ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-029

March 21, 2001

UNIVERSITY OF ALBERTA

Review Number 1951

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

Summary: The Applicant asked the University to disclose the six letters of references submitted by Third Parties for her application to a PhD programme. The University refused to disclose on the grounds that it would be an unreasonable invasion of the Third Parties' personal privacy under section 16(1) of the FOIP Act. The Commissioner found that the letters contained the Applicant's personal information. The name, addresses, departments, and signatures of the Third Parties and comments that would identify the Third Parties were the Third Parties' personal information. The Commissioner determined that disclosure of this information would not be an unreasonable invasion of the Third Parties' personal privacy. He stated that the University's policy not to disclose letters of reference for application to graduate studies was not in accordance with the FOIP Act. He found that the letters did not constitute privileged information. Furthermore, he determined that disclosure was desirable because it affects students' career opportunities, students ask the third parties to write the letters, third parties can refuse students' requests, and the students' already know who the third parties are because they asked the third parties in the first place.

Lastly, the Commissioner determined that the University could not apply section 18 (confidential evaluations) of the FOIP Act to withhold the letters because the University did not meet all the criteria of that section.

Statutes Cited: **AB**: *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss. 1(1)(n), 6, 16, 18, 26(1)(a), 29(2), 68.

Authorities Cited: **AB**: Order 2000-003, Order 96-020, Order 1998-021, Order 1998-005, Order 98-021; **B.C.:** Order 00-47, [2000] B.C.I.P.C.D. No. 51; **Ont**.: Order P-240 Ministry of Colleges and Universities, [1991] O.I.P.C. No. 34.

Cases Cited: *Dickie v. Nova Scotia (Department of Health),* [1999] N.S.J. No. 116; *Report FI-00-85 (Re Department of Health),* [2000] N.S.F.I.P.P.A.R. No. 78; *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403; *Slavutych v. Baker,* [1976] 1 S.C.R. 254; *Seager v. Copydex* [[1967] 2 All E.R. 415]; *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd. et al.,* [[1960] R.P.C. 128]; *A.M. v. Ryan*, [1997] 1 S.C.R. 157; *Wong v. University of Toronto* (1989), 79 D.L.R. (4th) 652, affirmed April, [1992] O.J. No. 3608, O.C.A.

Table of Contents

I. BACKGROUND

[para. 1.] In January 2000, the Applicant applied for admission to the PhD programme in the Department of Anthropology at the University of Alberta ("U of A"). According to the university procedures, the Applicant was required to obtain at least three original letters of reference in support of the application. The Applicant chose six individuals from whom the letters of reference were sought. Six referees ("Third Parties #1-6") submitted letters of recommendation in connection with the Applicant's application for admission. The Third Parties sent the Letters directly to the Department at the U of A.

[para. 2.] On May 23, 2000, the Applicant asked to see her file, including her reference letters, pursuant to the *Freedom of Information and Protection of Privacy Act* (the "Act"). The U of A denied her access to the reference letters on the basis of section 16(1) and 16(5)(f) (unreasonable invasion of a third party's personal privacy) of the Act.

[para. 3.] By letter dated June 27, 2000, the Applicant asked that I review the U of A's decision.

[para. 4.] Mediation was authorized, but was not successful. The matter was set down for an oral inquiry. This Office sent a Notice of Inquiry to all of the Third Parties.

[para. 5.] The oral inquiry was held on November 14, 2000. I heard evidence and submissions from the U of A, the Applicant and from Third Party #3, a professor at the U of A who wrote reference letter #12 (see below). Third Party #3 supported the U of A's position and opposed the disclosure of her letter to the Applicant.

[para. 6.] Albertans' right to access their personal information is relatively new. It has only been since September 1, 1999, that post-secondary institutions, such as the U of A, have been subject to the Act. As a result, the principles of access, accountability and transparency have been extended to the records in the custody and control of universities. The Supreme Court of Canada discussed these principles (for the equivalent federal legislation) and the importance of this shift in public policy in the seminal case *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403. The U of A, like other post-secondary institutions, is seeking to adapt its policies and practices to conform to the Act. Changing well-established policies is not always easy or straightforward.

II. RECORDS AT ISSUE

[para. 7.] The U of A withheld six letters in their entirety and numbered them #10-#15.

Letter #	Description	Third Party
10	Page #1- U of A Form "Letter to Support Application for Graduate Admission, Award and Appointment" with Applicant's name and degree applying for at top of form. The Third Party referee fills out 5 parts: 1."General	Professor of the U of A ("Third Party #1")

	Appraisal" allows the professor to provide comment, 2."Knowledge of Applicant" 3. "Ability in the English Language" where the professor can provide comment, 4. "Specific Abilities" includes a checklist for the professor to rank the student, 5. "Referee" information showing the professor's rank, department, address, etc. Page # 2 -Statement attached to complete Part 1. General Appraisal	
11	Page #1 - same as above Page #2 - Statement attached to complete Part 1. "General Appraisal" and 2. "Knowledge of Applicant"	Professor of the U of A ("Third Party #2")
12	Three-page Letter of Reference	Professor of the Uof A ("Third Party #3")
13	One-page Letter of Reference	Professor of the University of Guelph ("Third Party #4")
14	One-page Letter of Reference	Professor of Memorial University ("Third Party #5")
15	One- page Letter of Reference	Theatre Colleague ("Third Party #6")

[para. 8.] In this Order, I will refer to each letter by letter number where necessary, and will refer to all the letters collectively as the "Letters".

III. ISSUES

[para. 9.] The Notice of Inquiry outlined two issues:

A. Did the University determine correctly that the information withheld from the Applicant under section 16 is personal information about third parties?
B. Did the University decide correctly that the information it severed under section 16 must be withheld from the Applicant?

