ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2005-008

November 4, 2005

NORTHERN ALBERTA INSTITUTE OF TECHNOLOGY

Review Numbers **2889, 3003, 3017, 3084**

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Summary: The Applicant made a number of requests under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Northern Alberta Institute of Technology (the "Public Body"), where she had been a student. She asked for access to her personal information, and for some general information relating to the Public Body's policies. She also asked that a grade on a transcript be corrected. The Public Body provided some records, but severed or withheld some information on the basis that disclosure would be an unreasonable invasion of the personal privacy of third parties under section 17(1), or was information subject to solicitor-client privilege under section 27. It said it did not have some specific personal information the Applicant requested. It also provided its policies (contained in its calendars) for only some of the years for which the request was made. It refused to change the grade.

The Applicant asked for a review of these decisions of the Public Body, and complained that it had failed to conduct adequate searches under section 10 of the Act. These requests became the subject of four reviews.

In Review 2889, the Commissioner held that the Public Body had met its duty to conduct an adequate search. He upheld the Public Body's refusal to disclose personal information of third parties, and its refusal to disclose privileged information. In Review 3003, the Commissioner required the Public Body to search a specified location for particular records (unless, which was not clear, it had already done so). In Review 3017, he upheld

the refusal to change the grade. He found that this request amounted to asking that the *method* by which the grade and underlying performance scores are determined be changed – a matter that cannot be the subject of correction under section 36 of the Act. Finally, in Review 3084, he required the Public Body to provide the policy information for all years for which the information had been requested. He accepted the Public Body did not have some other particular information requested in this review.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.10(1), 15, 17, 17(1), 17(4)(a), 17(4)(d), 17(4)(g), 17(5), 17(5)(e), 17(5)(f), 17(5)(h), 27, 27(1), 29, 36, 36(2), 71(2), 72; *School Act*, R.S.A. 2000, c. S-3; Student Records Regulation, A.R. 71/99.

Authorities Cited: AB: Orders 96-017, 96-020, 98-010, 99-013, 99-021, 2000-021, 2000-022, F2002-007, Adjudication Order #4 *Hugh MacDonald MLA v. Alberta Justice / The Globe and Mail v. Alberta Justice*, October 3, 2003**.**

Cases Cited: *Stevens v. Canada* [1998] 4 F.C. 89 (C.A).

BACKGROUND

[para 1] The Applicant was registered in a cytotechnology program between August, 1997 and December, 1998. The program consists of one year of classroom instruction provided by the Northern Alberta Institute of Technology (NAIT) (the "Public Body"), followed by one year of practical training with a provincial regional health authority (the "practicum provider").

[para 2] During her year with the Public Body, the Applicant had some difficulties in her relations with other students, which gave rise to correspondence between the students and the Public Body's administration.

[para 3] The Applicant completed her instructional year with the Public Body in June, 1998. She began her clinical training with the practicum provider in the same month. In December of 1998 she was required to leave the program. She appealed this decision but was not successful. Subsequently she was given a transcript of her grades by the Public Body. The grade assigned for a particular course (MLT 324) appeared on this transcript as 50%.

[para 4] The Applicant made a number of requests to the Public Body for access to information, and for correction of information, under the *Freedom of Information and Protection of Privacy Act* (the "Act"). These included:

- Public Body's file reference 03-P-003 (Request for Review 2889): This was for all records containing her personal information in all departments of the Public Body between January 1, 1997 and August 27, 2003. (This was the final of several similar requests but the earlier requests were narrower in terms of the departments of the Public Body that were to be searched.)

- Public Body's file reference 04-P-003 (Request for Review 3003): This was for the record to show which Public Body property the Applicant had not returned, or money owing to the Public Body by the Applicant, between January 1, 1997 and April 22, 2004. (This request was related to the Applicant's idea that her final transcript or diploma was being withheld further to a Public Body policy that diplomas are not issued to people who owe money or have not returned property to the Public Body.)
- Public Body's file reference 04-C-004 (Request for Review 3017): This was a request to correct personal information, asking that the Public Body change a grade in the Applicant's transcript that had been assigned for the MLT 324 course from 50% to 82.75%. In her submissions the Applicant suggested some other percentage numbers that should be substituted for the assigned grade of 50%.
- Public Body's file reference 04-G-003 (Request for Review 3084): This request was for the Public Body's policies (which are found in its Calendars) relative to appeal of grades, academic grievances (including procedures for filing), clearing of course deficiencies, and course appeals for the period January 1997 to April 26, 2004; the name of a professional body to which a specific Public Body counselor belonged; records showing that a specified individual acted as legal counsel for the Public Body.

[para 5] The Public Body says it responded as follows:

- Public Body's file reference 03-P-003 (Request for Review 2889): The Public Body provided 645 pages of records (in six of these pages personal information of third parties was severed under section 17(1) of the Act); it withheld 59 pages under section 17(1) of the Act; it initially withheld 180 pages under section 27 of the Act, but an additional 139 pages were, according to the Public Body, released during mediation; 41 pages continue to be withheld under section 27.
- Public Body's file reference 04-P-003 (Request for Review 3003): The Public Body responded that it had found no responsive records.
- Public Body's file reference 04-C-004 (Request for Review 3017): The Public Body refused to make the change on the basis that it disagreed that an error had been made in assigning or recording the grade.
- Public Body's file reference 04-G-003 (Request for Review 3084): The Public Body provided excerpts from its Calendars dealing with the specified topics for the years 1998-1999, and 2004- 2005, but did not provide the excerpts for the years 1997-1998, 2000-2001, 2001-2002, 2002-2003, or 2003-2004; it indicated it did not have records showing the name of a professional body to which a specific Public Body counselor belonged, nor records showing that a specified individual acted as legal counsel for the Public Body.

