

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-009

June 17, 1998

ALBERTA FAMILY AND SOCIAL SERVICES

Review Number 1350

I. BACKGROUND

[para. 1] The Applicant suspected that the Applicant's former spouse and that individual's current spouse were receiving benefits from the Assured Income for the Severely Handicapped ("AISH") program, and that their AISH files contained personal and professional information about the Applicant. The Applicant feared that if personal information about the Applicant did, in fact, exist on these files and was released, it could compromise the Applicant's personal and business reputation.

[para. 2] On September 4, 1997, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Department of Family and Social Services (the "Public Body") for access to the Applicant's personal information. The Public Body refused to confirm or deny the existence of a record under section 11(2)(b) of the Act. In a letter dated September 16, 1997, the Applicant asked me to review the Public Body's decision.

[para. 3] Mediation was authorized but was not successful. An inquiry was held on April 2, 1998, where representations were made in writing by the Applicant and the Public Body.

II. ISSUES

[para. 4] There are three issues in this inquiry:

- 1) What process should a public body follow when it makes a decision to respond to an access request by refusing to confirm or deny the existence of a record under section 11(2)(b)?
- 2) Did the Public Body correctly apply section 11(2)(b) of the Act in this instance?
- 3) Did the Public Body exercise its discretion properly when it refused to confirm or deny the existence of a record under section 11(2)(b)?

III. RELEVANT LEGISLATION

Freedom of Information and Protection of Privacy Act

[para. 5] Section 11 states:

11(1) In a response under section 10, the applicant must be told

(a) whether access to the record or part of it is granted or refused,

(b) if access to the record or part of it is granted, where, when and how access will be given, and

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.

(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of

(a) a record containing information described in section 17 or 19, or

(b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.

IV. DISCUSSION

1) What process should a public body follow when it makes a decision to respond to an access request by refusing to confirm or deny the existence of a record under section 11(2)(b) of the Act?

[para. 6] In this case, the Public Body made the decision to invoke section 11(2)(b) of the Act without searching for the record requested by the Applicant. It determined that section 11(2)(b) was applicable at the very outset of the process of responding to the Applicant's request, and therefore felt that there was no need to search for the record, and to produce and review it, if, in fact, one existed.

[para. 7] In the context of this inquiry, I directed the Public Body to conduct a search for records and let me know whether the information the Applicant is seeking exists or not. I also directed the Public Body to produce the record, if, in fact, one was found to exist, so that I could review it. The Public Body complied with my instructions.

[para. 8] In my view, the process by which the Public Body invoked section 11(2)(b) in this case is not the correct one to follow. Section 11 of the Act outlines a process that a public body is to follow when responding to access requests. Section 11(1)(a) requires that a public body tell an applicant whether access to the record or part of it is to be granted or refused, and section 11(1)(c) outlines what the public body must do if access to the record or any part thereof is refused. Under section 11(1)(c)(i), a public body must provide reasons for deciding to refuse an applicant's access request. Section 11(2) outlines circumstances in which the head of a public body may, despite the requirements of section 11(1)(c)(i), refuse to confirm or deny the existence of a record. It is a very specific provision. It stipulates the limited circumstances in which a public body can remain silent about the existence of a record. There are three such circumstances: where a record contains information described in section 17 (safety or health) or section 19 (law enforcement) or where, under section 11(2)(b), a record contains personal information about a third party and the disclosure of the existence of the personal information would be an unreasonable invasion of a third party's personal privacy.

[para. 9] Clearly, a public body is required to conduct a search for records which are responsive to a request and satisfy itself as to what records it has and what exceptions to disclosure apply. It cannot decide how to respond to

an access request in a vacuum. A public body must search for and review the record, if one is found to exist, in order to determine if the circumstances in section 11(2) exist.

[para. 10] To determine whether a public body correctly applied section 11(2) and exercised its discretion properly in refusing to confirm or deny the existence of the record, I must be told whether a record exists or not, and have an opportunity to review the record if, in fact, one exists. In this case, the Public Body did not confirm the existence or non-existence of the record until I asked it to do so.

2) Did the Public Body correctly apply section 11(2)(b) of the Act in this instance?

[para. 11] To decide whether the Public Body correctly applied section 11(2)(b), I must determine whether the circumstances set out under section 11(2)(b) exist. However, in discussing section 11(2)(b), I must be careful to comply with the requirements of section 57(3)(b) of the Act and not disclose whether the information at issue exists or not. Section 57(3)(b) of the Act states:

57(3) In conducting an investigation or inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner must take every reasonable precaution to avoid disclosing and must not disclose

...

(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.

