

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-028

March 19, 2001

THE CITY OF CALGARY

Review Number 1767

Office URL: <http://www.oipc.ab.ca>

Summary: In 1994, an employee of the Public Body filed a workplace complaint against the Applicant. The Public Body conducted an investigation and gave the Applicant the name of the employee who complained, as well as a summary of the nature of the complaint. The Public Body did not give the Applicant the comments of witnesses. The Applicant subsequently requested information about the complaint. The Public Body responded under the *Freedom of Information and Protection of Privacy Act* (the "Act"), which had just come into force for the Public Body. The Public Body disclosed 458 pages of records, but severed the personal information of third parties from some of the records. After conducting an inquiry, the Commissioner decided that disclosure of most of the third parties' personal information severed from the records would be an unreasonable invasion of the third parties' personal privacy, as provided by section 16 of the Act. He agreed that that personal information should not be disclosed to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss. 1(1)(n), 1(1)(n)(i) to (ix), 6(1) and (2), 9(1), 16, 16(1), 16(4), 16(4)(b), (f) and (g), 16(5), 16(5)(c), (e) and (f), 17, 17(3), 18, 18(2), 19, 19(1), 23(1), 23(1)(a), 67(2), 68.

I. BACKGROUND

[para 1.] In 1994, an individual (the “Third Party”) employed by The City of Calgary (the “Public Body”) filed a workplace complaint against another employee (the “Applicant”). The Public Body investigated the complaint, wrote a report and subsequently disciplined the Applicant. The Applicant unsuccessfully grieved the discipline action.

[para 2.] Prior to the *Freedom of Information and Protection of Privacy Act* (the “Act”) coming into force for the Public Body on October 1, 1999, the Applicant requested access to her complete file from the Public Body’s human resources department. On October 1, 1999, the Public Body notified the Applicant of its intent to deal with her access request under the Act.

[para 3.] The Public Body provided the Applicant with 458 pages of records. The Public Body severed some information under the following provisions of the Act: section 16 (personal information of third parties), section 17 (individual health or safety, or public safety), section 18 (confidential evaluations), section 19 (law enforcement), and section 23(1) (advice).

[para 4.] The Applicant objected to the severing and requested a review under the Act. Mediation was authorized, but was not successful in regard to nine pages of records. The matter was set down for an oral, private inquiry. The Public Body provided an advance written submission. The Applicant did not.

[para 5.] I heard the Public Body and the Applicant on the date set for the inquiry. At that time, I informed the Applicant and the Public Body that I would decide whether I needed to hear from the Third Party, who had been notified of the inquiry. Subsequently, I heard the Third Party *in camera*.

[para 6.] This Order proceeds on the basis of the Act as amended on May 19, 1999.

II. RECORDS AT ISSUE

[para 7.] The records at issue for the inquiry originally consisted of nine pages, having the following numbers: 187, 188, 189, 318, 367, 373, 376, 497, and 499.

[para 8.] However, at the inquiry, the Public Body released page 376 in its entirety to the Applicant, and disclosed to the Applicant further

information that had been severed from page 367. Therefore, I do not intend to consider page 376, or the information on page 367 that has been disclosed to the Applicant.

[para 9.] In this Order, I will refer to the records individually by page number and collectively as the “Records”.

[para 10.] At the inquiry, the Applicant asked me to consider other records, in addition to those set out in the Notice of Inquiry. There was no evidence before me that the Applicant had objected to the issues and the records at issue, as set out in the Notice of Inquiry. As it is my usual practice not to allow an applicant to unilaterally expand the scope of an inquiry on the day of the inquiry, I refused the Applicant’s request.

