ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-028

February 28, 2000

ALBERTA JUSTICE

Review Number 1593

I. BACKGROUND

[para 1.] The Applicant was employed by Alberta Justice (the "Public Body"). In July 1998, the Applicant was dismissed from his employment.

[para 2.] On December 29, 1998, the Applicant's lawyer, on behalf of the Applicant, forwarded an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Public Body for access to various pieces of information relating to the Applicant's dismissal.

[para 3.] On March 8, 1999, the Public Body provided the Applicant with access to the severed copies of the records responsive to the request. The Public Body cited sections 16 (personal information of third parties) and 20(1) (disclosure harmful to intergovernmental relations) as its authority to withhold the information from those records.

[para 4.] On April 7, 1999, the Applicant requested that I review the Public Body's decision. Mediation was unsuccessful, and the matter was set down for a written inquiry.

[para 5.] In addition, it should be noted that, on May 19, 1999, and again on June 30, 1999, the Applicant's lawyer sent a letter to my Office requesting that my Office provide the following:

(a) information regarding the identity of two of the Third Parties;

(b) confirmation that the information was supplied in confidence under section 16(3)(f) and section 20(1)(b);

(c) information regarding whose reputation would be damaged under section 16(3)(h); and

(d) confirmation that the Public Body had properly assessed the possibility of harm under section 20(1)(a).

[para 6.] My Office did not provide the Applicant's lawyer with this information, as the information related to the issues that I would address during the inquiry.

[para 7.] I received the initial written submissions from the Public Body by the July 30, 1999 deadline, a portion of which I accepted *in camera*. Upon the Applicant's request, I also accepted the Applicant's May 19, 1999 letter as the Applicant's initial submission. I received a rebuttal submission from the Applicant by the September 13, 1999 deadline. The Public Body did not submit a rebuttal submission.

[para 8.] 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 9.] There are six pages of records at issue. They consist of two memoranda and several pages of handwritten notes. In this Order, I will refer to these memoranda and notes collectively as the "records".

III. ISSUES

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

A. Was the Public Body entitled to submit a portion of its initial submission *in camera*?

B. Did the Public Body correctly apply section 16 to the records?

C. Did the Public Body correctly apply sections 20(1)(a) and 20(1)(b) to the records?

IV. BURDEN OF PROOF

[para 11.] Section 67 of the Act addresses the burden of proof. The relevant parts read as follows:

> *67(1) If an inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*
>
> *(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, 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.*

[para 12.] In this inquiry, the burden of proof for section 16 is two-fold. The Public Body must first prove that section 16 does, in fact, apply to the personal information withheld from the records. The Applicant must then prove that the disclosure would not be an unreasonable invasion of a Third Party's personal privacy. The burden of proof for section 20 rests with the Public Body.

V. DISCUSSION

Issue A: Was the Public Body entitled to submit a portion of its initial submission *in camera?*

[para 13.] The Public Body requested that it be permitted to submit a portion of its initial submission *in camera*. The *in camera* documents consist of the unsevered records at issue, affidavits and additional written arguments.

[para 14.] The Applicant, in its rebuttal submission, objected to the Public Body's *in camera* documents. The Applicant argued that the Public Body's entire submission should be disclosed to the Applicant.

[para 15.] In this inquiry, I decided to permit the Public Body to submit a portion of their initial submission *in camera*. In making this decision, I had to determine whether allowing the *in camera* submission would breach the principles of procedural fairness. In my view, it did not. In Orders 97-009 and 98-006, I stated that in order to determine whether something is procedurally fair, I must consider three things: the

statutory provisions under the Act; the nature of the matter to be decided; and the circumstances of the case.

[para 16.] As I stated in these two orders, the standard of procedural fairness required under the Act is less than required of other decision makers. Particularly relevant to this inquiry is section 66(3). While this section provides an opportunity to make representations to the Commissioner, it specifically limits the right to be present during, to have access to, or to comment on another person's representations made to the Commissioner. Section 66(3) reads:

> *66(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given the opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.*

[para 17.] In Order 98-006, I also referred to Ontario Order 164 (1990) and Ontario Order 207 (1990) which are foundation cases outlining the extent of the duty on a Commissioner to exchange or disclose representations. In both of those orders, the Ontario Commissioner stated that the reason why representations are not exchanged is because, in the vast majority of cases, the representations would allude to the content of the information at issue and therefore defeat the purpose of the inquiry.

[para 18.] I also note that section 57(3) of the Act is relevant to this issue. In particular, section 57(3)(a) states that in conducting an investigation or inquiry under this Act, I must take every reasonable precaution to avoid disclosing and must not disclose, information that the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 7(1). Section 57(3) reads:

> *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*
>
> > *(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 7(1), or*

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

[para 19.] In this inquiry, the issue before me is whether the Public Body correctly withheld the information from the records under sections 16, 20(1)(a) or 20(1)(b). Due to the statutory provisions in the Act, the nature of the matter to be decided and the circumstances of the case before me, I decided to allow the Public Body to submit a portion of their submission *in camera*. In my view, this was the only way to allow the Public Body to make full and complete arguments without disclosing the content of the records.

Issue B: Did the Public Body correctly apply section 16 to the records?

[para 20.] Section 16 is a mandatory ("must") section of the Act. If section 16 applies, a public body must refuse to disclose the information.

[para 21.] In order for section 16 to apply to the information, two criteria must be fulfilled:

(a) the severed information must be "personal information" of a third party; and

(b) the disclosure of the personal information must be an unreasonable invasion of a third party's personal privacy.

<u>1. Is the severed information "personal information" of a third party?</u>

[para 22.] Personal information is defined in section 1(1)(n) of the Act. The relevant portions of 1(1)(n) read as follows:

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,

[para 23.] It is important to note that the list of personal information in sections 1(1)(n)(i)-(ix) is not exhaustive. In Orders 96-020, 96-021 and 97-002, I said that facts and events discussed, observations made, the circumstances (context) in which information was 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 set out in the initial part of section 1(1)(n).

[para 24.] After reviewing the severed information in the records, I find that the Public Body correctly identified the severed information as personal information of a Third Party.

2. Would the disclosure of the personal information be an unreasonable invasion of a third party's personal privacy, as provided by section 16(1) or section 16(2)?

[para 25.] Section 16(1) of the Act states that the head of a public body must refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. Section 16(2) lists a number of circumstances where a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Section 16(1) and the relevant portions of 16(2) read as follows:

> *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 26.] The Public Body states that the records meet the criteria for section 16(2)(g). I agree with the Public Body. I find that the criteria under section 16(2)(g) are fulfilled as the severed information consists of

the Third Parties' names along with other personal information of those Third Parties.

[para 27.] In determining whether there is an unreasonable invasion under section 16(1) or 16(2), a public body must consider the relevant circumstances under section 16(3). The relevant portions of section 16(3) reads as follows:

> *(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 of the relevant circumstances, including whether*
>
> …
>
> *(c) the personal information is relevant to a fair determination of the applicant's rights,*
>
> …
>
> *(f) the personal information has been supplied in confidence,*
>
> …
>
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.*

[para 28.] The Public Body states that sections 16(3)(f) and 16(3)(h) are relevant circumstances that weigh in favour of withholding the records.

[para 29.] In Order 97-002, I discussed the interpretation of section 16(3)(h). I said the focus of section 16(3)(h) is *unfair* (my emphasis) damage to reputation. Consequently, it is not necessary to prove that the damage is present or foreseeable. After reviewing the records, I find that the disclosure of the personal information could unfairly damage the reputation of those Third Parties.

[para 30.] I am also satisfied that the severed personal information in these records was supplied in confidence pursuant to section 16(3)(f). The sensitive nature and context of the information, the sworn affidavits submitted in evidence by the Public Body, and a reference in an internal Public Body memorandum dated September 11, 1998, all show that the information was supplied in confidence.

[para 31.] However, I do not find section 16(3)(c) to be a relevant circumstance in this inquiry. Although the Public Body and the Applicant did not specifically address this section in their submissions, I have decided to address this section due to the nature of this inquiry.

[para 32.] In Order P-312 (1992), the Ontario Assistant Commissioner stated that in order for the Ontario equivalent of section 16(3)(c) to be a relevant consideration, all four of the following criteria must be fulfilled:

> (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
>
> (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
>
> (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[para 33.] These four criteria are not fulfilled in this inquiry. Although this access request related to the Applicant's dismissal from his employment, none of the parties have provided me with an argument or evidence that the information is relevant to a legal right drawn from the concepts of common law or statute law, that it is related to an existing or contemplated proceeding, that the personal information will have a bearing on or is significant to the determination of the right, or that the information is required in order to prepare for the proceeding or to ensure an impartial hearing. In order to apply section 16(3)(c) as a relevant circumstance, arguments and evidence regarding this section must be placed before me. I cannot simply assume that these four criteria are fulfilled.

[para 34.] In summary, I have found that sections 16(3)(f) and 16(3)(h) are relevant circumstances in this case, but not section 16(3)(c). Sections 16(3)(f) and 16(3)(h) weigh in favour of withholding the Third Parties' personal information. Therefore, disclosure of the Third Parties' personal information is presumed to be an unreasonable invasion of the Third Parties' personal privacy, as provided by section 16(2)(g). The burden of proof now shifts to the Applicant to show that disclosure of the personal information would not be an unreasonable invasion of the Third Parties' personal privacy.

3. Did the Applicant meet the burden of proof under section 67(2)?

[para 35.] Section 67(2) of the Act states that if the record or part of the record to which the applicant is refused access contains personal information about a third party, 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.

[para 36.] I have found that the Public Body correctly applied section 16(2)(g) to the records. Therefore, the Applicant has the burden of proving that the disclosure of the information in these records would not be an unreasonable invasion of a third party's personal privacy.

[para 37.] After reviewing the Applicant's written arguments, I find that the Applicant has not met the burden of proof. In the Applicant's written argument, the Applicant states that the disclosure of the information in the record would not result in an unreasonable invasion as the Applicant believes that he is already aware of the identity and involvement of at least two of the Third Parties in this inquiry. I do not agree with the Applicant's argument. In Order 96-008, I stated that there is a difference between knowing a third party's personal information and having the right of access to that personal information under the Act. As such, the fact that the Applicant believes he is already aware of the identity and involvement of two of the Third Parties is not sufficient to meet the burden of proof that a disclosure of the Third Parties' personal information would not unreasonable invasion of the Third Parties' personal privacy.

4. Conclusion

[para 38.] I find that the Public Body correctly applied section 16(2)(g) to the information withheld from the records. I also find that the Applicant has not met the burden of proving that the disclosure would not be an unreasonable invasion of a Third Parties' personal privacy. Therefore, I uphold the Public Body's decision to withhold the personal information from the records.

ISSUE B: Did the Public Body correctly apply sections 20(1)(a) and 20(1)(b) to the records?

[para 39.] As I have decided that the personal information was properly withheld from the records under section 16(2)(g), I do not find it necessary to decide whether the Public Body correctly applied sections 20(1)(a) and 20(1)(b) to that same information.

VI. ORDER

[para 40.] Under section 68 of the Act, I make the following Order disposing of the issues in this inquiry.

Issue A: Was the Public Body entitled to submit a portion of their initial submission *in camera*?

[para 41.] I find that the Public Body was entitled to submit a portion of its initial submission *in camera.* After a review of sections 57(3) and 66(3) of the Act, the nature of the matter to be decided and the circumstances of the case, I find that allowing the Public Body to submit a portion of their initial submission *in camera* would not breach the principle of procedural fairness.

Issue B: Did the Public Body correctly apply section 16 to the records?

[para 42.] The Public Body correctly applied section 16(2)(g) to the personal information withheld from the records. I also find that the Applicant has not met the burden of proving that the disclosure would not be an unreasonable invasion of a Third Party's personal privacy. Therefore, I order the Public Body not to disclose the personal information withheld from the records.

Issue C: Did the Public Body correctly apply sections 20(1)(a) and 20(1)(b) to the records?

[para 43.] As I have determined that the personal information was properly from the records under section 16(2)(g), I do not find it necessary to decide whether the Public Body correctly applied sections 20(1)(a) or 20(1)(b) to that same information.

Robert C. Clark
Information and Privacy Commissioner