

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER 2001-026

October 3, 2001

#### ALBERTA HUMAN RESOURCES AND EMPLOYMENT

Review Number 2125

**Office URL:** [http/ / www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant, as Administrator of the Estate of a deceased individual, applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for access to information held by Alberta Human Resources and Employment (the “Public Body”) about an industrial accident which caused the individual’s death. The individual was employed and working with a company (the “Third Party”) at the time of the industrial accident. After consulting with the Third Party about the applicability of section 15 of the Act (business interests), the Public Body advised that it would disclose all the records, subject to the severing of personal information under section 16 of the Act. The Third Party objected to the disclosure of the records and requested a review of the Public Body’s decision. In this Order, the Adjudicator found that section 15 did not apply and ordered access to all the Records, subject to the severing of the third party personal information as determined by the Public Body under section 16 of the Act.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss.5, 15(1)(a), (b) and (c), 15(1)(c)(i), (ii) and (iii), 15(3)(b), 16(1), 16(2)(e), 16(4)(b), (d), and (g), 16(5)(a), (c), and (e), 67, 68 and 79; *Occupational Health and Safety Act*, R.S.A. 1980, c. O-2, s. 6.

**Authorities Cited:** **AB:** Orders 96-013, 99-018, 2000-014, 2000-017, 2000-019;  
**BC:** Order 57-1995; **ONT:** Order P-489.

## I. BACKGROUND

[para 1] On August 11, 2000, two individuals, while employed with the Third Party, died in an industrial accident in Alberta. Subsequently, Alberta Human Resources and Employment (the “Public Body”) carried out an investigation of the accident under the *Occupational Health and Safety Act*, R.S.A. 1980, c. O-2, wherein the Public Body asked for, and received from the Third Party, documents related to the Third Party’s safety and training procedures in place at the time of the accident.

[para 2] In a letter dated December 5, 2000, the Administrator of the Estate of one of the deceased (the “Applicant”) applied under the *Freedom of Information and Protection of Privacy Act* (the “Act” or “FOIP Act”) to the Public Body for access to all information generated by Occupational Health and Safety concerning the death of one of the deceased.

[para 3] There were 37 pages of records for which the Public Body decided to do a third party consultation, as provided by section 29 of the Act. The Third Party provided all of these documents to the Public Body during the course of its investigation. By letter dated February 12, 2001, the Third Party asked the Public Body to refuse disclosure of all of the documents based on section 15 of the Act.

[para 4] As provided by section 30, by letter dated February 23, 2001, the Public Body wrote to the Third Party to indicate that the Public Body had decided to give the Applicant partial access to the records, except for certain third party personal information severed under section 16 of the Act.

[para 5] By letter dated March 14, 2001, the Third Party asked the Office of the Information and Privacy Commissioner to review the Public Body’s decision on the basis that section 15 of the Act prevents disclosure of the records. The Commissioner authorized mediation on the review; however, mediation was not successful in resolving the Third Party’s concerns.

[para 6] The matters were set down for a written inquiry. As provided by section 64 of the Act, the Office of the Information and Privacy Commissioner notified the Applicant that it was a party affected by the review. The Public Body, the Third Party, and the Applicant all provided submissions for the inquiry. The Public Body provided rebuttal submissions to the Third Party’s submissions.

[para 7] On September 4, 2001, I received delegated authority to conduct inquiries generally and to issue orders under the Act.

[para 8] The Public Body’s initial submission raised section 16 of the Act as an additional issue for the inquiry; however, none of the parties provided any arguments on section 16 in their initial written submissions. As a result, I requested additional

submissions from all parties on this issue. This office received additional submissions from the Public Body and the Applicant, but not from the Third Party.

## II. RECORDS AT ISSUE

[para 9] The records at issue consisted of 37 pages of information the Third Party provided to the Public Body during the course of its investigation. The Public Body numbered these pages consecutively 1 through 37. In this Order, I will refer to the records individually by page number and collectively as the “37 pages of Records”, or the “Records”.

