OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 00-47

INQUIRY REGARDING MALASPINA UNIVERSITY-COLLEGE RECORDS

David Loukidelis, Information and Privacy Commissioner
October 19, 2000

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Summary: Applicant's signing of a contractual release and waiver in favour of public body did not preclude applicant from making subsequent access request for records related to him or excuse public body from responding. Public policy dictates that rights and obligations under the *Freedom of Information and Protection of Privacy Act* cannot be waived by contract. Public body was required to respond to applicant's access request, which it had done, but applicant was not entitled to have access to records covered by s. 14. It was not necessary to consider s. 22 issues relating to records protected by s. 14.

Key Words: jurisdiction to hold inquiry – contracting out of Act – solicitor client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 14, 22(1), 22(3)(g), 22(5); *Employment Standards Act*, s. 4; *Workers' Compensation Act*, s. 13(1).

Authorities Considered: B.C.: Order 00-06; Order 00-08; Order 00-39. **Ontario:** Order P-984.

Cases Considered: *Ontario Human Rights Commission et al.* v. *Borough of Etobicoke* (1982), 132 D.L.R. (3d) 14 (S.C.C.); *Millar Estate (Re)*, [1938] 1 S.C.R. 1; *Jones* v. *Asante*, [1995] B.C.J. No. 1083 (S.C.); *Huppé* v. *Huppé* (1990), 66 Man. R. (2d) 241 (Q.B.); *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 143; *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner)* [1998] O.J. No. 420 (Ont. C.J.); *John Doe Agency and John Doe Government Agency* v. *John Doe Corporation*, [1989] SCT-QL 5830; 493 U.S. 146; *Ontario (Criminal Review Board)* v. *Doe* (1999), 47 O.R. (3d) 201 (C.A.); *Hodgkinson* v. *Simms* (1989), 33 B.C.L.R. (2d) 129 (C.A.).

1.0 INTRODUCTION

This case raises the important question of whether it is possible to contractually limit or waive a person's rights of access to information under the *Freedom of Information and Protection of Privacy Act* ("Act"). The public body in this case, Malaspina University-College ("College"), says it was not required to respond to the applicant's November 16, 1999 request for access to information because of a contractual release and waiver signed by the applicant in the College's favour. When the College and the applicant parted ways last year, the applicant agreed – in an "Agreement and Final Release" signed October 25, 1999 ("Release") – as follows (among other things):

> THE RELEASOR [THE APPLICANT] HEREBY REMISES, RELEASES, AND FOREVER DISCHARGES the Releasee [the College] of and from any and all manner of actions, causes of action, claims and demands of any nature or kind whatsoever, whether in law or in equity, whether known or unknown, which the Releasor now has, or can or may have related to or arising out of the employment or termination of employment of the Releasor by the Releasee … .

In his access request, the applicant sought two records that had been written about him by College staff, a College employee's minutes of a meeting attended by the applicant and College representatives, and other records about the applicant allegedly held by the College's president. The College's initial response to the applicant's request, in a letter dated November 26, 1999, took the position that the College was not required to respond to the request. Despite its initial refusal to respond to the request, the College later responded to the request under the Act. It did so in a February 16, 2000 letter from its lawyers. That College took the position that the information sought by the applicant is, in any case, excepted from disclosure under s. 14 of the Act.

Because the matter was not settled during mediation, I held a written inquiry under s. 56 of the Act. Because I believed further submissions on the contracting-out issue were desirable, I sought and received further submissions from both parties on that issue.

2.0 ISSUES

The first question to be addressed is whether the College is correct when it says the Release deprives me of the jurisdiction to proceed with this inquiry. Put another way, have the College and the applicant validly, by contract, ousted the applicant's statutory right to have access to records, and have they relieved the College of its duties under the Act in relation to that request, such that I cannot complete this inquiry or offer the applicant any remedy? Neither party contends that I have no authority to determine the jurisdictional issue. In any case, I conclude – including in light of s. 56(1) of the Act – that I have the authority to determine that issue.

If I have the jurisdiction to proceed, the next issue is whether s. 14 of the Act applies to information requested by the applicant. Section 57(1) of the Act provides that the College has the burden of establishing that s. 14 applies. Another issue raised here is whether s. 22 applies to the two statements requested by the applicant. Because I have

found the two statements are protected by s. 14, it is not necessary to deal with the issue of whether s. 22 applies to prevent their release to the applicant.

In his reply submission, the applicant refers to an earlier access request he made to the College. The College acknowledges the applicant made a previous request for his personal file and that it responded. It says (and I agree) that this inquiry is limited to dealing with the applicant's November 16, 1999 access request.

