ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2003-009

June 28, 2005

UNIVERSITY OF ALBERTA

Review Numbers 2378 and 2553

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

Summary: The Applicant, a professor with the University of Alberta (the "Public Body"), made two information requests under the *Freedom of Information and Protection of Privacy Act* (the "Act"). In response, the Public Body released certain records and withheld others. The Applicant disagreed with the Public Body's decision to withhold some information and this resulted in two reviews, which were combined for this inquiry.

The Adjudicator found that the Public Body had initially conducted an inadequate search, but subsequently remedied its error and in sum met its duty to assist the Applicant. He found that the two internal complaints processes of the Public Body before him were not quasi-judicial processes and the records involved in them were not excluded from the Act.

The Adjudicator found that the internal complaints processes fell within labour relations as contemplated by section 16 of the Act. Some of the withheld records fell within the exception from disclosure under section 16(1)(c)(iv), including personal information about the Applicant that third parties brought into the complaints processes. Other records were properly withheld because of legal privilege under section 27.

Many of the withheld records were not responsive to the Applicant's requests. The Public Body was encouraged to provide a better explanation of why records were not

responsive. The Adjudicator declined the Applicant's request that he order the Public Body to destroy certain records, based on a lack of jurisdiction.

Statutes Cited: *of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(r), 4(1)(b), 6(1) and (2), 10(1), 16(1)(c)(iv), 27(1)(a) and (b)(iii), 53(1)(a) and (j), 72(3)(f).

Orders Cited: AB: Order 99-025, 99-030, 2000-003, 2000-019, 2000-023, F2002-004, and 2001-IR-008.

I. BACKGROUND

[para 1] On January 22, 2002, the Applicant applied to the University of Alberta (the "Public Body") for access to the following information under the *Freedom of Information and Protection of Privacy Act* (the *"*Act*"*):

> *"... any and all information pertaining to me, and about me with respect to any actions taken by me or initiated by me. These would be in addition to those documents already made available to me per our correspondence since May 23/01,and should include the university's responses to any other issues involving me."*

[para 2] The Public Body granted the Applicant partial access to the information sought. The Public Body identified a portion of the records as "non-responsive" to the Applicant's access request and others as being withheld under various sections of the Act.

[para 3] The Applicant asked the Commissioner to review the Public Body's response. Request for Review #2378 was opened and the Commissioner authorized mediation.

[para 4] On August 23, 2002, the Applicant made another request to the Public Body for:

> *"any information about and pertaining to me that is contained anywhere in the Perinatal Research Centre, in the Faculty of Medicine..."*

[para 5] The Public Body disclosed over 600 records in response to the Applicant's access requests. The Applicant asked for a review of the Public Body's decision not to disclose the remaining records. She also questioned whether the Public Body had fulfilled its duty to assist her under section 10 of the Act. Request for Review #2553 was opened and the Commissioner authorized mediation. Mediation was not successful and the two related requests were combined for this inquiry.

[para 6] As the parties went through the pre-inquiry process of this office, the Applicant made further requests; for access, for correction of records, and she complained of breaches of her privacy. Both parties in correspondence with this office

restated issues for the inquiry, asked that new issues be added, or that issues be eliminated. This inquiry addresses the 11 issues set out in the Notice of Inquiry, for the two access requests made by the Applicant.

[para 7] Four Affected Parties (the "Third Parties") participated. The Association of Academic Staff: UA (the "AAS") made a submission with evidence but not a rebuttal. The Public Body formally represented the interests of three individual Affected Parties in its submission and rebuttal. The parties provided me with considerable evidence. The individual Affected Parties gave sworn evidence in the Public Body's submission. The Public Body's Access and Privacy Adviser gave sworn evidence in the Public Body's submission and rebuttal. The Applicant filed a submission and a rebuttal that included sworn evidence.