[para. 10.] The U of A also raised a third issue in its submission:

C. Can the Records be withheld under section 18(1) (confidential evaluations) of the Act?

IV. DISCUSSION

Issue A: Did the University determine correctly that the information withheld from the Applicant under section 16 is personal information about third parties?

a) Position of the Parties

(i) Applicant's Position

[para. 11.] The Letters contain the Applicant's personal information and do not contain Third Parties' personal information other than the identity of the Third Parties. Information about the identities would not be an unreasonable invasion of the Third Parties' personal privacy because the Applicant already knows who they are. In the alternative, if there is personal information about the Third Parties, it is information the Third Parties voluntarily included in the Letters and it is information concerning the relationship with the Applicant. Consequently, the disclosure would not be an unreasonable invasion of their personal privacy.

[para. 12.] The Applicant stated that, as the Third Parties voluntarily submitted the information, they should be accountable for the information they provided by making it available to the Applicant. If the information is inaccurate or untrue, or motivated by malice, then the Third Parties should not be allowed to hide behind the cloak of "confidentiality" and/or "third party invasion of privacy".

(ii) The U of A's Position

[para. 13.] The U of A relied upon section 16(1), and two of the presumptions under section 16(4) to withhold the Letters:

- 16(4)(d) (the personal information relates to employment or educational history)
- 16(4)(g) (the personal information consists of the Third Parties' names when it appears with other personal information about the Third Parties)

[para. 14.] The U of A submitted that the Letters contain personal information about the Third Parties (the authors of the letters) as well as others involved in the relationship between the Applicant and the Third Parties (page 17 of the U of A's submissions). The opinions and evaluations cannot be severed from the personal information without rendering the remainder essentially meaningless. The nature and purpose of the letters of recommendation do not allow for a format that dictates that the writer divide their personal information from information on the candidate.

[para. 15.] The U of A also stated that it is the description of the relationship between the Applicant and the Third Parties that makes the letters uniquely a matter of personal information of the Third Parties.

(iii) Third Party #3's Position

[para. 16.] Third Party #3 argued in support of preserving the confidentiality policy for reference letters in general. It was argued that selection committees require documented observations set in a detailed contextual discussion to successfully analyse and predict a candidate's future performance in a given program. Letter #12 provides this type of information. Confidentiality is necessary because university graduate students and staff move into "a shared nexus of relationships that is much like a small village in its structure". Disclosure of a reference letter would make it difficult or impossible for the author to continue effectively in work relationships.

b) Analysis

[para. 17.] For section 16(1) to apply, there must first be personal information of third parties.

(i) Do the Letters contain "personal information" of the Third Parties

[para. 18.] Section 6 of the Act gives an applicant a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant. In all cases where the request involves access to personal information, it is my responsibility, before deciding whether any exception claimed by the U of A applies, to ensure that the information in the Letters falls within the definition of "personal information". Where information does qualify as personal information, I must then determine to whom the personal information relates.

[para. 19.] Therefore, my first task is to separate the Applicant's personal information from the Third Parties' personal information.

[para. 20.] Personal information is defined in section 1(1)(n) of the Act. The relevant portions of 1(1)(n) read as follows:

> *1(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,*
> *…*
> *(vii) information about the individual's educational, financial, employment or criminal history…*
> *(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. 21.] As stated above, the records here are either pre-printed forms soliciting a professor's views concerning a particular student (Letter #10-11) or letters written on the Third Party's letterhead. In the forms there are categories where the professor uses a check mark to indicate his or her ranking of the student in the categories provided, and there are other spaces where a professor can enter his or her written comments. In Letters #12-15, the Third Parties write in a block, paragraph format.

Third Parties' personal information

[para. 22.] I agree with the U of A that the referees' names, home or business addresses, and telephone numbers constitute the Third Parties' personal information (section 1(1)(n)(i)). Academic ranks, departments, and institutions would also constitute the Third Parties' personal information (section 1(1)(n)(vii)). The Third Parties' signatures would also be considered part of their personal information (section 1(1)(n)(recorded information about an identifiable individual)). Therefore, the information in Part 5 in Record #10 and #11 titled "Referee" is the Third Party's personal information. With respect to Letters #12-15, the letterhead information, names and signatures would also fall into this category.

[para. 23.] I disagree with the U of A's submission that the opinions and views in the letters include information concerning the Third Parties' educational or employment history and therefore contain the Third Parties' personal information pursuant to section 1(1)(n)(vii) of the Act. The Court of Appeal of Nova Scotia stated *in Dickie v. Nova Scotia (Department of Health),* [1999] N.S.J. No. 116, in paragraph 45 stated:

> The term "employment history" is not defined in the Act, but both the words themselves and the context in which they are used suggest that the ordinary meaning of the words in the employment context be intended. In the employment context, employment history is used as a broad and general term to cover an individual's work record.

[para. 24.] Even though the Third Parties might refer to their course work or areas of studies in the Letters, that information is provided as part of their opinion concerning the Applicant. It is not information about the Third Parties' work or employment record. Therefore it is not information concerning the Third Parties' educational or employment history.

[para. 25.] I find that the content of the reference letters, which are opinions about the Applicant, is the Applicant's personal information. However, I do agree with the U of A, that in providing an opinion in a factual matrix, the Third Parties include personal information about themselves. As a result, through the content, the Applicant could identity the Third Party. While I will say below that the content in the Letters contain the Applicant's personal information; there are interspersed comments that contain the Third Parties' personal information throughout Letters #10-15.

Applicant's Personal Information

[para. 26.] With respect to Letters #10-11, the Applicant's name, department, degree applying for and field of study are the Applicant's personal information (section 1(1)(n)(i)).

[para. 27.] Parts 1-4 (General Appraisal to Specific Abilities) and the body of Letters #12-15 describe the Third Parties' opinions and views about the student. I agree with the U of A that in expressing an opinion regarding the Applicant's suitability for the graduate program, that the Third Parties often describe the Applicant's abilities in a factual matrix. This inevitably requires the Third Parties to describe the relationship between the Applicant and the Third Parties or other students.

[para. 28.] The U of A argued that the letters contain interwoven information of the Third Parties. The U of A says that these types of comments give the Letter texture which may give an indication of how accurate a third party's prediction of his or her student's ability to succeed in a doctorate program. The following are examples: comments regarding when and where the Third Party was when reviewing the Applicant's work, or why the Third Party was interested in the Applicant's thesis.

[para. 29.] The U of A submitted that the Letters contain opinions expressed by the Third Parties about individuals other than the Applicant such as Letter #12, page 2, and paragraph 3. In that Letter, Third Party #3 describes how the Applicant handled her defence of her thesis but Third Party #3 also comments on her general impression of her colleagues. These two sentences do not name any particular individual and are both about the Applicant's defence of her thesis, so I do not view them as the personal information of any other third parties. In my view, these comments are the personal information of the Applicant.

[para. 30.] The overall objective of these reference letters is to provide an opinion about the Applicant. Keeping this in mind, I find that the Third Parties' description of their relationship with the Applicant is part of their personal views and opinions of the Applicant. Therefore, it is the personal information of the Applicant (section 1(1)(n)(viii)).

[para. 31.] Nova Scotia *Report FI-00-85 (Re Department of Health),* [2000] N.S.F.I.P.P.A.R. No. 78 also followed this approach with respect to the disclosure of employment reference checks. The Review Officer found that the reference checks were the Applicant's personal information because references are opinions about the Applicant. He stated that the Nova Scotia Court of Appeal in *Dickie v. Department of Health,* questioned the interpretation that the personal information in reference checks belongs to the person who provided the reference check. He stated that this case appeared to favour the opinion that information in a reference check is personal information about the person seeking the job.

[para. 32.] I also agree with the approach followed by Ontario Order *P-240 Ministry of Colleges and Universities* [1991] O.I.P.C. No. 34, which dealt with an applicant's request

for letters of recommendation for his application for the Ontario Graduate Scholarship. The Ontario Ministry of Colleges and Universities was the public body. The record at issue appears to be similar to the records at issue in this request. On page 1, the Ontario Commissioner stated:

> The form, which is titled 'Ontario Graduate Scholarship Program 1987-88', includes a checklist for the professor to rank the student and to provide comments. The form is described as a 'Confidential report from the professor most familiar with the candidate's work'.

[para. 33.] The Commissioner found that Part B of the letter (the checklist for the professor to rank the student, the professor's comments about the student, the length of time as well as the capacity in which the professor had known the student, and another checklist for an overall ranking of the student by the professor) was the student's personal information. Although, he found that the referee's name, signature, title, department and employer was the personal information of the referee (third party), he ordered it disclosed.

(ii) Conclusion

[para. 34.] Only parts of the Letters contain the Third Parties' personal information. In the content of the Letters, there is some information that is both the personal information of the Applicant and the Third Parties. Third Parties' personal information is as follows:

- Letters #10-11-Part #5;
- Letters #12-15-Third Parties' name, home or business addresses, telephone/fax numbers, e-mails, titles, academic ranks, departments, institutions, employers and signatures;
- Letters #10-11-Part #1-2-interspersed comments through which one may identify the Third Parties;
- Letters #12-15-Bodies of Letters- interspersed comments through which one may identify the Third Parties.

.

[para. 35.] For the most part, the Letters contain the Applicant's personal information. The Applicant's personal information is as follows:

- Letters #10-11-Introductory information related to student identification and degree applying for;
- Letters #10-11-Part #1-4;
- Letters #12-15-Bodies of Letters.

Issue B: Did the University decide correctly that the information it severed under section 16 must be withheld from the Applicant?

a) Would disclosure of the Third Parties' personal information be an unreasonable invasion of the Third Parties' personal privacy?

[para. 36.] Section 16 is a mandatory ("must") section of the Act. If section 16 applies, a public body must refuse to disclose the personal information of a third party if that disclosure would unreasonably invade the privacy of that third party. Also, section 16 would only apply to the Third Parties' personal information and not to the Applicant's personal information.

[para. 37.] The Third Parties' names, home or business addresses, telephone/fax numbers, e-mails, titles, academic ranks, departments, institutions, employers, signatures and some interspersed comments in the body of the Letters must be considered under section 16 because I have found that they are the personal information of the Third Parties.

[para. 38.] Section 16(1) reads:

> *16(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.*

b) Exception to section 16 - Consent of Third Party

[para. 39.] However, section 16 has some exceptions. Section 16(2) reads:

> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> *(a) the third party has, in writing, consented to or requested the disclosure,*
> *...*

[para. 40.] The U of A did not give notice to the Third Parties under section 29(2)(notifying the third party) of the Act. However, my Office in sending out the Notices of Inquiry, also sent notices to the Third Parties as Affected Persons under the Act. In response, Third Party #6, author of Letter #15, gave written consent to disclose his letter to the Applicant.

[para. 41.] It is the U of A's position that, even with the Third Party's consent, it will not disclose Letter #15 because its policy is that this type of letter is provided in confidence, and the U of A wishes to uphold its policy of non-disclosure.

[para. 42.] Unless another exception applies to Letter #15, I must order it disclosed. Section 6 gives information rights to the Applicant. Letter #15 and the U of A are subject to section 6 of the Act. No matter what policy the U of A wishes to follow, the Act must be followed.

c) Presumptions under section 16

[para. 43.] The U of A said that sections 16(4)(d) and (g) apply to the personal information. Those provisions read:

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

...

(d) the personal information relates to an 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

[para. 44.] I find that section 16(4)(g) applies. Therefore, I do not find it necessary to decide whether section 16(4)(d) also applies to the same information.

d) What relevant circumstances did the U of A consider under section 16(5)?

[para. 45.] In determining whether there is an unreasonable invasion under section 16(1) or 16(4), a public body must consider the relevant circumstances under section 16(5). The U of A said that it considered sections 16(5)(f) and (e). Those provisions read:

(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 of 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. 46.] U of A's arguments under section 16(5) were mainly directed to the opinions and comments expressed by the Third Parties about the Applicant. However, I have found that this information is mostly the Applicant's personal information. Accordingly, I will go through their section 16(5) arguments and deal with them with respect to the Third Parties' personal information at issue here.

- **Section16(5)(e)-The Possibility of Financial or Other Harm is Real**

[para. 47.] If applicable, this circumstance weighs in favour of withholding the Third Parties' personal information. The U of A submitted that these confidential letters may be taken out of context and may form an improper basis for legal actions based on defamation. The U of A conceded that the purpose for which the Letters were created, and the fact that they are presumed to contain honestly held beliefs, protects them from such litigation. The U of A stated that there are significant costs in defending such suits even when they are brought with little chance of success.

[para. 48.] In my view, there is not sufficient evidence for me to find that section 16(5)(f) is a relevant circumstance weighing against disclosure because the U of A has not said why this exposure would be unfair.

- **Section 16(5)(f) - personal information supplied in confidence**

[para. 49.] If applicable, this circumstance weighs in favour of withholding a third party's personal information. The U of A submitted that the Letters should be withheld in their entirety on the basis that they were provided to the U of A in confidence. I will deal with the U of A's four arguments under section 16(5)(f) as they were presented to me. Their submission contains four arguments: (i) The written policy; (ii) The Common Law Doctrine of Confidential Communications; (iii) The Chilling Effect; (iv) The Importance of Confidentiality to the Nature of a Letter of Recommendation.

(i) Written Policy

[para. 50.] The U of A submitted that the Applicant and the Third Parties were aware of the promise of confidentiality because it is explicitly stated in four U of A documents:

1) Department of Anthropology Application Procedures [Exhibit #1] requires:

> …5) Three original letters of reference, written within the last 12 months, with the referee's original signature, to be sent *directly* to the Department. Letters are to be submitted in confidence.

2) University Calendar [Exhibit #2] says:

> Letters of recommendation are considered to be confidential. Students may be permitted to look at the contents of their files in the Faculty of Graduate Studies and Research except for their letters of recommendation.

3) Application for Graduate Admission, Information and Instructions [Exhibit #3] says:

> Letters of Recommendation are confidential and become the property of the University of Alberta. They will not be released to the applicant or to anyone outside the University of Alberta.

4) Letter to Support Application for Graduate Admission, Award, and Appointment [Exhibit #4] says:

> To referee: The information in this report will be considered confidential and will not be released to the applicant or anyone outside the University of Alberta. We are particularly interested in the applicant's ability to carry on advanced study and research, teaching ability, potential for successful study in the applicant's field, and weaknesses, if any. We would appreciate knowing the basis for your statements.

[para. 51.] I agree with the U of A that it is explicitly stated that letters of reference are submitted in confidence and it is part of the U of A's policy. I find that, on the basis of the policy, the Third Parties believed that they were supplying their personal information in confidence.

[para. 52.] I must also examine whether the U of A's policy is in accordance with the Act.

[para. 53.] The U of A submitted that a student and a university are in a contractual relationship and the calendar forms the contractual relationship between the two. Gordon Unger, the U of A Access and Privacy Advisor, stated in his evidence that the policies approved in the Calendar are considered to be the contract between the student and the University.

[para. 54.] I have stated that the Act supersedes an agreement regarding the withholding of information, except where the Act itself permits that withholding: See Order 2000-003. Public policy mandates that parties cannot contract out of the *Freedom of Information and Protection of Privacy Act.*

[para. 55.] Therefore, I find that the U of A must comply with the Act, irrespective of its policy. The policy itself is subject to the Act and must conform to the Act.

[para. 56.] One of the purposes of the Act is to allow individuals, such as the Applicant, a right of access to personal information about themselves that is held by a public body, subject to limited and specific exceptions as set out in this Act.

[para. 57.] The Supreme Court of Canada has recognized the importance of access rights in *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403 where Justice La Forest discussed the purpose of access-to-information laws. Justice Cory, who was writing for the majority, agreed with Justice La Forest's approach to the interpretation of the federal Access to Information Act and Privacy Act . Paragraphs 59-61 read:

> As earlier set out, s. 2(1) of the Access to Information Act describes its purpose, inter alia, as providing 'a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public'. The idea that members of the public should have an enforceable right to gain access to government – held information, however, is relatively novel. The practice of government secrecy has deep historical roots in the British parliamentary tradition; see Patrick Birkinshaw, Freedom of Information: The Law, the Practice and the Ideal (1988), at pp. 61-84.
>
> As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes

> diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principles of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them; see David J. Mullan, 'Access to Information and Rule-Making', in John D. McCamus, Ed., Freedom of Information: Canadian Perspectives (1981), at p. 54.
>
> The overarching purpose of access to information legislation, then is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry…

[para. 58.] The B.C. Commissioner also followed this approach in B.C. *Order 00-47,* [2000] B.C.I.P.C.D. No. 51, which dealt with Malaspina University-College's contract with an applicant. The B.C. Commissioner held that the applicant's signing of a contractual release and waiver in favour of the university did not preclude the applicant from making a subsequent access request for records related to him or excuse the university from responding. The Commissioner held that public policy dictates that rights and obligations under the Act cannot be waived by contract. He stated at paragraph 42:

> Section 2(1) confirms that the Act's information access rights are intended to make public bodies accountable to "the public" as a whole, not simply to individual requesters. Access rights may be individually exercised, but they benefit the entire community. They also benefit public institutions: accountability enhances public trust in them, thus contributing to their legitimacy.

[para. 59.] At paragraph 44 he concluded:

> To echo the words of McIntyre J. in Etobicoke, the Act was enacted by the Legislature for the benefit of the community at large and of its individual members - including the applicant – and clearly falls within that category of enactment that may not be waived or varied by contract.

[para. 60.] In B.C. Order 00-47, the Commissioner cited, in support of the importance of access legislation, page 460 of *Reflections of a Siamese Twin – Canada at the End of the 20th Century*, John Ralston Saul (1997) (Viking Publications). I think his comments are well expressed here:

> The primary consideration is that in a democracy legitimacy lies with the citizenry. That's what makes a democracy superior to other forms of social organization. And the process which leads to important decisions is not simply supposed to include the citizen. It is supposed to use the intelligence of the society - which lies within the legitimacy of the citizen - in order to minimize the chances of making major mistakes. That is the primary characteristic of a democracy. That use of the citizenry's intelligence is what differentiates a democracy from the various sorts of dictatorships, whether direct and brutal or sophisticated and managerial in the corporatist's mode.

Conclusion

[para. 61.] I find that the parties cannot contract out of the Act. The Applicant has a right of access to her personal information, and a policy or contractual agreement does not allow a public body to withhold Third Parties' personal information under section 16.

Nonetheless, I find that, on this basis of this policy, the Third Parties supplied their personal information to the U of A in confidence.

[para. 62.] Therefore, I will consider this circumstance as a factor that weighs in favour of withholding the Third Parties' personal information under section 16.

(ii) The Common Law Doctrine of Confidential Communications

[para. 63.] The U of A submitted that the Letters are privileged and fall under the common law doctrine of confidential communications. Section 26(1)(a) of the Act is a discretionary exception that allows a public body to withhold privileged information from an applicant even if it is the Applicant's personal information. In Order 96-020, I have addressed "public interest" privilege and adopted the criteria that are set out in the Supreme Court of Canada decision *Slavutych v. Baker,* [1976] 1 S.C.R. 254.

[para. 64.] The U of A has not claimed section 26(1)(a), but argued that privilege is one of the circumstances I should consider with respect to the application of section 16. Section 16 only applies to the Third Parties' personal information and not to the Applicant's personal information. For this reason, I can only consider whether this privilege argument applies to the Third Parties' personal information as set out above.

[para. 65.] In support of its submission that the Letters should be withheld, the U of A cited the Supreme Court of Canada decision *Slavutych v. Baker*. This case involved dismissal proceedings against a U of A professor. Privilege was claimed for a "tenure form sheet" used to determine whether another professor would receive tenure. The professor had been assured in writing by the U of A that the form he wrote would be kept confidential and destroyed after the tenure committee had made their decision. The professor had written a number of harsh remarks which were opinions based on his interactions with the other professor. Rather than destroy the document, the U of A attempted to use it in his termination hearing to support a finding of misconduct. The Supreme Court of Canada found that the tenure form sheet met the Wigmore test for privilege and the common law doctrine of confidential communications.

[para. 66.] The Wigmore test used by the court for determining whether a document is privileged is set out as below:

i. the communications in question must originate in confidence that they will not be disclosed;
ii. the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
iii. the relationship must be one which in the opinion of the community should be fostered; and
iv. the injury that would be caused to the relationship by disclosure of the communications would exceed the benefit gained by the disclosure.

[para. 67.] The U of A stated (page 10 of its submissions):

> …Firstly, they are provided in confidence, in accordance with University policy. Secondly, confidentiality is necessary for the proper operation of the system of letters of recommendation, to elicit letters free from bias and so that the authors may be free from the fear of reprisal. Thirdly, the interests of the university community argue in favour of a process that ensures the best qualified and most likely to succeed candidates are admitted to public universities…Fourthly, the important purpose of letters of recommendation would be undermined by disclosure and given that the Applicant knew and agreed that the letters would remain confidential, this factor should be given greater weight than the Applicant's right to personal information.

[para. 68.] The facts here are different than in the *Slavutych* decision. In the *Slavutych* decision, U of A requested a professor to complete the tenure sheet, promised it would be confidential and then used it against the professor to support a finding of misconduct in a dismissal.

[para. 69.] I will go through each of the above criteria. First, I agree that the Letters originated in confidence based on the U of A's policy of confidentiality. However, I find that the U of A must comply with the Act, irrespective of its policy. The policy itself is subject to the Act and must conform to the principles enunciated in the Act. Also, consent of one of the Third Parties is evidence that disclosure to the Applicant was at least contemplated by one of the Third Parties.

[para. 70.] Second, I am not satisfied that the element of confidentiality is essential to the full and satisfactory maintenance of the relationship between the parties. Because these Letters are for application to the graduate program and not for employment tenure, I believe the authors can continue to write these kinds of letters with candour and without fear of reprisal. Unlike *Slavutych* decision where it was the U of A (employer) asking the professor (employee) to write a letter about one of his colleagues, no Third Party was obliged to provide a letter at the Applicant's request. The Applicant is not the Third Parties' employer but the Third Parties' student or former student. I am not satisfied that the Third Parties would have not provided the Letters without the guarantees of confidentiality.

[para. 71.] Third, I am not convinced that if the U of A's process was transparent, thus more accountable to the students, that it would prevent the best qualified and most likely to succeed candidates from being admitted to public universities. Therefore, I do not find that this confidential relationship is one which, in the opinion of the community, should be sedulously fostered.

[para. 72.] In Order 96-020, I stated that the fourth criterion requires an assessment of the interests served by protecting the communications from disclosure, including privacy interests and the inequalities which may be perpetuated by the absence of protection: *A.M. v. Ryan*, [1997] 1 S.C.R. 157. Moreover, the balancing exercise under the fourth criterion is essentially one of common sense and good judgment. The balance I need to strike under this fourth criterion is whether the injury to the relationship from the disclosure of the information is greater that an applicant's right of access to the information under section 6(1) of the Act.

[para. 73.] What is at issue then is the Third Parties' privacy interests in the context of their relationship with the U of A and their students, and whether those privacy interests should, in the circumstances of the case, prevail over the Applicant's right of access under the Act.

[para. 74.] In the *Slavutych* decision, the fact that it was the U of A who requested the communication under the promise of confidentiality, and then used it against the professor as a basis for a charge of misconduct, was a determinative factor in finding that the tenure sheets were privileged communications. The facts can be distinguished from this case, as I have already done.

[para. 75.] The Courts have held in informer law enforcement cases and in the *Slavutych* decision, that privacy interests outweigh the interest in disclosure. No cases have been presented to me to show that the Courts hold that privilege applies to graduate application reference letters. Furthermore, I do not find there to be compelling reasons, such as protecting the identity of an informer in law enforcement case or an employee from an oppressive employer, in this case. Consequently, I do not find that the Third Parties' privacy interests outweigh the Applicant's access right under the *Freedom of Information and Protection of Privacy Act*.

[para. 76.] Therefore, I find that the Wigmore criteria have not been met.

[para. 77.] The U of A also urged me to apply the doctrine of confidential communications here. The U of A stated at page 10 of its submission:

> With respect to the doctrine of confidential communications, the documents were created with the express agreement by all parties, (authors, applicant and university) that they were confidential and would not be released to the applicant or anyone outside the university. The documents were intended to be used in support of the application for admission and for no other purpose.

[para. 78.] In evidence on behalf of the U of A, Dr. Dale, Dean of the Faculty of Graduate Studies and Research, stated:

> If the student applies for a graduate award, Awards committee would see them [the letters]. They are used for Admission, Graduate Awards, and I think informally that they are used for the decisions by the graduate chair on assigning teaching assistants.

[para. 79.] Justice Spence in the *Slavutych* decision also considered the following reasoning regarding the doctrine of confidentiality. He stated that Lord Denning's decision in *Seager v. Copydex* [[1967] 2 All E.R. 415], at p. 417, (who, in turn had adopted the statement of Roxburgh J. in *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd. et al.* [[1960] R.P.C. 128]), was a sound statement of the doctrine as to revelation of confidential communications when it deals with the actions of those who are parties to the confidence. It read as follows:

> As I understand it, the essence of this branch of law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for

> activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.

[para. 80.] Gaining access to one's personal information under the Act is not a "springboard" for activities detrimental to the Third Parties who wrote the Letters. Rather, it is the Applicant's right under the Act.

[para. 81.] I do not believe this doctrine applies to trump the Applicant's right of access to information under the Act.

[para. 82.] Therefore, I will not consider this circumstance as a factor that weighs in favour of withholding the Third Parties' personal information under section 16.

(iii) The Chilling Effect

[para. 83.] This is the U of A's third argument under section 16(5)(f). If the Letters were not written pursuant to a promise of confidentiality, the U of A argued that there would be a chilling effect. Dr. Mark Dale stated:

> The main effect would be what people say in these letters of reference. Interpretation of letters of recommendation would become a fine art of looking at what is not said in these letters, rather than what it said. The value of the letters would be degraded.

[para. 84.] I think this argument goes to the U of A's reason for implementing its policy of confidentiality. No evidence was provided to show that if the Third Parties were informed at the outset that their letters could be disclosed to the student candidates, they would not write their Letters with honesty and integrity.

[para. 85.] The Third Party stated at the inquiry that she would have been more cautious about her "expression" had she known that Letter #12 was to be disclosed to the Applicant. She also stated that if the Letter were not confidential, one would not adequately present and describe the context. I understand that the Third Party would not have included as much emotion in her Letter, however, I also understand that her bottom line would have been the same. Moreover, I agree with the Applicant that an open process might discourage exaggeration and innuendo.

[para. 86.] Therefore, I will not consider this circumstance as a factor that weighs in favour of withholding the Third Parties' personal information under section 16.

(iv) The Importance of Confidentiality to the Process-The Nature of a Letter of Recommendation

[para. 87.] This is the U of A's fourth argument under section 16(5)(f). I think this argument also goes to the U of A's reason for implementing its policy of confidentiality. The U of A stated in its submissions that letters of reference are sought on the grounds that an important predictor of future behavior and success is a record of prior behavior

and performance. Dr. Dale stated in his evidence that the confidentiality of these letters is crucial because that enables the writer the freedom to provide an honest and frank opinion of the student. My comments to this argument are the same as set out above.

[para. 88.] Therefore, I will not consider this circumstance as a factor that weighs in favour of withholding the Third Parties' personal information under section 16.

- **Other Relevant Circumstances**

[para. 89.] The list of relevant circumstances under section 16(5) is not exhaustive. There may be other relevant circumstances that a public body must also consider.

(i) Applicant's Knowledge of the Third Parties' Personal Information

[para. 90.] The U of A submitted that Order 98-005 held that the Applicant's prior or purported knowledge of the information in a record is not relevant to a consideration of whether the document should be released.

[para. 91.] My decision in Order 98-005 is very apposite to the situation here, although I do not believe it supports the U of A's position. In Order 98-005 the Public Body wrongly withheld information on the basis that the Applicant might be able to link non-personal information to a third party. As I stated in Order 98-005, if I were to accept this argument, it would enable a public body to withhold a record where an applicant knew the identity of any party contained in the record, without having to consider section 6(2) of the Act, thereby rendering this section useless.

[para. 92.] I also considered that the names, titles, departments, etc., of the Third Parties who are professors at the U of A, have been made public since this information is in the U of A's calendar.

[para. 93.] I agree with the Ontario Order P-240 that held that the disclosure of the Third Party's name, title, department, and university affiliation would not constitute an unreasonable invasion of the Third Party's personal privacy.

[para. 94.] Therefore, I will consider this circumstance as a factor that weighs in favour of disclosing the Third Party's personal information under section 16.

(ii) Disclosure is desirable because it affects the Applicant's Career Opportunities

[para. 95.] This circumstance weighs in favour of disclosing a third party's personal information.

[para. 96.] All parties stressed the importance of reference letters in the admission process. Being admitted to a graduate program is key to an individual's career and

livelihood. I find that this is all the more reason that the Letters be disclosed to the Applicant. A basic sense of fair play holds that an applicant should know what is being said about him or her especially when the comments can have such serious adverse consequences on career plans and opportunities.

[para. 97.] I understand from the U of A's evidence that as many as eight to ten individuals within the university could see a reference letter. Dr. Dale stated:

> …letters will generally be seen by an Associate Chair or Dean for graduate studies, and often by a Department Admissions Committee. The third kind of person to see it will be potential supervisors. It could be competitive so a supervisor's evaluation of the letters of recommendation would be important.
>
> …If the student applies for a graduate award, Awards Committee would see them. They are used for Admission, Graduate Awards, and I think informally that they are used for decisions by the graduate chair on assigning teaching assistants.

[para. 98.] There is an imbalance of power between a student and a professor. The student is dependent on the professor for recommendations and references. As a result, professors have the ability to influence the academic future of a student. Moreover, these recommendations and references are key to the decision-making process of the U of A. As with other public bodies, the U of A must be transparent and accountable for the decisions it makes.

[para. 99.] Therefore, I will consider this circumstance as a factor that weighs in favour of disclosing the Third Party's personal information under section 16.

(iii) The Third Parties agreed to the Applicant's request to write the Letters on her behalf

[para. 100.] This circumstance weighs in favour of disclosing a third party's personal information. The Applicant individually requested each of the Third Parties to write a letter on her behalf. Each Third Party agreed to do so.

[para. 101.] I heard evidence from the U of A that, with respect to the Third Parties who are professors at the U of A, they are not obliged by the University Faculty Agreement or any other agreement to write letters on behalf of their students. Professors can refuse to write such letters. I suppose that a refusal may well be seen as a reflection on that person's lack of suitability as a candidate. Therefore, given that the Applicant knows the identity of the Third Parties because she asked them herself to write letters on her behalf, and the Third Parties agreed, I do not think it would be an unreasonable invasion of the Third Parties' personal privacy to disclose their personal information.

[para. 102.] Therefore, I will consider this circumstance as a factor that weighs in favour of disclosing the Third Party's personal information under section 16.

e) Conclusion under section 16

[para. 103.] Because Third Party #6 has consented to the disclosure of his personal information in Letter #15, section 16 does not apply to Letter #15. Therefore, it would not be an unreasonable invasion of the personal privacy of Third Party #6 to disclose Letter #15.

[para. 104.] In this case, there was no sensitive personal information regarding the Third Parties. There may well be reference letters where it would be an unreasonable invasion of a third party's personal privacy to disclose their personal information. In this inquiry, on balance, after weighing all the relevant circumstances under section 16(5), I find that it would not be an unreasonable invasion of the Third Parties' personal privacy to disclose their personal information contained in Letters #10-14. Therefore, the U of A must not withhold the Letters under section 16 of the Act.

Issue C: Can the Letters be withheld under section 18(1) (confidential evaluations) of the Act?

[para. 105.] U of A raised this third issue in its submissions but did not rely on this exception in making its determination about whether to disclose the Letters. Therefore, in considering the application of this exception to the Letters, I will not consider whether the U of A properly applied section 18 after responding to this access request. Nonetheless, I agree that the application of this exception to these types of records is important for future decision making, and on this basis I will make a determination based on the U of A's submissions.

[para. 106.] Section 18 reads:

> *18(1) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.*

[para. 107.] Order 98-021 (appointment as a bailiff) dealt with the interpretation of section 18. It stated that a three-part test applies:

1. Information must be evaluative or opinion material,
2. Information must be compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for
   - Employment, or
   - For the awarding of contracts or other benefits by a public body,
3. Information must be provided explicitly, or implicitly in confidence.

[para. 108.] I agree with the U of A that tests one and three have been met. However, I do not find that test two has been met.

[para. 109.] The U of A argued that the Letters were provided for determining the Applicant's suitability, eligibility or qualifications for a place in the graduate program of the U of A. By accepting a student, the U of A offers to provide educational services. The U of A stated that a contract is formed once a person has been accepted as a student into the university and has paid tuition. See: *Wong v. University of Toronto* (1989) 79 D.L.R. (4th) 652, affirmed April, [1992] O.J. No. 3608, O.C.A.

[para. 110.] I do not find that the U of A compiled the Letters for determining the Applicant's suitability, eligibility or qualifications for "awarding" a contract. The key word here is "awarding". I do not believe a university "awards" the contract of a place in the graduate program to a student. In Order 98-021, I said that "award" means, among other things, to give or to order to be given as a payment, compensation, or prize; to grant or assign. I agree that careful consideration is given to all applications for limited positions; however, the word "award" implies that the decision-maker is granting or adjudging. Determining the applicant's suitability, eligibility or qualifications for a place in the graduate program is rather the act of admission than the act of awarding.

[para. 111.] Furthermore, I do not believe that it was the Legislature's intention to include these types of letters in section 18 of the Act. I note that the U of A made a recommendation to the Select Special Freedom of Information and Protection of Privacy Act Review Committee dated June 30, 1998, that section 18 be amended to read "…the applicant's suitability, eligibility or qualification for employment or continuation of employment or for the awarding of government or local public body contracts or other benefits including admission to a post-secondary education program…".

[para. 112.] The Select Special Freedom of Information and Protection of Privacy Act Review Committee on November 30, 1998, responded to this recommendation. The discussion and vote of this recommendation is included in Transcript No. 24-2-12, pages 254-256. I find Mr. Dickson's comments on page 254 particularly telling. He stated:

> I don't know how we can accept that and still respect principles 2(c) and (d) of the act. If somebody is trying to get into med school or law school or nursing and they're torpedoed because of a bad reference, what if that information is inaccurate, incorrect? We're talking about potentially a career path being foreclosed on the basis of erroneous information. We know those things happen from time to time. This one, you know, is such a key element in the life of a young person. To simply say that stuff is closed and you can't access it could be hugely, hugely, prejudicial. That's my difficulty with this proposal. I see this admission to a university program as being a lot different than just a job situation.

[para. 113.] The Committee ultimately opposed the recommendation.

[para. 114.] I will not comment on whether the Letters could meet the second test under section 18 when they are used for the awarding of scholarships and bursaries or when they are considered for teaching assistant positions. That issue is not before me.

[para. 115.] My view is that, if the Legislature had intended that evaluative information of this sort not be subject to disclosure, section 18 would have been worded differently. Consequently, I find that section 18 does not apply to the Letters.

V. ORDER

[para. 116.] Under section 68 of the Act, I make the following order:

Issue A. Did the University determine correctly that the information withheld from the Applicant under section 16 is personal information about third parties?

1. Only parts of the Letters contain the Third Parties' personal information. In the content of the Letters, there is some information that is both the personal information of the Applicant and the Third Parties. The Third Parties' personal information is as follows:

- Letters #10-11-Part #5
- Letters #12-15-Third Parties' names, home or business addresses, telephone/fax numbers, e-mails, titles, academic ranks, departments, institutions, employer and signatures.
- Letters #10-11-Part #1-2-interspersed comments through which one may identify the Third Parties;
- Letters #12-15-Bodies of Letters- interspersed comments through which one may identify the Third Parties;

2. The following is the Applicant's personal information:

    - Letters #10-11-Introductory information related to student identification and degree applying for;
    - Letters #10-11-Part #1-4;
    - Letters #12-15-Bodies of Letters.

3. The U of A did not correctly determine that all the information withheld from the Applicant under section 16 was personal information about third parties.

Issue B. Did the University decide correctly that the information it severed under section 16 must be withheld from the Applicant?

4. Because Third Party #6 has consented to the disclosure of his personal information in Letter #15, section 16 does not apply to Letter #15. Therefore, it would not be an unreasonable invasion of Third Party #6's personal privacy to disclose Letter #15 to the Applicant. As a result, the U of A did not correctly decide that the information it severed under section 16 must be withheld from the Applicant.

5. On balance, after weighing all the relevant circumstances under section 16(5), I find that it would not be an unreasonable invasion of the Third Parties' personal privacy to disclose their personal information contained in Letters #10-14. As a result, the U of A did not correctly decide that the information it severed under section 16 must be

withheld from the Applicant. Therefore, the U of A must not withhold the Letters under section 16 of the Act.

Issue C. Can the Records be withheld under section 18(1) (confidential evaluations) of the Act?

6. I find that section 18(1) does not apply to the Letters.

7. I order the U of A to disclose to the Applicant the Letters in their entirety.

8. I further order that, within 50 days of being given a copy of this Order, the U of A notify me in writing that it has complied with this Order.

Robert C. Clark
Information & Privacy Commissioner

Appendix "A"

Appearances:

- Applicant
- Third Party #3
- U of A
  - Ms. Bertha Greenstein, counsel
  - Mr. Gordon Unger, Access and Privacy Advisor
  - Dr. Mark Dale, Dean of the Faculty of Graduate Studies and Research

Appendix "B"

Documents Considered by the Commissioner at the Inquiry and Provided to the Parties:

- Submissions from the Applicant, Third Party #3, and the U of A;
- Submission of the University of Alberta to the Select Special Freedom of Information and Protection of Privacy Act Review Committee dated June 30 1998;
- Legislative Assembly of Alberta, 24th Legislature, Second Session, Select Special Freedom of Information and Protection of Privacy Act Review Committee, Monday, November 30, 1998 (Transcript No. 24-2-12), pp. 252-256;
- Freedom of Information and Protection of Privacy Act, Statutes of Alberta, 1994, Chapter F-18.5 with amendments in force as of February 1, 1999;
- Letter from Third Party #6 consenting to disclosure of his reference letter;
- Application for Graduate Admission, Information and Instructions;

- Ontario Order *P-240 Ministry of Colleges and Universities* [1991] O.I.P.C. No. 34.

Documents Presented after the Inquiry by the U of A and Considered by the Commissioner:

- Article 7 of the University of Alberta Faculty Agreement