ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2004-027

April 18, 2006

Review Number 2005

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to the University of Alberta (the "Public Body") for access to her personal files at the University. The Public Body disclosed a large number of records, but withheld a number on the basis of specified exceptions. It also indicated that some requested records were no longer in its possession, and had been destroyed.

An inquiry was initiated with respect to a single withheld record. However, after the inquiry was commenced, but before the scheduled date for the hearing, the Public Body agreed to provide this record. A further inquiry was then initiated with respect to other issues outstanding from the request for review. The Public Body objected to the Adjudicator's jurisdiction in the subsequent inquiry. It said that as the issue in the first one had been resolved, the Adjudicator could not conduct another inquiry relative to different issues (which it said had been resolved through mediation).

The Adjudicator rejected the Public Body's objection to his jurisdiction. More than one inquiry is to be avoided. However, the resolution of a single issue for which an inquiry has been initiated does not preclude the conduct of another inquiry relative to other issues that had been raised in the original access request and the subsequent request for review, and which the Applicant regarded as unresolved. The Adjudicator also rejected the Public Body's complaint about failure to provide particular documents to it, on the basis that these documents were part of the mediation process, and there was no requirement to provide them.

The Adjudicator did not accept the Applicant's speculations that documents existed that the Public Body had deliberately withheld from her. He found that the Public Body had met its duty to assist the Applicant, and had conducted an adequate search. He also found that the Public Body was not required to retain a particular record for at least one year under section 35(b) of the Act, because the required period of retention for this record was governed by a collective agreement between the Public Body and the Association of its Academic Staff.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 7(1), 10(1), 35(b), 67, 67(1), 68, 69, 70(b), 72.

Authorities Cited: AB: Order 2001-038.

I. BACKGROUND

[para 1] On May 8, 2000, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the University of Alberta (the "Public Body") for access to her personal files (and any other documents with her name on them) at the University of Alberta. She also specified some particular locations in the offices of the Public Body for the records she sought, as well as some particular records.

[para 2] By letter dated July 10, 2000, the Public Body indicated there were approximately 4,200 pages of responsive records. This letter included an index of records which described the documents and numbers of pages, and which set out the documents that were being withheld under the Act as well as the section numbers relied on (primarily section 16(1) (now 17(1)), and also sections 26(1)(a) (now 27(1)(a)) and 18(2) (now 19(2)). The Public Body also referred to particular requested records and indicated that these records had not been located in the search (in some cases because they had been destroyed). It was agreed between the Applicant and the Public Body that copies would not be provided, but the Applicant would attend at the Privacy Office of the Public Body to view the documents (other than those withheld).

[para 3] On August 31, 2000, the Applicant requested a review of the Public Body's decision. This request was provided to the Public Body as an attachment to a letter from this office dated September 5, 2000. The matter was assigned to a mediator in this office. During mediation, the Public Body agreed to release all requested records that it had located (but was not withholding under specified exceptions), with the exception of a single record which had been written by a third party (who had refused to consent to release of the record).

[para 4] An inquiry was instituted with respect to the single record. The Notice of Inquiry setting out the issues was issued by this office on January 29, 2004. Prior to the date set for receipt of initial submissions in this inquiry, the third party withdrew his objection to release of the record, and by subsequent correspondence, the Public Body agreed to provide it to the Applicant.

[para 5] On March 28, 2004, the Applicant wrote a letter to the Commissioner in response to the Notice of Inquiry she had received on January 29, 2004. This letter stated that besides the matter of the single document on which the issue in the Notice of Inquiry was based, there were two other issues which she saw as outstanding. The letter described these issues – one relating to audiotapes of her tenure appeal, and the other to a particular 'report' authored by an accompanist in her classes. Both these issues had been raised in the Applicant's request for review of August 31, 2000.

[para 6] On April 14, 2004, the Mediator wrote a letter to the Public Body stating that because the Public Body had agreed to provide the single record in question in the inquiry, the issue in the inquiry had been "removed from consideration" and that the "inquiry had lost jurisdiction" because there was no longer a matter before it. This same communication also indicated that the "request for review (Case #2005) remains unclosed", and that the Mediator would communicate with the Applicant to offer two options. These were either that she request a new inquiry indicating what issues she wanted that inquiry to consider, or that she withdraw the request for review.

[para 7] On May 15, 2004, the Applicant wrote to the Mediator requesting a new inquiry. This letter summarized the two issues as stated in her March 28 letter to the Commissioner. It also added another issue, relating to whether a particular document written by another faculty member (the "P Report") had or had not already been made available to her.

[para 8] A new inquiry was instituted to deal with the additional issues raised by the Applicant. The Notice of Inquiry was dated June 1, 2004.

[para 9] By letter dated June 16, 2004, the Public Body raised a jurisdictional question. It suggested I do not have jurisdiction to hear and decide the issues in this inquiry because this office had commenced an inquiry into a single issue arising out of the request for review (the issue mentioned at paragraphs 3 and 4 above), and that issue had been resolved. The Public Body also complained that this office had not provided it with a copy of a "brief submitted by the Applicant "on 28-May-04" (as referenced in the Mediator's letter to the Public Body on April 13, 2004[1]). The Public Body asked for a copy of this "brief".

[para 10] By letter dated August 4, 2004, the Public Body formalized its raising of the preliminary jurisdictional issue. In the same letter, the Public Body asked for a copy of a letter from the Mediator to the Applicant of a particular date, as well as any other correspondence between this office and the Applicant "which bears on the issues".

[para 11] The first document requested by the Public Body, a letter written by the Applicant to the Commissioner (dated March 28, 2004 but mistakenly described in some of the correspondence as dated May 28, 2004), was provided to the Public Body by this office on August 9, 2004, on the basis that it related to what the issues in the inquiry would be. The letter from the Applicant to the Mediator dated May 15, 2004 was also

[1] This date was a mistake. The document in question is dated March 28, 2004.

provided, on the same basis. This office refused to provide any other records from the mediation file.

[para 12] A revised Notice of Inquiry that set out the jurisdictional issue was issued by this office on August 27, 2004.

[para 13] By letter dated November 30, 2004, I notified the Public Body that I had decided that I have jurisdiction over the issues in the Notice of Inquiry of June 1, 2004. I said I would provide my reasons for this decision together with my decision and reasons about the issues set out in that Notice of Inquiry. In the same letter, I indicated that another issue (Issue D) that the Applicant had raised in her Request for Review of August 31, 2000, (and had raised again in her letter of March 28, 2004), would be added to the issues in the inquiry.

[para 14] By letter dated December 3, 2004, the Public Body asked that I provide my reasons for decision on the jurisdictional issue before setting the date for the written submissions in the inquiry. By letter dated December 6, 2004, I declined this request, in order to avoid further delay.

II. RECORDS AT ISSUE

[para 15] The records at issue are: records which the Applicant speculates exist but were not provided to her; records which were destroyed; and one record (the "P Report") about which the issue is whether the Public Body had or had not already made it available.

[para 16] The Applicant makes some arguments in her submission (point #1) that certain records should not have been withheld or severed (evaluations and reviews for a tenure appeal), and says these "remain at issue". However, these records were not mentioned in her letters of March 28 and May 15, 2004, in which she described the outstanding issues she wished to have addressed in this inquiry. Therefore they are not in issue in this inquiry. The same applies to the "transcription tapes" to which the Applicant refers in her point #6.

III. ISSUES

[para 17] As explained above, this inquiry involves one preliminary jurisdictional issue raised by the Public Body that I decided earlier, but for which I will set out the reasons for decision here. This issue is:

Issue A: Did the resolution of the one issue set out in the January 29, 2004 Notice of Inquiry for Review # 2005 cause the Commissioner's Office to lose jurisdiction to conduct an inquiry into the two other issues set out in the June 1, 2004 Notice of Inquiry for Review #2005?

The remaining issues in this inquiry, as set out in my letter of November 30, 2004, are:

Issue B: Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act? In this case, the Adjudicator will also consider whether the Public Body conducted an adequate search for responsive records.

Issue C: Did the Public Body refuse to disclose a letter written by another faculty member ("Dr. P") concerning the Applicant's tenure application, and if so, did the Public Body do so with proper authority?

Issue D: Did the Public Body retain the Applicant's personal information for at least one year, as required by section 35(b) of the Act?

