ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-026

December 2, 1999

ALBERTA SECURITIES COMMISSION

Review Number 1576

I. BACKGROUND

[para 1.] On February 3, 1999, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for a specific investigation file of the Alberta Securities Commission (the “Public Body”) relating to the Applicant and to a company. The Applicant also requested information to “determine the source of complaint or the nature of the action which precipitated this investigation.”

[para 2.] The Public Body refused access to the information requested under the following provisions of the Act: section 19(1)(d) (identity of a confidential source of law enforcement information), section 16(1) (unreasonable invasion of personal privacy), and section 19(1)(a) (harm to a law enforcement matter).

[para 3.] By letter received June 22, 1999, the Applicant asked me to review the Public Body’s decision to withhold the records. Mediation was authorized but was not successful. The matter was set down for a written inquiry on August 11, 1999.

[para 4.] The matter for inquiry was narrowed and confirmed in a letter written by the Portfolio Officer to the Applicant: “…inquiry 1576 will only deal with your need to know who filed a complaint about you to the Alberta Securities Commission”.

[para 5.] Only the Public Body provided a written submission. I accepted as the Applicant's submission, the letters the Applicant had previously provided to my Office.

[para 6.] At the conclusion of the inquiry, I asked the Public Body to provide some further information. Based on this additional information, I continued the written inquiry on September 21, 1999.

[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.] The records at issue consist of two pages. Both pages were entirely withheld by the Public Body. Because the inquiry had been narrowed, I agree with the Public Body that the entire investigation file was no longer responsive as had been initially determined.

[para 9.] The first page is a memorandum from the investigator to the Public Body's administrative staff requesting that a file be created. The second page is titled "ID Details Report". It is a summary page of the investigation's status and details.

[para 10.] I will refer to these two pages as the "Records".

III. ISSUES

[para 11.] There are three issues in this inquiry:

A. Did the Public Body correctly apply section 19(1)(d) (identity of confidential source of law enforcement information) to the information severed from the Records?
B. Does section 16(1) (unreasonable invasion of personal privacy) apply to the information severed from the Records?
C. Did the Public Body correctly apply section 19(1)(a) (harm to a law enforcement matter) to the Records?

IV. DISCUSSION

Issue A. Did the Public Body correctly apply section 19(1)(d) (identity of a confidential source of law enforcement information) to the information severed from the Records?

1. Application of section 19(1)(d)

[para 12.] The Public Body applied section 19(1)(d) to sever the name(s) of the Complainant(s) who is/are responsible for filing a complaint to the Public Body. In the Public Body's opinion, disclosure of this information would disclose the identity of a confidential source of law enforcement information.

[para 13.] Section 19(1)(d) reads:

> *19(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> > *(d) reveal the identity of a confidential source of law enforcement information.*

[para 14.] For section 19(1)(d) to apply, there must be (i) "law enforcement" information, (ii) a "confidential source" of law enforcement information, and (iii) information that could reasonably be expected to reveal the identity of that confidential source.

(i) Is there "law enforcement" information?

[para 15.] In this case, "law enforcement" means investigations that lead or could lead to a penalty or sanction being imposed": see section 1(1)(h)(ii).

[para 16.] "Law enforcement" requires that both the public body's investigative authority and the penalty or sanction be under the same statute.[1]

[para 17.] Pursuant to Part 2 of the *Securities Act*, S.A. 1981, c. S-6.1, the Public Body has broad powers to investigate any matter and to issue orders. The investigations conducted under these provisions are by order of the Public Body's Executive Director. According to the Public Body, orders are made when investigators do not receive cooperation from those who are investigated and stronger powers of search, examination and seizure under Part 2 of the *Securities Act* are required.

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[1] The May 19, 1999 amendments to the Act change the definition of "law enforcement" . According to section 1(1)(h) of the amended Act, "law enforcement" means (i) policing, including criminal intelligence operations, (ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred.

[para 18.] The Public Body stated that the records at issue in this inquiry were not assembled pursuant to an order of the Public Body's Executive Director. The records are part of an informal investigation conducted by the Public Body. The matters considered in the course of such an investigation may or may not lead to an investigation ordered by the Executive Director under Part 2 of the *Securities Act*. According to the Public Body, many investigations undertaken by the Public Body are informal, that is, conducted without an order having been issued.

[para 19.] The Supreme Court of Canada has recognized that the *Securities Act* authorizes this form of "informal investigation" in the decision, *Brosseau v. Alberta Securities Commission* (1989) 65 Alta. L.R. (3d) 97. It stated at pages 105-106:

> ...Because of the formalities surrounding the s. 28 investigation, and because of the broad powers conferred, I am inclined to agree that the Commission must have the implied authority to conduct a more informal internal review. It would be unreasonable to say that a Securities Commission requires express statutory authority to review the documents it has on file, or to keep itself informed of the course of a R.C.M.P. investigation. To do so would be to make mandatory a resort to a s. 28 investigation for what are often simple administrative purposes. Such an approach might have the effect of paralyzing the operations of the Commission. It would seem logical that before ordering a s. 28 investigation, the Commission would have first investigated the facts. If no wrongdoing is found, that would end the matter. If irregularities are uncovered, then the Commission could proceed either to a more thorough s. 28 investigation or to order a hearing, as in this case, to probe more deeply into the matter.

[para 20.] I agree with the Public Body that this informal investigation constitutes an "investigation" for the purposes of the Act.

[para 21.] Part 15 of the *Securities Act* provides a variety of penalties and sanctions that may be imposed pursuant to an investigation. Orders to cease trading (section 165), prohibitions against individuals from acting as a director or officer of any company (section 165), administrative penalties of up to $100,000 for an individual and up to $500,000 for a company (section 165), payment of costs of both the investigation and hearing (section 167.1) and prosecution where a person or company commits an offence with liability of a fine of up to $1,000,000 and imprisonment of up to five years are examples of some of the sanctions included in the *Securities Act*.

[para 22.] Because the authority to investigate and the penalties or sanctions are contained in the same legislation, the information obtained by the Public Body in its investigation meets the definition of "law enforcement information".

[para 23.] Therefore, I find that the criteria for law enforcement information has been met.

(ii) Is there a "confidential source" of law enforcement information?

[para 24.] I said in Order 99-010, a *confidential source* is someone who supplies law enforcement information, as defined in the Act, to a public body on the assurance that his or her identity will remain secret.

[para 25.] The Public Body gave evidence that it has a standard practice about confidentiality. The Public Body stated that when asked by a complainant, it gives assurances that all information, including the complainant(s)' name, will be kept in confidence, with the proviso that the information may have to be revealed should the matter proceed to a hearing.

[para 26.] However, evidence was also given that there was a clear implicit understanding with the Complainant(s) in this file that the name(s) be kept confidential in this investigation. I cannot bring forth any more evidence presented by the Public Body without revealing the identity(ies) of the Complainant(s).

[para 27.] However, based on the evidence, I am persuaded that the name(s) severed from the Records are " confidential sources" of law enforcement information in accordance with the second criterion.

(iii) Could the information reasonably be expected to reveal the identity of a confidential source of law enforcement information?

[para 28.] If this criterion is met, the public body may refuse to disclose information that could reasonably be expected to reveal the identity of the confidential source.

[para 29.] I agree that the disclosure of the name(s) severed from Records would reveal the identity(ies) of the Complainant(s).

2. Exercise of discretion under section 19(1)(d)

[para 30.] Section 19(1)(d) is a discretionary ("may") provision in that, even if the section applies, a public body has a choice as to whether to disclose or withhold the information. To exercise its discretion properly, the Public Body must show that it considered the objects and purposes of the Act (one of which is to allow access to information) and did not exercise its discretion for an improper or irrelevant purpose.

[para 31.] For example, a public body would be fettering its discretion if it had a policy never to disclose complainants' names. Each request for access should be considered individually according to its unique circumstances.

[para 32.] In this case, based on the Public Body's submissions, I am satisfied that it did consider the unique circumstances of this file, as well as the objects and purposes of the Act. I find that the Public Body exercised its discretion properly under section 19(1)(d).

3. Conclusion under section 19(1)(d)

[para 33.] I find that the Public Body correctly applied section 19(1)(d) to the name(s) severed from the Records. Therefore, I uphold the Public Body's decision to refuse the Applicant access to that information.

Issue B. Does section 16(1) (unreasonable invasion of personal privacy) apply to the Records?

[para 34.] The Public Body applied section 16(1) to the Complainant(s)'s name(s) and to personal information of third parties contained in the Records. Given that I have found that the Public Body correctly applied section 19(1)(d) to the Complainant(s)'s name(s), it is not necessary to consider the application of section 16(1) to that information.

[para 35.] Second, because the scope of the inquiry had been narrowed to dealing with the Applicant's need to know who filed a complaint against the Applicant, it is also not necessary to consider the application of section 16(1) to the other information to which the Public Body said that section 16(1) applied.

Issue C: Did the Public Body correctly apply section 19(1)(a) (harm to a law enforcement matter) to the Records?

[para 36.] It is the Public Body's position that section 19(1)(a) applies to all the information severed from the Records.

[para 37.] Given that I have found that the Public Body correctly applied section 19(1)(d) to the Complainant(s)'s name(s), it is not necessary to consider the application of section 19(1)(a) to that information.

[para 38.] Second, because the scope of the inquiry had been narrowed to dealing with the Applicant's need to know who filed a complaint against the Applicant, it is also not necessary to consider the application of section 19(1)(a) to the other information to which the Public Body said that section 19(1)(a) applied.

V. ORDER

[para 39.] I make the following Order under section 68 of the Act.

Issue A. Did the Public Body correctly apply section 19(1)(d) (identity of a confidential source of law enforcement information) to the information severed from the Records?

[para 40.] The Public Body correctly applied section 19(1)(d) to sever the Complainant(s)' name(s), and properly exercised its discretion in withholding that information severed from the Records. Therefore, I uphold the Public Body's decision to refuse the Applicant access to that information.

Issue B. Does section 16(1) (unreasonable invasion of personal privacy) apply to the information severed from the Records?

[para 41.] Given that I have found that the Public Body correctly applied section 19(1)(d) to the Complainant(s)'s name(s), it is not necessary to consider the application of section 16(1) to that information.

[para 42.] Second, because the scope of the inquiry had been narrowed to dealing with the Applicant's need to know who filed a complaint against the Applicant, it is also not necessary to consider the application of section 16(1) to the other information to which the Public Body said that section 16(1) applied.

Issue C: Did the Public Body correctly apply section 19(1)(a) (harm to a law enforcement matter) to the Records?

[para 43.] Given that I have found that the Public Body correctly applied section 19(1)(d) to the Complainant(s)'s name(s), it is not necessary to consider the application of section 19(1)(a) to that information.

[para 44.] Second, because the scope of the inquiry had been narrowed to dealing with the Applicant's need to know who filed a complaint against the Applicant, it is also not necessary to consider the application of section 19(1)(a) to the other information to which the Public Body said that section 19(1)(a) applied.

[para 45.] The result is that the Applicant does not get access to any of the information the Public Body severed from the Records.

Robert C. Clark
Information & Privacy Commissioner