

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2003-021

May 11, 2005

UNIVERSITY OF CALGARY

Review Numbers 2692

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

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the University of Calgary (the “Public Body”), for a copy of a report written by a committee set up by one of the Dean’s to look into a complaint made by the Applicant. The Public Body provided the record after severing it extensively. It told the Applicant that sections 24(1)(a) (advice from officials) and 17 (third person personal information) were its authority for not disclosing the severed information.

The Adjudicator found that the Public Body had applied sections 24(1)(a) and 17(4)(g) correctly to most of the record. Where these sections were not properly applied, the Adjudicator ordered the Public Body to disclose specific passages of the record to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 1(n), 17, 17(4)(d), 17(4)(g), 17(5), 17(5)(f), 24(1)(a), 71, 72.

Authorities Cited: AB: Order 96-006, Order 99-001.

I. BACKGROUND

[para 1] The Applicant made an access request to the University of Calgary (the “Public Body”) for a copy of a report written by a committee at the request of a Dean of one of the faculties of the Public Body. The Public Body provided the Applicant with the

four-page record, with almost all of its contents severed. The Public Body relied on sections 17(4)(d) and 24(1)(a) of the *Freedom of Information and Protection of Privacy Act* (the “Act”) as the authority for the severing.

[para 2] The Applicant was not satisfied that the severing was appropriate and requested the Office of the Information and Privacy Commissioner review the Public Body’s decision. Mediation was authorized but was not successful. The matter was set down for a written inquiry.

[para 3] Initial submissions and rebuttal submissions were received from both the Applicant and the Public Body. This office identified two parties affected by the request for review and notified them of the inquiry. Each of the Affected Parties provided an *in camera* submission and one of them provided an *in camera* rebuttal submission.

II. RECORD AT ISSUE

[para 4] The sole record at issue in this inquiry is the four-page written report of an *ad hoc* committee to the Dean. The Public Body disclosed to the Applicant the title of the record, the first and part of the second paragraph, and the signature of the committee Chair. The balance of the report was severed.

III. ISSUES

- A. Did the Public Body properly apply section 24(1)(a) of the Act (advice from officials) to the record?
- B. Does section 17 of the Act (personal information) apply to the record?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body properly apply section 24(1)(a) of the Act (advice from officials) to the record?

[para 5] Section 24(1)(a) of the Act states:

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

- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*

[para 6] The Public Body says the report contains advice from officials, developed for the Public Body. The Applicant says that the report was in response to a complaint he made and he ought to be able to see the results. The Applicant says he was shown part of

the report and that it did not contain anything about suggested university policies. The Public Body says he was not shown the report.

[para 7] Previous decisions of the Commissioner have considered the purpose and requirements of section 24(1)(a) (see for example Orders 96-006, 99-001). The Public Body must have the ability to seek advice in confidence, with full and frank discussion of that advice and recommendations. The advice must be sought or expected, or be part of the responsibility of a person by virtue of that person's position. It must be directed toward taking an action, and be made to someone who can take or implement the action. The information must relate to a suggested course of action, and the course of action must be subject to acceptance or rejection during a deliberative process.

[para 8] The Public Body argues that all of the criteria have been met. It says the committee's report was advice to the Dean, who was in a position to ask for it and take some action as a result of receiving it, and that the advice was directed toward action.

[para 9] I agree with the Applicant that the report does not contain suggested policies for the Public Body. It does, however, contain the committee's assessment and analysis of the situation and recommendations for action on the issues that were put before it. Much of the text of the report gives the Dean analysis and advice on what to do about the issues that were raised by the Applicant. However, the analysis and advice addresses those issues in the more general context in which the committee's mandate was directed. The Applicant's complaint was but one matter.

[para 10] The focus of the report – on a number of matters, not just the Applicant's complaint - follows coherently from the instructions the committee received, which are referred to in all of the following documents: the Dean's February 25, 2002 letter to the Applicant and a March 8, 2002 letter to the staff of the Department, the committee report, including the report's title which includes a reference to the Applicant's complaint "and related matters", and in the Applicant's February 20, 2002 letter of complaint to the Dean, where he combines his individual concerns with reference to broader issues.

[para 11] While the Applicant may have thought that the essence of the committee's work was to report on his complaint, I find that the committee had a different view of its mandate. The committee was to report to the Dean with advice on the general matters which made up the context into which the particulars of the Applicant's complaint fell.

[para 12] The Dean wanted his officials to consult with others in the institution about a set of issues, tell him what they found and what they recommended he do about those issues. The committee report is that communication. It reveals the advice and analysis given by the committee to the Dean. Written communication to staff subsequent to the report reveals what action was taken by the Dean, substantiating his authority to have asked for the advice and his ability to take action on it.

