ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-57

November 23, 2016

ATHABASCA UNIVERSITY

Case File Number F8640

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Summary: The Applicant made an access request to Athabasca University (the Public Body) for information in his student records. The Public Body responded to his request and withheld certain records under sections of the *Freedom of Information and Protection of Privacy Act*. The Applicant requested a review of the Public Body's decision to withhold records.

The Adjudicator found the Public Body did not properly withhold certain records. She ordered disclosure of certain records. She also found section 32 did not apply in this case.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.17, 24, 32, 72

Authorities Cited: AB: Orders 96-006, 96-011, 97-009, F2004-024, P2007-029, F2009-015, F2009-010, F2012-10, F2013-13, F2014-29

Cases Cited: *Canada (A.G.) v. Downtown Eastside Sex Workers* (2012) 2 S.C.R. 524, *Covenant Health v. Alberta (Information and Privacy Commissioner)* 2014 ABQB 562

Other Source Cited: Access and Privacy Branch, Alberta Government Services. *Freedom of Information and Protection of Privacy Guidelines and Practices 2009*. Edmonton: Government of Alberta, 2009.

I. BACKGROUND

[para 1] This inquiry arises from an access request made under the *Freedom of Information and Protection of Privacy Act* (the Act) by the Applicant to Athabasca University (the Public Body) for records in his student file located in various areas of the Public Body, as well as several audio recordings.

[para 2] The Public Body responded to the Applicant's request, providing him with some audio recordings as well as paper records, from which information had been redacted in reliance on sections 17 and 24 of the Act. The Applicant requested a review of the Public Body's response, listing several issues. After an investigation was concluded by this Office, the Applicant requested an inquiry into the Public Body's application of section 24 to information in the records. He also argued that section 32 "overrides" this exception.

II. INFORMATION AT ISSUE

[para 3] In an effort to manage the information at issue, I have grouped withheld information in the following manner:

A. Record 12, pages, 11, 14, 15 (two instances), 17 (two instances), 19.
   - The information in this group is found in an email chain between ZJ (an employee of the PB) and various other individuals employed with the Public Body.

B. Record 16, pages 5 and 6.
   - Information withheld on this page is an email exchange between two instructors at the Public Body.

C. Record 19, pages 50, 52,53. From Record 21, pages 50, 52, 53.
   - The information is found in an email from an instructor to the Department Chair. The subject line is "Midterm #1, Step 2 Appeal Process."

D. Record 19, pages 89, 90, 91, 145, and 146. Identical to Record 21, pages 89 and 91
   - This information is in an email with the subject line –" Step Two – Appeal to Course Coordinator."

E. Record 19, page 119. Identical to page 119 in Record 21.
   - This is information in an email dated August 1, 2014. The subject line is "CRM - 0052845."

F. Record 19, pages 138, 139, 140, 141, 142, 143, 144. The same information is in Record 21 at pages 138, 139, 140, 141, 142, 143, 144, 145 and in Record 22 at pages 2, 3, 4 and 6.
   - This information is an email chain of letters under the subject line of "I need to know if we can close ticket."

G. Record 21, page 146.
    - The information in the first redaction on this page is an email sent by the Applicant.

H. Record 22, pages 7, 8, 9, 10, 11. The same information is in Record 26 at pages 17, 18, 27, 28, 37, 38, 48, 49, 59, 60, 79, 80, 102, 110, 111, 112, 120, 121, 129, 130, 138, 139, 140, 149, 150, 159, 160, 169, 177, 178, 186, 187, 195, 196, 210, 211, 218, 219, and 220.
    - This information is an email chain under the subject line "ATTN: [name of instructor] – Online Quizzes."

I. Record 26, pages 89, 90.
    - This information is an email chain under the subject line "Assistance."

J. Record 26, pages 234, 235 and 236.
    - This information is an email chain under the subject line "Please reassign…"

K. Record 34, pages 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21.
    - This information is various emails and email chains with the subject line "ASD-Request 02298159."

III. ISSUES

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

Issue B: Does section 32 of the Act (information must be disclosed if in the public interest) require the Public Body to disclose the information/records?