3.0 DISCUSSION

3.1 Description of the Requested Records – The applicant sought access to the following records:

1. Two 'letters' that a College employee indicated were written about the applicant by other College staff;

2. Minutes of a September 8, 1999 meeting, attended by College representatives and the applicant, which were made by a College employee; and

3. A file referred to by the College's president as being in existence about the applicant and his employment situation.

By a letter dated September 7, 2000, I asked the College to deliver to me the records it had identified as responding to the applicant's request, *i.e.*, the records in dispute in this inquiry. The College did so under cover of a letter dated September 14, 2000. It provided me with its law firm's "document brief", which contains documents related to the applicant's dealings with the College. That brief has two parts. It also provided me with its president's file. The two 'letters' (they are actually written statements) referred to in paragraph 1, above, are found at Tabs 5 and 6 of the first part of the document brief; the meeting minutes referred to in paragraph 2, above, are found at Tab 11 of the first part of the brief.

The rest of both the first and second parts of the document brief consists of records that are outside the scope of the applicant's access request. This means they need not be addressed in this order: only the records at Tabs 5, 6 and 11 of that brief are in issue here. Further, only some of the records in the president's file are in issue here. I return below to the question of which records are covered by this inquiry.

3.2 Freedom of Contract and Statutory Rights – As the College sees it, the Release means the applicant has contracted out of, or contractually limited, some or all of his rights under the Act. In its initial submission, it says "the applicant has bargained away his rights under" the Act. In its further submission, it modifies this stance somewhat. It says there that the applicant has "in exchange for genuine consideration" – *i.e.*, payment by the College – only "limited his access to a number of documents". It argues that the question to be answered here "is really whether the policy of ensuring repose" after a settlement between the applicant and the College "should permit a limited qualification of

some rights under the Act". The applicant is said to have given up only his statutory right to gain access to "a narrow category of documents related to a dispute which he has settled after full legal advice". The Release is "circumscribed" and "reasonably limits access to some documents for reasonable purposes".

Public Policy and Contractual Limits on Statutory Rights

The College argues that Canadian law permits individuals to "waive statutorily conferred benefits", subject only to three exceptions: (1) where it is contrary to the provisions or general policy of the statute in issue; (2) where it is contrary to public policy; and (3) where the benefits of the statute are imposed in the public interest. It cites, in support, one of the court decisions to which I referred the parties when I invited further submissions from them – *Ontario Human Rights Commission et al.* v. *Borough of Etobicoke* (1982), 132 D.L.R. (3d) 14 (S.C.C.). In that case, McIntyre J. cited *Millar Estate (Re)*, [1938] 1 S.C.R. 1, in which Duff C.J.C. articulated the three-part test relied on by the College.

In *Etobicoke* itself – to which I return below – McIntyre J. cited *Millar Estate (Re)* and English case law, but ultimately framed the question more simply, as being whether public policy prohibited contracting-out. That case involved a complaint by Etobicoke firemen that forced retirement at age 60, under a collective agreement provision, was discriminatory and violated the Ontario *Human Rights Code*. Etobicoke argued that the collective agreement provision was a *bona fide* occupational qualification, which meant there was no violation of the *Human Rights Code* prohibition against age discrimination. Although the argument was framed in terms of a *bona fide* occupational qualification, the Supreme Court of Canada dealt with it on the basis that it was an attempt to contract out of the *Human Rights Code*.

Writing for the Court, McIntyre J. observed that the *Human Rights Code* contained no explicit restriction against contracting-out. He went on to note, nonetheless, that the *Human Rights Code* was "a public statute and it constitutes public policy in Ontario as appears from a reading of the statute itself and as declared in the preamble" (p. 23). He went on to say the following at pp. 23-24:

> It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of such enactments and that contracts having such effect are void, as contrary to public policy. In *Halsbury's Laws of England*, 3rd ed., vol. 36, p. 444, para. 673, the following appears:
>
> > 673. Waiver of statutory rights. Individuals for whose benefit statutory duties have been imposed may by contract waive their right to the performance of those duties, unless to do so would be contrary to public policy or to the provisions or general policy of the statute imposing the particular duty or the duties are imposed in the public interest.

> And in the fourth edition of the same work the following is to be found in vol. 9, p. 289, para. 421:
>
> > 421. Contracting out. As a general rule, any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement; and, in certain circumstances, it is expressly provided that any such agreement shall be void.
> >
> > By way of example of an exception to the general rule, an agreement between an employer and employee whereby the latter agrees to waive a statutory duty imposed on the former in the interests of safety is generally not binding on the employee.
>
> … The Ontario *Human Rights Code* has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract; therefore this argument cannot receive effect.

