

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-005

May 15, 1998

ALBERTA TRANSPORTATION AND UTILITIES

Review Number 1321

BACKGROUND

[para 1] On May 8, 1997, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Transportation and Utilities (the "Public Body") for access to the following information:

- a. The agreement between the Public Body and the Third Parties regarding construction of a service road adjacent to the Third Parties' property (the "Record");
- b. All correspondence between the Public Body and the M.D. of Foothills regarding the agreement to change the design of the relevant portion of the service road; and,
- c. The original and revised plans for the relevant portion of the service road.

[para 2] In response to the request, the Public Body disclosed to the Applicant 7 pages of text, 7 pages of maps and technical drawings, and two 36" x 24" maps.

[para 3] The Public Body refused to disclose the Record, which was withheld in its entirety on the basis that the Record falls within the exception to disclosure contained in section 16 (disclosure that would be an unreasonable invasion of the personal privacy of third parties). Alternatively, the Public Body argued that section 24 (harm to economic interests of public body) applied to deny the Applicant access to the Record.

[para 4] On June 16, 1997, the Applicant requested that this Office review the Public Body's decision to withhold the Record. Mediation between the Applicant and the Public Body was authorized under section 65 of the Act but was unsuccessful. Accordingly, I directed that the matter be set down for a written inquiry to be held on February 26, 1998, pursuant to section 66(4) of the Act.

RECORD AT ISSUE

[para 5] The Record consists of a settlement agreement entered into between the Crown in Right of Alberta (as represented by the Public Body) and one or more Third Parties, a one page Schedule A, a dower affidavit, one map, and a one page Schedule B. The settlement agreement is a contract between the parties that outlines the terms and conditions that were negotiated to resolve this matter without recourse to litigation. Both the Public Body and the Third Parties objected to disclosure of the Record.

ISSUES

[para 6] There are two issues raised in this inquiry:

- A. Did the Public Body correctly apply section 16 (personal information) to the Record?
- B. Alternatively, did the Public Body correctly apply section 24 (harm to economic interests of public body) to the Record?

[para 7] If the answer to both A and B is no, then the entire record is releasable.

DISCUSSION OF ISSUES

A. Did the Public Body correctly apply section 16 (personal information) to the Record?

[para 8] The Public Body submitted that section 16(1) applies to the entire Record.

[para 9] Section 16(1) reads:

16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[para 10] Section 16(1) is a mandatory ("must") section of the Act. If section 16(1) applies, a public body must refuse to disclose the personal information.

1. Does the Record contain “personal information”?

[para 11] Section 1(1)(n) of the Act defines “personal information”. The relevant portions of section 1(1)(n) read:

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,

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

(ix) the individual’s personal views or opinions, except if they are about someone else.

[para 12] Having reviewed the Record, I find that it does contain personal information about the Third Parties in the form of the Third Parties’ name, home address, and financial history. I also find that the Agreement contains personal information about other Third Parties including their names, home addresses, and financial history. From this point on, all references to the “Third Parties” will include all of the third parties referred to in the Record.

[para 13] In reaching a conclusion about exactly what information in the Record constitutes personal information, I find I disagree with the Public Body on two points.

[para 14] First, the Public Body submitted that clause 12 of the Record should be entirely severed on the basis that it is information about the Third Parties’ financial history. With the exception of the information specifically listed below, I fail to see how the remainder of the clause reveals any information about the third parties’ financial history.

[para 15] Second, the Public Body submitted that portions of the Record contained information about the Third Parties’ personal views or opinions. On my review of the Record, I find that it does not express personal views or opinions that are specific to the Third Parties in this inquiry. On the contrary, I find many of the clauses in this Record to be “boiler plate” clauses common to most settlement agreements. Further, it is my experience that most properly drafted contracts endeavour to capture facts rather than opinions or risk being challenged for uncertainty.