[para 18] As already noted at paragraph 16 above, the Applicant makes some arguments in her submission that certain records should not have been withheld or severed (evaluations and reviews for a tenure appeal). These records were mentioned in the Applicant's request for review to this office of August 31, 2000. However, they were *not* mentioned in her letters of March 28, 2004, and May 15, 2004, in which the Applicant described the outstanding issues she wished to have addressed in this inquiry. They are, therefore, not in issue in this inquiry.

IV. DISCUSSION OF ISSUES

Issue A: Did the resolution of the one issue set out in the January 29, 2004 Notice of Inquiry for Review # 2005 cause the Commissioner's Office to lose jurisdiction to conduct an inquiry into the two other issues set out in the June 1, 2004 Notice of Inquiry for Review #2005?

[para 19] On November 30, 2004, I provided the parties with my decision that I have jurisdiction to decide Issues B and C in this inquiry. My reasons for this decision (which also apply to my having jurisdiction over Issue D) are as follow.

[para 20] The Public Body contends that this office lost jurisdiction because it commenced an inquiry into a single issue arising out of the request for review, and that issue was resolved. (The document relative to which the inquiry issue had been framed was disclosed to the Applicant on the consent of a third party.) In its argument the Public Body relies on a letter written to it by the Mediator assigned to the case. In that letter, the Mediator wrote that

> A change of position by the third party, communicated to [the Applicant] on 22-Mar-04, removed from consideration the one matter at issue in the inquiry. As there was no longer a matter before the inquiry, the inquiry lost jurisdiction and so has had to be cancelled.

[para 21] The Public Body says that the mediator "speaks for the Commissioner". This is inaccurate. The mediation process is a separate process from the inquiry process. Under section 68 the Commissioner may authorize a mediator to investigate and try to

settle any matter that is the subject of a request for review. This process is voluntary on the part of the parties, and any settlement depends on the agreement of the parties. The mediator neither speaks for the Commissioner during this process, nor can he or she bind the Commissioner to an outcome. The Commissioner is not aware of what goes on in the mediation process either at the time it is conducted, or during the inquiry (unless, as happened in this case, the submission of a party imparts some information about this process[2]). If a matter is not settled under section 68, the Commissioner is to conduct an inquiry pursuant to section 69. Thus if, at the conclusion of the mediation process, a party comes forward with a request for an inquiry relative to issues that are outstanding in the mind of the party, the Commissioner will not look behind that conclusion, to see if the mediator took a position during the mediation process that would somehow be inconsistent with holding an inquiry. This point is demonstrated by the fact that if, as happens occasionally, a mediator writes a 'report' at the conclusion of an investigation/mediation, the Commissioner will neither review it, nor consider himself bound by it, if an inquiry is subsequently initiated. Rather, the inquiry begins afresh.

[para 22] Second, I note that the part of the letter to the Public Body in which the Mediator spoke of a "loss of jurisdiction" was quite clearly referable to a single issue that gave rise to an inquiry relating to that issue alone. In the very same letter, the Mediator indicated that there may be other issues outstanding in the request for review, that the review had not been resolved in its entirety, and that different options for resolution would be made available to the Applicant. The Mediator stated clearly that:

> The file opened to investigate and mediate [the Applicant's] request for review (Case #2005) remains unclosed.

[para 23] The Public Body also asserts that it is not open for the Adjudicator to proceed with a different inquiry based on totally different records. As well, it says that "the Commissioner should not permit an Applicant to range freely outside the stated parameters of an inquiry to rehash previously-settled issues. That does not revive jurisdiction … .". However, it provides no authority for these assertions about the limits on the jurisdiction of the Commissioner and Adjudicator, nor for the idea that when an inquiry is instituted for a specific issue raised in a request for review, jurisdiction over other issues in the same request for review is lost.

