ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-013

November 30, 2010

ALBERTA HEALTH AND WELLNESS

Case File Number F4942

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Summary: During the time when Albertans were required to pay Alberta Health Care premiums, Alberta employers were required to collected and submit Alberta Health Care premiums for their employees who were residents of Alberta and therefore covered by Alberta Health Care. This meant that employers would submit a form to Alberta Health and Wellness ("the Public Body") stating when an employee was commencing coverage under the employer's plan and when coverage was terminated.

The Applicant requested, "…Group Commencement and Termination notices for [a third party company]…The time period is from January 1, 2004 to March 31, 2005…" from the Public Body pursuant to the *Freedom of Information and Protection of Privacy Act* ("the Act"). He made it clear in his request that he was aware that he was not entitled to any third party personal information.

After contacting the third party company, the Public Body responded to the Applicant's access request, withholding all of the responsive records pursuant to sections 16(1) (disclosure harmful to business interests of a third party) and 17(1) (disclosure harmful to a third party) of the Act.

The Adjudicator found that section 16(1) of the Act did not apply to the responsive records because the records did not, as the Public Body had argued, reveal commercial or labour relations information, nor was there sufficient evidence brought forward to

establish any real expectation of harm to the third party company should the information be disclosed.

The Adjudicator also found that the Public Body had improperly applied section 17 of the Act, as the top portions of the Group Commencement and Termination notices could be severed, and the remaining information would not disclose information about an identifiable individual. As the Applicant had been clear throughout his submissions that the information that he was seeking was only on the bottom of the Group Commencement and Termination notices, the Adjudicator ordered the Public Body to disclose the information on the bottom portions of the forms, as requested by the Applicant and confirmed in his submissions.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 6(2), 16, 17, 30, and 71, 72.

Authorities Cited: AB: Orders 2000-003, F2005-011, F2008-018, and F2009-028.

Cases Cited: *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515.

I. BACKGROUND

[para 1] On March 12, 2009, the Applicant requested "…general information on [a third party company's] group coverage…" from Alberta Health and Wellness ("Public Body"). The Applicant made it clear in his initial request that he understood that third party personal information could not be disclosed. The Applicant later refined his request for records as follows:

> I would like to request the Group Commencement and Termination notices for [a third party company]…The time period is from January 1, 2004 to March 31, 2005.

[para 2] During the time period specified by the Applicant, Alberta employers were required to collected and submit Alberta Health Care premiums for their employees who were residents of Alberta and therefore covered by Alberta Health Care. This meant, that employers would submit a form to the Public Body stating when an employee was commencing coverage under the employer's plan, and when coverage was terminated.

[para 3] On April 7, 2009, the Public Body wrote to the Applicant and informed him that because the records responsive to his access request may affect the interests of third parties, it had provided the third party company a notice under section 30 of the Act, and was awaiting its reply.

[para 4] On May 1, 2009, the Public Body wrote to the Applicant in response to his access request, denying access to the responsive records in reliance on sections 16(1) and 17(1) of the Act.

[para 5] On May 11, 2009, the Applicant wrote to the Office of the Information and Privacy Commissioner ("this office") and requested a review of the Public Body's response. The Commissioner authorized mediation to attempt to resolve the issues between the parties, but that was unsuccessful, and the Applicant requested an inquiry.

[para 6] A third party was invited by this office to participate in the inquiry, but it did not respond to the invitation. Both the Applicant and the Public Body provided initial and rebuttal submissions.

[para 7] A portion of the Public Body's initial submissions were provided *in camera*. Its reason for providing the submissions *in camera* was that in order to argue the propriety of using section 16(1) of the Act in responding to the Applicant's request, it needed to provide a copy of the third party company's response to the Public Body's section 30 notice. The third party company's response letter forms part of the responsive records at issue in another inquiry currently before this office. Therefore, the Public Body did not want to disclose the record or the contents thereof which were being withheld from the Applicant following an access request made subsequent to the one at issue in this inquiry. I found this to be an acceptable reason, and allowed the *in camera* submissions.