[para 8] Both the Public Body and the Applicant complained about the parallel submission process: each wanted the other to first give their evidence and argument on those points where they bear the onus of proof before the other had to respond. I am satisfied that the process provided adequate opportunity for the parties to make their cases before me. I am also satisfied that the issues as framed did not restrict the parties from putting forward their legal positions.

[para 9] The Applicant emphasized in this inquiry that she wants access to her personal information. I acknowledge that parameter of her request, and the right to that information given to applicants by section 6 of the Act, albeit subject to subsequent qualifications in the statute [section 6(2)].

[para 10] Most of the information that the Public Body would not disclose arises from the record of two complaints brought by the Applicant against the individual Affected Parties through two different structured complaints processes within the Public Body.

II. RECORDS AT ISSUE

[para 11] The records at issue (the "records") consist of 131 pages from five groups. Those groups are the Research and Scholarship Integrity Policy Complaint file, the records of the Faculty Agreement Complaint file, the Legal Correspondence file (from the Applicant's Personnel file), the Faculty of Nursing file, and the Perinatal Research file. All of the records were submitted *in camera*.

III. ISSUES

[para 12] The issues in this inquiry are:

1. Are the records excluded by section 4(1)(b) of the Act?

2. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

3. Did the Public Body conduct an adequate search for responsive records?

4. Are the records responsive to the Applicant's access request?

5. Does section 16(1)(c)(iv) of the Act (labour relations information) apply to the information/records?

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

7. Does section 20(1)(c) of the Act (law enforcement) apply to the information/records?

8. Did the Public Body properly apply section 24 of the Act (advice) to the information/records?

9. Does section 25(1) of the Act (economic interest of a public body) apply to the information/records?

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

11. Does the Commissioner have jurisdiction to review whether the Public Body should destroy records?

IV. DISCUSSION OF THE ISSUES

Issue 1: Are the records excluded by section 4(1)(b) of the Act?

[para 13] Section 4(1)(b) reads:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *...*
>
> *(b) a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity including any authority designated by the Lieutenant Governor in Council to which the Administrative Procedures Act applies;*

[para 14] The Public Body argued that many of the withheld records were outside my jurisdiction because they fell within section 4(1)(b).

[para 15] There are previous Orders of the Commissioner that give guidance on determining what it means to be acting in a quasi-judicial capacity (Orders 99-025, 2000-003). The Public Body gave evidence of the mandates and procedures for the two complaints processes used by the Applicant to raise issues about the Third Parties.

[para 16] One complaint process is under section 96 of the General Faculties Council Research and Scholarship Integrity Policy ("General Faculties Complaint"). The other is the discipline procedure under Section 16 of the Faculty Agreement ("Faculty Agreement Complaint"). The Public Body said that the persons who heard the complaints were acting in a quasi-judicial capacity, in all of their activities from the start of the complaint, based on how those processes were conducted and the nature of their mandated outcomes. The Public Body claimed that all of the records associated with those complaints are excluded from the application of the Act.

[para 17] Referring to the factors discussed by the Commissioner in Order 99-025, I find that both complaint processes directly affect the rights of persons – the potential consequences to the staff member if a complaint is found to be valid can be as severe as loss of employment. Both processes apply rules – General Faculties Council policy and Faculty Agreement contract requirements – to individual cases. The task is case by case assessment of complaints, not implementing social and economic policy in a broad sense. There is recognition that some of the decision makers in the process may have a conflict of interest and there is a procedure for considering that. There is some opportunity for the participants to make representations to the decision makers, directly or through an investigator. The person complained about is entitled to a copy of the written complaint.

[para 18] The Applicant argues to me, based on her interpretation of the complaint processes mandate documents, that they provide a robust opportunity for the parties to bring evidence and know and test the evidence brought by others. In her view, the Public Body denied her that opportunity – her access request includes documents in the processes that the Public Body withheld from her. She wants to know what the other parties said about her. She also says there is no evidence that supports a finding that the decision-makers in the complaint processes operate in a quasi-judicial capacity. The Applicant says the fact that the Public Body discloses information to people outside the processes supports that the action is not quasi-judicial.