[para 6] The Applicant was not satisfied with these responses and requested reviews by my office. As mediation was not successful, the Applicant asked, in correspondence dated between May and August, 2004, that the requests for review proceed to inquiry.

I. RECORDS AT ISSUE

[para 7] The records withheld in Request for Review 2889 consist of:

- communications that seek, provide, or discuss legal advice, and billing and related information of lawyers acting for the Public Body,
- correspondence between the Public Body and other students who attended the Public Body at the same time as the Applicant, and
- severed parts of Public Body's charts containing lists of students names (including of the Applicant) and other information pertaining to the students (fees payable, assignment to labs, etc.); the severed parts are the names and other information of students other than the Applicant.

[para 8] The records relating to Request 3017 are documents relating to the Applicant's grade in MLT 324.

[para 9] The records not provided in Request for Review 3084 consist of excerpts from the Public Body's Calendars dealing with specific information for the years 1997-1998, 2000-2001, 2001-2002, 2002-2003, or 2003-2004.

III. ISSUES

[para 10] The issues are:

Review 2889 (Public Body's file reference 03-P-003):

Issue A: Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as provided by section 10(1) of the Act?

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

Issue C: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

Review 3003 (Public Body's file reference 04-P-003):

Issue D: Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as provided by section 10(1) of the Act?

Review 3017 (Public Body's file reference 04-C-004):

Issue E: Did the Public Body properly refuse to correct the Applicant's personal information, as authorized by section 36 of the Act?

Review 3084 (Public Body's file reference 04-G-003):

Issue F: Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as provided by section 10(1) of the Act?

IV. DISCUSSION OF ISSUES

Review 2889 (Public Body's file reference 03-P-003):

Issue A: Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 11] The Applicant contends that the Public Body did not search for her personal information under the correct name or in the correct time frame.

[para 12] The search that is under review here was the final and most comprehensive of a number of searches conducted by the Public Body for the Applicant's personal information held by it. The earlier searches excluded some of the departments of the Public Body that might have held the Applicant's personal information.

[para 13] When one of the earlier searches was conducted, the Applicant's name was misspelled in the body (but not in the subject line) of the memorandum the Public Body's FOIP Coordinator sent to the Registrar. However, a handwritten and initialed correction of this error was made before it was sent. The Applicant also points out other spelling errors in earlier searches conducted by the Registrar. However, the FOIP Coordinator deposes that the first of the searches conducted in the Registrar's office resulted in records containing the personal information of the Applicant, indicating that the officials in that office recognized that they were searching for the information of the Applicant. There was also a misspelling in the body (but not the subject line) of the memorandum sent to the Diagnostic Laboratory Programs (DLP) area. This error was not corrected, but the FOIP Coordinator subsequently spoke by telephone to the Team Leader of the DLP area. The FOIP Coordinator deposes it was clear from the conversations that the DLP area recognized the correct name of the Applicant. She also deposes that the searches conducted in the DLP area resulted in records containing the personal information of the Applicant, again indicating that the officials in this area recognized they were searching for information of the Applicant.

[para 14] Subsequent to these searches, the Public Body's FOIP Coordinator conducted a new search (03-P-003), which is the subject of this review. In this search the Coordinator sent memoranda to all departments of the Public Body that would, she says, house records containing personal information of students or former students. In these memoranda, the Applicant's name was spelled properly. The memoranda instructed the recipients to search for all records containing the Applicant's personal information, and to advise of any records that had already been provided through the earlier searches. The

FOIP Coordinator deposes that for the purposes of the final search and response, she reviewed all records already in her possession as a result of the earlier searches.

[para 15] The Applicant argues that the Public Body was not entitled to rely on earlier searches it had conducted unless they were identical to the search that is being reviewed. Order 99-021 held that a Public Body should not rely on an earlier search unless it is for substantially the same information as the later one. However, in this case the Public Body is not relying on earlier searches as a reason not to have conducted a later one. Rather, in its later comprehensive search, it advised the departments that if they had already provided particular records, they need not provide them again. The procedure that was followed would locate all responsive records even though different records were located at different times from searches that were different in their scope. I see no reason to impugn the search for the reason suggested by the Applicant.

[para 16] The Applicant also suggests that the search was inadequate because her records were transferred from the DPL area to the Registrar on January 17, 2002, but the DPL area was searched after this transfer, and the Registrar's area was searched before it. She seeks to support these suggestions by reference to handwritten notations on copies of memoranda sent between the Public Body's officials. The source of this handwriting is unknown, and its meaning is not apparent. I cannot discern from the documents and notations to which she refers that the records were transferred in the manner she contends, or that the searches were conducted on dates on which responsive documents would not have been found due to such transfer. I accept the FOIP Coordinator's evidence that an adequate search was conducted for records in both these areas.

[para 17] I am satisfied that the last of the institution-wide searches for personal information (03-P-003), which combined the results of the earlier searches and any additional records, was comprehensive and was an adequate search for the personal information of the Applicant held by Public Body.

[para 18] The Applicant also asserts that a search was incomplete because a particular area did not archive data before 1999 and the request was for data from 1997. The facts that records were not archived and therefore do not exist is not a basis for finding that a search for records was inadequate.

