ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-016

December 2, 1996

ALBERTA ENVIRONMENTAL PROTECTION

Review Number 1095

BACKGROUND

[1.] On January 4, 1996, the Applicant requested that Alberta Environmental Protection ("the public body" for the purposes of this review and inquiry) and Alberta Environmental Centre (AEC, the Research and Scientific Support Division of the public body until July 10, 1996) provide the Applicant with one copy of a report written jointly by AEC and an independent consulting company, and held in the custody or under the control of the public body. The Applicant stated in its accompanying letter to the public body that the president of the independent consulting company had given the Applicant permission to obtain a copy of the report.

[2.] On January 11, 1996, the public body responded that it had received the Applicant's request, and on January 24, 1996, the public body again wrote to the Applicant, this time indicating that it believed that the requested report contained information that might affect the business interests of third parties. The public body's letter also stated that section 29 of the *Freedom of Information and Protection of Privacy Act* (the Act) required that the public body, prior to releasing the report, afford those third parties an opportunity to support disclosure to the Applicant or to make representations explaining why disclosure would have an adverse effect on their business interests.

[3.] The Applicant sent a further letter to the public body, asking to be informed of the identities of the third parties and to receive copies of the third party responses to the Applicant's request. On February 21, 1996, the public body sent a letter to the Applicant, denying access to the report and citing section 24(1)(c) (disclosure of information harmful to economic interest) of the Act.

[4.] On April 15, 1996, the Applicant requested that my office review the public body's decision to deny access to the report. Under section 65 of the Act, mediation was authorized but was not successful. The Applicant and the public body were subsequently notified that an inquiry would be held on August 9, 1996.

[5.] Prior to the date set for the inquiry, the Applicant requested that the inquiry be open to the public, and I agreed. I then directed that the public body, in advance of the inquiry, prepare a letter for the Applicant, explaining, in meaningful terms, its reasons for refusing access to the report. I further required that the public body include a clear indication of how it was applying section 24 of the Act, and to provide my office with a copy of that letter. The public body provided the letter on July 5, 1996.

[6.] At the conclusion of the inquiry, I permitted both the Applicant and the public body to make further written submissions to my office, in order to deal with some issues requiring further evidence. I received the Applicant's submission on August 28, 1996 and the public body's submission on September 3, 1996.

RECORD AT ISSUE

[7.] The record under consideration is a report co-authored by AEC and an independent consulting company, and held in the custody or under the control of the public body. The report contains approximately 845 pages. It is a summary of the literature relating to particular environmental studies. The contract to write the report was signed by AEC and another organization that provided some funding to complete the report. Both AEC and that organization object to the disclosure of the report.

ISSUE A: Could disclosure of the information in the record reasonably be expected to harm the economic interest of a public body under section 24(1)?

[8.] The public body relied specifically on section 24(1)(c), which reads:

> *s. 24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
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> > *(c) information the disclosure of which could reasonably be expected to*
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> > > *(i) result in financial loss to,*
> > >
> > > *(ii) prejudice the competitive position of, or*
> > >
> > > *(iii) interfere with contractual or other negotiations of,*
> >
> > *the Government of Alberta or a public body.*

1. Who is "a public body" for the purposes of section 24(1)?

[9.] When I reviewed the evidence, it was clear that Alberta Environmental Protection considered AEC to be "a public body" for the purposes of the harm test in section 24(1). However, AEC is not "a public body" in its own right, but a division of a public body. Prior to July 10, 1996, AEC was a division of Alberta Environmental Protection. On July 10, 1996, the authority over AEC was transferred from the public body to the Alberta Research Council (ARC). Consequently, AEC is now a division of ARC. Under the definition of "public body" in section 1(1)(p)(i) and (ii) of the Act, AEC is neither a department, branch or office of the Government of Alberta, nor an agency, board, commission, corporation, office or other public body designated as a public body under the *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95, Sched. 1 [re-en. Alta. Reg. 96/96, s. 3], although both Alberta Environmental Protection and ARC are designated as public bodies under that regulation.

[10.] Consequently, "a public body", for the purposes of the harm test in section 24(1) must be either Alberta Environmental Protection or ARC. Given

that the wording of section 24(1) implies future harm, and given that the public body's evidence alleged future harm to ARC as well as to AEC, I believe that ARC should prevail as "a public body" for the purposes of section 24(1). Any harm to AEC, as a division of ARC, would accrue to ARC. The onus is on Alberta Environmental Protection to meet the burden of proving harm under section 24(1).

2. Did the public body correctly apply section 24(1)(c)?

[11.] The public body applied section 24(1)(c) to the record. In Orders 96-012 and 96-013, I stated that the public body may present evidence to show that the information falls within section 24(1)(c), but the public body must still present evidence to show that the information falls within the general rule under section 24(1). In other words, the public body must show that the information "could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy".

[12.] The public body claims that section 24(1) should be interpreted so that the harm to a public body does not have to result directly from disclosing the specific information, but can be "harm at large" or "indirect harm" (my interpretation of the public body's claim). The essence of the public body's argument is this: The information in the record was produced under a contract between a division of a public body and an organization independent of government. There was a confidentiality clause in that contract, which restricts publication of the information. Releasing this information under the Act, contrary to the confidentiality clause, will affect AEC's and, consequently, ARC's contracts with this and other organizations, thereby causing harm to both AEC and ARC. Harm will result from cancelled contracts, and from other organizations bypassing AEC and ARC, knowing they are subject to the Act. That harm is quantifiable.

[13.] However reasonable the public body's argument sounds, I do not think that section 24(1) can or should be interpreted as the public body claims. Section 24(1) focuses on the harm resulting from the disclosure of *that specific information* (my emphasis). The wording of section 24(1) implies that it is the specific information itself that must be capable of causing the harm, if that information is disclosed. When I look at the kinds of information listed in section 24(1)(a)-(d), two things are clear to me: (i) the legislature had very specific kinds of information in mind when it was contemplating what information had the potential to cause harm if disclosed; and (ii) there must be a direct link between disclosure of that specific information and the harm resulting from disclosure; in other words, there must be something in the information itself capable of causing the harm.

[14.] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054 (Fed. T.D.), the court considered this same issue about "direct" harm. In that case, which dealt with a similar section in the federal access legislation, the court stated that (i) there must be a clear and direct linkage between the disclosure of the specific information and the harm alleged, and (ii) the court must be given an explanation of how or why the harm alleged would result from disclosure of the specific information. "This requires evidence linking the harm described and the disclosure of specific pages of the record and an explanation of why, in all the circumstances, the disclosure of the contents of the record would cause such harm." Consequently, the court determined that the public body must do a page-by-page analysis of the record to determine the harm from releasing specific pages and whether specific pages could be released.

[15.] *Canada (Information Commissioner) v. Canada (Minister of External Affairs)*, [1990] 3 C.F. 665 (Fed. T.D.) also supports the proposition that a public body must show how the information could be used to the public body's detriment. This approach has been followed in Ontario: see Order P-1235, [1996] O.I.P.C. No. 280.

[16.] To determine whether the particular information, or any of it, could reasonably be expected to cause the harm specified in section 24(1), the public body must examine the information. If the public body does not examine the information, it cannot say that it correctly applied section 24(1) to except all the information.

[17.] In the present case, the public body claimed an exception for the entire record. I carefully reviewed the public body's evidence to determine if it examined the information contained in the record. There is no evidence that the public body examined the information to determine whether that particular information could reasonably be expected to cause the alleged harm, if disclosed. Instead, the public body appears to have focused on protecting the contractual relationship which produced that information. To the public body's way of thinking, if (i) there's a contractual relationship in place, (ii) the relationship produces information that could be disclosed under the Act, and (iii) the information is subject to a confidentiality clause, then "harm at large" or "indirect harm" to this or any other contractual relationship is sufficient for the purposes proving harm under section 24(1).

[18.] The alleged harm to AEC's and ARC's potential contractual relationships does not result from disclosing the specific information in the record. There is no clear and direct linkage between allegations of harm and disclosure of these 845 specific pages. It is the fact of disclosure in general which is said to cause the harm. The consideration in applying section 24(1) must be whether it's reasonable to expect the alleged harm from the disclosure of the specific

information. Since the public body did not examine the information, it is precluded from claiming that there is a reasonable expectation of harm from disclosure.

[19.] Furthermore, the main object and purpose of the Act is access, subject to limited and specific exceptions. The public body's focus on protecting contractual relationships is not one of the objects or purposes of the Act. If the legislature had intended to protect those relationships, it would have said so. Nowhere in section 24(1), or anywhere else in the Act, can I find that intent. As stated by the court in *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1989] F.C.J. No. 453 (Fed. T.D.), "…if the relationship between the parties…is to be treated as one of confidence and the records arising in it are to be wholly exempt from disclosure, that decision rests with Parliament or with the executive under the Act…" I adopt that reasoning for the purposes of interpreting section 24(1) to exclude a general protection for contractual relationships, unrelated to the harm resulting from the release of the specific information in question.

[20.] I will nevertheless consider whether there is a reasonable expectation of probable harm to the economic interest of a public body from disclosing the specific information in the record.

[21.] I have reviewed all 845 pages of the record. Most of the information on those pages summarizes the literature relating to particular environmental studies. Very little of the information relates to Alberta studies; of those studies discussed, most are more than twelve years old. I identified only 58 pages (approximately 7% of the entire record) where the disclosure of the information on the page had the potential to harm the economic interest of a public body (not ARC), if proven.

[22.] However, in this case, I do not accept that disclosure of any of this information, including the 58 pages mentioned, could reasonably be expected to cause harm. It is not reasonable to expect that harm will result from disclosure of this information because of the nature of the information itself: it is not original research, but merely summaries of studies. Furthermore, those studies have already been published. It is not reasonable to expect that harm will result from disclosure of information that is already in the public domain.

[23.] Consequently, I am of the opinion that disclosure of the information contained in the record could not reasonably be expected to harm the economic interest of a public body. This is particularly true for Section 1 (Introduction), Section 6 (Regulations and Guidelines), the three Glossaries of Technical Terms, and the bibliographies at the end of each part within each section of the record. Therefore, I do not uphold the public body's decision to refuse to disclose the record under section 24(1)(c).

[24.] My decision in this case should not be read as requiring disclosure of the information produced under all research contracts with public bodies. There may well be contracts for future research undertakings in which the information produced from that research falls within section 24(1) because there is a clear and direct linkage between disclosure of the specific information and the harm resulting from that disclosure.

ISSUE B: Should section 31 (disclosure of information in the public interest) be considered in this inquiry?

[25.] The Applicant raised the issue of section 31 and led evidence bearing on that issue. However, section 31 is the subject of another review involving the same record as in this inquiry; consequently, I decline to deal with section 31 in this Order.

ORDER

[26.] I find that the public body incorrectly applied section 24(1)(c) to the information contained in the record. Therefore, the public body is not authorized to refuse access. Consequently, pursuant to section 68(2)(a) of the Act, I require that the head of the public body give the Applicant access to the record.

[27.] I ask that the public body notify me in writing, not later than 30 days after being given a copy of this Order, that this Order has been complied with.

Robert C. Clark
Information and Privacy Commissioner