[para 8] The Applicant contacted me by telephone to object to the *in camera* submissions. I explained to him that his attempting to have a discussion with me without the other party present was inappropriate, and ended the conversation.

[para 9] Despite the Applicant's objections, I allowed the Public Body's *in camera* submissions. I later proposed that this inquiry be held in abeyance pending the outcome of the inquiry relating to the third party company's response to the section 30 notice. Both the Public Body and the Applicant objected to holding this inquiry in abeyance pending the outcome of the related inquiry. Among other arguments made by the Applicant, he saw no benefit to himself from holding this inquiry in abeyance. Therefore, I decided to proceed with this inquiry as scheduled.

II. INFORMATION AT ISSUE

[para 10] The Applicant has made it clear in his submissions that the only information to which he is seeking access is contained in the bottom portions of "Employee Group Commencement and Termination" notices ("the forms") submitted by the third party company to the Public Body between January 1, 2004 to March 31, 2005.

III. ISSUES

[para 11] The Notice of Inquiry dated June 8, 2010 sets out the issues for this inquiry as follows:

Issue A:

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

Issue B:

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

[para 12] In addition to these issues, the Applicant raises issues relating to the adequacy of the Public Body's response to his request and, specifically, its failure to disclose the objections of the third party company. As I explained above, the Applicant made a subsequent access request to the Public Body for information in its possession relating to the processing of his access request. This access request is now the subject of another inquiry before this office that is being heard by another Adjudicator. Therefore, I will restrict my findings to the two issues set out in the Notice of Inquiry.

IV. DISCUSSION OF ISSUES

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

[para 13] Section 16(1) of the Act states:

> *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 significantly 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.

[para 14] As I mentioned above, on receiving the Applicant's access request, the Public Body contacted the third party company to solicit its opinion with respect to possible disclosure of the requested information. Taking the information provided by the third party company into account, the Public Body argues that section 16 of the Act applies to the information requested.

[para 15] In order for section 16 of the Act to be properly applied, the following three part test must be satisfied:

> Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?
>
> Part 2: Was the information supplied, explicitly or implicitly, in confidence?
>
> Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?
>
> (Order F2005-011)

[para 16] Pursuant to section 71 of the Act, the Public Body has the burden of proof to establish that section 16 of the Act applies. However, the third party company also has a burden to provide evidence that establishes that there is a reasonable expectation of harm within the parameters of section 16(1)(c) of the Act if the information is disclosed (*Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 and Order F2008-018 at para 90).

[para 17] I will deal with each portion of the test below.

Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

[para 18] The Public Body argues that disclosure of the responsive records would reveal commercial and labour relations information of the third party company. It relied on the definition of "commercial information" adopted in orders of this office to include, "…information about how a third party organizes its work…"

[para 19] In Order F2009-028, after reviewing this office's prior orders and an order of the Ontario Privacy Commissioner, the Adjudicator stated:

> In my view, Orders 96-013 and 96-018 of this office, and Order MO-2496 of the Office of the Information and Privacy Commissioner of Ontario, are essentially stating the same thing. "Commercial information" is information belonging to a third party about its buying, selling or exchange of merchandise or services.

[para 20] I have reviewed the responsive records in their entirety. As I will discuss in more detail below, the forms contain information about individual employees, including their names, addresses, health care numbers, number of dependents and, generally, the reasons the third party company terminated the employee from its group coverage. According to the Applicant, this was not information that he requested. He requested the dates that coverage began for the employees, the date that coverage was terminated, and the date that the employees left their employment – essentially, the bottom half of the forms. In his submissions, the Applicant explained that he was not interested in the name of the administrator who signed the form, the number of people to be covered by the plan or why coverage was terminated (I noted, however, given how the form is structured – that the date of termination appears in the same row as the reason for termination – that if the date of termination on the bottom of the form were disclosed, the general reason for termination would be revealed).

[para 21] Based on the nature of the information requested, the argument of the Public Body, and the *in camera* submissions of the Public Body, I fail to see how the information requested by the Applicant would reveal commercial information.