III. ISSUES

[para 11.] The Notice of Inquiry set out the following issues for the inquiry:

- A. Did the Public Body properly use sections 16(4) and 19(1) when it refused to disclose some information contained on pages 187, 188 and 189?
- B. Is the text from page 318 that was withheld under sections 16(4) and 18(2) in fact information about the Applicant? If so, did the Public Body act reasonably in withholding that information from the Applicant?
- C. Was the Public Body correct in using section 16(4) and reasonable in using section 17(3) when it refused to disclose some information severed from page 367?
- D. Did the Public Body act reasonably in withholding information from page 373 under the exception provided in section 23(1)?
- E. Was the Public Body correct in using section 16(4) and 16(5) to refuse to disclose third party personal information on page 376?
- F. Was the Public Body correct in using section 16(4) to sever information from page 497?
- G. Was page 499 as received by the Applicant deliberately provided to the Applicant by the Public Body? If so, did the Public Body respond in accordance with section 9(1) to the Applicant with respect to the information contained in page 499?

[para 12.] At the inquiry, the Public Body informed me that it was no longer relying on sections 17, 18 and 19 for severing information from the Records. Therefore, I do not intend to consider those exceptions in this inquiry.

[para 13.] As a result of the changes in exceptions applied to the Records, and in the Records at issue, I have summarized the issues for the inquiry, as follows:

A. Does section 16 apply to the information severed from pages 187, 188, 189, 318, 367, and 497 of the Records?

B. Did the Public Body properly apply section 23(1) to page 373 of the Records?

C. Did the Public Body intentionally release the information on page 499 to the Applicant? If so, did the Public Body respond to the Applicant in accordance with section 9(1), with respect to the information contained on page 499 of the Records?

IV. DISCUSSION OF THE ISSUES

A. Does section 16 apply to the information severed from pages 187, 188, 189, 318, 367, and 497 of the Records?

1. General

[para 14.] Section 16(1) reads:

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.

[para 15.] For section 16 to apply, there must be personal information of a third party, and the disclosure of the personal information must be an unreasonable invasion of a third party's personal privacy.

2. Personal information of third parties

[para 16.] The Public Body says that the Records relate to the investigation into the Third Party's complaint. Some of the records are notes of the investigators. Those notes contain the views of witnesses given during the investigation. The Public Body says it severed

information of the witnesses. It also severed information of the Third Party where that information would identify the witnesses who were expressing opinions about situations that had occurred.

[para 17.] For the purposes of section 16, the witnesses and the Third Party are the third parties. A reference to “third parties” includes the Third Party.

[para 18.] “Personal information” is defined in section 1(1)(n) of the Act to mean “recorded information about an identifiable individual”, including the kinds of personal information listed in section 1(1)(n)(i) to (ix). I have said that, where events, facts, observations or circumstances contained in a record would identify a third party, that is also personal information of a third party because it is “recorded information about an identifiable individual”.

[para 19.] I have reviewed the information severed from the Records, which I find is the personal information of the third parties. The personal information consists primarily of names, opinions of or about third parties, and events, facts, observations or circumstances that would identify third parties. In deciding whether there is personal information of third parties, I have considered each record individually and the Records as a whole.

[para 20.] I also find that some of the information severed contains the Applicant’s personal information (except pages 318, 367 and 497). As the Applicant cannot be a third party under the Act, section 16 does not apply to the Applicant’s personal information. The Applicant would normally have a right of access to her personal information, as provided by section 6(1).

[para 21.] However, the Applicant’s personal information is intertwined with the personal information of the third parties and cannot be separated. In such a case, in deciding whether the personal information of the third parties can be disclosed, I must also decide whether some or none of the Applicant’s personal information can be disclosed.

3. Presumptions under section 16(4)

[para 22.] The Public Body initially said that 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(4)(b), (f) and (g). At the inquiry, the Public Body said that it was withdrawing section 16(4)(b), and relying only on section 16(4)(f) and (g) for all the records, except page 497. For that page, the Public Body said it was relying only on section 16(4)(g).

[para 23.] Section 16(4)(f) and (g) read:

16(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,

(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 24.] I find that the personal information does not fall within section 16(4)(f). At the inquiry, the Public Body agreed that it probably would not use this section now. However, at the time, having just come under the Act, the Public Body says that it used whatever it thought would apply.

