**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER**

# ORDER F2002-030R

January 21, 2003

## UNIVERSITY OF ALBERTA

Reconsideration Number 2486

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**Summary**: On March 28, 2002, the Court of Queen's Bench of Alberta (the "Court") quashed Order 2000-032 on judicial review and remitted the matter back to the Commissioner for reconsideration and re-weighing of the specific factors found under section 17(5)(a), section 17(5)(c) and section 17(5)(f) of the *Freedom of Information and Protection of Privacy Act*. These sections address public scrutiny, fair determination of the applicant's rights and personal information supplied in confidence. Also to be considered under section 17(5) was the power imbalance between the Applicant, a professor, and the former students whose personal information the Applicant sought from the University of Alberta. The Commissioner concluded that public scrutiny did not apply, that there was a power imbalance favouring the Applicant, and that the former student's personal information was supplied in confidence. Therefore, the relevant circumstances under section 17(5) weighed in favour of not disclosing personal information in the records sought by the Applicant.

**Statute Cited:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17(1) [previously section 16(1)], 17(5)(a) [previously section 16(5)(a)], section 17(5)(c) [previously section 16(5)(c)], 17(5)(f) [previously section 16(5)(f)] and section 71(2)[previously section 67(2)].

**Order Cited:** Order 2000-032.

**Authority Cited:** *University of Alberta v. Pylypiuk* ABQB 0022, March 28, 2002.

## I. BACKGROUND AND ISSUES

[para 1] On March 28, 2002, the Court of Queen's Bench of Alberta (the "Court") quashed Order 2000-032 on judicial review and remitted the matter back to the Commissioner for reconsideration and re-weighing of the specific factors found under section 17(5)(a) [previously section 16(5)(a)], section 17(5)(c) [previously section 16(5)(c)] and section 17(5)(f) [previously section 16(5)(f)] of the *Freedom of Information and Protection of Privacy Act* (the "Act").

[para 2] These sections address public scrutiny, fair determination of the Applicant's rights and personal information supplied in confidence. Also to be considered under section 17(5) [previously section 16(5)] of the Act, is the issue of a power imbalance between the Applicant, a professor, and the former students whose personal information the Applicant sought from the University of Alberta (the "Public Body").

The relevant portions of section 17 [previously section 16] read:

> *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.*
> *…*
>
> *(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,…*
>
> *(f) the personal information has been supplied in confidence,…*

[para 3] The Court concluded that:

i. The standard of review is one of correctness on questions dealing with interpretations of general law.

ii. Some deference is owed to the Commissioner as a specialized tribunal on questions involving the application and interpretation of the Act.

iii. The Commissioner erred (his analysis sufficiently flawed to warrant reconsideration) in weighing the factors under section 17 [previously section 16]

of the Act, in particular sections 17(5)(a) and (f) [previously section 16(5)(a) and (f)].

iv. Public scrutiny may have the components of "public" accountability, interest and fairness. In this case there is no public component. Further, the Commissioner correctly determined the Applicant's rights were not at stake and therefore one could not also raise the issue of fairness under section 17(5)(c) [previously section 16(5)(c)] of the Act.

v. The Commissioner erred in seeking a need for public scrutiny, without any analysis of what public component was involved in this private dispute involving private correspondence, primarily concerned with an individual's education program (para 63).

vi. The burden of proof should have been on the Applicant to prove the power imbalance existed to her detriment.

vii. The Public Body provided strong *prima facie* evidence that there is a power imbalance between the Applicant and the former students. This type of power imbalance could easily extend beyond a student's graduation (paras 56-61). The Court also determined that the power imbalance between the former students and the professor was worthy of reconsideration when weighing the relevant circumstances.

viii. The Commissioner erred by placing emphasis on the impact of the records on the Applicant's reputation and employment even though he found that the information in the records would not affect any legal rights in the Applicant's employment.

ix. The Court concluded that the Commissioner's weighing of all the relevant circumstances was unreasonable. Personal information supplied in confidence required further consideration by the Commissioner.

[para 4] The Court sealed the records that were at issue in Order 2000-032. Those records contained the former students' personal information. The Court returned those sealed records to the Commissioner after it ordered the Commissioner to reconsider. Those are the records at issue in this reconsideration.

## II. THE PARTIES' ARGUMENTS ON RECONSIDERATION

### The Public Body

[para 5] The Public Body's arguments can be summarized as follows:

i. There are no new, unclear facts or additional evidence that needs to be reconsidered, just an account of the errors.

ii. The Commissioner need only "re-weigh" the non-disclosure of the sealed records.

iii. The Commissioner is entitled to review all the relevant circumstances considered by a head of a public body under section 17 [previously section 16] of the Act but must do so within the framework of balancing the "two competing principles relating to disclosure of information and protection of privacy" (para 28 of the judicial review).

iv. The records relate to a private and internal matter.

v. A reason or desirable purpose does not exist for the matter to be subject to public scrutiny.

vi. The Commissioner did not follow his own tests for section 17(5)(a) [previously section 16(5)(a)] by allowing the section to override the other factors such as personal information supplied in confidence found in section 17(5)(f) [previously section 16(5)(f)].

vii. The Court gave no weight to section 17(5)(a) [previously section 16(5)(a)] as a factor for rebutting the presumption of non-disclosure where the matter is private and there was no discernable purpose for subjecting the Public Body to public scrutiny.

viii. The Court agreed (para 62) with the Commissioner in Order 2000-032 (para 45) that the sealed records do not relate to legal rights for the purposes of making section 17(5)(c) [previously section 16(5)(c)] of the Act relevant.