[para 19] The Public Body and the AAS argue to me that the two complaint processes rely heavily for their effectiveness, for all concerned, on the decision-makers and the parties' representative (the AAS), <u>not</u> sharing certain evidence among the parties, in their discretion. The Public Body and the AAS say that is the given mandate, from their interpretation of the complaint processes mandate documents, and based on long practice. In both processes, an adjudicator is designated and either appoints an investigator or does the investigation him/herself. The Public Body argues that the whole process, from start to finish, is a quasi-judicial activity.

[para 20] The descriptions of the two complaint processes, and the facts of how they were implemented in this case, allow the parties only limited access to the evidence. In

the General Faculties Complaint process, the complaint goes to a Complaint Guidance Committee and the accused. It must contain enough information for that Committee to decide "if the alleged conduct plausibly constitutes an offence under this policy…." If that first step is passed, the adjudicator must investigate or appoint an investigator. The investigator must invite the parties to suggest sources of evidence, and must invite them to "review the evidence" with him/her. The investigation report must summarize the "sources of evidence consulted." The parties are entitled to receive the report and submit rebuttals. It is for the investigator to "[E]xamine all sources of evidence that he/she deems relevant to the complaint." Anonymous complaints will be considered in certain circumstances.

[para 21] The Faculty Agreement Complaint process requires the complainant to include "a description of the act or omission complained about." The complaint gets sent to AAS on behalf of the accused staff member. The first decision to proceed is made by the decision-makers based on the written complaint only. In the second step the parties meet with the investigator, but no written material other than the complaint is allowed. If the complaint proceeds beyond that, the investigator has untrammeled authority to gather and review evidence. There is no explicit requirement that he/she share that information with the parties. The parties receive the investigation report, may respond to it, and may respond to each other's responses. There is no requirement that the investigator, the investigation report, or the adjudicator share the evidence with the parties. Evidence may be gathered by the adjudicator subsequent to the parties' written responses, through meeting with them, or with other people.

[para 22] These are complaint processes about university staff, often but not only, between themselves, in the context of employment obligations between employee and employer. They are a crucial part of the labour relations regime of a major academic institution. Staff mindset includes commitment to principles of academic freedom, including "the right to criticize without deference to prescribed doctrines." Questions arise around research ethics, integrity, intellectual property, producing research for publication, and funding in a competitive environment. Strongly held views about these issues are the norm. In this context, the evidence component of the processes is not "robust" in a quasi-judicial sense.

[para 23] This is not a criticism by me of the treatment of the evidence in these processes. It is the basis of my finding that the secrecy about the evidence, in the context, detracts significantly from the hallmarks of a quasi-judicial activity. That is not saved by the one written reference in the mandate documents to "due process" or the need to meet what the requirements of natural justice may be in a case.

[para 24] There are other detractions. The adjudicator comes from senior management within the Public Body, and is appointed on an *ad hoc* basis. The mechanism in place for conflict of interest review can reduce but does not overcome the inherent conflict of interest of the adjudicator. The AAS, the parties' representative, has a structurally inherent conflict of interest, described in some detail in its submission. The representative has a delicate discretion to exercise in deciding what information to share

and how to advance the members' cases when he has in his constituency literally all of the participants.

[para 25] The adjudicator does not have to hear, and in this case did not hear, evidence and argument directly from the parties. He sought the report of an investigator. Although a hearing can take many forms, both these processes provide for limited features of a hearing. The adversarial process is restrained. The AAS submission makes clear that in defending members' interests, not all evidence should be shared and positions are only put forward that take into account the representative's past and future role with other parties. Both complaint procedures provide that with a founded complaint, the party accused may proceed to arbitration or other similar step. At that point quasi-judicial activity becomes more likely. Applying the principles set out in Orders 99-025 and 2000-003, I find that the decision-makers in the two complaint processes that relate to the records at issue are not acting in a quasi-judicial capacity.

