ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-037

April 4, 2000

ALBERTA JUSTICE

Review Number 1648

I. BACKGROUND

[para 1.] In October, 1992, two children were taken from Alberta to Wales, U.K. The father of the children (the "Applicant") reported the matter to the Royal Canadian Mounted Police (the "R.C.M.P."). The R.C.M.P., in cooperation with Alberta Justice (the "Public Body"), investigated the matter.

[para 2.] On March 25, 1999, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Public Body for a copy of the Public Body's entire Family Law file regarding the investigation.

[para 3.] On April 27, 1999, the Applicant sent the Public Body a power of attorney authorizing the children's paternal grandfather to act on the Applicant's behalf. For the purpose of this inquiry, the paternal grandfather will be called the "Applicant's agent".

[para 4.] On May 28, 1999, the Public Body sent the Applicant's agent a letter advising the Applicant's agent that, in response to the access request, the Public Body was partially or entirely withholding 31 of 269 pages of records. The Public Body cited sections 4(1)(l), 16(1) and 16(2) as its authority to withhold this information.

[para 5.] On June 6, 1999, the Applicant's agent requested a review of the Public Body's decision. Mediation was unsuccessful.

[para 6.] On October 4, 1999, my Office sent a letter to the parties setting the matter down for a written inquiry. In that letter, my Office asked the parties to address whether section 26(2) applies to the records.

[para 7.] On October 13, 1999, the Applicant's agent sent a letter to this Office asking this Office to appoint an independent person to act on the Applicant's agent's behalf. On October 18, 1999, this Office wrote to the Applicant's agent, informing the Applicant's agent that this Office did not have the authority to appoint such a person, but that I would consider the written representations made by the Applicant's agent.

[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 31 pages of records at issue. They consist of various pages of one of the Public Body's Family Law files. The Public Body numbered all the pages. In this Order, I will refer to each page number, where necessary, and will refer to all the pages collectively as the "records".

III. ISSUES

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

A. Does section 4(1)(l) exclude certain records from the application of the Act?

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

C. Does section 26(2) apply 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 the 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 4(1)(l) and 26(2) rests with the Public Body. 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 records. The Applicant's agent must then prove that the disclosure would not be an unreasonable invasion of a Third Party's personal privacy.

V. DISCUSSION

Issue A: Does section 4(1)(l) exclude certain records from the application of the Act?

[para 13.] If a record falls under section 4 of the Act, the Act does not apply to the record and there is no obligation on a public body to give an applicant access to the record.

[para 14.] The Public Body applied section 4(1)(l) to records 51b, 53c, 53d, and 53f.

[para 15.] Section 4(1)(l) reads:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

…

(l) a record created by or for

(i) a member of the Executive Council,

(ii) a Member of the Legislative Assembly, or

> *(iii) a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly*
>
> *that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly;*

[para 16.] In Order 97-007, I discussed the interpretation of section 4(1)(l). I said that in order for a record to fall outside the Act by reason of section 4(1)(l), the record must be created by or for any of those classes of persons listed in section 4(1)(l)(i) to (iii). I interpreted the word "for" to mean "on behalf of", and said that "for" did not mean "intended to go to" or "destined for" because that interpretation would allow a record created by anyone in the world to be excluded from the application of the Act.

[para 17.] In that Order, I also said that the concluding part of section 4(1)(l) requires that the record "has been sent or is to be sent" to one of the same three classes of persons listed in section 4(1)(l)(i) to (iii). Therefore, section 4(1)(l) is intended to exclude from the application of the Act communications among only those persons listed in section 4(1)(l)(i) to (iii).

[para 18.] I find that records 51b and 53f meet the requirements of section 4(1)(l). These records were created by one of the classes of persons listed in section 4(1)(l)(i) to (iii), and was sent to one of those same classes of persons. Therefore, section 4(1)(l) excludes these records from the application of the Act, and I have no jurisdiction over these records. Furthermore, I find that records 53c and 53d are drafts of record 51b. In Order 96-020 I said that the phrase "is to be sent" in section 4(1)(l) could be applied to exclude drafts of records from the Act. As such, I find that records 53c and 53d also meet the requirements of section 4(1)(l) and I have no jurisdiction over those records.

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

[para 19.] The Public Body cites section 16(1) and 16(2)(g) as the authority to withhold information from records 16c, 16d, 16e, 20, 21a, 21b, 24h, 30, 35, 40, 43, 51a, 53a, 53e, 53g, 53h, 60a, 60b, 60c, 60d, 60e, 60f, 60g, 60h, 60i, 60j, and 100b.

[para 20.] Section 16 is a mandatory ("must") section of the Act. If section 16 applies, a public body has no choice; it must refuse to disclose the information.

A. Is the severed information "personal information"?

[para 21.] In order for section 16 to apply to the severed information, the information must be "personal information". Personal information is defined in section 1(1)(n) of the Act. Section 1(1)(n) reads:

> *1(1) In this Act,*
>
> *(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,*
> >
> > *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
> >
> > *(iii) the individual's age, sex, marital status or family status,*
> >
> > *(iv) an identifying number, symbol or other particular assigned to the individual,*
> >
> > *(v) the individual's fingerprints, blood type or inheritable characteristics,*
> >
> > *(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,*
> >
> > *(viii) anyone else's opinions about the individual, and*
> >
> > *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 22.] 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 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 23.] After reviewing the severed information on the records, I find that the Public Body correctly identified severed information on these records as personal information.

B. Did the Public Body correctly apply section 16(1) or 16(2) to the records?

[para 24.] 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 parts of section 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 25.] In determining whether there is an unreasonable invasion under sections 16(1) or 16(2), a public body must consider the relevant circumstances under section 16(3). It is important to note that although section 16(3)(a)-(h) lists a number of relevant circumstances, this list is not exhaustive and there may be many other relevant circumstances that the public body must consider. Section 16(3) reads as follows:

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

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

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

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

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people.

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable, and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

[para 26.] After a review of the severed information in the records at issue, the criteria under section 16(2)(g) and the relevant circumstances under section 16(3), I find that the Public Body correctly applied section 16(2)(g) to the 2nd severed line on record 100b.

[para 27.] However, the information in records 16(d)(1st severed line, 1st bullet), 21a (1st severed line, 1st bullet), 35, 40 and 43 consists of the Applicant's personal information. The Applicant cannot be a third party for the purposes of section 16 of the Act: see section 1(1)(r). Therefore, I find that the Public Body did not correctly apply sections 16(1) or 16(2) to this information.

[para 28.] Furthermore, I find that the Public Body did not correctly apply section 16(1) or 16(2) to the severed information on records 16c, 16d (2nd bullet), 16e, 20, 21a (2nd bullet), 21b, 24h, 30, 51a, 53a, 53e, 53g, 53h, 60a, 60b, 60c, 60d, 60e, 60f, 60g, 60h, 60i, 60j and 100b (1st and 3rd severed lines), as a number of relevant circumstances pursuant to section 16(3), which I have outlined below, weigh in favour of disclosing this information.

[para 29.] After a review of the records at issue I find that much of the severed information consists of information that cites the outcome of court judgments in which the Applicant was a party, and consists of a court transcript from a court proceeding in Wales, U.K., in which the Applicant was also a party. In this case, I find the Applicant's participation in these proceedings to be a relevant circumstance under section 16(3) that weighs in favour of disclosing the information. I do not see how disclosing the court transcript or information regarding the outcome of the proceedings could be an unreasonable invasion of a Third Party's personal privacy, given the Applicant's participation in these proceedings. I want to emphasize that it is not the Applicant's knowledge of the personal information at issue that I find to be a relevant circumstance, but rather the Applicant's participation in the court proceedings that is relevant.

[para 30.] The Public Body stated that the transcript from the Welsh Court should not be disclosed to the Applicant because it is the practice of the Welsh Court to provide transcripts of custody and access matters only to the parties. The Public Body states that all other individuals, including those with a power of attorney, such as the Applicant's agent, must apply to the Court for leave. Although I acknowledge that this may be the practice of the Welsh Court, I do not find that the practice of this court is relevant to a proceeding under the Alberta *Freedom of Information and Protection of Privacy Act.* In the case before me, the Applicant is not seeking access from the Welsh Court but instead is seeking access from a public body in Alberta that is governed by the Alberta *Freedom of Information and Protection of Privacy Act*.

[para 31.] Furthermore, section 79(1)(c) of the Alberta *Freedom of Information and Protection of Privacy Act* clearly states that any right or power under that Act conferred on an individual such as the Applicant, may be exercised by the attorney specified in the individual's power of attorney if the right or power relates to the powers and duties conferred by the power of attorney. As previously mentioned, on April 27, 1999, the Applicant sent the Public Body a power of attorney authorizing the children's paternal grandfather, who I have referred to as the "Applicant's agent", to act on the Applicant's behalf. As such, under section 79(1)(c),

the Applicant's agent has the authority to make an access request on the Applicant's behalf.

[para 32.] One of the other severed records consists of a letter authored by the Applicant. In Order 98-004, I found that the fact that the personal information was supplied by the Applicant to be a relevant circumstance under 16(3) weighing in favour of disclosure as there was no change in circumstances that would warrant withholding the information. Similarly, in this inquiry, I find that there is no change in circumstances between the Applicant and the Third Parties that would warrant withholding the information in this record. As such, I find the fact that the Applicant authored one of the records to be a relevant circumstance that weighs in favour of disclosing that record.

[para 33.] Some of the other severed records consist of information, which if disclosed, would reveal the actions taken by the Applicant's lawyer. I find that the fact that some of the information would reveal the actions taken by the Applicant's lawyer to also be a relevant circumstance under section 16(3) that weighs in favour of disclosure. I fail to see how disclosing information regarding the actions of the Applicant's lawyer would be an unreasonable invasion of a Third Party's privacy, given that this lawyer was acting on the Applicant's behalf.

[para 34.] The Applicant's agent argued that the severed information should be disclosed because there are allegations that the Public Body and the R.C.M.P. failed to give due attention to the case and that the U.K. Official solicitor was guilty of serious misconduct in regard to the case. Although the Applicant's agent did not cite any section numbers in his written submissions, given the nature of his arguments, I will also address whether section 16(3)(a) (public scrutiny) or 16(3)(c) (relevant to a fair determination of rights) are relevant circumstances that weigh in favour of disclosure of the severed information.

[para 35.] In Order 97-002 I discussed the interpretation of section 16(3)(a). I said that evidence had to be provided to demonstrate that the activities of the Government of Alberta or a public body had been called into question, which necessitated the disclosure of personal information in order to subject the activities of the Government of Alberta or a public body to public scrutiny. I also said that:

> (i) It was not sufficient for one person to have decided that public scrutiny was necessary;
>
> (ii) The applicant's concerns had to be about the actions of more than one person within the public body; and

(iii) 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 is particularly so if the public body had also investigated the matter.

[para 36.] In this case, I find the following:

(i) The only evidence put forth that suggests that public scrutiny is warranted is that of the Applicant's agent on behalf of the Applicant;

(ii) The Applicant's concerns are about the actions of a number of individuals within the Public Body;

(iii) The Public Body's evidence shows that the Public Body had disclosed a substantial amount of information to the Applicant, disclosing 238 of 269 pages of records.

[para 37.] Therefore, on balance, I find that section 16(3)(a) is not a relevant circumstance weighing in favour of disclosing this personal information.

[para 38.] In addition, I find that section 16(3)(c) is not a relevant circumstance in this inquiry. In Order 99-028, I discussed the interpretation of section 16(3)(c). I adopted the reasoning of the Ontario Assistant Commissioner in Order P-312 (1992) and said that in order for section 16(3)(c) to be a relevant circumstance, all four of the following criteria must be fulfilled:

(i) 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;

(ii) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

(iii) 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

(iv) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[para 39.] These four criteria are not fulfilled in this inquiry. There is insufficient evidence before me that the severed 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.

[para 40.] In summary, I find that the Public Body correctly applied section 16(2)(g) to the 2nd severed line on record 100b. As such, the burden of proof now shifts to the Applicant's agent to show that the disclosure of the personal information would not be an unreasonable invasion of the Third Party's personal privacy.

[para 41.] Conversely, I find the Public Body did not correctly apply sections 16(1) or 16(2) to records 16(d) (1st severed line, 1st bullet), 21a (1st severed line, 1st bullet), 35, 40 and 43 as these records contain the Applicant's personal information. Furthermore, after taking into account the relevant circumstances, I find that the Public Body did not correctly apply section 16(1) or 16(2) to the severed information on records 16c, 16d (2nd bullet), 16e, 20, 21a (2nd bullet), 21b, 24h, 30, 51a, 53a, 53e, 53g, 53h, 60a, 60b, 60c, 60d, 60e, 60f, 60g, 60h, 60i, 60j and 100b (1st and 3rd severed lines). However, I had asked the parties to address whether section 26(2) applies to the records and, as such, I will consider this information under section 26(2).

C. Did the Applicant's agent meet the burden of proof under section 67(2)?

[para 42.] 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 43.] I have found that the Public Body correctly applied section 16(2)(g) to the 2nd severed line on record 100b. Therefore, the Applicant's agent has the burden of proving that the disclosure of this information would not be an unreasonable invasion of a third party's personal privacy.

[para 44.] The Applicant's agent argued that the severed information should be disclosed as it is already in the public domain. In support, the Applicant's agent referred to an Internet site created by the Applicant's agent and to a letter sent by the Applicant's agent to several Members of Parliament and to several Members of the Legislative Assembly. Both the Internet site and the letter disclose personal information about some

Third Parties. In essence, the Applicant's agent is arguing that this severed information should be disclosed because the Applicant's agent believes that he and the Applicant already have knowledge of that information.

[para 45.] 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's agent believes that he and the Applicant are already aware of a Third Party's personal information is not sufficient to meet the burden of proof that a disclosure of a Third Party's personal information would not be an unreasonable invasion of the Third Party's personal privacy.

[para 46.] Therefore, I find that the Applicant's agent did not meet the burden of proof under section 67(2) and I therefore uphold the Public Body's decision to withhold the 2nd severed line on record 100b.

Issue C: Does section 26(2) apply to the records?

[para 47.] In preparation for this inquiry, I requested that the parties address whether section 26(2) applies to the severed information in the records. However, as I have determined that the Public Body correctly applied section 4(1)(l) to the severed information on records 51b, 53c, 53d and 53f, and section 16(2)(g) to the 2nd severed line on record 100b, I will not address this information under section 26(2).

[para 48.] Section 26(2) states that a Public Body must refuse to disclose information described in section 26(1)(a) if that information relates to a person other than a public body. Sections 26(1)(a) and 26(2) read as follows:

> *26(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> …
>
> *(2) The head of a public body must refuse to disclose information described in subsection 1(a) that relates to a person other than a public body.*

[para 49.] There are two requirements under section 26(2):

(i) the information must be the subject of a type of legal privilege under section 26(1)(a); and

(ii) the information must relate to a person other than a public body.

[para 50.] The two types of privilege most often referred to under section 26(1)(a) are solicitor-client privilege and litigation privilege.

[para 51.] In Order 96-017, the Commissioner said in order for a record to be subject to solicitor-client privilege, the Public Body must meet the common law criteria set out in *Solosky* v. *The Queen,* (1980) 1 S.C.R. 821. In that case, the Supreme Court of Canada stated that solicitor-client privilege must be claimed document by document, and each document must meet the following criteria: (i) it must be a communication between solicitor and client; (ii) that entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 52.] In Order 97-009, I listed the requirements for litigation privilege. First, there must be a third party communication. Second, the maker of the document or the person under whose authority the document was made intended the document to be confidential. Third, the dominant purpose for which the documents were prepared was to submit them to a legal advisor for advice and use in existing or contemplated litigation.

[para 53.] There is no evidence before me that the severed information on records 16c, 16d, 16e, 20, 21a, 21b, 24h, 30, 35, 40, 43, 51a, 53a, 53e, 53g, 53h, 60a, 60b, 60c, 60d, 60e, 60f, 60g, 60h, 60i, 60j and 100b (1st and 3rd severed lines) meets the requirements for either solicitor-client, litigation privilege or another type of privilege under section 26(1)(a). As such, I find that this information does not meet the requirements of section 26(2). Furthermore, as there are no other mandatory exceptions that apply to this information, and the Public Body did not claim any discretionary exceptions in regard to this information, the Public Body must disclose this information to the Applicant.

VI. ORDER

[para 54.] Under section 68 of the Act, I make the following Order disposing of the issues in this inquiry.

Issue A: Does section 4(1)(l) exclude certain records from the application of the Act?

[para 55.] Records 51b, 53c, 53d and 53f are excluded from the application of the Act by section 4(1)(l). Consequently, I have no jurisdiction over those records. The Applicant cannot obtain access to those records under the Act.

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

[para 56.] I find that the Public Body correctly applied section 16(2)(g) to the 2nd severed line on record 100b. I also find that the Applicant's agent 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 to withhold this information from the Applicant. In order to assist the Public Body, I will provide the Public Body with a copy of record 100b, highlighting the portion that must be withheld.

[para 57.] I find that the Public Body did not correctly apply section 16(1) or 16(2) to the severed information on records 16c, 16d, 16e, 20, 21a, 21b, 24h, 30, 35, 40, 43, 51a, 53a, 53e, 53g, 53h, 60a, 60b, 60c, 60d, 60e, 60f, 60g, 60h, 60i, 60j and 100b (1st and 3rd severed lines). However, I requested that the parties address whether section 26(2) applies to this information and, as such, I will consider this information under that section.

Issue C: Does section 26(2) apply to the records?

[para 58.] I find that section 26(2) does not apply to the severed information in records 16c, 16d, 16e, 20, 21a, 21b, 24h, 30, 35, 40, 43, 51a, 53a, 53e, 53g, 53h, 60a, 60b, 60c, 60d, 60e, 60f, 60g, 60h, 60i, 60j and 100b (1st and 3rd severed lines). As there are no other mandatory exceptions that apply to this information and the Public Body did not claim any discretionary exceptions in regard to this information, I order the Public Body to disclose this information to the Applicant.

[para 59.] 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 and Privacy Commissioner