## III. ISSUES

[para 10] The Notice of Inquiry set out the following issues for the inquiry:

- Does section 15(1) of the Act apply to the Records?
- Does section 15(3)(b) of the Act apply to the Records?

[para 11] In addition, the Third Party’s submission indirectly raised an issue related to section 5 of the Act and whether the *Occupational Health and Safety Act* is paramount over the Act. The Third Party’s argument requires me to consider the following as a preliminary jurisdictional issue:

- Does section 5 of the Act apply to the Records?

[para 12] Finally, as indicated above, the Public Body’s initial submissions raised section 16 of the Act as an additional issue for the inquiry. The Public Body did not initially provide any arguments regarding section 16. As a result, I asked all parties to provide additional submissions so that I could consider the following issue:

- Does section 16 of the Act apply to the Records?

## IV. DISCUSSION OF THE ISSUES

### **ISSUE A: Does section 5 of the Act apply to the Records?**

[para 13] The Third Party indirectly raised the issue of whether section 5 of the Act applies to the Records.

[para 14] Section 5 of the Act, also known as the paramountcy provision, establishes the relationship between the Act and other enactments. The relevant portions of section 5 of the Act read:

5(2) *If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless*

(a) *another Act, or*

(b) *a regulation under this Act expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.*

[para 15] The Third Party submitted that "...section 13 of the [*Occupational Health and Safety Act*] prevents and limits the use of information delivered by an employer in the course of an investigation". The Third Party also argued that "Anyone reading the [*Occupational Health and Safety Act*] is easily left with the clear inference that confidentiality will be upheld unless the disclosure is required for a genuine purpose under the [*Occupational Health and Safety Act*]".

[para 16] The Third Party implies that the *Occupational Health and Safety Act* is paramount over the FOIP Act, which would remove the Records from my jurisdiction and prevent the Applicant from obtaining the Records under the FOIP Act. In its rebuttal submission, the Public Body argued that the *Occupational Health and Safety Act* does not override the FOIP Act.

[para 17] The *Occupational Health and Safety Act* does not contain a clause which provides that documents collected under that legislation are not to be disclosed despite the FOIP Act. In addition, the *Occupational Health and Safety Act* is not listed in the FOIP Regulation as being paramount over the FOIP Act. It is not sufficient for the purposes of section 5 for the Third Party to infer from the *Occupational Health and Safety Act* that the confidentiality of records produced under that Act will be upheld unless the disclosure is required for a genuine purpose under that Act.

[para 18] As a result, I find that section 5 of the FOIP Act does not apply to the Records. The *Occupational Health and Safety Act* is not paramount over the FOIP Act to prevent the disclosure of documents collected under the *Occupational Health and Safety Act*.

#### **ISSUE B: Does section 15(1) of the Act apply to the Records?**

[para 19] Section 15 is a mandatory ("must") exception. If a head of a Public Body determines the information falls within the exception, he or she must refuse access to the information. 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 20] In this case, section 67(3)(b) requires that the Third Party bears the burden of proof for section 15(1).

[para 21] I note that in its initial submissions, the Third Party did not specifically argue section 15(1); however, the Third Party did argue section 15(1) in its February 12, 2001 letter to the Public Body in response to the section 29 third party consultation. As a result, I relied upon the Third Party's February 12, 2001 letter, which was provided as an attachment to the Public Body's submissions. In the letter, the Third Party argued that section 15(1) applies to all of the pages of the Records, prohibiting the release of this information.

[para 22] For section 15(1) to apply, the Third Party must establish that:

1. Disclosure of the information would reveal trade secrets of the Third Party, or commercial, financial, labour relations, scientific or technical information of the Third Party (section 15(1)(a));
2. The information was supplied, explicitly or implicitly, in confidence (section 15(1)(b)); **and**
3. Disclosure of the information could reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

**1. Would disclosure of the information reveal trade secrets of the Third Party or commercial, financial, labour relations, scientific or technical information of the Third Party (s. 15(1)(a))?**

[para 23] The Third Party stated that the information contained in the 37 pages of Records is commercial or technical information.

**a. Commercial Information**

[para 24] In Order 96-013, the Commissioner adopted part of Ontario Order P-489, which defined “commercial information” as including a “contract price” and information “...which relates to the buying, selling, or exchange of merchandise or services...”

[para 25] The Public Body submitted that the Third Party has not indicated how the information may be perceived as commercial and argued that none of the Records contains commercial information. After a review of the Third Party’s submissions and the Records, I agree with the Public Body. I find that the 37 pages of Records do not contain and would not reveal commercial information.

**b. Technical Information**

[para 26] In Order 2000-017, the Commissioner adopted the definition of technical information from British Columbia Order 57-1995, which said that “...technical information is information relating to a particular subject, craft or technique”. The Public Body indicated that it “...has no objection to the characterization that *some* of the information is technical”. While the Third Party argued that the Records contain technical information, the Third Party did not specify what information is technical. I have reviewed all of the pages of the Records and have found, on the face of the Records, that the following pages contain or would reveal technical information:

1, 2, 3 (same as 29), 4, 15, 16, 18, 19, 20, 25 (same as 27), 27, 28, 29, 30, 35, 36, 37 (paragraph 2)

[para 27] I find that the following pages do not contain and would not reveal technical information:

5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 21, 22, 23, 24, 26, 31, 32, 33, 34, 37 (paragraphs 1 and 3)

[para 28] The foregoing pages consist of such things as blank forms for safe work permits, job site safety meetings, and confined space entry logs; fax cover sheets; general information on the program for confined space training; table of contents for confined space training program; and records of training logs.

**c. Trade Secrets, Financial, Labour Relations or Scientific Information**

[para 29] The Public Body argued that “The Third Party has not asserted...that the information...represents any kind of trade secret”. In addition, the Public Body stated that it “...cannot identify information on the face of the record that can be characterized as commercial, financial, labour relations or scientific”. The Third Party was silent on whether the Records contain trade secrets, or financial, labour relations, or scientific information.

[para 30] On a review of the Records, I find that the 37 pages of Records do not contain and would not reveal any trade secrets, or financial, labour relations or scientific information.

## **2. Was the information supplied, explicitly or implicitly, in confidence (s. 15(1)(b))?**

[para 31] I have considered whether the Third Party explicitly or implicitly supplied in confidence to the Public Body, the information contained in all of the Records and specifically, the information contained in the pages I have identified as containing or revealing technical information.

### **a. Explicit Confidentiality**

[para 32] In Order 2000-014, the Commissioner looked for evidence such as a “statement or agreement” to determine whether information was provided explicitly in confidence.

[para 33] The Third Party submitted that during the course of the Public Body’s investigation, the Public Body asked the Third Party to produce “...certain confidential business information in respect of safety and training procedures which were in place at the time of this accident”. The Third Party also submitted that it released this documentation “...for the sole purpose of assisting the OH&S investigation”. The Third Party implies that the Third Party released the Records to the Public Body on the condition of confidentiality.

[para 34] The only overt evidence regarding confidentiality in the Records is found on page 37, which consists of a letter from the Third Party to the Public Body. Page 37 states regarding the Third Party’s fatality investigation report, “...we will give you our report on good faith for your ability to produce a bulletin for our industry”. However, it is important to note that the fatality investigation report does not form a part of the Records.

[para 35] There is nothing on the face of the Records which indicates that the Third Party provided the information explicitly in confidence. There is no evidence on any of the fax cover sheets or correspondence indicating that the Records were confidential or to be kept confidential. None of the 37 pages of the Records contains any “confidential” markings. Therefore, as stated in Order 2000-014, I “...must decide whether the information was supplied *implicitly* in confidence, that is, whether there was an expectation or understanding of confidentiality” [emphasis added].

**b. Implicit Confidentiality**

[para 36] Regarding implicit confidentiality, the Commissioner stated in Order 99-018:

In determining whether an expectation of confidentiality is 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 institution 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 government organization.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

[para 37] The Third Party submitted that, "...when [the Third Party] surrendered the information to the OH&S investigator in the course of this investigation, it did so with at least an implicit expectation of confidentiality". However, the Public Body submitted that the Third Party has not "...provided any evidence that a reasonable expectation of confidentiality existed". The Public Body argued in its rebuttal submissions that when the Third Party provided the Records, the Third Party never characterized the information as "confidential business information" and that "...no mutual understanding or agreement of confidentiality existed".

[para 38] There is no evidence to support any of the four points above; therefore, I find that the information was not provided implicitly in confidence.

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

[para 39] The Third Party submitted that the disclosure of the Records will 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 (section 15(1)(c)(ii)). In addition, the Third Party submitted that if the Records are disclosed, the Applicant would use the information for private litigation. The use of the Records for private litigation implies that the disclosure of the Records could significantly harm the competitive position of the Third Party (section 15(1)(c)(i)), or result in undue financial loss or gain to a person or organization (section 15(1)(c)(iii)). As a result, I intend to examine section 15(1)(c)(i), (ii), and (iii).

**a. Continued Release of Information in Public Interest (section 15(c)(ii))**



[para 40] The Third Party argued that the possibility of disclosure of the Records would result in the Third Party reviewing the extent it would be willing to cooperate with any future government investigations. However, I note that the Third Party has a statutory duty under section 6 of the *Occupational Health and Safety Act* to provide the Public Body with information related to the health and safety of workers when the Public Body asks the Third Party to do so.

[para 41] In Order 2000-014, the Commissioner stated that where a person:

...is legally required to supply the information under the *Occupational Health and Safety Act*, it cannot be said that disclosure of the information could reasonably be expected to result in similar information no longer being supplied to the Public Body, whether or not it is in the public interest that similar information continue to be supplied.

[para 42] Because of the Third Party's statutory duty, I find that the disclosure of the Records could not reasonably be expected to result in similar information no longer being supplied to the Public Body, regardless of whether it is in the public interest that similar information continue to be supplied.

**b. Significant Harm to Competitive Position or Undue Financial Loss or Gain (section 15(c)(i) and (iii))**

[para 43] The Third Party submitted that if the Records are disclosed to the Applicant, the Applicant will use these Records for the purpose of private litigation. While the Third Party did not specifically argue section 15(1)(c)(i) or (iii), the Third Party implies that the private litigation could either result in significant harm to the Third Party's competitive position or undue financial loss or gain to a person or organization. However, the Public Body argued that "[The Third Party] has not demonstrated the harm that would reasonably arise from the release of this information while a private litigation is being pursued..."

[para 44] In Order 99-018, the Commissioner stated that:

...to establish that disclosure of information would bring about one of the outcomes listed in section 15(1)(c), the party who is alleging the harm must provide evidence of the following:

- (i) the connection between disclosure of the specific information and the harm that is alleged;
- (ii) how the harm constitutes "damage" or detriment" to the matter; and
- (iii) whether there is a reasonable expectation that harm will occur.

[para 45] The evidence presented by the Third Party on this matter was a letter from the solicitor of the spouse of the other individual who died in the industrial accident. In

the letter, the solicitor stated that, “Our objective is to keep [the Third Party] out of any litigation...” I do not interpret this letter as evidence of either possible significant harm to the competitive position of the Third Party, or undue financial loss or gain to a person or organization.

[para 46] I find that the Third Party has not presented any evidence of a reasonable expectation of harm. Furthermore, there is no such evidence on the face of the Records. As a result, the disclosure of information could not reasonably be expected to bring about one of the outcomes listed in section 15(1)(c).

#### **4. Conclusions under Section 15(1)**

[para 47] While some of the Records contain technical information (s. 15(1)(a)), the Third Party failed to demonstrate that the information contained in the Records was supplied explicitly or implicitly in confidence to the Public Body (s. 15(1)(b)). In addition, the Third Party failed to demonstrate that the disclosure of any of the information could reasonably be expected to result in one of the outcomes set out in section 15(1)(c). For section 15(1) to apply, the Third Party must have demonstrated the existence of section 15(1)(a), (b), **and** (c). Since the Third Party failed to do so, I find that section 15(1) of the Act does not apply to prevent disclosure of the Records.

#### **ISSUE C: Does section 15(3)(b) of the Act apply to the Records?**

[para 48] Having found that section 15(1) does not apply to the Records, there is no need to consider section 15(3)(b).

#### **ISSUE D: Does section 16 of the Act apply to the Records?**

[para 49] The Public Body had a duty to consider section 16, like all other mandatory exceptions, if it was apparent on the face of the Records that the exception was in issue. Section 16 provides that the head of a public body must refuse to disclose third party personal information if the disclosure would be an unreasonable invasion of a third party’s personal privacy. The relevant portions of section 16 are 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.*

*(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*

*...*

*(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or*

*member of a public body or as a member of the staff of a member of the Executive Council*

...

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

...

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

...

*(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*

*(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*

*(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny*

...

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

...

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

[para 50] Section 67(2) requires that the Applicant bears the burden of proof with respect to section 16 and the release of third party personal information. Nevertheless, I will review the Public Body's decision under section 16.

[para 51] For section 16 to apply, two criteria must be met: 1) the information is personal information of a third party, and 2) disclosure would be an unreasonable invasion of that third party's personal privacy, considering the relevant circumstances.

### **1. Do the Records contain personal information of a third party?**

[para 52] Section 1(1)(n) of the Act sets out a non-exhaustive list of what is personal information. The relevant portions of section 1(1)(n) are as follows:

*1(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 53] The Public Body submitted that certain pages of the Records contain third party personal information. I agree with the Public Body and find that the following pages contain third party personal information:

5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 24, 26, 31, 36, 37

**2. Would disclosure of the personal information in the Records be an unreasonable invasion of a third party's personal privacy, considering the relevant circumstances?**

[para 54] The Public Body determined that it could disclose the deceased's personal information because the Applicant was exercising the rights of the deceased under section 79 of the Act.

[para 55] The Public Body then applied sections 16(1), 16(2)(e), 16(4)(b), (d) and (g), 16(5)(a), (c), and (e) to the personal information in the pages listed above, and thoroughly canvassed the application of these sections in its additional submissions. The Public Body determined that the disclosure of the names of employees of the Public Body found on a number of the pages of the Records would not be an unreasonable invasion of personal privacy. However, the Public Body decided that it would be an unreasonable invasion of personal privacy to disclose the remaining third party personal information contained in the pages listed above.

[para 56] In his submissions on section 16, the Applicant indicated that he is not interested in any third party information which may be of a more personal nature. In addition, the Applicant stated that, "...I must rely on the [Adjudicator's] judgment and discretion what would be permissible for release or what would be an invasion of privacy".

[para 57] As stated in Order 2000-019, the Commissioner's independent power of review of the Public Body's decision under section 2(e) is intended to ensure that the Applicant is not penalized by not having specific information about section 16 or about the information contained in the Records.

[para 58] I find that section 16 applies to the personal information the Public Body severed from the Records. Disclosure would be an unreasonable invasion of the third

parties' personal privacy. I uphold the Public Body's decision not to disclose the personal information of the third parties to the Applicant.

## **V. ORDER**

[para 59] I make the following Order under section 68 of the Act.

### **Issue A: Application of Section 5**

[para 60] Section 5 of the Act does not apply to the Records. The *Occupational Health and Safety Act* is not paramount over the FOIP Act.

### **Issue B: Application of Section 15(1)**

[para 61] Section 15(1) of the Act does not apply to the Records. I uphold the Public Body's decision to disclose all the Records, and order the Public Body to disclose the Records to the Applicant, subject to the severing of personal information (below).

### **Issue C: Application of Section 15(3)(b)**

[para 62] Having found that section 15(1) does not apply to the Records, there is no need to consider whether section 15(3)(b) of the Act applies to the Records.

### **Issue D: Application of Section 16**

[para 63] Section 16 applies to the personal information the Public Body severed from the following pages of the Records:

5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 24, 26, 31, 36, 37

[para 64] I uphold the Public Body's decision to refuse to disclose that personal information. I order the Public Body not to disclose that personal information to the Applicant.

[para 65] I further order the Public Body to notify me, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

Dave Bell  
Adjudicator