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OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

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SOUTHERN ALBERTA INSTITUTE OF TECHNOLOGY

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Summary: The SAIT Academic Faculty Association (the "Applicant") made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Southern Alberta Institute of Technology ("SAIT") for access to contracts between SAIT and its fee-for-service instructors (54 in number) entered into in a specific time period. SAIT provided the documents but severed the hourly rate and related information, relying on sections 16, 17 and 25 of the Act.

The Commissioner rejected SAIT's reliance on section 16 of the Act on the basis that information that has been negotiated between a third party and a public body is not information that has been "supplied to" a public body within the terms of the section. He also held that disclosure would not be an unreasonable invasion of the personal privacy of third parties, on the basis that the information fell within the terms of section 17(2)(f). Finally, he held that section 25 does not apply because the Public Body did not establish that the disclosure sought could reasonably be expected to harm its competitive position. The Commissioner ordered that the records be disclosed to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 16(1), 16(1)(a), 16(1)(b), 16(1)(c), 16(3)(a), 17, 17(1), 17(2)(a), 17(2)(e),17(2)(f), 17(4), 17(4)(d), 17(4)(g), 17(5), 17(5)(a), 17(5)(c), 17(5)(f), 25, 25(1)(c), 71(1), 72; *Personal Information Protection Act*, R.S.A. 2003, c. P-6.5.

Authorities Cited: AB: Orders 96-003, 99-040, 2000-005; **BC:** Order 03-15; **ONT:** Orders 61, M-18, M-373, M-498.

Cases Cited: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983.

I. BACKGROUND

[para 1] For the purpose of providing instruction, the Southern Alberta Institute of Technology (the "Public Body") employs both faculty members (so designated by its Board of Governors), and fee-for-service instructors. The SAIT Academic Faculty Association (the "Applicant") is the bargaining agent for faculty members, but not for fee-for-service instructors. The Collective Agreement between the Public Body and the Applicant provides in section 9.09 that "The Employer [the Public Body] shall provide a copy of the letter of appointment concerning a fee-for-service appointment [a fee-for-service contract] upon request from the President of the Association [the Applicant]", and in section 9.10 that "The Association shall take appropriate steps to maintain the security of all letters referred to in Subsection … 9.09". The individual contracts/letters of appointment contain a paragraph acknowledging these collective agreement provisions, as well as a declaration at the conclusion of the contract that it "may be shared with [the Applicant]".

[para 2] On October 15, 2002, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") for all instructor fee-for-service contracts entered into in four specified academic years.

[para 3] Following receipt of a fee estimate from the Public Body, the Applicant narrowed its request to the much smaller time period of January and February, 2003.

[para 4] The Public Body provided the contracts to the Applicant, including names, but severed some personal information (uncontested) as well as the hourly rate, the Public Body's total financial commitment, the total hours, and the hours per month (all contested).

[para 5] The Applicant requested a review by this office. Further attempts to reach a resolution were unsuccessful, and the matter was set down for inquiry.

[para 6] Five of the 54 affected parties responded to the notice of inquiry. Of these, three refused to consent to disclosure of their personal information, while two consented.

II. RECORDS AT ISSUE

[para 7] The records are specified portions of all contracts between the Public Body and named fee-for-service instructors (54 in number) entered into in the time period January 2003 to February 2003. The information in the specified portions (which were

severed in the contracts that were supplied) consists of: hourly rate, the Public Body's total financial commitment, total hours, and hours per month.

III. ISSUES

[para 8] The issues are:

A. Does section 16 of the Act (business interests) apply to the records/information?
B. Does section 17 of the Act (personal information) apply to the records/information?
C. Did the Public Body properly apply section 25 of the Act (economic interest of a public body) to the records/information?

IV. DISCUSSION OF ISSUES

Issue A: Does section 16 of the Act (business interests) apply to the records/information?

[para 9] Section 16(1) requires a public body to withhold information if the criteria are met, but the provision does not apply if the third party consents to the disclosure. The relevant parts of section 16 provide:

> *16(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 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.*
>
> *16(3) Subsections (1) and (2) do not apply if*

(a) the third party consents to the disclosure, … .

[para 10] For section 16(1) to apply in this case, it must be established that:

- disclosure of the information would reveal commercial, financial, labour relations, scientific or technical information of a third party (section 16(1)(a))
- the information was supplied, explicitly, or implicitly, in confidence (section 16(1)(b)),
- disclosure of the information could reasonably be expected to bring about one of the outcomes set out in section 16(1)(c), and
- the third party did not consent to the disclosure in the context of a request under the Act.

[para 11] The Public Body says that the requested information is "commercial and financial information" of the third party fee-for-service instructors. I accept this assertion.

[para 12] The Applicant and the Public Body make a number of arguments as to whether the records in question meet the confidentiality aspect of the test in section 16(1)(b), and whether there was consent to their disclosure under section 16(3)(a).

[para 13] The Public Body also argues that disclosure would harm the competitive position or interfere with the negotiating position of the third parties, resulting in undue financial loss for these people. The Public Body says that the Applicant would use the information to challenge the use of fee-for-service instructors, reducing such instructors' ability to negotiate individual rates of pay commensurate with their value on the open market.

[para 14] In my view this issue is determined by the requirement in section 16(1)(b) that the information be "supplied".

[para 15] For information to be "supplied" by a third party to a public body, the third party must be the source of the information. Order 2000-005 held that, generally, information in an agreement that has been *negotiated between* a third party and a public body is not information that has been *supplied* to a public body. There are exceptions, where information supplied to the public body prior to or during negotiations is contained in the agreement that is reached in a relatively unchanged state, or where disclosure of information in an agreement would permit an applicant to make an accurate inference about information supplied to the public body during the negotiations (See Order 2000-005 at para 85; see also an extensive discussion of this topic in British Columbia Order 03-15.)

[para 16] In this case, the information the Public Body seeks to withhold is part of the terms of a contract negotiated between itself and the third parties. There is no evidence before me nor any suggestion that any of the information sought was supplied to the Public Body by third parties for the purpose of or prior to the negotiations of the contracts, or that any inferences can be drawn from the requested information about

information that was so supplied. Accordingly I cannot conclude that the requested information was information "supplied" to a Public Body as contemplated by section 16(1)(b).

[para 17] In addition I am not persuaded that disclosure of the information would reasonably be expected to bring about any of the outcomes set out in section 16(1)(c). The Public Body says that the disclosure would harm or interfere with the competitive and negotiating positions of the instructors, resulting in undue financial loss. It says that if the Applicant had the instructors' actual rates, it would "redouble its efforts to challenge the use of fee-for-service instructors", and this would result in a loss of the instructors' ability to negotiate individual rates of pay commensurate with their value on the open market. However, the Public Body does not provide any convincing explanation or evidence as to how the severed information in the contracts could be used to challenge the use of fee-for-service instructors (if this is indeed the purpose for the request), and no indication that such efforts would have any chance of success.

[para 18] Section 71(1) of the Act places the burden on the Public Body to show that information it withheld falls within the scope of an exception to disclosure under the Act. The Public Body has not discharged its onus to show that the information was supplied to it. Neither has it, nor have any of the third parties, established the requisite likelihood of harm or loss to the third parties. Thus the information cannot be withheld on this basis of this section.

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

[para 19] Section 17 provides in part:

> *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.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the third party has, in the prescribed manner, consented to or requested the disclosure,*
> > …
> > *(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'*
> >
> > *(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,*
> > … .

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

…
(d) the personal information relates to educational or employment history
…
(g) the personal information consists of the third party's name when
(i) it appears with other personal information about the third party,
….

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

…
(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.
…
(f) the personal information has been supplied in confidence,….

[para 20] I find that the information at issue is the personal information of the third party fee-for-service instructors.

Submissions of the Parties

[para 21] The submissions of the Applicant and Public Body as to how section 17 applies may be summarized as follows.

[para 22] The Applicant argues that the records fall under sections 17(2)(a), 17(2)(e) and 17(2)(f) and thus their disclosure would not be an unreasonable invasion of the fee-for-service instructors' personal privacy. Relative to section 17(2)(e) it says that "salary range" can be interpreted as referring to actual salaries where there is no salary range. It also argues that "total hours" and "hours per month" falls within the "responsibilities" portion of section 17(2)(e). Finally it says that the information falls within section 17(2)(f), "financial and other details of a contract to supply services to a public body".

[para 23] The Public Body acknowledges that section 17(2)(e) provides that disclosure of the salary range of an employee of a public body is not an unreasonable invasion of personal privacy. However, it points out that "salary range" and 'actual salary' are not the same. It says in this case the requested information can be equated with 'actual salary' (on the basis that the withheld information would reveal everything necessary to calculate the 'actual salaries' of the fee-for-service instructors), in contrast to "salary range". The Public Body cites Ontario decisions dealing with a provision similar

to section 17(2)(e). These cases hold that the inclusion in that provision of "salary range" implies that 'actual salaries' are excluded from the provision. The result in the Ontario cases is that, with reference to an actual salary, the parallel provision cannot be relied on to rebut the presumption (contained in a different section of the Ontario legislation) that disclosure of a person's income is an unreasonable invasion of personal privacy. (See Ontario Order 61, Order M-18). The Public Body says with reference to section 17(2)(e) that "the legislature has specifically defined what salary-related information may be disclosed without there being an unreasonable invasion of a third party's personal privacy". On this basis it contends that section 17(2) does not apply to the information at issue.

[para 24] The Public Body's argument with regard to section 17(2)(f) is as follows: Under the Act, "employee" includes a person who performs a service for the public body under a contract. Thus section 17(2)(e), which refers to "employees", governs the matter of what information may be disclosed relative to the employees in this case. Section 17(2)(e) restricts what may be disclosed to "salary ranges". Section 17(2)(e) is more specific than section 17(2)(f) in that it "addresses information of the character sought by [the Applicant]"; the "general" words in section 17(2)(f) are not capable of overriding the "specific" words of section 17(2)(e). Thus section 17(2)(f) does not operate to preempt the presumptions triggered under section 17(4).

Analysis

[para 25] I agree with the Applicant that the information in question falls within section 17(2)(f) of the Act, and therefore its disclosure would not be an unreasonable invasion of personal privacy. My primary conclusion is based on the idea that sections 17(2)(e) and 17(2)(f) cover different types of employment relationships. For the reasons given below I find that only the latter provision covers 'fee-for-service' relationships – the type of relationship at issue in this case.

[para 26] The Public Body's submission about section 17(2)(f) does not touch on the Ontario decisions that deal with the provision in Ontario legislation that is parallel to section 17(2)(f). That Ontario provision says that disclosure of financial or other details of a contract for personal services between an individual and an institution is not an unreasonable invasion of personal privacy. In Ontario, which of the two provisions applies (whether the one that speaks of employees and salary ranges, or the one that speaks of contracts for providing services) has been decided on the basis of whether the relationship at issue is one of 'employer-employee'on the one hand, or one of 'fee-for-service' or 'independent contractor' on the other. (See Ontario Orders M-373, M-498.) The Supreme Court of Canada has recently used the language "contract of service" (employee) and "contract for services" (independent contractor) to distinguish the two concepts. (See *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983.**)** With respect to the former, according to the decisions of the Ontario Office of the Information and Privacy Commissioner, disclosure of remuneration information is covered by Ontario's parallel to section 17(2)(e). With respect to the latter, it is covered by the parallel to section 17(2)(f).

[para 27] I accept this reasoning. I do so even though the Alberta and Ontario legislation is not quite the same. In Alberta, but not in Ontario, 'employee' is defined as follows:

> *1 In this Act*
>
> *(e) "employee" in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body; … .*

[para 28] The Public Body's argument hinges on the idea that because section 17(2)(e) speaks of "employees", and the definition of "employee" includes a person in a 'contract for service' relationship, the 'fee-for-service' relationships at issue are covered under section 17(2)(e). I do not accept this argument. To read "employee" in section 17(2)(e) as including the "contracts to supply services" described in section 17(2)(f) would mean that what is disclosable about the financial details of a 'contract-for-services' relationship is addressed twice, in a different and contradictory way in each case. All financial details of the relationship can be disclosed under the latter provision whereas only some financial information is disclosable under the former.

[para 29] The Public Body addresses this problem by arguing that because the language of section 17(2)(e) *more specifically* addresses the information in question, section 17(2)(f) can, in essence, be ignored. The Public Body says: "As section 17(2)(e) specifically addresses information of the character sought by [the Applicant] and allows only limited access, it would be unreasonable and contrary to recognized principles of statutory interpretation to find the general words in s. 17(2)(f) capable of overriding the specific words of s. 17(2)(e)."

[para 30] I disagree. In my view the problem is better resolved by reading the two provisions as covering different types of employment relationships. Such a reading is supported by the principle of statutory interpretation of presumed coherence – that internal conflict is to be avoided.

[para 31] Section 17(2)(e) deals with employment relationships of the type that have classifications, salary ranges, and discretionary benefits. "Employee" is given a contextual meaning by its place in a list that also includes "officer" and "member". In my view, the types of "employees" referred to are 'contract of service' employees, in contrast to 'independent contractors' (who do not have classifications, salary ranges, and discretionary benefits).

[para 32] Section 17(2)(f) speaks of "contracts to supply … services to a public body". In my view only 'contract for services' or 'fee-for-service' relationships are covered by this provision. Arguably every employment relationship can be described as a contract to supply services, but again, to read section 17(2)(f) as embracing 'contract of service' relationships would result in redundancy and internal contradiction. Thus I interpret section 17(2)(f) as excluding 'contract of service' relationships.

[para 33] I must decide which of the two provisions covers the relationships at issue. The significant factors for this determination have been set out in many court and tribunal decisions. Some of these factors are relevant only to certain kinds of commercial settings, and have no application here. The Supreme Court of Canada has recently stated that the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. (See *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983.) In the present case, the contracts themselves allow me to make the necessary determination. The relationships in the present case are created by contracts entitled "Casual Employment Agreement – Fee-for-Service". Each contract is to provide instruction for a particular course or courses, over a fixed time period, for a fixed number of hours and hours per month, at a fixed hourly rate. Both by their terms and in their content the contracts evince a 'fee-for-service' or 'contract for services' relationship. On this account, the applicable provision in this case is section 17(2)(f).

[para 34] If I am wrong in my conclusion that sections 17(2)(e) and 17(2)(f) apply to different kinds of relationships, or if I have wrongly characterized the relationship in question, it is still my view that section 17(2)(f) governs the question of whether section 17(2) applies. This is because I disagree with the Public Body that the language of section 17(2)(e) more specifically addresses the information in question than does section 17(2)(f). In my opinion the opposite is true, for the following reasons.

[para 35] The Public Body's argument requires treating the information requested by the Applicant as an 'actual salary'. The contracts in question speak of fees for a service, not of salaries. According to the Canadian Oxford Dictionary, a 'salary' is "a fixed regular payment made by an employer to an employee … usually expressed as an annual sum". 'Salary' or 'actual salary' is not apt to describe the 'fees', specified in the contracts, as payments for the provision of a particular service. Even if I accept that the language of section 17(2)(e) speaks implicitly to 'actual salaries' and excludes them by implication, this language is severely strained at best when applied to the information at issue, and arguably does not speak to it at all.

[para 36] In contrast, the phrase "financial … details of a contract to supply … services" in section 17(2)(f) is highly apt to describe the information at issue – the hourly rate, monthly and total hours, and total contract cost. The amount of the payment for the service (in this case teaching of a course or courses), and the manner of calculating it, very naturally engage the phrase in section 17(2)(f).

[para 37] Thus I can conclude that section 17(2)(f) governs this situation and the information at issue also on the basis that its language more aptly and precisely describes the information.

[para 38] In my view my conclusions on this issue comport with the policy implicit in sections 17(2)(e) and (f) that there should be transparency for expenditures of public funds for employment or the purchase of services. This policy goal is evident in Ontario

Order M-18, cited by the Public Body. That case involved a 'contract of service' relationship in which there was a salary but no salary range. The Commissioner directed that a salary range be established and disclosed so that the policy goal of transparency in the section of the legislation parallel to section 17(2)(e) could not be defeated by not having a range. In Alberta, for situations in which there are salary ranges, section 17(2)(e) achieves the desired transparency. For situations where there are contracts to pay a fee for the performance of a particular service, section 17(2)(f) does so.

[para 39] Because in my view the records are covered by section 17(2)(f), I conclude that disclosure of the personal information at issue would not be an unreasonable invasion of the personal privacy of the fee-for-service instructors, and that the Public Body cannot rely on section 17 for mandatory refusal. I do not need to consider, therefore, whether any of the factors in section 17(5) operate to rebut any presumptions arising under section 17(4).

[para 40] I note that three fee-for-service instructors submitted arguments that disclosure of the requested information in this case would be a violation of their personal privacy. Because I have held that section 17(2)(f) applies to this information, I do not accept these arguments.

Issue C: Did the Public Body properly apply section 25 of the Act (economic interest of a public body) to the records/information?

[para 41] The relevant part of section 25 provides:

> *25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body …, including the following information: …*
>
> *(c) information the disclosure of which could reasonably be expected to*
>
> *(i) result in financial loss to,*
> *(ii) prejudice the competitive position of, or*
> *(iii) interfere with contractual or other negotiations of,*
>
> *… a public body; … .*

[para 42] Orders 96-003 and 99-040 establish that the party who is asserting harm under section 25 of the Act must provide objective evidence of three things:

a. there must be a clear cause and effect relationship between the disclosure and the harm;

b. the disclosure must cause harm and not simply interference or inconvenience; and

c. the likelihood of harm must be genuine and conceivable.

[para 43] The Public Body argues that disclosure would harm its economic interests in two ways:

[para 44] First, it says that "disclosure of the salary information sought would provide both the private and public sector competitors with valuable information and place the Public Body in a disadvantageous position in relation to its competitors in a highly competitive for profit customized training market". More specifically, it says disclosure would allow competitors to outbid it in the labour market for instructors with valuable experience and sought-after skills.

[para 45] Second, it says disclosure would "place [the Public Body] in a disadvantageous position in future negotiations with fee-for-service instructors as it is reasonable to assume that instructors who viewed themselves as underpaid in relation to their colleagues would demand higher salaries or leave the institution altogether, necessitating their [costly] replacement".

[para 46] In my view, the Public Body has failed to show the three-part test is met.

[para 47] The first of the Public Body's arguments rests on the assumption that if the records were disclosed, the Applicant would make them available to the Public Body's private and public competitors in the for-profit training market. The second argument rests on the assumption that the Applicant would make the requested information of particular fee-for-service instructors available to other such instructors. To decide that section 25 applies, there must be a reasonable expectation of harm, and therefore a reasonable expectation that one of these eventualities would happen.

[para 48] I note that the Collective Agreement, in allowing the Applicant access to fee-for-service contracts under Section 9.09, places a duty on the Applicant in Section 9.10 to "take appropriate steps to maintain the security of all letters referred to in Subsection … 9.09". This duty of confidentiality is not premised on any particular means of accessing the information. Thus the Collective Agreement constrains the Applicant from making such disclosures as the Public Body apprehends.

[para 49] The Public Body has asserted that the purpose of the Applicant's request was to challenge the use of fee-for-service instructors. Even if this is so, I do not see why the Applicant would, in trying to achieve this purpose, disclose the requested information to competitors of the Public Body, or the information of one fee-for-service instructor to other individual fee-for-service instructors. There is no suggestion before me of any other purpose that would prompt such disclosures.

[para 50] In light of these considerations, in my view there is no reasonable expectation that the Applicant would disclose the information to competitors of the Public Body, or distribute it among individual fee-for-service instructors. Therefore, I

have no basis for finding a reasonable expectation of the sort of harm described by the Public Body.

[para 51] I note also that the Applicant in this case is an "organization" as defined under the *Personal Information Protection Act*, and as such is subject to that Act. The organization is bound by the restrictions in that Act on the disclosure of personal information in its possession.

[para 52] Even if such disclosures were to happen, in my view the Public Body has not shown that it would thereby suffer a significant competitive disadvantage. In the cases that have found potential harm in the revelation of contract prices, price has been the primary factor in the potential 'bidding war'. In the employment context at issue in this case, salary is only one factor that would make a job desirable or otherwise; it may not even be one of the most significant factors. The Public Body has not shown to my satisfaction that it would likely lose instructors or be required to pay more to retain them even if the information requested by the Applicant wound up in the hands of other fee-for-service instructors or other institutions in the same business as the Public Body.

[para 53] For the reasons given I conclude that the discretionary exemption under section 25 of the Act does not apply.

V. ORDER

[para 54] I make this Order under section 72 of the Act.

[para 55] I find that none of the provisions of the Act on which the Public Body relied to withhold the records are applicable. I order the Public Body to disclose the records to the Applicant.

Frank Work, Q.C.
Information and Privacy Commissioner