] I find that the Public Body properly applied section 24(1)(b) [previously section 23(1)(b)] to the severed information on Record 90 and properly exercised its discretion under that section. As such, I uphold the Public Body's decision not to disclose this information to the Applicant.

**C. Did the Public Body properly apply section 27(1)(b) [previously section 26(1)(b)] of the Act (privileged information) to the information severed from Record 81?**

[para 96] I find that the Public Body properly applied section 27(1)(b) [previously section 26(1)(b)] to the severed information on page 1 of Record 81. I also find that the Public Body properly exercised its discretion under this section in regard to this page. As such, I uphold the Public Body's decision not to disclose the severed information on that page.

[para 97] I do not, however, find that the Public Body properly applied section 27(1)(b) [previously section 26(1)(b)] to pages 2 and 3 of Record 81. However, I have addressed these pages under section 27(1)(c) [previously section 26(1)(c)].

**D. Did the Public Body properly apply section 27(1)(c) [previously section 26(1)(c)] of the Act (privileged information) to the information severed from Record 81?**

[para 98] I find that the Public Body correctly applied section 27(1)(c) [previously section 26(1)(c)] to the severed information on pages 2 and 3 of Record 81. However, I am not satisfied that the Public Body properly exercised its discretion in regard to this information. As such, I order the Public Body to reconsider its decision in regard to these pages.

[para 99] Furthermore, as provided in section 72(4) [previously section 68(4)], I order that the Public Body reconsider its decision according to the following terms and conditions:

(i) The reconsideration must be made within 50 days of receiving a copy of this Order.

(ii) In reconsidering his decision, the head of the Public Body must keep in mind that one of the main objects and purposes of the Act is access.

(iii) Written reasons for the decision resulting from this reconsideration must be given to the Applicant, and a copy sent to my Office, within the 50-day period set out in (i) above.

Dave Bell  
Adjudicator