Issues 2 and 3

> 2. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?
>
> 3. Did the Public Body conduct an adequate search for responsive records?

[para 26] These issues both flow together from the requirements of section 10(1) of the Act. I will deal with them together in this Order to prevent repetition.

[para 27] The Public Body complied with the January 22, 2002, access request in a timely fashion. Many documents were disclosed to the Applicant by February 21, 2002. The Applicant was not satisfied with the results and sought the assistance of this office, which was involved from March 2002, onwards. In late June 2002, the Public Body found a package of documents that related to the Applicant's January 22, 2002, request in the desk of a Dean who had been away at the time of the search. The Public Body promptly admitted the error, apologized to the Applicant, processed the documents, and released records to the Applicant.

[para 28] The Public Body apparently had some difficulty understanding the potential scope of the original request. It sought and received helpful information from the Applicant as to where responsive records might be found. She did not point to the desk of that Dean as a potential source of relevant information. In a letter to the Public Body, the Applicant implied that she should have thought of that person's desk as a source of responsive records. The Applicant's second access request was reasonable to make, based on the results of the search, and not indicative of an inadequate search by the Public Body.

[para 29] I find that the initial search was, on the face of it, inadequate. This is evident from the fact that a subsequent search of the Dean's desk resulted in the discovery of further responsive records. Those records, however, were copies of records already discovered during the substantive search by the Public Body.

[para 30] If records are going to be stored in people's desks they should not expect privacy in the event of a search under the Act. Therefore, the absence of an employee should not be used as justification for an incomplete search for responsive records. Applicants are not legally burdened to assist public bodies by suggesting where to search, but it makes sense that they do when they can. In the matter before me, once the error was discovered, the Public Body responded in a timely, forthright way.

[para 31] Taken on the whole, I am satisfied that a proper search was eventually done. Therefore I will not order a further search. Apart from this incident, I see no substantive evidence that the Public Body failed in its duty under section 10 from January 22, 2002, onwards. I find the Public Body met its duty to assist.

Issue 4: Are the records responsive to the Applicant's access request?

[para 32] The Applicant does not agree with the conclusion of the Public Body that certain records are non-responsive to her access requests and argues that the records might reasonably be expected to relate to her requests. The Applicant references Order F2002-004 where the Commissioner stated that although he agreed with the public body's characterization of the records as being non-responsive he cautioned the public body that it came close to taking a narrow view of responsiveness. The Commissioner further advised the public body that it could have stated reasons why the records were not responsive and thereby possibly prevent section 10(1) of the Act becoming an issue.

[para 33] The Public Body provided affidavit evidence that it gave the Applicant detailed lists of the responsive and non-responsive records. I have reviewed the Public Body's letters to the Applicant and the lists. It would possibly have helped if the Public Body had repeatedly told the Applicant the reason why the documents were non-responsive (they did not contain her personal information) instead of combining the label "non-responsive" with sections of the Act that are exceptions to disclosure. However, the reason for classification as "non-responsive" was present in the correspondence.

[para 34] I have done a detailed review of the *in camera* records classified by the Public Body as non-responsive. I find that the following records do not contain personal information about the Applicant. They are therefore not responsive to her requests:

> 2-1, 2-2, 3, 4-2 to 4-4, 7-2, 7-3, 8-1, 20, 21, 24-1, 24-3, 25-1, 30-1, 32, 36, 37, 48, 49, 51, 53-1, 53-2, 56, 57, 65, 72, 92, 94, 97.

[para 35] All of the records classified as non-responsive by the Public Body were correctly classified as non–responsive. The Public Body is not required to supply those records to the Applicant.

Issue 5: Does section 16(1)(c)(iv) of the Act (labour relations information) apply to the information/records?