[para 22] This is would certainly be that case if I were to adopt the definition found in Order F2009-028, as none of the information on the forms is about the buying, selling or exchange of merchandise or services. Furthermore, neither is the information on the forms commercial information using the definition on which the Public Body relies. The information requested is not information about how the third party company organizes its work. There is no information on the forms themselves, much less in the part of the forms requested, that would indicate if the employee was terminated by the third party company or if the employee had resigned and any reasons therefore (which might possibly indicate how the third party company organizes its work). Furthermore, I am not convinced that even this information would reveal how the third party company organizes its work.

[para 23] Turning to "labour relations", I note that the Applicant seems to believe that this information will reveal how the third party company treats its employees – that it terminates coverage months prior to terminating the employment relationship. However, I do not believe that the information requested actually speaks to any general practice of the third party company: there could be any number of explanations as to why the third party company terminated coverage in a given case.

[para 24] The Public Body adopted a definition of "labour relations" found in Order 2000-003, which states:

> The term "labour relations" has been defined by a number of other sources:
>
> • Sack and Poskanzer, *Labour Law Terms, A Dictionary of Canadian Labour Law*, defines labour relations as "employer/employee relations including especially matters connected with collective bargaining and associated activities".
>
> • Webster's Third New International Dictionary defines labour relations as "relations between management and labour, especially as involved in collective bargaining and maintenance of contract".
>
> • Arthur Mash, *Concise Encyclopedia of Industrial Relations*, defines labour relations within the context of industrial relations, as follows: "…relationships within and between workers, working groups and their organizations and managers, employers and their organization…'Labour relations' are sometimes abstracted from 'industrial relations' as describing organized or institutionalized relationships within the whole, though sometimes the two terms are used as if they were interchangeable..."
>
> Given these definitions, I agree that "labour relations" would include "collective relations", such as collective bargaining and related activities.
>
> However, I do not think that "labour relations" should be limited to "collective relations", as that would unduly limit the scope of labour relations. For the purposes of section 15(1), I favour a more comprehensive definition, such as that set out in the *Concise Encyclopedia of Industrial Relations*.
>
> (Order 2000-003 at paras 97-99)

[para 25] Even adopting the very broad definition of labour relations found in Order 2000-003, I do not believe that the information requested reveals information about labour relations. It does not reveal information about the relationships within and between workers and the third party company. The requested information will reveal when the third party company began group coverage for individual employees (but not why) and when coverage was terminated. It will also reveal, in a general way, why the employee's coverage was terminated. The reasons for termination listed on the form are as follows:

- left employment,
- deceased,

- left province to reside in another part of Canada,
- left country, or
- released from Armed Forces, RCMP.

[para 26] This information might tell something about the employee in question, but tells nothing about the relationship between the third party company and the employee. Thus, I find that information about labour relations would not be revealed by the disclosure of the requested information.

[para 27] However, if I am incorrect, I will examine the remaining two parts of the test in the context of the facts and evidence before me in this inquiry.

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

[para 28] The Public Body argues that the information in the responsive records was implicitly supplied by the third party company in confidence because the information, "…deals with personal employee information."

[para 29] As I will explain in more detail below, the responsive records do contain personal information of employees of the third party company. However, the Applicant specifically stated in his access request that he understood that he could not be given access to personal information of third parties. Therefore, the Public Body's argument regarding confidentiality as it relates to the parts of the records that are responsive to the Applicant's request are not relevant. Nevertheless, for the purposes of this discussion, I will accept that the information provided by the third party company to the Public Body was implicitly supplied in confidence.

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

[para 30] The Public Body argues that disclosure of the responsive records could, "…reasonably be expected to harm the competitive or negotiating position of the [third party company] and reveal labour relations information."

[para 31] It made no further argument in its open submissions. In its *in camera* submissions, the Public Body provides the objection letter from the third party company which gives a slightly more extensive explanation of the competitive or negotiating position that may be harmed; however, it gives no explanation as to how this position would be harmed by the disclosure of the information in the responsive records. I find that the third party company has not met its burden to provide evidence that there would be a reasonable expectation of harm resulting from disclosure of the responsive records. As well, I do not find the Public Body's submissions on the point compelling. Therefore, I find that part 3 of the test is not met.

[para 32] Based on the foregoing, I find that section 16 of the Act does not apply to the responsive records.

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

[para 33] The Public Body also cited section 17(1) of the Act as an applicable exception to disclosure of the responsive records.

[para 34] The Public Body argues that the responsive records contain personal information of third parties – employees of the third party company. Personal information is defined by section 1(n) of the Act as follows:

> *1(n) "personal information" means recorded information about an identifiable individual, including*
>
> > *(i) the individual's name, home or business address or home or business telephone number,*
> >
> > *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
> >
> > *(iii) the individual's age, sex, marital status or family status,*
> >
> > *(iv) an identifying number, symbol or other particular assigned to the individual,*
> >
> > *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
> >
> > *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
> >
> > *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
> >
> > *(viii) anyone else's opinions about the individual, and*
> >
> > *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 35] The Applicant argues that he did not request the top portions of the forms, and that he specifically did not request the personal information of any third parties. The Public Body argues that given the Applicant's request, the entire form was responsive. It

based its arguments on the applicability of section 17 of the Act having regard to the information contained in both the top and bottom halves of the forms.

[para 36] Taking the responsive records as a whole, they do contain personal information about third parties. Specifically, the records contain third party names, addresses, health care numbers, information about a third party's family status and employment history.

[para 37] However, section 6(2) of the Act states:

> *6(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

[para 38] Therefore, where it is possible for the Public Body to sever a third party's personal information from the records and still respond to the Applicant's request, it must do so.

[para 39] The Applicant has given the Public Body his view as to how the Public Body could sever the forms to avoid disclosing any third party personal information. He suggests severing the top portions of the forms, which contain third parties' names and addresses as well as other identifying numbers. The bottom portions of the forms contain the dates the third party company commenced group coverage for an employee, the date the employee was terminated from coverage, the date the employee stopped being eligible for coverage, the reason why the employee stopped being eligible for coverage, the number of people to be covered by the plan, the name and signature of the third party company's employee who filled out the forms, and the date the form was completed.

[para 40] The Public Body argues that even if the information is severed from the forms, third parties may still be identifiable. It is not entirely clear how this could be the case, but the Applicant points out that the third party company employs a significant number of employees and that the third party company released 220 employees in the first three months of 2009. Not all of these employees were residents of Alberta and subject to group coverage. Therefore, without the top portion of the form, the bottom portion does not contain enough information to be considered a third party's personal information.

[para 41] In his submissions, the Applicant was clear that he was not concerned with the number of people to be covered by the plan or the third party company's employee's name and signature, nor the reason the employee was terminated from coverage. As I explained above, given the way the form is set up, revealing the date the employee become ineligible for coverage necessarily reveals the reason he or she was terminated. However, if the top part of the form is severed, this information will not be tied to any particular individual, hence is not personal information.

[para 42] Similarly, although the bottom portion of the form reveals information about an employee's employment history and potentially an employee's family status, the information on the bottom of the form, divorced from the information on the top of the form, is not information about an identifiable person and is, therefore, not personal information. The only exception to this is where an employee's payroll number is noted on the bottom of the form, which is information about an identifiable individual. However, this information could also be severed.

[para 43] As the bottom portions of the forms do not contain information about identifiable individuals, I find that the Public Body improperly withheld them by reference to section 17 of the Act. I find that the Public Body should have released the information requested by the Applicant, which he clarified in his submissions to include the following:

- The date group coverage was commenced;
- The date group coverage was terminated;
- The termination date; and
- The date the form was filled out.

V. ORDER

[para 44] I make this Order under section 72 of the Act.

[para 45] I find that the Public Body improperly severed information from records responsive to the Applicant's request pursuant to sections 16 and 17 of the Act. I order the Public Body to release the information requested by the Applicant (as clarified in his submissions) in the manner described in paragraph 43 above.

[para 46] 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 with the Order.

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Keri H. Ridley
Adjudicator