IV. DISCUSSION OF ISSUES

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

[para 4] The Public Body applied sections 24(1)(a) and (b) to the information at issue. These provisions state:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(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 5] The Public Body submits it consulted Service Alberta's FOIP Guidelines and Practices (2009). Chapter 4, page 179 provides definitions for some of the terms found in section 24(1)(a).

> *Advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.
>
> *Recommendations* include suggestions for a course of action as well as the rationale for a suggested course of action.
>
> *Proposals* and *analyses or policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[para 6] In previous orders, the Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p.9).

[para 7] In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at paragraph 123). She explained,

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. This purpose would not be achieved if information otherwise falling under section 24(1)(a) were automatically producible prior to the decision maker actually receiving it, or in cases where a public body elected to follow another course and the advice did not ultimately reach the decision maker. So long as the information described in section 24(1)(a) is developed by a public body or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a) regardless of whether the individual or individuals ultimately responsible for making a decision receives it.

[para 8] In Order 96-006, former Commissioner Clark considered the meaning of "consultations and deliberations" within the terms of section 24(1)(b). He said:

> When I look at section 23 as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe a "consultation" occurs when the views of one or more officers or

> employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of the responsibility of [the] person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.

[para 9] In Order F2012-10, the adjudicator further clarified the scope of section 24(1)(b):

> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 10] As the adjudicator in Order F2014-29 suggested (at para. 74-79),

> The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (section 24(1)(a)), or consultations or deliberations between specified individuals (section 24(1)(b)). Neither section 24(1)(a) nor (b) apply to a decision itself (Orders 96-012, at paras. 31 and 37).
>
> Further, sections 24(1)(a) and (b) apply only to the parts of the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of the individuals involved in the advice or consultations, dates, and information that reveals only the fact that advice is being sought or consultations held (and not the substance of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para 89).

[para 11] It is clear from the information provided to the Applicant that the Public Body has meticulously disclosed the names of the individuals involved, the dates of the emails and information found in the subject line of the emails suggesting advice is being sought or consultations are being held. For example, in group C (as outlined above in para. 3), the subject line of the email chain is Midterm #1 Step 2 Appeal. The information contained in this email is directed to an individual who is in a position to make a decision on the matter. The names of the individuals are disclosed, the date of the email is disclosed and the subject line is disclosed. This is the case for all of the emails in the information at issue.

[para 12] I will now review each of the groups of information and determine whether section 24(1) is applicable.

Group A

[para 13] This is a series of emails between an instructor (ZJ) and various other individuals employed with the Public Body. One subject line is "[KS – student number] BIOL-230." The other subject line is "Please accept my apologies." The emails are directed toward taking an action or decision on a particular matter while providing analysis of events, or are consulting about a course of action to be taken. I find this group to be properly withheld under section 24(1)(a) and 24(1)(b).

Group B

[para 14] Information in these two emails are between two instructors at the Public Body. The initial email (Record 16, page 6) has been marked as non-responsive to the Applicant's request and also withheld under section 24(1)(a). The Applicant's request was for copies of his student records and audio recordings of his telephone interactions. I agree with the Public Body the initial email is non-responsive to his request. It is a request for decision to be made on an matter unrelated to the Applicant and is directed to a decision maker. It provides advice to the decision maker. I find the Public Body correctly withheld this email as non-responsive.

[para 15] The email exchange found at the bottom of Record 16, page 5 has also been marked as non-responsive to the Applicant's request. It proposes a course of action on the request for a decision and asks a further question on the request for action. I find this can be characterized as deliberations and consultations. It is unrelated to the Applicant's request. I find the Public Body correctly withheld this email.

[para 16] Similarly, the next email in response to those emails is also non-responsive to the Applicant's request. While the Public Body has also applied section 24(1)(a) to this email, I find that this email is not a consultation, but rather a statement of fact about an agreement. I find the Public Body correctly withheld this information as non-responsive to the Applicant's request.

[para 17] Finally, the Public Body has withheld the first line of an email sent by the decision maker to another employee of the Public Body regarding the decision made. The Public Body applied section 24(1)(a) and also indicated the information was non-responsive to the Applicant's request. The first line contains personal information about an individual who is not the Applicant. It is my opinion that while the correct section to withhold this information would be section 17, it is also non-responsive to the applicant's request. However, the decision itself, having now been made, is responsive to the Applicant's request and the Public Body is not entitled to withhold a final decision under section 24(1). I will order the Public Body to disclose the first line of this email, but to withhold the name and student ID number.

