ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-28

September 13, 2013

LETHBRIDGE COLLEGE

Case File Number F6056

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Lethbridge College (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). He requested anonymous surveys completed by team members of the women's volleyball team about coaching staff. He also requested all documentation referring to the surveys.

The Public Body located responsive records, but withheld them under sections 17, (disclosure harmful to personal privacy), 18, (disclosure harmful to individual or public safety) and 24(1)(b) (consultations and deliberations).

The Adjudicator determined that most of the information withheld by the Public Body was not personal information, as the volleyball team members could not be identified individually. She also found that the Public Body had not established that its expectation that harm might result from disclosing the records was reasonable. Finally, the Adjudicator found that the information to which the Public Body applied section 24(1)(b) did not contain consultations or deliberations, but rather an objective description of a state of affairs. She ordered the Public Body to disclose the information in the records to the Applicant, with the exception of a name and email address, and a comment containing educational history that could enable identification of the comment's maker.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 17, 18, 24, 30,72

Authorities Cited: AB: Orders 99-009, F2004-032, F2006-006

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515

I. BACKGROUND

[para 1] The Applicant made an access request to Lethbridge College (the Public Body) for anonymous individual survey responses provided by members of the women's volleyball team. The purpose of the anonymous survey was to obtain the views of volleyball team members about the way the Applicant and other coaching staff performed coaching duties. The Applicant stated in his access request that he had been provided negative points from the surveys, but had never been provided with positive points. The Public Body indicates in its submissions that the survey formed part of its investigation into accusations made about the Applicant, and that his contract was terminated on the basis of the investigation. The submissions of the Public Body confirm that records 36 – 38, which contain negative comments, were reviewed with the Applicant in person.

[para 2] In response to the Applicant's access request, the Public Body provided records containing the survey questions that had been asked, but withheld the answers that had been provided in response to them. According to the index the Public Body supplied for the inquiry, it withheld the answers under sections 17(1) (disclosure harmful to personal privacy) and 18 (disclosure harmful to individual or public safety). The Public Body also withheld an email written by one of the players, and portions of a letter addressed to the Applicant, where it referred to survey answers, under section 17(1). The Public Body withheld the contents of three emails (records 39, 40, and 41) under section 24.

The Applicant requested review of the Public Body's decision. The Commissioner authorized mediation to resolve the issues between the parties. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. RECORDS AT ISSUE

[para 3] The records at issue are responses to an anonymous survey (records 1 – 34), a letter or memo documenting with the Applicant's name at the top, (records 36 – 38) and four emails (records 35, 39 – 41). The information at issue in these records is the information the Public Body withheld from the Applicant.

III. ISSUES

Issue A: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information withheld from the records?

Issue B: Does section 18 of the Act (disclosure harmful to individual or public safety) apply to the information withheld from the records?

Issue C: Does section 24 of the Act (advice from officials) apply to the information withheld from the records?

IV. DISCUSSION OF ISSUES

[para 4] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 5] Section 1(n) of the FOIP Act defines personal information. It states:

> *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,*
> > > *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
> > > *(iii) the individual's age, sex, marital status or family status,*
> > > *(iv) an identifying number, symbol or other particular assigned to the individual,*
> > > *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
> > > *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
> > > *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
> > > *(viii) anyone else's opinions about the individual, and*
> > > *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 6] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 7] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, 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.*

[…]

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

[…]

(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[…]

(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 […]

[para 8] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 9] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application) applies. Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 10] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

> In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner,

> the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4).
>
> In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is [*sic*] met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4). [my emphasis]

Section 17(1) requires a public body to withhold information only once the head has weighed all relevant interests in disclosing and withholding information under section 17(5) and has concluded that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 11] If a decision is made that a presumption set out in section 17(4) applies to information, then it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not be, an unreasonable invasion of a third party's personal privacy to disclose the information. If the decision is made that it would be an unreasonable invasion of personal privacy to disclose the personal information of a third party, section 6(2) of the FOIP Act requires the Public Body to consider whether it is possible to sever the personally identifying information from the record and to provide the remainder to the Applicant.

Records 1 – 34, 36 - 39

[para 12] The Public Body has withheld statements made by members of a women's volleyball team contained in records 1 – 34 and 36 – 39 from the Applicant. The statements are anonymous, and appear without personal identifiers, such as names. The statements have been compiled into two documents. The statements appearing in records 1 – 34 are generally favorable to, and supportive of, the Applicant, although there are some negative statements in these records which are also reproduced in records 36 - 39. The statements appearing in records 36 – 39 are negative. The Public Body indicates that the statements appearing on records 1 – 11 are "aggregate", in the sense that it compiled these statements from all the statements it received from records 12 - 34. Records 12 – 34 contain the complete responses of individuals, and are not combined with the statements of others. The responses do not contain the names of the persons responding.

[para 13] These statements in the responses do not indicate the names of anyone who participated in the survey, and no statements are attributed to one participant or to all participants. Moreover, the statements are general assessments of the Applicant's coaching style, and do not refer to specific circumstances, or contain specific conversations that would enable the Applicant to identify the team members making statements.

[para 14] The statements are opinions about the Applicant, and fall within the terms of section 1(n)(viii). The statements are therefore the personal information of the Applicant. While an individual's opinion about another individual is the personal information of the other individual, the fact that an individual holds the opinion remains

the personal information of the individual. This point is made in Order F2006-006 in which the Adjudicator noted:

> A third party's personal views or opinions about the Applicant - by that reason alone - are expressly not their personal information under section 1(n)(ix). However, the identification of the person providing the view or opinion may nonetheless result in there being personal information about him or her. Section 1(n)(ix) of the Act does not preclude this conclusion, as that section only means that the content of a view or opinion is not personal information where it is about someone else. In other words, the substance of the view or opinion of a third party about the Applicant is not third party personal information, but the identity of the person who provided it is third party personal information.

If it is possible for the statements to be attributed to specific individuals, then the fact that the individuals made these statements and are associated with the views presented in them would be their personal information.

[para 15] For the reasons that follow, with one exception, I am unable to find that the makers of the statements are identifiable from their statements or that any of the information in the statements can be attributed to any one person.

[para 16] I find that the fourth statement appearing on record 4, which also appears as an answer to the third question appearing on record 16, does contain personal details sufficient to identify the maker of the statement. However, with regard to the other statements in records 1 – 34 and 36 – 39, I find that they do not contain any details about the makers of the statements so as to enable a reader to identify them. The statements express various opinions, rather than one opinion, so it is not possible to attribute one opinion to all the members of the volleyball team. The statements do not contain unique grammatical styles or contain details of events or conversations, or a statement maker's part in events, specific enough to enable the Applicant to identify the maker of any particular statement. Where conversations are documented, they are conversations the Applicant had with the entire team. Where the Applicant's decisions and actions are referred to, they are decisions and actions relating to the entire team.

[para 17] With the exception of the fourth statement appearing on record 4, which also appears as an answer to the third question appearing on record 16, I find that it is not possible to identify the makers of the statements from the statements. I therefore find that information about the makers of the statements as identifiable individuals is not present in the records, with the exception of the statement I have described appearing on records 4 and 16. The only personal information in these records is that of the Applicant.

[para 18] Cited above, section 17(1) delineates the type of information that a public body may withhold under section 17. It states:

> *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.*

As I find that personal information of third parties within the terms of section 1(n) of the FOIP Act is not present in records 1 – 34 and 36 – 39, with the exception of the statement appearing on records 4 and 16, it follows that I find that the Public Body improperly applied section 17(1) when it withheld information from records 1 – 34 and 36 – 39 on the basis of this provision. As I find below that section 18 does not apply to the information in these records, I will order the Public Body to disclose these records in their entirety, with the exception of the statement appearing on records 4 and 16, to the Applicant.

The statement appearing on records 4 and 16

[para 19] The statement appearing on records 4 and 16 contains details about the educational history of the maker of the statements that could serve to identify her. I find that the information in the statement is subject to the presumption set out in section 17(4)(d).

[para 20] The statements made by this anonymous player are generally supportive of the Applicant. The statement that appears on both records 4 and 16 refers to a concern she had that she intended to discuss with the Applicant. It is therefore possible that the maker of the statements appearing on records 4 and 16 would have consented to the disclosure of the information she provided.