[para 16] Accordingly, I find that the following portions of the Record contain personal information of the Third Parties as defined in section 1(1)(n)(i) and (vii), and as contemplated in section 16(1):

1. Page 1: lines 3 and 4 (name); line 11 (name); line 12 (name); line 13 (address); line 14 (name); line 17 (name); line 19 (name); line 22 (name);
2. Page 2: line 35 (name); line 44 (name);
3. Page 3: line 49 (name); line 50 (name); line 53 (name); line 59 (name); line 60 (amount paid); line 63 (name); line 64 (name); line 67 (name); line 69 (name);
4. Page 4: line 73 (name) and (description of individual); line 78 (signature) and (name); line 79 (signature) and (name);
5. Schedule A: line 1 (name); line 2 (business address); line 3 (occupation); lines 7, 8 and 9 (address); line 9 (handwriting); line 16 (amount paid); line 17 (total amount paid); line 20 (amount paid); line 22 (amount paid); line 23 (amount paid); line 32 (signature); line 34 (signature);
6. Dower Affidavit: line 1(name); line 5 (signature); and,
7. Schedule B: line 1(legal description); line 2 (name); line 3 (legal description); line 4 (name).

[para 17] The Public Body indicated that it not only severed those kinds of personal information listed in section 1(1)(n)(i)(vii) and (ix) of the Act, but also severed the remainder of the Record because it considered such information to be personal information. It did so for two reasons. First, the Public Body said that it believed that the remainder of the Record “mainly dealt with certain design considerations of the service road” which were already made available to the Applicant and thus, would not provide “any information of material interest which [was] not [already] known to the Applicant”. Second, I understand the Public Body to have submitted that because the identify of one or more of the Third Parties is known to the Applicant, to release the remainder of the Record would be to release personal information because it “still contains information about an identifiable individual”.

[para 18] In response to the Public Body’s first argument, the Public Body’s obligation is to address the Applicant’s *entire* access request. Where the Public Body finds that information can reasonably be severed from the record, section 6(2) of the Act gives the Applicant a right of access to the remainder of the record regardless of whether the substance of the information has already been conveyed in a different format.

[para 19] In response to the Public Body’s second argument, the knowledge or purported knowledge of an applicant does not affect a public body’s obligation to sever according to the Act. If I were to accept the Public Body’s second argument, it would enable a public body to withhold a record where an applicant knew the identity of any party contained in the record, without having to consider section 6(2) of the Act, thereby rendering this section useless. I do not believe that was the intention of the legislators.

[para 20] I find that with the exception of the personal information specifically listed above in paragraph 16 the Record does not contain personal information. Accordingly, I also find that

the personal information specifically referenced can be severed and the remainder of the Record released to the Applicant.

2. Would disclosure of the personal information be an unreasonable invasion of the Third Parties' personal privacy?

[para 21] The Public Body submitted that section 16(1) and section 16(2)(g) apply to the Record.

[para 22] Section 16(1) and (2)(g) read:

16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

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

(g) the personal information consists of the third party's name when

- (i) it appears with other personal information about the third party, or*
- (ii) the disclosure of the name itself would reveal personal information about the third party.*

[para 23] I have reviewed the Record and find that the presumption in section 16(2)(g) applies to the personal information referred to in paragraph 16. Accordingly, disclosure of that personal information is presumed to be an unreasonable invasion of the Third Parties' personal privacy for the purposes of section 16(1).

3. What relevant circumstances did the Public Body consider under section 16(3)?

a. General

[para 24] Under section 16(3) of the Act, a public body must consider all relevant circumstances in deciding whether disclosure of personal information would be an unreasonable invasion of a third party's personal privacy.

[para 25] The Public Body explained that it considered section 16(3)(a) (public scrutiny), section 16(3)(c) (personal information relevant to a fair determination of applicant's rights), and section 16(3)(f) (supplied in confidence).

b. Disclosure of personal information desirable for public scrutiny (section 16(3)(a))

[para 26] Section 16(3)(a) reads:

16(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 relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny.

[para 27] If considered to be a relevant circumstance, section 16(3)(a) weighs in favour of disclosing personal information.

[para 28] The Public Body submitted that it considered section 16(3)(a), but decided it was not a relevant circumstance when determining whether disclosure of the Third Parties' personal information constituted an unreasonable invasion of the Third Parties' personal privacy under section 16(1) and (2).

