ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2007-011

February 5, 2008

UNIVERSITY OF ALBERTA

Case File Number 3575

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Summary: An Applicant made a request to the University of Alberta (the "Public Body") for a copy of an agreement, entered into by the University, the Students' Union, and Coca Cola Bottling Ltd., for establishing the latter as the sole cold beverage provider to the University. The Public Body agreed to permit the Applicant and individual students to view the entire agreement in its offices, but refused to provide a copy to the Applicant.

The Adjudicator held that the Public Body had failed to meet its statutory obligation to provide a copy of the records to the Applicant, and ordered it to do so.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 12(1), 13, 13(2), 13(4), 16, 25, 32, 71, 72(1), 72(2), 72(2)(a), 72(3), 72(3)(a).

Authorities Cited: AB: Orders 2000-029, F2005-030; **BC:** Order 01-20.

I. BACKGROUND

[para 1] On September 13, 2005, a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") was made by the then-Editor of "The Gateway" student newspaper, on the letterhead of the Gateway Student Journalism Society (the "Society"). The position of the Editor is held only temporarily, and the request has been carried forward although that Editor is no longer in office. The Society operates the

newspaper. In their submissions, both the Applicant and the Public Body refer to the Applicant as "the Gateway Student Journalism Society". Thus I will treat the Society as "the Applicant" in this case.

[para 2] The request was made to the University of Alberta (the "Public Body") for a copy of an agreement entered into by the University, the Students' Union (one of the "Affected Parties"), and Coca Cola Bottling Ltd. (another "Affected Party"), for establishing the latter as the sole cold beverage provider to the University.

[para 3] The University consulted with the Affected Parties. Following this, it provided a large part of the Agreement to the Applicant, but severed some portions. The Applicant requested a review of this decision. A mediator was appointed by this Office. As indicated in the Public Body's submission, the result of the mediation was that the Public Body agreed to permit the Applicant and individual students to view the entire Agreement, in its Information and Privacy Office, but refused to provide a copy of the Agreement to the Applicant. (This arrangement was agreed to by the second Affected Party).

[para 4] The Applicant was not satisfied with this outcome. The matter was accordingly set down for a written inquiry. Both the Applicant and Public Body provided initial and rebuttal submissions. The first Affected Party provided an initial submission only, and the second one did not provide submissions.

II. RECORDS AT ISSUE

[para 5] The records at issue consist of the entire Agreement. A particular mode of access to this document (viewing in a specified location) has been granted, but it remains in issue in the sense that the Applicant is asserting a right to a mode of access which the Public Body has denied – that a copy of the entire Agreement be provided to the Applicant.

III. ISSUES

[para 6] The issues stated in the Notice of Inquiry are as follow:

Issue A: Did the Public Body comply with section 13(2) of the Act (how access will be given)?

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

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

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body comply with section 13(2) of the Act (how access will be given)?

[para 7] Section 13 provides as follows:

> *13(1) If an applicant is told under section 12(1) that access will be granted, the head of the public body must comply with this section.*
> *(2) If the applicant has asked for a copy of a record and the record can reasonably be reproduced,*
> *(a) a copy of the record or part of it must be provided with the response, or*
> *(b) the applicant must be given reasons for any delay in providing the copy.*
> *(3) If there will be a delay in providing the copy under subsection (2), the applicant must be told where, when and how the copy will be provided.*
> *(4) If the applicant has asked to examine a record or for a copy of a record that cannot reasonably be reproduced, the applicant*
> *(a) must be permitted to examine the record or part of it, or*
> *(b) must be given access in accordance with the regulations.*

[para 8] Section 12(1), to which section 13 refers, provides:

> *12(1) In a response under section 11, the applicant must be told*
> *(a) whether access to the record or part of it is granted or refused,*
> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*
> *(c) if access to the record or to part of it is refused,*
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
> *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

[para 9] According to a letter provided by the Public Body to the mediator in this case[1], the Public Body is now willing to permit the Applicant[2] to view the entire document as well as to take notes.[3] The Public Body also states in its initial submission (para 24) that

[1] The Public Body included this letter in its submission, at Tab 15.
[2] I take the reference to "the Applicant" in this letter to refer to any representative of the Society.
[3] The correspondence from the Public Body to the mediator indicates note-taking was to be permitted. However, the Applicant's affidavit indicates that on the occasion on which its representative took the opportunity to view the Agreement (in the Students' Union offices), he was told that taking notes was not

the Affected Party has indicated to the Applicant that the contract is available for viewing by anyone with a valid student ID card.[4]

[para 10] However, the Public Body is refusing to provide a copy of the Agreement to the Applicant.

