ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2003-005

December 29, 2004

UNIVERSITY OF CALGARY

Review Number 2446

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Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the University of Calgary (the "Public Body") for access to an investigation report (the "Report") and other records relating to a sexual harassment complaint she had made against a member of a faculty of the Public Body (the "Faculty"). The Public Body provided some of the documents but withheld or severed others, relying primarily on section 27 (legal privilege), as well as a number of other sections of the Act.

The Adjudicator rejected the Public Body's claim that the Report had been prepared for the dominant purpose of litigation. Thus he held that the Report could not be withheld under section 27 on that basis. However, he allowed the Public Body's claim of solicitor-client privilege for some of the related documents. He also directed that some documents be severed or withheld on the basis that disclosure would be an unreasonable invasion of personal privacy.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 16, 16(1), 16(1)(c), 17, 17(1), 17(4), 17(4)(b), 17(4)(d), 17(4)(g), 17(5), 17(5)(a), 17(5)(b), 17(5)(f), 17(5)(g), 17(5)(i), 20(1), 20(1)(a), 20(1)(c), 24, 24(1)(b), 27, 27(1), 27(1)(a), 27(2), 72.

Authorities Cited: AB: Order 96-006, Order 96-015, Order 96-017, Order 97-002, Order 97-003, Order 97-009, Order 97-018, Order 99-010, Order 99-017, Order 2000-019, Order 2000-029; **ONT**. Order M-615.

Cases Cited: *Waugh v. British Railway Board*, [1979] 2 All E.R. 1169 (H.L.), *Solosky v. The Queen*, [1980] 1 S.C.R. 821 *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta. L.R. (2d) 183 (C.A.), *College of Physicians of British Columbia v. British Columbia (Privacy Commissioner)*, [2002] B.C.J. No. 2779.

Authors Cited: Ronald D. Manes and Michael P. Silver, *Solicitor-Client Privilege in Canadian Law*, Toronto: Butterworths, 1993.

I. BACKGROUND

[para 1] On April 1, 2002 the Applicant made a request to the Public Body for all information relating to a sexual harassment complaint she had made against a member of the Faculty.

[para 2] The Public Body located documents responsive to the Applicant's request. It disclosed some of the responsive documents, but withheld or severed 102 pages, relying on various sections of the Act.

[para 3] The Applicant was not satisfied with the response and by letter dated May 3, 2002, requested the Office of the Information and Privacy Commissioner to review the Public Body's decision to withhold or sever documents.

[para 4] Mediation was authorized but did not resolve all of the issues.

RECORDS AT ISSUE

[para 5] The primary record is an investigation report (the "Report") which was located in the files of the Public Body's legal counsel. The remaining records are from the files of: the Public Body's legal counsel ("Legal Counsel's file"), its Sexual Harassment Adviser ("Sexual Harassment Adviser's file"), and the Faculty ("Faculty file"). They consist of: parts of a campus security incident report ("Campus Security Report"); a complaint made by the Applicant to the Alberta Human Rights and Citizenship Commission; investigation notes, notes of meetings and telephone conversations, and correspondence and draft correspondence, involving Public Body officials and staff (including the Public Body's legal counsel), the Applicant, the investigator, the respondent to the complaint and his lawyer, and witnesses to the subject matter of the complaint.

ISSUES

[para 6] The issues are:

A. Did the Public Body properly apply section 27 of the Act (privileged information) to the records?

B. Did the Public Body properly apply section 24 of the Act (advice from officials) to the records?

C. Does section 17 of the Act (personal information) apply to the records/information?

D. Does section 16 of the Act (business interests) apply to the records/information?

E. Did the Public Body properly apply section 20(1)(c) of the Act (disclosure harmful to law enforcement) to the records/information?

DISCUSSION OF ISSUES

Issue A: Did the Public Body properly apply section 27 of the Act (privileged information) to the records?

[para 7] The key record in this inquiry is a report prepared by an investigator who was retained by the Public Body to inquire into a sexual harassment complaint that had been brought by the Applicant ("the Report"). I will address the application of section 27 first to the Report, and then to the remaining records.

[para 8] The relevant parts of section 27 provide:

> *27(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,…*
>
> *(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.*

The Report

[para 9] The Public Body has relied primarily on section 27(1)(a) as the basis for withholding the Report from the Applicant. It is clear that one type of legal privilege which it claims for the Report is litigation privilege. There is some suggestion in the Public Body's submission that it also claims solicitor-client privilege for this document.

Litigation Privilege

[para 10] Order 97-009 said that litigation privilege applies to papers and materials created or obtained by the client for the lawyer's use in existing or contemplated litigation, or created by a third party or obtained from a third party on behalf of the client for the lawyer's use in existing or contemplated litigation: *Waugh v. British Railway Board*, [1979] 2 All E.R. 1169 (H.L.).

[para 11] That Order also said that to correctly apply litigation privilege, the Public Body must show that:

- There is a third party communication.
- The maker of the document or the person under whose authority the document was made intended the document to be confidential.
- The "dominant purpose" for which the documents were prepared was to submit them to a legal advisor for advice and use in litigation, whether existing or contemplated: *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta. L.R. (2d) 183 (C.A.); *Waugh v. British Railway Board* [1979] 2 All E.R. 1169 (H.L.).

[para 12] The dominant purpose test consists of three requirements:

- the documents must have been produced with existing or contemplated litigation in mind
- the documents must have been produced for the dominant purpose of existing or contemplated litigation, and
- if litigation is contemplated, the prospect of litigation must be reasonable.

[para 13] To support its reliance on litigation privilege, the Public Body says:

1. There was a third party communication.

[para 14] I accept the Report was a third party communication.