[para 36] The Public Body argued that specific records fell within the meaning of section 16(1) of the Act. The section is mandatory – the Public Body must <u>not</u> disclose information if the conditions are met. The section contains a three part test. The Public Body says the requirements of the three subsections are all met. The records would reveal labour relations information of a third party, they were supplied in confidence, and their disclosure would reveal information supplied to a person appointed to inquire into or resolve a labour relations dispute. Section 16 states:

> *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 37] The Act defines third parties broadly [section 1(r)]. In this case the AAS and the three individual Affected Parties are third parties. The Public Body refers me to the Commissioner's description of "labour relations" in Order 2000-003. I find that the complaint processes were labour relations dispute resolution processes. The adjudicator and investigator were persons appointed to inquire into and resolve the dispute. The dispute was between employees, involving their compliance with requirements of the employer. From my review of the documents submitted *in camera* it is evident to me that disclosure of them would reveal labour relations information of the third parties that was supplied in confidence. Therefore, the requirements of section 16(1)(a)(ii) and section 16(1)(c)(iv) are met.

[para 38] The Public Body provided extensive and persuasive evidence that the information was supplied in confidence. The complaint mandate documents speak strongly and repeatedly to confidentiality. The letters and reports that the process produced are marked confidential and some contain confidentiality reminders in the text. The Third Parties gave evidence that they believed they were supplying information in confidence. The AAS and the Public Body argued long practice in treating such information as confidential as evidence.

[para 39] Against that evidence, the Applicant alleges that the Public Body shared some of the information from the complaint processes with others who were not parties to it nor authorized to receive information from it. Therefore, the Applicant asked how the Public Body can now claim that records in the complaint processes are confidential.

[para 40] The Public Body allowed the investigator of the Faculty Agreement Complaint to have access to information from a complaint that was made against the Applicant in 1996. The Public Body included materials from that complaint in the Affidavit of Third Party C in its submission. Third Party C deposes at some length about the circumstances of the 1996 complaint, while claiming that the Applicant ought not to have access to records from the current complaints processes because "…disclosing them would serve no purpose other than to prolong old feuds…." Third Party C attaches as exhibits documents from that 1996 complaint. One of them contains the names of people interviewed. The Applicant points out that the Public Body did not sever those names.

[para 41] The Applicant argued:

- Through the steps in the process she should have had the information revealed to her if the Public Body had complied with its own process requirements.

- The confidentiality offered to the parties in the process was not offered to them as between themselves. Since she was a party she should have had access. This includes her view that the AAS must not keep information it obtains from parties, where it represents more than one of them, confidential as between them.

- She must see the information, to achieve the protection of her privacy and reputation that the processes claim to offer.

- The Third Parties revealed significant personal information about themselves in their affidavits in this proceeding. That reveals their expectation of what would breach their privacy. Releasing their information from the complaints would not.

[para 42] The information supplied by the Third Parties in their affidavits does not amount to their consent to release information previously supplied in confidence. To the contrary, it was provided to support their claim that they would suffer harm if their confidences were breached. Section 16 of the Act requires third party consent for release.

[para 43] The General Faculties Complaint process allows information of a founded complaint to be sent to funding or oversight agencies. The Faculties Association Complaint process allows the decision-maker to share information with persons who have a need to know, in some cases only after consultation with the AAS.

[para 44] It is not within my jurisdiction to decide whether or not the Public Body's confidentiality requirements in its labour relations processes are sound or were breached. I consider the points only to determine whether any information sharing, authorized by the complaints processes or alleged breaches of them, would change my finding that the Third Parties supplied information in confidence. It does not.

[para 45] However, it does not escape me that the Public Body has used confidential information from a complaint brought by Party C against the Applicant in 1996 to try to convince me that Third Parties A, B, and C should have their privacy protected by the Act in regard to the complaints brought against them by the Applicant. It does this in the face of Investigation Report 2001-IR 008, where it was found that the Public Body was responsible for the wrongful use and disclosure of one of the records from the 1996 complaint: Party B obtained the record and used it in her defense against the Applicant's complaint. The Public Body's respect for the confidentiality in its process seems to be selectively applied.

