

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2003-016

November 7, 2003

### ALBERTA JUSTICE

Review Number 2451

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

**Summary:** The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to Alberta Justice for access to all documents regarding the Applicant's complaint of harassment and unfair employment practices. The Applicant also requested a copy of the Public Body's investigation report and any documents which allege that the Applicant engaged in inappropriate behaviour.

In response, Alberta Justice provided the Applicant with 95 pages of records but withheld, partially or entirely, 96 pages of records. Alberta Justice cited sections 17, 24(1)(a) and 24(1)(b)(i) as its authority to withhold these records.

The Adjudicator largely upheld Alberta Justice's decision to withhold the records under section 17, 24(1)(a) and 24(1)(b)(i). However, the Adjudicator found that these sections did not apply to the severed portion of one record. The Adjudicator ordered Alberta Justice to disclose that portion of the record to the Applicant.

**Statutes Cited:** AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 1(n), 17, 24(1), 71(2), 72

**Authorities Cited:** AB: 96-006, 96-012, 96-017, 98-007, 99-001

## **I. BACKGROUND**

[para 1] On March 20, 2002, the Applicant made an access request to Alberta Justice (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The Applicant requested all documents regarding the Applicant’s complaint of harassment and unfair employment practices to the Public Body. The Applicant also requested a copy of the Public Body’s investigation report and any documents which allege that the Applicant engaged in inappropriate behaviour.

[para 2] On May 9, 2002, the Public Body responded to the access request, providing the Applicant with 96 full pages of records but withholding, either partially or entirely, 95 pages of records under sections 17, 24(1)(a) and 24(1)(b)(i).

[para 3] On May 16, 2002, the Applicant requested a review of the Public Body’s decision to withhold the records. Mediation was authorized but was unsuccessful in resolving these issues. The matter was set down for a written inquiry.

[para 4] In that request for review, the Applicant also alleged that the Public Body breached the Act by improperly disclosing the personal information of several individuals on a number of occasions. These issues were addressed prior to this inquiry and are, therefore, not at issue in this inquiry.

[para 5] The Public Body sent this Office an initial submission. The Applicant and the Affected Parties did not make a submission. I accepted part of the Public Body’s submission *in camera*.

## **II. RECORDS AT ISSUE**

[para 6] The records at issue consist of 96 pages of records. The records fall within three categories:

(a) Package #1 – This package of records consists of the Public Body’s Internal Investigation Report regarding the Applicant’s allegations of harassment. The Public Body withheld, either partially or entirely, 18 of 69 pages of records. Pages 14-30 and 34 are at issue in this inquiry. Pages 14 and 34 were partially withheld, while pages 15-30 were completely withheld.

(b) Package #2 – This package of records consists of the Public Body’s Transcript of Interviews conducted by the Public Body’s Investigation Panel. The Public Body withheld, either partially or entirely, 75 of 117 pages of records. Pages 43-117 are at issue in this inquiry. Page 43 was partially withheld while pages 44-117 were completely withheld.

(c) Package #3 – This package of records consists of the Public Body’s Response to a Human Rights Complaint. The Public Body withheld, either partially or entirely, three of five pages of records. Pages 2, 3 and 5 are at issue in this inquiry. Pages 2-3 were completely withheld while page 5 was partially withheld.

### **III. ISSUES**

[para 7] There are two issues in this inquiry:

1. Did the Public Body properly apply section 24(1) (advice) to the records/information?
2. Does section 17 of the Act (personal information) apply to the records/information?

### **IV. DISCUSSION**

#### **A. Did the Public Body properly apply section 24(1) (advice) to the records/information?**

[para 8] There are two subissues within this issue:

- 1) Did the Public Body properly apply section 24(1)(a) to the records/information?
- 2) Did the Public Body properly apply section 24(1)(b)(i) to the records/information?

1) Did the Public Body properly apply section 24(1)(a) to the records/information?

[para 9] Section 24(1)(a) states:

*24(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 10] The Public Body states that section 24(1)(a) applies to page 34 of Package #1 and page 5 of Package #3.

[para 11] In Order 96-006, the Commissioner set out the criteria for “advice” (which includes advice, proposals, recommendations, analyses or policy options) under section 24(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 12] In Order 99-001, the Commissioner held that section 24(1)(a) does not apply to 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. Facts may only be withheld if the facts are sufficiently interwoven with other advice, proposals, recommendations, analyses or policy options so that they cannot reasonably be considered separate or distinct.

[para 13] In Order 96-012, the Commissioner held that section 24(1)(a) contemplates protecting information generated during the decision-making process and not information generated after the decision has been made.

[para 14] Section 24(1)(a) is a discretionary exception. Consequently, even if this section applies to the information in the records, a public body may nevertheless decide to disclose the information. In Order 96-017, the Commissioner stated that a public body exercises its discretion properly when: (1) it considers the objects and purposes of the legislation in question, and (2) it does not exercise its discretion for an improper or irrelevant purpose.

[para 15] The Public Body states that page 34 of Package #1 and page 5 of Package #3 fulfills the three criteria under section 24(1)(a). The Public Body states that this information consists of advice given by the investigating panel who had the responsibility to gather, review information and provide findings to the Assistant Deputy Minister and the Executive Director. In addition, the Public Body states that the advice was prepared for the purposes of determining the final disposition of the complaints and thereby directed toward an action. Lastly, the Public Body states that the advice was made to the Assistant Deputy Minister who could implement the advice.

[para 16] The Public Body also states that it exercised its discretion properly. The Public Body states that its Executive Director exercised the discretion on behalf of the Public Body by virtue of the authority given to him under Ministerial Order 16/2001.

[para 17] After a review of the records and all the arguments before me, I find that the Public Body properly applied section 24(1)(a) to the severed portion of page 34 of Package #1. I find that all three criteria were fulfilled. I also find that the Public Body properly exercised its discretion in regard to page 34. In this regard, I note that although

the Public Body could have applied section 24(1)(a) to a larger portion of information within the records, the Public Body exercised its discretion to only withhold a small portion on page 34. I uphold the Public Body's decision to withhold this information from the Applicant under section 24(1)(a).

[para 18] However, I find that the Public Body did not properly apply section 24(1)(a) to page 5 of Package #3. The information on page 5 is not a summary of advice given by the investigating panel but instead is a summary of the department's decision regarding the complaint after receiving the investigation report. Information outlining the department's decision is not "advice" under section 24(1)(a). I do not uphold the Public Body's decision to withhold this information under section 24(1)(a). However, the Public Body also claimed section 17 as its authority to withhold the information. As such, I will address whether section 17 applies to this information.

2) Did the Public Body properly apply section 24(1)(b)(i) to the records/ information?

[para 19] Section 24(1)(b)(i) reads:

*24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*

...

*(b) consultations or deliberations involving*

*(i) officers or employees of a public body,*

[para 20] The purpose of section 24(1)(b) is to shield consultations or deliberations that occurred during the decision-making process. In Order 96-006, the Commissioner said that a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of a particular proposal or suggested action. The Commissioner defined a "deliberation" as a discussion or consideration by the persons described in the section of the reasons for or against an action.

[para 21] The Public Body states that pages 2 and 3 of Package #3 consist of consultations and deliberations and therefore fall under section 24(1)(b)(i). The Public Body also states that it exercised its discretion properly to withhold the information. The Public Body states that it took into consideration the fact that disclosure of this information would reduce candid and comprehensive exchange of advice and limit open and frank deliberations among management.

[para 22] I find that the Public Body properly applied section 24(1)(b)(i) to pages 2 and 3 of Package #3. I find that these pages consist of consultations and deliberations. These pages contain the views of one or more employees as to the appropriateness of a particular proposal or suggested action as well as a discussion or consideration of the reasons for or against a particular action. I also find that the Public Body properly

exercised its discretion to withhold the information on these pages. I uphold the Public Body's decision to withhold this information from the Applicant.

**B. Does section 17 of the Act (personal information) apply to the records/ information?**

[para 23] Section 17 is a mandatory ("must") section of the Act. If section 17 applies, a public body must refuse to disclose the information. There are two criteria that must be fulfilled under section 17:

- (a) the severed 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 24] The Public Body states that section 17 applies to all of the records at issue. However, as I have found that the Public Body properly applied section 24(1)(a) to the severed portion of page 34 of Package #1 and section 24(1)(b)(i) to pages 2 and 3 of Package #3, I will not address these pages under section 17. The records that remain at issue under section 17 are pages 14 -30 of Package #1, all of the pages within Package #2 and page 5 of Package #3.

1. Is the severed information "personal information" of a third party?

[para 25] Personal information is defined in section 1(n). This section reads:

*I 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,*

*(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*

*(iii) the individual's age, sex, marital status or family status,*

*(iv) an identifying number, symbol or other particular assigned to the individual,*

*(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*

*(vi) information about the individual's health and health care history, including information about a physical or mental disability,*

*(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*

*(viii) anyone else's opinions about the individual, and*

*(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 26] The Public Body argues that all of the records contain personal information of the Affected Parties. In addition, the Public Body argues that although the records discuss a series of events involving the Applicant, the records do not contain "opinions" about the Applicant. In the alternative, the Public Body argues that if the records contain personal information about the Applicant, the personal information is so intertwined with the Affected Parties' personal information that it cannot be severed without making the rest of the record meaningless.

[para 27] After a review of the records, I find that pages 14-30 of Package #1 and the pages within Package #2 consists of the personal information of several Affected Parties. In addition, I find that some of the information is intertwined with the Applicant's personal information such that it cannot reasonably be separated.

[para 28] However, I find that page 5 of Package #3 does not contain the personal information of the Affected Parties. Furthermore, as there are no other mandatory exceptions that apply to this page and the Public Body did not claim any other discretionary exceptions in regard to this page, I intend to order the Public Body to disclose this information to the Applicant.

2. Would the disclosure of the personal information be an unreasonable invasion of a third party's personal privacy, as provided by section 17(1) or section 17(4)?