[para 19] The Applicant also argues that the Public Body failed in its duty to assist her because it did not transfer her information request to the practicum provider (the body in charge of the clinical portion of her training). I do not accept the Applicant's contention that the duty to assist includes a duty to transfer a request to another public body. The ability to transfer is discretionary. Order 2000-021 held that "there is no relationship between section 9(1) [the section creating the duty to assist, now 10(1)] and section 14 [the section permitting the Public Body to transfer requests to another Public Body, now 15] that would compel the Public Body to exercise its discretionary power to transfer a request under section 14 only to assist an applicant".

[para 20] The Applicant also suggests that because the Public Body in this review had some shared responsibility over her program of study with the other Public Body aforementioned, it had control of records in the custody of the other Public Body and therefore had some duty to provide them. There is insufficient evidence before me about the relationship between the two bodies to come to such a conclusion. In any case I note that the Applicant's August 27, 2003 request for records (the subject of this review) was only for records "in all departments of [the Public Body]".

[para 21] The Applicant also suggests that I should make some adverse finding about the adequacy of the Public Body's search (or fulfillment of its duty to assist) by reference to:

- the part of the FOIP Coordinator's Affidavit in which she deposes (apparently in error) that the Applicant was a student of the Public Body until December of 1999 (the correct date is December, 1998), and
- the fact the Public Body in its response to the Applicant numbered the pages on the back rather than on the front.

With regard to the former, the context indicates to me that the incorrect date was simply an error from which no conclusions can be drawn. With regard to the latter, I accept the Public Body's explanation that placing the numbers on the back was done to avoid confusion relative to those records that were part of an earlier search and thus were already stamped with numbers on the front.

[para 22] The Applicant also argues that the records that were disclosed to her reveal that an official of the Public Body disclosed some information about her to another educational institution as well as to a public body in another province, and that this indicates that there were records (the communication by the official) that existed but were not found or disclosed to her. However, while the documents do suggest some such communication, the idea that this was in written or recorded form is speculative. I cannot base a conclusion that there was an inadequate search on this speculative argument. I accept the Public Body's assertion that there was a search that would embrace the office of the official in question, and such records were not found.

[para 23] Finally, the Applicant complains that the Public Body did not indicate to her that it was withholding records on the basis of sections 17 and 27 of the Act. The Applicant says that the Public Body's response did not allow her to even be aware of the existence of such records. I do not accept this contention because the Public Body's response clearly stated (in the third paragraph of the body of its letter to her of October 31, 2003) that it was denying access to some records falling within the scope of the request on the basis of the section 17 and 27 exceptions. However, I accept that in order to satisfy its duty to assist, the Public Body should have indicated how many records it was withholding in their entirety in reliance on the exceptions in the Act. However, I do not need to order the Public Body to provide this information, as it provided it in its Affidavit for Review 2889.

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

[para 24] Section 17 provides in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if …*
>
> > *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation, …*
> >
> > *(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… .*
> >
> > *…*
>
> *17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> > *(e) the third party will be exposed unfairly to financial or other harm, …*
> >
> > *(f) the personal information has been supplied in confidence, …*
> >
> > *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, … .*

[para 25] The Act defines personal information. The relevant parts of the definition are:

1 In this Act, …

> *n) "personal information " means recorded information about an identifiable individual, including …*
>
> > *(i) the individual's name, home or business address or home or business telephone number, …*
> >
> > *(viii) anyone else's opinions about the individual, and*
> >
> > *(ix) the individual's personal views or opinions, except if they are about someone else; … .*

[para 26] The Public Body relied on section 17(1) of the Act to withhold 59 records containing personal information of third parties in their entirety, and to sever the personal information of third parties from six pages of records.

[para 27] I have examined the withheld and severed records.

[para 28] Dealing first with the 59 pages of records withheld in their entirety, these contain the personal information of both the Applicant and of third parties. In these pages, the information of the Applicant is so intertwined with the information of the third parties that it would not be possible to sever the information of the third parties and provide the remaining information to the Applicant, without disclosing the information of the third parties.

[para 29] I must decide, therefore, whether disclosure of the personal information of the third parties in these records would be an unreasonable invasion of their personal privacy under the terms of section 17(1) of the Act. If it is, it must be withheld, because section 17 is a mandatory ('must') provision. My decision about this personal information requires me to balance the protection of the privacy interests of third parties with the right of applicants to access to information for the purposes set out in section 17.

[para 30] The Applicant makes a number of arguments to support her position that the records should be disclosed to her. These include:

- The Student Records Regulation 71/99 under the *School Act* applies. It requires that a student record must contain information affecting decisions made about the education of the student that is collected or maintained by a board. The Applicant assumes the information in the withheld pages should therefore constitute part of her 'student record'. She says there is a very narrow list of exceptions as to what may not be disclosed under the related policy. This means the Applicant can and should be given all the information in her 'student record'.
- The Public Body's harassment policy requires that a person accused of harassment be given copies of the complaint. The Applicant assumes the withheld records contain information provided about her by other students, and argues the harassment policy requires that she be given the records.
- The Public Body released information to other students about the Applicant (by posting grades in alphabetical order), so it should not now be concerned about the

privacy of the other students in considering whether to release their information to her.

[para 31] The Public Body argues that the presumptions under section 17(4) (a), (d), and (g) apply, with the consequence that disclosure of the personal information of the third parties is presumed to be an unreasonable invasion of their personal privacy. It also argues that the factors under sections 17(5) (e), (f), and (h) apply and weigh against disclosure in this case,

[para 32] I do not accept any of the Applicant's arguments about this issue.

[para 33] With respect to the Student Record Regulation, this regulation is enacted pursuant to the *School Act.* The *School Act* applies to schools (K-12), which are educational programs offered to students by 'boards'. A 'board' is defined as 'a board of trustees of a district or division'. A "district" means a school district established pursuant to the *School Act*, and a "division" means a school division or regional division established pursuant to the *School Act.* The Board of the Public Body is not the 'board of trustees of a district or division', and the provisions of the regulation do not apply in this case. The Applicant has put forward a document [3017 #14] which suggests that it was the opinion of a person who communicated with officials of the Public Body (but whose status in the Public Body, if any, is unknown) that it would be reasonable to refer to the definition of 'school record' from the *School Act* for the purpose of deciding what should be contained in a student record, and what part of it should be disclosed, in the Applicant's case. The context of the communication containing this opinion is unclear. This opinion has no relevance to my decision in this case.

[para 34] I also reject the Applicant's argument that the Public Body's harassment policy governs what information is to be disclosed in this case. The provisions of this policy respecting disclosure of information about harassment complaints do not prevail over the provisions respecting third party personal information in the *Freedom of Information and Protection of Privacy Act.* In any event, the facts presented to me do not indicate that the Public Body's harassment process was relied on.

[para 35] Finally, I reject the suggestion that the Public Body's past practices respecting disclosure of student information have any bearing on whether disclosure would be an unreasonable invasion of the personal privacy of third parties in this case.

[para 36] Turning to the arguments of the Public Body, I accept its contention that, given the context in which the records were created, severing the names associated with these records would not anonymize them. I also accept that section 17(4)(g) applies to all the personal information of third parties in the 59 pages of records which were withheld under section 17 in this case. This means there is a presumption that disclosure of the personal information would be an unreasonable invasion of the personal privacy of these persons.

[para 37] I have considered the application of the factors under section 17(5). There is evidence before me that some of the information in the withheld 59 pages of records was supplied with an expectation that it would not be disclosed to the Applicant, which weighs against disclosure of this information under section 17(5)(f) of the Act. There is also evidence that some of the persons supplying the information in the records apprehend some possibility of harm to themselves if the records are disclosed, which weighs against disclosure of this information under section 17(5)(e) of the Act. The Applicant says she wants to see the information in the withheld records so that she can know what kind of decisions were made about her that were sufficiently serious to have her "booted out" of the program. The withheld records do not appear to contain such information, and I do not see that provision of the records would be helpful or desirable to the Applicant for any of the purposes under section 17(5). This weighs against disclosure. I conclude, therefore, that in view of the applicability of the presumption arising under section 17(4)(g) of the Act, and the application of sections 17(5)(e) and (f), disclosure of the personal information in the 59 pages of withheld records would be an unreasonable invasion of the personal privacy of third parties.

[para 38] The same conclusions apply to the severed portions of the six pages of records. The presumption under section 17(4)(g) applies to all this information, and there is nothing in the information that could conceivably be of any use to the Applicant, thus no factor which weighs in favour of disclosure. I conclude that disclosure of the personal information in the severed portions of these records would be an unreasonable invasion of the personal privacy of the third parties. The Applicant has not met the burden of proving otherwise, as required by section 71(2) of the Act.

Issue C. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

[para 39] The relevant parts of section 27 provide:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege, ….*

[para 40] In Order 96-017, the former Commissioner adopted a definition of 'legal advice' which requires that the advice in question, "include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications".

[para 41] The privilege applies not only to the records that actually give the legal advice but also to those that seek it and that provide factual information relative to which the advice is sought (see Adjudication Order *#4 Hugh MacDonald MLA v. Alberta Justice / The Globe and Mail v. Alberta Justice*, October 3, 2003, at paragraphs 16 to 18).

[para 42] Solicitor-client privilege applies as well to records that quote or discuss the legal advice. In Orders 96-020 and 99-013, the former Commissioner said that solicitor-client privilege applies to information in written communications between officials or employees of a public body in which the officials or employees quote or discuss the legal advice given by the public body's solicitor. The same reasoning applies to notes 'to file'.

[para 43] The privilege also applies to lawyers' billing information. In Order F2002-007, I relied on *Stevens v. Canada* [1998] 4 F.C. 89 (C.A), which held that the statements of account of lawyers are privileged as they are integral to the seeking, formulating and giving of legal advice. I adopt this reasoning in this case. In my view the reasoning also applies to records that are not bills in themselves, but that discuss the payment of a lawyer's accounts.

[para 44] All the information that was withheld under section 27(1) of the Act falls in one of the following categories: legal advice between a solicitor and client (the Public Body) or an agent of the client; part of the continuum of communications for obtaining legal advice; a record that discusses or quotes legal advice, or; billing and related information relative to lawyers who acted for the Public Body in relation to issues raised by the Applicant. Thus all these records fall within the terms of section 27(1). I accept the Public Body properly exercised its discretion to withhold these records to preserve the utility of the legal advice it obtained, and to preserve its ability to obtain such advice.

Review 3003 (Public Body's file reference 04-P-003):

Issue D: Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 45] This review relates to the Applicant's contention that the Public Body did not conduct an adequate search because its search did not disclose records that she says were held by the Public Body's library. The Applicant has provided me with documents from that library dated 1998 and 1999 which reveal that there were transactions and correspondence between herself and the library, and that reveal the library had shown the books as unreturned and charges as outstanding. These documents contained personal information of the Applicant. The Applicant's argument suggests these documents were not found as part of the Public Body's search, and that therefore the search was inadequate.