[para 6] The Public Body emphasized that this is not a dispute about the Public Body and the Applicant but a disagreement on how the Applicant's right to disclosure of certain records must be balanced with the privacy interests of third parties (the former students), as the Act requires.

**The Applicant**

[para 7] The Applicant believes that she has a right to access the records in the custody and control of the Public Body and has a right to correct her own personal information.

[para 8] The Applicant's arguments can be summarized as follows:

i. The Public Body is subject to the Act, and public policy mandates that parties cannot contract out of the Act.

ii. The Public Body was relying on confidentiality to conceal errors and the activities of the Public Body fall outside of section 17(4)(f) [previously section 16(4)(f)] of the Act (employment and educational history).

iii. The Public Body fears disclosure because it cannot justify non-disclosure.

iv. The Public Body is wrongfully protecting the former students' disclosures, as the former students' opinions are not their personal information but views expressed about the Applicant with malice and bad faith.

v. The privacy claims of the former students are not at issue but the views they expressed about the Applicant are.

vi. The Public Body is wrongfully using section 17(5)(f) [previously section 16(5)(f)] of the Act because the information was supplied by the former students, to be used as evidence without a benefit of a fair hearing for the Applicant.

vii. The Public Body's contention that the records should not be disclosed under section 17(5)(f) [previously section 16(5)(f)] of the Act (because the personal information was supplied in confidence) is wrong as the Public Body "has no business soliciting student surveys".

viii. The Applicant cannot see an imbalance of power between her and the former students so as to favour the students.

ix. The Applicant views public interest heavily weighing in favor of a need for public scrutiny of the actions of the Public Body. The need for public scrutiny arises from the requirement of the Public Body to provide a fair hearing, for failure to investigate unethical behavior, for failure to preserve the integrity of the university, for failure to adhere to the regulations and the need for accountability and reform.

x. The Applicant sees a public component in what the Court described as a private dispute involving private correspondence primarily concerned with an individual's educational program as being hinged upon the word "education". The Applicant believes "all matters" concerning education must be equated to being "public", as education is publicly funded.

xi. The Applicant believes that disclosing the records at issue is about "preserving public integrity of a discipline against the attacks of a group of students".

xii. The Applicant disagrees with the principle of honouring confidential assurances.

xiii. The Applicant sees the Public Body as wrongfully championing student "confidentiality". The release of the records would allow the Applicant to correct a public impression as to her culpability, make the Public Body accountable for its errors, and encourage the Public Body to adhere to its conflict resolution procedures.

[para 9] The Applicant summed up her concerns by pointing out that allowing the records to be withheld, will only strengthen the Public Body's efforts to be seen as the defender of students' rights, which would not be in the public interest.

## III. MY DECISION

[para 10] I have reviewed the submissions of the Applicant and the Public Body, keeping in mind the results of the judicial review.

[para 11] By labeling the issue as a private matter involving private correspondence that is primarily concerned with individual educational matters, the Court has effectively removed the section 17(5)(a) [previously section 16(5)(a)] issue of "public scrutiny" as a viable consideration. I agree with the Court that there is no "public scrutiny" of this private issue to be served by releasing the personal information in the records at issue. Therefore, section 17(5)(a) [previously section 16(5)(a)] does not apply and does not weigh in favour of disclosing the former students' personal information.

[para 12] In reviewing the application of section 17(5)(c) [previously section 16(5)(c)], I have not been provided with any compelling reasons to alter the conclusion in Order 2000-032, [paras 44 and 45] that: "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 the 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". Therefore, I find that the section does not apply and does not weigh in favour of disclosing the former students' personal information.

[para 13] As in Order 2000-032, I find that the personal information was supplied in confidence, in accordance with section 17(5)(f) [previously section 16(5)(f)] of the Act and therefore weighs in favour of not disclosing the former students' personal information.

[para 14] I also find that there is a power imbalance between the Applicant and the former students. I agree with the submissions of the Public Body and the analysis of the Court (paras 56-61) that a professor controls class results, grades, potential employment,

future academic pursuits and scholarship recommendations. That power imbalance weighs in favour of not disclosing the former students' personal information.

[para 15] The Applicant has not persuaded me that disclosure, in these circumstances, would not be an unreasonable invasion of the former students' personal privacy. The Applicant has not provided sufficient evidence to meet the burden of proof on her, as required under section 71(2) [previously section 67(2)] of the Act,

[para 16] Therefore, having reconsidered the relevant circumstances under section 17(5) [previously section 16(5)], I find that the relevant circumstances weigh in favour of not disclosing the former students' personal information. Disclosure would be an unreasonable invasion of the former students' privacy, as provided by 17(1) [previously section 16(1)] of the Act.

## IV. ORDER

[para 17] I make the following Order under section 72 [previously section 68] of the Act.

[para 18] On reconsideration, I confirm the decision of the Public Body not to disclose the records. I order the Public Body not to disclose the records to the Applicant.

Frank Work, Q.C.
Information and Privacy Commissioner