[para 29] The Public Body argued that if the Record was the only source of information where the Applicant could learn about the activities of the Public Body in the redesign and construction of the service road, then it may be required to produce the Record pursuant to section 16(3)(a). However, the Public Body submitted that the information released to the Applicant has already subjected the activities of the Government to public scrutiny. According to the Public Body, the information provided indicates how the service road was redesigned, includes the location of the original and revised alignment, and shows how the revised alignment avoided certain structures built on the property. The Public Body also considered the fact that the Applicant lives in the area, presumably travels on the same road and, by virtue of personal knowledge, is aware of the location of the new road and its design characteristics. On that basis, the Public Body concluded that releasing the Third Parties' personal information to the Applicant was unnecessary to subject the activities of the Government to public scrutiny.

[para 30] In Order 97-002, I discussed the interpretation of section 16(3)(a). In that Order, I said evidence had to be provided to demonstrate that the activities of the public body had been called into question, necessitating disclosure of personal information to subject the activities of the public body to scrutiny. I followed the following Ontario Orders: (1) Ontario Order p-347, which held that it was not sufficient for one person to have decided that public scrutiny was necessary; (2) Ontario Order M-84, which held that the applicant's concerns had to be about the actions of more than one person within the public body; and (3) Ontario Order P-673, which held that where the public body had previously disclosed a substantial amount of information, the release of personal information was not likely to be desirable for the purpose of subjecting the activities of the public body to public scrutiny. This was particularly so if the public body had also investigated the matter in issue.

[para 31] The Applicant submitted that the Public Body provided a substandard roadway that was for the benefit of the Third Parties and accordingly, was a negligent misuse of public funds. Based on that submission, the Applicant believes the Public Body should be subjected to public scrutiny.

[para 32] In this case, I find the following:

(1) The evidence submitted by the Applicant reveals that it is only the Applicant who believes that scrutiny is necessary. While the Applicant alluded to a number of discussions with the RCMP and an engineer employed by the Public Body who also had concerns about the construction of the service road, no evidence of complaints were tendered by anyone other than the Applicant.

(2) The Applicant's concerns do appear directed toward a number of individuals within the Public Body.

(3) The Public Body has provided the Applicant with all of the information that it requires to determine if the service road is substandard. The Applicant has schematics of the road, original and revised plans, and the M.D. of Foothills' Road Construction Standards which were adopted in 1993. Further, I fail to see how releasing the Third Parties' personal information (name, address, financial history) would further the Applicant's objective of scrutinizing the decision to build the service road.

[para 33] Consequently, I find that section 16(3)(a) is not a relevant circumstance to consider when determining whether disclosure of the Third Parties' personal information would be an unreasonable invasion of personal privacy under section 16(1) and (2).

c. Personal information relevant to a fair determination of the Applicant's rights (section 16(3)(c))

[para 34] Section 16(3)(c) reads:

16(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

(c) the personal information is relevant to a fair determination of the applicant's rights.

[para 35] If considered to be a relevant circumstance, section 16(3)(c) weighs in favour of disclosing personal information.

[para 36] The Applicant said that it believes that disclosure of the Record will reveal a violation of the Provincial *Planning Act* and thus the personal information contained therein is relevant to a fair determination of the Applicant's rights.

[para 37] Incidentally, and as a point of clarification, the *Planning Act* was repealed in 1995 when the “planning” provisions were incorporated under the *Municipal Government Act*.

[para 38] The Public Body submitted that the service road has not been constructed in violation of either the *Planning Act* or the *Municipal Government Act*. Furthermore, I understand the Public Body to have argued that disclosing personal information is not necessary to a fair determination of the Applicant’s rights.

[para 39] Assuming, without deciding, that the Applicant has a “right” to ensure that the service road was constructed in compliance with *Municipal Government Act* and the relevant municipal bylaws, I find it unnecessary to disclose the Third Parties’ names, addresses and financial history in order to challenge the construction of the service road. Not only do I find the personal information irrelevant to the fair determination of the Applicant’s “rights” but the Public Body has disclosed all of the information necessary to determine the proper or improper construction of this road.

