

ALBERTA
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

ORDER F2004-013

November 5, 2004

ALBERTA ENVIRONMENT

Review Number 2874

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

Summary: The Applicant requested access under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to records submitted to Alberta Environment (the “Public Body”) regarding soil conditions at the site of a former service station. The Public Body wrote to the current owner of the property (the “Third Party”) requesting its views on disclosure. The Public Body concluded, after an examination of the criteria for release under section 16 (business interests) of the Act, that it did not have sufficient evidence to conclude that significant harm could reasonably be expected to result to the Third Party from a release of the records. The Third Party requested the Commissioner review the decision to disclose the records. The Adjudicator upheld the Public Body’s decision to release the records to the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16(1),16(1)(b),16(1)(c),30, 71(3)(b),and 72.

Authorities Cited: Orders 96-003, 96-013, 99-008, 99-018, 2000-010 and 2000-017;
B.C.: Order 57-1995.

I. BACKGROUND

[para 1] On September 26, 2003, Alberta Environment (the “Public Body”) received an access request from the Applicant under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The request was for records pertaining to soil conditions at the site of a former service station located in the City of Edmonton (the “property”).

[para 2] On October 6, 2003, the Public Body provided notice to the current owner of the property (the “Third Party”) in accordance with section 30 of the Act.

[para 3] By letter dated November 3, 2003, the Public Body advised the Third Party that it had decided to release the records requested. After examining the criteria for release under section 16 of the Act, the Public Body stated it did not have sufficient evidence to conclude that significant harm could reasonably be expected to result to the Third Party from a release of the records. The Third Party was advised that if no request for review was made within 20 days from the date of the letter that the Applicant would be given access to the records.

[para 4] By an undated letter received by the Commissioner on November 20, 2003, the Third Party requested a review of the decision to disclose the records.

[para 5] Due to a misunderstanding regarding whether the Third Party had requested an inquiry, the Public Body released the records to the Applicant. The records were, however, subsequently retrieved by the Public Body before the Applicant had opportunity to examine them.

[para 6] I must add, regarding the mistaken release of the records to the Applicant, there has been no indication that the records were examined prior to being returned. The Public Body, realizing the miscommunication, very properly retrieved the records forthwith. The accidental release of records has no bearing on the issue before this inquiry.

II. RECORDS AT ISSUE

[para 7] The records at issue consist of correspondence between the Public Body and previous owners of the property, correspondence between previous owners and environmental consultants and two environmental reports.

III. ISSUE

[para 8] Does section 16 of the Act (business interests) apply to the records/information?

IV. DISCUSSION OF ISSUE

[para 9] As the records do not contain personal information, in accordance with section 71(3)(b) of the Act, the burden of proof will be upon the Third Party to prove that the Applicant has no right of access to the records.

[para 10] For the records/information to qualify under the mandatory exception found under section 16, the following three-part test must be met:

Part 1: 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?

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

Part 3: Could disclosure of the information be reasonably expected to bring about one of the outcomes set out in section 16(1)(c)?

1. 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?

[para 11] Order 99-008 set down three criteria that must be met in order to fulfill part 1 of the section 16 test. They are:

- a) The records must contain trade secrets, or commercial, financial, labour relations, scientific or technical information.
- b) The disclosure must reveal this type of information. This means that the information must not already be in the public domain; and
- c) The records must contain information that is “of a Third Party.”

[para 12] The Public Body does not dispute that the records consist of either scientific or technical information. In Order 2000-017 the Commissioner adopted the definitions for both terms as was set out in British Columbia Order 57-1995:

“scientific information” is information exhibiting the principles or methods of science, and “technical information” is information relating to a particular subject, craft or technique.”

[para 13] Having had the opportunity of examining the records, I can state that they consist of field and laboratory observations which are analyzed using, as the information itself indicates, “generally accepted hydro-geological and environmental engineering practices”. The records therefore consist of methods of science and information relating to particular subjects and techniques. I find therefore that the records fall within both definitions.

[para 14] Regarding the second criteria, the Public Body has presented evidence that the Third Party had earlier consented to a similar access request to the records in June 2001. In light of this evidence, the information is already in the public domain and does

not meet the requirement of being revealed. The second criterion to Part 1 of the section 16 test therefore has not been met.

[para 15] Although my conclusion to Part 1 of the section 16 test effectively disposes of this matter, for the sake of completeness, I will continue my analysis of the arguments advanced by the parties regarding section 16.

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

[para 16] Order 96-013 points out that the wording of section 16(1)(b) [then section 15(1)(b)] uses the phrase “is supplied...in confidence”. The use of the word “is” as opposed to “was” is significant as it indicates that not only must I consider the status of the information when it was originally supplied but also its current status.

[para 17] Originally, correspondence from the first owner of the property to the Public Body explicitly stated that the environmental report attached was proprietary and confidential.

[para 18] Correspondence from the second owner to the Public Body stated that proprietary and confidentiality rights extended to a second environmental report, although no mention was made that such an obligation applied to the first environmental report or to correspondence by the first owner to the Public Body, which was also enclosed for reference.

[para 19] In reply to the Public Body, during a later access request, the second owner declined to make any representations regarding the release of records as the environmental reports had been conveyed at the time of the property’s purchase to the Third Party.

[para 20] The Third Party in this case has not presented any argument or submitted evidence as to whether it has an expectation of confidentiality regarding the information.

[para 21] In Orders 99-018 and 2000-010, the Commissioner stated in order to fulfill the confidentiality requirements of this section, a third party must, from an objective point of view, have a reasonable expectation of confidentiality in regard to the information that was supplied. In examining this issue all the circumstances of the case must be considered.

[para 22] In this instance, it was incumbent upon each owner to assert its confidentiality and proprietary rights. When ownership of the property changed, it appears that responsibility to set out any rights of confidentiality fell to the new owner. The Third Party for its part has not made out any argument or submitted evidence as to whether it has an expectation of confidentiality regarding the information.

[para 23] There is nothing on the face of the records that would cause me to conclude that the confidential nature of the information continued indefinitely from each

owner of the property to the next. I cannot, therefore, find that the information has been supplied, explicitly or implicitly, in confidence. I find the test as set out in section 16(1)(b) has not been met.

Part 3. Could disclosure of the information be reasonably expected to bring about one of the outcomes set out in Section 16(1)(c)?

[para 24] The Third Party has argued that release of the records/information will result in harm to its business interests. Order 96-003 sets out the evidential requirement that must be met for the “harm test” to be sustained under section 16(1):

“The evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue.”

[para 25] In Order 96-003, it was also stated that the party denying disclosure 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 the harm will occur.

[para 26] The Third Party’s only evidence of harm is found in its initial submission that states that it has received an unspecified number of telephone calls regarding rumors that its business was being forced to close due to “risk factors”. By contrast, the Third Party’s rebuttal submission quotes one of the records as stating that the property poses minimal risk and is therefore suitable for redevelopment.

[para 27] The evidence presented is insufficient to establish a reasonable connection between the disclosure of the information and resulting harm or to create a reasonable expectation that significant harm would result to the Third Party’s competitive position.

[para 28] As previously stated the Third Party had earlier consented to a similar access request to the records in June 2001. Although there has been a passage of time and conditions change, no evidence has been submitted by the Third Party as to any change of circumstance during the intervening period which would lead to the harm of its business interests, if the records were now again released.

[para 29] The Third Party has therefore not been able to adduce evidence that would satisfy the “harm test” as set out and accordingly the requirement of section 16(1)(c) has not been met.

V. ORDER

[para 30] I make the following Order under section 72 of the Act.

[para 31] I find that section 16 does not apply to the records/information in this inquiry. I order the Public Body to disclose the records to the Applicant.

[para 32] I further order the Public Body to notify me in writing within 50 days of being given a copy of this Order that the Public Body has complied with this Order.

Dave Bell
Adjudicator