Again, Ontario's *Human Rights Code* did not expressly prohibit contracting-out. The Supreme Court of Canada decided, however, that public policy prevented contracting-out.

One respected Canadian author says two kinds of cases exist – those where a contract is invalid because it is directly contrary to statute and those where it is invalid because it is contrary to what is considered to be public policy. See S. Waddams, *The Law of Contracts*, 3rd ed., 1993 (Toronto: Butterworths), at pp. 371 and following.

In my view, the question to be answered here is whether the Legislature has explicitly prohibited contracting-out from the Act and, if it has not, whether public policy nonetheless prevents the College and the applicant from doing that.

Before proceeding, I should deal with the College's argument (at page 3 of its supplemental submission) that the validity of the Release, as a "circumscribed" contract, is to be analyzed differently than a contract by which it or any other public body purports to contract out of the Act in a broader or more fundamental way. To my mind, no useful distinction can be drawn between the Release and such a contract. If the College can validly contract to affect, or remove, a statutory right otherwise available to the applicant (and the College's corresponding statutory obligations), it would be difficult to advance a principled objection to a broader (or blanket) contracting-out. In light of the scheme of the Act, the issue of whether the Act or public policy permits the Release to stand must be dealt with on the same footing as the question of whether a more extensive contracting-out is effective.

Has the Legislature Prohibited Contracting-Out of the Act?

The College says, in its initial submission, that the Release is perfectly valid in the absence of an express statutory prohibition against such a contract. It argues that, "where public policy requires that persons not be able to contract-out of a statute, this is expressly provided for in the legislation". It cites s. 4 of the *Employment Standards Act* as an example. Since the Legislature has expressly prohibited contracting-out of the *Employment Standards Act*, the College argues, the "Legislature must be taken to have, through its inaction, permitted parties to bargain away their rights conferred by the Act".

Granted, the Legislature has expressly prohibited contracting-out of rights conferred in certain statutes, including the *Employment Standards Act* and the *Workers' Compensation Act*. In the case of the *Employment Standards Act*, s. 4 says the requirements of that statute "are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69". In the case of the *Workers' Compensation Act*, s. 13(1) reads as follows:

> A worker may not agree with his or her employer to waive or to forego any benefit to which the worker or the worker's dependants are or may become entitled under this Part, and every agreement to that end is void.

The Act does not in this fashion prevent public bodies and others from contracting-out of rights otherwise afforded under the Act. The College argues that, in light of the Legislature's explicit prohibition against contracting-out in other statutes, the Legislature cannot be taken to have prohibited anyone from contracting-out of the Act. Silence in the Act indicates acquiescence by the Legislature to such an arrangement.

In my view, the absence of an express prohibition against contracting-out is not determinative. As is apparent from *Etobicoke*, above, a legislature sometimes will expressly prohibit contracting-out. But if there is no explicit legislative prohibition, the public policy question on which *Etobicoke* turned still remains.

Does Public Policy Prevent Contracting-Out?

The College cautions against my too readily injecting my view of what public policy is and, on that basis, deciding that contracting-out from the Act is precluded. It says public policy is the "most amorphous ground" on which to set aside a contract and that the courts have been aware that "this basis is open to completely subjective criteria". Citing the Supreme Court of Canada decision in *Millar Estate (Re)*, above, the College says two "strict criteria" must be met before a contract can be held invalid or ineffective on the ground of public policy. First, a prohibition against a contract must only be imposed in the interest of state safety or the economic or social well-being of the state and its people as a whole. Second, public policy should only be invoked in clear cases, in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judges. The College says that, unlike the situation in *Etobicoke*, fulfillment of the Act's purposes – as set out in s. 2(1) – would not be substantially

affected by the Release. The College says only one of the Act's purposes is engaged by the Release, *i.e.*, that of "granting individuals access to personal information". Nor is the Act an attempt, the College submits, to cure the mischief of individuals forfeiting existing rights.

