

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2011-004**

May 25, 2011

**NATURAL RESOURCES CONSERVATION BOARD**

Case File Number F4764

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant requested a letter dated June 17, 2008 and the attachments thereto from the Natural Resources Conservation Board (“the Public Body”) pursuant to the *Freedom of Information and Protection of Privacy Act* (“the Act”). The Public Body responded to the Applicant, providing a severed copy of the letter and withholding the attachments pursuant to sections 16 and 17 of the Act.

The Adjudicator found that, with the exception of the last attachment to the letter, the Public Body had properly applied section 16(2) of the Act to the severed information.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 17, 35, and 72.

**Authorities Cited: AB:** Orders F2008-018, and F2010-020.

**I. BACKGROUND**

[para 1] The Applicant is in the process of contesting a decision made by the Natural Resources Conservation Board (“the Public Body”) which allowed his neighbour to operate a Confined Feeding Operation (“feedlot”).

[para 2] On October 15, 2008, the Applicant made an access request to the Public Body pursuant to the *Freedom of Information and Protection of Privacy Act* (“the Act”)

for all statements from his neighbour that the Public Body relied on to make its decision. According to the Public Body, the Applicant's request was later narrowed to a request for a letter (with attachments) dated June 17, 2008 ("the letter"), written by his neighbour, on behalf of the neighbour's ranch, Rocky Butte Ranches.

[para 3] On December 19, 2008, the Public Body responded, providing a copy of the letter, which had portions of it severed pursuant to sections 16 and 17 of the Act. The attachments to the letter were completely withheld. On January 9, 2009, the Applicant wrote to this office and requested a review of the Public Body's decision to sever information from the letter.

[para 4] The Commissioner authorized a portfolio officer to investigate and attempt to resolve the issues between the parties; however, this was not successful and the Applicant requested an inquiry into this matter. The sole issue for inquiry was whether the Public Body properly applied section 16 of the Act to the records at issue.

[para 5] By the time this matter was referred to inquiry, the Applicant and the Public Body were engaged in a judicial review of the Public Body's decision regarding the feedlot. A preliminary issue in this judicial review was whether the Applicant could be given access to an unsevered copy of the letter and attachments. As such, the parties requested that this inquiry be held in abeyance pending the outcome of the judicial review. Although the judicial review is ongoing, by way of a Consent Order signed by a Master of the Court of Queen's Bench, the Applicant was given access to an unsevered copy of the letter and attachments for restricted use as part of the judicial review.

[para 6] On January 13, 2010, I wrote to the parties and asked if they wished to proceed with this inquiry. The Public Body took no position and the Applicant wished to proceed immediately. Therefore, I decided to proceed with the inquiry.

[para 7] The information that was severed by the Public Body pursuant to section 16 of the Act was information relating to Rocky Butte Ranches Ltd. Rocky Butte Ranches Ltd. ("the Affected Party") made a request to me to become an Affected Party in the inquiry and I acceded to this request.

[para 8] The Applicant, Public Body, and Affected Party all provided initial submissions. I also received rebuttal submissions from the Applicant and Public Body.

## **II. RECORDS AT ISSUE**

[para 9] The record at issue is the letter of June 17, 2008 written by the Affected Party to the Public Body, and the attachments to that letter.

[para 10] Based on the submissions of the Public Body, I understand that, since the Applicant's complaint was initiated, the Public Body has disclosed, without restriction, the "delivery slips" (attachment E to the letter of June 17, 2008) and the name of the supplier on the delivery slips in the letter. Given this, this information is no longer at

issue and I will deal only with the remaining severed portions of the letter and attachments in this Order.

### **III. ISSUES**

[para 11] The Amended Notice of Inquiry, dated March 7, 2011, sets out the sole issue in this inquiry as follows:

#### **Issue A:**

#### **Does section 16 of the Act (disclosure harmful to the business interests of a third party) apply to the records/information?**

[para 12] In their initial submissions, the Public Body and the Affected Party both questioned why this was the sole issue in this inquiry when section 17 of the Act was also applied to all of the information that was severed.

[para 13] As the Adjudicator for this inquiry, I am not made privy to what occurs at mediation. I am aware that when the Applicant requested an inquiry, the portfolio officer confirmed that an inquiry would proceed with section 16 of the Act as the sole issue. In his submission regarding the abeyance issue, the Applicant mentioned only the application of section 16 of the Act. Later, when the issue arose as to whether I should allow the Affected Party and its principal to participate in this inquiry, the Applicant again confirmed that he understood the only issue in this inquiry to be the application of section 16 of the Act.

[para 14] On this basis, I concluded that the only issue that the Applicant was interested in pursuing was the Public Body's application of section 16 of the Act. As the Applicant was the party that requested this inquiry, he is in the best position to frame what issues he would like to have addressed, and he has indicated that his concern is only with the application of section 16 of the Act.

[para 15] As well, in his rebuttal submissions, the Applicant states:

There is no question in this Inquiry that, generally speaking, tax records and personal information of individuals is covered under Sections 16 and 17 of the FOIP Act. That is a given and is not the question at this Inquiry.

[para 16] I believe that this reveals why the Applicant did not believe that the Public Body's application of section 17 of the Act ought to be an issue in this inquiry. He seems to agree that section 16 and 17 of the Act both apply to the severed information that consists of tax records and personal information of individuals. Therefore, if I am interpreting the Applicant's argument correctly, if I find that the information consists of tax records or personal information of individuals, the Applicant concedes that section 16 and 17 of the Act apply.

[para 17] In any event, for the reasons that I will set out below, I do not think it is essential to examine the Public Body's use of section 17 of the Act.

[para 18] As well, in his initial submissions, the Applicant also raises issues, beyond the one stated in the Notice of Inquiry, which he would like addressed. The first is the alleged sharing of information about this inquiry by the Public Body with the Affected Party. As I have previously explained to the parties, this is an issue that is separate from this inquiry and I will not address it.

[para 19] The Applicant also asks that I add the following question as an issue:

Did the Public Body provide information, sent to them on February 25, 2008 (attachment N) by me, regarding the contents or the actual [individual's] February 9, 2008 letter, to the Third Party on or before the April 18, 2008?

[para 20] I believe that the "Third Party" the Applicant is referring to in this question is the Affected Party or its principal. I fail to see how this proposed issue relates to the application of the Act and, therefore, I will not add this question as an issue to this inquiry.

[para 21] However, given that the Applicant's submissions focus on issues other than the one stated in the Notice of Inquiry, I will first deal with the preliminary issue of the scope of this inquiry.

#### **IV. DISCUSSION OF ISSUES**

##### **Preliminary Issue – What is at issue in this inquiry?**

[para 22] The Applicant's submissions focus almost exclusively on whether the Public Body made the correct decision in allowing his neighbour to operate a feedlot. His main argument appears to be that the Public Body relied on false or incomplete information in coming to its decision to permit the operation of the feedlot.

[para 23] In the summary to the Applicant's initial submission, the Applicant stated:

At this Inquiry F4764 the [Public Body] bear[s] the Burden of Proof to answer the question

"Does section 16 of the Act apply to the records/information?"

In this submission I have reviewed the Public Record of fact and ask the [Public Body], in exercising their Burden of Proof, in answering the Inquiry question to consider these discrepancies:

The Third Party did not describe his Home Ranch cattle feeding operation as a ‘feedlot’ in 2003 and 2006 but does so, emphatically and numerous times, in a letter to Revenue Canada dated October 25, 1999.

Could the [Public Body] please explain these discrepancies as it prepares to answer the Inquiry question.

[para 24] This inquiry is not a review of the Public Body’s decision regarding the feedlot; it is a review of the Public Body’s decision to apply section 16 of the Act to withhold information from the Applicant. As I am sure the Applicant is aware, the proper forum for disputing the Public Body’s decision regarding the feedlot is a judicial review.

[para 25] Further, in his rebuttal submission, the Applicant made it clear that his concern is not with the application of sections 16 and 17 of the Act but with the authenticity of the records. In his rebuttal submissions, the Applicant stated:

My intent is to further the process started by the [Public Body’s inspector] creating reasonable doubt as to the authenticity of the records information and the [Public Body], at that time, requiring “crucial” independent verification of those records as authentic.

...

Now that the [Public Body has] raised this question of reasonable doubt regarding the records information, and with the [Public Body] protecting those documents under FOIP Legislation, the [Public Body] bear the burden of proof under FOIP that the records information are authentic and that is what the question at Inquiry is asking:

“Does Section 16 of the Act apply to the records information?”

FOIP legislation cannot be used to protect or legitimize unauthentic documents.

There is no question in this Inquiry that, generally speaking, tax records and personal information of individuals is covered under Section 16 and 17 of the FOIP Act. That is a given and is not the question at this Inquiry.

[para 26] As this passage is critical to what the Applicant believes to be at issue in this inquiry, I will address it.

