

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 97-008

July 22, 1997

ALBERTA ENVIRONMENTAL PROTECTION

Review Number 1255

BACKGROUND:

[1.] On January 23, 1997, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Environmental Protection (the "Public Body") for access to the Public Body's response to a report and recommendations made to the Public Body by the Ombudsman. The Ombudsman had investigated the Public Body's approval of a particular timber company's application for Phase I of its mainline road.

[2.] The Public Body refused access and claimed that the withheld record was specifically excluded from the application of the Act under section 4(1)(c) of the Act. On February 3, 1997, the Applicant requested that this Office review the Public Body's decision. Mediation was not successful and an inquiry was scheduled for May 8, 1997.

[3.] Representations were made both in person and in writing by the Applicant and the Public Body. Although the Office of the Ombudsman participated at the inquiry as an observer, it was not a party to the inquiry.

RECORD AT ISSUE:

[4.] The Record is a two-page letter from the Deputy Minister of the Public Body to the Ombudsman, containing comments regarding the Ombudsman's

recommendations to the Public Body. It is important to note that the Record is not an original copy, but the Public Body's file copy.

ISSUE:

[5.] Does section 4(1)(c) exclude the Record from the application of the Act?

DISCUSSION:

[6.] Section 4(1)(c) is an exclusion from the Act and marks out the jurisdiction of the Act. The standard in applying that jurisdiction should be a standard of correctness. In other words, a record either is or is not subject to the Act; there is no discretion involved.

[7.] Section 4(1)(c) reads:

This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(c) a record that is created by or is in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer's functions under an Act of Alberta;

Applicant's Position

[8.] The Applicant's position was that section 4(1)(c) does not apply to file copies of letters sent to the Ombudsman. The Applicant argued that it has not requested information under the custody and control of the Ombudsman, but under the custody and control of the Public Body.

[9.] The Applicant relied upon sections 2(a) and 6(1) of the Act which read:

2 The purposes of this Act are

(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act.

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[10.] The Applicant stated that it had previously received a large number of documents from previous requests under the Act, most of which probably had

been submitted to the Ombudsman in connection with the investigation. The Applicant asserted that should the Public Body's arguments be accepted, these documents would also need to be excluded because the Ombudsman now has copies in his custody and control. The Applicant submitted that section 4(1)(c) does not refer to correspondence; it extends to all information. Consequently, it would be absurd to exclude a record on the basis that the Ombudsman also has a copy. For these reasons, the Applicant submitted that the Record should not be excluded from the Act's application.

Public Body's Position

[11.] The Public Body's position is that the Record is in the custody or control of the Ombudsman because the Ombudsman, in the exercise of his functions under the *Ombudsman Act*, requested a response from the Public Body with respect to his recommendations.

[12.] According to the Public Body, the documents previously disclosed to the Applicant are records prepared in the course of the Public Body's business. The Public Body asserted that they are not records relating specifically to the Public Body's response to the Ombudsman's request and are therefore distinguishable from the Record. In any event, the Public Body is not arguing to have any other records withheld besides the Record at issue.

Analysis

[13.] For a record to be excluded under section 4(1)(c), three criteria must be met:

- (a) (i) a record created by or
- (ii) a record in the custody of or
- (iii) a record under the control of
- (b) an officer of the Legislature
- (c) and relates to the exercise of that officer's functions under an Act of Alberta.

[14.] The wording requires that the Record must be within one of the first three options of the first criterion. I will first deal with criteria (b) and (c) before dealing with criterion (a).

Criteria (b): Is the Ombudsman an officer of the Legislature?

[15.] The Ombudsman is an officer of the Legislature as set out in section 1(1)(m) of the Act.

[16.] Section 1(1)(m) of the Act reads:

(m) “officer of the Legislature” means the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner or the Information and Privacy Commissioner;

Criteria (c): Does the Record relate to the exercise of the Ombudsman’s function under an Act of Alberta?

[17.] To be excluded under section 4(1)(c), the Record must also be related to the exercise of that officer’s functions under an Act of Alberta. In accordance with section 20(3) of the *Ombudsman Act*, R.S.A. 1980 c. O-7, the Ombudsman exercised his legal authority to compel the Public Body to respond to his recommendations. Section 20(3) of the *Ombudsman Act* provides:

20(3) If, when this section applies, the Ombudsman is of the opinion...

the Ombudsman shall report his opinion and his reasons for it to the appropriate Minister and to the department or agency concerned, and may make any recommendations he thinks fit and in that case he may request the department or agency to notify him within a specified time of the steps, if any, that it proposes to take to give effect to his recommendations.