[para. 12] The wording in section 11(2)(b) and section 16 of the Act is very similar. Section 16 prohibits the disclosure of personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. Section 11(2)(b) allows a public body to refuse to confirm or deny the existence of a record containing a third party's personal information if disclosing the existence of the information would be an unreasonable invasion of a third party's personal privacy. I want to point out that both sections do not prohibit giving out personal information. Instead, they focus on whether there is an "unreasonable invasion" of a third party's personal privacy.

[para. 13] The Public Body used the following analytical framework outlined in section 16 to determine whether disclosing the existence or non-existence of the record would be an unreasonable invasion of a third party's personal privacy:

(i) Section 16(1) precludes a public body from disclosing personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(ii) Section 16(2) outlines a number of circumstances in which a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy.

(iii) Section 16(3) lists the kinds of relevant circumstances a public body must consider in making a determination under the section.

(iv) Section 16(4) outlines situations in which a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy.

[para. 14] The Public Body relied on section 16(2)(c) and section 16(3)(f), as well as other parts of section 16, when it decided that revealing the existence of the information would constitute an unreasonable invasion of a third party's or third parties' personal privacy. Those sections read:

16(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

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. 15] I agree with the Public Body's use of section 16 to provide guidance for determining whether the disclosure constitutes an unreasonable invasion of a third party's personal privacy. However, the focus of the analysis must be on whether the disclosure of the existence [my emphasis] of the information, rather than whether the disclosure of the information itself, would constitute an unreasonable invasion of a third party's personal privacy.

[para. 17] In my view, disclosing the existence of the information would be an unreasonable invasion of the personal privacy of a third party or third parties in this case.

[para. 18] I find that Public Body correctly applied section 11(2)(b) of the Act. I must now consider whether the Public Body properly exercised its discretion in refusing to confirm or deny the existence of the record under this section.

3) Did the Public Body exercise its discretion properly when it refused to confirm or deny the existence of the record in question under section 11(2)(b)?

[para. 19] Section 11(2)(b) is a "may" or discretionary section. Under this section, a public body may deny an access request by refusing to confirm or deny the existence of the record if disclosing the existence of the information would be an unreasonable invasion of a third party's personal privacy, or it may choose a different course. In Order 96-017, I decided that I have the authority to review a discretionary decision made by a public body and either confirm it or return the matter to the public body for reconsideration if I determine that the public body has improperly exercised its discretion. The questions I have to determine in order to decide this issue are the following: a) What kind of standard should a public body be held to in exercising its discretion under section 11(2)(b); and b) Did the Public Body in this case meet this standard?

a) What kind of standard should a public body be held to in exercising its discretion under section 11(2)(b)?

[para. 20] In Order 96-017, and in subsequent Orders, I said that a public body must consider the objects and purpose of the Act, and, specifically, the access principles, when it exercises its discretion to withhold information from an applicant. I also said that a public body must provide evidence of what it considered when it exercises its discretion to withhold information.

[para. 21] In my opinion, the same standard is applicable in cases involving the exercise of discretion under section 11(2)(b). A public body must consider the access principles set out in the Act when exercising its discretion to refuse to confirm or deny the existence of a record.

b) Did the Public Body exercise its discretion properly in this case when it refused to confirm or deny the existence of a record under section 11(2)(b)?

[para. 22] According to the Applicant, the purpose of the Applicant's access request is not to seek confirmation of the fact that the Applicant's former spouse and that individual's current spouse are receiving AISH. Rather, the Applicant wants to know whether there is any personal information on these files that relates to the Applicant or the Applicant's business. If there is, the

Applicant wants assurances that it will be deleted in order to protect the Applicant's personal and business reputation. The Applicant also argues that the same privacy rights and protection extended to AISH recipients is owed to the Applicant.

[para. 23] Though I understand and sympathize with the Applicant's concerns, the focus of my review is whether the Public Body properly exercised its discretion when it refused to confirm or deny the existence of a record.

[para. 24] Based on a review of the Public Body's submission, I find that the Public Body did consider the objects and purpose of the Act, and, specifically, the access principles, when it exercised its discretion to invoke section 11(2)(b). The submission indicates that the Public Body gave thorough consideration to the access principles when it made its decision.

[para. 25] I therefore find that the Public Body exercised its discretion properly in this case.

V. ORDER

[para. 26] Under section 68 of the Act, I make the following order:

1. The Public Body correctly applied section 11(2)(b) of the Act.
2. The Public Body exercised its discretion properly under section 11(2)(b) of the Act.

[para. 27] I therefore uphold the head's decision to refuse to confirm or deny the existence of a record.

Robert C. Clark
Information and Privacy Commissioner