

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2017-86

December 15, 2017

UNIVERSITY OF CALGARY

Case File Number 001162

Office URL: www.oipc.ab.ca

Summary: The Faculty Association of the University of Calgary (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the University of Calgary (the Public Body). It stated:

We are requesting detailed information regarding the University of Calgary budget for the Faculty in Qatar, for fiscal years 2011-12, 2012-13, and 2013-14, including but not limited to all revenue, all expenditures, and the net profit / loss. In addition, we are requesting any forecasts regarding the budget of the Faculty in Qatar, with the same information noted above, for fiscal years 2014-2015, and 2015-2016.

The Public Body withheld all the responsive records under section 21(1)(b) (disclosure harmful to intergovernmental relations) on the basis that the information in the records was supplied in confidence by the Government of Qatar (Qatar).

The Adjudicator determined that section 21(1)(b) did not apply to the records withheld by the Public Body. She found that Qatar had not supplied the information in the records and that even if the information in the records could be said to have been supplied, that it was not supplied in confidence. She ordered the disclosure of the records.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 21; 72; *Post-Secondary Learning Act*, S.A. 2003, c. P-19.5

Authorities Cited: **AB:** Orders F2004-018, F2008-027, F2016-64

I. BACKGROUND

[para 1] On March 11, 2015, the Faculty Association of the University of Calgary (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the University of Calgary (the Public Body). It stated:

We are requesting detailed information regarding the University of Calgary budget for the Faculty in Qatar, for fiscal years 2011-12, 2012-13, and 2013-14, including but not limited to all revenue, all expenditures, and the net profit / loss. In addition, we are requesting any forecasts regarding the budget of the Faculty in Qatar, with the same information noted above, for fiscal years 2014-2015, and 2015-2016.

[para 2] The Public Body responded to the Applicant on May 20, 2015. It stated:

Unfortunately, access to all the information that you requested is refused under section 21(1)(b) and 21(3) of the Act “Disclosure harmful to intergovernmental relations” [...]

[para 3] The Applicant requested review of the Public Body’s application of section 21(1) and (3) to the records it had requested. The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. RECORDS AT ISSUE

[para 4] The Audited University of Calgary at Qatar financial statements for the years 2011-2012, 2012-2013, and 2013-2014 and the budget forecast for the University of Calgary at Qatar are at issue.

III. ISSUE

Issue A: Did the Public Body properly apply section 21(1)(b) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?

[para 5] The Public Body withheld all the records requested by the Applicant under section 21(1)(b) of the FOIP Act. Section 21(1)(b) applies to information that has been supplied in confidence by a foreign government. It states:

[para 6] Section 21 states:

21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:

- (i) *the Government of Canada or a province or territory of Canada,*
- (ii) *a local government body,*
- (iii) *an aboriginal organization that exercises government functions, including*
 - (A) *the council of a band as defined in the Indian Act (Canada), and*
 - (B) *an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,*
- (iv) *the government of a foreign state, or*
- (v) *an international organization of states,*

or

(b) *reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.*

(2) *The head of a public body may disclose information referred to in subsection (1)(a) only with the consent of the Minister in consultation with the Executive Council.*

(3) *The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.*

(4) *This section does not apply to information that has been in existence in a record for 15 years or more.*

[para 7] In Order F2004-018, the Commissioner stated that four criteria must be met before section 21(1)(b) applies:

There are four criteria under section 21(1)(b) (see Order 2001-037):

- a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;
- b) the information must be supplied explicitly or implicitly in confidence;
- c) the disclosure of the information must reasonably be expected to reveal the information; and
- d) the information must have been in existence in a record for less than 15 years.

[para 8] In Order F2008-027, I noted the following difficulties in applying the test adopted in Order F2004-018:

This test does not address whether the supplier of the information can be the Government of Alberta, or to whom the information is to be supplied; clause (b) on its own is ambiguous in this regard. The text of clause (b) does not conclusively indicate whether the supplier of the information is to be one of the entities listed in subclauses (i) to (v), or whether it can also be the Government of Alberta, which is named in clause (a). As a result, the following questions arise: What does clause (b) protect? Does this provision protect only intergovernmental or also intragovernmental information exchanges? Who must receive the information and who must supply it before clause (b) applies?

[para 9] In the foregoing case, I concluded:

[...] I find that the purpose of section 21 is to enable public bodies to withhold information harmful to the intergovernmental relations of the Government of Alberta with other governments and that clause (b) also serves this purpose. In my view, clause (b) presumes harm to the intergovernmental relations of the Government of Alberta if information supplied in confidence by an entity listed in clause (a) to a public body representing the Government of Alberta, is disclosed. I also find that the Government of Alberta, or an entity representing the Government of Alberta, cannot supply information for the purposes of clause (b) because it is not an entity listed in clause (a). In determining the purpose of section 21, I have considered standard drafting conventions, the heading, and the language and context of the provision.

[para 10] The question of who must receive the information and who must supply it before clause (b) can be said to apply to information is one that must be answered in this inquiry, as the Public Body has applied section 21(1)(b) to information generated under an agreement between it and the Government of Qatar (Qatar), while the Applicant argues section 21(1)(b) cannot apply to such information because the Public Body is not a representative of the Government of Alberta.

[para 11] The Public Body argues:

OIPC Order 2001-037 laid out four criteria to be met when applying section 21(1)(b) (formerly s.20(1)(b)):

- a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;
- b) the information must be supplied explicitly or implicitly in confidence;
- c) the disclosure of the information must reasonably be expected to reveal the information;
- d) the information must have been in existence in a record for less than 15 years.

The University submits that all four criteria are met as follows:

a) The University of Calgary and the State of Qatar are party to an agreement entitled the 2006 Comprehensive Agreement to Establish a Campus of the University of Calgary in Qatar (the "Agreement"). The Agreement, which is confidential, is the governing document for UCQ. The State of Qatar clearly qualifies as the government of a foreign state. The Agreement provides for various costs to be provided by the State of Qatar. Financial information with respect to capital and operating costs are provided by the State of Qatar to prepare the financial statements, and therefore, disclosing the financial statements and the forecast budget would reveal financial information originally supplied by the State of Qatar.

b) The Agreement states that all information created pursuant to the Agreement must be held “in the strictest of confidence”. This constitutes explicit confidence. Financial statements and projected budgets for UCQ are created pursuant to the expectations laid out in the Agreement. Furthermore, the financial information supplied by the State of Qatar under the auspices of the Agreement are, by extension, confidential.

c) The disclosure of the audited financial statements would reveal financial information supplied by the State of Qatar. Nor can the financial information in the statements be selectively redacted. If one were to selectively redact the financial data, the resulting redacted financial statements would present an inaccurate financial picture due to the inextricably interrelated nature of financial statements.

d) The financial statements and budget forecast cover the period 2011-2015, therefore the information has been in existence in a record for less than 15 years.

The University notes that the test for s.21(1)(b) is that the disclosure must reveal information supplied; there is no requirement to establish harm.

Although the current inquiry is focused on the application of section 21(1)(b), the University respectfully submits that the application of section 21(3) to the records is also justified. Section 21(3) the Act states:

(3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.

The University consulted with the State of Qatar, specifically one of the Qatari members of the Joint Oversight Board (as defined in the Agreement). The Qatari member indicated that the State of Qatar did not consent to disclosure of any of the financial records.

[...]

The University submits that it has met the test for the application of section 21(1)(b) of the Act to the UCQ financial statements and budget forecast. The financial information was supplied by the State of Qatar, a foreign government, under the auspices of the Agreement which specifically calls for any information created pursuant to the Agreement to be treated as confidential. The financial information supplied by Qatar underpins all the financial statements and the budget forecast. Therefore, to disclose the financial statements equates to disclosing the confidential financial information supplied by the State of Qatar.

[para 12] The Applicant counters:

Applying the above test here, the University cannot deny access to the information at issue based on s. 21(1)(b). To begin, the University is not the Government of Alberta or an agent of the Government of Alberta in establishing the educational program in Qatar. When negotiating the agreement with Qatar and when making budgetary decisions regarding the Qatar campus, the University was not acting as an agent of the Government of Alberta.

Even if s. 21(1)(b) did apply to the University, it could not rely on this section to refuse to disclose its own information, including information regarding its budget for the Faculty in Qatar.

Finally, to the extent that the access request encompasses information disclosed to the University of Calgary, the University can only refuse access to that information if it can

demonstrate that one of the listed bodies supplied the information with an objectively reasonable expectation of confidentiality.

[para 13] The Public Body asserts that the records at issue contain information supplied to it in confidence by Qatar. It also asserts that under an agreement signed with Qatar, capital and operating costs are provided by Qatar, and that the financial statements and forecast budgets therefore contain information supplied by Qatar. It also asserts that the agreement states that all information created pursuant to the Agreement must be held “in the strictest of confidence”. As the information in the financial statements and forecast is created under the terms of the agreement, the Public Body reasons that the information is confidential.

[para 14] The Applicant takes the position that the Public Body is applying section 21(1)(b) to information that Qatar submitted to it in its capacity as a university. It argues that the Public Body is not, for this reason, a representative of the Government of Alberta. It argues that section 21(1)(b) cannot apply to information submitted to an entity other than the Government of Alberta. Further, it takes the position that in any event, the Public Body has not established that the information in question was supplied in confidence.

[para 15] The Public Body argues in its reply submissions:

The University refutes the Applicant's claim that “the University is not the Government of Alberta or an agent of the Government of Alberta in establishing the educational program in Qatar”. The University is a local public body as defined in sections 1(d) and (j) of the *Freedom of Information and Protection of Privacy Act* (the Act). The University therefore qualifies as a public body to whom information was supplied by a foreign government for the purposes of section 21(1)(b).

In Order F2008-027 (see para 90 & 91), the Adjudicator found that:

The authority to establish a municipal police service also lies in the *Police Act*, and the powers and duties of a provincial police service are established by the legislation. Consequently, when a government, local government body or organizations listed in clause (a) of its agencies supplies information to it in order for it to perform its policing function, it can be argued that the Public Body receives the information on behalf of the Government of Alberta. As noted above, information (*sic*) only information supplied to a public body representing the Government of Alberta is protected by clause (b).

The situation of the University of Calgary is analogous to that of the municipal police service as described in F2008-027. In 1966, the University of Calgary was established by the province in the *Universities Act*. The *Universities Act* has been superseded by the *Post-Secondary Learning Act*, which in section 126(1) states that “the universities established or continued as universities under the *Universities Act* are continued, with the same name, as universities under this Act.”

There can be no doubt that the University can receive information on behalf of the Government of Alberta in the context of section 21(1).

The University refutes the reasoning presented in paragraphs 6, 7 & 12 of the Applicant's initial submission in this Inquiry. The University acknowledges that “that the Government of Alberta, or an entity representing the Government of Alberta, cannot supply information for the purposes

of clause (b) because it is not an entity listed in clause (a).” However, the financial information supplied by the State of Qatar forms the basis for the financial statements and budgetary forecasts. The original financial information supplied by the State cannot be separated from the financial statements and budgetary forecasts. To reveal any portion of the financial statements or budgetary forecasts would be to reveal the financial information originally supplied in confidence by the State of Qatar.

Analysis

[para 16] In order to determine whether the Public Body has appropriately applied section 21(1)(b) to withhold the records from the Applicant, I must consider whether the facts necessary to ground the application of this provision are present in this case.

[para 17] In Order F2008-027, I determined that section 21(1)(b) applies to information supplied in confidence to the Government of Alberta, or to public bodies representing the Government of Alberta. I said:

Clause (a) creates a dichotomy between the Government of Alberta and the entities listed in subclauses (i) – (v). This provision does not protect information harmful to the relations of a local government body with a foreign government, but protects only the Government of Alberta’s relations with either of these entities. Clause (a) is clearly unconcerned with the relations of the entities in subclauses (i) – (v) with one another; only with the Government of Alberta’s relations with them. Consequently, if clause (b) presumes harm to government relations, it is logical to assume that it presumes harm to the Government of Alberta’s relations, and not to the relations of a foreign government or a local government body.

I interpret the phrase *listed in clause (a) or its agencies* as modifying not only “an organization” but also the phrase “a government, local government body” in clause (b) as well. Otherwise, governmental relations with agencies of governments and local government bodies that are protected by clause (a) would be excluded from clause (b), without any obvious policy reason for this exclusion. It would be an absurd result for clause (a) to protect the relations between the Government of Alberta and an agency of the federal government, for example, and clause (b) fail to protect that same relationship from harm. In my view, the better reading is to consider the phrase “listed in clause (a) or its agencies” as applying to “government, local government body, or organization”. Consequently, I find that a government not listed in clause (a), unless acting as a representative of an entity listed in clause (a), cannot supply information for the purposes of clause (b).

I consider the legislature’s intention in using the word “*listed*” in clause (a),” as opposed to a more general word such as “referred to” or “mentioned” in clause (a),” is to imply that a specific list in clause (a) is being referred to. “Listed” is a more precise word than “mentioned” or “referred to” - a list is “a number of connected items written or printed, usually consecutively, to form a record”, (*Canadian Oxford Dictionary*) or “a series (of names, words, numbers, etc.) set forth in order” (*Webster’s*). Clause (a) contains a list: the items in subclauses (i) to (v) are “connected” in the sense that each of them has the same relation to the opening words in the clause. The Government of Alberta is not included in the list, but is part of the opening words preceding the list to which every item in the list bears the same relation.

Subclauses (i) – (v) create an exhaustive list of entities belonging to a single, identifiable class: those entities with whom the Government of Alberta’s relations are to be protected from harm. Consequently, the Government of Alberta is, by implication, not included in subclause (i), and, as it is not listed in clause (a), cannot be the supplier of confidential information in clause (b). I find that the Government of Alberta is not an entity listed in clause (a) for the purposes of clause (b). Even though Alberta is a province of Canada, context indicates that it is not included in

subclause (i). As noted above, clause (a) creates a dichotomy between the Government of Alberta and the entities listed in subclauses (i) – (v). The provinces referred to in subclause (i) are those with which the Government of Alberta has governmental relations.

Section 21 addresses harm to the intergovernmental relations of the Government of Alberta. It therefore follows that the information supplied in clause (b) must be supplied *to* a public body representing the Government of Alberta, before this provision applies. If information is supplied to any entity other than a representative of the Government of Alberta, it would be illogical to presume that harm would result to the intergovernmental relations of the Government of Alberta from disclosure of that information [...]

[para 18] My interpretation of section 21(1)(b) remains the same. Section 21(1)(b), like section 21(1)(a), is intended to protect intergovernmental relations of the Government of Alberta. It does so by requiring that information supplied in confidence to the Government of Alberta, or a public body representing the Government of Alberta, by an entity listed in clause (a), be exempt from disclosure until fifteen years have passed from the date the information was supplied, or the entity consents to disclosure under section 21(3).

[para 19] The first question to be asked, then, is whether the information at issue was supplied to the Government of Alberta (or a public body representing the Government of Alberta) by a government, local government body or an organization listed in clause (a) or its agencies. Once this question is addressed, consideration may be given to the additional three factors set out in Order F2004-018, which, as noted above, are the following:

- b) the information must be supplied explicitly or implicitly in confidence;
- c) the disclosure of the information must reasonably be expected to reveal the information; and
- d) the information must have been in existence in a record for less than 15 years.

Was the information at issue supplied to the Government of Alberta by an entity listed in clause (a)?

[para 20] The Public Body takes the position that the information to which it has applied section 21(1)(b) is information supplied to it, as a representative of the Government of Alberta, by Qatar. I find that this position is unsupported by the evidence before me, for the reasons that follow.

[para 21] The Public Body argues that it “can receive information on behalf of the Government of Alberta”. It cites the *Post-Secondary Learning Act*, SA 2003, c. P-19.5, which creates and governs universities in the Province of Alberta. I agree with the Public Body that it is a university and created by a provincial statute. However, I disagree that because it is created by a provincial statute that it represents the Government of Alberta in relation to the performance of its contract with Qatar. Rather, from my review of the contract between the Public Body and Qatar, which the Public Body provided for my review¹, I note that there is no indication in it that the Public Body intended to bind the

¹ I accepted the agreement between the Public Body and Qatar *in camera* as the Public Body takes the position that the agreement is confidential. While I am unable to identify any articles or clauses in the

Government of Alberta when it entered the agreement, or that either party to the contract understood that the Public Body was representing the Government of Alberta. Rather, the conclusion I draw from the agreement is that a representative of the Public Body signed the agreement intending to bind the Public Body to its terms.

[para 22] Based on the evidence before me, I find that the Public Body did not represent the Government of Alberta in the agreement it entered with Qatar. As a result, I find that any information supplied to the Public Body by Qatar under the agreement, if such were to exist, would not be supplied to the Public Body as the Government of Alberta or as a representative of the Government of Alberta. As a result, section 21(1)(b) would not apply.

[para 23] In the event I am wrong that the application of section 21(1)(b) is limited to information supplied to the Government of Alberta or to an entity representing it, I will address the Public Body's assertion that the information in the records at issue was supplied to it by Qatar.

[para 24] I accept that Qatar meets the definition of "the government of a foreign state" within the terms of section 21(1)(a)(iv) and is therefore a government listed in clause (a) within the terms of section 21(1)(b). However, from my review of the information in the records and the terms of the agreement, I am unable to identify any information at issue that could be said to have been supplied by Qatar to the Public Body.

[para 25] The records consist of three audited financial statements and a budget forecast. The audited financial statements are created under article 5.6 of the agreement. Under the agreement, neither side supplies audited financial statements to the other; instead, an independent auditor prepares them and provides them to both Qatar and the Public Body. The budget forecast is created under article 7.2 of the agreement, which requires the Public Body to prepare and submit a proposed budget to a board, the members of which are established by the Public Body and Qatar.

[para 26] The audited financial statements do not meet the terms of section 21(1)(b) as they are created by an auditor and provided to both the Public Body and Qatar. The information is not supplied to the Public Body by a foreign state, in this case, but by an auditor appointed by both the Public Body and Qatar.

[para 27] The budget forecast does not meet the terms of section 21(1)(b) as it is generated by the Public Body and provided to a board. Section 21(1)(b) does not apply to information supplied by a public body to a foreign state.

[para 28] I acknowledge that the Public Body asserts "financial information with respect to capital and operating costs are provided by the State of Qatar to prepare the financial statements, and therefore, disclosing the financial statements and the forecast

agreement that would require the agreement to be held in confidence by its signatories, I will not quote from the agreement, given that I agreed to accept it *in camera*. However, I will discuss the effect and meaning of relevant provisions in general terms.

budget would reveal financial information originally supplied by the State of Qatar” in its submissions. If the information prepared by an auditor or the Public Body reveals information that was supplied by Qatar, then section 21(1)(b) would apply, provided the information was supplied in confidence. However, I find that the Public Body’s assertion is not borne out by the agreement and there is no other evidence before me that grounds the assertion.

[para 29] The agreement indicates that Qatar will reimburse the Public Body for the costs the Public Body will incur under the agreement. Reimbursing costs that a public body has incurred is not the same thing as supplying information about those costs to the public body. Possibly, the Public Body means that the expenditures of Qatar under the agreement will be revealed if the audited financial statements and budget forecast are disclosed. While I accept that it is likely the case that such information would be revealed if the records are disclosed, such information cannot be said to have been “supplied” by Qatar.

[para 30] As noted in Order F2016-64, the word “supply” typically means “provide or furnish what is necessary.” For information to be *supplied* by a government, the government must provide or furnish necessary information. Assuming that the expenditures of Qatar would be revealed indirectly by the disclosure of the records at issue, it cannot be said that information about expenditures was *supplied* by Qatar, as any information revealed about its expenditures results from information generated by auditors and the Public Body. The records at issue do not contain any information that could be said to have been supplied by Qatar about its expenditures under the agreement.

Was the information in the audited financial statement and budget forecast supplied in confidence?

[para 31] If I am wrong in my conclusions as to whether Qatar supplied the information in the records and whether the Public Body could be the recipient of the information within the terms of section 21(1)(b), then it is necessary to consider whether it provided information to the Public Body in confidence.

[para 32] As noted above, the Public Body asserts:

The Agreement states that all information created pursuant to the Agreement must be held “in the strictest of confidence”. This constitutes explicit confidence. Financial statements and projected budgets for UCQ are created pursuant to the expectations laid out in the Agreement. Furthermore, the financial information supplied by the State of Qatar under the auspices of the Agreement are, by extension, confidential.

[para 33] The foregoing statement reflects a misreading of the agreement. Article 13.2 of the agreement, to which the Public Body drew my attention to ground its assertion regarding confidentiality, does not address all information generated under the agreement, as the Public Body contends. Rather, it addresses “confidential information”, which is a defined term in the agreement. “Confidential information” is defined under

Article 1 as a type of proprietary information². In other words, article 13.2 addresses the circumstances in which one party has custody of the proprietary information of the other. When a phrase is defined in a contract, it is understood that the parties intended the defined meaning to apply where the phrase is used in the contract.

[para 34] Article 13.2 is the only article in the agreement addressing confidentiality and it applies only to information meeting the definition of “confidential information” in article 1. I find that none of the information in the records at issue can be said to meet the definition of “confidential information” in the agreement. As a result, article 13.2 does not apply to the records at issue. As the Public Body relies on article 13.2 of the agreement for its position that all information generated under the agreement is confidential, and as I find that section 13.2 does not have this effect, it follows that I find that any information that could be said to have been supplied by Qatar (as noted above, I find that there is no information that could be said to have been supplied by Qatar) was not supplied in confidence.

[para 35] As I find that the records at issue do not contain or reveal information supplied by Qatar, it follows that I find that section 21(1)(b) does not apply to the information in the records.

Does section 21(3) apply in this case?

[para 36] Section 21(3), cited above, is limited in its application to the situation where section 21(1)(b) applies to records. It requires the head of a public body to first obtain the consent of a government that has supplied information subject to section 21(1)(b) to a public body prior to disclosing it. As section 21(1)(b) does not apply to the information in the records, section 21(3) has no application in this case. While I acknowledge that the Public Body takes the position that Qatar does not consent to the disclosure of its audited financial statements and budget forecast, Qatar’s consent, or the lack of it, is irrelevant in this case, as section 21(1)(b) does not apply.

IV. ORDER

[para 37] I make this Order under section 72 of the Act.

[para 38] I order the Public Body to disclose the records to which it applied section 21(1)(b) to the Applicant in their entirety.

[para 39] I order the Public Body to notify me within 50 days of receiving this order, that it has complied with it.

Teresa Cunningham
Adjudicator

² As I accepted the contract *in camera*, I cannot set out the terms of the definition.