ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-002

July 17, 2001

ALBERTA HUMAN RESOURCES AND EMPLOYMENT

Review Number 1952

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

Summary: The Applicant sent an access request under the *Freedom of Information and Protection of Privacy Act* to Alberta Human Resources and Employment. In that request, the Applicant requested copies of letters and submissions received by Alberta Human Resources and Employment from various organizations regarding revisions to the Labour Relations Code and the performance and decisions of the Labour Relations Board for the years 1997, 1998, 1999 and 2000.

At the date of the inquiry, 61 pages of records remained at issue. Alberta Human Resources and Employment claimed that 24 of the 61 pages were not responsive to the request. Alberta Human Resources and Employment also claimed sections 23(1)(a) and 16 as its authority to withhold the records. In addition, an Affected Party stated that section 15(1) applied to the records.

The Commissioner agreed that the Public Body properly withheld the 24 pages of records as not responsive to the request. The Commissioner also decided that of the remaining 37 pages of records at issue under sections 15(1), 23(1)(a) and 16, Alberta Human Resources and Development properly withheld three pages of records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* S.A. 1994, c.F-18.5, ss. 1(1)(n), 4(1)(l), 15(1), 16, 23(1)(a), 68.

Authorities Cited: AB: Orders 96-006, 96-013, 96-018, 97-007, 97-013, 97-020, 98-006, 98-011, 99-030, 2000-003; **ON:** Order P-489 (1993).

Cases Cited: *Canada (Information Commissioner)* v. *Canada (Prime Minister)* [1992] F.C.J. No.1054 (Fed. T.D.).

I. BACKGROUND

[para 1.] On April 3, 2000, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Human Resources and Employment (the "Public Body") for:

> *"Any and all letters and submissions received by the Ministry of Human Resources and Employment from the following:*
>
> *Christian Labour Association of Canada*
> *Merit Contractors Association of Alberta*
> *All Alberta Chambers of Commerce*
>
> *Regarding revisions and changes to the Labour Relations Code and the performance and decisions of the Labour Relations Board.*
>
> *I wish to receive copies of the above records sought.*
>
> *Time Period of Requested Records:*
>
> *The above records are sought for the years 1997, 1998, 1999 and 2000."*

[para 2.] On June 9, 2000, the Public Body responded to the access request, partially or entirely withholding 123 pages of records. The Public Body cited sections 16 and 23(1)(a) as its authority to withhold these records. Through the mediation process, the number of records at issue was narrowed. At the date of the inquiry, only 61 records were at issue.

[para 3.] On July 6, 2000, the Applicant requested a review of the Public Body's decision to withhold the 61 records. The matter was set down for an oral inquiry.

[para 4.] After a review of the records, I determined that six organizations should be given Affected Party status at the inquiry.

[para 5.] On November 10, 2000, the Public Body sent a letter to my Office, arguing that these six organizations should not have been given Affected Party status. Furthermore, the Public Body stated that if it was appropriate to give these parties Affected Party status, they should have been identified earlier in the inquiry process. The Public Body stated that the Affected Parties should have been identified when the mediation process first began within this Office, instead of being identified as Affected Parties later when the inquiry was ready to be set down.

[para 6.] On November 20, 2000, I responded to the Public Body's letter. In that letter, I stated that I have a duty to be fair to all persons who are involved in an inquiry. This duty requires me to give notice to any person who may be adversely and directly affected by the outcome of an inquiry, so that person can decide if he or she wants to participate in the process. Furthermore, I stated that I do not believe the Affected Parties were notified too late in the inquiry process. I stated that the Act recognizes that notice can be given to an affected party at any stage of the process.

[para 7.] The Public Body, the Applicant and one of the Affected Parties sent a submission to this Office in advance of the inquiry. The other five Affected Parties did not make a submission, nor did they participate at the inquiry.

II. RECORDS AT ISSUE

[para 8.] The records at issue consist of 61 pages of text. Of these records, 60 were entirely withheld (record numbers 1 to 60) and one record was partially withheld (record number 124).