[18.] The Public Body submitted, as evidence in support of the Public Body’s decision to refuse disclosure of the Record, the affidavit of Acting Ombudsman, Brian Carver. Paragraphs #2 and #3 stated:

2. On October 3, 1996, the then Ombudsman for the Province of Alberta, Harley Johnson, sent to Peter Melnychuk, Deputy Minister, Department of Environmental Protection, (the “Department”) a letter containing recommendations directed to the Department in relation to matters that are the subject of the Applicant’s request under the Freedom of Information and Protection of Privacy Act, S.A. 1994 c. F-18.5, as amended (“FOIP”).

3. Mr. Johnson’s letter of October 3, 1996 requested that the Department provide a response to his recommendations. On the 25 day of October, 1996, the Office of the Ombudsman received a response to Mr. Johnson’s letter of October 3, 1996 and this response remains in the custody of the Office of the Ombudsman.

[19.] I am satisfied, based on the evidence, that the Record relates to the exercise of the Ombudsman’s function under the *Ombudsman Act*.

Criteria (a): Is the Record created by or in the custody or under the control of the Ombudsman?

[20.] Criterion (a) contains its own three criteria: (i) created by, (ii) in the custody, and (iii) under the control. By including “or” in the wording of section 4(1)(c), a record has to meet only one of criteria (i) to (iii) to be excluded. Accordingly, it is not necessary that the Record be created by, and in the custody of and under the control of the Ombudsman to be excluded. Criteria (i) to (iii) are worded in the alternative such that the failure to meet one or even two of these criteria does not preclude the application of section 4(1)(c).

[21.] Therefore, the Public Body need only show that one of criteria (i) to (iii) has been met for section 4(1)(c) to apply.

[22.] While it is clear that the original letter sent to the Ombudsman is in the Ombudsman’s custody and control, the Record (the file copy of the original letter), is in the Public Body’s possession. In the Act, a “record” means a record of information in any form. In other words, the same information can appear in several different forms of record. A record is merely a conduit for the information. I believe the form in which information appears is secondary to the essence of the information the Act seeks to exclude. The purpose of section 4(1)(c) is to exclude a certain type of information. Presumably, the intent of the Legislature is to exclude that type of information in all its forms.

[23.] I have reviewed the Record and for the purposes of this Order I will presume that the original letter is exactly the same as the Record (the Public Body’s file copy). Therefore the information contained in both is identical. The issue which arises is the following: should a file copy of a letter be disclosed when the original letter is excluded from the Act’s application under section 4(1)(c)? Since it is the same information appearing in two different forms of records, I find that the Record should not be treated differently than the original letter.

[24.] Consequently, I find that if the original letter is in the custody and control of the Ombudsman, that is the end of the matter. Section 4(1)(c) applies to exclude that information from the application of the Act. Therefore, section 4(1)(c) also applies to exclude the Record from the application of the Act.

[25.] I prefer this interpretation for two reasons. First, it would be absurd for the Act to exclude an original but not a filed copy of a record: see the statutory interpretation principle of “Avoiding Absurd Consequences”-Order 97-007. If an Applicant cannot have access to the Ombudsman’s records, it does not make sense that it could get the same records from a Public Body. A party cannot do indirectly that which it cannot do directly. Section 4(1)(c) would be rendered meaningless if only original documents in the possession of the Ombudsman were to be excluded.

[26.] Second, this interpretation is in accordance with the legislative intent expressed in the *Ombudsman Act* regarding confidentiality and the Ombudsman's autonomy and independence. Since both the Act and the *Ombudsman Act* deal with the disclosure of information gathered as a result of the Ombudsman's function, statutory interpretation holds that both statutes be coherent and consistent on the same subject. Driedger on the Construction of Statutes, third edition, R. Sullivan, (Toronto: Butterworths, 1994) at page 286 states:

Often two or more statutes enacted by a legislature touch on the same subject without actually constituting a single integrated scheme. Such statutes are presumed to operate together harmoniously and to reflect a consistent view of the subject in question.

[27.] Further, it was held in *Nova an Alberta Corp. v. Amoco Canada Petroleum Co. Ltd.* (1981), 128 D.L.R. (3d) 1 at 9 (S.C.C.), per Estey J.:

While each statute must, for the purpose of its interpretation, stand on its own and be examined according to its terminology and the general legislative pattern it establishes, sometimes assistance in determining the meaning of the statute can be drawn from similar or comparable legislation within the jurisdiction or elsewhere.

[28.] In order that the interpretation of section 4(1)(c) be consistent with the *Ombudsman Act*, the purpose of the *Ombudsman Act* should be kept in mind. Mr. Justice Milvain succinctly summed up the purpose of the Ombudsman in the decision, *Re Ombudsman Act* (1970), 72 W.W.R. 191. He stated at p. 193:

...he can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process, if not, no harm can be done in looking at that which is good.