[para 46] The Public Body's submission in Review 3003 focuses on its perception of the Applicant's reasons for requesting the search. It says that the Applicant was motivated to request another search by her mistaken idea that the Public Body had withheld transcripts or certification based on non-payment of monies owing to the Public Body or non-return of its property. The Public Body declined to undertake a new comprehensive search for records that would support this idea of the Applicant partly because it had already conducted a search that in its view was sufficiently

comprehensive, and, judging from its submission, partly because it did not accept the Applicant's idea that withholding of her certification was tied to her owing of money or property to the institution. The Public Body did, however, contact its Manager of Financial Planning to confirm there was no financial record indicating money owed to the Public Body by the Applicant. However, this latter search would not reveal whether there were records indicating that money had been owing or was said to have been owing at an earlier time.

[para 47] In my view the Applicant's motives for making the access request are not relevant to whether the search was adequate. Neither do I agree with the Public Body that I may decide on a case-by-case basis whether it is appropriate for a public body not to conduct a search.[1] While I agree that no further comprehensive search of all the Public Body's departments was called for, it does appear that there may have been personal information of the Applicant in the custody of the Public Body in its library, as there is evidence that the library held such information in 1998-1999. Whether or not the library held such information at the time of the request depends on its retention policies.

[para 48] The Public Body did not respond to the Applicant's argument that the library was not searched and thus the search was inadequate. The fact that it might have provided a rebuttal submission if this contention was incorrect gives credence to the Applicant's argument that a search of the library should have been, but was not, conducted as part of a search for the Applicant's personal information in all the departments of the Public Body. If the library was in fact not searched, the search was deficient in my view, relative to this particular department only.

Review 3017 (Public Body's file reference 04-C-004):

Issue E: Did the Public Body properly refuse to correct the Applicant's personal information, as authorized by section 36 of the Act?

[para 49] The relevant parts of section 36 provide:

> *36(1) An individual who believes there is an error or omission in the individual's personal information may request the head of the public body that has the information in its custody or under its control to correct the information.*
>
> ***(2)** Despite subsection (1), the head of a public body must not correct an opinion, including a professional or expert opinion.*
>
> ***(3)** If no correction is made in response to a request under subsection (1), or if because of subsection (2) no correction may be made, the head of the public body must annotate or link the personal information with that part of the requested correction that is relevant and material to the record in question.*

[1] The Public Body cited Order 2000-022, para 69, in support of this proposition. This order does not, in my view, suggest that I have this ability.

[para 50] The Applicant requested the Public Body to correct a grade, for a particular course (MLT 324), that had been recorded in her transcript as 50%. The Public Body in charge of the clinical portion of her training (the practicum provider) had provided this (in the Applicant's view, incorrect) grade to the Public Body in this inquiry, and the latter had entered the grade on her transcript. The Applicant supported her request for correction by providing information about her scores on tests of her clinical competency, as well as information that in her view suggests her scores on such tests should have been tabulated and calculated by the practicum provider in a different way. She also pointed to a percentage score on a particular test, which appeared in an Affidavit of her former instructor, and suggested that this grade should be substituted for the one on her transcript. The latter Public Body refused to make the correction, but it noted the request, and its refusal to make it, on the Applicant's record in the Registrar's office.

[para 51] In its initial submissions the Public Body did not explain how the grade of 50% in the MLT 324 course that appeared on the Applicant's transcript was determined. It responded to the Applicant's arguments by saying it need not correct where there is a dispute about a fact. In the alternative it said that the grade is not a fact but a professional opinion, and therefore it did not need to correct. It also said that the burden of proof that a correction is required is on the Applicant.

[para 52] I do not agree that the application for correction should be dismissed on the basis that there is a dispute about a fact. In my view that is a reason to refuse a correction only in circumstances where it is not possible to make a factual determination about the matter at issue, through the inquiry process. In this case, it is possible to determine what grade should appear on the Applicant's transcript.

[para 53] I turn now to the Public Body's argument that it cannot correct because section 36(2) of the Act prohibits it from correcting an opinion. Whether this is so depends on the aspect of the grade to which the correction request pertains. A grade can have a component that is a matter of opinion, and at the same time another component that is the application of a predetermined rule. The former is not correctible, but an error in the latter may be. Thus, for example, a qualified technician's assessment of the correctness or otherwise of a cytotechnology student's readings of gynecological slides is an expert opinion that could not be corrected. Similarly, neither the standards for accuracy that must be met by students in slide readings, nor the methods by which accuracy is determined, are correctible, both because they are not personal information (which is the subject matter of section 36), and because these are matters of professional opinion which must be left to the technical and educational expertise of the training institution. However, an error in the application of a rule would be correctible – for example, an error in tabulating the student's data on which her grade was based, or a mathematical error in calculating the result. It is necessary, therefore, to closely examine the Applicant's arguments to determine the basis of her challenge to the grade that appeared on her transcript.

[para 54] With respect to the burden of proof, section 36 of the Act does not indicate upon whom the burden lies to show that a correction should be made. Order 98-

010 discusses this question. The former Commissioner held that the factors to consider are:

i. who raised the issue? and
ii. who is in the best position to meet the burden of proof?

[para 55] In this situation, the Applicant raised the issue. However, some of her submissions suggest that she did not know how the grade of 50% was determined. (I acknowledge that this was explained to the Applicant by the Public Body, but some of her submissions suggest she remains unclear about this point. For example, she speculates in her submission that the assigned grade may have been a function of the proportion of days, out of the total number of days in the course, that she remained enrolled.) In my view, the Public Body, rather than the Applicant, in the best position to establish how the final grade of 50% was determined, and whether the method applied was the appropriate one according to the applicable rules. I therefore sought further information from the Public Body on this point.

[para 56] The Public Body replied by providing the following information:

- the grade was conveyed to it by the Public Body that provided the practicum portion of the Applicant's training (the "practicum provider")
- this communication was by way of a letter dated May 25, 2000, addressed to the Public Body from the practicum provider, stating that the Applicant had been required to withdraw from the Cytotechnology training program effective December 18, 1998, following her appeal of the requirement to withdraw, and indicating that her mark for MLT 324 was 50%
- attached to that letter was a copy of a letter dated December 9, 1998, from the practicum provider to the Applicant, which advised her that she was required to withdraw because she had failed to meet a requirement in the area of diagnostic accuracy in GYN screening, as laid out in the requirements for completion of the training program
- the practicum provider's policies for completion of the program, contained in the relevant Clinical Training Manual; these policies include
    - the rule that "failure to meet any of the minimum requirements of the program will result in a total program mark of no greater than 50%" (pages 18 and 20)
    - one of the "minimum requirements", under the heading "Competency Based Objectives Workbook", is the completion of all clinical competencies as outlined in the workbook to a satisfactory level (page 17)
- the Applicant appealed the requirement to withdraw (which the Public Body erroneously referred to as an appeal of her 'grade') by challenging the methods by which her scores were tabulated and calculated, but that this appeal was denied
- the 50% grade on the Applicant's transcript was an application of the rule that she had not met one of the minimum requirements of the program (the minimum score for accuracy for a particular evaluation period in the program).

[para 57] The materials before me also contain

- the rule, found in the Diagnostic Cytology Workbook at page 51, that at the completion of the second 10-week evaluation period, the student must achieve an

accuracy rate of 85% for GYN screening (the score is determined on a cumulative basis for the 10-week period)

- an excerpt from the Applicant's Workbook showing that she did not attain a satisfactory level for accuracy for the second evaluation period (page 53 of the workbook)
- copies of the tabulation and calculation of her overall accuracy for the period in question (which included an extension of two weeks and deletion of the first two weeks), in which overall accuracy appears as 82.75%; (this page includes corrections, made on March 25, 2002, pursuant to the Applicant's earlier correction request; the corrections that were made were based on the weekly report sheets.)

[para 58] The Applicant disputes the final grade in several ways.

[para 59] She refers to a percentage score of 82.75 that was discussed in an Affidavit of her former instructor.[2] The instructor deposed that an accuracy score of 82.75% was achieved by the Applicant [relative to a particular skill (gynecological (GYN) slide screening)] in a particular evaluation period. This Affidavit states that:

> In the first ten weeks of the program a student must have over 80% accuracy to pass and [the Applicant] achieved 80.5%. In the second ten weeks the criteria (sic) is 85% to pass and on her first attempt [the Applicant] achieved 82.71%. Upon that failure, the student was given a two week extension to meet the requirement. On this attempt [the Applicant] obtained a mark of 82.75%, a failure.

[para 60] The Applicant also says the calculations of her accuracy scores were wrong because her accuracy was to be determined by reference to a chart found at page 19 of the applicable Clinical Training Manual. She appears to suggest that page 19 of this Manual is to be used to convert accuracy percentage scores as they appear on the "Weekly Report Sheets" in the space for "Overall Accuracy", to scores for accuracy for the purpose of meeting the 10-week minimum requirements, by reading across the columns. In other words, the Applicant seems to think that, for example, an "Overall Accuracy" score of 88 on the Report Sheet means that a student's "accuracy" figure for the purpose of meeting the weekly minimum requirement is 97. [3]

[para 61] The Applicant also disputes the methods and standards by which her work in some of the tests of diagnostic accuracy (GYN (gynecological) screening) were tabulated and the ways in which the scores were calculated. She thinks that had the methods and standards relative to accuracy in cytotechnology that are used by other bodies, or discussed in particular publications, been applied, she would not have failed to meet the program requirement, and a different (higher) grade than 50% would have been assigned. She says, for example, that the practicum provider did not use the "CMA

[2] This document formed part of the Public Body's defence submission to a civil claim by the Applicant against itself, an individual and another public body.

[3] The Applicant does not expressly explain how she interprets this chart. However, her claim that an assigned percentage of 88 would result in an accuracy rate of 97 would, by reference to the chart, be in accord with the interpretation suggested here.

accreditation guidelines" for her evaluation, and that it did not use the table and formula for recording and calculating results that are used in a document that she provides, obtained from the Internet, which is titled "Cytology Standards for Accreditation". She suggests that the Public Body was contractually bound to apply the "CMA accreditation guidelines" by reference to a contract between the Public Body and the practicum provider. She also refers to the standards of the CSMLS, which is the Canadian Society of Medical Laboratory Science.

[para 62] In addition to the above, the Applicant has a number of other theories about how the accuracy scores should have been determined, and other figures that she says should have been used as her final grade. She refers, for example, to a score calculated by a named individual who was appointed to conduct an independent review of her situation. She also does calculations using what she refers to as the Public Body's definitions of "specificity" and "sensitivity", to achieve accuracy results that are greater than 90%. As well, she suggests her scores should be calculated by weighting her detection rate with her accuracy rate in a proportion of 80% to 20%.