Group C

[para 18] This information is an email from an instructor to the Chair of the Department. This email is referenced by the Applicant on numerous occasions within the information the Public Body has disclosed to the Applicant. It would appear that it is information the Applicant already

has. Indeed, the author of this email has apologized to the Applicant for a term used within the email. The Public Body has, however, continued to apply section 24(1) to this email.

[para 19] This email can be characterized as outlining backgound facts regarding which a decision is to be made. There is a reference to a policy of the Public Body. However, there is no advice given or sought, no recommendations, no analyses of the information, and no exploration of policy options within the email. This is not an email either soliciting or responding to a request for consultation or deliberation. Rather, it is an email sent to a decision maker with an outline of the facts on which a decision is to be made.

[para 20] I find the Public Body did not properly apply section 24(1) to this information and I will order the Public Body to disclose it.

Group D

[para 21] These pages consist of an email sent by an instructor under the subject line "Step Two—Appeal to Course Coordinator." It is similar to the emails discussed immediately above.

[para 22] Again, these emails can be characterized as outlining facts regarding which a decision to be made, and, again, there is reference to a policy of the Public Body. There is no advice sought or given, no recommendations, no analyses of the information and no policy options explored. The emails merely outline the steps to be taken by the decision maker.

[para 23] I find the Public Body did not properly apply section 24(1) to this information and I will order the Public Body to disclose it.

Group E

[para 24] This email has been sent by one employee of the Public Body to two other employees. The email solicits advice on how to proceed on a matter and what decision should be made. It recommends a proposal for action and invites comments and as such can be characterized as consultation. I find the Public Body has correctly applied section 24(1) to this information.

Group F

[para 25] This information is a repeated email chain sent among various members of the Public Body. It starts with a request for advice on how to proceed on an issue. Various individuals respond with recommendations and analyses of the situation. All of the emails involving some amount of deliberation with respect to the issue and the course of action to be taken. I find the Public Body has correctly withheld most of this information under section 24 of the Act. The only information I will order to be disclosed is the last email from S to J indicating the final decision. This is found in Record 22, page 6.

Group G

[para 26] The first redaction on this page is an email from the Applicant. The Public Body has withheld this information relying on section 24(1)(a) and 24(1)(b). I cannot see how these sections would apply to this information and I will order the Public Body to disclose it.

Group H

[para 27] This information is akin to the information in Group F. The various individuals involved are deliberating regarding a course of action to be taken. There is advice and recommendations on the course of action. I find the Public Body has correctly withheld most of the information in this group, save for the second redaction at Record 22, page 11. This is not part of the email chain and is merely a statement of fact. On the page, the information is below an email from I to the Applicant and is numbered "29." I will order the Public Body to disclose this information.

Group I

[para 28] The information being withheld is an email chain asking for information. The response to the email is setting out how the information will be forwarded to the requestor. This information consists of facts regarding a certain request. There is no advice, proposals or recommendations in the email. There are no consultations or deliberations. This is a straightforward request for information and a reply. I find the Public Body did not properly apply section 24 to this information and I will order the Public Body to disclose it.

Group J

[para 29] The information in this group is contained within an email chain. The information in this matter is a direction for action, rather than a solicitation for advice as to how to proceed in a matter. I do not find any advice, proposals, recommendations, analyses or policy options developed in this email chain, nor do I find any consultations or deliberations. The Public Body also withheld information (Record 26, page 235 first redaction on the page and Record 26, page 236 first redaction on the page) as being non-responsive to the Applicant's request. I agree with the Public Body that this information is non-responsive and will not order that it be disclosed. With respect to the rest of the withheld information, I find the Public Body has incorrectly applied section 24 and I will order the Public Body to disclose the information.

Group K

[para 30] The Public Body withheld information contained in an email chain among various employees. The information can be characterized as a request for factual information and such factual information being provided. There is no advice, proposals, recommendations, analyses or policy options that would be revealed in the information. There are no consultations or deliberations contained within the email. I find section 24(1) does not apply to this information and I will order the Public Body to disclose it.

Exercise of discretion

[para 31] Section 24 is a discretionary ("may") exception. Even if this section applies to the information, the Public Body may still decide to disclose. To exercise its discretion properly, the Public Body must show that it considered the objects and purposes of the Act.

[para 32] The purpose of section 24 is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decision without fear of being wrong or appearing foolish if these frank deliberations were made public. (Order 96-006 para.10).

[para 33] The Public Body submitted the following as to how it exercised its discretion:

> Athabasca University considered the FOIP Act's general purposes, the particular provisions on which the University was relying, the interests the provision attempts to balance and whether withholding the portions of the records would meet the purposes of both in this case. Athabasca University also considered the purpose of section 24(1) to protect the ability of a public body to obtain and consider frank advice without interference.
>
> After considering all of these items, Athabasca University determined the information contained within the records marked with the section 24(1) redactions, met all steps of the three step process in all instances and that the information met the definitions as outlined in the Service Alberta Guidelines and Practices and the respective Commissioner Orders outlined herein. All records partially excepted by section 24(1) contained either advice, proposal, recommendation, consultation, deliberation or analysis between employees of Athabasca University.
>
> Athabasca University staff work in a distributed environment and the majority of communication takes place via email. Discussions that would normally take place fact to face in a more standard office setting, take place electronically or by telephone. If Athabasca University determined the information contained within these particular records should be released to the Applicant, it is reasonable to expect that advice would become "less candid and comprehensive", consultations will become "less frank" and those two things would undermine the public body's ability to undertake personnel and administrative planning." As such, section 24 was applied to a small number of records within this access request.

[para 34] In *Covenant Health v. Alberta (Information and Privacy Commissioner)* 2014 ABQB 562, at paragraph 152, Justice Wakeling stated,

> The *Freedom of Information Act* does not require the delegate of the head of a public body making a s. 24 discretion decision to provide a comprehensive account of her reasoning process. An officer meets legislative expectations if she considers relevant legal principles and facts before making her decision. The *Act*'s goals are met if the head of a public body acts in good faith, demonstrates a solid grasp of the interests at stake and the relevant facts and makes a reasonable decision. The final decision, according to the *Act*, must be made by the public body. The adjudicator is not the ultimate decision maker.

[para 35] I am satisfied the submissions of the Public Body show relevant legal principles and facts were considered before the exercise of discretion. I find the Public Body properly exercised its discretion in this matter.

Issue B: Does section 32 of the Act (information must be disclosed if in the public interest) require the Public Body to disclose the information/records?

[para 36] The relevant parts of section 32 of the Act state,

> *32 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*
>
> > *(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or*
> >
> > *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*

[para 37] The Applicant has the burden of proof. He must provide proof of the following:

i. There is a risk of significant harm to the health or safety of the public, of an affected group of people, of the person or of the applicant.
ii. The release of information is clearly in the public interest.

(Order 96-011, page. 16, Order 97-009, para. 167).

[para 38] Former Commissioner Work in Order F2004-024 at para. 57 stated:

> Order 96-011 established that an applicant has the burden of proof to show that a public body is required to disclose information under section 32. Due to section 32 overriding the Act, section 32 is interpreted narrowly and the burden of proof is difficult to meet. An applicant must show that the information concerns matters of compelling public interest and that there are "emergency-like" circumstances compelling disclosure. An applicant must show that a matter is "clearly in the public interest" as opposed to a matter that may be of interest to the public: see Orders 96-011, 2000-005 and 2000-031.

[para 39] Former Commissioner Clark in Order 96-011, at page 18 stated,

> There must be some actual risk, and there must be some evidence that the harm in question is significant.

[para 40] The Applicant indicates, in his submissions, that a complaint against the Public Body has been filed with the Human Rights Commission of Alberta. He asserts the disclosure of records would assist in the investigation of his complaint.