2. The maker of the document or the person under whose authority the document was made intended it to be confidential.

[para 15] The Public Body relies on the fact that its legal counsel controlled the Report and its release, and also on the fact that the investigator stamped ‘confidential’ on every page of the Report.

[para 16] The Applicant asserts that both she and her lawyer expected to receive copies of the Report. Correspondence from the Applicant’s lawyer to the Public Body’s legal counsel, which requests the Report and appears to assume a copy will be provided, reflects that expectation, as does correspondence between the Applicant’s lawyer and the Applicant. However, the Applicant does not claim that she was given any assurance the Report would be provided to her.

[para 17] The legal counsel's reply to the Applicant's lawyer's request says there was no intention to share the Report with the Applicant.

[para 18] However, the investigator orally disclosed much of the contents of the Report to the Applicant in a meeting he had with the Applicant and her lawyer. Material provided to me by the Applicant (the investigator's response to a complaint made by the Applicant to the Alberta Solicitor General regarding his conduct as an investigator, dated May 1, 2002) contains a statement by the investigator that "no important or relevant information was withheld from [the Applicant]". The letter from the Dean of the Faculty to the Applicant that dismissed her complaint did not provide reasons beyond referring to the results of the investigation; it appears the oral disclosure was the means by which the details of the investigation results and the reasons for the Public Body's decision to reject the complaint were provided to the Applicant.

[para 19] While the investigator and the legal counsel may have intended the Report itself to be withheld, they did not intend significant parts of it - those disclosed to the Applicant - to be confidential.

[para 20] In my view, the evidence supports a finding that the document was not intended to be confidential.

3. The "dominant purpose" for which the document was prepared was to submit it to a legal advisor for advice and use in litigation.

[para 21] To fulfill the 'dominant purpose' element of the test, the Public Body begins with the following statement:

> In January [the Public Body's legal counsel] received from the President's office correspondence from [the Applicant] to the President.

This presumably refers to the Applicant's letter alleging harassment and requesting the Public Body to investigate, which was dated January 2, 2001. The submission continues:

> Within days she received correspondence from [the Applicant's] counsel, indicating that legal action would be taken if the wrongful dismissal and harassment matters were not resolved.

[para 22] The material provided to me contains no record of correspondence between the Applicant's legal counsel and the Public Body's legal counsel requesting compensation for wrongful dismissal. Neither is there any record of correspondence from the Applicant's counsel making such a request directly to the Public Body. There is reference in various materials before me to a letter dated January 8 written by the Applicant's lawyer *to the respondent to the complaint*, claiming compensation for lost wages for constructive dismissal, which was copied to the Public Body's President and the Dean of the Faculty. I am not able to tell whether this is the letter referred to in the

Public Body's submission (or whether there was some other letter which was not provided to me by the Public Body). Neither can I tell from the submissions whether the claim for wages in the January 8th letter was made against the Public Body or only against the individual respondent (who apparently was the Applicant's employer). The fact the letter was addressed to the respondent to the complaint suggests the claim was made against him, as does the reply from the respondent's lawyer to the Applicant's lawyer (dated January 19, 2001) refusing to pay the compensation requested. In any case, the Public Body does not clearly assert that it had received a threat of legal action *against the Public Body*, nor has it provided evidence of such a threat.

[para 23] Despite this, the submission asserts that

> In light of this pending legal action, [the Public Body's legal counsel] requested that [the investigator] conduct an investigation and prepare a report.

[para 24] In my view, whether or not the Public Body was itself directly threatened with a legal claim, the available evidence with respect to the Public Body's motives for commissioning an independent investigation contradicts the assertion in the submission. It does not appear that the decision to conduct a harassment investigation was based on a threat of legal action. The evidence from points in time predating the Applicant's access request shows that the investigation was, rather, undertaken to fulfill the Applicant's request for an investigation of her allegation of harassment.

[para 25] One such item of evidence is found in a letter from the Public Body's legal counsel to the Applicant's lawyer, dated February 20, 2001. This letter says that the investigator will "address our [the Public Body's] initial obligations with respect to [the Applicant's] concerns *expressed in her January 2, 2001 letter*. Similarly, the letter from the Public Body's legal counsel which engages the investigator says that the investigator is being asked to "investigate the enclosed allegation of sexual harassment received from [the Applicant] *on January 15, 2001* [this is the January 2, 2001 letter].

[para 26] Another piece of evidence that reveals the Public Body's intention is found in its response to the Applicant's complaint to the Alberta Human Rights and Citizenship Commission (provided to me by the Applicant). In this response the Public Body writes:

> On receipt of [the Applicant's] letter [this is, again, the January 2, 2001 letter], the Dean of [the Faculty] referred the complaint to the [Public Body's] Sexual Harassment Adviser pursuant to the Sexual Harassment Policy of the [Public Body]. Initial efforts to meet with [the Applicant] were not successful. [The subject of the complaint] categorically denied the allegations, sought legal advice respecting suing [the Applicant] for defamation and welcomed an investigation.
>
> In light of the seriousness of the allegations and the fact that [the Applicant] had contacted the Sexual Harassment Adviser prior to the January letter, the [Public Body] retained [the investigator], to conduct an independent confidential inquiry

> through interviews with [the Applicant], [the subject of the complaint] and witnesses, *and to conclude as to whether or not there was any basis to the allegations*. [The investigator] is an experienced investigator who has over 20 years, conducted many sexual harassment investigations … . [The investigator] is not associated in any way with the [Public Body]. *He was asked to make his recommendations to the [Public Body] without any restrictions, and it was made clear to [the investigator] that the [Public Body] was interested in properly addressing the situation, whatever outcomes his investigations reached.* [emphasis added]
> …
>
> The [Public Body] has a Sexual Harassment Policy and took [the Applicant's] letter of January 2001 extremely seriously. *In ensuring every step was taken to have a full and fair investigation and to have the appearance of a full and fair investigation,* the [Public Body] hired an experienced investigator, recommended by an outside third party, expert in the area of sexual harassment … . [emphasis added]

[para 27] In my view these statements conflict directly with the idea that in commissioning the Report the Public Body was preparing to litigate with the Applicant. In contrast, it appears the Public Body's purpose was to find facts on which to base a judgment about what had actually happened and what an appropriate outcome – "properly addressing the situation" – would involve. This is supported by the terms of engagement of the investigator. The letter of engagement concludes with a statement that the Public Body may, depending on the investigator's findings, be willing to support a mutually satisfactory resolution, and directs the investigator that he is to be open to the possibility of such a resolution.

