ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-018

October 19, 1999

HUMAN RESOURCES AND EMPLOYMENT

Review Number 1465

I. BACKGROUND

[para 1.] There was an explosion on July 21, 1997, at the Swan Hills Waste Management Site. On January 20, 1998, the Alberta Federation of Labour (the "Affected Party") applied to Human Resources and Employment, formerly known as Alberta Labour (the "Public Body") under the *Freedom of Information and Protection of Privacy Act* (the "Act") for access to:

(i) Copies of records covering medical assessments, air sampling, environmental monitoring and pollution control from 1994 onwards;
(ii) Records pertaining to the site visit (following the July 21, 1997 explosion), that took place July 25, 1997 and the follow-up with the company on the recommendations;
(iii) Inspections of the operation commencing with the one dated July 27, 1996 to the present.

[para 2.] Bovar Waste Management (the "Third Party") had provided the information requested to the Public Body.

[para 3.] The Third Party objected to disclosure of portions of the records that made reference to PCB levels at the Swan Hills Waste Management Site, on the grounds that the information must not be disclosed, as

provided by section 15(1) ("disclosure harmful to business interests") and section 16(1) ("personal information") of the Act.

[para 4.] The Public Body decided to disclose the majority of the information in the records, notwithstanding the Third Party's objections. It decided to withhold only employee names under section 16(1). This severing is not at issue.

[para 5.] By letter dated August 6, 1998, the Third Party asked me to review the Public Body's decision to release the information. Mediation was not successful and the matter was set down for a written inquiry on May 26, 1999.

[para 6.] Written representations were made by the Affected Party, the Third Party and the Public Body.

[para 7.] This Order proceeds on the basis of the Act as it existed before the amendments to the Act came into force on May 19, 1999.

II. RECORDS AT ISSUE

[para 8.] Information has been withheld from the following 4 records.

Record #1. Letter dated August 4, 1997 (2 pages) - one paragraph at the bottom of the first page withheld pursuant to sections 15(1) and 16(1) of the Act;
Record #2. Letter dated December 10, 1997 with four-page attachment - second last bullet and the last bullet on page three of attachment have been withheld pursuant to section 15(1) of the Act;
Record #3. Letter dated October 14, 1997 with six-page attachment - first paragraph under first bullet on second page of attachment withheld pursuant to section 15(1) of Act;
Record #4. Letter dated September 17, 1997 with four-page attachment - first sentence under first bullet on first page of attachment withheld pursuant to section 15(1) of the Act.

[para 9.] The foregoing will be referred to collectively as the "Records".

III. ISSUES

[para 10.] There are three issues in this inquiry:

A. Does section 16(1) ("personal information") apply to Record #1?

B. Does section 15(1) (disclosure harmful to the business interests of a third party) apply to the Records?

C. Is the Public Body required to disclose the Records under section 31(1)(a) of the Act (disclosure about a risk of significant harm)?

IV. BURDEN OF PROOF

[para 11.] The relevant portion of section 67 states:

> *67(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*
>
> > *(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*
> >
> > *(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

[para 12.] Section 67(3)(a) requires that the applicant (the Affected Party in this Third Party request for review) bear the burden of proof with respect to Issue A which deals with section 16 and the issue of personal information.

[para 13.] However, with respect to Issue B and section 15(1), the Third Party bears the burden of proof, in accordance with section 67(3)(b).

V. DISCUSSION

Issue A. Does section 16(1) ("personal information") apply to Record #1?

[para 14.] The Third Party submitted that the information contained in Record #1 is personal information of its employees and is excepted from disclosure under section 16(2)(a) of the Act as it is information relating to a medical condition or evaluation of a third party.

[para 15.] Sections 16(1) and 16(2)(a) 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

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

[para 16.] Before I can determine whether there would be an unreasonable invasion of a third party's personal privacy, I must determine whether the information in question is personal information.

[para 17.] The Public Body submitted that section 16 does not apply because the information withheld from Record #1 does not constitute personal information under the Act, since that information is a comment regarding the Third Party's workforce.

[para 18.] The Third Party stated that, even though the comment in Record #1 refers to the entire workforce of the Third Party, the individual employees are readily identifiable as a result of the following factors:

(1) The majority of the workforce of the Third Party is resident in a small community;
(2) The majority of the workforce live in company housing units, both single family homes, apartment and condominium units, and
(3) The industry in which the Third Party conducts its business is a small one and has a very high profile.

[para 19.] The Third Party submitted that, even though the statement contained in Record #1 does not specifically name employees, that does not preclude the information from being personal information of an individual employee. While the comment applies to all employees, the Third Party maintains that each is identifiable as a result of the factors set out above.