[para 11] The Public Body indicates in its submission (para 29) that it has chosen this course in view of the second Affected Party's position that it [the second Affected Party] will not invoke the confidentiality and indemnification provisions of the Agreement as long as the Public Body discloses it only in the restricted manner approved by the Affected Party. This suggests that the Public Body anticipates that if it were to provide the requested copy, a response by the Affected Party that would be adverse to the Public Body would flow. It also says the Affected Party's position conforms with section 13(4) of the Act.[5]

[para 12] I understand the Public Body's intention in taking this approach is to try to resolve the matter in a way that accommodates both the Applicant and the second Affected Party, which is commendable.

[para 13] However, the Applicant is not satisfied and continues to assert its rights under the statute. The language of the statute is mandatory. The Public Body is required to say whether it will provide access or not, and if the answer is 'yes', it is obligated to provide a copy.

[para 14] I accept the submissions of the Applicant that there is no question of the application of section 13(4) (reproduction cannot reasonably be done). A copy of the Agreement has been provided to me, so it is clear that it is reproducible.

[para 15] The Public Body acknowledges that it is not in strict compliance with the mandatory requirements of the Act. It asks me to hold that its non-compliance is a mere technical breach, and that what it refers to as its "substantial compliance" with the Act is sufficient. It says it is strengthened in this view by the fact the Applicant has not taken the opportunity to view the record.[6]

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allowed. This may have been because this person chose to view a copy of the Agreement that was located in the Students' Union offices. It seems likely that had he attended to view the Agreement at the University Information and Privacy Advisor's office, the Applicant's representative would have been allowed to take notes. In any case, as will be seen, the conclusion in this decision does not depend on whether note taking was permissible.

[4] The Public Body cites its Tab 16 in support of this statement, which is the January 11, 2007 issue of "The Gateway", and which reports that at a meeting of December 5, "Coke announced that the old contract is now publicly viewable to anyone with a valid student ID".

[5] This section provides that where a copy has been requested but the record cannot reasonably be reproduced, the applicant must be given an opportunity to examine it.

[6] As noted above, the Applicant contests this factual point; it provided an affidavit from a person who states that he viewed the record, as the Applicant's representative, at the Students' Union offices. As also noted earlier, the apparent disparity in the evidence on this point may be explained by the fact there were multiple copies of the Agreement, held in the offices of the different signatories.

[para 16] I am unable to make a finding that there has been substantial compliance, or that the breach is merely technical. Both the Applicant and the Affected Party - each from their opposite position – appear to regard whether or not a copy is provided as significant. This is, indeed, the very reason for this inquiry. It is not clear to me why the Affected Party draws the line at the point between viewing and note taking on the one hand and providing a copy on the other, especially as a considerable part of the Agreement has already been provided. I am also unclear about the significance of having a complete copy from the Applicant's point of view. However, the very fact that each of them is tenaciously holding their ground makes it impossible for me to conclude that this is a minor and merely technical difference.

[para 17] Even if I did accept the Public Body's contention, I do not have jurisdiction to make the ruling – a declaration of substantial compliance – for which the Public Body asks. The Act limits what findings I may make and what I can order a public body to do relative to particular findings. The orders that are available to me are listed under sections 72(2) and 72(3).

[para 18] The Act does not specify in terms whether an order relating to a section 13 question is to issue under section 72(2) or 72(3).

[para 19] In this inquiry, the Public Body is refusing to give access in the prescribed manner. On one view, this inquiry *relates to* a public body's decision to refuse to give access, within the terms of section 72(2), and I am to decide, under section 72(2)(a), whether the Public Body is authorized to refuse a particular mode of access. If that is right, then in the event I find the Public Body is not so authorized, I am to issue my order under this same subsection. The only order available under section 72(2)(a) is that access is to be provided. Thus, if my order relative to a section 13 question is to issue under section 72(2)(a), the only order I am permitted to make is that access be given in the prescribed manner – in this case, that a copy be provided.

[para 20] Arguably, because section 13 concerns *how* access will be given, an order relative to section 13 can be seen as falling under section 72(3)(a) rather than 72(2)(a). Again, the available order is specified. There is no ability under section 72(3)(a) for the Commissioner to waive the completion of the performance of a duty that has been complied with partially or to some degree. The Commissioner is permitted only to require that the duty imposed by the Act be performed. The duty clearly set out in section 13(2) is to provide a copy of the records.

[para 21] There is another reason why I would not excuse the Public Body in this case from providing a copy of the Agreement. The action on the part of the Affected Party that the Public Body is seeking to avoid is that the Affected Party will rely on the confidentiality provisions of the Agreement. The Public Body appears to believe that disclosure in the form of providing a copy would result (or would have resulted at the time) in consequences adverse to it - the invocation of the "confidentiality and indemnification provisions of the Agreement against the University".

[para 22] A recent order of this Office – F2005-030 – involved an agreement, between a public body and an affected party, which contained clauses relative to confidentiality. The parties to the agreement contended that these clauses made the agreement confidential and made disclosure an event of default. They relied on this contention to argue for withholding the agreement under section 25 (economic harm to a public body). The Commissioner addressed this argument by quoting from an earlier Order (2000-029) in which the former Commissioner had made the following comment:

> I have stated that the Act supersedes an agreement regarding the withholding of information, except where the Act itself permits that withholding: See Order 2000-003. Public policy mandates that parties cannot contract out of the Freedom of Information and Protection of Privacy Act.[7]

The Commissioner continued (at para 93) as follows:

> A Public Body cannot enter into a contract that it will not meet any obligations it has under the FOIP legislation, and then argue, *on the basis of this contract*, that section 25 is met because violating the contract will cause it economic harm.

[para 23] In contrast to the decision just quoted, the Public Body here is not trying to withhold the Agreement on the basis that disclosure would cause it economic harm. However, it is offering the potential of harm from violating confidentiality provisions in an agreement as an excuse for not meeting its precise obligations under section 13. As contracting out of its duties under the FOIP Act is contrary to public policy, I do not accept this justification.

[para 24] Thus I find that the Public Body failed to meet its duty under section 13 to provide a copy of the Agreement to the Applicant.

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

[para 25] Section 16 sets out the circumstances under which a Public Body is to withhold information, on a mandatory basis, where certain conditions are met.

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[7] Similar comments have been made by the British Columbia Information and Privacy Commissioner. In Order 01-20, he stated (at para 80):

> I also agree with applicant that CCB's wish to keep information confidential does not establish risk of harm to UBC under s. 17(1). [This provision relates to harm to the financial or economic interests of a public body.] A third party that contracts with a public body may prefer that the terms of the contract not be publicly disclosed. Yet even if the third party obtains a contractual commitment of confidentiality, as CCB did here, that commitment cannot dictate whether the contract, or part of it, is accessible under the Act. Nor is the application of s. 17 dictated by a third party contractor maintaining that it prefers or insists on confidentiality as a condition of its doing business with a public body. As I found in Order 00-47, [2000] B.C.I.P.C.D. No. 51, any attempt to contract out of the Act is void as against public policy.

[para 26] The Public Body's submission on this point briefly reviews the history of its decision making under section 16, including that it initially provided the Agreement to the Applicant with some portions severed. Its two concluding paragraphs under the heading of section 16 are as follows:

> 38. Subsequently, in response to Request for Review #3575 and further review of the Agreement following the processes laid out in Sections 30 and 31 of FOIPPA, it was decided to provide full disclosure on a viewing basis.
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> 39. In view of British Columbia decisions which discuss whether similar circumstances meet that province's harm test and in view of the fact that Coca Cola has authorized full disclosure, the University *takes no position on section 16 of FOIPPA* in this inquiry. [emphasis added]

[para 27] Under section 71 of the Act, the Public Body has the burden of proving that an Applicant has no right of access to a record. As the Public Body takes no position on this question, I cannot find that the provision applies.

[para 28] I note that the Public Body also asserts that the section 16 issue does not need to be decided, because it has already provided access in the form of an opportunity to view the records, so the issue is moot.

[para 29] I do not accept this contention. Whether section 13 has been met is an issue in this inquiry. In order that there be a duty by the Public Body to provide access to records in the prescribed manner under section 13, there must be a duty to provide access. Section 6 of the Act imposes a duty to provide access unless an exception applies. Thus whether the exception in section 16 applies determines whether the duty to provide access in a particular manner applies. The Public Body has not tried to establish, and it has not established, that section 16 applies. Furthermore, the second Affected Party, which could have provided a submission as to the application of this exception, did not do so. As the burden is on the Public Body relative to this question, I find the section does not apply. It is on that basis that I hold that the Public Body must provide access, and must do so in the prescribed manner.

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

[para 30] As I have held that there is no exception to disclosure applicable to the records at issue in this case, it is not necessary for me to decide whether section 32 applies so as to override an exception.

V. ORDER

[para 31] I make this Order under section 72 of the Act.

[para 32] I find that section 16 does not apply in this case.

[para 33] I order the Public Body to provide a copy of the Agreement to the Applicant.

[para 34] 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 therewith.

[para 35] I note that in parts of the Public Body's submissions there is reference to another application for the same information (which it refers to as the "first request"), which it says it processed in the same manner. In para 47 of its initial submission, it appears to ask that this order be applied to the other applicant as well. I am not aware who this applicant is. Possibly, the same considerations apply, but I do not know whether they do, and cannot make an order relative to this other application.

Christina Gauk, Ph.D.
Director of Adjudication