

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2005-015

December 07, 2005

ALBERTA AUTOMOBILE INSURANCE BOARD

Review Number 2895

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Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to the Alberta Automobile Insurance Board (the “Public Body”) for records, between specified dates, relating to the Board’s considerations and decisions regarding applications for rate changes by insurance companies. The Applicant authorized the Public Body to “de-identify” the company names and particulars.

The Public Body provided access to 1386 (out of 1479) pages of responsive records, from which it had removed all insurance company names, and other information that would, in the Public Body’s view, potentially identify the companies. It also withheld some records in their entirety. The Applicant asked for a review of the decision.

The Adjudicator decided that all the records in the inquiry are “insurer information” under the *Insurance Act*. As the provisions in the *Insurance Act* with respect to “insurer information” prevail over the *Freedom of Information and Protection of Privacy Act*, and as all the issues related to “insurer information”, he held he did not have jurisdiction to decide any of the issues in the inquiry.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 5, 16, 24, 31, 65(2), 72; *Insurance Act* R.S.A. 2000, c I-3, ss. 791(1), 816, 816(1)(a), 816(1)(b)(i), 816(1)(b)(iii), 816(2), 816(8).

I. BACKGROUND

[para 1] On May 22, 2003, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (“the *FOIP Act*”) to the Alberta Automobile Insurance Board (“AAIB”, “the Public Body”)¹ for records (applications for rate changes and supporting documentation) submitted to the Board by insurance corporations operating within the province of Alberta between January 1, 1997 and May 15, 2003, as well as for documents pertaining to approval or rejection of the applications.

[para 2] This request was subsequently altered to cover “all records relating to Board considerations and decisions regarding insurance company applications ..., not the company applications themselves”. The request was also narrowed to a shorter time-frame, about which there is some dispute (it was either November 15, 2002 to May 15, 2003, or May 15, 2002 to May 15, 2003). The Applicant also authorized the Public Body to “de-identify” the company names and particulars, in order to eliminate the need to notify third parties, thereby shortening the response time for the request.

[para 3] The Public Body provided access to 1386 out of 1479 pages of responsive records. All insurance company names, and other information that would, in the Public Body’s view, potentially identify the companies, was removed as unresponsive in light of the modification of the request to permit anonymization. Records relating to two companies were withheld on the basis that they could not be sufficiently anonymized. In the alternative, the Public body relied on sections 16 and 24 to sever or withhold the records.

[para 4] The Applicant was not satisfied with the response and submitted a request for review to the Information and Privacy Commissioner on December 9, 2003. Mediation was authorized but was not successful, and the matter was scheduled for an inquiry.

[para 5] A number of affected parties (insurance companies and one other company) were identified for the purposes of the inquiry. Many of these affected parties provided submissions.

II. RECORDS AT ISSUE

[para 6] The records are the severed and withheld portions of the documents identified as responsive by the Public Body, dated between November 15, 2002 and May 15, 2003 (1484 pages). They include information that identifies companies who made rate change applications, and the “considerations and decisions” of the Public Body relating to these applications. The records include information of particular companies, as well as numerical benchmarks and averages, calculated by the Public Body based on composite data, or obtained from other sources, and commentary on the applications by

¹ This body no longer exists. The provisions of the *Insurance Act* that established the Board were repealed on October 1, 2004. Subsequently, the request was dealt with by officials of the Minister of Finance.

internal experts, that was considered or relied on by the Public Body in making its decisions about the applications. The records also include such benchmarks and averages that were interfiled with other records but which were not actually considered by the Public Body in making its decisions.

III. ISSUES

[para 7] The issues as stated in the Notice of Inquiry were:

- A. Did the Public Body properly remove information and records as being non-responsive to the Applicant's request?
- B. Does section 16 of the Act (business interests) apply to the records/information?
- C. Did the Public body properly apply section 24 of the Act (advice) to the records/information?