[para 63] My review of the Applicant's arguments shows that the Applicant's challenge is, in every case, to the methods by which the Public Body assessed students' slide-reading accuracy, rather than to any misapplication of its methods in her case.[4]

64] Section 36 of the Act permits requests for corrections to personal information. In my view the crux of this request is not based on an alleged error or omission in the Applicant's personal information. It is based on alleged errors in how the Public Body treated the personal information - the way the Public Body assigned the codes that reflect how a student's slide readings compare with the readings of the reviewer, the formula it applied to calculate her scores, and the way it determined her final grade based on these scores. It is true that if the Public Body were to change the way it makes these determinations, this might change the Applicant's scores or grade, which is her personal information. However, changing the methods is not correcting her personal information. What the Applicant requests cannot be the subject of correction under section 36 of the Act.

[para 65] Furthermore, the legislation does not permit the Applicant, nor does it give the power to me, to instruct an institution engaged in training about how to set up its evaluation processes. According to section 36(2) of the Act, the head of a public body *must not* correct an opinion, including a professional or expert opinion. The methods for tabulating (assigning 'codes'), calculating results, and assigning final grades are, assuming this is done in accordance with the Public Body's own rules and correctly, matters of the professional scientific and educational expertise of the Public Body's training instructors and other professionals. Which tabulation and calculation methods are to be applied to evaluate a student's competency is a matter of such opinion. So is the grade to be assigned where some aspect of the course is not satisfactorily completed. Therefore these matters cannot become the subject of correction under the Act (though

[4] As already noted, corrections in tabulating the Applicant's data (and resulting re-calculations of her scores) had been made earlier, in response to other correction requests.

errors of recording or errors of mathematical calculation conceivably could be). To put this another way, the final grade and the calculated scores, based on the tabulated data, are a professional or expert opinion about whether the Applicant has met the necessary requirements to pass the course.

[para 66] It is not necessary for me to decide whether I see any merit in the Applicant's arguments that the Public Body is applying methods that are inferior to those used by other bodies or organizations, or is failing in its duty to apply methods that are consistent. I will nevertheless, review and comment on some of the Applicant's particular points so that she may be satisfied her arguments were carefully considered.

[para 67] With respect to her suggestion that her grade should be 82.75% - the number discussed in the Affidavit of the coordinator/instructor, I note that this score is only one component of - or, more precisely, is a precursor to - the final grade, in the sense that a particular percentage level must be achieved for particular time periods in order to pass the course, and this was one such score. Neither this, nor any other such single score, can be used as the final grade to be assigned for the course.

[para 68] With respect to the Applicant's idea that her accuracy should be determined by reference to a chart found at page 19 of the Clinical Training Manual, there is nothing on the face of the chart to suggest it is to be used in the way the Applicant suggests, and she has provided no arguments to support this idea.[5]

[para 69] The Applicant's suggestion that any of the following:

- the "CMA accreditation guidelines"
- the formula for calculating accuracy (used in a document located on the Internet) titled "Cytology Standards for Accreditation", or
- the standards of the CSMLS

be used for her evaluation, are similarly unpersuasive.

[para 70] I can find no reference to "CMA accreditation guidelines" that set out methods for evaluating slide-screening accuracy. The Applicant refers to a contract between the Public Body and practicum provider that cites "CMA accreditation guidelines" (in clause 2.01), but under this clause, the "CMA accreditation guidelines" are relevant only to "the number of students to be involved", and not more generally to evaluation processes for training.

[para 71] The document entitled "Cytology Standards of Accreditation – 1425" was taken from the website of the University of Manitoba, and appears to have emanated from or had some relationship with the Manitoba College of Physicians and Surgeons.

[5] The Chart in fact appears to set out the mark (or PERCENT ASSIGNED) that is to be assigned by reference to the percentage accuracy (ACCURACY RATE) attained, for the purpose of determining if the minimum mark of 60% for screening has been attained at the completion of the practicum. Thus the minimum percentage accuracy (ACCURACY RATE) required - (90%) - equates with the minimum mark (PERCENT ASSIGNED) of 60%, and this mark is to constitute a percentage of the final grade in the course.

The document appears to relate to the accreditation of cytology laboratories. It imposes requirements on laboratories, including that of measuring performance indicators of practicing cytotechnologists. The method of calculation cited by the Applicant, and relied on throughout her submissions, is for assessing a cytotechnologist's overall accuracy rate relative to biopsy results, according to a system that subtracts 1 to 3 points (from a total of 3 per case) for discrepancies. This is to be done for the purpose of quality assurance and to indicate the necessity for performance enhancement for cytotechnologists who do not meet the standard. I do not see the relevance of this formula to the question of assessment of slide-reading skills of students by comparison with readings of the same slides by reviewers.

[para 72] Finally, the Applicant does not make clear what she means by 'CSMLS' standards. There is some suggestion it is the formula discussed in the preceding paragraph. If that is so, the same comments apply.