[para 21] The Public Body states in its submissions that it did not contact members of the volleyball team under section 30 to determine their views regarding disclosure of the statements in the records to the Applicant. I understand that it did not provide notice to the author of the statement, who is a member of the volleyball team. It did not obtain evidence from the writer of the statement as to whether she expected the statement, or her other statements, to be kept confidential. Had the Public Body contacted the author of the email, it could have tested its theory that the email was supplied in confidence. By contacting the author, it could have obtained evidence to support the application of section 17(5)(f), or to establish that this factor does not apply. Alternatively, by contacting the third party, it might have obtained her consent to disclose the email to the Applicant. As it stands, there is simply no evidence that the email was supplied to the Public Body in confidence and I find that section 17(5)(f) is an irrelevant consideration.

[para 22] That being said, I am unable to identify any factors that weigh in favor of disclosing the information I have described above from records 4 and 16. As the information is subject to a presumption that it would be an unreasonable invasion of the third party's personal privacy to disclose the statement, the statement must be withheld.

Record 35

[para 23] Record 35 is an email written by a member of the volleyball team. The email contains the player's opinions about the Applicant. I find that the player's name, email address, and the fact that she holds the opinions about the Applicant contained in the email are her personal information.

[para 24] The personal information of the volleyball team member appearing in record 35 is information falling within the terms of section 17(4)(g), as it contains her name in the context of other information about her, i.e. her email address and the fact that she holds particular opinions. The personal information of the team member is therefore subject to a presumption that it would be an unreasonable invasion of her personal privacy to disclose it.

[para 25] The Public Body argues:

> Section 17(5)(e) was determined to be a relevant circumstance based on the fact that the applicant could conceivably use the information to make further unwanted contact with the students.
>
> It was brought to the attention of the Athletic Manager by some of the team athletes that the day after the applicant's contract was terminated, he had unapproved contact with the athletes who completed the survey. Following the team practice in the evening after the applicant's contract was terminated, he and the assistant coach who left the team on his own volition, confronted the group of students to whom the survey was sent. It was reported to the Athletic Manager that the applicant wanted to determine who said what and who it was that stirred his termination (our words not those of the athletes, as by using their words here could allow for identification of the athletes). His action was not permitted by the college management, nor known about until after the fact. Given his action and the justification provided for severing under 17(5)(f) – that he could identify the students if the survey responses were disclosed, the harm that could result is the applicant using the information to make additional unwanted contact with the athletes to establish whose comments stirred his termination.

The Public Body did not provide an affidavit or other direct evidence from someone with knowledge of the meeting it alleges took place between the applicant and the volleyball team members and to which it refers to as a "confrontation". I am unable to find on the basis of the Public Body's arguments, or the evidence of the records, that the meeting it claims took place was a "confrontation", or that it took place without the consent of the players. Moreover, accepting that the Applicant met with the volleyball team after his dismissal without obtaining the permission of the Public Body to do so, I am unable to find that this fact would serve to establish that the Applicant would attempt to harm members of the volleyball team should he receive all the comments they made.

[para 26] I find that the Public Body's arguments that disclosure of the records could result in harm to members of the volleyball team are without merit and do not serve to establish that section 17(5)(e) (exposure to harm) has any application to the decision to be made under section 17(5) in relation to the records generally or to record 35 specifically. I base this finding on the fact that not only is there no support for the Public Body's arguments regarding harm, but that the information in record 35, which describes the Applicant's coaching in favorable terms, contradicts the Public Body's statements regarding the Applicant and his relationship with the volleyball team members.

[para 27] With regard to the Public Body's arguments that the information in the records was supplied in confidence within the terms of section 17(5)(f), I have already noted that the contents of record 35 establish that its author wrote it in order to support

the Applicant and to seek his reinstatement. Many of the statements in the email indicate that the author of the email would like the Applicant to know her views. Moreover, as the purpose of the email is at least partly to persuade the Public Body to keep the Applicant on as coach, I infer that the Applicant anticipated that the email would be distributed at least to the extent that it would be provided to those employees of the Public Body responsible for making the decision regarding reinstatement.

[para 28] As discussed above, the Public Body did not provide notice to any of the players to obtain their views regarding disclosure of the statements in the records to the Applicant. I understand that it did not provide notice to the author of the email, who is a member of the volleyball team. Similarly it did not obtain evidence from the author of the email as to whether she expected the email to be kept confidential. Given the indications in the email that its author might want the Applicant to know her favorable views regarding his coaching, the Public Body's decision not to provide her with notice under section 30 to obtain her position regarding disclosure of the email is arguably an inappropriate exercise of its discretion. Moreover, had the Public Body contacted the author of the email, it could have tested its theory that the email was supplied in confidence. By contacting the author, it could have obtained evidence to support the application of section 17(5)(f), or to establish that this factor does not apply. Alternatively, by contacting the third party, it might have obtained her consent to disclose the email to the Applicant.

[para 29] As it stands, there is simply no evidence that the email was supplied to the Public Body in confidence and I find that section 17(5)(f) is an irrelevant consideration.

[para 30] That being said, there are only indications in the email that the author of the email wanted the Applicant to know that she holds particular views. It is possible that with the passage of time, she may no longer want to be associated with the views she expressed in the email. I also note that the Applicant's primary purpose in obtaining the records is to learn whether they contain any positive statements about him.

[para 31] As I am unable to find that there are any factors that apply and would outweigh the presumption under section 17(5), I find that the author of the email's identifying information must be withheld. However, if the name and the email address are removed from record 35 under section 6 of the FOIP Act, it would not be possible for the Applicant to identify its author and the remainder of the information can be disclosed to him. I say this because the author of the email does not use language differently than her teammates, or provide details of specific conversations or events that would enable her to be identified. As I find below that section 18 does not apply, I will order the Public Body to sever the name and email address of the third party from the record and to provide the remainder to the Applicant.

Issue B: Does section 18 of the Act (disclosure harmful to individual or public safety) apply to the information withheld from the records?

[para 32] Section 18(1)(a) of the FOIP Act states, in part:

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(a) threaten anyone else's safety or mental or physical health[…]*

[para 33] In Order 99-009, former Commissioner Clark explained the necessary elements for establishing the reasonableness of an expectation that the disclosure of information could threaten the health or safety of an individual under what is now section 18 of the FOIP Act. He said:

> In Order 96-004, I said that where "threats" are involved, the Public Body must look at the same type of criteria as the harm test referred to in Order 96-003, in that (i) there must be a causal connection between disclosure and the anticipated harm; (ii) the harm must constitute "damage" or "detriment", and not mere inconvenience; and (iii) there must be a reasonable expectation that the harm will occur.
>
> Consequently, for section 17(1)(a) to apply, [now section 18(1)(a)], the Public Body must show that there is a threat, that the threat and the disclosure of the information are connected, and that there is a reasonable expectation that the threat will occur if the information is disclosed.

[para 34] In Order F2004-032, the Adjudicator found that a Public Body cannot rely on speculation and argument that harm might take place, but must establish a reasonable expectation that harm would result from disclosure before it may apply section 18 of the FOIP Act.

[para 35] In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner),* 2006 ABQB 515, the Court agreed with the Commissioner that a public body must provide evidence to support its arguments that there would be a risk of harm if information is disclosed. The Court said:

> The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasons does he suggest that evidence of actual harm is necessary. The evidentiary standard that the Commissioner applied was appropriate. The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm."

These cases establish that section 18 of the FOIP Act applies to harm that would result from disclosure of information in the records at issue, but not to harm that would result from factors unrelated to disclosure of information in the records at issue. Further, a public body must provide evidence that there is a reasonable expectation that harm will result from the disclosure of information contained in the records.

[para 36] As set out above, the Public Body argues that the Applicant would be likely to identify the students from the information in the records and to contact them, contrary to their wishes. With regard to section 18, it states:

> The college has partially severed the records using section 18(1)(a) as authority to do so. This section was applied only to those comments or portions **o**f comments that the college believes would threaten the student's safety or mental or physical health should the applicant have access to the information. In the survey comments, some of the athletes self-disclosed the impact the situation had on them personally and on others.
>
> As previously stated, the college believes the applicant could determine the identity of the athletes who completed the survey. Based on his confrontation with the students to find out what was said, and who said what about him, the college believes he would use the information to make unwanted contact with the athletes to discuss the particulars of the termination of his contract and / or to discuss the survey comments within the athletic community. Sharing of this information within the athletic community could increase the probability of harm to the athletes who were most negatively affected.

The Public Body's arguments rely on its view that the Applicant would be able to identify the makers of statements from the contents of the statements. I have already rejected this view and find that the makers of the statements are not identifiable from the statements. The team members do describe the impact of events on the team and as team members, but in general terms so that the impact described does not serve to identify any of them individually.

[para 37] With regard to records 1 – 34, as discussed above, the parties who made statements are not identifiable from their statements. Secondly, most, although not all, of the comments are supportive of the Applicant. With regard to record 35, the comments it contains are clearly intended to support the Applicant and to ensure that he continue as coach of the volleyball team. With regard to records 36 – 39, which do contain negative comments about the Applicant, (some of which appear in records 1 – 34) the evidence of both parties is that this information was disclosed to the Applicant in a meeting verbally, despite its now being withheld in response to his access request. The Applicant indicates in his access request that he is aware of the negative comments; he is now seeking the positive comments. Like records 1 – 34, records 36 – 39 do not contain names or other information that would serve to identify individuals who made statements.

[para 38] Even if the team members making the statements were identifiable to the Applicant on the basis of the contents of their statements, I would not find it likely that harm would result to them as a result of the disclosure of the statements. The information withheld from the records under section 18 is either generally favorable to the Applicant or has already been described to him.

[para 39] It is also unclear how sharing the comments in the athletic community would result in harm to the team members. The comments are, for the most part, about the Applicant himself, and, where they are not, with the exception of information I have found is subject to section 17, it is not possible to identify the makers of the comments.

[para 40] No evidence has been submitted that would lead me to conclude that if the Applicant received statements in response to an access request that contain favorable opinions about him, or alternatively, unfavorable opinions that have already discussed with him, that this would lead him, or anyone else, to harm the team members physically or psychologically. The Public Body's submissions in relation to section 18 amount to

bare arguments, as described in *Qualicare Health*, and do not establish a reasonable expectation of harm.

[para 41] For these reasons, I find that section 18 does not apply to the information to which the Public Body applied this provision.

Issue C: Does section 24 of the Act (advice from officials) apply to the information withheld from the records?

[para 42] The Public Body applied section 24(1)(b) to withhold information from three emails appearing on records 39 – 41.

[para 43] Section 24(1)(b) of the FOIP Act states:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(b) consultations or deliberations involving*
> *(i) officers or employees of a public body,*
> *(ii) a member of the Executive Council, or*
> *(iii) the staff of a member of the Executive Council […]*

[para 44] The Public Body argues:

> The college reviewed Order F2006-016 and noted that the purpose of section 24(1)(b) is to shield consultations or deliberations that occurred during the decision-making process. "Consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of a particular proposal or suggested action. The Commissioner defined a "deliberation" as a discussion or consideration by the persons described in the section of the reasons for or against an action.

[para 45] I agree with the Public Body's discussion of the principles behind section 24(1)(b) and the meaning to which it assigns "consultations" and "deliberations" in this provision. However, having reviewed the emails in question, I find that there is no information falling within the terms of section 24(1)(b) in them. Rather, these emails describe a course of action that had already been adopted. The emails do not seek views as to the appropriateness of the course of action, or discuss reasons for or against the action; the purpose of the emails is to communicate an objective state of affairs.

[para 46] For these reasons, I find that section 24(1)(b) does not apply to the information to which the Public Body applied this provision.

V. ORDER

[para 47] I make this Order under section 72 of the Act.

[para 48] I order the Public Body to disclose the information in the records to the Applicant with the exception of the name and email address of the author of the email appearing in record 35, and the fourth statement appearing on record 4 and the third statement appearing on record 16.

[para 49] I order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

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Teresa Cunningham
Adjudicator