#### Section 17(1)

[para 29] Section 17(1) 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. This section reads:

*17(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.*

Section 17(4)

[para 30] Section 17(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. The Public Body applied section 17(4)(g) to the records.

Section 17(4)(g) – Third Party's Name

[para 31] Section 17(4)(g) reads:

*17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*

...

*(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 32] I find that section 17(4)(g) applies to the Affected Parties' personal information on pages 14-30 of Package #1 and all the pages within Package #2. These records contain the Affected Party's name along with other personal information of the Affected Parties.

Section 17(5)

[para 33] In determining whether the disclosure of personal information would constitute an unreasonable invasion under sections 17(1) and 17(4), a public body must consider the relevant circumstances under section 17(5).

[para 34] The Public Body did not refer to section 17(5). However, due to the numerous references to confidentiality in the records, I have decided to review whether section 17(5)(f) is a relevant circumstance in this inquiry. If section 17(5)(f) applies, it is a relevant circumstance that weighs in favour of withholding the personal information. Section 17(5)(f) reads as follows:



*17(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*

...

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

[para 35] In Order 98-007, the Commissioner held that the primary concern under section 17(5)(f) is to honour promises of confidentiality made to individuals providing personal information and to protect their privacy and the privacy of others to whom the information relates. The Commissioner found that the context in which information is recorded and the sensitivity of the events recorded are indicators of confidentiality under this section.

[para 36] After a review of the records, I find that the Affected Parties' personal information within pages 14-30 of Package #1 and within Package #2 was supplied in confidence. In coming to this conclusion, I took into account the sensitivity of the events recorded. In addition, I took into account that the records also refer to the confidentiality of the information. The transcript shows the interviewer repeatedly told the Affected Parties that the investigation report would be confidential and, on at least one occasion, told a witness that the whole process would be confidential.

### 3. Did the Applicant meet the burden of proof?

[para 37] Section 71(2) of the Act states that an applicant bears the burden of proving that disclosure of third party personal information would not be an unreasonable invasion of privacy under the Act. An applicant may meet the burden of proof under section 71(2) by showing that one of the circumstances listed in section 17(2) of the Act applies. In this inquiry, the Applicant did not make a submission and has not provided any evidence that the disclosure of the Affected Parties' personal information would not be an unreasonable invasion of privacy. I find that the Applicant has not met the burden of proof under section 71(2).

### 4. Conclusion under section 17

[para 38] I find that section 17 applies to the Affected Parties's personal information on pages 14-30 of Package #1 and all of the pages within Package #2. Disclosure of this information would be an unreasonable invasion of the Affected Parties' personal privacy as provided by section 17(1) and 17(4) and must not be disclosed. As such, I intend to order the Public Body not to disclose this information to the Applicant. In addition, I find that the Applicant's personal information within these pages is intertwined with the personal information of the Affected Parties and cannot reasonably be separated. Consequently, the Applicant's personal information on these pages cannot be disclosed.

[para 39] However, I find that section 17 does not apply to page 5 of Package #3. Furthermore, as there are no other mandatory exceptions that apply to this record and the Public Body did not claim any other discretionary exceptions in regard to this record, I intend to order the Public Body to disclose this information to the Applicant.

## **V. ORDER**

[para 40] I make the following Order under section 72 of the Act:

### **A. Did the Public Body properly apply section 24 (advice) to the records/information?**

#### 1) Did the Public Body properly apply section 24(1)(a) to the records/information?

[para 41] I find that the Public Body properly applied section 24(1)(a) to page 34 of Package #1 and properly exercised its discretion in this regard. I uphold the Public Body's decision to withhold this information from the Applicant under this section.

[para 42] I find that the Public Body did not properly apply section 24(1)(a) to page 5 of Package #3. However, I have considered this information under section 17 of the Act.

#### 2) Did the Public Body properly apply section 24(1)(b)(i) to the records/information?

[para 43] I find that the Public Body properly applied section 24(1)(b)(i) to pages 2 and 3 of Package #3 and properly exercised its discretion in this regard. I uphold the Public Body's decision to withhold this information from the Applicant.

### **B. Does section 17 of the Act (personal information) apply to the records/information?**

[para 44] I find that section 17 applies to the Affected Parties' personal information on pages 14-30 of Package #1 and all of the pages within Package #2. Disclosure of this information would be an unreasonable invasion of the Affected Parties' personal privacy as provided by section 17(1) and 17(4). In addition, I find that the Applicant's personal information within these pages is intertwined with the personal information of the Affected Parties and cannot reasonably be separated. As such, I find that the Applicant's personal information must not be disclosed. I order the Public Body not to disclose pages 14-30 of Package #1 and all the pages within Package #2.

[para 45] However, I find that section 17 does not apply to page 5 of Package #3. Furthermore, as there are no other mandatory exceptions that apply to this record and the

Public Body did not claim any other discretionary exceptions in regard to this record, I order the Public Body to disclose this information to the Applicant. I further order that the Public Body notify me in writing within 50 days of receiving this Order, that the Public Body has complied with this Order.

Dave Bell  
Adjudicator