ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-008

May 22, 2001

ALBERTA HEALTH & WELLNESS

Review Number 1887

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Summary: A newspaper reporter requested a package of information pursuant to the *Freedom of Information and Protection of Privacy Act* from Alberta Health and Wellness ("AHW" and "the Public Body"). The information related to proposed business arrangements between the Calgary Regional Health Authority (the "CRHA" and "Affected Party") and MDS-Kasper Medical Laboratories ("MDS" and "Third Party"). The Commissioner considered late exceptions and determined that he would consider mandatory provisions but not discretionary provisions that were raised during the course of the inquiry. The Commissioner found that AHW did not properly apply section 21(1) (Cabinet confidences), and that this provision did not apply to the record. The Commissioner found that section 26(1)(a) (solicitor-client privilege) and section 26(2) applied to the two memoranda from legal counsel to the CRHA and MDS, and that these pages must not be disclosed. The Commissioner found that the doctrine of *res judicata* did not apply to the record or to the information. Section 15(1) (business interests of a third party) applied to parts of the covering letter to the Minister of Health, but AHW was ordered to disclose the balance of this letter to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* S.A. 1994, c.F-18.5, ss. 15(1), 21(1), 22(1), 23(1) and 26(1)(a)(b)(c) and 26(2).

Authorities Cited: AB: Orders 96-008, 96-013, 96-017, 96-018, 97-013, 98-006 and 2000-005; **B.C.** Order 01-03.

I. BACKGROUND

[Para 1.] In February 28, 2000, a reporter for NetNews, (the "Applicant") made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Health and Wellness ("AHW" and "the Public Body").

[Para 2.] The Applicant had also made an earlier and much broader access request to AHW in 1997. AHW provided the Applicant with many pages of information pursuant to the earlier request. AHW withheld the information in the record from the Applicant in the previous request pursuant to section 21(1) of the Act. The earlier request did not go on to inquiry.

[Para 3.] This request was for a package that had been referenced in the records provided by AHW to the Applicant in the earlier request. This request was specifically for a 'December 22, 1995 package' that had been faxed to the Minister of Health.

[Para 4.] The access request said:

> I would like the entire contents of the "December 22, 1995 package faxed" to the then Minister of Health, Mrs. Shirley McClellan. This package is referenced in an enclosed letter, (page 1, paragraph 3) marked on the letter.

[Para 5.] AHW again withheld the information from the Applicant pursuant to section 21(1) of the Act, as in the earlier request. This time the Applicant asked me to review AHW's decision. I authorized mediation to attempt to settle this matter. The parties were unable to reach a resolution.

[Para 6.] The matter was set down for a written inquiry. The Applicant and AHW submitted written submissions. AHW submitted part of its written submission 'in camera'. AHW's submission made reference to the issue of section 26 (privilege) for the first time. The Applicant and AHW did not provide rebuttal submissions.

[Para 7.] During the written inquiry, I requested further written submissions from the Calgary Regional Health Authority (the "CRHA" and an "Affected Party") and MDS-Kasper Medical Laboratories ("MDS" and a "Third Party"), on the issue of privilege pursuant to section 26.

[Para 8.] I received further written submissions from the CRHA and MDS. These further written submissions raised the issues of *res judicata*, section 15(1), section 22(1) and section 23(1) for the first time.

II. RECORD AT ISSUE

[Para 9.] The record at issue in this inquiry consists of 26 pages that were withheld in their entirety from the Applicant. AHW numbered these pages from page number 10 to 35. These pages consist of a covering letter with two attachments, with each page showing a fax footer of December 22 '95.

[Para 10.] The covering letter is dated December 20, 1995 and is addressed from the CRHA to the Minister of Health, and is numbered from pages 10 to 13. The attachments were both dated December 20, 1995 and were memoranda from a law firm sent jointly to the CRHA and MDS. The first attachment discussed the formation of CLS and was numbered pages 14 to 24 of the record. The second attachment discussed a processing contract and was numbered pages 25 to 35 of the record.

III. ISSUES

[Para 11.] The issues before this inquiry are:

Issue A: Did the Public Body properly apply section 21(1) (Cabinet and Treasury Board confidences) to the information?

Issue B: Did the Public Body properly apply section 26 (privilege) to the information?

Issue C: Does the doctrine of *res judicata* apply to the record or the information?

Issue D: Does section 15(1) (business interests of a third party) apply to the information?

IV. DISCUSSION OF THE ISSUES

Preliminary Matter

[Para 12.] The written submission of AHW referred to section 26 for the first time. The further written submission from MDS raised the doctrine of *res judicata* and the mandatory provision of section 15(1) for the first time. The further written submission from the CRHA raised the discretionary provisions of section 22(1) and section 23(1) for the first time. I must determine whether I will consider the mandatory ("must") exceptions and discretionary ("may") exceptions that were not raised until during the course of the inquiry.

[Para 13.] In Order 96-008, I considered the late raising of exceptions that were claimed by the public body in its written submission for the first time. I said that I would consider mandatory exceptions that were not raised until during the course of the inquiry. As I am responsible for the administration of the Act, I would consider a mandatory exception whether or not the parties raised the exception. Therefore, I will consider sections 15(1) and 26(2) of the Act. I will also consider the doctrine of *res judicata*.

[Para 14.] In Order 96-008, I referred to the Ontario practice of refusing to consider discretionary exceptions raised by a public body within 35 days of an inquiry. In Order 98-001, I said that a public body has discretion and is not required to consider discretionary provisions. I note that in the present situation, the Affected Party raised the discretionary exceptions rather than the Public Body. The Affected Party has not provided evidence to show that these provisions apply.

[Para 15.] I have determined that in this inquiry I will not consider the discretionary provisions that were raised during the course of the inquiry and for which there is no evidence. Therefore, I will not consider whether the discretionary exceptions of sections 22(1) and 23(1) of the Act apply in this situation.

Issue A: Did the Public Body properly apply section 21(1) (Cabinet and Treasury Board confidences) to the information?

1. General

[Para 16.] Section 21(1) of the Act says:

> 21(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.

[Para 17.] Section 21(1) prohibits a public body from disclosing information that would reveal the substance of deliberations of Executive Council. However, for information to be withheld, the information must reveal the substance of deliberations of the 'Executive Council', which is also referred to as the 'Cabinet'.

2. Application of section 21(1)

[Para 18.] AHW says that section 21(1) applies to the entire record. AHW says that Cabinet considered the record, although this took place some time later. AHW says that if the information withheld in these pages was disclosed, this disclosure would reveal the substance of deliberations of Cabinet. The Applicant says that the February 9, 1996, letter of response from the Minister of Health to the CRHA acknowledges that this package of information is subject to the Act and may be disclosed.

[Para 19.] I find that disclosure of the information in the record would not reveal the substance of deliberations of Cabinet. At the time the CRHA provided the information to the Minister of Health, it was not provided for the purpose of submission to Cabinet. Furthermore, disclosure of this information could not possibly reveal the substance of deliberations of Cabinet. Therefore, I find that the record does not fall within section 21(1).

[Para 20.] I find that AHW did not properly apply section 21(1) and did not discharge its burden of proof for the application of section 21(1) to any part of the record. The entire record remains to be considered under section 26 of the Act.

Issue B: Did the Public Body properly apply section 26 (privilege) to the information?

1. General

[Para 21.] The relevant parts of section 26 read:

> 26(1) The head of a public body may refuse to disclose to an applicant
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,
> (b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney General or a public body in relation to a matter involving the provision of legal services, or
> (c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer.
> 26(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.

2. Application of section 26(1)(a)

[Para 22.] In Order 96-017, I said that to correctly apply section 26(1)(a) (solicitor-client privilege), a public body must meet the common law criteria for that privilege, as established in Solosky v. The Queen, (1980) 1 S.C.R. 821. In that case, the Supreme Court of Canada said that solicitor-client privilege must be claimed document by document, and that each document must meet the following criteria:

a. it must be a communication between solicitor and client;
b. that entails the giving or seeking of legal advice; and
c. which is intended to be confidential by the parties.

[Para 23.] AHW says that 'if section 21 is found not to apply' to the record 'then section 26, legal privilege, applies'. AHW did not provide any evidence or make any submissions regarding the application of section 26 of the Act. The CRHA says that section 26(1)(a) (solicitor-client privilege) applies to pages 14 to 35 of the record as these two memoranda consist of legal advice that was prepared and sent to the CRHA and to MDS from their legal counsel.

[Para 24.] I find that pages 14 to 35 meet the criteria for solicitor-client privilege. The CRHA says that only the client can waive solicitor-client privilege, and it has not waived privilege by providing the memoranda to the Minister of Health, to whom it reports. I find that the CRHA has not waived privilege for pages 14 to 35. MDS also has not waived the privilege.

3.Application of section 26(2)

[Para 25.] As pages 14 to 35 of the record meet the criteria of section 26(1)(a), it is necessary to consider whether these pages fall within section 26(2). Section 26(2) is a mandatory provision that prohibits a public body from disclosing information that is subject to any type of legal privilege, when that information relates to a person other than a public body. The information in pages 14 to 35 relates to MDS, which is a person other than a public body. Therefore, AHW must not disclose this information on the basis of section 26(2).

4. Application of sections 26(1)(b) and 26(1)(c)

[Para 26.] As I have already determined that pages 14 to 35 of the record fall within section 26(1)(a), I do not find it necessary to consider whether the same pages also fall under sections 26(1)(b) and (c) of the Act. Pages 10 to 13 of the record remain to be considered under other provisions of the Act.

Issue C: Does the doctrine of *res judicata* apply to the record or the information?

[Para 27.] The doctrine of *res judicata* is based in the common law and is an exclusionary rule of evidence. The doctrine of *res judicata* and issue estoppel prevent a party from bringing an action against another person when the same cause of action has already been decided in earlier proceedings, that is, the same issue can not be retried.

[Para 28.] In Order 01-03, the British Columbia Commissioner said that he had the authority to determine whether the doctrine of *res judicata* applies in the circumstances of a given case under similar legislation in that province. The doctrine of *res judicata* was discussed at length in that case, and I do not intend to repeat the reasoning here. In that case, the criteria for *res judicata* or issue estoppel were that:

1. the same question had previously been decided,
2. the previous decision was a final decision of a judicial character, and
3. the parties were the same in the previous case and this one.

[Para 29.] I must first consider whether the doctrine of *res judicata* applies to pages 10 to 13 of the record, which is the covering letter to the Minister of Health. MDS says that the record consists of negotiations and discussions that were generally incorporated into formal contracts that were the subject of another inquiry before me. MDS says that I have already addressed this question and made a decision regarding the record at issue in Order 2000-005.

[Para 30.] In previous orders I have said that drafts and proposals are not the same thing as the final contract or document. Pages 10 to 13 of the record are a covering letter containing the CRHA's summary of proposed contractual arrangements. However, final documents such as the partnership agreement were before me in the earlier inquiry that resulted in Order 2000-005.

[Para 31.] The Applicant had made a previous access request to AHW. AHW says that the information it withheld from the Applicant pursuant to the earlier access request included pages 10 to 13 of the record. However, that request did not go on to inquiry. I find that I have not decided this question or made a decision regarding pages 10 to 13 of the record in an earlier inquiry.

[Para 32.] I must also consider whether the doctrine of *res judicata* applies to the information. The covering letter is CRHA's summary of proposed arrangements with MDS to form CLS and to enter into a processing contract. The arrangements were merely being proposed as a basis to draft formal contracts in the future.

[Para 33.] In contrast, the information before me in Order 2000-005 involved the final partnership agreement. The information before me in this inquiry is different from the information before me in my previous Order. Therefore, I find that the doctrine of *res judicata* does not apply to the information.

[Para 34.] I also find that the parties in the previous inquiry were different from the parties in the present inquiry. Order 2000-005 involved another applicant's request to another public body, the CRHA. AHW was not a party to the earlier inquiry. The Applicant in this inquiry is different from the applicant in the previous inquiry.

[Para 35.] CLS is a partnership comprised of 703590 Alberta Ltd. a corporation owned by the CRHA, and MDS. The earlier inquiry involved CLS as a third party, whereas CLS did not even exist as an entity in the present inquiry.

[Para 36.] I find that the doctrine of *res judicata* does not apply to the record or the information. Therefore, pages 10 to 13 of the record remain to be considered.

Issue D: Does section 15(1) (business interests of a third party) apply to the information?

[Para 37.] The application of section 15(1) of the Act to the record was not raised by AHW. AHW says that the partnership agreement for Calgary Laboratory Services between MDS and 703590 has already been made public pursuant to Order 2000-005. AHW says that disclosure of the record would not add substantively to the information publicly available in the partnership agreement.

[Para 38.] However, section 15(1) is a mandatory provision. When section 15(1) applies, a public body has no discretion and must refuse to disclose the information. MDS says that section 15(1) applies to the record and therefore the information must not be disclosed by AHW. I will consider the application of a mandatory provision whether or not a public body raises the provision. Therefore, I will consider whether section 15(1) applies to pages 10 to 13 of the record.

1. General

[Para 39.] Section 15(1) of the Act says:

> 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 40.] For section 15(1) to apply, the public body must establish that all of the following three criteria are met:

> a. disclosure of the information would reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (section 15(1)(a));
>
> b. the information was supplied, explicitly or implicitly, in confidence (section 15(1)(b)); and
>
> c. disclosure of the information could reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

2. Would disclosure of the information reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (section 15(1)(a))?

a. Financial or commercial information of a third party

[Para 41.] I find that MDS is a Third Party in this situation for the purposes of section 15(1), as determined in Order 2000-005. MDS says that the record contains and disclosure of the record would reveal commercial and financial information of MDS as a Third Party, as provided by section 15(1)(a)(ii).

i. Is there "financial information" of a third party?

[Para 42.] In Order 96-018, I said that "financial information" of a third party includes information regarding the monetary resources of a third party, such as the third party's financial capabilities, and assets and liabilities, past or present. The information in pages 10 to 13 of the record was not before me and therefore was not considered in Order 2000-005. Therefore, this information has not already been revealed and is not in the public domain as a result of my earlier order.

[Para 43.] I have reviewed the covering letter, which consists of pages 10 to 13 of the record. Article B. 5 and 6 on page 11 and article C. 1 and 4 on page 12 contain financial information about the parties to the proposed contract. I find that disclosure of the information contained in article B. 5 and 6 on page 11 and article C. 1 and 4 on page 12 would reveal financial information of MDS.

[Para 44.] I find that disclosure of the information contained in the remainder of pages 10 to 13 would not reveal the monetary resources of a third party and therefore would not reveal the financial information of a third party. However, I will consider whether that and other information contained in pages 10 to 13 would reveal commercial information of a third party.

ii. Is there "commercial information" of a third party?

[Para 45.] In Order 96-013, I said that "commercial information" includes the contract price, and information that relates to the buying, selling, or exchange of merchandise or services. In Order 97-013, I also found that information about how a third party proposed to organize its work was commercial information because it related to the buying, selling or exchange of merchandise or services.

[Para 46.] In Order 2000-005, I said that I do not accept that a partnership is unique because of its public/private organization or its management structure. Delegating control and operation to a management committee, permitting input into the operation of a partnership only through a management committee, or restricting each partner from speaking for the partnership is not unique. The partnership business model is not commercial information.

[Para 47.] I have already found that disclosure of article B. 5 and 6 on page 11 and article C. 1 and 4 on page 12 of the record would reveal financial information of MDS. Therefore, I do not intend to consider whether that same information would reveal commercial information of a third party.

[Para 48.] I have reviewed the covering letter as a whole to see whether disclosing the severed information would have the aggregate effect of revealing commercial information of a third party: see Order 98-006.

[Para 49.] I find that disclosure of the following information would reveal commercial information of MDS, as that information would reveal the specific business plans of MDS related to the buying, selling or exchange of merchandise or services: the balance of article B. and C., which is article B. 1 to 4 and 7, and article C. 2, 3, 5 and 6.

[Para 50.] The remaining information in pages 10 to 13 would not reveal commercial information of a third party because that information relates only to the general partnership arrangements or to specific arrangements between the partners. That information does not relate to the buying, selling or exchange of merchandise or services.

3. Was the information supplied explicitly or implicitly in confidence, as provided by section 15(1)(b)?

a. Was financial or commercial information "supplied" by a third party to a public body?

[Para 51.] Section 15(1)(b) implies that the information is to be supplied to a public body. MDS says that the financial and commercial information contained in articles B. and C. was supplied by MDS, a Third Party, to CRHA, a public body.

[Para 52.] MDS originally supplied financial and commercial information to CRHA when Calgary Laboratory Services was formed. CRHA then supplied that information to AHW. Since disclosure of that information would reveal the financial and commercial information supplied by MDS, that information also meets the criteria of section 15(1)(b).

b. Was commercial or financial information supplied explicitly or implicitly in confidence?

[Para 53.] MDS says that the financial and commercial information was supplied explicitly in confidence, and that this is evident in articles D. and F. 1 of the covering letter. Article D. of the covering letter says the information is supplied to AHW in confidence. Article F. 1 says that AHW must keep the information confidential. Article D. requires the partners, MDS and the CRHA, to keep all information confidential. In spite of those Articles, it is my practice to independently determine whether the criteria of any of the provisions of section 15(1) have been met, including section 15(1)(b).

[Para 54.] The evidence of MDS is that it is in competition with other laboratory and other medical service providers. This evidence together with the confidentiality provisions of the covering letter leads me to find it reasonable that MDS and the CRHA would supply commercial or financial information only in confidence.

[Para 55.] Therefore, I find that the financial and commercial information of MDS, contained in the covering letter, was supplied explicitly in confidence to the CRHA and to AHW, the Public Body.

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

a. Harm significantly the competitive position of a third party (section 15(1)(c)(i))

[Para 56.] MDS says that disclosure of the information would harm significantly the competitive position of MDS. MDS says that disclosure of the information contained in the covering letter could reasonably be expected to harm its competitive position with respect to competing for business opportunities. MDS says that a competitor could unfairly compete in establishing its business plans, pricing services or promoting its business.

[Para 57.] I agree that disclosure of the above-described financial and commercial information contained in the covering letter could reasonably be expected to harm significantly the competitive position of MDS.

b. Interfere significantly with the negotiating position of a third party (section 15(1)(c)(i))

[Para 58.] MDS says that disclosure of the financial and commercial information contained in the covering letter would interfere significantly with its negotiating position.

[Para 59.] MDS says that disclosure of this information would damage its negotiating position, as knowing the specifics of its business would allow other persons to limit its business opportunities. That information would allow an analyst to determine the financial and business approaches taken by MDS, and thereby significantly interfere with the current negotiating position of MDS. MDS says that this would result in unfair competition and an uneven playing field during negotiations, particularly when competitors are not required to disclose their information.

[Para 60.] I agree that disclosure of the financial and commercial information contained in the covering letter, as described above, could reasonably be expected to interfere significantly with the negotiating position of MDS. However, I do not believe that the disclosure of any of the other information set out in the covering letter could reasonably be expected to have that result. Furthermore, I have found that the other information set out in the covering letter does not meet the criteria of section 15(1)(a)(i) or (ii).

5. Conclusion under section 15(1)

[Para 61.] Section 15(1) applies to all of Articles B. and C. on pages 10 to 13 of the covering letter. I uphold the head's decision to refuse to disclose this information to the Applicant. Section 15(1) does not apply to the remainder of the information contained in the covering letter. I do not uphold the head's decision to refuse to disclose that information to the Applicant.

V. ORDER

[Para 62.] Under section 68 of the Act, I make the following order:

1. AHW did not properly apply section 21(1) to the information.

2. AHW properly applied section 26(1)(a) to the information contained in pages 14 to 35 of the record. Section 26(2) applies to pages 14 to 35 as this information relates to a person other than a public body. AHW must not disclose pages 14 to 35 of the record to the Applicant.

3. The doctrine of *res judicata* does not apply to the record or the information.

4. Section 15(1) applies to all of the information contained in article B. on page 11 and article C. on page 12 of the record. AHW must not disclose this information to the Applicant. However, section 15(1) does not apply to the balance of the information on pages 10 to 13 of the record. I order AHW to disclose that information to the Applicant.

5. I further order AHW to notify me in writing within 50 days of being given a copy of this Order, that it has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner