ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2004-024

August 21, 2006

ALBERTA FINANCE

Review Number 2906

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Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Finance (the "Public Body") for a copy of the KPMG LLP ("KPMG") actuarial study commissioned by the government to help set the rate for basic automobile insurance in 2003 (the "Report") and the total cost of the Report. The Report was in draft form. The Public Body denied access to the entire Report on the basis that it was "advice" (section 24(1)(a) of the Act). The Public Body disclosed the total cost of the Report but withheld the breakdown of the cost on the basis that it was personal information (section 17 of the Act).

The Commissioner confirmed the Public Body's decision to withhold the Report as being "advice" under section 24(1)(a) of the Act. He found that section 17 did not apply to the breakdown of the cost, but said that he would allow the parties to provide further written submissions on whether that information should be withheld under the provision for business interests (section 16 of the Act). He further held that section 32 of the Act did not require the Public Body to disclose the Report or the breakdown of the cost in the public interest.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(i), 1(n)(vii), 1(r), 5, 16, 17, 17(1), 17(2), 17(2)(f), 24, 24(1), 24(1)(a), 24(1)(b), 24(1)(g), 32, 32(1)(b), 68, 69, 72; Insurance Act, R.S.A. 2000, c. I-3; *Personal Information Protection Act*, S.A. 2003, c. P-6.5.

Orders Cited: AB: Orders 96-011, 97-020, 2000-005, 2000-031, F2002-011, F2002-028, F2004-014.

I. BACKGROUND

[para 1] The Applicant applied to Alberta Finance (the "Public Body") under the *Freedom of Information and Protection of Privacy Act* (the "Act") for access to the following:

> The KPMG actuarial study commissioned by the government to help set the rate for basic automobile insurance in 2003. Include the total cost of the study please.

[para 2] The Public Body initially identified a total of 95 pages of records as being responsive to the Applicant's access request. The Public Body divided those 95 pages into what it describes in its Summary of Responsive Records as "Record 1" and "Record 2".

[para 3] Record 2 (numbered as pages 8-95) is a record entitled "Auto Reform in Alberta". That record is subtitled "An Analysis by KPMG" and is dated October 8, 2003. Each page of the record has written on it "DRAFT Confidential for discussion purposes only." Record 2 is the KPMG actuarial study to which the Applicant refers and which the Public Body calls the "Draft Report". The Public Body refused to disclose Record 2 to the Applicant, on the ground that section 24(1) of the Act ("advice") applied.

[para 4] Record 1 (numbered as pages 1-7) consists of records containing information about the total cost of Record 2 and the breakdown of the cost. The Public Body decided that pages 1, 2, 5 and 6 were responsive to the Applicant's access request, and disclosed pages 2 and 5 in their entirety to the Applicant. Pages 2 and 5 contained the total cost of Record 2. The Public Body withheld the breakdown of the cost by severing pages 1 and 6 under section 17 of the Act (personal information), and disclosed the remainder of those pages to the Applicant. The Public Body decided that pages 3, 4 and 7 were not responsive to the Applicant's access request because those pages did not refer to the total cost of Record 2. The Public Body did not disclose pages 3, 4 and 7 to the Applicant.

[para 5] The Applicant asked my Office to review the Public Body's decision. Mediation did not resolve the matters, which proceeded to an oral inquiry that included KPMG as an affected party. I subsequently requested further written submissions on the applicability of section 32 of the Act (disclosure in the public interest). The Applicant raised the section 32 issue for the first time in the inquiry.

II. RECORDS AT ISSUE

[para 6] The records at issue are Record 1 and Record 2, as described above.

III. ISSUES

[para 7] The Notice of Inquiry sets out the following issues:

- Did the Public Body properly decide that certain records were not responsive to the Applicant's access request?
- Does section 16 of the Act (business interests) apply to the records/information?
- Does section 17 of the Act (personal information) apply to the records/information?
- Did the Public Body properly apply section 24 of the Act ("advice") to the records/information?

[para 8] In the Applicant's written submission, the Applicant raised section 32 of the Act (disclosure in the public interest) for the first time. I have added section 32 as an issue for the inquiry, as follows:

- Does section 32 of the Act require the Public Body to disclose information in the public interest?

[para 9] In this Order, I intend to consider the responsiveness issue first, followed by section 24, section 17, section 16 and section 32.

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body properly decide that certain records were not responsive to the Applicant's access request?

[para 10] The Applicant requested access to the total cost of Record 2. The Public Body provided affidavit evidence from its FOIP Coordinator and FOIP Access Advisor concerning their interpretations of "responsiveness" of records.

[para 11] The Affidavit of the FOIP Coordinator states that he interpreted "records related to the total cost of the study" to mean any records reporting the total cost of the study either contained in Record 2 or, if not available there, any records that could be used by the Applicant to determine the cost of Record 2. The FOIP Access Advisor's affidavit detailed evidence of the three-stage process she went through to determine responsiveness. Certain records were excluded as they did not contain dollar amounts and would not further an understanding as to the cost or the content of Record 2 and cover letters supporting receipts.

[para 12] In Order 97-020 and subsequent Orders, "responsiveness" has been interpreted to mean anything that can reasonably be related to an applicant's access request. Order F2002-011 further determined that a broad, rather than a narrow view,

should be taken by a public body when determining what is responsive to an access request.

[para 13] Accordingly, for the purposes of this inquiry, I decided that I would treat all of Record 1 as responsive to the Applicant's access request, and not just those records that referred to the total cost. I informed the Public Body and KPMG of that decision during the oral inquiry and instructed them to present their submissions accordingly. The Public Body and KPMG did not object to my decision.

ISSUE B: Did the Public Body properly apply section 24 of the Act ("advice") to the records/information?

[para 14] In its written submission, the Public Body states that Record 2 resulted from a contract with KPMG to provide advice, analysis and recommendations to the Superintendent of Insurance and the Automobile Insurance Reform Implementation Team, on behalf of the Minister of Finance. Record 2 was required to address the costs of different scenarios involving potential changes to the existing compulsory automobile insurance product and to develop a benchmark system for a universal premium structure. At the time the Applicant made the access request, and at the time the head of the Public Body considered the application of the Act, Record 2 was in draft form.

[para 15] Record 2 contains an actuarial analysis. The Public Body asserts that the Automobile Insurance Reform Implementation Team and the Minister of Finance used that analysis to understand the cost impact of possible policy options being considered before recommending changes that would be approved by Cabinet. The options examined by KPMG were pending policy options as of October 2003. Record 2 is marked "DRAFT Confidential for discussion purposes only" on each page. The Public Body also asserted that the limited factual information in Record 2 was so interwoven with the analysis, advice and recommendations that severing would not provide any meaningful information to the Applicant.

[para 16] The Public Body argued that the following three provisions of section 24(1) applied to Record 2:

- section 24(1)(a) (advice, proposals, recommendations, analyses or policy options)
- section 24(1)(b) (consultations and deliberations)
- section 24(1)(g) (proposed plans, policies or projects of a public body, that could reasonably be expected to result in disclosure of a pending policy or budgetary decision)

[para 17] Section 24(1)(a) of the Act 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*

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,…

[para 18] Order F2002-028 also dealt with a draft report that was withheld under section 24(1)(a). That Order refers to the three criteria for "advice" (which includes advice, proposals, recommendations, analyses and policy options). The "advice" must be:

- sought or expected, or be part of the responsibility of a person by virtue of that person's position;
- directed toward taking an action; and
- made to someone who can take or implement the action.

[para 19] I have reviewed Record 2 and considered the written submissions and oral evidence provided during the inquiry. Record 2 was sought by the Superintendent of Insurance to assist the Automobile Insurance Reform Implementation Team, on behalf of the Minister of Finance. Record 2 was sought as part of the responsibility of the Superintendent of Insurance, on behalf of the Minister of Finance. The actuarial analysis contained in Record 2 is an analysis of cost scenarios involving potential changes to the existing compulsory automobile insurance product. Record 2 can also be characterized as a proposal that was requested to assist in the development of a benchmark system for a universal premium structure. It was ultimately directed to the Minister of Finance who could take or implement action on this issue. Therefore, I find that Record 2 meets the criteria for section 24(1)(a) of the Act.

[para 20] The minimal factual information contained in Record 2 is inextricably interwoven with the analysis or proposal information. I do not see how the analysis or proposal information could be severed from the minimal factual information to disclose any meaningful information to the Applicant.

[para 21] As to the exercise of discretion to refuse disclosure, the Public Body stated that the head considered the harm that would be caused by releasing an incomplete draft report. I am satisfied that the head of the Public Body properly exercised her discretion in refusing to disclose Record 2 under section 24(1)(a).

[para 22] The Applicant had provided evidence in the form of an excerpt from *Hansard* that indicated that the head of the Public Body intended to release a final report on the issue. It subsequently came to my attention that a KPMG report was added or released on the Alberta Finance website on January 19, 2005. The KPMG report was entitled "Technical background reports prepared by KPMG for Alberta Finance - Costing Analysis of 2004 Auto Insurance Reform." My Office requested and received confirmation from the FOIP Coordinator for the Public Body that this two-volume report on the website is the final version of Record 2 at issue in this inquiry. The final report is dated December 13, 2004 and has "Final Report" written on it.

[para 23] Finally, the Applicant says that the Portfolio Officer, whom I authorized under section 68 of the Act to investigate and try to settle the matters that were the subject of the Applicant's request for review, determined that the Public Body inappropriately severed portions of the records under sections 17 and 24 of the Act. The Applicant asserts that the Public Body should have to comply with the Portfolio Officer's determination and release the inappropriately severed portions of the records. I disagree.

[para 24] Under section 69 of the Act, if a matter is not settled under section 68, I must conduct an inquiry to decide all issues of fact and law. An inquiry is a chance for the parties to come to me for a "fresh" decision that I have the power to make under section 69 when mediation has failed. The parties have the opportunity to present "fresh" evidence and arguments to me or to rebut or support the evidence and arguments that they may have already put forward to the Portfolio Officer in mediation.

[para 25] Consequently, in the oral inquiry, I told the parties that I would not take the mediation into consideration and would not take into consideration or adopt the findings of the Portfolio Officer. Instead, I would make a "fresh" decision as section 69 empowers me to do.

[para 26] By way of postscript, my Office has since added a paragraph to the Notice of Inquiry, which says that records generated in the mediation and investigation processes of my Office should not be put before me in an inquiry and, if put before me, I will not consider them.

[para 27] In summary, I find that Record 2 meets the criteria for section 24(1)(a), and the head of Public Body properly exercised her discretion in withholding Record 2. Therefore, I find that the Public Body properly applied section 24(1)(a) of the Act to Record 2.

[para 28] As a result of this finding, I do not find it necessary to decide whether the Public Body also properly applied section 24(1)(b) and section 24(1)(g) to Record 2.

ISSUE C: Does section 17 of the Act (personal information) apply to the records/information?

[para 29] I will consider only Record 1 under section 17 of the Act. Only pages 1, 3, 4, 6 and 7 of Record 1 are at issue, as the Public Body disclosed the entirety of pages 2 and 5 of Record 1 to the Applicant.

[para 30] As a result of my instructions in the oral inquiry to treat all of Record 1 as being responsive to the Applicant's access request, the Public Body said it was refusing to disclose all the personal information contained in Record 1. The Public Body had previously treated pages 3, 4 and 7 as being non-responsive to the Applicant's access request, and severed personal information from only pages 1 and 6 of Record 1.

[para 31] Section 17 is a mandatory ("must") exception, which requires that a public body refuse to disclose "personal information" if disclosure would be an unreasonable invasion of a third party's personal privacy.

[para 32] "Personal information" is defined in section 1(n) of the Act as "recorded information about an identifiable individual". Section 1(n) also provides a non-exhaustive list of information that is "personal information".

[para 33] The Public Body severed what is says is "personal information" from pages 1 and 6 of Record 1, as follows: the names of KPMG's employees; the hourly rate for each employee; the number of hours each employee worked; the number of hours each employee worked on specific aspects of the project; the total amount billed for each employee; and the total amount billed for each employee on specific aspects of the project. Other personal information that the Public Body says it is now withholding from pages 3, 4 and 7 of Record 1 is much the same as the personal information the Public Body has already severed from pages 1 and 6. KPMG agreed to disclose only the titles of individuals at KPMG who performed the services.

[para 34] KPMG and the Public Body submitted that the individual's experience, and to some degree their competence in the industry and their level in the company, could be discerned from this information.

[para 35] Both the Public Body and KPMG identified the information as being the kind of personal information defined in section 1(n)(vii) of the Act (individual's financial or employment history). KPMG in argument states that the income of KPMG employees could be derived from a fairly simple calculation using the information; however, no evidence was provided regarding how this could be done.

[para 36] In Order F2004-014, I found that the hourly rate, monthly and total hours, and total contract cost of instructors who contracted with a public body was "personal information", since it was recorded information about identifiable individuals.

[para 37] The personal information in this case is similar to the information that I found to be "personal information" in Order F2004-014. I find that the information in Record 1 is "personal information" because it is recorded information about identifiable individuals. Some of the personal information falls specifically within the list of personal information in section 1(n), such as an individual's name (section 1(n)(i)) and an individual's financial or employment history (section 1(n)(vii)).

[para 38] For personal information to be withheld under section 17, disclosure must be an unreasonable invasion of a third party's personal privacy, as provided by section 17(1).

[para 39] KPMG argues that its employees are not "third parties" for the purposes of section 17. KPMG also argues that individual employee information is not "third party" information as its employees' personal information is "so entwined with the information

of KPMG, it cannot be reasonably separated". KPMG says that the information is its "financial and costing information".

[para 40] KPMG also points to the private sector privacy legislation, Alberta's *Personal Information Protection Act* ("PIPA"), in terms of dealing with disclosure of employee information, which KPMG says is limited to administer the employment relationship. KPMG asserts that this should influence the interpretation of section 17 of the FOIP Act concerning this information. KPMG asserts it would be a serious privacy invasion of KPMG employees who are not directly paid by public funds to have this information released. Further, the employees have not consented to this disclosure.

[para 41] Section 1(r) of the Act defines "third party" to mean a person, a group of persons or an organization other than an applicant or a public body. Consequently, I find that the employees of KPMG are third parties for the purposes of the Act. KPMG is arguing on behalf of its employees in this inquiry.

[para 42] Furthermore, the Act, and not PIPA, applies to Record 1 held by the Public Body. The Act, and not PIPA, allows anyone to make an access request for another individual's (a third party's) personal information. What has to be determined under section 17 of the Act is whether disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy.

[para 43] The first consideration is whether any provision of section 17(2) of the Act applies in this case. Section 17(2) contains those provisions for which the Legislature has seen fit to decide that disclosure of certain personal information is not an unreasonable invasion of a third party's personal privacy.

[para 44] Upon reviewing the provisions of section 17(2), section 17(2)(f) is applicable. Section 17(2)(f) reads:

> *17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> …
>
> *(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,…*

[para 45] In Order F2004-014, I held that the hourly rate, monthly and total hours, and total contract cost were "financial and other details of a contract to supply goods or services to a public body" under section 17(2)(f). Further, I commented that the policy implicit in section 17(2)(f) is that the section was included to provide transparency for expenditures of public funds for purchase of services. In my view, the financial accountability for public bodies, as mandated by section 17(2)(f), requires disclosure of who is supplying the services, what services the person is supplying, and how much that person is being paid for supplying the services.

[para 46] KPMG entered into a contract with the Public Body to supply services, consisting of preparing Record 2. The personal information pertains to individuals who are employed by KPMG and who prepared Record 2.

[para 47] Disclosure of personal information in this case consists of the names of KPMG's employees who are supplying the contracted service; the hourly rate for each employee; the number of hours each employee spent preparing Record 2; the number of hours each employee worked on specific aspects of Record 2; the total amount billed for each employee; and the total amount billed for each employee on specific aspects of Record 2. I find that disclosure of that personal information would reveal financial and other details of KPMG's contract to supply services to the Public Body, as provided by section 17(2)(f). Consequently, disclosure of the personal information of KPMG's employees is not an unreasonable invasion of their personal privacy.

[para 48] Therefore, I find that section 17 of the Act does not apply to Record 1. The Public Body, KPMG and its employees cannot rely on section 17 to refuse disclosure of the personal information contained in Record 1.

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

[para 49] On the face of Record 1, the Public Body had applied only section 17 of the Act to withhold information. However, in its written submission, the Public Body said that section 16 of the Act would also apply to that information. Furthermore, the evidence is that when the Public Body was considering Record 1, it wrote to KPMG and received KPMG's response that section 16 applied to Record 1.

[para 50] At the inquiry, KPMG argued that section 16 applied to Record 1. KPMG says that Record 1 contains its financial and costing information.

[para 51] Section 16 is a mandatory ("must") provision of the Act that requires a public body to withhold information if the provision applies. Therefore, in the oral part of the inquiry, I told the parties that if I found that section 17 did not apply to the information the Public Body withheld under section 17 in Record 1, I would give the parties a fuller opportunity to provide evidence and arguments about the applicability of section 16 to Record 1. My decision to allow that fuller opportunity also resulted from my earlier decision to treat all of Record 1 as responsive to the Applicant's access request, and not just what the Public Body originally determined to be responsive.

[para 52] Because I have found that section 17 does not apply to Record 1, I intend to convene a written inquiry to decide whether section 16 applies to Record 1. I will be requesting that further written submissions on section 16 be provided before I make a determination of this issue. After I receive and consider those written submissions, I will issue a further order on whether section 16 applies to what KPMG says is its financial and costing information.

[para 53] As to Record 2, in the Public Body's written *in camera* submission, the Public Body said that it was also arguable that section 16 of the Act applied to Record 2, but the Public Body had not consulted with KPMG or other third parties because it had withheld Record 2 in its entirety under section 24(1).

[para 54] Since I have found that the Public Body properly applied section 24(1)(a) of the Act to Record 2, I do not find it necessary to consider whether section 16 of the Act also applies to Record 2. It is also not necessary to ask for representations from insurers whose information the Public Body says is contained in Record 2, or to consider whether information related to insurers is excluded from the Act by virtue of the *Insurance Act* and the paramountcy provision contained in section 5 of the Act.

ISSUE E: Does section 32 of the Act require the Public Body to disclose information in the public interest?

[para 55] The relevant provision of section 32 of the Act reads:

> *32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*
>
> …
>
> *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*

[para 56] Section 32(1)(b) of the Act requires the head of a public body to disclose information if disclosure is clearly in the public interest. The Applicant submitted that, since Record 1 had been funded by taxpayers, taxpayers should be able to see Record 1 because it deals with an important issue that could shed light on the government's move to a new system of automobile insurance.

[para 57] Order 96-011 established that an applicant has the burden of proof to show that a public body is required to disclose information under section 32. Due to section 32 overriding the Act, section 32 is interpreted narrowly and the burden of proof is difficult to meet. An applicant must show that the information concerns matters of compelling public interest and that there are "emergency-like" circumstances compelling disclosure. An applicant must show that a matter is "clearly in the public interest" as opposed to a matter that may be of interest to the public: see Orders 96-011, 2000-005 and 2000-031. The Applicant's burden is particularly difficult in this case, since the Public Body released the final version of Record 1 to the public and released the total cost of Record 1.

[para 58] I have reviewed the argument of the Applicant and find it does not meet the burden of proof required under section 32(1)(b) to release either Record 1 or

Record 2. I find that section 32 of the Act does not require the Public Body to disclose either Record 1 or Record 2 in the public interest.

V. ORDER

[para 59] I make the following Order under section 72 of the Act.

[para 60] I find that the entirety of Record 1 is responsive to the Applicant's access request.

[para 61] The Public Body properly applied section 24(1)(a) of the Act to Record 2. I uphold the Public Body's decision to refuse to give the Applicant access to Record 2.

[para 62] Section 17 of the Act does not apply to Record 1.

[para 63] However, the Public Body and KPMG have argued that section 16 of the Act applies to Record 1. In the oral inquiry, I told the parties that if I decided that section 17 of the Act did not apply to Record 1, I would convene a written inquiry to decide whether section 16 of the Act applied. I will consider the applicability of section 16 in a further Order.

[para 64] I find that section 32 of the Act does not require the Public Body to disclose either Record 1 or Record 2 in the public interest.

Frank Work, Q.C.
Information and Privacy Commissioner