[para 13] Section 24(1)(a) grants the Public Body discretion. It is not compelled to withhold information, but it may choose to do so. The Applicant sees the exercise of

discretion as motivated specifically to obstruct him. I disagree with this position. On the facts as they are presented to me, I see no wrongful exercise of discretion. The Public Body considered the proper purposes of the Act and did not consider improper purposes or irrelevant factors. The Dean is charged with administrative matters in the faculty. His decisions on how to execute that responsibility, on advice, are his province and responsibility.

[para 14] The Public Body stated that in reaching a decision regarding disclosure, maintaining the confidences of those who had participated with the committee was especially important. The desire to preserve existing relationships by not releasing the committee report, while not a goal that the Applicant approved of, is a reasonable consideration for the Public Body in the circumstances. In the face of the evidence provided by the Public Body on why it exercised its discretion as it did, the evidence provided by the Applicant does not substantiate his allegation that the withholding of the report was motivated by bad faith towards him.

[para 15] I find that the Public Body properly applied section 24(1)(a) of the Act to the report with the following exceptions:

- The last seven lines of paragraph 2 of the report, consisting of an introductory sentence followed by a list of names.
- The first two sentences of paragraph 3 of the report.
- The first sentence of paragraph 6 of the report.

ISSUE B: Does section 17 of the Act (personal information) apply to the record?

[para 16] Having found that section 24(1)(a) of the Act was properly applied to most of the record at issue, I will now determine whether section 17 of the Act applies to those portions of the record for which section 24(1)(a) does not apply. The portions of section 17 that were argued by the Public Body are as follows:

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

(d) the personal information relates to employment or educational history,

...

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

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

1. Do the severed portions of the record contain personal information of third parties?

[para 17] In order for section 17 of the Act to apply to the severed portions of the record, they must contain personal information. The personal information must belong to a third party, and disclosure of the information must be an unreasonable invasion of the third party's privacy. Personal information is defined in section 1(n) of the Act.

[para 18] The last seven lines of paragraph 2 consist of an introductory sentence followed by a list of names. The introductory sentence does not contain personal information. Therefore, since the Public Body has not applied any other exceptions under the Act, I intend to order the Public Body to disclose the introductory sentence to the Applicant.

[para 19] The Applicant's name appears in the middle of the list of names. Names are the personal information of the named individual. Therefore, the Applicant's name is his own personal information. All of the other names are those of third parties. I will consider whether disclosure would constitute an unreasonable invasion of the third parties' privacy.

[para 20] The first two sentences of paragraph 3 contain opinions of the Applicant and a statement of an agreement made by the Applicant that form the starting point for the review carried out by the committee. I find that these sentences contain the personal information of the Applicant and not any of the third parties set out in the list of names. Therefore, section 17 does not apply to this section. I intend to order the Public Body to disclose this information to the Applicant.

[para 21] The first sentence of paragraph 6 is the statement of some concerns expressed by the Applicant to the committee. I find that this sentence contains personal information of the Applicant and none of the third parties. I also intend to order the Public Body to disclose this sentence to the Applicant.

2. Does section 17(4)(g) apply to the list of names?

[para 22] The only information which remains to be considered under section 17 is the list of names (the last six lines of paragraph 2). The Public Body says that section 17(4)(g) applies to the list of names of the people with whom the committee met. It says the third parties were interviewed, with the explicit assurance of confidentiality, and that the report contains their comments, opinions and work relationship with the Applicant. The Applicant says the parts of the report he saw did not contain third party personal information.

[para 23] I have already found that the list of names contains the personal information of third parties. Other information that is the personal information of those third parties appears throughout the report, although not in every paragraph or sentence and not specifically attached to one or more of the individuals named in the list. It is quite possible that if the Applicant has seen excerpts of the report, those may not have contained obviously identifiable third party information. In the context of the group of

people involved and the type of information provided throughout the whole of the report, I agree with the Public Body that it may be possible to tie the names of third parties to some of the comments mentioned by the committee in the report. At the very least, release of the list of names would disclose who participated in the committee's investigation. I find that the requirements of section 17(4)(g) are met. The disclosure of the third parties' names is presumed to be an unreasonable invasion of their privacy in the context of the record at issue.

[para 24] Section 17(5) is therefore engaged and the Public Body must consider all relevant circumstances in coming to a conclusion about whether disclosure would be an unreasonable invasion of a third party's personal privacy. In this case the Public Body referred to section 17(5)(f). It asserted that an assurance of confidentiality was held out to the parties and they acted on it. In that assertion – that confidentiality was offered – all of the submissions and appended documents, from Public Body, Applicant, and Affected Parties – are agreed. From the start and without exception, the Applicant's request to the Dean, the Dean's response, the committee's process, and the treatment of its results, were explicitly referred to as being done in confidence.