[para 25.] I find that the personal information of third parties severed from page 497 falls within section 16(4)(g).

[para 26.] I find that some, but not all, of the personal information of third parties severed from pages 187, 188, 189, 318, and 367 falls within section 16(4)(g).

[para 27.] On those pages, there are no names of some of the third parties. However, the Public Body has given evidence that the third parties are identifiable from the events, facts, observations and circumstances. I agree. Consequently, I find that there is recorded information about identifiable individuals and therefore personal information. Even though that personal information does not fall within section 16(4)(g) because there is no name, that personal information remains to be considered under section 16(1).

4. Relevant circumstances under section 16(5)

[para 28.] In deciding whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy under section 16(1) or section 16(4), a public body must consider all the relevant circumstances, as provided by section 16(5).

[para 29.] The Public Body says that it considered all the relevant circumstances, but did not specifically indicate on the Records what those relevant circumstances were. However, at the inquiry, the Public Body discussed in general terms the relevant circumstances it considered. I have set out those relevant circumstances under section 16(5), as follows:

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

...

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

...

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

...

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

[para 30.] The following discussion of relevant circumstances excludes page 497 of the Records, from which the Public Body severed the personal information of two of its employees. I will discuss that personal information later in this Order.

a. Section 16(5)(c) – Fair determination of the Applicant's rights

[para 31.] If applicable, section 16(5)(c) weighs in favour of disclosing a third party's personal information.

[para 32.] The Public Body says that it considered whether section 16(5)(c) was a relevant circumstance, but decided that it was not. The Public Body maintains that it had no evidence that the Applicant had any present rights to be determined at the time of the access request, although the Public Body acknowledges that the Applicant had rights to be determined in 1994. At that time, the Applicant had filed a grievance. The Public Body disclosed to the Applicant the name of the Third Party

who filed the complaint, as well as a summary of the nature of the complaints and background material. It also disclosed the investigation report. However, the Public Body did not give the Applicant the comments of the Third Party, the names or comments of the witnesses, and one recommendation that pertained to the Third Party.

[para 33.] The Applicant says that she needs the personal information of the third parties because her reputation at work is at stake. The Applicant is still employed by the Public Body. The Applicant claims that she does not know if the stories are true, and she cannot defend herself. She believes that she should have the right to answer allegations made and wants to refute the comments. She is also concerned about the length of time that has passed, and says that she would retire if she had the information.

[para 34.] The Public Body says that it is not aware of any reasons for the Applicant to defend herself with the Public Body, as there are no ongoing matters with the Public Body.

[para 35.] The Third Party says that the Applicant is suing the Third Party over statements made as a result of the Third Party's complaint. The Third Party has countersued the Applicant. The Third Party says there were witnesses to the complaint. Those witnesses made statements to the Third Party, who then conveyed that information to the investigator.

[para 36.] The Third Party also says that, in the court action, the Third Party was required to provide the Applicant with all documentation, including a chronological record the Third Party wrote to document the complaint.

[para 37.] It is evident from page 188 of the Records that the Applicant knew the specifics of the complaint and what the witnesses said, because the Applicant responded to those specifics.

[para 38.] Furthermore, given that the Applicant received information from the Public Body for the grievance, and from the Third Party for the court action, I find that disclosure of the third parties' personal information severed from the Records is not required for a fair determination of the Applicant's rights. Therefore, section 16(5)(c) is not a relevant circumstance weighing in favour of disclosing the third parties' personal information.

b. Section 16(5)(e) – Unfair exposure to financial or other harm

[para 39.] If applicable, section 16(5)(e) weighs in favour of not disclosing a third party's personal information.

[para 40.] The Public Body says that the witnesses expressed fear and concern for their safety, which would be harm for the purposes of section 16(5)(e). The Public Body says that there is a continuous theme of concern for safety throughout the documents. The third parties also expressed concern over reactions in the workplace.