Before turning to *Millar Estate (Re)* – which dealt with a situation very different from this – it should be said that the College's contention that the Release would not affect fulfilment of the Act's purposes generally is debatable. First, the College's argument that the Release only affects the applicant's right of access to his own personal information is difficult to square with the broad characterisation of the Release's terms advanced elsewhere by the College. Its portrayal of the Release's effect varies somewhat. At one point, the College treats the Release as affecting only the applicant's right of access to his own personal information. In another place, however, the College contends that the Release prevents the applicant from getting access to records containing information related to his employment or its termination, a class of information that is not necessarily restricted to the applicant's own personal information. His request certainly covers more than his own "personal information", as that term is defined in the Act, and the College declined to respond to the applicant's request on the basis of the Release. In any case, even if the College's argument that the Release only affects the applicant's right to have access to his own personal information is correct, it would not affect my conclusion on the issue.

As for *Millar Estate (Re)*, that case dealt with a bequest which left the residue of the deceased's estate to whichever mother in Toronto had, within ten years after the death of the deceased, given birth to the most children. The bequest was not prohibited by any statute or by any common law or equitable rule. It was allegedly invalid because it offended public policy at large – it was said the bequest would lead to competition between couples to have children in rapid succession, thus harming mothers and children both morally and physically and degrading family life. Unlike this case, therefore, *Millar Estate (Re)* did not deal with an attempt to contract out of existing statutory rights and obligations. It would be understandable for a court, in a case such as *Millar Estate (Re)*, to be cautious about applying, as the College puts it here, "subjective criteria" in creating an "amorphous ground" for interfering with an otherwise valid bequest.

In relying on *Millar Estate (Re)*, the College distinguishes *Etobicoke*, and other cases in which public policy has been found to prohibit contracting-out of a statute, because they deal with human rights legislation, which the courts have said is of a quasi-constitutional character. I am not persuaded by this distinction. None of the cases referred to by the College readily supports the distinction and the Supreme Court of Canada said nothing to that effect in *Etobicoke*. True, a number of the cases deal with human rights laws, but there are also many modern cases in which contracts have been held invalid on grounds of public policy where no statutory context exists at all or where other kinds of statute are involved. See, for example, *Jones* v. *Asante*, [1995] B.C.J. No. 1083 (S.C.) (failed attempt to contract out of Canada Pension Plan statutory pension division provisions) and *Huppé* v. *Huppé* (1990), 66 Man. R. (2d) 241 (Q.B.) (invalid attempt to contract out of statutory provisions respecting asset division on marital breakdown).

Turning to the main issue, there is ample support for the conclusion that public policy prohibits contracting-out of the Act, which is intended to further a number of important public interests. Section 2 sets out the Act's purposes:

> 2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
>
> (c) specifying limited exceptions to the rights of access,
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (e) providing for an independent review of decisions made under this Act.
>
> (2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

As the first lines of s. 2(1) make clear, the Act's dual purposes are to protect personal privacy and promote accountability to the public of institutions covered by the Act. The Act's accountability objective is achieved, as is acknowledged by s. 2(1)(a), by giving "the public" a right of access to records. That right is, necessarily, exercised by individual applicants on a case-by-case basis. But the 'right' articulated in the section belongs to "the public", not to individual applicants. This provision acknowledges the sea-change effected by the Act in relations between the public, on the one hand, and governments and other public institutions, on the other. The public's right of access to information under the Act compels public bodies to share information with citizens, within prescribed limits, so as to enable them to participate more effectively in society and government.

This was acknowledged by the then Attorney General, Colin Gabelmann, when he introduced Bill 50, which became the Act, in the Legislature on May 22, 1992, during First Reading debate:

> This Bill will strengthen the public's right to information and records in the hands of government, government agencies, boards and commissions and Crown corporations. It does more than simply open government files; it makes it very clear that government is the domain of the public.

During Second Reading debate, on June 18, 1992, the Attorney General said the following:

> As I suggested during First Reading, the philosophy underlying the freedom of information provisions is that government is the public's business and the public has a right, with certain necessary exceptions, to have ready access to information in the hands of government or government agencies.
> …
>
> What this Bill seeks to do is empower citizens so that they can fully exercise their democratic rights. The reality is that if government has information which is denied to citizens, it becomes extremely difficult to make informed judgments about government policy or to endeavour to influence public policy. …
> …
>
> It's a critically important piece of legislation. It extends fundamental rights in a democratic society that citizens should enjoy across the entire broad public sector. It also very clearly increases the accountability and openness of all public bodies in this province. This is important, because another important principle there is an attempt to try to restore faith in our democratic system and in our public bodies.
>
> After this legislation is passed, citizens will have access to information as a fundamental right. They will have the same standards of access and protection of privacy, whether they're dealing with a larger ministry – the Ministry of Health, say, with 100,000 people involved in delivering health care in this province – or the smallest village in British Columbia.
> …
>
> As a result of this extension, we in British Columbia will have freedom of information legislation that will have the broadest scope of any in the country. I believe it's a major advance in terms of openness, accountability and privacy protection for individuals.