[para 25] Public bodies need to be aware that their offer of confidentiality may not always be supportable under the Act, after collecting information under those auspices. They should not offer what the law may not protect. In this case, the third party information is required to be protected for the presumptive reason in section 17(4)(g). That confidentiality was offered in this case is a highly relevant circumstance and supports the Public Body's decision.

[para 26] The Public Body says a second factor is that relationships within the Department could be negatively affected. The Applicant disagrees that that was relevant. From my review of his submissions I take the Applicant's point to be that there are already negative relationships and that revealing the information to him might reduce his sense of embattlement.

[para 27] The Applicant was well aware, and participated in asserting through the process, that confidentiality was a hallmark of the process. Now he finds himself wanting access to the information the process produced. To the extent that the information is his personal information or otherwise allowed by law to be released, he is entitled to it and I have so ordered. However, his initial sense of the importance of confidentiality in the circumstances is supported by the Act and its application will result in very limited information being released to him. He has not in my view discharged the burden of proof that the Act shifted from the Public Body to him under section 71 of the Act. He has not shown that the disclosure of the third parties' personal information would not be an unreasonable invasion of their privacy. He simply asserted that there was no third party personal information and the evidence before me clearly shows there is.

1. Does section 17(4)(d) apply to the records?

[para 28] The Public Body initially told the Applicant that the two legal bases for withholding the severed information in the report were Act sections 24(1)(a) and 17(4)(d).

[para 29] I do not need to decide on the applicability of section 17(4)(d) as I have already found that the severed portions of the report fall within section 24(1)(a) and 17(4)(g).

ISSUE C: Was the information released inappropriately?

[para 30] During the course of the inquiry, the Applicant alleged that the Public Body had inappropriately released the personal information contained in the record at issue. The Applicant says that he has seen portions of the report, and from what others have said to him he expects they have seen the report in whole or in part. He questions how the Public Body can now assert that the information should be protected from disclosure to him. He argues that either it should be protected and the Public Body has wrongly released information to him and others, or that it should be released to him and the Public Body is wrong in asserting the Act requires or allows it to be withheld.

[para 31] The Public Body denies that the Applicant or others were shown the report. It provides evidence that after the committee submitted its report, the Dean wrote to staff and faculty advising them of the outcomes of the committee's work. That included that the Dean had given advice to three individuals, who had agreed to abide by that advice.

[para 32] The parties put before me three instances where they dispute the facts – what happened in meetings between the Applicant and two others, and who has seen the report. The state of the evidence before me on those points, from both parties, is of modest value.

[para 33] After reviewing all the evidence, I accept that the record at issue has been kept confidential from staff in the Department. The information the Dean provided in his letter to staff as an outcome of the report and his acknowledged discussion with three particular individuals, is at least as likely the source of information that the Applicant claims he has heard from others, than is a disclosure of the document at issue. The Applicant's assertions support this conclusion. He says that only some parts of the report were repeated to him by others and he offers no evidence to suggest that the information was not of the type that the Public Body asserts was disseminated.

[para 34] I do not need to decide the parties' factual dispute about whether or not the Applicant was shown portions of the report. Revealing the information to him, if done, would not remove the protection of the Act in subsequent circumstances. The protection of the Act continues to apply. Therefore, the Applicant's allegation that the Public Body disclosed the information is not relevant to my decision about the applicability of section 17 of the Act to the Applicant's access request.

V. ORDER

[para 35] I make this Order under section 72 of the Act.

[para 36] With only the exceptions set out below, I find that the Public Body properly applied section 24(1)(a) of the Act to the record at issue and that its exercise of discretion was proper. I confirm the Public Body's decision not to disclose this information to the Applicant.

[para 37] With the exception of the Applicant's name, I find that the Public Body properly applied section 17(4)(g) of the Act to the list of third party names contained in the record at paragraph 2. I confirm the Public Body's decision not to disclose this information to the Applicant.

[para 38] I find that the Public Body has not properly applied section 17 or section 24(1)(a) of the Act to the following information contained in the record. I order the Public Body to disclose this information to the Applicant:

- The introductory sentence to the list of names, starting in the fifth line of paragraph 2.
- The Applicant's name which appears in the middle of the list of names in paragraph 2.
- The first two full sentences of paragraph 3.
- The first sentence of paragraph 6.

[para 39] Along with this Order I am providing the Public Body with a copy of the record, marked by me, indicating which information is to be disclosed to the Applicant.

[para 40] I further order the Public Body to notify me in writing, within 50 days of receiving this Order, that it has complied with this Order.

Dave Bell
Adjudicator