ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-008

July 31, 1996

DEPARTMENT OF JUSTICE

REVIEW NUMBER 1049

BACKGROUND

On November 16, 1995, the Applicant, a corrections officer, requested that Correctional Services Division, Alberta Justice, provide staff and inmate reports, and transcripts of staff and inmate verbal statements regarding an investigation that resulted in disciplinary action against the Applicant.

On December 19, 1995, Alberta Justice refused to disclose the information requested, and, on January 19, 1996, the Applicant requested that my office review that refusal. However, the Applicant revised the request for records, requesting only a copy of a named corrections officer's written report, with the name blacked out, and agreed to forgo the request for transcripts of staff and inmate verbal statements at this time.

Under section 65 of the *Freedom of Information and Protection of Privacy Act* ("the Act"), mediation was authorized between the Applicant and Alberta Justice, but was not successful.

The Applicant and Alberta Justice were subsequently notified that a private inquiry would be held on June 25, 1996. My office received the Applicant's submission on June 5, 1996 and Alberta Justice's submission on June 17, 1996.

Alberta Justice had refused access initially citing sections 19(1) ("law enforcement") and 23(1) ("advice from officials") of the Act. In its submission to the inquiry, Alberta Justice abandoned its section 23(1) argument and raised the application of section 16 ("personal information") of the Act for the first time. As a result, the Applicant did not have the opportunity to respond to Alberta Justice's arguments under section 16.

The late raising of exemptions has not yet become a serious issue in Alberta. It did become a serious issue in Ontario, and the Commissioner there responded by informing government that his office would refuse to consider discretionary ("may") exemptions raised by a public body within 35 days of the date of the inquiry. In other words, the case for discretionary exemptions was closed 35 days before the inquiry. This policy was upheld by the Ontario Divisional Court and the Ontario Court of Appeal: *Ministry of Consumer and Corporate Relations v. Anita Fineberg, Inquiry Officer et al* (21 December 1995), Toronto Doc. 220/95 Ont. Div. Ct., [1996] O.J. No. 1838 (Ont. C.A.). A certain degree of tolerance is in order during the first year of applying the Act, but if the late raising of discretionary exemptions results in delays or works to the prejudice of other parties, a policy may have to be made. However, section 16 is a mandatory ("must") exemption, and because I am responsible for the overall administration of the Act, I would consider section 16, whether or not it has been raised.

Section 16 places the burden of proof on the Applicant to prove that disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy. Therefore, I gave the Applicant the opportunity to present arguments relating to section 16. This office received the Applicant's further submissions on July 26, 1996.

RECORD AT ISSUE

The record under consideration, as set out in Alberta Justice's submission, is a statement concerning the conduct of the Applicant while on duty as a corrections officer. The statement was provided to Correctional Investigators by Corrections Officer X, a named individual, on November 15, 1995. The statement resulted in an investigation into the Applicant's conduct, which in turn resulted in disciplinary action against the Applicant.

It is significant that a copy of X's statement was provided to the Applicant's union representative for an arbitration hearing. X gave Alberta Personnel Administration Office a verbal consent to disclose the statement to the union representative for the Applicant's arbitration hearing, subject to an undertaking that the statement not be copied or given to anyone other than the

union representative. X did not consent to a copy of the statement being provided to the Applicant.

ISSUES

Issue A:

Does any information contained in the Record qualify as "personal information" as provided by section 16(1) of the Act and as defined in section 1(1)(n) of the Act?

If the answer to that question is "yes", did Alberta Justice correctly apply the mandatory exemption provided by section 16 of the Act to the Record.

If the answer to this question is "yes", and the Record contains personal information of identifiable individuals other than the Applicant, did Alberta Justice properly refuse to disclose the personal information because disclosure would be an unreasonable invasion of a third party's personal privacy, as provided for in section 16(1)?

Issue B:

Did Alberta Justice correctly apply the discretionary exemption provided by section 19(1) ("law enforcement") of the Act to the Record? This requires an answer to the preliminary question of whether this is a "law enforcement" matter, as defined in section 1(1)(h) of the Act.

DISCUSSION

Issue A:

Does the Record contain "personal information"? Section 1(1)(n) defines "personal information". The relevant clauses of that section are as follows:

> 1(1)(n) "personal information" means recorded information about an identifiable individual, including
>
> (i) the individual's name, home or business address or home or business telephone number
>
> (viii) anyone else's opinions about the individual
>
> (ix) the individual's personal views or opinions, except if they are about someone else

The Record contains personal information about the Applicant. Under section 6(1) of the Act, the Applicant is entitled to any record containing the Applicant's personal information, including anyone else's opinions about the Applicant. However, the Record also contains the personal information of X, namely, X's name and other recorded information about X that is clearly attributable to and identifies X. Furthermore, the Record contains the personal information of other identifiable individuals.

Under section 16(1) of the Act, 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. This judgment is made by the head of the public body. My role is to not to review the head's decision, but to see that he used the right process. Alberta Justice claims that it properly refused to disclose the Record under this provision.

Alberta Justice submits that section 16(2)(b), (g) and (3)(f) are relevant to its refusal to disclose under section 16(1). Section 16(2)(b) and (g) provide that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if:

> (2)(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation
>
> (g) the personal information consists of a 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
>
> (3) In determining under subsection (1) or (2) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (f) the personal information has been supplied in confidence

In Order 96-006, which my office issued to the public on July 9, 1996, I have expressed my view that "a possible violation of the law", as contained in section 16(2)(b), encompasses the notion of violation of a statute or regulation, and a penalty or sanction imposed under that same statute or regulation. As in Order 96-006, the Record in this case relates to disciplinary action against the

Applicant. The Applicant's action, if wrong, would be a breach of employment duties, and not a violation of the "law" as defined.

Since this was not an investigation into a possible violation of the "law", section 16(2)(b) is not applicable to the Record, and Alberta Justice incorrectly applied this provision when refusing to allow the Applicant access to the Record.

Section 16(2)(g) is applicable to the names of other identifiable individuals and X. Those names appear in the body of the Record. X's name is not in the body of the record itself, but is signed at the end of the record. Furthermore, the record contains other personal information about X that is clearly attributable to and identifies X.

Under section 16, the Applicant must prove that disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy. In replying to section 16(1) and (2)(g), the Applicant claims that it would not be an unreasonable invasion of X's personal privacy to disclose the personal information, particularly X's personal information, because:

> (1) The Applicant knows who wrote the letter that is the Record.
>
> (2) X has admitted to writing the letter that is the Record.
>
> (3) The Applicant knows X's personal information, and claims that the Record will not reveal any of X's personal information not already known.

In British Columbia, the Information and Privacy Commissioner rejected an argument that the Applicant should receive records because the Applicant knew "the subject of the material as well as the persons connected with this incident." (see British Columbia Order 83-1996). The Commissioner stated that there is a difference between knowing the subject matter or the names of parties and having a right under the legislation to obtain access to the information given by those parties. I also reject the Applicant's argument under section 16(1) and (2)(g) on the ground that there is a difference between knowing a third party's personal information and having the right of access to that personal information under the Act.

The Applicant further claimed that X provided the Record as part of X's employment, not in a personal capacity. Presumably, the Applicant was claiming that the Record should be released on this ground, and was citing Order 96-006. The Applicant should not take Order 96-006 to mean that personal information is releasable just because a person prepares a record as part of his or her employment responsibilities. Even in that order, I considered the issue of personal information contained within records at issue, and

required that the personal information be severed. Unlike Order 96-006, in this case severing is not feasible to protect personal information.

I therefore find that the Applicant's evidence does not meet the burden of proof under section 16(1) and (2)(g). Accordingly, Alberta Justice correctly applied section 16(2)(g) to the Record, and I uphold Alberta Justice's decision to refuse access to the Record on the basis of section 16(2)(g).

Even though Alberta Justice correctly applied section 16(2)(g) to the Record, in most cases this would result in simply severing names and other identifying information, rather than refusing to disclose the entire record. This is particularly the case when the Record, as here, also contains the Applicant's personal information to which the Applicant would be entitled under section 6(1).

I have carefully reviewed the Record to determine whether the third party personal information can be severed, as requested by the Applicant, so that the Applicant can be provided with the remainder of the Record that includes the Applicant's personal information. I find that the third party personal information is so intertwined with the contents of the statement that it cannot be severed without making the rest of the Record meaningless. Therefore, this presents an "all or nothing" proposition.

As stated, my responsibility is to satisfy myself that the head of the public body properly exercised his discretion under section 16. That section requires the head to consider a number of stated factors which tell him what is and is not "an unreasonable invasion of a third party's personal privacy". Section 16(3) tells the head to consider all relevant circumstances, including those listed in the subsection. If, after weighing all relevant circumstances, the head determines that the invasion of personal privacy is unreasonable, he is required to refuse access. Section 68(2)(c) says that, where the head is required to refuse access, if the Commissioner is satisfied that the head exercised his discretion correctly, the order must be to uphold the decision of the head to refuse access. As I see it, in this case, the head was confronted with a clear choice between the right of the third party to have personal information withheld and the issue of whether the personal information is relevant to a fair determination of the Applicant's rights (section 16(3)(c)). The head of the public body was aware that a copy of the record had been made available to the union representative for the purpose of the Applicant's arbitration hearing. By the Applicant's own admission, the Applicant has seen and read that copy of the record. I am going to assume that the head therefore knew that there would be no prejudice to the Applicant's rights if the information were not released pursuant to this application. With that condition satisfied, the balance would reasonably tip towards this being an

unreasonable invasion of X's personal privacy. On this basis, I am satisfied that the head properly applied section 16.

Having made this decision, I do not need to consider Alberta Justice's argument that section 16(3)(f) applies in determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy. It follows that I also do not need to consider the Applicant's submission on this issue or on other issues not relevant to section 16.

One further consideration is X's oral consent to disclosure of personal information, in the form of the Record, to the arbitration proceeding. Section 16(4)(a) of the Act provides, as follows:

> 16(4) 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

As X did not provide consent in writing, as required by the Act, section 16(4)(a) does not apply to remove this Record from the ambit of section 16(1).

Issue B:

Did Alberta Justice correctly apply the discretionary exemption provided by section 19(1) ("law enforcement") of the Act to the Record? The following provisions of section 19(1) are relevant to this issue:

> 19(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> > (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement
> >
> > (d) reveal the identity of a confidential source of law enforcement information

The initial issue is whether this is a "law enforcement" matter, as defined in section 1(1)(h) of the Act. As discussed in Order 96-006, the investigation of a corrections officer's performance of his or her job does not fall within the definition of law enforcement. A corrections officer's duties are not imposed by law such that a breach of those duties is a violation of law which could result in the imposition of a penalty or sanction imposed by the enforcement of that law.

Accordingly, I do not find that the Record concerns a law enforcement matter as defined in the Act. The Record would not be properly withheld under this exemption. However, as stated above, the head properly considered the other factors in section 16 and came to his decision properly.

ORDER

For the reasons stated in this order, I uphold Alberta Justice's decision to refuse access to the Record.

Robert C. Clark
Information and Privacy Commissioner