III. ISSUES

[para 9.] There are four issues in this inquiry:

1. Are the records responsive to the access request?

2. Does section 15(1) apply to the records?

3. Did the Public Body properly apply section 23(1)(a) to the records?

4. Does section 16 apply to the records?

IV. DISCUSSION

A. Are the records responsive to the access request?

[para 10.] The Public Body and the Affected Party state that records 9-11, 15-16, 23-41 are not responsive to the request.

[para 11.] In Order 97-020, I said that information or records will be responsive to an access request if they are reasonably related to the request.

[para 12.] The access request asked for all letters and submissions received by the Public Body from several organizations regarding revisions and changes to the Labour

Relations Code and the performance and decisions of the Labour Relations Board for the years 1997, 1998, 1999 and 2000.

[para 13.] After a review of the records, I find that records 9-11, 15-16 and 23-41 are not reasonably related to the access request. These records do not address revisions and changes to the Labour Relations Code, nor the performance and decisions of the Labour Relations Board. Instead, these records discuss the Federal Fair Wages and Hours of Labour Act and the Federal wage rate schedules. Given the nature and content of these records, I find that the Public Body properly withheld these records as not responsive to the access request.

B. Does section 15(1) apply to the records?

[para 14.] Section 15(1) reads as follows:

> *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 15.] For information to fall under section 15(1), the following three-part test must be fulfilled:

> Part 1: The information must reveal the 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 must reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

[para 16.] As I have found that records 9-11, 15-16 and 23-41 are not responsive to the access request, the records that remain at issue under section 15(1) are records 1-8, 12-14, 17-22, 42-60 and 124.

<u>1. Does the information reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party?</u>

[para 17.] The Affected Party states that the records contain commercial information about the Affected Party. The Affected Party states that one of its objectives as an employer organization is to promote and support sound legislation in the area of labour relations. As such, the Affected Party argues that the information at issue is the Affected Party's commercial information. Alternatively, the Affected Party states that the records at issue contain "labour relations information".

[para 18.] After a review of the records and the submissions of the parties, I find that the records at issue under section 15(1) do not contain commercial information.

[para 19.] In Orders 96-013, 96-018 and 97-013, I held that merely labeling a record as "commercial" is insufficient to fulfill the requirements of section 15(1)(a). Consideration must be given to the content of the record. I also decided that dictionary definitions should be used to define the term, and adopted part of Ontario Order P-489 (1993) which defined commercial information as that "… which relates to the buying, selling, or exchange of merchandise or services…". I held that this type of information included third party associations, past history, references, and insurance policies.

[para 20.] Furthermore, in Order 98-006, I held that presentation documents and letters written to the Public Body which provide general information, detail the Third Party's views and opinions, or request the Public Body take a certain policy action or direction, do not constitute commercial information. I stated that this type of information does not specifically relate to the buying, selling, or exchange of merchandise or services of the Third Party.

[para 21.] The records at issue under this section, consist of presentation documents and letters submitted to the Public Body by the Affected Parties requesting amendments

to the Labour Relations Code. I do not find that this information consists of commercial information.

[para 22.] Similarly, I find that the information at issue does not consist of labour relations information. In Order 99-030, I adopted the Canadian Oxford definition of "labour relations" as "relations between management and employees". In Order 2000-003, I expanded on this definition and cited the Concise Encyclopedia of Industrial Relations which defines "labour relations'" as:

> "… relationships within and between workers, working groups and their organizations and managers, employers and their organization… 'Labour relations' are sometimes abstracted from 'industrial relations' as describing organized or institutionalized relationships within the whole, though sometimes the two terms are used as if they were interchangeable…"

[para 23.] As previously mentioned, the information at issue consists of presentation documents and letters which request that the Public Body make various changes to the Labour Relations Code. The information does not address a specific relationship between two or more identifiable workers, working groups or employers. Instead, I find that this information consists of background information regarding a specific piece of legislation. Despite the eloquent arguments of legal counsel to the contrary, I am not persuaded that these types of records constitute labour relations information under section 15(1)(c)(i).

[para 24.] Having found that none of the information meets the requirements of section 15(1)(a), I do not need to consider section 15(1)(b) or (c). However, as the parties argued those provisions, I will deal with them.

2. Was the information supplied, explicitly or implicitly in confidence?

[para 25.] The Affected Party and the Public Body state that the information was supplied to the Public Body in confidence.

[para 26.] After a review of the records and the submissions of the parties, I find that the records at issue fulfill this criterion. At the inquiry, representatives of the Public Body and the Affected Party testified under oath that the information was submitted in confidence. I accept this evidence and find that the Affected Party submitted the information at issue in confidence to the Public Body.

3. Could the disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 15(1)(c)?

[para 27.] The Affected Party states that the disclosure of the information could reasonably be expected to bring about the outcomes set out in sections 15(1)(c)(i), (ii) and (iv).

Section 15(1)(c)(i)

[para 28.] Section 15(1)(c)(i) states that the head of a public body must refuse to disclose information if the disclosure could reasonably be expected to significantly harm the competitive position or significantly interfere with the negotiating position of a third party. In Order 96-013, I emphasized that under this section, the harm or interference must be considered "significant". I also said that in order 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.)

[para 29.] In addition, I also stated that evidence of the following is required 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 30.] After a review of the arguments and the records at issue, I find that there is insufficient evidence that the disclosure of the information could reasonably be expected to significantly harm the competitive position of the Affected Party under section 15(1)(c)(i).

[para 31.] I also do not find that the disclosure of the information could reasonably be expected to significantly interfere with the negotiating position of the Affected Party under section 15(1)(c)(i). The Affected Party states that the disclosure of this information would interfere with the Affected Party's ability to negotiate future legislative changes. However, the Canadian Oxford Dictionary defines the term "negotiate" as to "confer with others in order to reach a compromise or agreement". I find that there is no evidence before me that the information at issue in this inquiry reflects this type of relationship. As previously stated, the records at issue consist of presentation documents and letters, submitted by the Affected Party to the Public Body, in an attempt to provide general information, detail the Affected Party's views and opinions, or request the Public Body take a certain policy action or direction regarding amendments to the Alberta Labour

Relations Code. I do not find that the disclosure of these records would significantly interfere with the Affected Party's "negotiating position".

Section 15(1)(c)(ii)

[para 32.] Section 15(1)(c)(ii) states that the head of a public body must refuse to disclose information if the disclosure could reasonably be expected to 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.

[para 33.] In Order 96-018, I stated that in order to fulfill section 15(1)(c)(ii), the disclosure must reasonably be expected to result in the Affected Party or anyone else no longer supplying similar information to the Public Body. Furthermore, I emphasized that the continued supply of this information must be in the public interest and not just in the interest of one of the parties.

[para 34.] After a review of the submissions and the records at issue, I find that the requirements under section 15(1)(c)(ii) are not fulfilled.

[para 35.] The Affected Party argued that if the information at issue were disclosed, the Affected Party would not supply this type of information to the Public Body in the future. However, I find that there is insufficient evidence before me that the disclosure could reasonably be expected to result in the Affected Party or anyone else no longer supplying similar information to the Public Body. I am not persuaded that this type of representation would cease if the information at issue in this inquiry were disclosed. Furthermore, it seems to me that the continued supply of this information is more in the interest of the Affected Party as opposed to the public interest. As such, I find that the requirements under section 15(1)(c)(ii) are not fulfilled.

Section 15(1)(c)(iv)

[para 36.] Section 15(1)(c)(iv) states that a head of a public body must refuse to disclose information if the disclosure of that information could reasonably be expected to 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 37.] I do not find that the information at issue fulfills the requirements of section 15(1)(c)(iv).

[para 38.] The Affected Party argued that the disclosure of the information would reveal the Affected Party's proposed legislative amendments to the Labour Relations Code. The Affected Party argues that this information has been supplied to the Public Body in order to resolve or inquire into a future labour relations dispute. However, it is my view that section 15(1)(c)(iv) requires that the disclosure reveal information supplied in regard to a specific labour relations dispute with specific identifiable parties.

Furthermore, the other requirements of section 15(1)(c)(iv) have not been met; for example, there has been nobody appointed to resolve or inquire into a labour relations dispute.

[para 39.] As previously discussed, the information at issue consists of presentation documents and letters submitted by the Affected Party to the Public Body in an attempt to provide general information, detail the Affected Party's views and opinions, or request the Public Body take a certain policy action or direction regarding amendments to the Alberta Labour Relations Code. The information does not refer to a specific labour relations dispute. As such, I find that the requirements of section 15(1)(c)(iv) are not fulfilled.

[para 40.] The Affected Party also argued that if this type of information is disclosed, it may result in conflict between management and labour in the future. That may well be the case. However, the possibility of such a conflict is not a relevant consideration under section 15(1)(c). My jurisdiction under section 15(1)(c) is limited to determining whether the disclosure will result in one of the outcomes outlined in that section.

4. Conclusion – Section 15(1)

[para 41.] In summary, I find that the information at issue does not fulfill the requirements under section 15(1)(a) or section 15(1)(c). As such, I find that the information must not be withheld under section 15(1).

C. Did the Public Body properly apply section 23(1)(a) to the records?

[para 42.] Sections 23(1)(a) states:

> *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 43.] In Order 96-006, I set out the criteria for "advice" (which includes advice, proposals, recommendations, analyses or policy options) under section 23(1)(a). The advice should:

> (a) be sought or expected, or be part of the responsibility of a person by virtue of that person's position;
>
> (b) be directed toward taking an action; and
>
> (c) be made to someone who can take or implement the action.

[para 44.] In that Order, I held that the record must contain more than a bare recitation of facts or summaries of information. The information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process.

[para 45.] In addition, in Order 98-011, I held that section 23(1)(a) will apply to information in the records only if it "reveals" advice. The information at issue must not have already been disclosed in the public domain.

[para 46.] As I have found that records 9-11, 15-16 and 23-41 are not responsive to the access request, the records that remain at issue under section 23(1)(a) are records 1-8, 12-14, 17-22, 42-60 and 124.

[para 47.] After carefully reviewing these records, I find that records 1-8, 17-22, 42-60, and 124 do not fulfill the section 23(1)(a) criteria. I find that the information in these records was not sought or expected, or part of the responsibilities of the Affected Party by virtue of their position. The records at issue are essentially unsolicited lobbying documents sent to the Public Body to persuade the Public Body to act in a certain manner. Although the Public Body provided evidence that the Minister occasionally met with the Affected Party in response to these letters, this does not change the unsolicited nature of these documents.

[para 48.] During the inquiry, a specific question arose regarding record 57. In that record, the Affected Party wrote to the Minister outlining the key recommendations that the Affected Party made to the Standing Policy Committee on Learning in December 1999. The Affected Party stated that the Minister suggested that the Affected Party make this presentation and thereby sought these recommendations from the Affected Party. The Public Body, however, disputes the extent to which these recommendations were requested by the Minister.

[para 49.] After reviewing record 57 and the submissions of the parties, I find that, notwithstanding the difference of opinion between the parties regarding the extent to which the recommendations were requested by the Minister, the information in this record does not fulfill the requirements of section 23(1)(a), as the disclosure of the information in this record would not "reveal" advice. The information at issue has already been disclosed into the public domain. Both the Public Body and the Affected Party acknowledge that the Standing Policy Committee meeting was open to the public. The Affected Party and the Public Body also indicated that at least one representative of the public was in attendance at the meeting. As such, I find that the disclosure of the information could not reasonably be expected to "reveal" advice under section 23(1)(a).

[para 50.] However, I find that the information in records 12-14 fulfills the section 23(1)(a) criteria. I find that the "advice" in these records was sought by the Minister, that the advice was directed toward taking an action and the advice was made to someone who can take or implement the action. I also find that the information has not already been disclosed in the public domain and that the Public Body properly exercised its

discretion in withholding this information. As such, I find that the public body properly withheld this information from the Applicant under section 23(1)(a).

D. Does section 16 apply to the records?

[para 51.] In order for section 16 to apply to this information, two criteria must be fulfilled:

> (a) the 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.