[para 24] With respect to the idea that the issues to be addressed in this inquiry were settled in mediation, I note there is evidence before me now that the "P Report" was made available to the Applicant in the Public Body's initial response. However, the Applicant has said she was confused about this not only because the index of records was not, in her view, sufficiently detailed to make this clear, but also because the Public Body's Access and Privacy Advisor had verbally indicated to her that this record was not available.[3] The "P Report" issue aside, the Public Body does not provide a basis (other than what it says was its own understanding) for concluding that the additional issues for

[2] The current version of the Notice of Inquiry states that the parties are not to include mediation and investigation information in their submissions.
[3] These points are contained in the Applicant's letter to the Mediator of May 15, 2004.

the new inquiry were "previously-settled". I do not accept that such an inference can be drawn from the fact the first inquiry was set up to deal with only a single issue. Neither do I find the statements in the related Notice of Inquiry that

> The records at issue for this file were originally over 4371 pages (…). After mediation, the record at issue is now one 6 page document.

to be a sufficient basis for concluding that all other issues were settled. The references were to records that the Public Body had located. They do not relate to the matter of records that the Applicant believed existed but had not been located, or which had been destroyed. Further, the quoted excerpt can be seen as merely a description of a series of facts, rather than as an assertion about some kind of connection between them.

[para 25] The Public Body also tries to impugn the "Integrity of the Process", as well as to deny the Commissioner's jurisdiction, by complaining that the issues set for the June 21, 2004 Notice of Inquiry were not "new", or if they were, that they were not instigated by making another access request for the records related to these issues under section 7(1) of the Act. Records that were requested and the related issues that were raised in the original access request to the Public Body, and the request for review to this office, do not have to be requested or raised again in order that they be dealt with, whether by mediation or through inquiry.

[para 26] The Public Body's position on all these questions may be based on the fact that it does not seem to draw a distinction between two distinct processes – reviews (and requests for reviews) on the one hand, and inquiries (and requests for inquiries) on the other. In the case of an access request, an Applicant engages the processes of this office by bringing a request for review. It is this request to which section 67 (which requires the Commissioner to provide the Public Body with a copy of the request as soon as practicable) refers. At this point, the Commissioner must meet the requirements of section 67, and may – and typically does - authorize mediation under section 68. This provision authorizes the Commissioner to "authorize a mediator to investigate and try to settle any matter that is the subject of a request for a review". If the mediation fails, or fails as to some aspect of the request for review, the Commissioner must conduct an inquiry. The request for an inquiry - the Applicant's notification to the Commissioner that they are dissatisfied with the outcome of the mediation, or do not want to mediate and wish to go directly to inquiry – does not have to take any particular form. Contrary to what the Public Body asserts, there is no statutory requirement to provide a Public Body with the Applicant's request for an inquiry (which may not even exist in written form). The Notice of Inquiry is the means by which the office communicates to the Public Body the issues it must address. Written documents requesting an inquiry are commonly used by this office to help frame the issues for inquiry, but other sources of information provided by the parties might also come into play in this task. The Commissioner controls his own process and, so long as the procedural fairness requirement is met that a party knows the case it is to meet, it is up to the Commissioner to decide by what means the parties will be apprised of the matters the inquiry will address.

[para 27] Neither are there any statutory rules limiting the number of inquiries that may be held arising out of a particular request for review. Again, while it is to be hoped the Commissioner will adopt the most efficient process possible – that of dealing with all outstanding issues at once - there is no rule that a failure to be efficient will result in a loss of jurisdiction.

[para 28] With respect to the Pubic Body's idea that the issues set for the new inquiry are moot, I do not accept this idea. The Applicant has contended throughout that documents exist that were not provided to her. Thus issue B is not moot. There is a factual finding to be made about Issue C. The question of retention of documents (Issue D) is also a live issue. The only issue that is clearly moot is the one relating to the document that was disclosed subsequent to the giving of consent by its author, which is not one of the issues in the present inquiry.

[para 29] In this case it is not clear why only a single issue was framed for the first inquiry when there were other issues, raised in the original request for review, that from the Applicant's standpoint had not been settled. As the Office of the Commissioner is involved in framing the issues for the inquiry, the omission of some of the outstanding issues from the inquiry may have been an oversight on the part of this office. If that were the case, it would not be a reason to compromise the ability of an Applicant to bring such outstanding issues forward to inquiry.

[para 30] The other explanation may be that the Applicant appeared to have abandoned some of the issues she raised initially, focusing only on the one raised in the first inquiry, and resurrecting the other issues only later. The Public Body claims (in its Access and Privacy Advisor's affidavit) that it understood the additional matters had been resolved. However, there is no evidence to show that this is what the Applicant understood.[4] Though a variable or selective focus on different issues by the Applicant throughout a mediation might give rise to an unfortunate inefficiency such as in this case, unless the Public Body was significantly prejudiced, I see nothing in the Act or in principle that prevents the Applicant from proceeding in this way. Though the Public Body may have been inconvenienced, it has not shown that it has been prejudiced by the timing of the new inquiry. In its rebuttal submission it contends that it was prejudiced, but it does not indicate how.[5] The Public Body has been given sufficient notice of all the issues it must address to enable it to respond.

[para 31] Another possibility is that the Applicant actually agreed in some formal or written way that the issues she now brings forward for the new inquiry were being abandoned or had been resolved to her satisfaction. However, there is nothing before me

[4] As noted earlier, with respect to the "P Report", such a conclusion on the part of the Public Body was reasonable because this record had apparently been made available to the Applicant. However, the Applicant herself was not certain about this. This was due in part to her failure to attend at the Public Body's offices to review the documents, but, according to the Applicant, it was also based on the conversation, noted above at paragraph 24, that she had with the Access and Privacy Advisor.

[5] The Public Body says it was prejudiced by the failure of the Mediator to provide it with communications he had with the Applicant. However, that is a separate matter from the timing question, (and will be dealt with below).

to suggest this. Even if there were, it is not clear that the Applicant would thereby be estopped from bringing the issues forward to inquiry. The Commissioner has no power to enforce settlements and in the normal course is not advised of any aspect of what went on during mediation. Though it is arguable he could use his power under section 70(b) to refuse to conduct an inquiry in such a case, it is equally arguable that he could not because the mediation process is outside his purview. Again, even if this happened, the Public Body has not shown that it was prejudiced.

[para 32] To the extent this office is responsible for the inefficiencies of process in this case, I regret the inconvenience to the parties. However, such inconvenience does not in itself relieve me from my obligation to hold an inquiry into any matter that was the subject of a request for review and was not resolved through mediation.

[para 33] The other main element in the Public Body's submissions on the jurisdictional issue has to do with communications between this office and the Applicant. The Public Body's concern, which in its words "caused it alarm", gave rise to a "reasonable apprehension of bias" and constituted "reviewable error", was that the "Commission" had communications with the Applicant which it failed to disclose to the Public Body.[6] The Public Body comments about these communications that

> It is the [Public Body's] position that the Commissioner exceeds his jurisdiction if he has communications with an Applicant that are not shared with the other party to an inquiry, … .

More specifically, the Public Body complains that it was not provided with copies of the Applicant's letters of March 28, 2004 and May 15, 2003, which it seems to characterize as 'requests for review'. This, it says, was both a breach of section 67 of the Act[7], and also shows that the Commissioner was not treating the letters as a "real" request for review.[8]

[para 34] The response to this complaint is that this office did not provide copies of the letters of March 28 and May 15, 2004 to the Public Body because the letters were not "requests for review". The only request for review in this case was the Applicant's letter of August 31, 2000, which was provided to Public Body on September 5, 2000.[9] The

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[6] There is no entity under the Act that can be referred to as 'the Commission'. This is significant because there are members of the staff of the Commissioner who do not perform an adjudicative function, whereas the idea that such staff are members of a 'Commission' may lead to the erroneous conclusion that they are part of the inquiry process.

[7] Section 67(1) provides that on receiving a request for a review, the Commissioner must as soon as practicable give a copy of a request to the head of the public body concerned.

[8] Another communication about which the Public Body complains relates to the idea that the mediator in the case 'recused himself' during the course of the 'inquiry'. This idea is derived from a statement in the Applicant's submission. Though I note that the Public Body gives credence to the Applicant's contention that such a 'recusal' happened, I have no knowledge of whether it did happen.

[9] I note that in Order 2001-038, a letter requesting an inquiry following the investigation of a complaint by the Commissioner under section 53(2)(e) was characterized as a "request for review". However, the procedure for complaints under section 53(2)(e) is different from the procedure for requests for review under section 65(1), and the characterization of the letter in that case has no application to this one.

decision to provide the other aforementioned letters directly to the Public Body on its specific request for them was discretionary on my part.

[para 35] I also note the Public Body's idea that the letters in question were not part of the mediation process because they took place after the period within which mediation was to be concluded (which in this case included one written extension by the then-Commissioner). It also suggests that the process that followed the expiry of this period was an 'investigation' (apparently because the Mediator used this word to describe the process in correspondence with the Applicant dated October 22, 2003).

[para 36] I acknowledge the mediation process in this case was unduly lengthy, and the entire process has far exceeded the time period for completion referred to in the Act. However, the expiry of the period set for conclusion of the mediation by the former Commissioner did not convert the process relating to other, outstanding, issues into an inquiry process, nor does it make communications between a mediator and the parties the communications of the Commissioner. An inquiry begins (under section 69) only where it can be concluded that the matter has not been settled. Discussions with the parties about what has or has not been settled take place prior to the inquiry and are part of the mediation process.[10] Though ultimately matters that are to be addressed at the inquiry must be communicated to both parties sufficiently for them to be able to respond, as noted above, this communication does not have to take any particular form, and the phase during which these matters are being identified does not in itself attract the 'case to meet' principle.[11]

[para 37] With regard to the significance of the reference by the Mediator to an 'investigation', the 'investigation' that is statutorily recognized in the case of an access request (under section 68) is one that allows a mediation to proceed, and is part of the mediation. The 'investigation' phase of a mediation does not attract the 'case to meet' principle either. I am unaware of any rule that requires mediators to communicate their discussions with one party to a mediation to the other side. Indeed I can imagine circumstances in which this would be contrary to sound mediation practice. I reject the idea that following the expiry of a time period which was set for a mediation to conclude, the mediator in a case becomes obliged to treat the mediation process as an open one as between the parties.

[para 38] For all these reasons, I reject the Public Bodies objections to my assuming jurisdiction. I find that I have jurisdiction over Issues B, C and D in this case.

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[10] Though the Applicant addressed her letter of March 28, 2004 to the Commissioner, this letter was not dealt with by the Commissioner or Adjudicator at the time it was received; it was dealt with by the Mediator.

[11] The Public Body argues with reference to communications between the mediator and the Applicant that "Apart from the fairness and natural justice issues implicit in *a decision-maker* communicating with one party to a dispute and keeping that correspondence from the other, it is counter-productive to the agreement process set out above. It is destructive of the trust necessary to achieve the result" (emphasis added). This argument seems to be premised on the mistaken idea that a mediator in the process of this office is a "decision-maker".

Issue B: Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act? In this case, the Adjudicator will also consider whether the Public Body conducted an adequate search for responsive records.

[para 39] I will begin this discussion by commenting on the scope of this issue. In its rebuttal, the Public Body contends that the issues raised in points #2 and #3 of the Applicant's submission are not within the issues for this inquiry defined in my letter of November 30, 2004.

[para 40] With respect to the Applicant's point #2 (the "GAC audiotapes"), this issue is covered under Issue D, which relates to the Public Body's duty to retain information.

[para 41] With respect to a particular report mentioned in the Applicant's point #3, the Public Body makes the following points:

1. It contends this issue was "dealt with" through mediation, and provides affidavit evidence saying this. As discussed above at paragraphs 30 and 31 above, I do not regard this as relevant.
2. It says the Commissioner defined the scope of this inquiry without reference to this issue. I note that in the Notice of Inquiry dated June 1, 2004, provided to the Public Body, Issue B includes a note to the effect that the Applicant's concerns included the one about receiving access to this particular record. In any event, the matter was discussed by the Applicant in her submission, and the Public Body has had an opportunity to respond, and has responded, in its rebuttal.
3. It suggests that the allegation about this report is one of "deliberate withholding", and consequently does not fall within any of the issues stated for the inquiry. In my view, Issue B, which deals with whether the Public Body met its duty to assist the Applicant, covers such an allegation.

[para 42] Turning to the merits of the Applicant's submission about this report, she points to a number of materials and situations, or comments she heard from others, which lead her to believe that this document was in existence at various times during her dealings with the Public Body relative to her performance and her tenure appeal. She acknowledges that she was told such a report had existed but was not on her file. However, she suggests that this was due to someone having deliberately removed it (most likely taking it off campus), presumably so she could not gain access. The Applicant suggests that the search must be extended outside the offices of the Public Body to the home offices and computers of named individuals.

[para 43] The Public Body has provided me with a detailed list of the steps it took to assist the Applicant and to locate responsive records generally, as well as supporting materials. It also told me, as well as the Applicant, about its efforts to locate the particular report in question. The Public Body's response to the Applicant stated clearly that there was such a report, but that "the Dean" indicated the report was returned to its author and

no copies were made. The author, when questioned by the Public Body's Access and Privacy Adviser, indicated that he had destroyed the report. I accept this evidence.

[para 44] In my view the Applicant's suggestions that the Public Body deliberately secreted and withheld this particular report from her are based on unsubstantiated speculations. I do not accept them, or regard them as a basis for finding that the Public Body failed to meet its duty to assist her under section 10(1) of the Act, or that its search was inadequate and that it needs to go further afield to find these documents.

In my view, the steps taken by the Public Body were adequate to meet its duty to the Applicant under section 10(1), and its search for records was also adequate.

Issue C: Did the public body refuse to disclose a letter written by Dr. P concerning the Applicant's tenure application, and if so, did the Public Body do so with proper authority?

[para 45] The Public Body has provided extensive evidence that this record was included in the group of records made available to the Applicant in its initial response.

[para 46] In addition, it has attached a copy of the record in question to the Affidavit of its Access and Privacy Adviser, which forms part of its submission to be exchanged between the parties. This document has been provided to the Applicant by this office. This action on the Public Body's part means that Issue C is indisputably removed from contention in this inquiry.

Issue D: Did the Public Body retain the Applicant's personal information for at least one year, as required by section 35(b) of the Act?

[para 47] Section 35(b) of the Act provides as follows:

> *35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must*
>
> …
>
> *(b) retain the personal information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it, or for any shorter period of time as agreed to in writing by*
>
> *(i) the individual,*
>
> *(ii) the public body, and*
>
> *(iii) if the body that approves the records and retention and disposition schedule for the public body is different from the public body, that body.*

[para 48] The Applicant complains about the destruction of several documents. However, the Public Body provides evidence that most of these were destroyed before the Public Body became subject to the Act (on September 1, 1999). I accept this evidence, and the Public Body's argument that I have no jurisdiction over the retention of records destroyed before the Act became applicable to the Public Body.

[para 49] There is a single exception, however, This is the audiotape cassette of the Applicant's tenure appeal, held on January 27, 2000. This recording was apparently destroyed some time after the hearing, within a period shorter than the period of "at least one year" after the decision affecting the Applicant (the tenure decision) was made.

[para 50] The Public Body says that this was in accordance with Article 15.25 of the University of Alberta / AAS:UA Agreement, which was in effect at the time. This agreement states that such a recording may be destroyed by the Hearing Chair after six weeks after the date the hearing decision is issued.

[para 51] In my view, the Public Body had the right to destroy the tape because this procedure was agreed to in writing between the Applicant and the Public Body within the terms of section 35(b), in the agreement mentioned in the preceding paragraph. The Applicant was not personally a signatory to this agreement, but she was a Faculty member and thus a member of the Association of Academic Staff (AAS:UA) at the relevant time. Thus the agreement was signed on her behalf by the AAS:UA, as her representative in the collective bargaining process, and she was bound by its terms. While it might be argued that section 35(b) was intended to address only agreements that are created in a specific case, rather than pre-existing agreements such as a collective agreement, there is nothing in the language of the provision that would impose such a restriction. Therefore I will not read one in. I find that the Applicant did not have a right that this record had to be retained for one year. Therefore, the Public Body did not violate such a right when it destroyed the record in accordance with the terms of the agreement.

V. ORDER

[para 52] I make this Order under section 72 of the Act.

[para 53] For the reasons given under Issue A, I find I have jurisdiction to conduct this inquiry and I have assumed jurisdiction over Issues B, C and D in this case.

[para 54] I find the Public Body met its duty to the Applicant, as provided by section 10(1) of the Act, and that it conducted an adequate search.

[para 55] I find that because the Public Body appended the documents at issue under Issue C to its submission, which was provided to the Applicant, I do not need to address this issue.

[para 56] I find the Public Body was not required to retain the Applicant's personal information for at least one year under section 35(b) of the Act.

Dave Bell
Adjudicator