[para 41.] The Public Body also says that none of the third parties have seen the information contained in the records, most of which is a summary prepared by an investigator who was one of the Public Body's employees. The investigator summarized the third parties' interpretation of particular situations or circumstances. The third parties have not had an opportunity to respond to or rebut that summary, so the disclosure of that information would unfairly expose the third parties to harm.

[para 42.] The Third Party confirmed that the Third Party has not seen the Public Body's notes of the investigation. Since the Applicant has sued the Third Party, the Third Party does not want the witnesses exposed to harm just because they made statements to the Third Party and to the investigator.

[para 43.] After considering the evidence, I find that section 16(5)(e) applies, and is a relevant circumstance weighing in favour of not disclosing the third parties' personal information.

c. Section 16(5)(f) – Personal information supplied in confidence

[para 44.] The Public Body says that the investigators told the witnesses that the investigation would be confidential. Consequently, there was an expectation of confidence. The Public Body concludes that the personal information was therefore supplied in confidence. The Third Party also says that the information was given in confidence. I note that the promise of confidentiality was given in 1994, before the Act came into force.

[para 45.] After considering the evidence, I find that section 16(5)(f) applies, and is a relevant circumstance weighing in favour of not disclosing the third parties' personal information.

d. Other relevant circumstances under section 16(5)

[para 46.] Section 16(5) is not exhaustive. There may be other relevant circumstances to consider.

[para 47.] The Public Body says that, on page 497, it withheld the personal information of two of its employees. The Public Body explained that the personal information was withheld because there was no indication as to why the personal information was there.

[para 48.] I note that, on page 497, the Public Body has already disclosed the personal information of one of those employees for which it severed the personal information in another place on the same page. The Public Body also disclosed that personal information on page 367.

[para 49.] In the records, the Public Body has consistently disclosed the personal information of employees where it is evident that the employees are not the Third Party or the witnesses whose personal information has otherwise been severed.

[para 50.] Therefore, I find that the relevant circumstances weigh in favour of disclosing the employees' personal information severed from page 497.

e. Conclusion under section 16(5)

[para 51.] The relevant circumstances weigh in favour of not disclosing the third parties' personal information severed from pages 187, 188, 189, 318, and 367 of the Records. Disclosure of that personal information would be an unreasonable invasion of the third parties' personal privacy.

[para 52.] The relevant circumstances weigh in favour of disclosing the third parties' personal information severed from page 497 of the Records. Disclosure of that personal information would not be an unreasonable invasion of the third parties' personal privacy.

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

[para 53.] Section 67(2) of the Act puts a burden on the Applicant to show that the disclosure of the third parties' personal information would not be an unreasonable invasion of the third parties' personal privacy. The Applicant has the burden of proof with respect to the third parties' personal information severed from pages 187, 188, 189, 318 and 367, but not page 497.

[para 54.] I have considered the Applicant's arguments in the context of section 16(5). I find that the Applicant has not met the burden of proving that disclosure of the third parties' personal information would not be an unreasonable invasion of the third parties' personal privacy.

6. Conclusion under section 16

[para 55.] Section 16 applies to the personal information of third parties, which the Public Body severed from pages 187, 188, 189, 318 and 367 of the Records. Disclosure of that personal information would be an unreasonable invasion of the third parties' personal privacy, as provided by section 16(1) and section 16(4). The Public Body must not disclose that personal information to the Applicant. Because the Applicant's personal information is intertwined with the personal information of the third parties, the Applicant's personal information cannot be disclosed to the Applicant.

[para 56.] Section 16 does not apply to the personal information of third parties, which the Public Body severed from page 497 of the Records. Disclosure of that personal information would not be an unreasonable invasion of the third parties' personal privacy. I intend to order the Public Body to disclose that personal information to the Applicant.

B. Did the Public Body properly apply section 23(1) to page 373 of the Records?

[para 57.] Section 23(1)(a) reads:

23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council...

[para 58.] To fall within section 23(1)(a), the "advice" (advice, proposals, recommendations, analyses or policy options) should:

- (i) be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
- (ii) be directed toward taking an action,

(iii) be made to someone who can take or implement the action.

[para 59.] Based on the Public Body’s evidence, I am satisfied that the information severed from page 373 is a proposal and a recommendation. That “advice” meets the three requirements for section 23(1)(a), as set out above.

[para 60.] Section 23(1)(a) is a discretionary (“may”) provision in that, even if the section applies, a public body may nevertheless decide to disclose the information. To exercise its discretion properly, a public body must consider the objects and purposes of the Act, and not exercise its discretion for an improper or irrelevant purpose.

[para 61.] The Public Body explained that the “advice” was not followed. If the advice had been followed, the Public Body would have released it. The Public Body says that it withheld the advice because of the need to allow confidential discussions in order to come to a decision.

[para 62.] In my view, the Public Body exercised its discretion properly. I note that the Public Body also withheld a minimal amount of information from the Applicant (only two sentences) under section 23(1)(a).

[para 63.] Therefore, I find that the Public Body properly applied section 23(1)(a) to the information severed from page 373. The Public Body is not required to disclose that information to the Applicant, even though the information also contains the Applicant’s personal information. Section 6(2) of the Act provides that access to the Applicant’s personal information is subject to limited exceptions, one of which is section 23(1)(a).

C. Did the Public Body intentionally release the information on page 499 to the Applicant? If so, did the Public Body respond to the Applicant in accordance with section 9(1), with respect to the information contained on page 499 of the Records?

[para 64.] Section 9(1) reads:

9(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 65.] At the inquiry, the Public Body explained that it had initially severed all the information on page 499. However, on a subsequent review of the page, the Public Body decided to release the entire page to the Applicant. The Public Body says that it intentionally released the page because it was evident from the Applicant's signature on the page that the Applicant had already seen the page. The Public Body said that it did not notice the Applicant's signature when it initially decided to withhold that page from the Applicant.

[para 66.] When the Public Body released page 499, the Applicant thought that the Public Body had not released all the information because there were section numbers of the Act written on the page. The Public Body says that it wrote the section numbers on the page when it initially decided to sever all the information. The Public Body explained that, in error, it did not remove the section numbers from the page before it provided the page to the Applicant.

[para 67.] I accept the Public Body's evidence that it intentionally released page 499 to the Applicant. I also accept the Public Body's evidence that it disclosed all the information on page 499, but unintentionally did not remove the section numbers under which it previously severed the information. In spite of that unintentional error, I find that the Public Body met its duty to make every reasonable effort to respond to the Applicant openly, accurately and completely, as provided by section 9(1).

V. ORDER

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

A. Application of section 16

[para 69.] Section 16 applies to the personal information of third parties, which the Public Body severed from pages 187, 188, 189, 318 and 367 of the Records. Disclosure of that personal information would be an unreasonable invasion of the third parties' personal privacy, as provided by section 16(1) and section 16(4). The Public Body must not disclose that personal information to the Applicant. Because the Applicant's personal information is intertwined with the personal information of the third parties, the Applicant's personal information cannot be disclosed to the Applicant.

[para 70.] Section 16 does not apply to the personal information of third parties, which the Public Body severed from page 497 of the Records. Disclosure of that personal information would not be an

unreasonable invasion of the third parties' personal privacy. I order the Public Body to disclose that personal information to the Applicant.

B. Application of section 23(1)

[para 71.] The Public Body properly applied section 23(1)(a) to the information severed from page 373. The Public Body is not required to disclose that information to the Applicant.

C. Duty under section 9(1)

[para 72.] The Public Body intentionally released page 499 to the Applicant. The Public Body also disclosed to the Applicant all the information on page 499, but unintentionally did not remove the section numbers under which it previously severed the information. In spite of that unintentional error, I find that the Public Body met its duty to make every reasonable effort to respond to the Applicant openly, accurately and completely, as provided by section 9(1).

[para 73.] I order the Public Body to 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