[29.] The importance of confidentiality and secrecy to the Ombudsman's role is outlined in numerous sections of the *Ombudsman Act*:

Section 9(1) Before entering on his duties, the Ombudsman shall take an oath that he will faithfully and impartially perform the duties of his office and that he will not, except in accordance with section 19(2) or section 22(3) and (4), divulge any information received by him under this Act.

Section 16(1) Every investigation by the Ombudsman under this Act shall be conducted in private.

Section 19(1) The Ombudsman and every person holding an office or appointment under him shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions.

[30.] Moreover, all documents arising out of an Ombudsman's investigation are considered privileged. Section 24(3) of the *Ombudsman Act* reads:

(3) Any thing said or any information supplied or any document, paper or thing produced by any person in the course of any inquiry or proceedings before the Ombudsman under this Act is privileged in the same manner as if the inquiry or proceedings were proceedings in a court.

[31.] In view of ensuring his autonomy and independence in his role of administrative watchdog, the Ombudsman is given control over the information he gathers in the course of his duties. Control over the information is central to the Ombudsman's ability to fulfill his duties. The following sections of the *Ombudsman Act* show that he has the discretion to disclose information in the manner he chooses.

Section 19(2) reads:

(2) Notwithstanding subsection (1), the Ombudsman may disclose in any report made by him under this Act any matters that in his opinion ought to be disclosed in order to establish grounds for his conclusions and recommendations.

21(1) If the Ombudsman makes a recommendation under section 20(3) and no action that seems to the Ombudsman to be adequate and appropriate is taken on the recommendation within a reasonable time, the Ombudsman shall inform the complainant of his recommendation and make whatever comments on the matter he thinks fit.

(2) The Ombudsman shall in any case inform the complainant, in the manner and at the time he thinks proper, of the result of the investigation.

27(2) The Ombudsman may, from time to time, in the public interest or in the interests of any person or department or agency publish reports relating
(a) generally to the exercise of his functions under this Act, or
(b) to any particular case investigated by him,

whether or not the matters to be dealt with in any such report have been the subject of a report to the Legislature.

[32.] Mr. Justice Milvain in *Re Ombudsman Act (supra)*, at p. 190, discussed these powers:

...as an ultimate objective, the Ombudsman can bring to the legislature his observations on the misworking of administrative legislation. He can also focus the light of publicity on his concern as to injustices and needed change.

[33.] Also, the Supreme Court of Canada in *Re B.C. Dev. Corp. and Friedmann* (1984), 14 D.L.R. (4th) p. 141, commented on the significance of similar sections contained in the British Columbia Ombudsman Act:

It is these sections that ultimately give persuasive force to the Ombudsman's conclusions: they create the possibility of dialogue between governmental authorities and the Ombudsman; they facilitate legislative oversight of the workings of various government departments and other subordinate bodies; and they allow the Ombudsman to marshal public opinion behind appropriate causes.

[34.] While being mindful of the purpose of the *Ombudsman Act*, I find that for both statutes to operate harmoniously, file copies of Ombudsman's records, such as the Record, must be excluded from the Act's application. To make file copies subject to the Act, would be contrary to the spirit and intent of the *Ombudsman Act*. Such disclosure would in effect, trivialize the provisions in the *Ombudsman Act* which give the Ombudsman wide powers over his process and information.

[35.] I think section 21(1) is particularly significant because it gives the Ombudsman control over where, when, and to whom, his recommendations are made known. He will only make them known when he believes that the Public Body has not acted adequately. If the Public Body acts, the Ombudsman does not divulge. To allow this Application would be to deprive the Ombudsman of that power.

[36.] In accordance with the statutory interpretation principle that both acts be interpreted harmoniously and consistently, I interpret "custody and control" to include file copies of an original record. Consequently, a record need not be held by the Ombudsman to be "in the custody and under the control" of the Ombudsman. This interpretation of section 4(1)(c) reflects the unique role of the Ombudsman.

[37.] After considering the Applicant's and the Public Body's arguments and evidence, I find, based on the above reasons, that because the Record was "in

the custody and under the control” of the Ombudsman, who is an officer of the Legislature, and the record relates to the exercise of his functions under the *Ombudsman Act*, the criteria of section 4(1)(c) have been met. The clear legislative intent expressed in section 4(1)(c) is to enable the Ombudsman to fulfill his duties unimpeded by the provisions of the Act. The Record is therefore excluded from the Act’s application.

ORDER:

[38.] I find that the Public Body has properly applied section 4(1)(c) of the Act and the Record requested in this inquiry is not subject to the *Freedom of Information and Protection of Privacy Act*.

Robert C. Clark
Information and Privacy Commissioner