[para 46] I find in this Order that section 16 of the Act does protect the Third Parties in this case. Any breach by the Public Body of its own requirements around confidentiality in its labour relations complaints processes does not give it any right to commit breaches of the Act as a remedy for someone else.

[para 47] Some of the documents contain third party labour relations information, supplied in confidence to the investigators and adjudicators in their efforts to resolve the complaints, and the Third Parties have not consented to the release. The Public Body must not disclose them. That includes records with information that is the personal information of the Applicant where it meets those criteria. This decision is consistent with the Commissioner's Orders 99-030 and 2000-003.

[para 48] I find that section 16(1)(a)(b) and (c)(iv) apply to the following documents:

> 4-1, 4-1a, 4-5, 4-6, 6, 7-4, 8-2 to 8-4, 9, 10, 16-1, 16-2, 22, 25-2, 25-3, 25-4 to 25-11, 26, 29, 33-1 to 33-5, 35, 38, 43, 44, 54, 58-1 to 58-13, 58-22 to 58-25, 58-29, 58-30, 59, 60, 64, 68-a, 70, 078.1 to 078.4, 081, 81-1 to 81-3, 82-1 to 82-3, 88-1, 88-2, 098.1 to 098.4, 108.

[para 49] The Public Body and the Affected Parties brought evidence and made arguments to show that other subsections of section 16(1)(c) applied. As I have found that section 16(1)(c)(iv) applies to the records, I do not find it necessary to decide on the applicability of the other subsections.

Issue 10: Did the Public Body properly apply section 27 of the Act (privileged information) to the information/records?

[para 50] Given the nature of the records remaining after my findings regarding section 16, and the records I have determined are non-responsive, I will deal with the application of section 27 next.

[para 51] Section 27(1) of the Act states:

> *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,*
>
> *(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, or*
>
> *(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 52] All the documents for which the Public Body claims the exception meet the requirements of the section as discussed in Orders 2000-019 and 2000-023. The evidence is clear. They are to and from the Public Body's legal counsel, created in contentious circumstances where litigation was reasonably anticipated or proceedings were in progress. They seek or give legal advice, in confidence. Some are information in correspondence between the Public Body and its lawyer in relation to obtaining legal advice.

[para 53] There is nothing before me to suggest that the Public Body's exercise of its discretion was improper. The face of the records and the circumstances before me support that the exercise of discretion was proper.

[para 54] I find that section 27(1)(a) applies to documents 104.1, 105.1, 15.1 – 15.5.

[para 55] I find that section 27(1)(c)(iii) applies to documents 102.1 – 102.7, 103-1 – 103.4, 106.1 – 106.5.

Issue 6: Does section 17 of the Act (personal information) apply to the information/records?

[para 56] Given my findings above, it is not necessary for me to consider the applicability of section 17.

ISSUE 7: Did the Public Body properly apply section 20 of the Act (law enforcement) to the records/information?

[para 57] Neither party made submissions regarding section 20. Given my findings above, it is not necessary for me to reach conclusions about the applicability of section 20.

Issue 8: Did the Public Body properly apply section 24 of the Act (advice) to the information/records?

[para 58] Given my findings above, it is not necessary for me to consider the applicability of section 24.

Issue 9: Does section 25(1) of the Act (economic interest of a public body) apply to the information/records?

[para 59] Given my findings above, it is not necessary for me to consider the applicability of section 25(1).

Issue 11: Does the Commissioner have jurisdiction to review whether the Public Body should destroy records?

[para 60] The Applicant raised this as an issue. Her concern is that the Public Body continues to use records about a complaint brought against her in 1996.