[para 41] The Applicant also asserts the following:

1. The Public Body has violated his human rights.
2. Having access to complete records during an investigation of alleged discrimination would act to prevent damage to the well-being of the body or mind of an individual, or the health of the general public.
3. The disclosure of information is in the public interest as it will inform the public of the Public Body's actions and prevent the Public Body from violating other people's rights

[para 42] He also provides me with information from various written sources on how discriminatory practices affect individuals. He asserts the Public Body has engaged in discriminatory practices towards him. He makes the following statements in his submissions:

> As I have suffered significant harm to my mind and body as a result of discrimination and prejudicial treatment (my emphasis) by the Public Body, it is reasonable to believe that should discrimination and prejudice continue by the Public Body, other similarly disabled students would face harm to their health (Applicant's initial submissions, page 9).
>
> …I identified myself as disabled student and was referred to as "being difficult", and by my course instructor referring to me in this way I was privy to prejudicial and discriminatory statements…(Applicant's initial submissions, page 10).
>
> Collectively, these statements "expressed or imply[ed] discrimination or an intention to discriminate" and "incites or is calculated to incite others to discriminate" (Applicant's rebuttal submissions, page 5 and 6).
>
> It is clear that statements by staff and faculty were made about me and discriminatory (Rebuttal submission of the Applicant, page 6).

[para 43] As well, the Applicant provides me with an account of his medical deterioration upon learning of the various statements that were made about him. He speculates others may be harmed upon learning of discriminatory practices within the Public Body if those practices continue. He asserts the only way to prevent that harm is to release the information to stop the practice.

[para 44] The Public Body argues the issue at hand is a private matter between the Applicant and the Public Body which has been ongoing over a number of years. It says the Applicant's complaint is currently under investigation by the Alberta Human Rights Commission and there are no exigent circumstances.

[para 45] Further, the Public Body argues it is beyond the scope of my jurisdiction to determine human rights complaints. In response, the Applicant urges me to consider *Canada (A.G.) v. Downtown Eastside Sex Workers* (2012) 2 S.C.R. 524 para. 40.

> …where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government…

i. Whether the information is "information about a risk of significant harm to the … health or safety of the public, of the affected group of people, of the person or of the applicant", within the terms of section 32(1)(a)

[para 46] The Applicant's arguments as to why the disclosure of unredacted records is required by section 32(1)(a) of the Act are based on two ideas.

Release of the records will facilitate the Applicant's Complaint to the Human Rights Commission (which will have the effect of preventing future discrimination)

[para 47] One argument is that disclosure would assist in the investigation of a complaint he has made to the Alberta Human Rights Commission. Possibly he believes that section 32 is engaged on the basis that a finding by the Human Rights Commission that the Public Body has engaged in discriminatory practices against him would have the effect of making the Public Body less likely to discriminate against him and others in the future. In this way, ordering the disclosure of the information would meet the purpose, underlying section 32(1)(a), of diminishing the risk of harm.

[para 48] This argument is based on presumptions which I am not in a position to accept. The first is that if the Applicant were able to provide the records to the Human Rights Commission, the Commission would find that the Public Body's actions were in fact discriminatory. I cannot predict the outcome of the Human Rights complaint. Nor can I make this determination myself, lacking sufficient information, expertise, and, most importantly, the jurisdiction to make such a determination.

[para 49] The second assumption is that if the Human Rights Commission made such a finding, this would be a significant step in eliminating the kinds of harms the Applicant foresees. This is a very speculative idea.

[para 50] Even if I were to assume the Public Body's statements or actions were discriminatory, it is not clear that the Applicant would need to obtain access to the records that constituted evidence of such discrimination *via the Act* to enable him to pursue his complaint. Orders of this office have held the fact another process exists by which to obtain records (for example, by discovery in the court process) does not diminish the right of access under the Act (see Order F2007-029, at paras. 55-57). However, this has been qualified by the recognition that the availability of another process may make access under the Act less important as a means by which to obtain information necessary for vindicating legal rights (see Order F2009-015 at para 68).

[para 51] While the parties have made no submissions as to the precise powers of the Alberta Human Rights Commission, it would stand to reason human rights legislation would place powers of production of relevant records in the hands of the Human Rights Commission to permit resolution of a complaint based on those records. This diminishes the need for ordering disclosure of such records in the present case.

Release of the records would have the direct effect of stopping the Public Body's practice of discriminating

[para 52] The Applicant's second argument is based on the assumption the Public Body's practices are discriminatory, and would be seen as such by anyone who came to know of them. He also suggests that if these practices were to somehow come to the attention of the public following their release, this would change the Public Body's practices.

[para 53] It might be the case that certain kinds of information would patently reveal discrimination, and release of such information would be a source of pressure on a public body to change its ways. In those circumstances, I would not need to be an expert or have the jurisdiction of a human rights commission to accept that certain types of practices would be harmful, and the disclosure of information about them important as a means to help curb the practice.

[para 54] However, I do not see this to be the case with the information at issue. The Applicant relies to a considerable extent on the Public Body's characterization of him as a "difficult student", and his belief that this characterization is tied in some way to his disability. An investigation of the surrounding circumstances may reveal this characterization as discriminatory, but that cannot be determined from the characterization alone. The Applicant suggests there are other records that provide proof of discrimination but it is not patently clear from the records before me that the Public Body has discriminated, nor is it clear that their release would somehow pressure the Public Body into changing its current practices.

[para 55] As already noted above, "[t]here must be some actual risk, and there must be some evidence that the harm in question is significant."

[para 56] Based on the submissions and evidence before me, the Applicant has not discharged his burden to persuade me the information he wishes to have disclosed is "information about a risk of significant harm to the … health or safety of the public, of the affected group of people, of the person or of the applicant", within the terms of section 32(1)(a).

Whether disclosure is "clearly in the public interest"under section 32(1)(b)

[para 57] The Applicant also argues disclosure of the information is "clearly in the public interest."

[para 58] In Order 97-009, former Commissioner Clark at para 169, stated,

> As to what type of information might be "clearly in the public interest", Mr. Justice Cairns considered that issue in Order 96-014, where he made an important distinction between information that "may well be of interest to the public" and information that is "a matter of public interest". As I said in Order 96-011, the Legislature did not intend for section 31 to operate simply because a member of the public asserts "interest" in the information. The pre-condition that the information must be "clearly a matter of public interest" must refer to a matter of compelling public interest.

[para 59] The adjudicator in Order F2009-010 expanded on the concept of "clearly in the public interest" starting at para. 55,

> In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007) 86 O.R. (3d) 259, relied on by the Applicant, the Ontario Court of Appeal made the following comment regarding Alberta's legislation:

> I would first note that the public interest overrides in those two statutes apply to the entire Act. There are, however, two other substantive differences between those provisions and the public interest override in the Ontario Act that are also worth noting:
>
> (i) The lack of a need for an application: the head of a public body "must" disclose information "whether or not a request for access is made".
>
> (ii) There is no balancing between the public interest and the exemption: the test is whether disclosure is "clearly in the public interest".
>
> I agree with the Ontario Court of Appeal that the test in section 32 is whether disclosure is "clearly in the public interest". However, in my view, the application of this test requires a balancing of the public interest in disclosure versus the public interest represented by the exceptions in the Act, in situations where an exception to disclosure applies, to determine whether disclosure is "*clearly* in the public interest". The right of access is subject to limited and specific exceptions. Each exception to disclosure in the Act reflects the decision of the legislature that a specific public interest in withholding the information may outweigh an individual's right of access. Consequently, one must balance the public interest in disclosure with the public interest in withholding information, in order to determine whether disclosing or withholding information best serves the public interest, or is clearly in the public interest.

[para 60] In this case, as discussed above, the Applicant's premise is that the Public Body has discriminatory practices towards disabled students. He is asking me to agree with his characterization of certain statements made by instructors as discriminatory. I am unable to do so on the basis of the submissions he has made.

[para 61] In balancing the public interest in having information disclosed under section 32(1)(b) against the public interest in withholding that information under section 24, I am not persuaded by the Applicant there is a compelling reason to disclose.

[para 62] I will not order the Public Body to disclose information under section 32 of the Act.

V. ORDER

[para 63] I make this Order under section 72 of the Act.

[para 64] I order the Public Body to disclose the following information to the Applicant (the groups of information are found in para. 3):

1. From Group B – Record 16, page 5 – First line of email, withhold name and student ID number.
2. From Group C – all information to be disclosed.
3. From Group D – all information to be disclosed.
4. From Group F – Record 22, page 6 – email from S to J outlining final decision.
5. From Group G – all information to be disclosed.
6. From Group H – Record 22, page 11, second redaction beginning with "29".
7. From Group I – all information to be disclosed.
8. From Group J – all information to be disclosed except Record 26 page 235 (first redaction) and page 236 (first redaction).

9. From Group K – all information to be disclosed.

[para 65] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Neena Ahluwalia Q.C.
Adjudicator