[para 20.] Personal information is defined in section 1(1)(n) of the Act as "recorded information about an identifiable individual". The section goes on to provide a non-exhaustive list of the kinds of information which qualify as personal information. The parts of section 1(1)(n) that are relevant to this case read:

1(1)(n) "personal information" means recorded information about an identifiable individual, including

…

(vi information about the individual's health and health care history, including information about a physical or mental disability,

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

[para 21.] I agree with the Third Party that it is not necessary to specifically name employees for there to be recorded information about an identifiable individual. Facts and events, the context in which information is given, as well as the nature and content of the information may also be personal information if it is shown to be recorded information about an identifiable individual. The key here is whether there is an "identifiable" individual.

[para 22.] However, a reference to an aggregate group such as "in our workforce" is not, in my view, a reference to an identifiable individual. From that comment, one cannot reasonably deduce a specific individual in the Third Party's workforce. Furthermore, it is not possible to ascertain from the contents of the Records the identity of the individuals.

[para 23.] Consequently, there is no personal information in Record #1, and section 16 does not apply.

Issue B. Does section 15(1) (disclosure harmful to the business interests of a third party) apply to the Records?

[para 24.] Section 15(1) reads:

15(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal
(i) trade secrets of a third party, or
(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to
(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 25.] Section 15 is a mandatory exception. If a head of a Public Body determines the information falls within the exception, he must refuse access.

[para 26.] For information to fall under section 15(1), the Third Party must satisfy the following three-part test:

> Part 1: The information must reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (Section 15(1)(a));
>
> Part 2: The information must be supplied, explicitly or implicitly, in confidence (Section 15(1)(b)); and
>
> Part 3: The disclosure of the information must reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

[para 27.] I will discuss each part in turn.

> **Part 1: The information must reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (Section 15(1)(a))**

[para 28.] The Third Party and the Public Body submit that the information in the records fulfills Part 1 of the test. Specifically, they argue the information in the Records constitutes the Third Party's scientific information. I agree that the Records contain information that qualifies as scientific information for the purposes of section 15(1)(a)(ii) of the Act. Therefore the first part of the test has been met.

> **Part 2: The information must be supplied, explicitly or implicitly, in confidence (Section 15(1)(b))**

[para 29.] The records were supplied to the Public Body pursuant to the Third Party's obligations under the *Occupational Health and Safety Act* (the "OHS Act").

[para 30.] The Public Body argued that the information provided to the Public Body because of a statutory obligation to do so under the OHS Act, cannot be said to have been provided in confidence. The Public Body also stated, that in late 1997, the Public Body advised the Third Party that the confidentiality of the reports the Third Party was providing could not be guaranteed.

[para 31.] The Third Party submitted that the Records were part of an ongoing special reporting program that had been negotiated between the Public Body and the Third Party for the purpose of providing information on workplace conditions to the Public Body. The Third Party stated that the Records were submitted in confidence and, to the best of the knowledge of the Third Party, have been treated as confidential material by the Public Body from the time they were submitted.

[para 32.] In November 1998, the Public Body wrote to the Third Party stating that the Public Body would not require the Third Party to continue the practice of sending in monthly reports. However, the Public Body stated that the reports must be kept on file at the Third Party's site for review by the Public Body's officers during site visits.

[para 33.] The Third Party stated that it thought that all the reports were submitted in confidence and that it was never advised that there had been a change in policy in 1997. Only after receiving the November 1998 letter did the Third Party cease sending reports to the Public Body. The Third Party argued that the confidentiality under which the prior reports were sent should be maintained.

[para 34.] The Third Party did not present evidence of any explicit statement or agreement with the Public Body concerning the confidentiality of the information in the Records. There is nothing on the face of the Records that would lead one to conclude that the Third Party was supplying the information on the condition that it remain undisclosed.

[para 35.] The issue then turns to the question of whether the information can be said to have been supplied implicitly in confidence. In my view, the word "implicit" denotes a particular state of understanding: a belief in a certain set of facts.

[para 36.] The 1998 Freedom of Information and Protection of Privacy Policy and Practices Manual published by the Information Management

and Privacy Branch at Alberta Labour (now Municipal Affairs) states, at page 64:

> Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential. In such cases, all relevant facts and circumstances need to be examined to determine whether or not there is an understanding of confidentiality.

[para 37.] In Ontario Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the issue of confidentiality in the equivalent of section 15(1) found in the *Municipal Freedom of Information and Protection of Privacy Act* of Ontario:

> In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.
>
> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:
>
> (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
> (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
> (3) Not otherwise disclosed or available from sources to which the public has access.
> (4) Prepared for a purpose which would not entail disclosure.

