**ALBERTA**

**INFORMATION AND PRIVACY COMMISSIONER**

# ORDER 2000-010

August 21, 2000

**ALBERTA TREASURY**

Review Number 1700

## I. BACKGROUND

[para 1.] On March 4, 1999, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Treasury (the "Public Body") for information regarding several contracts between the Public Body and a consultant (the "Third Party").

[para 2.] The Applicant subsequently revised the access request. This revision was confirmed in a letter, dated June 30, 1999, from the Public Body to the Applicant. This letter described the revised access request as follows:

> *… you are modifying the question to copies of contracts between the government and an organization employing* [named individual] *for the purposes of the contract and copies of the final correspondence presented by* [named individual] *for the government during the course of the contract during the fiscal years 97/98 – 98/99 ending on March 31. Also you indicated that you are looking for the type of audience that attended the seminars.*

[para 3.] On August 30, 1999, the Public Body responded to the access request, partially or entirely withholding 177 of 332 pages of records. The Public Body cited sections 4(1)(l), 15(1), and 21(1) of the Act as its authority to withhold the records.

[para 4.] On September 15, 1999, the Applicant requested a review of the Public Body's decision. Through the mediation process, the Applicant agreed to accept the Public Body's decision to apply sections 4(1)(l) and 21(1) to the records. Therefore, as of the date of the inquiry, only the 16 pages of records withheld under section 15(1) remain at issue.

[para 5.] 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 6.] The records at issue consist of 16 of 332 pages of records. The severed information in these records consist of several internal Public Body memos and portions of contracts that address the fee that the Public Body paid to the Third Party. The Public Body numbered all the pages. The pages of records that remain at issue are pages 20, 22, 27, 32, 37, 70, 135, 137, 142, 146, 147, 148, 149, 150, 152, 157, which I will refer to collectively as the "records".

## III. BURDEN OF PROOF

[para 7.] Section 67 addresses the burden of proof under the Act. The relevant portion of section 67 states:

> *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.*

[para 8.] In this inquiry the Public Body refused to give the Applicant access to the severed information in the records at issue. Therefore, the Public Body has the burden of proof.

## IV. ISSUE

[para 9.] Does section 15(1) apply to the records?

## V. DISCUSSION: Does section 15(1) apply to the records?

[para 10.] 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 11.] Section 15(1) is a mandatory exception. This means that if a head of a public body determines the information falls within the exception, there is no choice: he/she must refuse access.

[para 12.] For information to fall under section 15(1), the following three-part test must be satisfied:

> 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 could reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

[para 13.] After a review of the records and the arguments of the parties, I find that this three-part test is not fulfilled. Although a portion of the severed information reveals commercial information under section 15(1)(a), I find that the severed information does not fulfill the confidentiality requirement under section 15(1)(b) or the harm test under section 15(1)(c).

[para 14.] In Order 99-018, I referred to Ontario Order M-169 and stated that in order to fulfill the confidentiality requirements under section 15(1)(b), a third party must, from an objective point of view, have a reasonable expectation of confidentiality in regard to the information that was supplied. Furthermore, in order to determine whether the expectation was 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 public body 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 public body;
>
> (3) Not otherwise disclosed or available from sources to which the public has access; or
>
> (4) Prepared for a purpose which would not entail disclosure.

[para 15.] The Public Body and the Third Party argue that the Third Party supplied the severed information explicitly or implicitly in confidence. In their submissions, they both refer to the presence of a "confidentiality clause" in the contracts to support their position. The Public Body also provided me with the Third Party's August 6, 2000 response to the Public Body's section 29 notice, which further outlines the Third Party's argument regarding section 15(1)(b).