[para 61] Sections 53(1)(a) and (j) of the Act state:

> *53(1) In addition to the Commissioner's powers and duties under Part 5 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may*
>
> > *(a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records*
> >
> > > *(i) set out in any other enactment of Alberta, or*
> > >
> > > *(ii) set out in a bylaw, resolution or other legal instrument by which a local public body acts or, if a local public body does not have a bylaw, resolution or other legal instrument setting out rules related to the destruction of records, as authorized by the governing body of a local public body,*
> > >
> > > *….*
> >
> > *(j) give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under this Act.*

[para 62] The Applicant interprets section 53(1)(a) of the Act as a requirement for public bodies to abide by their own policies regarding the destruction of records. The Applicant says that the Public Body failed to prepare a records retention schedule. The Applicant therefore believes that the Commissioner has jurisdiction to order the Public Body to ensure that it has written record retention and disposal policies and that it abides by them. The Applicant argued that this means that the Commissioner has the jurisdiction to review whether the Public Body should destroy records pursuant to the Public Body's policies and the Act.

[para 63] The Public Body noted that it does not have an overall destruction policy or comparable rule, but it has a guideline for preparing records retention and disposal policies within various areas, although not all areas had implemented policies in accordance with the guideline at the time of this inquiry.

[para 64] My interpretation is that the enumerated powers of the Commissioner in section 53(1) of the Act are discretionary. The Commissioner may investigate to ensure compliance with the Act or with the rules about destruction of records that apply to a particular public body. In the event that no such rules exist the Commissioner may investigate to ensure compliance with the rules of the Act, and give advice and recommendations to the head of the public body under section 53(1)(j).

[para 65] I take the Applicant's request to mean that she would like me to order the Public Body to destroy certain records in the possession of the Public Body that contain personal information about her that the Public Body continues to use.

[para 66] I am unable to do so. The only time the Act authorizes me to order destruction of records is where I come to the conclusion that personal information was improperly collected. I then have a remedy under section 72(3)(f). I do not have the jurisdiction to order the Public Body to destroy records in the circumstances in front of me.

V. ORDER

[para 67] I make this Order under section 72 of the Act.

[para 68] I find that the records in issue are not excluded from the application of the Act under section 4(1)(b).

[para 69] I find that the Public Body correctly withheld the following records as non-responsive to the Applicant's requests and I confirm the Public Body's decision to withhold them:

> 2-1, 2-2, 3, 4-2 to 4-4, 7-2, 7-3, 8-1, 20, 21, 24-1, 24-3, 25-1, 30-1, 32, 36, 37, 48, 49, 51, 53-1, 53-2, 56, 57, 65, 72, 92, 94, 97.

[para 70] I find that the Public Body met its duty to the Applicant under section 10(1) of the Act.

[para 71] I find that section 16(1)(a),(b) and (c)(iv) of the Act (labour relations information) applies to the following records and I order the Public Body to withhold them:

> 4-1, 4-1a, 4-5, 4-6, 6, 7-4, 8-2 to 8-4, 9, 10, 16-1, 16-2, 22, 25-2, 25-3, 25-4 to 25-11, 26, 29, 33-1 to 33-5, 35, 38, 43, 44, 54, 58-1 to 58-13, 58-22 to 58-25, 58-29, 58-30, 59, 60, 64, 68-a, 70, 078.1 to 078.4, 081, 81-1 to 81-3, 82-1 to 82-3, 88-1, 88-2, 098.1 to 098.4, 108.

[para 72] I find that section 27(1)(a) of the Act (privileged information) applies to the following records and I confirm the Public Body's decision to withhold them:

> 104.1, 105.1, 15.1 – 15.5

[para 73] I find that section 27(1)(c)(iii) of the Act (information in correspondence with legal counsel) applies to the following records and I confirm the Public Body's decision to withhold them:

> 102.1 – 102.7, 103-1 – 103.4, 106.1 – 106.5

[para 74] I do not have the jurisdiction to order the Public Body to destroy the records the Applicant wants destroyed.

Dave Bell
Adjudicator