

# ALBERTA

## INFORMATION AND PRIVACY COMMISSIONER

### ORDER 97-014

December 22, 1997

### ALBERTA JUSTICE

Review Number 1271

#### **Background:**

[1.] On February 10, 1997, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Justice (the "Public Body") for access to a file. The Applicant is an employee with the Public Body. In the request the Applicant stated: "I have been informed of memos written about me by my supervisor without my knowledge. I wish to see this file, kept by my immediate supervisor or the director of this centre."

[2.] In response to the Applicant's request, the Public Body first disclosed 33 pages of records, with some information excepted, and withheld four records in their entirety. The Public Body claimed that the severed information fell within the exceptions to disclosure contained in sections 16(disclosure harmful to personal privacy of third parties) and 23(1)(a) and 23(1)(b)(advice from officials) of the Act. On March 18, 1997, the Applicant made a request for review that this office review the decision of the Public Body.

[3.] During the course of mediation, the Public Body disclosed the remaining four records with information severed under sections 16(1) and 16(2)(g) and sections 23(1)(a) and (b) of the Act. The Applicant reviewed the records and was satisfied with the severing done on three of the records. However, the Applicant contested the severing done under sections 23(1)(a) and 23(1)(b) on the record titled "Briefing Note".

[4.] The matter was set down for inquiry on August 6, 1997. The inquiry was conducted in public except for a brief “in camera” session with the Public Body when a line by line review of the Record was conducted to determine the applicability of sections 23(1)(a) and 23(1)(b) to the “Briefing Note”.

**Record at Issue:**

[5.] The record consists of four pages authored by the Division Executive Director regarding the Applicant’s employment history and is titled “Briefing Note”. It will be referred to as the “Briefing Note”. Evidence was given by the Public Body to show that this Briefing Note was written in a standard briefing note form and was provided to the Assistant Deputy Minister.

[6.] There are five passages severed under sections 23(1)(a) and 23(1)(b) in the Briefing Note as follows:

- first page- under title “Issue”, the last sentence under this section;
- last page- under title “Background”, the entire second paragraph;
- last page- under title “Background”, four sentences of the third paragraph;
- last page- under title “Background”, last sentence of the third paragraph;
- last page- under title “Recommendation”, the entire paragraph.

[7.] Although there was also severing under section 16(1) and 16(2)(g)(disclosure harmful to personal privacy of third parties), it was not at issue in the inquiry since the Applicant did not contest the severing done on this basis.

**Issues:**

[8.] There are three issues in this inquiry:

- A. Does the Briefing Note contain personal information about the Applicant as set out in section 6(1)?
- B. Do sections 23(1)(a) and 23(1)(b) apply to the Briefing Note?
- C. Is there a right of access to the Briefing Note if the information is excepted from disclosure under Division 2 in accordance with section 6(2)?

**Applicant’s position:**

[9.] The Applicant stated that because the Briefing Note is about the Applicant, access to the entire Briefing Note should be provided to the Applicant. The Applicant stated: “I have a right to access all my personal files and employment

documentation.” Further, the Applicant submitted that the Public Body would not suffer any harm from the disclosure if the analyses and recommendations were done in good faith.

**Public Body’s position:**

[10.] The Public Body submitted that the information severed in the Briefing Note falls under sections 23(1)(a) and 23(1)(b). According to the Public Body, free flow of candid advice and recommendations is critical to the decision-making process in matters of employee performance management and discipline. For this reason, the Public Body has chosen to withhold the above-noted passages in the Briefing Note.

**Discussion:**

**Issue A. Does the Briefing Note contain personal information about the Applicant as set out in section 6(1)?**

[11.] Section 6 of the Act reads:

*(1) An applicant has 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.*

*(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

[12.] Section 1(1)(n) of the Act defines “personal information” as follows:

*(n) “personal information” means recorded information about an identifiable individual, including*

*(vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,*

*(viii) anyone else’s opinion about the individual, and*

[13.] Having reviewed the Briefing Note, I find that the information severed does contain personal information about the Applicant as set out in section 6(1) of the Act since it contains references to the Applicant’s employment history and opinions about the Applicant (sections 1(1)(n)(vii) and (viii)).

**Issue B. Do sections 23(1)(a) and 23(1)(b) apply to the Briefing Note?**

[14.] Section 23(1)(a) and (b) of the Act reads:

*23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*

*(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*

*(b) consultations or deliberations involving*

*(i) officers or employees of a public body,*

*(ii) a member of the Executive Council, or*

*(iii) the staff of a member of the Executive Council,*

*permits the head of a public body to refuse to disclose information that would reveal the advice, recommendation, consultations, and deliberations of officials.*

**(a) Application of section 23(1)(a)**

[15.] In Order 96-006 I said that to correctly apply section 23(1)(a), there must be advice, proposals, recommendation, analyses, or policy options (“advice”), and the “advice” must meet the following criteria:

- i. be sought or expected, or be part of the responsibility of a person by virtue of that person’s position,
- ii. be directed toward taking an action,
- iii. be made to someone who can take or implement the action.

[16.] In Order 97-007, I said that the criteria set out in Order 96-006 apply to briefing notes. I also said that just because something is called a briefing note, that does not automatically mean the information is excepted under section 23(1)(a). The information must be examined to see whether it meets the criteria under section 23(1)(a).

**(i) Was the information severed in the Briefing Note sought, or expected, or part of the responsibility of a person by virtue of that person’s position?**

[17.] Evidence was provided by the Public Body to show that the author of the Briefing Note, the Executive Director of the Division, is responsible for personnel matters and that the advising the Assistant Deputy Minister with respect to these matters falls within the author’s responsibilities.

**(ii) Was the information severed in the Briefing Note directed toward taking an action?**

[18.] Evidence was also given by the Public Body that the Briefing Note was prepared because of the gravity of the author's concerns about the Applicant's performance. According to the Public Body, this issue was considered so serious that it required consultation with the Assistant Deputy Minister in terms of possible action to be taken.

[19.] I note that towards the right of the title "Briefing Note" there are a number of vertical entries, with one entry marked off: "for decision". The Public Body stated that had the Briefing Note simply provided information about a situation, which is sometimes the case, the author would have instead checked off the "for information" box.

[20.] Based on the evidence, I find that the information severed is in the form of analyses and recommendation and is directed towards taking an action.

**(iii) Was the information severed in the Briefing Note made to someone who can take or implement the action?**

[21.] Evidence was provided by the Public Body to show that the Briefing Note was prepared for the Assistant Deputy Minister, who has the authority to implement the actions being suggested in the Briefing Note.

**(iv) Did the Public Body exercise its discretion properly under section 23(1)(a)?**

[22.] Section 23 is a discretionary ("may") exception. Consequently, even if section 23(1)(a) applies to information, the Public Body may nevertheless decide to release that information. In Order 96-017, I said that to properly exercise its discretion under the Act, a public body must take into consideration the access provisions of the Act. However, the Commissioner may not exercise the discretion for a public body, but it is limited to requiring the head of a public body to reconsider if a public body has improperly exercised the discretion: see Order 96-017.

[23.] The Public Body gave evidence regarding its exercise of discretion. The Public Body provided a copy of Ministerial Order 27/95 which sets out that the Assistant Deputy Minister is the delegated authority under the Act for the Public Body. The decision to withhold the Briefing Note was made by the Assistant Deputy Minister once the disclosure's impact on the department was assessed.

[24.] It was decided by the Public Body that the free flow of candid advice and recommendations is critical to the decision-making process in matter of employee performance management and discipline. For this reason, the Public Body stated that it had provided the background information to the Applicant and withheld the analyses and recommendation portions of the Briefing Note.

[25.] I also note that all the records (over 33 pages) with the exception of the Briefing Note have been disclosed in entirety with some personal information of third parties withheld.

[26.] Furthermore, only five brief passages have been severed in the Briefing Note. The Briefing Note remains intact and legible to the reader. This supports the Public Body's position that it disclosed as much as it could to the Applicant.

[27.] Taking the above evidence into consideration, I find that the Public Body did consider the objects and purposes of the Act when exercising its discretion.

**(v) Conclusion under section 23(1)(a)**

[28.] I find therefore that the information severed in the Briefing Note meets the criteria to be considered "advice" under section 23(1)(a). I also find that none of the conditions set forth in section 23(2) are applicable to the information severed.

**(b) Application of section 23(1)(b)(consultations or deliberations)**

[29.] The Public Body applied section 23(1)(a) and section 23(1)(b) to the same information severed in the Briefing Note. Because I have already held that the Public Body correctly applied section 23(1)(a) to the information severed, I do not need to deal with section 23(1)(b).

**Issue C: Is there a right of access to the Briefing Note if the information is excepted from disclosure under Division 2 in accordance with section 6(2)?**

[30.] Section 6(2) provides that the right of access to a record, including a record containing personal information about the applicant, does not extend to information excepted from disclosure under Division 2 of the Act. Division 2 contains the various exceptions to disclosure permitted under the Act. Section 23 is in Division 2. Therefore, there is no right of access to the information severed in the Briefing Note because that information is excepted from disclosure in accordance with section 6(2).

**Conclusion:**

[31.] The Briefing Note does contain personal information about the Applicant, who is entitled under section 6(1) to any record containing personal information about the Applicant, including anyone else's opinions about the Applicant. However section 6(2) states that this right is conditional. The right does not extend to information excepted in Division 2 of the Act (exceptions to disclosure). Section 23(1)(a) is in Division 2 and I have found that the information severed under this exception was correctly applied by the Public Body.

**Order:**

[32.] Pursuant to section 68(2)(b), I uphold the decision of the head of the Public Body to refuse access to the information severed in the Briefing Note.

Robert C. Clark  
Information and Privacy Commissioner