[para 28] Evidence of the investigator's own view of his role is found in his response to a complaint made by the Applicant to the Alberta Solicitor General regarding the investigator's conduct dated May 1, 2002 (provided to me by the Applicant). He says:

> Our role in this matter was to act as an unbiased investigator and not to proceed from a standpoint of attempting to prove or disprove the allegations.

[para 29] In response to a complaint made by the Applicant to the Law Society dated March 6, 2002, the Public Body's lawyer comments on the investigator's role in a manner suggesting that he [the investigator] was to be an unbiased fact-finder:

> … [the investigator] informs me that during his first meeting with [the Applicant], he advised her that had he been involved in University level teachings. [The investigator] advised that he would not have accepted this retainer, and conducted the investigation, if he felt that he was in a position of conflict.

[para 30] An investigator retained for the purpose of preparing for litigation would need to be accurate, but would not need to be unbiased. This emphasis on his neutrality suggests he was not engaged for the purpose of preparing for litigation.

[para 31] Finally, in the letter of April 11, 2001 to the Applicant from the Dean of the Faculty advising her of his conclusion that "the appropriate disposition of your complaint does not include a finding consistent with your allegations", the Dean appears to rely on the results of the investigation for his conclusion.[1] Thus it would be wrong to conclude the Public Body had solidified its position on the proper outcome of the complaint or any claim prior to requesting the Report. In contrast, the Report was meant to ascertain these facts.

[para 32] The documents I have just reviewed also suggest that at the time the Report was commissioned, the Public Body viewed itself as applying its Sexual Harassment Policy and process. Clear evidence of this is found in the Public Body's legal counsel's letter engaging the investigator. This letter instructs the investigator to cooperate with the Sexual Harassment Adviser "*in relation to the application of the [Public Body's] Sexual Harassment Policy"*. The preface to the Report itself also strongly suggests this purpose and understanding. The investigator's statement of what the Report is to contain includes the following:

- A summary of the factual allegations and identification of the issues raised for determination
- A summary of the evidence and any inconsistencies in the evidence
- A summary of the findings of fact
    - Did the alleged behaviour occur?
    - If they did occur, *do they constitute sexual harassment as defined by the [Public Body's] policy* and the Human Rights legislation? [emphasis added].

[para 33] This view of the Public Body's intention is reinforced by the fact that the investigator shared the substance of the Report with the Applicant, presumably with the concurrence of the Public Body. This would make no sense relative to a Report prepared primarily for the purpose of defending against a legal action taken by her.

[para 34] The Public Body's sexual harassment process cannot be instituted to help it protect itself in litigation. By its own terms it is to preserve the rights of both the complainant and respondent to a complaint. This obligation is at odds with the idea that a harassment investigation is 'in preparation for litigation', and the role of Public Body officials at the investigation stage of dealing with complaints is to protect the Public Body's interests against complainants.

[para 35] I do not comment on whether a public body asked to investigate a sexual harassment complaint, while at the same time being notified of a potential legal claim against it based on alleged harassment, is obliged to run its impartial sexual harassment

[1] I note also that in this letter the Dean makes no mention of any claim for compensation, but responds only to the allegations of harassment.

process. I do note that a finding of harassment as the outcome of the process would not oblige it to concede liability for a related legal claim. Depending on the facts, there might be many defences to such a claim.

[para 36] In this case, however, regardless whether there was a threat of a legal action, the evidence shows the Public Body elected to run its harassment process, and it explicitly acknowledged in the material before me that this process was to be impartial, and was intended to discover the facts to enable its officials to decide how to treat the allegation of harassment. This is not consistent with its current characterization of the process as undertaken for the purposes of defending against a legal action. In light of this evidence, and of the requirements to establish litigation privilege, I must reject the Public Body's contention that the Report can be withheld on the basis that it was prepared in contemplation of litigation.

Solicitor-Client Privilege

[para 37] I also reject any suggestion that the Report can be withheld on the basis it was supplied to the lawyer for the purpose of obtaining legal advice. Part of the Public Body's submission (at page 6, second paragraph) might be taken as suggesting it is claiming privilege for the Report because it was found in the Public Body's legal counsel's file, and thus was part of a 'continuum of legal advice' respecting the Applicant's complaint to the Public Body.

[para 38] A document does not attract solicitor-client privilege under section 27(1)(a) simply by virtue of its presence in a lawyer's file. As set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821 (discussed in Order 96-015) a document must meet the following criteria for solicitor-client privilege to apply:

(i) it is a communication between solicitor and client,
(ii) which entails the seeking or giving of legal advice, and
(iii) which is intended to be confidential by the parties.

[para 39] In Order 96-017, the former Commissioner adopted a definition of 'legal advice' which requires that the advice in question, "include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications". Privilege also attaches to information passing between a lawyer and his or her client that is provided for the purpose of giving the advice, as part of the continuum of solicitor-client communications. A particular document need not on its face evince the seeking or giving of legal advice, but to attract the privilege, it must be shown to be part of a continuum in which this is actually being done.