[para 38.] Here, the Public Body says there was no understanding of confidentiality. Other than stating its expectations that the Records would be held in confidence, the Third Party has not provided evidence in support of this assertion. I find that the Third Party has not pointed to any particular circumstance or facts that would give rise to a reasonable expectation that the information was communicated on the understanding that it was supplied, explicitly or implicitly, in confidence.

[para 39.] Therefore, part two of the test has not been met.

[para 40.] Having found that the second part of the test has not been met, it is not necessary for me to deal with the third part of the test. However, as all parties have made representation on the point, I will address it.

Part 3: The disclosure of the information must reasonably be expected to bring about one of the outcomes set out in section 15(1)(c)

[para 41.] The Third Party made three arguments under section 15(1)(c). First, it stated that, if the information were to be disclosed, it can reasonably be expected to interfere with the ability of the Third Party to obtain and maintain qualified employees, which would seriously harm the competitive position of the Third Party in accordance with section 15(1)(c)(i).

[para 42.] Second, the Third Party argued that the information in the Records is historical and does not reflect the current status of the operations of the Third Party. This information is highly prejudicial to the business interests of the Third Party and, if disclosed, can reasonably be expected to result in undue financial loss to the Third Party in accordance with section 15(1)(c)(iii).

[para 43.] Lastly, the Third Party argued that disclosure of this sensitive scientific information will likely result in similar information no longer being supplied to the Public Body unless required by law. Here, I presume that the Third Party is referring to section 15(1)(c)(ii).

[para 44.] The Public Body argued that no detailed information has been provided by the Third Party to show how the information could reasonably be expected to significantly harm the Third Party's competitive position. It further stated that the Third Party could not legally refuse permission for copies to be taken of documents requested under the OHS Act, although they could require that the Public Body's staff come to a worksite to collect such documents.

[para 45.] With respect to the Third Party's allegation regarding undue financial loss, the Public Body argued that it seems unlikely that the release of information related to PCB contamination in the workplace could result in undue financial loss or gain to anyone, as long as the test results were accurate. The Public Body stated that it has no reason to believe that the test results were inaccurate.

[para 46.] The Public Body cited Webster's Third New International Dictionary which defines "*undue*" as "*exceeding or violating propriety or fitness*" and offers the following synonyms: *excessive, immoderate, unwarranted*". The Public Body stated that it is difficult to conceive of a situation in which the release of workplace contamination data would result in undue financial loss or gain.

[para 47.] As I stated in previous orders, to establish that disclosure of information would bring about one of the outcomes listed in section 15(1)(c), the party who is alleging the harm must provide evidence of the following:

(i) the connection between disclosure of the specific information and the harm that is alleged;
(ii) how the harm constitutes "damage" or "detriment" to the matter; and
(iii) whether there is a reasonable expectation that the harm will occur.

[para 48.] Upon review of the Third Party's submissions, I find the submissions provided to support these allegations unconvincing.

[para 49.] Furthermore, I am not persuaded by the argument that if potential future employees find out about the information in the Records, the Third Party would have difficulty in attracting or maintaining employees.

[para 50.] Therefore, the Third Party has not met the burden of proving that the disclosure of the information in the Records could reasonably be expected to bring about one of the outcomes listed in section 15(1)(c).

Conclusion under section 15(1).

[para 51.] As previously mentioned, the Third Party must satisfy all three parts of section 15(1) in order for the information to be withheld under this exception. As I have decided that the Third Party has not discharged the burden of proof in regards to Parts 2 and 3, the information in the Records cannot fall within the section 15(1) exception.

ISSUE C: Is the Public Body required to disclose the Records under section 31(1)(a) of the Act (disclosure about a risk of significant harm)?

[para 52.] I have found that section 16(1) and section 15(1) do not apply to the information contained in the Records, and I intend to order that information be disclosed. Therefore, I do not find it necessary to decide whether section 31(1)(a) also requires the Public Body to disclose the same information.

VI. ORDER

[para 53.] Under section 68 of the Act, I make the following Order.

1. Section 16 does not apply to the Record #1 because Record #1 does not contain personal information. Therefore, I order the Public Body to disclose the information withheld under section 16(1) in Record #1.

2. Section 15 (1) does not apply to the Records. Therefore, I order the Public Body to disclose the information withheld under section 15(1) in the Records.

3. Given my decisions under section 16(1) and section 15(1), I do not find it necessary to decide whether section 31(1)(a) also requires the Public Body to disclose the same information.

4. I further order that the Public Body notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

Robert C. Clark
Information & Privacy Commissioner