ALBERTA

INFORMATION AND PRIVACY COMMISSSIONER

ORDER 2000–004

April 06, 2000

ALBERTA JUSTICE

Review Number 1749

I. BACKGROUND

[para. 1.] This inquiry involves two requests for access to records under the *Freedom of Information and Protection of Privacy Act* (the "Act"), made by the same Applicant to the same Public Body. Alberta Justice ("the Public Body) responded to the requests in 1997 and in 1999. All records involved in the 1997 request are also involved in the 1999 request.

[para. 2.] The Applicant made the first request for access to records on December 16, 1996. The Public Body describes this as the 1997 request (the "1997 Request"). In the 1997 Request, the Applicant asked for correspondence between Alberta Justice and various third parties (Alberta Human Rights Commission, Law Society of Alberta, RCMP, Ombudsman's Office and the federal government) that related to the Applicant's complaints against individuals.

[para. 3.] In response to the 1997 Request, the Public Body released all six responsive records to the Applicant in March 1997. Personal information was severed from four of the six records pursuant to section

16(1) and section 16(2)(b) and (g) of the 1997 version of the *Freedom of Information and Protection of Privacy Act*. In Order 97-011, the Commissioner upheld the refusal of the Public Body to disclose the personal information of third parties.

[para. 4.] The matter before me in this inquiry is the Applicant's second request for access to records, made in a letter dated August 26, 1999. The Public Body describes this as the 1999 request (the "1999 Request"). The 1999 Request involves four specific items ("Items #1, #2, #3, and #4"). Item #1 of the 1999 Request was for a consultation letter from the Public Body to the RCMP asking for their views on the disclosure of the six documents involved in the 1997 Request.

[para. 5.] Items #2, #3, and #4 of the 1999 Request asked for Alberta Justice consultation letters and attachments involved in the disclosure of the six documents in the 1997 Request. The identity of individual third parties was not disclosed during the 1997 Request and inquiry.

[para. 6.] In a letter dated November 2, 1999, the Public Body released all records responsive to Item #1 in the 1999 Request, except for personal information that was severed pursuant to section 16(1) and section 16(4)(b) and (g) (previously, section 16(2)(b) and (g)). In response to Items #2, #3, and #4 of the 1999 Request, the Public Body refused to confirm or deny the existence of responsive records pursuant to section 11(2)(b).

[para. 7.] Mediation was authorized but was not successful. On February 4, 2000, the parties were notified that the matter was proceeding to written inquiry. An initial written submission was received from the Public Body and a rebuttal submission was received from the Applicant. The Public Body provided evidence by way of Affidavit.

[para. 8.] This inquiry proceeds on the basis of the Act as amended on May 19, 1999.

II. RECORDS AT ISSUE

[para. 9.] The Public Body's response to the 1999 Request falls into two categories. The first category is the response to Item #1 of the 1999 Request. The second category is the response to Items #2, #3 and #4 of the 1999 Request.

A. Response to Item #1 of the 1999 Request

[para. 10.] The Public Body says that the records responsive to Item #1 of the 1999 Request consist of 21 records having a total of 26 pages. The Public Body has numbered these records consecutively from #1 to #21. All 21 records were disclosed in whole or in part and 16 records were disclosed in their entirety. Five records were disclosed with part of the page severed, pursuant to section 16(4)(b) and (g) of the Act (presumed unreasonable invasion of third party's personal privacy).

[para. 11.] Six of the records responsive to Item #1 of the 1999 Request have been addressed in a previous order. Two of the six records that were previously addressed were disclosed in their entirety in the 1997 Request and were again disclosed in their entirety in the 1999 Request. Four of the six records that were previously disclosed with personal information severed in the 1997 Request were again disclosed with identical severing in the 1999 Request, pursuant to section 16. The Public Body's refusal to disclose the severed portions of these same four records was upheld in Order 97-011.