[para 8] Many of the affected parties who provided submissions raised an additional issue that challenges my jurisdiction with respect to most of the records in this matter. Both the Applicant and the Public Body addressed this issue in their rebuttal submissions. I will therefore address this issue, and, given that it is a jurisdictional question, will deal with it first. This issue is:

Does section 816(8) of the *Insurance Act* apply to the records/information, with the result that the adjudicator has no jurisdiction in this matter?

[para 9] I will number this issue as Issue A, and renumber the foregoing issues as Issues B, C and D.

[para 10] Some of the affected parties in this inquiry argued that some of the documents already released by the Public Body should not have been disclosed. They asked for a finding that the disclosure that was already made was in breach either of section 816 of the *Insurance Act* or of the *FOIP Act*, or both. This question is not an issue in this inquiry, but I will comment on it.

IV. DISCUSSION OF THE ISSUES

Issue A: Does section 816(8) of the *Insurance Act* apply to the records/information, with the result that the adjudicator has no jurisdiction in this matter?

[para 11] Many of the affected parties who provided submissions argued that section 816 of the *Insurance Act*, which speaks to disclosure of "insurer information", covers the records at issue. This section provides that "insurer information" is not to be

disclosed except in accordance with section 816, and further provides that the *Freedom of Information and Protection of Privacy Act* does not apply to such information.

[para 12] The relevant parts of *Insurance Act*² section 816 are as follows:

816(1) In this section,

(a) "insurer information" means information that the Minister or the Minister's officials obtain or create for the purpose of administering or enforcing this Act and the regulations and that relates to the business or affairs of an insurer, a reciprocal insurance exchange or a dissolved insurer or to an application for incorporation of a provincial company;

(b) "Minister's officials" means

(i) any person acting under the Minister's direction or authority for the purposes of the administration or enforcement of this Act and the regulations,

(ii) the Superintendent and Deputy Superintendent of Insurance, and

(iii) any person who exercises a power, duty or function delegated under this Act or the regulations.

(2) Insurer information is confidential and neither the Minister, nor the Minister's officials, may disclose or provide insurer information to any person except in accordance with this section. ...

(8) Despite the Freedom of Information and Protection of Privacy Act, that Act does not apply to insurer information.

[para 13] The relevant part of section 5 of the *FOIP Act* provides:

5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

(a) another Act, or

(b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

² The *Insurance Act* that was in effect at the time of the access request and Public Body response, has been significantly amended since. However, section 816 remains unchanged. In the remainder of this discussion references to the *Insurance Act* will be to the earlier version, R.S.A. 2000, c. I-3.

[para 14] The affected parties argue that the combined effect of section 816(8) of the *Insurance Act* and section 5 of the *FOIP Act* is that I have no jurisdiction with respect to information of insurers in this matter because the latter Act does not apply. The Public Body did not raise the jurisdictional question in its initial submission, in its rebuttal submission it adopted most of the arguments of one of the affected parties on this point.

[para 15] The Applicant's rebuttal response includes the following points: that the information at issue is not "created by the Minister's officials" but is based on information already provided by insurers; that 'privilege' in the information is lost when a company applies to a public body 'for a benefit that is detrimental to the public' [this presumably refers to a rate increase]; and that the result would be that all information submitted by companies to various government bodies would be protected even in the face of legislation requiring it to be released to the public.

[para 16] For the reasons that follow, I accept that the information that was withheld by the Public Body is "insurer information" within the terms of the *Insurance Act*, and that the terms of section 816 of that act prevail over the access provisions in the *FOIP Act*. Thus I agree that I do not have jurisdiction over this information.

Do the records consist of "insurer information"?

[para 17] To decide whether section 816 comes into play in the way the affected parties contend, I must first determine if the information in the records is "insurer information". "Insurer information" means information that relates to the business or affairs of an insurer and that the Minister or the Minister's officials obtain or create for the purpose of administering or enforcing the *Insurance Act* and the regulations.