[para 40] Consequently, I find that in this case section 16(3)(c) is not a relevant circumstance to consider when determining whether disclosure of the Third Parties’ personal information would be an unreasonable invasion of the Third Parties’ personal privacy under section 16(1) and 16(2).

d. Personal information supplied in confidence (section 16(3)(f))

[para 41] Section 16(3)(f) reads:

16(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

[para 42] If considered to be a relevant circumstance, section 16(3)(f) weighs in favour of not disclosing personal information.

[para 43] The Public Body submitted that section 16(3)(f) was a relevant circumstance when determining whether disclosure of the Third Parties’ personal information would be an unreasonable invasion of the Third Parties’ personal privacy under sections 16(1) and (2).

[para 44] The Public Body submitted that the personal information was supplied in confidence. The Public Body made two arguments in support of this proposition. Firstly, the Public Body argued that the information was supplied in confidence because the Third Parties retained a solicitor to negotiate and execute the Record. Secondly, the Public Body explained

that when it negotiates an agreement with a land owner, there is an understanding that the negotiations and any resulting agreements are confidential and will not be disclosed.

[para 45] Without going into the issue of privilege (which was not raised by the Public Body in the matter at hand), I find the Public Body's arguments unconvincing. Had the parties contemplated that the entire Record should remain confidential, it would have been simple enough to insert a confidentiality clause. Because both parties were represented by legal counsel, an adverse inference can be drawn from the lack of such a clause.

[para 46] Having said that, and in light of my findings of what information in the Record is personal in nature, I agree with the Public Body that the Third Parties supplied their personal information (names, addresses, financial history) to the Public Body in confidence. I find it reasonable to assume that the Third Parties would believe that their personal information was supplied in confidence, and would expect it not to be released. Thus, I find that section 16(3)(f) is a relevant circumstance to consider when determining whether disclosure of the Third Parties' personal information would be an unreasonable invasion of the Third Parties' personal privacy under sections 16(1) and (2).

e. Burden of proof (section 67(2))

[para 47] Because disclosure of personal information is presumed to be an unreasonable invasion of a Third Parties' personal privacy, the burden of proof is on the Applicant to show that disclosure of the personal information would not be an unreasonable invasion of a Third Parties' personal privacy, as provided under section 67(2) of the Act.

[para 48] Having reviewed the Applicant's arguments, discussed above under section 16(3), I find that the Applicant has not met the burden of proving that disclosure of the Third Parties' personal information (names, addresses, financial information) would not be an unreasonable invasion of the Third Parties' personal privacy.

f. Conclusion under section 16

[para 49] While I find that the Public Body considered all the relevant circumstances under section 16(3), I also find that the Public Body was overly broad in its application of section 16(1) to the entire Record.

[para 50] Accordingly, I find the Public Body was not correct in its application of sections 16(1) and (2)(g) to all of the information contained in the Record but was correct in its application of sections 16(1) and (2)(g) to the personal information specifically listed in paragraph 16 above.

B. Did the Public Body correctly apply section 24 (harm to economic interests of public body) to the Record?

[para 51] Even though I have found that personal information is to be severed under section 16, I must still consider the Public Body's section 24 argument because the Public Body

has applied section 24 to the entire Record and there are still parts of the Record remaining after the section 16 severing.

[para 52] The Public Body has specifically relied on section 24(1)(c), which reads:

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:

(c) information the disclosure of which could reasonably be expect to

(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;

[para 53] In support of this submission the Public Body argued that:

1. Disclosing land agreements without the consent of the land owners could interfere with negotiations;
2. If land agreements were routinely disclosed, it would expose the personal financial situation of the land owner to public scrutiny;
3. Negotiation with land owners may become more difficult and time consuming;
4. The land owners may even refuse to negotiate with the Public Body resulting in the need to expropriate land. Expropriation is costly and time consuming and any delay in construction could add hundreds of thousands of dollars on certain projects; and,
5. Because there are some terms in the Record that are not completely fulfilled, negotiations between the parties are ongoing and releasing the Record will reduce the flexibility which the parties have to reach a resolution without resorting to further legal proceedings.

[para 54] I will first deal with the test that the Public Body has to meet to satisfy the requirements of section 24 and then address each of the Public Body's supporting arguments individually.

[para 55] Section 24 is a discretionary exception. In Orders 97-005, 96-013 and 96-012, I stated that while the public body may present evidence to show that the information falls within section 24(1)(c), the public body must still present evidence to show that the information falls within the general rule under section 24(1). To meet that general rule, 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”.

[para 56] As I indicated in Order 96-003, the courts have applied a threshold test in interpreting “reasonable expectation of harm” by considering the following three factors: 1) there must be a clear cause and effect relationship between the disclosure and harm; 2) the disclosure must cause harm and not simply interference or inconvenience; and, 3) the likelihood of harm must be genuine and conceivable.

[para 57] In Order 96-003, I also referred to the decision *Canada (Information Commissioner) v. Canada (Prime Minister)* [1992] F.C.J. No. 1054 (“*Canada (Information Commissioner)*”), which held that the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue.

[para 58] The wording of section 24(1) implies that it is the specific information itself that must be capable of causing harm if the information is disclosed. When I look at the kinds of information listed in section 24(1)(a)-(d), two things appear clear: (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 alleged.

[para 59] In Order 96-016, I adopted the reasoning in *Canada (Information Commissioner)* wherein the court considered the issue of “direct” harm in dealing with a similar section of the federal access legislation and found 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.

[para 60] I find that, on the whole, the evidence presented by the Public Body does not demonstrate how disclosing the information in this *specific* Record to the Applicant could reasonably be expected to bring about the harm alleged. The Public Body’s arguments, for the most part, relate to the harm that may ensue if land agreements in general are disclosed. Accordingly, I find unconvincing and speculative the Public Body’s submission that disclosing land agreements could interfere with negotiations by making them more difficult and time consuming and perhaps result in future landowners refusing to negotiate with the Public Body. The Public Body has not met any of the tests set out in section 24(1)(c).

[para 61] Does the information nevertheless fall within the general rule under section 24(1)? The only argument raised by the Public Body that could meet the first part of the direct harm test is the allegation that releasing the Record would interfere with the ongoing

negotiations between the Third Parties and the Public Body in view of the fact that a number of terms of the Record remain unfulfilled. While I understand the argument, I cannot agree with Public Body's position that negotiations are ongoing as the contract was entered into between the parties approximately two years ago. Once a contract is executed, negotiation is no longer required to secure performance of the terms of the contract. If one party has not fulfilled its obligations under the contract, the other party to the contract has a legal remedy to compel the other's performance. Thus, even though the Public Body addressed the harm that may result from specifically disclosing the Record, I find the harm alleged insufficient to meet the requirements of section 24(1).

[para 62] In summary, the Public Body's arguments speculate that future negotiations with landowners would be hindered if land agreements generally could be accessed by the public and I find this insufficient evidence to meet the first part of the test set out in section 24(1).

ORDER

[para 63] I find that:

1. The personal information specifically listed below must be severed and the remainder of the Record should be released; and,
2. The Public Body incorrectly applied section 24(1) to the Record in its entirety.

[para 64] Pursuant to section 68(2)(a) of the Act, I require the head of the Public Body to give the Applicant access to the Record, subject to severing the following information:

1. Page 1: lines 3 and 4 (name); line 11 (name); line 12 (name); line 13 (address); line 14 (name); line 17 (name); line 19 (name); line 22 (name);
2. Page 2: line 35 (name); line 44 (name);
3. Page 3: line 49 (name); line 50 (name); line 53 (name); line 59 (name); line 60 (amount paid); line 63 (name); line 64 (name); line 67 (name); line 69 (name);
4. Page 4: line 73 (name) and (description of individual); line 78 (signature) and (name); line 79 (signature) and (name);
5. Schedule A: line 1 (name); line 2 (business address); line 3 (occupation); lines 7, 8 and 9 (address); line 9 (handwriting); line 16 (amount paid); line 17 (total amount paid); line 20 (amount paid); line 22 (amount paid); line 23 (amount paid); line 32 (signature); line 34 (signature);
6. Dower Affidavit: line 1 (name); line 5 (signature); and,

7. Schedule B: line 1 (legal description); line 2 (name); line 3 (legal description); line 4 (name).

[para 65] I have provided the Public Body with a highlighted copy of the Record. The highlighting shows the personal information that the Public Body is to sever.

[para 66] I ask that the Public Body notify me in writing, no 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