The importance of access and privacy rights is further signalled by s. 79 of the Act, which reads as follows:

> If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

In the context of human rights legislation, Lamer J. (as he then was) indicated in *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145, that an override such as that found in s. 79 of the Act affirms the pre-eminence of human rights legislation. In my view, by providing that the Act's provisions prevail over those of any other enactment – unless the Legislature has expressly provided otherwise in the other enactment – the Legislature has further underscored the Act's public interest importance.

Turning to the courts, the Supreme Court of Canada has, more than once, acknowledged the importance of statutory access to information rights in our modern system of government. In *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, for example, La Forest J. discussed the purpose of access to information laws. The policy objectives of the federal *Access to Information Act* are comparable to those of the Act. The following passage, found at paragraphs 59 to 63 of *Dagg*, merits quotation at length:

> 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. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 Can. J. of Econ. and Pol. Sci. 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.
>
> See also: Canadian Bar Association, *Freedom of Information in Canada: A Model Bill* (1979), at p. 6.
>
> Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible. Political philosopher John Plamenatz explains in *Democracy and Illusion* (1973), at pp. 178-79:
>
> > There are not two stores of politically relevant information, a larger one shared by the professionals, the whole-time leaders and persuaders, and a much smaller one shared by ordinary citizens. No leader or persuader possesses more than a small part of the information that must be available in

> the community if government is to be effective and responsible; and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism.
>
> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsible and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.

Although La Forest J. was writing for a dissenting minority in *Dagg*, Cory J., writing for the majority, clearly agreed with La Forest J.'s approach to interpretation of the federal *Access to Information Act* and *Privacy Act*.

The openness and accountability goals of such laws have also been recognized in decisions under Ontario's access to information legislation, which is similar to the Act. It was put this way in Ontario Order P-984 (August 28, 1995):

> One of the principal purposes of the Act is to open a window into government. The Act is intended to enable an informed public to better participate in the decision-making process of government and to ensure the accountability of those who govern. Accordingly, in my view, there is a basic public interest in knowing more about the operations of government.

In *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner)* [1998] O.J. No. 420 (Ont. C.J.) (appeal allowed on another ground: [1999] O.J. No. 484 (C.A.)), at paras. 127 and 128, Wright J. considered LaForest J.'s observations about access to information rights in *Dagg*, and also a work of Canadian political philosophy, to demonstrate the importance of these rights in a democracy:

> The statement of La Forest J. in *Dagg v. Canada (Minister of Finance)*, referred to earlier, bears repeating in this context:
>
> > 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.
>
> The Canadian author and philosopher John Ralston Saul in his recent book *Reflections of a Siamese Twin - Canada at the End of the 20th Century* (1997) (Viking Publications) at p. 460 makes a similar comment:
>
> > The primary consideration is that in a democracy legitimacy lies with the citizenry. That is 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.

The United States Supreme Court expressed similar views in a case with the entertaining name of *John Doe Agency and John Doe Government Agency* v. *John Doe Corporation*, [1989] SCT-QL 5830; 493 U.S. 146. At para. 18, Blackmun J. provided the following summary of that Court's rulings in freedom of information cases:

> This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA [the United States federal *Freedom of Information Act*]. "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). The Act's "basic purpose reflected a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of Air Force* v. *Rose*, 425 U.S. 352, 360-361 (1976), quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B.* v. *Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978). See also *Department of Justice* v. *Reporters Committee for Freedom of Press*, 489 U.S. 749, 772-773 (1989).

As for the privacy protection aspects of the Act, the Attorney General said the following in Second Reading debate on the Act, on June 18, 1992:

> The Bill provides greater protection for privacy with respect to personal information held by the government. It places limits on the right to collect such information and provides that such information cannot be used for other purposes without authorization.

The following passage from the reasons of La Forest J. in *Dagg*, at paragraphs 63 to 67, is apposite, since it deals with the federal *Privacy Act*, the privacy protection purposes of which are consonant with those of the Act:

> The purposes of the *Privacy Act*, as set out in s. 2 of the Act, are twofold. First, it is to "protect the privacy of individuals with respect to personal information about themselves held by a government institution"; and second, to "provide individuals with a right of access to that information", this appeal is, of course, concerned with the first of these purposes.
>
> The protection of privacy is a fundamental value in modern, democratic states; see Alan F. Westin, *Privacy and Freedom* (1970), at pp. 349-50. An expression

of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy – the freedom to engage in one's own thoughts, actions and decisions; see *R.* v. *Dyment*, [1988] 2 S.C.R. 417, at p. 427, per La Forest J.; see also Joe Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?" (1982), 58 Notre Dame L. Rev. 445.

Privacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms*; see *Hunter* v. *Southam Inc*., [1984] 2 S.C.R. 145. Certain privacy interests may also inhere in the s. 7 right to life, liberty and security of the person; see *R.* v. *Hebert*, [1990] 2 S.C.R. 151, and *R.* v. *Broyles*, [1991] 3 S.C.R. 595.

Privacy is a broad and somewhat evanescent concept, however. It is thus necessary to describe the particular privacy interests protected by the *Privacy Act* with greater precision. In *Dyment*, I referred to *Privacy and Computers*, the Report of the Task Force established jointly by the Department of Communications/Department of Justice (1972), especially at pp. 428-30. That "report classifies these claims to privacy as those involving territorial and spatial aspects, those relate to the person, and those that arise in the information context". It is the latter type of privacy interest that is of concern in the present appeal. As I put it in *Dyment*, at pp. 429-30:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p.13); "this notion of privacy derives form the assumption that all information bout a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations about where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, an restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the *Privacy Act*. …

See also *R.* v. *Duarte*, [1990] 1 S.C.R. 30, at p. 46 ("privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself"); *R.* v. *Osolin*, [1993] 4 S.C.R. 595, at pp. 613-15 (per L'Heureux-Dubé J., dissenting); Westin, *supra*, at p. 7 ("[p]rivacy is the claim of individuals … to determine for themselves when, how, and to what extent information about them is communicated to others"); Charles Fried, "Privacy" (1968), 77 Yale L.J. 475, at p. 483 ("[p]rivacy …. is control over knowledge about oneself").

Other decisions, including *R.* v. *Dyment*, [1988] 2 S.C.R. 417, and *R.* v. *O'Connor*, [1995] 4 S.C.R. 411, also affirm the role of privacy laws in promoting

> the important goal of giving citizens protection against inappropriate state collection, use or disclosure of their personal information.

The last authority to which I will refer is *Ontario (Criminal Review Board)* v. *Doe* (1999), 47 O.R. (3d) 201 (O.C.A.). That case dealt with the question of whether an institution had – for the purposes of Ontario's *Freedom of Information and Protection of Privacy Act* – control over a backup tape made by a court reporter of Ontario Criminal Review Board proceedings. An access request had been made for the tape, but the court reporter – who was an independent contractor – refused to turn the tape over to the Board so it could respond to the request. As is the case under the Act, the Ontario law only applies to records in the custody or under the control of an institution covered by the Act. Since the court reporter was not covered by the Act, and since the Board had lost control over the tape, the Board said it could not respond to the access request.

In affirming a decision that the Board had control of the tape for that purpose, the Ontario Court of Appeal rejected the Board's argument that, by contracting out the court-reporting functions previously performed by Board employees, the Board had lost its ability to control the tape. At para. 35, O'Connor J.A. said the following for the Court:

> The Board has argued throughout this proceeding that if it is ordered to make access to the backup tapes available to the John Does [the requesters], it will be unable to comply because it is not able to compel the court reporter to deliver the backup tapes to it. I must say I find this a rather surprising proposition. We were told that at some time in the past the Board had used employees to do what independent court reporters now do. If the Board had continued to use employees there would be no issue; the backup tapes would be in the Board's custody and under its control. However, the Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfill its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the Act by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act.

Although the Court did not explicitly appeal to public policy grounds in its reasoning, it evidently took a jaundiced view of the argument that, by contracting out functions it had previously performed, the institution had effectively contracted out of Ontario's access and privacy legislation, which is similar to the Act. *Ontario (Criminal Review Board)* is useful in considering the public policy issue at hand.

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. As for privacy, the Act's rules for collection, use and disclosure of individuals' personal information apply in individual cases, but they benefit

society as a whole. Those rules curtail state actions that otherwise might unreasonably encroach on citizens' individual autonomy. Diminished individual autonomy is not conducive to the development, or continued existence, of a free and democratic society.

The authorities quoted above also attest to the fundamental importance of access and privacy laws. The Attorney General observed in debate in the Legislature that the Act creates "fundamental" access to information rights. As La Forest J. observed in *Dagg*, at para. 59, access to information rights are enacted on the premise "that members of the public should have an enforceable right to gain access to government-held information". He also emphasized, at para. 61, that the "overarching purpose of access to information legislation … is to facilitate democracy". It is equally clear that statutory privacy rights are of central importance in our society. As La Forest J. noted in *Dagg*, at para. 64, "protection of privacy is a fundamental value in modern, democratic states". *Dagg* and several other Supreme Court of Canada decisions also demonstrate that privacy has constitutional dimensions under the *Canadian Charter of Rights and Freedoms*.