[para 40] The evidence before me does not reveal any request for legal advice relative to the Report by the Public Body's officials. Neither does the Public Body claim that it provided the Report to its legal counsel for such a purpose, or that the legal counsel made any assessment of the Report's conclusions or advised the Public Body's officials how to respond to the complaint by reference to the investigation results.

[para 41] The evidence does suggest that the Report was supplied directly by the third party investigator to the legal counsel. Even if this was for the purpose of enabling the lawyer to advise the Public Body, this communication between the investigator and the counsel would not be privileged. There are circumstances in which a communication by a third party with a lawyer that facilitates or assists in giving legal advice is protected by solicitor-client privilege, but this is not such a circumstance. When a third party serves as a channel of communication between the client and the lawyer, or when the third party's function is otherwise essential to the maintenance or operation of the solicitor-client relationship, the communication is protected by privilege. Where, in contrast, "the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client … the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected". (See *College of Physicians of British Columbia v. British Columbia (Privacy Commissioner)*, [2002] B.C.J. No. 2779. The role of an agent in solicitor-client communications is also discussed in Order 97-003).

[para 42] As discussed earlier, the protection of legal privilege also arises if a report prepared by a third party (or by an agent or employee of the client) is supplied to a lawyer for the lawyer's advice and use in existing or contemplated litigation. (See Manes & Silver, *Solicitor-Client Privilege in Canadian Law*, at Chapter 1, 1.02, and at 56.) However, for the reasons given above, I do not accept the Report was prepared for such a purpose. Its dominant purpose was to provide an evidential basis for the Public Body officials who had decision-making responsibility relative to the complaint in this case, enabling them to decide how to respond.

[para 43] Finally, the concluding paragraph of the Public Body's submission relative to privilege contradicts the earlier ambiguity in the submission (at page 6, second paragraph) as to which kind of privilege it is claiming for the Report. The final paragraph says explicitly that the Public Body relied on 'litigation privilege' for the Report, and 'general solicitor-client privilege' for other documents in the Legal Counsel's file.

Remaining Records

[para 44] The Public Body relied on solicitor-client privilege to withhold the following of the remaining records: all but one (page 64) of the records in the Legal Counsel's file: pages 13, 14, 15-18, 31, 32, 33, 34, 40 and 41 of the Sexual Harassment Adviser's file; and documents 15 and 24 of the Faculty file. I find that some of these documents meet the test for solicitor-client privilege, whereas others do not.

[para 45] I have examined the documents in the Legal Counsel's file. It is evident from the content of some of these documents that they meet the criteria for solicitor-client privilege described above. These are pages 12, 13, 37, 40, and 68. As to the rest, it may be speculated that some of them might have met the criteria had an explanation been given of how they were implicated in the seeking or giving of legal advice. The Public Body asserts they were, but does not explain or provide evidence as to what advice was being sought or given respecting the Applicant's claims, or how the documents in the file

were relevant to such advice. In the absence of such explanations, I cannot conclude that they may be withheld under section 27.

[para 46] With respect to documents in the Sexual Harassment Adviser's file, the following meet the criteria for solicitor-client privilege by reference to their contents: 13 and 14. As with the documents in the Legal Counsel's file, there is insufficient information relative to the remaining documents in this file for which legal privilege is claimed to determine whether they were part of the process of seeking or giving legal advice.

[para 47] Finally with respect to documents in the file of the Faculty, I accept that document 24 meets the criteria for solicitor-client privilege.

[para 48] As the Public Body disclosed some documents to the Applicant while withholding others, I find it properly exercised its discretion to withhold those documents to which I have found section 27 applies.

[para 49] Some of the file documents also meet the criteria for mandatory withholding under section 27(2) in that they are the privileged documents of a third party (settlement-negotiation privilege). Settlement-negotiation privilege attaches to confidential communications made in the context of settlement negotiations conducted to resolve a dispute. (See Manes & Silver, *Solicitor-Client Privilege in Canadian* Law at 115-116.) The documents to which this privilege applies are: pages 33, 42, 43, 68 of the Legal Counsel's file; page 34 of the Sexual Harassment Adviser's file.

Issue B: Did the Public Body properly apply section 24 of the Act (advice from officials) to the records?

[para 50] The Public Body relies on section 24(1)(b), which reads

> *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, ….*

[para 51] The Public Body relied on this section with respect to two kinds of records: fax cover sheets that list correspondence being conveyed among the Public Body's officials and employees (Legal Counsel's file pages 44 and 45), and notes by one Public Body official relating to a meeting with other Public Body officials (Sexual Harassment Adviser's file pages 13 and 14).

[para 52] In Order 96-006 the former Commissioner said that "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness

of particular proposals or suggested actions. A “deliberation” is a discussion or consideration, by the persons described in the section, of the reasons for and against an action.”

[para 53] I do not accept that Legal Counsel’s file pages 44 and 45 meet this test. With respect to Sexual Harassment Adviser’s file pages 13 and 14, I do not need to decide this question because I have already held that these were properly withheld by the Public Body under section 27.

Issue C: Does section 17 of the Act (personal information) apply to the records/information?

[para 54] Section 17(1) provides:

> *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.*

[para 55] Section 17 is a mandatory ("must") section of the Act. According to this section, personal information must be withheld if its disclosure would be an unreasonable invasion of a third party’s personal privacy. If section 17 applies, the information must be withheld whether or not the Public Body argued that it meets the requirements of the section.

[para 56] The following records must be tested relative to section 17:

a) the Report:
I have decided that section 27 does not apply to the Report and it may not be withheld on this basis. Therefore it is necessary to decide whether this document contains personal information that must be withheld under section 17.

b) the remaining file documents that contain personal information:
The Public Body withheld some of these documents in their entirety. It provided others but severed the personal information. I have already found that some of these documents are properly withheld under section 27 (legal privilege) (see the preceding discussion). I need not consider whether the personal information these documents contain must also be withheld on the basis that its disclosure would be an unreasonable invasion of a third party’s personal privacy. However, I must still ask this question for the personal information in those of the remaining file documents which I have held are not properly withheld under section 27.

[para 57] In order for section 17 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.

[para 58] Personal information is defined in section 1(n). The relevant portions provide:

> *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 59] The first question is whether the withheld or severed records contain "personal information" of a third party.

The Report

[para 60] The Report contains third party personal information of the following kinds:

- information about third parties (the respondent to the complaint and others) provided to the investigator by the Applicant and recounted by the investigator to the witnesses
- names of the witnesses (the respondent to the complaint and others), and the fact they were interviewed
- information provided by the witnesses to the investigation (the respondent and others) in their responses
    a. about their own involvement
    b. about other third parties
        1. the witnesses' observations about the activities of the respondent and others
        2. the witnesses' opinions about the respondent and others.

The remaining file records (not properly withheld under section 27)

[para 61] The following of the remaining withheld and severed file records contain personal information of third parties:

- Legal Counsel file page 7, severed part of page 8, pages 9, 10, 11, 16, severed parts of pages 17 and 18, pages 19, 22, 23, 24, 41, 44, 45, 48, 49, 53, 54, 55, 56, 57, 62, 63, 64
- Sexual Harassment Adviser's file page 6, severed parts of pages 7 and 8, pages 9-12, severed part of pages 15 and 17, pages 16, 18, 25-28, 31, 32, 33, 40, 41, 42, 43, 45-54
- Faculty file: pages 9, 14, 15, 19, 20, 21.

[para 62] I will now consider whether the disclosure of any of the personal information in the Report or remaining file records just listed is an unreasonable invasion of a third party's personal privacy under section 17. In doing this I will consider whether any of the presumptions in section 17(4), and any of the factors in section 17(5), apply.

Section 17(4)

[para 63] Section 17(4) provides:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if …

> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,…*
>
> *(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…*

Section 17(4)(g) - name plus personal information

[para 64] For all the personal information of third parties in the Report, either

- the names of third parties appear together with other personal information about them, or

- disclosure of the name itself (of the witnesses) would reveal other information about them (that they gave the statements, and were in some way involved in the events).

[para 65] I find that section 17(4)(g) creates a presumption that disclosure would be an unreasonable invasion of the personal information of third parties found in Report.

[para 66] With respect to personal information of third parties contained in the remaining file records (not already withheld under section 27), I find the presumption under section 17(4)(g) arises relative to the personal information of third parties in the following documents or severed portions of documents:

- Legal Counsel file: page 7, severed part of page 8, pages 9, 10, 11, 16, severed parts of pages 17, 18, pages 19, 22, 23, 24, 41, 44, 45, 48, 49, 53, 54, 55, 56, 57, 62, 63, 64
- Sexual Harassment Adviser's file page 6, severed parts of pages 7 and 8, pages 9-12, severed part of pages 15 and 17, pages 16, 18, 25-28, 31, 32, 33, 40, 41, 42, 43, 45-54
- Faculty file: pages 9, 14, 15, 19, 20, 21.

Section 17(4)(b) – law enforcement record

[para 67] The Public Body claimed that section 17(4)(b) applied to the Campus Security Report, as well as to a number of the records relating to the Applicant's complaint and its investigation of the complaint. In its rebuttal submission the Public Body says the "nature of the records excluded pursuant to Section 17(4)(b) relate to records that comprise the investigations into the sexual harassment claim and into a related incident and matters surrounding these events".

[para 68] I do not accept that the records that relate to the Public Body's sexual harassment investigation are part of a law enforcement record. Order 2000-019 held that "law enforcement" should encompass the notion of a violation of "law". The sexual harassment investigation here at issue and resulting records were related to enforcement of the Public Body's sexual harassment policy. While this policy contains some references to provincial and federal human rights legislation, the Public Body's investigation was under the policy, not under the "law" which consists of human rights legislation.

[para 69] With respect to personal information in the severed and withheld parts of the Campus Security Report (pages 16-19 and 22-24 of the Legal Counsel's file and pages 7-12 of the Sexual Harassment Adviser's file), this report relates to an incident which involved the Applicant and respondent to the complaint, as well as several other people, to which the Public Body's security personnel were summoned. The Campus Security Report originated in the Public Body's security department and related to law enforcement. I agree that section 17(4)(b) applies, and the presumption thereunder arises, in relation to these records.

[para 70] I also find that the Applicant's complaint to the Human Rights and Citizenship Commission (Sexual Harassment Adviser's file pages 45-54) is part of a law enforcement record of the Commission, and that the section 17(4)(b) presumption arises for this record.

Section 17(4)(d)- employment history

[para 71] The Public Body claims that section 17(4)(d) applies to personal information relating to the employment of the respondent to the complaint. It claims the presumption under section 17(4)(b) for a number of the records relating to the Public Body's investigation of the Applicant's complaint.

[para 72] According to Order 2000-029: "employment history" in section 17(4)(d) is a broad, general phrase that covers information pertaining to an individual's work record.

[para 73] In my view the term 'employment history' describes a complete or partial chronology of a person's working life such as might appear in a resume or personnel file. Particular incidents that occur in a workplace may become the subject of entries in a personnel file, and such entries may properly be viewed as part of 'employment history'. However, the mere fact there is a written reference to or account of a workplace event does not make such a document part of the 'employment history' of those involved. Many workplace incidents of which there is some written record will not be important enough to merit an entry in a personnel file. Similarly it would not make sense to regard documents recording complaints or investigations into complaints as part of a person's 'employment history' unless the complaints were substantiated and a record of some related disciplinary action were entered in a personnel file. (For a similar view, see Ontario Order M-615.)

[para 74] Accordingly in my view section 17(4)(d) does not apply to those of the records for which it is claimed other than records such as might appear on a personnel file. I have no evidence as to whether any of the records appear on a personnel file. However, in my view page 64 of the Legal Counsel's file and page 21 of the Faculty file are such as might appear on such a file, and I accept that the presumption under section 17(4)(b) applies to these records.

Section 17(5)

[para 75] The Applicant and the Public Body have both made submissions about the application of the factors relative to disclosure of third party personal information under section 17(5). The parts of this section raised by the Applicant or the Public Body provide:

> *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,

(b) the disclosure is likely to promote public health and safety,…

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

(g) the personal information is likely to be inaccurate or unreliable, …

(i) the personal information was originally provided by the applicant.

Section 17(5)(a) – disclosure desirable for subjecting the Public Body's activities to public scrutiny

[para 76] In Order 97-002, the Commissioner stated that in order to fulfill what is now section 17(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.

[para 77] The Applicant is concerned about the fairness of the Public Body's investigation process as it was applied in her case. Her concern arises in part because the Public Body has now characterized the investigation portion of the process, in which the Applicant participated, as in contemplation of litigation against the Applicant. However, I have found that at the time the investigation was undertaken, the Public Body was applying its Sexual Harassment Policy and process. Neither the documents themselves nor evidence provided by the Applicant has persuaded me that the Public Body's process was in fact such as to call its activities into question. Accordingly, section 17(5)(a) does not apply and therefore does not weigh in favour of release of the personal information in the records.

Section 17(5)(b) – disclosure would promote public health and safety

[para 78] The Applicant also relies on section 17(5)(b), on the basis that improper handling of harassment complaints can put the safety of the public at risk. She points to an incident in which she felt threatened by the alleged harasser, and another incident in which another person felt unsafe in a harassment situation on campus. In my view there is an insufficient connection between the safety issues raised and the records at issue to warrant treating section 17(5)(b) as favouring disclosure of the personal information.

Section 17(5)(f) - information supplied in confidence

[para 79] With regard to section 17(5)(f), the Applicant argues that this factor should not prevent disclosure of third party personal information in the witness statements, because she disagrees that the personal information was 'supplied in confidence'.

[para 80] The Public Body argues that sexual harassment proceedings involve an expectation that the fewest number of people possible would see any statements or comments made, in order to provide dignity and respect to all concerned, to prevent ongoing harassment and to avoid jeopardizing the personal safety of third parties. It notes that a third party's privacy is often a condition of receiving a statement. However, the Public Body does not assert in its argument that any such conditions were imposed by witnesses in this case. Though 'confidentiality agreements' are discussed in the evidence and arguments, the materials before me contain denials by both the Public Body and the investigator that there were such agreements.

[para 81] There is evidence before me that the investigator advised people he interviewed that 'the discussion is a confidential matter'. This statement was ambiguous - it could have meant either that they were to treat what was told to them as confidential, or that the investigator would treat what they said in this way. His intention as to the degree of confidentiality of the statements can be garnered from the fact that he did disclose the substance of the witness information to the Applicant orally. Therefore I cannot find that there was any explicit guarantee of confidentiality as against the Applicant.

[para 82] With respect to implied confidentiality based on the circumstances, people who provide information for a purpose that may require disclosure should not assume their statements will be kept confidential. It would be inappropriate to keep such information strictly confidential as against the complainant and respondent in a sexual harassment investigation. Therefore, confidentiality should not be expected or implied from the circumstances.

[para 83] Taking all these factors into account I conclude that section 17(5)(f) has no bearing on disclosure of personal information in this case.

Section 17(5)(g) - information likely to be inaccurate or unreliable

A number of earlier orders held that if what is now section 17(5)(g) applies, it weighs in favour of not disclosing personal information. (See, for example, Orders 97-018, 99-017).

[para 84] The Applicant relies on this provision to argue that information provided by witnesses should be disclosed to her, presumably on the basis that if it is disclosed to her, she can challenge its accuracy. She challenges the credibility of some of the witnesses on the basis of their association with the respondent to the complaint. However, in my view, she has not demonstrated that the evidence of persons interviewed in the investigation process is likely to be inaccurate or unreliable.

[para 85] As section 17(5)(g) does not apply, it does not weigh in favour of either disclosing or withholding personal information.

Section 17(5)(i) – personal information was originally supplied by the Applicant

[para 86] This factor is relevant to Appendix 2 of the Report (the Applicant's original complaint to the Public Body).

[para 87] It is also relevant to: the parts of the Report in which the investigator describes how he put the Applicant's allegations to witnesses; a chart prepared by the investigator containing the list of the Applicant's allegations (Sexual Harassment Adviser's file pages 25-28); and the parts of the investigator's memo to file in which he describes the steps he took to follow up on the Applicant's requests for further investigation (Legal Counsel's file pages 53-55).

[para 88] The investigator's descriptions contain the personal information of third parties - they are information about which witnesses he interviewed, and about the activities of these third parties as alleged by the Applicant or the Applicant's opinions about the third parties. However, this personal information was originally provided by the Applicant – it does not reveal any additional personal information about these third parties beyond what she supplied herself.

[para 89] Section 17(5)(i) weighs in favour of disclosure of the third party personal information contained in these particular portions of the Report and Appendix, and in the other documents referred to in para 87.

[para 90] The same conclusion applies to the personal information provided by the Applicant in her complaint to the Alberta Human Rights and Citizenship Commission (Sexual Harassment Adviser's file pages 45-54). Section 17(5)(i) weighs in favour of disclosure of the personal information contained in the complaint document, as the Applicant supplied the third parties' personal information contained therein.

Conclusions under section 17

[para 91] Weighing all the factors discussed above, I conclude that although they contain third party personal information to which a presumption under section 17(4) applies, disclosure of the following records:

- the parts of the Report in which the investigator describes how he put the Applicant's allegations to witnesses
- the parts of the investigator's chart in which he sets out the Applicant's allegations (Sexual Harassment Adviser's file pages 25-28), and
- the parts of the investigator's memo to file in which he describes the steps he took to follow up on the Applicant's requests for further investigation (Legal Counsel's file pages 54, 55),

would not be an unreasonable invasion of the personal privacy of any third party. The third party personal information they contain is information originally supplied by the Applicant, as under section (17(5)(i).

[para 92] With regard to the copy of the Applicant's complaint to the Alberta Human Rights and Citizenship Commission (pages 45-54 of the Sexual Harassment Adviser's file), I find that although the presumptions under sections 17(4)(b) and 17(4)(g) apply to the third party personal information, disclosure of this document would not be an unreasonable invasion of the personal privacy of any third party, because the personal information it contains is information originally supplied by the Applicant, as under section 17(5)(i).

[para 93] With regard to the Appendix 2 of the Report, I find that although the presumption under section 17(4)(g) applies to the third party personal information it contains, disclosure of this document would not be an unreasonable invasion of the personal privacy of any third party, because the personal information is information originally supplied by the Applicant, as under section 17(5)(i).

[para 94] With regard to the following records:

- witness statements in the Report (severed by me, as marked)
- Legal Counsel's file: pages 48, 49; the parts severed by me, as marked, of the investigator's follow-up memo to file (pages 54, 55); pages 56, 57, 62, 63, 64
- Sexual Harassment Adviser's file: pages 6, 33, 40, 41, 42, 43
- Faculty file: pages 9, 14, 19 to 21

in my view there is no factor that outweighs the presumption arising under section 17(4)(g) (and in the case of Legal Counsel's file page 64 and Faculty file page 21, under section 17(4)(b)) that disclosure would be an unreasonable invasion of the privacy of the persons about whom these records contain personal information.

[para 95] With regard to the severed or withheld parts of the Campus Security Report (Legal Counsel's file pages 17-19, 22-24; Sexual Harassment Adviser's file pages 7-12), I find there are no factors that outweigh the presumptions arising under section 17(4)(g) and section 17(4)(b) that disclosure would be an unreasonable invasion of the privacy of the persons about whom these severed or withheld portions contain personal information.

[para 96] With regard to the third party personal information in the following records, I find the fact they contain only business contact information, or record or otherwise reveal activities of staff of the Public Body in the course of performing their duties, is a relevant circumstance under section 17(5). This circumstance outweighs the presumption in section 17(4)(g) that disclosure of this information would be an unreasonable invasion of the privacy of third parties:

- the second page of Appendix 1 of the Report
- Legal Counsel file: pages 7, severed part of page 8, pages 9, 10, 11, 16, 41, 44, 45, 53

- Sexual Harassment Adviser's file: severed parts of pages 15 and 17, pages 16, 18, 31, 32
- Faculty file: page 15.

Issue D: Does section 16 of the Act (business interests) apply to the records/information?

[para 97] In its response to the Applicant, the Public Body relied on section 16(1) for refusing to disclose the following: correspondence from its legal counsel to the investigator (Legal Counsel's file page 41); severed or withheld parts of correspondence from the Sexual Harassment Adviser to the Respondent's Faculty Association representative (Sexual Harassment Adviser's file pages 15 to 18); notes made by the investigator (Sexual Harassment Adviser's file pages 25 to 28); correspondence from its legal counsel to the investigator (Sexual Harassment Adviser's file pages 31 and 32).

[para 98] The relevant parts of section 16(1) of the Act provide:

16(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

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

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

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[para 99] Section 16(1) is a mandatory ("must") section of the Act. If the provision applies, a Public Body must refuse to disclose the information. For the section to apply, all three parts of section 16(1) must be met.

[para 100] The Public Body's rebuttal submission says that under section 16(1) it may withhold information relating to the terms of engagement of the investigator, his commercial terms, and his proprietary approach as to how he conducts harassment investigations for employers.

[para 101] The Applicant says that section 16(1) does not apply because there is no evidence to establish that disclosure would result in significant harm.

[para 102] In my view, there is only one item of information that can be withheld under section 16. This is the part of the letter engaging the investigator (Legal Counsel's file page 41 and Sexual Harassment Adviser's file page 32) which sets out the investigator's hourly rate. This information is financial information of a third party, supplied in confidence, that can reasonably be expected to harm the competitive or negotiating position of the third party.

[para 103] None of the remaining records for which section 16(1) was claimed, nor the Report, engage the section on the basis that they would harm the business interests of the investigator, for the following reasons.

[para 104] First, none of them constitutes 'trade secrets', or 'commercial, financial, labour relations, scientific or technical information' of the investigator. With respect to the manner in which the investigator conducted his investigation, nothing is revealed of his techniques beyond the fact that he asked questions of all the persons involved and noted their answers. None of the terms in the provision apply to a commonly-understood investigative technique.

[para 105] Second, apart from the financial information mentioned above, there is no evidence, nor do I see how, any of the outcomes described in section 16(1)(c) would follow from disclosure of the investigator's 'business information' contained in the documents relative to which the Public Body relied on section 16(1).

[para 106] In its rebuttal submission at page 2, the Public Body also seems to rely on a potentially negative impact for future investigations of refusal to disclose the third party witness statements. I do not need to decide this question as I have already decided these records must be withheld under section 17.

Issue E: Did the Public Body properly apply section 20(1)(c) of the Act (disclosure harmful to law enforcement) to the records/information?

[para 107] The relevant parts of section 20(1) read:

20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

> *(a) harm a law enforcement matter, …*
>
> *(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement, … .*

[para 108] Sections 20(1)(a) and 20(1)(c) are discretionary exemptions under the Act. This means that to rely on them in this inquiry, the Public Body must actually have considered their application and exercised its discretion whether to rely on them in refusing the Applicant's access request. They cannot be raised by the Public Body for the first time in its rebuttal submissions in the inquiry. Therefore I will not consider the Public Body's submission under section 20(1)(a), as it raised this section for the first time in its rebuttal. Similarly, at page 4 of its rebuttal submission the Public Body refers very generally to the information or records "at issue". This broad reference might be taken to suggest it is relying on section 20(1)(c) with reference to all the records relating to the investigation, which it did not do when it denied access to the Applicant in the first instance, nor in its initial submission. To the extent this is so, I will not consider its argument at this stage.

[para 109] The Public Body's initial reliance on section 20(1)(c) was with respect to: the severed or withheld portions of copies of the Campus Security Report (Legal Counsel's file pages 16-19 and 22-24, Sexual Harassment Adviser's file pages 7-12); the investigator's memo to file regarding follow up to the initial investigation (Legal Counsel's file pages 53-55); correspondence between the investigator and a witness (Legal Counsel's file pages 56, 57, 62, 63); notes made by the investigator relating to the sexual harassment allegations (Sexual Harassment Adviser's file pages 25-28); and a copy of the Applicant's complaint to the Alberta Human Rights and Citizenship Commission (Sexual Harassment Adviser's file pages 45-54).

I do not need to deal here with the Campus Security Report, nor with the correspondence between the investigator and a witness (Legal Counsel's file pages 56, 57, 62, 63), as I have already decided these records may be properly withheld under section 17.

[para 110] Section 20(1)(c) requires that I be satisfied that disclosure could reasonably be expected to harm the effectiveness of investigative techniques used in law enforcement.

[para 111] Section 20(1)(c) covers only records used in law enforcement. For reasons given earlier at para 68, I do not agree that the Public Body's sexual harassment investigation was 'law enforcement'. However, I accept that the copy of the Applicant's 'human rights' complaint was part of a law enforcement record (of the Human Rights and Citizenship Commission).

[para 112] With respect to the 'harm' aspect of section 20(1)(c), the records that remain at issue under this provision (Legal Counsel's file pages 53-55; Sexual Harassment Adviser's file pages 25-28 and 45-54) reveal only that people were asked about, or supplied information about, their knowledge of related events, and this information was recorded. Order 99-010 held that the harms test contained in this exception does not permit the refusal of basic information about well-known investigative techniques. According to this Order, the focus in this exception is on the refusal of information on investigative techniques and procedures that relates directly to their continued effectiveness. I do not accept that disclosure of the documents relating to the harassment investigation, or the 'human rights' complaint, meet the conditions in

20(1)(c) of being likely to cause harm to investigative techniques. The investigative techniques that were employed are commonly known. Their revelation does no harm to the effectiveness of the techniques, and the protection of the section is not triggered.

V. ORDER

[para 113] I make this Order under section 72 of the Act.

[para 114] I find that the Public Body properly applied section 27(1)(a) of the Act to:

- Legal Counsel's file pages 12, 13, 37, 40, 68
- Sexual Harassment Adviser's file pages 13, 14
- Faculty file page 24.

[para 115] I find that the following records must be withheld from disclosure under section 27(2):

- Legal Counsel's file: 33, 42, 43, 68
- Sexual Harassment Adviser's file page 34.

[para 116] I find that the following records must be withheld from disclosure under section 17 of the Act:

- Legal Counsel's file: the parts severed by the Public Body, as marked, or pages withheld by the Public Body, of the Campus Security Report (pages 17, 18, 19, 22, 23, 24); pages 48 and 49; the parts of pages 54, 55 severed by me, as marked; pages 56, 57, 62 63, 64; the parts of the Report (pages 69-90) severed by me, as marked
- Sexual Harassment Adviser's file: page 6; the parts severed by the Public Body, as marked, or pages withheld by the Public Body, of the Campus Security Report (pages 7 to 12); pages 33, 40, 41, 42, 43
- Faculty file: pages 9, 14, 19 to 21.

[para 117] I find that the following information must be withheld from disclosure under section 16 of the Act:

- Legal Counsel's file: the part of page 41 severed by me, as marked
- Sexual Harassment Adviser's file: the part of page 32 severed by me, as marked

[para 118] I order the following records to be disclosed:

- Legal Counsel's file: page 7; the part of page 8 severed by the Public Body; pages 9, 10, 11, 16; the part of page 41 not severed by me; pages 44, 45, 53; the parts of pages 54 and 55 not severed by me; the parts of the Report (pages 69-90) not severed by me; the Appendices to the Report (pages 91-95)
- Sexual Harassment Adviser's file: the parts of pages 15 and 17 severed by the Public Body; pages 16, 18, 25 to 28, 31; the part of page 32 not severed by me; pages 45 to 54
- Faculty file: page 15.

Along with this Order I am providing the Public Body with a copy of records which I have severed. I have highlighted the severed information. These records, severed as marked, are to be disclosed to the Applicant.

[para 119] I further order the Public Body to notify me in writing, within 50 days of being given a copy of the Order, that the Public Body has complied with this Order.

Dave Bell
Adjudicator