[para 73] With respect to the remaining theories put forward by the Applicant about how her accuracy scores should have been determined, and other figures that she says should have been used as her final grade, I note the following:

- With respect to her reference to a score calculated by a named individual who was appointed to conduct an independent review of her situation, the Applicant does not explain how the accuracy figure this person purportedly calculated was achieved or why it should be preferred over the score that was applied.
- With respect to calculations she does using what she refers to as the Public Body's definitions of "specificity" and "sensitivity", to achieve accuracy results that are greater than 90%, the Applicant does not explain why these definitions should apply. They seem to be irrelevant, because they measure the efficacy of particular screening methods in detecting disease.
- Her suggestion that her scores should be calculated by weighting her detection rate with her accuracy rate (80% and 20%) has no merit. These proportionate weightings are mentioned in the Training Manual, but they are to be used, according to the Training Manual, in the process of determining the final grade in the course. It is not possible to apply them to determine whether the required minimum diagnostic and accuracy scores, which must each be met independently, have been met for a particular evaluation period.

[para 74] I have also reviewed the various calculations of her accuracy and supporting materials the Applicant provided in her most recent submission to this office, which was received on June 30, 2005. As with her earlier submissions, this contains suggestions for ways the Public Body should have calculated her scores or determined her final grade that are different from the methods it normally applies, and calculations made by the Applicant based on these suggestions.

[para 75] I am not persuaded that any of these other suggested scores for accuracy, or for the final grade, are correct, and should be substituted for those finally determined by the practicum provider.

[para 76] I am satisfied that in this case the final grade was to be determined in accordance with the rule, contained in the Clinical Training Manual at pages 18 and 20, that a grade of 50% will be assigned where the applicant fails to achieve any of the minimum requirements of the program. The Applicant failed to achieve the level of accuracy in GYN slide screening (85%) for the second evaluation period of the program, a requirement set out in the Diagnostic Cytology Workbook at page 51. Thus she did not meet the minimum requirement for that part of the practicum training. The way this grade was determined was a matter of professional and expert opinion, not subject to correction.[6] In accordance with the rule stated at pages 18 and 20, she was assigned a grade of 50%. This was the appropriate rule. The proper application of the rule cannot form the basis for correction under section 36. To put this another way, section 36 is not applicable to the Applicant's request.

[para 77] The Applicant makes a number of other points about factual errors in the Public Body's submissions in this particular Request for Review. One is that the Public Body arranged her appeal and prepared a draft of the response (on November 8, 1998) before she had failed the program. However, I note the date the draft letter was faxed (which is the only date on the document and is presumably, therefore, the one she refers to), is November 8, 1999 and not November 8, 1998. Another point is that the Affidavit of the Public Body's FOIP Coordinator says the Applicant continued in the program until 1999 whereas she was in fact required to withdraw in December, 1998. I agree this was an error. However, the Applicant does not suggest any motive the Public Body might have had for deliberately misleading the court on this point, and I do not accept there was a deliberate deception. In any event, I do not see the relevance of these points to the Applicant's claim for correction of her grade.

Review 3084 (Public Body's file reference 04-G-003):

Issue F: Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 78] The Applicant requested specified information from the Public Body's Calendar for the time period January, 1997 to April, 2004. The Public Body provided excerpts from 1998-1999, and 2004-2005, but did not provide the excerpts for 1997-1998, 2000-2001, 2001-2002, 2002-2003, or 2003-2004.

[para 79] This review relates in part to the Applicant's contention that the response was inadequate because excerpts from only some of the years (two of six) were provided.

[para 80] The Public Body does not dispute this fact, but says it did not provide the other excerpts for two reasons. With regard to 1997-1998, it said it searched the Registrar's office for a copy but found that one had not been maintained. It did not search

[6] There have already been corrections for some errors in tabulating the Applicant's data. The Applicant is no longer arguing such errors, but rather is contending the wrong methods were applied. The methods to be applied for determining the scores are the subject of professional opinion, and I cannot accept such arguments.

throughout the institution. It said this was because in its view the 1998-1999 Calendar contained the information that would be relevant to the Applicant's situation. Similarly, it did not provide the remaining excerpts (although presumably these latter were available) because in its view the Applicant would not want the requested policy information because she was not in attendance in the institution in those years and the information would not apply to her.

[para 81] In my view the Public Body's search for the 1997-1998 Calendar in the Registrar's office was adequate. It was not necessary to determine if any copies had been retained by any other departments or individuals in the institution. With regard to the remaining Calendar excerpts that were not provided, the Applicant's motives for requesting information are irrelevant to the issue of whether the information should be provided. Although it seems the information is quite likely publicly available, which would justify a refusal to provide it under section 29 of the Act, the Public Body has not relied on this provision for its refusal. I therefore find the Public Body should have searched for the requested information from the years 2000-2001, 2001-2002, 2002-2003, and 2003-2004, and provided any such information in its possession.

[para 82] With respect to the Applicant's request for the name of a professional body to which a specific Public Body counselor belonged, and records showing that a specified individual acted as legal counsel for Public Body, I accept the Public Body's statement that it did not locate and does not have any records that contain this information.

V. ORDER

[para 83] I make this order under section 72 of the Act.

[para 84] I order the Public Body to search its library for the Applicant's personal information (unless it has done so already). Beyond this I find the search was adequate under section 10(1) of the Act.

[para 85] I uphold the Public Body's decision to withhold and sever the personal information of third parties under section 17 of the Act.

[para 86] I uphold the Public Body's decision to withhold information subject to legal privilege under section 27(1) of the Act.

[para 87] I order the Public Body to search for its Calendars for the years 2000-2001, 2001-2002, 2002-2003 and 2003-2004, and provide any such records in its possession.

[para 88] I uphold the Public Body's decision to refuse to change the Applicant's grade on her transcript.

Frank Work, Q.C.
Information and Privacy Commissioner