[para 27] To begin, it is obvious that the Applicant believes that the authenticity of records or information is critical to whether the Act will apply to those records.

[para 28] The Affected Party stated its position on this question as follows, “[t]he question of authenticity or correctness of documents is wholly outside of the mandate of the [Act].”

[para 29] This statement is not entirely correct. Section 35 of the Act does place an obligation on a public body to make reasonable efforts to ensure that an individual's personal information is accurate when it uses that information to make a decision that directly affects the individual. However, this section is not applicable in this inquiry because the information sought is not the Applicant's personal information.

[para 30] As well, section 16(2) of the Act (which I will discuss in greater detail below) does state that information must have been collected on a tax return or for the purpose of determining tax liability or collecting a tax in order for it to be exempt from disclosure under section 16(2) of the Act. Therefore, a public body must show that the records fit these criteria in order to apply section 16(2) of the Act. Having read the Applicant's initial submissions, which included two letters from the portfolio officer who mediated this file, it may be that the Applicant is trying to argue that section 16(2) of the Act does not apply to the records because it could not be verified that the records at issue were sent to the Canada Revenue Agency ("CRA"). This could be considered an issue of authenticity over which I do have jurisdiction, as it a factual question that relates directly to whether section 16(2) of the Act applies.

[para 31] With respect to, the Applicant's comment, "FOIP legislation cannot be used to protect or legitimize unauthentic documents" the Act can be used to protect information from disclosure if it is subject to an exception, whether authentic or not. As to "legitimizing" documents, possibly the Applicant thinks that by applying the Act, the Public Body is attempting to confirm the authenticity of the record. Even if the Public Body had such an intention (which seems unlikely given my findings below), since applying an exception could not have such a consequence other than as explained in the preceding paragraph) I will not concern myself about this suggestion.

[para 32] In view of the foregoing, I will examine whether the information in the records at issue is correct or authentic only to the extent this is necessary to decide if it meets the criteria for section 16(2) of the Act.

**A: Does section 16 of the Act (disclosure harmful to the business interests of a third party) apply to the records/information?**

[para 33] Section 16 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.*

*(2) The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax.*

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

*(a) the third party consents to the disclosure,*

...

[para 34] The Public Body argues that section 16(1) and 16(2) of the Act apply to the severed information. As different factors apply for each, I will examine the application of sections 16(1) and 16(2) of the Act separately.

### **Section 16(1) of the Act:**

[para 35] All of the subsections of section 16(1)(a), (b), and (c) of the Act must be met in order to prove that the Public Body properly severed the information in accordance with section 16(1).

[para 36] The Public Body argues that the information severed was business information, with the exception of the last attachment to the letter. The Public Body agrees that this attachment is not business information and therefore does not satisfy the first criterion under section 16(1)(a) of the Act.

[para 37] I agree that all of the information that was severed would reveal commercial or financial information of the Affected Party; with the exception of the last attachment to the letter, which ought to be disclosed. While some of the information is from the Affected Party's principal's personal tax return, it nevertheless contains or reveals financial information of the Affected Party as a business.

[para 38] The next criterion is that the information must have been supplied in confidence. The Public Body submits that this criterion is met because the Affected Party's principal made it clear that the letter was being supplied to the Public Body on the "trust condition" that it remain confidential and not be disclosed by the Public Body. According to the Public Body, this "trust condition" was repeated by the Affected Party's principal when he responded to the Public Body's notice of the Applicant's request.

[para 39] Given this evidence, I agree with the Public Body that the information was supplied in confidence and that the second criterion has been met.

[para 40] The final criterion that must be met under section 16(1) of the Act is that the disclosure of the information could reasonably be expected to, "harm significantly the competitive position or interfere significantly with the negotiating position of the third party" or that the disclosure would, "result in undue financial loss or gain to any person or organization".

[para 41] The Public Body states that it did not make any specific finding regarding any harm or financial loss that the Affected Party could reasonably expect to suffer, but instead, relied on the fact that the Affected Party's principal must have believed one of these things to be true, based on his objection to disclosure.

[para 42] Indeed the Affected Party submits that:

[The Affected Party's principal] is a prominent and successful member of the Calgary and Alberta business and ranching community, with interests in oil and gas, cattle, a CFO, ski operations with Alberta and other business interests. His personal financial information as disclosed on his tax returns is of an intensely private and confidential nature, as it would be to most Canadians, especially those engaged in operating a business in a competitive industry. Disclosure of this information could affect competitive business activities and personal security.

[para 43] To be clear, the Affected Party in this inquiry is the business and not the principal of the business. The harm that the Affected Party cites is primarily harm to the principal or to his reputation personally, and not harm to the business. However, the Affected Party does say that disclosure could "affect competitive business activities", which possibly also refers to the activities of the business. As well, as noted above, the business information of the Affected Party is disclosed through the personal tax information of its principal.



[para 44] In any event, previous Orders from this office have made it clear that in order to establish “harm” under section 16 of the Act there must be more than a speculation of harm; rather, harm must be a probable result of the disclosure. The Adjudicator in Order F2008-018 stated (relying on prior Court decisions):

As happened in *Canada (Prime Minister)*, I have been presented with general arguments as to the harm that may result from disclosure, but without a description of the harm that would be probable as a result of the disclosure of each piece of information or the correlation between the harm and the disclosure of the information. Further, the harm to a third party’s competitive position that could reasonably result from disclosure under section 16(1)(c)(i) must be significant. ACS has not provided any explanation as to how disclosure of specific information would result in significant harm to Gatsometer’s or its own competitive position. From review of the records at issue, I do not find that the significant harm to Gatsometer’s or ACS’s competitive position projected by ACS is self-evident.

(Order F2008-018 at para 94)

[para 45] I am in a similar position as the Adjudicator in Order F2008-018. I agree that the personal information of the Affected Party’s principal may be of a private and confidential nature. However, neither the Public Body nor the Affected Party have shown how the disclosure of this information could reasonably be expected to affect the Affected Party’s competitive business activities or otherwise cause harm to the Affected Party as a business. Therefore, I find that section 16(1) of the Act does not apply to the records at issue.

#### **Application of Section 16(2) of the Act:**

[para 46] However, in my view, section 16(2) of the Act does apply to the severed information (with the exception of the last attachment to the letter).

[para 47] In his submissions, the Applicant expresses his concerns about the authenticity of the documents as tax documents. As I have noted, this is a relevant consideration to the applicability of section 16(2) of the Act to those records.

[para 48] However, the Affected Party has provided evidence, in the form of an affidavit sworn by the Affected Party’s principal, that the information severed from the letter was taken from tax returns, that the first attachment to the letter is an actual excerpt from the Affected Party’s principal’s tax return, and that the remaining attachments (with the exception of the last attachment) are documents that were submitted to the CRA by the Affected Party’s principal in response to requests by the CRA relating to an audit and other tax-related inquiries. As I have no reason to doubt the truthfulness of this evidence, I accept it.

[para 49] In order for section 16(2) of the Act to apply to the information, the Public Body must prove that the information was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax. The Affected Party submits that it

is not necessary that the Public Body have collected this information for any of these purposes, only that the information was originally prepared, and collected by the CRA, for these purposes. In support of this position, the Affected Party relies on Order F2010-020.

[para 50] The Adjudicator in Order F2010-020 examined the application of section 17(4)(e) of the Act, which states that it is an unreasonable invasion of an individual's personal privacy to disclose his or her personal information that was collected on a tax return or gathered for the purposes of collecting a tax. In that Order, the Adjudicator found that section 17(4)(e) of the Act applied to information taken from line 150 of a third party's tax return which was collected by the public body (who was not the CRA) for the purposes of determining a student's eligibility for financial support.

[para 51] Although Order F2010-020 deals with section 17 rather than section 16(2) of the Act, I believe that the interpretation of section 17(4)(e) of the Act is applicable to an interpretation of section 16(2) of the Act. Therefore, I agree with the Affected Party that in order to engage section 16(2) of the Act, the information need not be collected by the Public Body for tax purposes. It is enough that, when the information was first collected (in this instance, by the CRA), it was for the tax purposes listed in section 16(2) of the Act, although it was later collected and used by the Public Body for a different purpose.

[para 52] Given the evidence of the Affected Party, I find that the information that was severed by the Public Body pursuant to section 16(2) of the Act was information that was collected on a tax return (by the CRA) or for the purpose of determining tax liability.

[para 53] As I have found that the Public Body properly applied section 16(2) of the Act to all of the information with the exception of the last attachment (which does not contain personal information and which the Public Body agreed to disclose should section 16(1) of the Act not apply to it) I do not need make any findings regarding the applicability of section 17 of the Act to the severed information.

## **V. ORDER**

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

[para 55] I confirm that the Public Body properly severed information from the responsive records pursuant to section 16(2) of the Act, with the exception of the last attachment to the letter of June 17, 2008, which I order the Public Body to disclose to the Applicant.

[para 56] I 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