[para 18] I am satisfied that all the information at issue falls within this definition. In my view the definition covers both information that reveals or could reveal the information of particular insurers, and information that does not do this, but is information about the insurance industry that was or could be used by the Public Body in the rate-approval aspect of its duty to administer the Act. Insofar as this information is or can be considered or relied on to determine particular rate-change applications, it is information that "relates to the business or affairs" of particular insurers. Such information also "relates to the business or affairs" of particular insurers insofar as it is a compilation of data of particular insurers.

[para 19] My conclusion that the latter, 'non-identifying', category of information is "insurer information" is based not only on the fact that the language of the definition is broad enough to cover it. As well, I believe that the Legislature, in enacting section 816 of the *Insurance Act* and making it paramount over the *Freedom of Information and Protection of Privacy Act*, intended to create a comprehensive scheme for dealing with the confidentiality of information, that was consonant with the overall purpose of the Act of regulating and facilitating the province's insurance industry. It would not make sense to have some categories of information created or provided for the purpose of regulating

the industry governed by the *Insurance Act*, and other categories, created or provided for the same purpose, governed by the *FOIP Act*.

[para 20] With respect to the Applicant's arguments, described above, I note that section 816 refers both to information created by the Minister's officials and information obtained by them. As to the point that the argument extends to protecting information submitted to other governmental bodies, I note first that section 816(4)(h) permits disclosure to any prescribed person for any prescribed purpose. Second, if there were a conflict between section 816 and a provision of some other act, the normal rules of statutory interpretation would apply to determine which of the provisions prevailed.

[para 21] All the information at issue in this inquiry that either identified or could identify particular insurers, or that was or could be relied on or considered in deciding particular applications for rate changes, is thus "insurer information" within the meaning of section 816 of the *Insurance Act*, and is outside my jurisdiction.

Is the AAIB a "Minister's official" within the terms of the Insurance Act?

[para 22] I must also decide whether the Alberta Automobile Insurance Board was acting as an official of the Minister within the terms of section 816(1)(b)(iii) of the Act.

[para 23] In my view this body fell within the terms of that definition, in that it was exercising a power, duty, or function delegated under the *Insurance Act*, to review and approve rate change applications. I read the word "delegated" in this context as equivalent to "granted by the Legislature".

[para 24] I am aware that the word "delegated" in the context of the section is susceptible of a narrower meaning – under which it refers only to delegations by the Minister pursuant to his specific authority to delegate his powers under other provisions of the *Insurance Act* (for example, section 791(1)³).

[para 25] However, I reject this narrower interpretation, for the following reasons. First, "delegated" is a word that is commonly used in both court decisions and by academic writers to mean 'granted' or 'conferred' by the Legislature; the recipient of a statutory power is the 'delegate' of the Legislature.⁴ Second, the narrower interpretation would make section 816(1)(b)(iii) redundant by reference to section 816(1)(b)(i). The latter section embraces persons acting under authority specifically delegated by the Minister. Third, the other parts of the Act that deal with delegation refer specifically to the Minister as the one who delegates, whereas section 816(1)(b)(iii) does not specify this. This difference in usage suggests that, although used in the same statute, the term in the different contexts need not be given the same meaning. Finally, this interpretation seems most sensible as a matter of policy. There appears to be no reason to treat information relating to the business of insurers differently when it was obtained or

³ This is a reference to the former *Insurance Act*, R.S.A. 2000, c. I-3.

⁴ There are numerous such references in texts and articles on administrative law. See, for example, Mullan, D.J., *Administrative Law*, (2001), Chapter 15, "C. Delegation".

created by other Ministerial officials, or the Superintendent of Insurance, than when it was obtained or created by the AAIB.

[para 26] As the conditions of section 816 (1)(a) are met, I conclude the information of particular insurance companies that is contained in the records is “insurer information” within the terms of the *Insurance Act*.

How does the FOIP Act apply to “insurer information”?

[para 27] Section 5 of the *FOIP Act* governs the matter of conflicts or inconsistencies between the *FOIP Act* and other statutes. It provides that the *FOIP Act* prevails unless the other statute expressly provides that it prevails despite the *FOIP Act*.

[para 28] I must first decide whether there is a conflict or inconsistency between the *Insurance Act* and the *FOIP Act* such as triggers section 5 of the *FOIP Act*.

[para 29] Section 816(2) of the *Insurance Act* contains an express prohibition against the disclosure of “insurer information” to any person other than as provided in the section. The type of disclosure of this information requested in the Applicant’s request is not a disclosure permitted by the section.

Does this provision conflict with the FOIP Act, within the terms of section 5 of the FOIP Act?

[para 30] The *FOIP Act* creates rules according to which information is to be released or withheld on an access request. The *FOIP Act* covers all information held by Public Bodies other than that specifically excepted.

[para 31] Business information of companies such as insurer information is not excepted, so is covered by the *FOIP Act*. Section 16 creates rules specifically for business information, according to which such information is either to be withheld or released depending on the application of particular criteria, for example, whether disclosure would harm a company’s business interests. It is possible that in some circumstances the *FOIP Act* would require disclosure of insurer business information on an access request.

[para 32] With respect to information about the insurance industry that is not the information of a specific insurer, this is also not excepted from, so is covered by, the *FOIP Act*. The *FOIP Act* has many rules which might govern access to such information held by a Public Body, depending on the circumstances - for example, the rules in section 24. It is possible that in some circumstances the *FOIP Act* would require or permit disclosure of information about the insurance industry on an access request.

[para 33] There is, therefore, an inconsistency or conflict between the *FOIP Act* and section 816 of the *Insurance Act*. The *Insurance Act* prohibits the disclosure of “insurer information” to anyone other than in accordance with section 816, whereas the *FOIP Act* provides for either withholding or release depending on the application of the relevant

factors. There could well be circumstances in which the *Insurance Act* prohibited release of information as “insurer information”, but the *FOIP Act* required its disclosure because none of the exceptions to access in the Act were met (or permitted the Public Body to disclose on a discretionary basis even though an exception was met).

[para 34] Section 5 of the *FOIP Act* says that in such circumstances of inconsistency or conflict, the *FOIP Act* is to prevail, unless another Act (or a regulation under the *FOIP Act*) expressly provides that the other Act or regulation, or a provision of it, prevails despite the *FOIP Act*.

[para 35] Section 816(8) of the *Insurance Act* says that despite the *FOIP Act*, “that Act does not apply to insurer information”. In my view this constitutes an express provision that the *Insurance Act* prevails despite the *FOIP Act*.

[para 36] In the result, section 816 (2) of the *Insurance Act* prevails over those provisions in the *FOIP Act* that would in some circumstances require or permit disclosure of information that is “insurer information” under the *Insurance Act*. Since the *Insurance Act* contains the governing provision, I have no jurisdiction over any information that is “insurer information” under the *Insurance Act*. As all of the records in this inquiry are “insurer information”, I do not have jurisdiction over any of them.

Issues B, C and D

[para 37] As I have decided that all the records are “insurer information” under the *Insurance Act*, and as all the remaining issues in this inquiry (Issues B, C and D) relate to “insurer information”, I do not have jurisdiction to decide any of these issues.

[para 38] There is one additional matter on which I will comment. Some of the affected parties in this inquiry argued that some of the documents already released by the Public Body should not have been disclosed.

[para 39] The information contained in the records at issue is “insurer information.” As I have determined earlier in this order, the information is not subject to the *Freedom of Information and Protection of Privacy Act*. I am not authorized to make any finding in relation to an allegation that the information was released by the Public Body in breach of the *Insurance Act*.

V. ORDER

[para 40] I make this Order under section 72 of the Act.

[para 41] I find that I do not have jurisdiction to deal with the records at issue in this inquiry.

Dave Bell
Adjudicator