[para 52.] As I have found that records 9-11, 15-16 and 23-41 are not responsive to the access request and as I have found that the Public Body properly exercised its discretion to withhold the information contained in records 12-14 under section 23(1)(a), the records that remain at issue under section 16 are pages 1-8, 17-22, 42-60 and 124.

1. Do the records contain personal information of a third party?

[para 53.] Personal information is defined in section 1(1)(n) of the Act. The relevant portions 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,*
> >
> > …
> >
> > *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given…*

[para 54.] After a review of the records, I find that the names, business addresses and employment titles in the records fulfill the definition of personal information under section 1(1)(n)(i) and (vii) respectively.

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

[para 55.] 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(4) 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.

[para 56.] The Public Body states that sections 16(1), 16(4)(d) and 16(4)(g) apply to the records. These sections 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.*
>
> ...
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > ...
> >
> > *(d) the personal information relates to employment or educational history,*
> >
> > ...
> >
> > *(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 57.] I find that the names, business addresses and employment titles of the individuals listed in the records fulfill both of these criteria under section 16(4)(g). In addition, I find that the employment titles listed in these records fulfill the requirements of section 16(4)(d).

[para 58.] In determining whether there is an unreasonable invasion of personal privacy under section 16(1) and (4), section 16(5) says that a public body must consider the relevant circumstances including those listed under section 16(5).

[para 59.] One of these relevant circumstances is found within section 16(5)(f). This section states that, in determining whether a disclosure of personal information

constitutes an unreasonable invasion of privacy, the head of a public body must consider whether the personal information was supplied in confidence. For the reasons mentioned in my discussion under section 15(1)(b), I find that this criterion is fulfilled.

[para 60.] However, in this inquiry, I find that the professional and business context in which the records were composed are also relevant circumstances. Most of the personal information at issue is either contained in the salutation or signature of the letters. All of the personal information consists of the information that one would normally find on a business card. In addition, I find that although the letters were authored by individuals, they were written on behalf of a corporation. These are all relevant circumstances under section 16(5). Although I have found that the records fulfill the criteria under section 16(5)(f), the context and nature of the information weighs very heavily in favour of disclosing the information to the Applicant. As such, I find that the disclosure of this information would not constitute an unreasonable invasion of an individual's personal privacy and cannot be withheld under section 16. Having made this finding, I do not find it necessary to consider the Applicant's burden of proof under section 67(2).

V. ORDER

[para 61.] I make the following Order under section 68 of the Act.

A. Are the records responsive to the access request?

[para 62.] I find that records 9-11, 15-16 and 23-41 are not reasonably related to the access request. I find that the Public Body properly withheld these records as not responsive to the access request.

B. Does section 15(1) apply to the records?

[para 63.] I find that the information in records 1-8, 12-14, 17-22, 42-60 and 124 do not fulfill the requirements of section 15(1). As such, the Public Body must not withhold this information from the Applicant under this section. However, the information in these records remains to be considered under section 23(1)(a) and section 16.

C. Did the Public Body properly apply section 23(1)(a) to the records?

[para 64.] I find that the information in records 1-8, 17-22, 42-60 and 124 do not fulfill the requirements of section 23(1)(a). As such, I do not uphold the Public Body's decision to withhold this information from the Applicant under this section. However, the information in these records remains to be considered under section 16.

[para 65.] I find that records 12-14 fulfill the requirements of section 23(1)(a). As such, I uphold the Public Body's decision to withhold this information from the Applicant.

D. Does section 16 apply to the records?

[para 66.] I find that the disclosure of the personal information in records 1-8, 17-22, 42-60 and 124 would not be an unreasonable invasion of privacy under section 16(1) and 16(4). As such, I do not uphold the Public Body's decision to withhold this information from the Applicant under this section.

E. Summary

[para 67.] I uphold the Public Body's decision to withhold records 9-16 and 23-41 from the Applicant. I order the Public Body to disclose records 1-8, 17-22, 42-60 and 124 to the Applicant. I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that the Public Body has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner