ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2003-018

December 29, 2003

ALBERTA HUMAN RESOURCES AND EMPLOYMENT

Review Number 2642

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Summary: The Applicant filed an access request under the *Freedom of Information and Protection of Privacy Act* with Alberta Human Resources and Employment (the "Public Body") for a copy of a report prepared by the Affected Party for the Public Body regarding certain health and safety audits completed by the Applicant's business. After being ordered to obtain the report from the Affected Party (Order F2002-006), the Public Body applied section 16(1) and withheld the report. At inquiry, the Public Body also applied section 17(1) to some of the information, and questioned whether it was responsive to the access request. Adjudicator Bell found that this information was responsive and upheld the Public Body's application of section 17(1) to it. He found that section 16 did not apply to the remaining information, and ordered Human Resources to disclose that information to the Applicant.

Statutes cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 c. 25, sections 1(n), 16(1), 17(1), 17(4)(d) and (g), 17(5), 24(1)(a), 71(1) and (2), 72.

Authorities cited: AB: Orders 96-020, 97-020, 98-006, 99-018, 2000-017, F2002-006; **BC:** Orders 57-1995, 01-46, 03-21.

I. BACKGROUND

[para. 1.] The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Human Resources and Employment ("AHRE" or the "Public Body"), for a report reviewing several health and safety audits completed by the Applicant's business. The report was prepared by the Alberta Forest Products Association ("AFPA" or the "Affected Party") for the Public Body as part of a workplace health and safety program of the Public Body.

[para. 2.] The Public Body took the position that it did not have the report in its custody or under its control for the purposes of the Act. This preliminary matter proceeded to inquiry, resulting in Order F2002-006. In Order F2002-006, I found that the Public Body did have control of the report requested by the Applicant. I ordered the Public Body to obtain a copy of the report from the Affected Party and to process the Applicant's request.

[para. 3.] The Public Body complied with Order F2002-006. The Public Body notified the Affected Party that it was contemplating disclosure of the report. The Affected Party objected to the disclosure of the report. The Public Body then applied section 16(1) to refuse access to all of the responsive information. The Applicant requested that this Office review that decision.

[para. 4.] Mediation failed, and notice of a written inquiry was sent out to the parties. All parties filed an initial and a rebuttal submission. The Public Body and the Affected Party provided *in camera* submissions, which I accepted. At inquiry the Public Body argued that the cover letter it had provided to me as part of the records was not responsive to the access request; but if the letter was responsive, then section 17(1) applied to severed personal information in it.

II. RECORDS AT ISSUE

[para. 5.] The records at issue consist of a document containing a discussion of the health and safety audits prepared by the Applicant's business, with a cover letter attached.

III. PRELIMINARY ISSUES

Preliminary issue #1: should section 24(1)(a) be added as an issue to the inquiry?

[para. 6.] The Affected Party raised the application of section 24(1)(a) in its inquiry submission. The gist of its argument is as follows:

> The initial inquiry in this review process (Order F2002-006) dealt with very narrow issues regarding the Public Body's custody and control of the records, and whether the Public Body was in a position to process the Applicant's request. The issue of possible exclusions under the Act was not raised and was not considered to be an issue in the initial inquiry. …Section 24(1)(a)

should be included as an issue in this inquiry, as the record falls squarely in the provisions of that section and would provide grounds upon which the Public Body could refuse to disclose the record to the Applicant.

[para. 7.] Section 24(1)(a) is a discretionary provision that the Public Body did not apply to the information when it processed the request. None of the parties objected to the formulation of the issues when the Notice of Inquiry was sent out. The Public Body did not raise section 24(1)(a) in its original inquiry submission, and addressed it in passing in its rebuttal. Consequently, the Affected Party is in effect arguing that I ought to disregard the Public Body's exercise of its discretionary authority under the Act and exercise the Public Body's discretion on its behalf to apply section 24(1)(a) to the records.

[para. 8.] I have no authority to unilaterally apply a discretionary exception such as section 24(1)(a) at the urging of the Affected Party. As the Public Body did not apply this provision to the records when it processed the request, and did not raise the issue after Notice of Inquiry issued, or in its initial submission at inquiry, this issue will not be added to the inquiry.

Preliminary issue #2: is the cover letter responsive to the Applicant's request?

[para. 9.] The Public Body severed information in the copy of the cover letter it sent as part of the records. In its inquiry submission, the Public Body took the position that the cover letter was not responsive to the Applicant's request.

[para. 10.] To decide whether the cover letter was responsive to the Applicant's access request for the report, I turned to the principle established in Order 97-020, which is that a record is responsive to an access request if it is "reasonably related to the request". A report is generally understood to be the totality of a communication by one party to another party about a particular subject. There is information in the cover letter which is not found in the document to which it was attached, and that information is an integral part of the report to the Public Body. It completes the communication to the Public Body. I am satisfied that the information in the cover letter is part of the totality of the information sought by the Applicant, is reasonably related to the access request, and is therefore responsive to the Applicant's access request.

Preliminary issue #3: should section 17(1) be added as an issue for this inquiry?

[para. 11.] Section 17(1) is a mandatory provision that requires a public body to sever third party personal information, if disclosure would be an unreasonable invasion of a third party's personal privacy. As I decided that the cover letter is responsive, and section 17(1) is a mandatory provision, this issue must be added to the inquiry. I wrote to the parties and invited them to file a supplementary submission on the application of section 17(1) to the severed personal information in the cover letter. The Public Body and the Affected Party filed a submission; the Applicant did not.

IV. ISSUES

[para. 12.] There are two issues in this inquiry:

A. Does section 17(1) (disclosure that is an unreasonable invasion of a third party's personal privacy) apply to the information in the records?

B. Does section 16(1) of the Act (disclosure harmful to business interests of a third party) apply to the records?

V. DISCUSSION OF THE ISSUES

Issue A. Does section 17 (disclosure that is an unreasonable invasion of a third party's personal privacy) apply to the information in the records?

[para. 13.] As the Public Body provided me with a severed copy of the records, I used the unsevered copy provided to me by the Affected Party to determine if section 17(1) applied to the severed information. My first task is to determine if the severed information is "personal information" as defined in section 1(n) of the Act: "recorded information about an identifiable individual." After reviewing the information, I am satisfied that it is personal information within the meaning of the Act.

[para. 14.] Section 17(1) of the Act states that 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) of the Act 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 and the Affected Party relied on the circumstances listed in section 17(4)(d) and (g):

> **17 (4)** A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> ….
>
> (d) the personal information relates to employment or educational history,
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> …..
>
> (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. 15.] After reviewing the information, I am satisfied that section 17(4)(g)(i) or (ii) applies, raising the presumption that disclosure of the information would be an unreasonable invasion of more than one third party's personal privacy.

[para. 16.] In determining whether the disclosure of personal information would constitute an unreasonable invasion under sections 17(1) and 17(4), the Public Body must consider all relevant circumstances under section 17(5), including those raised by the Public Body and the Affected Party, which are set out below:

> **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
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,
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> …..
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
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> …..
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,

[para. 17.] The Public Body submitted these arguments under section 17(5):

> Relevant factors considered by the public body included the fact that the AFPA declined to name their employees (i.e. blacked out their names), when it provided the audit report….those individuals were employees of AFPA, and not the public body, and therefore disclosure of their names would be an unreasonable invasion of their personal privacy. This interpretation is consistent with BC Orders 01-46 and 03-21, which determined, in relation to employees of non-public bodies, that the name of one's employer is personal information, since it is information under the Act (BC).
> ….
>
> In Order 96-020, the Commissioner determined that exposure to civil liability can constitute harm for the purposes of the above subsection [section 17(5)(e)]. The applicant has indicated in his rebuttal that he 'has no disagreements with the Affected Party nor does he plan to take any kind of action against them.' It is clear however that the AFPA believes differently… Disclosure of AFPA employee names may unfairly expose them *individually* to civil damages, and not just the employer AFPA.

[para. 18.] After considering all of the relevant circumstances, and the Applicant's failure to make any submissions on point, despite his burden under section 71(2) of the Act to prove that disclosure would not be an unreasonable invasion of third party personal privacy, I am satisfied that section 17(1) applies to the information that was severed in the cover letter. I intend to order the Public Body not to release that personal information to the Applicant.

Issue B. Does section 16(1) of the Act (disclosure harmful to business interests of a third party) apply to the records?

[para. 19.] The applicable provisions of section 16 read:

> **16(1)** The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> …
>
> (ii) … technical information of a third party,
>
> (b) that is supplied, explicitly or implicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
>
> …
>
> (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…

[para. 20.] Section 16(1) is a mandatory exception to disclosure. If information falls within this exception, access must be refused. There is a three-part test for determining whether section 16(1) applies to information. The test, adjusted to reflect the type of information that the Public Body claims is at issue, is this:

> i. Would disclosure of the information reveal the technical information of the Affected Party?
>
> ii. Is the information supplied, explicitly or implicitly, in confidence?
>
> iii. Could disclosure be reasonably expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 21.] Under section 71(1) of the Act, the Public Body must prove each element of the above test on a preponderance of evidence.

i. Would disclosure of the information reveal the technical information of the Affected Party?

[para. 22.] The Public Body and the Affected Party argued that the Affected Party's review of the Applicant's audits is "technical information" within the meaning of section 16 of the Act. The Public Body submitted: "[w]hile an audit process may ordinarily be based on predetermined auditing protocols, the AFPA submits that, in this instance, it

'*designed the process*' to undertake an independent review…This was an out-of-the-ordinary process (an audit of an audit) to mediate an audit quality issue." The Affected Party argued that if the record were to be disclosed to the Applicant, it would "reveal information related to a particular subject or technique, namely the review process designed and implemented by the Affected Party in this process", which was created specifically in response to the request by the Public Body for assistance.

[para. 23.] The Applicant argued that the Affected Party is a non-profit organization that is not in competition with other organizations, and has no trade secrets relative to audits or the auditing process. The Applicant submitted that Certifying Partners in the program (including the Affected Party) meet regularly to exchange information for the purpose of maintaining consistency and standardization of practices. The Applicant disputed the claim that the Affected Party designed a special process for reviewing these audits. The Applicant argued that the review was "not supposed to be any different than other audit reviews conducted by Certifying Partners." The Affected Party was contracted "to conduct an independent audit review plain and simple." (underlining in original)

[para. 24.] Order 2000-017 adopted the following definition of "technical information" from BC Order 57-1995: "technical information is information relating to a particular subject, craft or technique." To determine whether a record would reveal "technical information", I must consider not only the face and the contents of the record, but the nature of the record, and its context as a whole: Orders 98-006, 2000-017. This includes the circumstances of the creation of the record(s) and the expertise of its authors or the consulting subject matter experts.

[para. 25.] Neither the Public Body nor the Affected Party provided cogent evidence, in either documentary or affidavit form, proving that the audit review process was specifically designed by the Affected Party or its employees, or that this review departed in any way from generally accepted audit review principles. Bare arguments to that effect are not enough. In particular, I was struck by the fact that the bulk of the information in the document attached to the cover letter is taken from the audits prepared by the Applicant's business. That document does little more than present conclusions about the adequacy of those audits. I cannot see what analysis was done by the persons selected by the Affected Party, or what technique was used to reach the conclusions in the report. Accordingly, I find that there is no "technical information" in the records, nor would the records reveal technical information. As the Public Body has failed to prove this first part of the test, section 16(1) cannot apply to the records.

[para. 26.] Nonetheless, I considered the arguments of the parties under the last two elements of the test.

ii. Is the information supplied, explicitly or implicitly, in confidence?

[para. 27.] The Public Body and Affected Party claim that the information in the report was implicitly supplied in confidence to the Public Body. The Affected Party argued that it was approached by the Public Body to assist in a quality of audit issue. The Affected

Party volunteered to assist on the basis of an existing memorandum of understanding with the Public Body, which bound the Affected Party to collaborate with the Public Body to contribute to the development, review and maintenance of stated standards. The Affected Party asserts in its submission that it was not informed of the name of the original auditor [the Applicant's business], the name of the organization audited, the name of the Certifying Partner or the issues surrounding the review. The Affected Party agreed to keep the issues in confidence, and its independent review was "conveyed to the Public Body on the understanding that the specifics of the report and its recommendation would similarly be kept confidential from the other parties". The Affected Party argued that an expectation of confidentiality runs through the Partnerships Program and it is standard practice that reports are never released to the auditor in an audit review.

[para. 28.] The Public Body's arguments track those of the Affected Party. It admitted that "the record is not stamped confidential" but argued that it was agreed between the Public Body and Affected Party that the review process was to be entirely confidential. The Public Body argued that there was no requirement to provide copies of the Affected Party's review of the audits to the Applicant's business. It also noted: "given that AHRE [the Public Body] immediately returned the record[s] to the Affected Party, it was not unreasonable that the Affected Party expected confidentiality."

[para. 29.] The Applicant argued that he had a "definite expectation…that a detailed report on the strengths and weaknesses of the audits would be provided [to him]". He says there was no indication that he would only be allowed to see an edited or abridged version of the Affected Party's review of the audits. He argued that under the program in question all auditors receive a complete and detailed copy of the review of their audits, and "full disclosure of the review contents is a necessary part of the continuous improvement process". As well, he submitted:

> There were no conditions placed on the second review (e.g. no access to the report). Had there been, the applicant would have refused to participate in the process. It is remarkable that only after examining a copy of the review did AHR&E decide that a copy would not be made available to the applicant.

[para. 30.] To meet the confidentiality requirement under this provision a third party must, from an objective point of view, have a reasonable expectation of confidentiality in regard to the information that was supplied. Order 99-018 summarizes the applicable test for confidentiality:

> 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. 31.] There is nothing in the records that supports the claim that the report was understood to be supplied on an implicitly confidential basis. There is also no evidence that the Applicant agreed to, or was told, that the review would be conducted on a confidential basis and that he would be denied access to everything but the result of the review. In fact, the Public Body argued in its submission that the independent review was intended as a form of dispute resolution within a cooperative and collaborative process. It also submitted a letter dated April 27, 2001, from Neil Irvine, an Assistant Deputy Minister, to the Applicant, in which the Affected Party's review of the audits is characterized as "a gesture of goodwill and dispute resolution." This is, in my opinion, inconsistent with the Public Body's arguments that the process was confidential and unavailable to the Applicant.

[para. 32.] Neither the Public Body nor the Affected Party supplied any sworn evidence or contemporary documentary evidence from the persons involved in arranging for the review. Therefore, under the applicable test the Public Body has failed to establish that the information in the records was supplied, implicitly or explicitly, in confidence, by the Affected Party to the Public Body.

iii. Could disclosure be reasonably expected to bring about one of the outcomes set out in section 16(1)(c)?

[para. 33.] The Public Body and Affected Party made similar arguments that engage section 16(1)(c)(ii) of the Act. They argued that the Affected Party was under no statutory or other legal obligation to provide an independent review. It provided a voluntary service for the purposes of dispute resolution. Ordering disclosure of the records would jeopardize the spirit of the Partnerships in Health and Safety Program in which the parties are involved, and jeopardize the entire voluntary process, potentially chilling future participation because of civil liability issues.

[para. 34.] The Applicant disputed this argument, asserting that the release of the report would not jeopardize the spirit of this program, as "hundreds if not thousands of audits are annually reviewed, and full copies provided to auditors".

[para. 35.] After considering the arguments and the evidence, I find that the Public Body failed to prove under all elements of the applicable test that disclosure of the information could be reasonably expected to bring about one of the outcomes set out in section 16(1)(c).

VI. ORDER

[para. 36.] I make the following Order under section 72 of the Act:

> 1. I uphold the Public Body's application of section 17(1) to the third party personal information in the records. I order the Public Body not to disclose that personal information to the Applicant.
>
> 2. I find that section 16(1) does not apply to the remaining information in the records. I order the Public Body to disclose that information to the Applicant.
>
> 3. I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Dave Bell
Adjudicator