[para 16.] After a review of the records and the submissions of the parties, I find that there is insufficient evidence that the Third Party had a reasonable expectation of confidentiality under section 15(1)(b) at the time the Third Party supplied the severed information to the Public Body. Although the Public Body and the Third Party refer to the presence of a "confidentiality clause" in the contracts, the wording of this clause does not support their argument. This "confidentiality clause" reads as follows:

> *The Consultant shall treat this Agreement and any materials, data or other information rendered available by the Treasurer to the Consultant in the performance of his obligations under this Agreement as privileged and confidential, and shall not use or disclose such materials, data or other information in any manner whatsoever to third parties without the written consent of the Treasurer. The Consultant acknowledges that all documents, reports, plans, analysis and all other matter whatsoever produced by the Consultant pursuant to the services provided or to be provided herein shall be the sole and exclusive property of the Treasurer and shall be given to the Treasurer upon request forthwith. The copyright in any work produced in or as a result of this Agreement shall vest in the Treasurer but in any publication of such work by or on behalf of the Treasurer, the contribution of the Consultant shall be acknowledged.*

[para 17.] This clause states that the Third Party must treat any information it receives as confidential. It also states that any work produced by the Third Party is the sole and exclusive property of the Public Body. However, the clause does not state that the severed information provided by the Third Party to the Public Body was provided in confidence.

[para 18.] Furthermore, in Order 96-013, I stated that in order to meet the "harm" test under section 15(1)(c), the disclosure of the information must reasonably be expected to bring about one of the outcomes listed in section 15(1)(c). In addition, I stated that the words "could reasonably be expected to" determine the standard of proof under section 15(1)(c). I stated that the proof of harm must be on a balance of probabilities. This means that the evidence must be more than speculation, and more than a mere possibility of harm. Moreover, I emphasized that under section 15(1)(c)(i), the harm or interference must be "significant" and under section 15(1)(c)(iii), the resulting financial loss or gain must be "undue".

[para 19.] In Order 96-013, I also cited Order 96-003 and said that in order for a Public Body to meet the "harm" test under section 15(1)(c)(i) "… [The] evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue." (*Canada (Information Commissioner)* v. *Canada (Prime Minister),* [1992] F.C.J. No. 1054 (Fed. T.D.). I stated that the Public Body must provide evidence of the following to prove significant harm or interference:

> (i) the connection between disclosure of the specific information and the harm which 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 20.] The Public Body and the Third Party argue that the disclosure of the severed information could reasonably be expected to significantly harm the Third Party's competitive position or significantly interfere with the Third Party's negotiating position under section 15(1)(c)(i), or result in undue financial loss to the Third Party under section 15(1)(c)(iii). In particular, the Third Party states that although the Third Party is currently employed by the Government of Saskatchewan and under the terms of that employment is prohibited from acting as a consultant, the Third Party is nevertheless entitled to return to the consulting business upon completion of the employment contract. The Third Party states that, if the Third Party returns to the consulting business in the future, the disclosure of the severed information could impair the Third Party's ability to re-establish relations with clients at a future date and could place the Third Party at a significant disadvantage when competing for, and negotiating, future contracts. This, in turn, has the potential to result in an undue financial loss to the Third Party.

[para 21.] After a review of the arguments and the records at issue, I find that there is insufficient evidence that the disclosure of the severed information could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the Third Party under section 15(1)(c)(i) or result in undue financial loss or gain under section 15(1)(c)(iii). The Third Party has acknowledged that the Third Party is now employed with the Government of Saskatchewan and, under the terms of employment, is prohibited from acting as a consultant. Although the Third Party states that the Third

Party is entitled to return to the consulting business once the Third Party has finished the term of employment, there is no evidence as to when, or if, the Third Party will return to the consulting business nor is there sufficient evidence regarding the harm the Third Party would incur at that time. As I previously stated in this Order, in order to fulfill part three of the section 15(1) test, the proof of harm must be on a balance of probabilities. The disclosure of the information must reasonably be expected to bring about one of the outcomes listed in section 15(1)(c). The evidence before me must consist of more than speculation, and more than a mere possibility of harm. I find that this standard of proof has not been met in this inquiry.

## VI. ORDER

[para 22.] I find that section 15(1) does not apply to the severed information in the records at issue. Therefore, I do not uphold the Public Body's decision to withhold the severed information from the Applicant and I order the Public Body to give the Applicant access to this information.

[para 23.] 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