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. The public policy issue does not turn here on an idiosyncratic or subjective assessment of what is or should be public policy – that is articulated in the Act (including s. 2(1)) and is confirmed by the authorities to which I have referred. I have, therefore, concluded that the Release is, as regards its purported effect on the parties' rights and obligations under the Act, contrary to public policy and is not to be given effect. Accordingly, I find that I have the jurisdiction to conduct this inquiry.

It is not necessary for me to consider whether the terms of the Release, properly interpreted, actually have the effect the College says they do. The next question is whether the College was authorized or required by provisions of the Act to refuse to disclose information to the applicant.

3.3 Solicitor Client Privilege – It is well established that s. 14 – which authorizes a public body to refuse to disclose information "that is subject to solicitor client privilege" – incorporates both branches of common law solicitor client privilege. The College says the responsive records are privileged because they meet the test for litigation privilege, *i.e.*, they were created for the dominant purpose of preparing for, advising on or conducting litigation that was underway or in reasonable prospect at the time they were created. It cites Order 00-06 in support of this argument.

The College's initial submission contains the following argument on s. 14:

> 21. Privilege must be established by the public body through evidence.
>
> 22. It is submitted that those written statements created by MUC staff after the applicant threatened legal action and at the direction of MUC's solicitor were records which were created in contemplation of litigation. They were created out

> of a confidential meeting between MUC and its staff in which legal advice was sought.
>
> 23. Accordingly, it is clear that section 14 privilege applies in both senses to some of the staff's written statements and some of the Johnston file [*i.e.*, the file kept by the College's president, Richard Johnston].

In support of its case, the College relies on an affidavit sworn by its president. Paragraphs 5 through 9 of that affidavit read as follows:

> 5. On September 14, 1999, I received a letter from … a lawyer representing … [the applicant], indicating that legal proceedings would be commenced against MUC [the College] unless MUC agreed to reinstate … [the applicant]. MUC was not prepared to reinstate … [the applicant].
>
> 6. On September 20, 1999, a confidential meeting was arranged at my office with MUC's solicitors and senior staff at MUC to discuss this situation. MUC wished to and did receive legal advice at this time. We also were seeking advice in light of … [the applicant's] threatened legal proceedings. On the latter point, we were advised by our solicitors to secure a number of statements from MUC employees in order to assist the defense of … [the applicant's] claim, should he advance one.
>
> 7. After the September 20th confidential meeting with MUC's solicitors, I asked for several statements to be prepared and sent those onto MUC's solicitors.
>
> 8. Finally, on September 20, 1999, MUC instructed our solicitors to formally reply to and reject … [the applicant's] demand for reinstatement.
>
> 9. After some communications between … [the applicant's] solicitors and MUC's solicitors a settlement was agreed to between … [the applicant] and MUC. The terms of the settlement were recorded in an Agreement and Final Release which was executed by … [the applicant] on October 25, 1999. Attached and marked as Exhibit "B" to this Affidavit is a copy of the Agreement and Final Release.

In addition to this affidavit evidence, this is a case where the records themselves provide evidence of facts material to the College's claim of privilege. On this point, see Order 00-39.

The College argues that the two statements at Tabs 5 and 6 of the first part of the document brief, having been created after the applicant's lawyer wrote to the College and threatened to sue, are privileged under the litigation privilege aspect of s. 14. I agree, based on the College's evidence, that there was a reasonable prospect of litigation between it and the applicant from and after September 14, 1999. Accordingly, I find that there was a reasonable prospect of litigation in relation to the two statements delivered to me by the College. I am also satisfied, based on the College's evidence and my review of the statements, that the dominant purpose for creation of these statements was to assist the College's lawyers in preparing the College's defence against litigation in reasonable

prospect at the time the statements came into existence. Accordingly, these two records are protected by litigation privilege under s. 14 of the Act.

The College's submissions and supporting material, as well as the two statements, also support the conclusion that the statements are protected by legal professional privilege. They were prepared to enable the College's lawyers to give legal advice to the College. In my view, these statements – which were made by College employees – are not communications by third parties to the College's lawyers. They are to be treated as communications from the College to the College's lawyers. In this light, the statements at Tabs 5 and 6 are solicitor-client communications protected by legal professional privilege under s. 14. They are protected despite the signing of the Release. Legal professional privilege is not affected by the termination of existing litigation or of the possibility of litigation.