B. Response to Items #2, #3 and #4 of the 1999 Request

[para. 12.] The Public Body refused to confirm or deny the existence of records responsive to Items #2, #3 and #4 of the 1999 Request, pursuant to section 11(2)(b) of the Act.

III. ISSUES

[para. 13.] There are two issues in this inquiry:

A. Did the Public Body correctly apply section 16(1) and section 16(4)(b) and (g) (presumed unreasonable invasion of third party's personal privacy) to the records?

B. Did the Public Body correctly apply section 11(2)(b) (refusal to confirm or deny existence of record)?

IV. DISCUSSION

Issue A: Did the Public Body correctly apply section 16(1) and section 16(4)(b) and (g) (presumed unreasonable invasion of third party's personal privacy) to the records?

1. General

[para. 14] In response to Item #1 of the 1999 Request, the Public Body provided 21 records to the Applicant. The Public Body says that it was required to sever personal information from five records (#10, #17, #18, #19 and #20), pursuant to section 16(1) and section 16(4)(b) and (g).

2. Do the records contain personal information within the meaning of section 1(1)(n)?

[para. 15.] The relevant portions of section 1(1)(n) read:

> 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,
> …
> (iii) the individual's age, sex, marital status or family status,
> …
> (vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

[para. 16.] The information severed by the Public Body is personal information pursuant to section 1(1)(n) of the Act. The information consists of names of individuals (section 1(1)(n)(i)), gender of individuals (section 1(1)(n)(iii)) and employment history of identifiable individuals (section 1(1)(n)(vii)).

3. Would disclosure of the personal information be an unreasonable invasion of a third party's personal privacy, as provided by section 16(1) and section 16(4)?

a. General

[para. 17.] Section 16(1) and the relevant portions of section 16(4) 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.
> …
> (4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

> …
> (b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,
> …
> (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,

b. Did the Public Body properly apply the presumptions under section 16(4)?

[para. 18.] Section 16(4) describes circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy.

[para. 19.] The Public Body claims that the presumptions in sections 16(4)(b) and (g) apply to the information that is severed from the records and that disclosure of this personal information would be an unreasonable invasion of a third party's personal privacy.

[para. 20.] Section 16(4)(g) says that disclosure of personal information is presumed to be an unreasonable invasion of the personal privacy of a Third Party when the personal information involves the name of the Third Party, and (i) the name appears with other personal information about the Third Party, or (ii) disclosure of the name itself would reveal personal information about the Third Party.

[para. 21.] The Public Body says that the names appear with other personal information about the Third Party such as employment history, so the section 16(4)(g)(i) presumption applies. The Public Body also argues that disclosure of the name itself would reveal personal information about the third party, so the section 16(4)(g)(ii) presumption applies.

[para. 22.] The names of the Third Parties exist along with personal information including gender and employment history. Disclosure of the name alone would also reveal personal information about the Third Party. I find that section 16(4)(g) applies and therefore disclosure of the personal information is presumed to be an unreasonable invasion of the Third Party's personal privacy.

[para. 23.] As section 16(4)(g) applies, it is not necessary to consider whether section 16(4)(b) also applies.

c. Did the Public Body properly consider the relevant circumstances under section 16(5)?

[para. 24.] The relevant portions of section 16(5) read:

> 16(5) In determining under subsections (1) and (4) 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,
> > …
> > (c) the personal information is relevant to a fair determination of the applicant's rights,
> > …
> > (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and
> >
> > (i) the personal information was originally provided by the applicant.

[para. 25.] Section 16(5) requires that the Public Body consider the relevant circumstances, in determining whether the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy pursuant to section 16(1) and (4).

[para. 26.] It should be noted that the amended wording in the Act for the relevant circumstances (section 16(5)) has changed from the previous provision (section (16(3)).

[para. 27.] The previous section 16(3) reads:

> 16(3) In determining under subsection (1) or (2) [my emphasis] whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy,…

[para. 28.] The present section 16(5) reads:

> 16(5) In determining under subsections (1) and (4) [my emphasis] whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy,…

[para. 29.] In Dukelow and Nuse, The Dictionary of Canadian Law, 2nd Edition (Toronto: Carswell, 1995), the authors confirm that Canadian

courts have accepted that "and" is a "semantically ambiguous conjunction" that can be read conjunctively or disjunctively. In the latter cases, it functions semantically as an equivalent to "or".

[para. 30.] There is no evidence that the Legislative Assembly consciously intended to amend section 16(5). Therefore, in the absence of such evidence, I believe that the change of wording in section 16(5) is simply stylistic rather than substantive. Consequently, I read the "and" in section 16(5) disjunctively as "or". This was the approach taken by the Public Body in their Submission, and I agree with this approach.

[para. 31.] The list of relevant circumstances under section 16(5) is not exhaustive. Therefore, there may be other relevant circumstances that a public body must also consider.

[para. 32.] The Public Body considered section 16(5)(a), namely, whether disclosure would be desirable for subjecting the activities of the Public Body to public scrutiny. Order 97-002 said that evidence must be provided to demonstrate that the activities of a public body have been called into question, and that this necessitates the disclosure of personal information. This Order set out three criteria to be considered in determining whether public scrutiny is a relevant circumstance weighing in favour of disclosing the third party's personal information:

(i) It is 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. 33.] The Public Body considered these criteria and determined that the Applicant is the only one that feels that public scrutiny is needed. Although the Applicant's concerns are about more than one person within the Public Body, the Public Body has disclosed a substantial amount of information.

[para. 34.] Consequently, the release of the personal information is not likely to be desirable for the purpose of subjecting the Public Body to public scrutiny. Therefore, I agree with the Public Body that section 16(5)(a) is not a relevant circumstance weighing in favour of disclosing personal information of a third party.

[para. 35.] The Public Body considered whether the disclosure was relevant to a fair determination of the Applicant's rights pursuant to section 16(5)(c). The Public body considered the criteria set out in Order 99-028 for section 16(5)(c) to apply:

(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. 36.] The Public Body said that the personal information severed was not relevant to the determination of rights of the Applicant as these determinations have already been made. I agree and find that section 16(5)(c) is also not a relevant circumstance weighing in favour of disclosing personal information of a third party.

[para. 37.] The Public Body considered section 16(5)(i) and whether the Applicant provided the information. The Public Body found that this circumstance did not apply to the records at issue, as the Applicant did not provide the records.

[para. 38.] The Public Body also considered whether a third party had previously refused consent to release personal information to the Applicant. I find that the refusal of consent is a relevant circumstance weighing against disclosure of personal information of a third party. In the 1997 inquiry the Public Body considered this relevant circumstance, and the Commissioner found that release of personal information when consent had been refused would be an unreasonable invasion of a third party's personal privacy. I see no reason to make a different finding.

[para. 39.] Having considered section 16(5)(a) and section 16(5)(c) and section 16(5)(i) and the refusal of consent, I have no evidence that there are any circumstances weighing in favour of disclosing personal information of any third party. Therefore, I find that the Public Body has properly considered the relevant circumstances in reaching its conclusion that disclosure of personal information would be an unreasonable invasion of the personal privacy of any third party.

4. Applicant's burden of proof

[para. 40.] Pursuant to section 67(2), the burden of proof now shifts to the Applicant to prove that disclosure of the information would not be an unreasonable invasion of the personal privacy of any third party. Having studied the Applicant's submission, I find that the Applicant has not discharged this burden of proof.

5. What conclusion should be reached under section 16?

[para. 41.] I find that the Public Body correctly applied section 16(4)(g) to the information severed from the records contained in Item #1. The identical parts of four of the severed records were considered in Order 97-011, under the Act before it was amended on May 19, 1999. I am making the same finding as the Commissioner made in Order 97-011 with regard to the four identical records that were severed and are at issue again in this inquiry. Since the wording of section 16(4)(g) is the same after the Act was amended on May 19, 1999, the result is the same.

[para. 42.] Having found that the Public Body correctly applied section 16(4)(g), I do not find it necessary to decide whether the Public Body also correctly applied section 16(4)(b) to the same information.

Issue B: Did the Public Body correctly apply section 11(2)(b) (refusal to confirm or deny existence of record)?

1. General

[para. 43.] The relevant parts of section 11 read:

> 11(1) In a response under section 10, the applicant must be told
> …
> (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,
>
> …
>
> (2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of
> …
> (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,

[para. 44.] In response to Items #2, #3 and #4 of the 1999 Request, the Public Body has refused to confirm or deny the existence of a record pursuant to section 11(2)(b). Section 11(2)(b) allows a Public Body to refuse to confirm or deny the existence of 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.

2. Did the Public Body use the proper process when refusing to confirm or deny the existence of a record under section 11(2)(b)?

[para. 45.] Order 98-009 states the principles that must be applied when utilizing section 11(2)(b) in an inquiry. The principles are:

a. Appropriate process - Public Body must search for the records, review the records to determine whether responsive records exist and provide the records to the Commissioner for review;
b. Correct application of section 11(2)(b) – Determine whether the required circumstances exist; that is, determine whether disclosure of the existence of the information is an unreasonable invasion of the Third Party's privacy. This determination involves applying the provisions of section 16 for guidance; and
c. Proper exercise of discretion under section 11(2)(b) – Consider the objects and purpose of the Act including access principles and provide evidence of what was considered.

[para. 46.] The Public Body argues that this provision applies, as disclosing whether or not records exist would reveal whether third parties were contacted during the 1997 Request. Although it is common knowledge that the Public Body did consult with third parties when processing the 1997 Request, the Public Body has never identified the third parties to the Applicant or even indicated how many third parties were involved in consultation. The Affidavit of the Public Body says that the names of any third parties have not been disclosed.

[para. 47.] The Public Body says that it utilized section 16 and considered the same factors with respect to section 11(2)(b) as it did for the section 16 records. I find that the Public Body used the correct process and applied section 11(2)(b) correctly.

3. Did the Public Body properly exercise its discretion when refusing to confirm or deny the existence of a record under section 11(2)(b)?

[para. 48.] The Public Body says that it considered the requirements established in Order 98-009 and considered the access principles as well

as the overall objects and principles of the Act when it exercised discretion under section 11(2)(b).

[para. 49.] I have reviewed the exercise of discretion, and find that discretion was exercised properly by the Public Body.

[para. 50.] I am mindful of the requirement in section 57(3)(b). Section 57(3)(b) requires me to take every reasonable precaution to avoid disclosing whether information exists, if the head of the Public Body in refusing to provide access did not indicate whether information exists.

4. What conclusion should be reached under section 11(2)(b)?

[para. 51.] The Public Body has met the requirements of Order 98-009 by using the correct process, the proper application of section 11(2)(b), and the proper use of discretion. I find that the Public Body has properly refused to confirm or deny the existence of a record.

V. ORDER

[para. 52.] Pursuant to section 68 of the Act, I make the following order:

1. The Public Body correctly applied section 16(4)(g) of the Act to the information severed from the records contained in Item #1. Having made this finding, I do not find it necessary to decide whether the Public Body correctly applied section 16(4)(b) to the same information. Under section 67(2), the Applicant did not meet the burden of proving that disclosure of the third party's personal information would not be an unreasonable invasion of the third party's personal privacy. Therefore, I uphold the head's decision to refuse access to the personal information severed from the records contained in Item #1.

2. The Public Body correctly applied and properly exercised its discretion under section 11(2)(b) of the Act, in refusing to confirm or deny the existence of a record. Therefore, I uphold the head's decision to refuse to confirm or deny the existence of a record.

Frank Work, Q.C.
Assistant Information & Privacy Commissioner