The College's s. 14 submissions do not explicitly deal with the minutes of the September 8, 1999 meeting, which was attended by College representatives and the applicant. I have already found that litigation was in reasonable prospect from and after September 14, 1999. There is no evidence before me to support a finding that litigation was in reasonable prospect before that date. Nor is there any support in the material for a finding that the minutes were prepared for the dominant purpose of preparing for, advising on or conducting litigation. I find that the meeting minutes, which are found at Tab 11 of the first part of the document brief, are not protected by litigation privilege. Nor is there any basis on which I can conclude that the minutes are solicitor-client communications that qualify for legal professional privilege under s. 14.

The College concedes, in paragraph 23 of its initial submission, that only "some" of the contents of its president's file is protected by s. 14. That file contains copies of records that are also found in the document brief maintained by the College's lawyers. It also contains copies of letters and faxes between the College and its lawyers regarding the applicant's November 16, 1999 access request under the Act and this inquiry. Both of these kinds of records are not responsive to the applicant's request. They are outside the scope of this inquiry. They would, in any case, almost certainly be protected by legal professional privilege under s. 14.

The president's file also contains records that pre-date the Release's signing on October 25, 1999. (There are no records dated between October 25, 1999 and November 16, 1999.) Many of the pre-Release records are communications between the College and its lawyers and are, on their face, protected by legal professional privilege. I have delivered copies of these privileged records to the College along with its copy of this order, so it can identify the records that I find are protected by s. 14.

Other records in the president's file include copies of local newspaper articles reporting on the applicant's employment situation (or articles published elsewhere regarding similar situations). Some of the newspaper articles deal with the applicant's replacement at the College. The records include copies of letters between the College's administration and the media or between the College and members of the public or College students.

These letters deal with the applicant's situation and the College's handling of it. The College has not provided me with any evidence to support a finding that these records were prepared for the dominant purpose of assisting with, conducting or advising upon litigation in reasonable prospect at the time of their creation. Nor do the records themselves support such a conclusion. The College has not relied on any of the Act's other exceptions to the right of access in relation to these records.

Returning to the document brief, the records found at Tabs 1-4, 7-10 and 12-25 of the brief are outside the scope of the applicant's request and are not subject to this inquiry. In any case, these records may well be privileged under s. 14 (including in light of *Hodgkinson* v. *Simms* (1989), 33 B.C.L.R. (2d) 129 (C.A.)).

The records at Tabs 1 through 15 of the second part of the document brief are also outside the scope of the applicant's request and are not covered by this inquiry. Those records would almost certainly be protected by legal professional privilege under s. 14.

4.0 CONCLUSION

Again, this inquiry is not concerned with any of the following records (collectively, "Excluded Records"): the records at Tabs 1-4, 7-10 and 12-25 of the first part of the document brief; all of the records in the second part of the document brief (*i.e.*, the records at Tabs 1-15 of that part); or any records in the College's president's file dated on or after November 16, 1999.

It should also be noted that a few of the records in the College president's file contain personal information of third parties. Some of that information relates to the employment history of a third party. In another case, the record contains personal information about a third party's emotional and psychological history. This personal information – a good deal of which is sensitive – is clearly subject to one or more of the presumed unreasonable invasions of personal privacy found in s. 22(3) of the Act. In both his initial and reply submission here, the applicant made it clear that he does not wish to see third party personal information – as regards personal information, he clearly wishes to have access only to his own personal information. In the circumstances, I find that s. 22(1) requires the College to refuse access to third party personal information in records found in its president's file. I have delivered copies of the affected records to the College, marked in each case as "Section 22 Records".

In light of the findings made above, the following orders are made with respect to the records other than the Excluded Records:

1. Under s. 58(2)(b) of the Act, I confirm the decision of the College that it is authorized by s. 14 of the Act to refuse to disclose (a) the records found at Tabs 5 and 6 of the first part of the document brief; and (b) the privileged solicitor-client communications found in its president's file, copies of which I have delivered to the College with its copy of this order;

2. Under s. 58(2)(c) of the Act, I require the College to refuse to give the applicant access to the Section 22 Records, copies of which I have delivered to the College with its copy of this order; and

3. Under s. 58(2)(a) of the Act, I require the College to give the applicant access to (a) every record in its president's file that is not described in paragraphs 1 or 2, above; and (b) the meeting minutes found at Tab 11 of the first part of the document brief.

October 19, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia