

# ALBERTA

## INFORMATION AND PRIVACY COMMISSIONER

### ORDER 98-008

June 8, 1998

#### ALBERTA MUNICIPAL AFFAIRS

Review Number 1361

##### I. BACKGROUND

[para 1] Allegations by members of the public regarding the Applicant's conduct while the Applicant was employed with the Public Body resulted in the Applicant being relieved of the Applicant's duties with pay, pending the outcome of an investigation into the allegations.

[para 2] The investigation was conducted by the Public Body and entailed obtaining witness statements from interviews with certain Third Parties, the Applicant's supervisor, and the Applicant.

[para 3] As a result of the findings of the investigation, a disciplinary meeting was held. At this meeting, the Applicant's employment was terminated.

[para 4] The Applicant filed a grievance requesting a formal review of the disciplinary action and a reinstatement of employment.

[para 5] Pursuant to the Grievance Procedure outlined in the Collective Agreement, a grievance hearing was conducted at which the Applicant was represented by an Alberta Union of Provincial Employees ("AUPE") representative.

[para 6] Following the grievance hearing, discussions took place between the Public Body and the AUPE representative, resulting in a settlement of the grievance, wherein the Applicant agreed, in part, to withdraw the grievance and waive any rights arising from the Applicant's employment and the Public Body's decision to terminate the employment relationship. In

exchange, the Applicant received a severance package and the Public Body rescinded the letter of termination.

[para 7] On May 8, 1996, the Applicant applied to the Public Body, under the *Freedom of Information and Protection of Privacy Act* (the “Act”), for “total and complete disclosure of the complete records, files, all letters, documents or other material” contained in the Applicant’s personnel file held by the Public Body.

[para 8] On May 21, 1996, the request was narrowed to include only those records that related to the Applicant’s termination.

[para 9] After third party consultations, the Public Body released severed records to the Applicant on August 7, 1996, claiming that sections 16 (personal information) and 26 (privileged information) applied to the information that was severed.

[para 10] On September 16, 1996, this Office notified the Public Body that the Applicant was appealing the Public Body’s refusal to grant access to all of the records.

[para 11] Mediation was authorized under section 65 of the Act, but was unsuccessful. The Applicant decided not to pursue the matter to inquiry and this Office closed the file on October 31, 1996.

[para 12] Shortly thereafter, the Applicant sent a letter dated November 29, 1996, to this Office, indicating that the Applicant believed that mediation had not accomplished its objective and that the Applicant was “reserving the option to pursue or terminate this case”.

[para 13] On November 5, 1997, the Applicant requested that the file be reactivated. In considering the Applicant’s request, I determined that section 66(1) was relevant. Section 66(1) says that if a matter is not settled by mediation, the Commissioner *must* [my emphasis] conduct an inquiry. In this case, because the Applicant promptly expressed a concern with this Office’s closing the file, and because of the operation of section 66(1), I granted the Applicant’s request to reopen the file. The Public Body was notified accordingly on December 3, 1997.

[para 14] On January 12, 1998, the Public Body informed this Office that it reviewed its previous decision to sever the records but was not altering that decision.

[para 15] The matter was set down for inquiry on April 1, 1998.

[para 16] On March 13, 1998, the Public Body notified this Office that it reconsidered its decision to withhold a record under section 26 (privileged information) of the Act and intended to release that record to the Applicant. That record was released, in its entirety, to the Applicant prior to the inquiry commencing. Accordingly, I need not consider section 26 in this Order.

## II. RECORDS AT ISSUE

[para 17] On August 7, 1996, the Public Body released 155 pages of records to the Applicant. Of these 155 pages, 31 pages were released with portions severed (the “Records”) and the remainder of the records were released to the Applicant in their entirety.

[para 18] The Records are Third Party witness statements or “identifying characteristics” of Third Parties (events and discussions that occurred between the Applicant and one or more Third Parties) contained within those statements that were obtained during the investigation conducted by the Public Body into allegations regarding the Applicant’s conduct.

## III. PROCEDURAL ISSUE

[para 19] Both the Public Body and the Applicant requested, and were granted, *in camera* sessions during the inquiry. In Order 98-006, I canvassed the issue and confirmed that I have the authority to conduct *in camera* sessions.

## IV. ISSUE

[para 20] The only issue raised in this inquiry is whether the Public Body correctly applied section 16 (personal information) when it decided to sever the names, addresses, telephone numbers and other “identifying characteristics” (details of incidences and discussions between the Applicant and Third Party) of the Third Parties from the Records.

## V. DISCUSSION OF THE ISSUE

### A. Did the Public Body correctly apply section 16 (personal information) to the Records?

[para 21] The Public Body submitted that section 16(1) applies to the information severed from the Records.

[para 22] Section 16(1) reads:

*16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.*

[para 23] Section 16(1) is a mandatory (“must”) section of the Act. If section 16(1) applies, a public body must refuse to disclose the personal information.

## 1. Do the Records contain “personal information”?

[para 24] Section 1(1)(n) of the Act defines “personal information”. The relevant portions of section 1(1)(n) read:

*1(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*

*(viii) anyone else’s opinions about the individual*

[para 25] Having reviewed the Records, I find that they do, in part, contain personal information about the Applicant in the form of opinions about the Applicant. Additionally, I also find that they contain personal information about Third Parties in the form of names, home addresses, and telephone numbers.

[para 26] I understand the Applicant’s position to be that it is entitled to complete and unsevered Records because that information is about the Applicant.

[para 27] While section 6(1) of the Act gives the Applicant a right of access to any record containing the Applicant’s personal information, including anyone else’s opinions about the Applicant, that right is not absolute and is subject to the limitations set out in section 6(2).

[para 28] Section 6(2) of the Act provides that the right of access to a record does not extend to information excepted from disclosure under Division 2 of Part 1 of the Act. Information, the disclosure of which could be harmful to a third party’s personal privacy, is included in Division 2, Part 1 of the Act. That having been said, section 6(2) also requires that where information that is excepted from disclosure can be severed from a record, the applicant has a right of access to the remainder of the record.

[para 29] The Public Body indicated that it had to sever the opinions about the Applicant and the context in which those opinions were given because it was information that the Public Body considered could reveal “identifying characteristics” of a third party. In support of its action, the Public Body relied on Orders 96-010, 96-019, and 96-008.

[para 30] In Order 96-010, I determined that “recorded information about an identifiable individual” can include events, circumstances and facts that would identify an individual.

[para 31] In Order 96-008 (which is followed in Orders 96-010 and 96-019), I said that events and facts discussed, observations made and the circumstances in which information is given, as well as the nature and content of the information, may be shown to be personal information.

[para 32] The Public Body submitted that there are “identifying characteristics” in the Records which, if revealed, would enable the Applicant to determine the identity of one or more of the Third Parties, particularly because the information described would only be known by the

parties to the interaction. The Public Body further submitted that the “identifying characteristics” include opinions of the Applicant, excerpts of discussions the Applicant had with Third Parties, and references to events involving the Applicant and one or more Third Parties.

[para 33] The Applicant has indicated that because the Applicant was a party to the interactions with the other Third Parties, the Applicant already knows the identity of the Third Parties. Accordingly, I understand the Applicant to have submitted that it does not matter if the personal information reveals the identities of the Third Parties.

[para 34] I have held in previous Orders that the knowledge of an applicant is an irrelevant consideration in determining whether personal information should be disclosed to the applicant. Specifically, in Order 96-008, I drew a distinction between knowing a third party’s personal information (such as a third party’s name) and having a right of access to that personal information under the Act.

[para 35] The question to be determined is whether the “identifying characteristics” are “events and facts discussed”, such that a third party can be identified. If the third party can be identified (because it is “recorded information about an identifiable individual”), then it is the third party’s personal information. The fact that it is intertwined with the Applicant’s personal information means that the Public Body ultimately has to make an “all or nothing” decision regarding access. In this case, the Public Body had to weigh the Applicant’s right of access to information against the Third Parties’ right to protection of privacy. In so doing, the Public Body determined that the “identifying characteristics” could not be released to the Applicant without revealing the identity of one or more Third Parties.

[para 36] I accept the Public Body’s conclusion that the Records do contain personal information about Third Parties that is attributable to and will identify the Third Parties if released.

**2. Would disclosure of the personal information be an unreasonable invasion of the Third Parties’ personal privacy?**

[para 37] The Public Body submitted that section 16(1) and section 16(2)(g) apply to the Records.

[para 38] Section 16(1) and (2)(g) read:

*16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.*

*(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if*

*(g) the personal information consists of the third party’s name when*

*(i) it appears with other personal information about the third party, or*

*(ii) the disclosure of the name itself would reveal personal information about the third party.*

[para 39] The Act does not say that a third party's personal information should never be released. It says that personal information should not be released when it would result in an unreasonable invasion of personal privacy. I have reviewed the Records and find that the presumption in section 16(2)(g) of the Act applies to the personal information contained in the Records. Accordingly, disclosure of that personal information is presumed to be an unreasonable invasion of the Third Parties' personal privacy for the purposes of section 16(1).

**3. What relevant circumstances did the Public Body consider under section 16(3)?**

**a. General**

[para 40] Under section 16(3) of the Act, a public body must consider all relevant circumstances when deciding whether disclosure of personal information would be an unreasonable invasion of a third party's personal privacy.

[para 41] The Public Body said that it considered section 16(3)(c) (personal information relevant to a fair determination of applicant's rights) and section 16(3)(f) (personal information supplied in confidence).

[para 42] The Applicant implied that the Public Body should also have considered section 16(3)(a) (public scrutiny).

**b. Personal information relevant to a fair determination of the Applicant's rights (section 16(3)(c))**

[para 43] Section 16(3)(c) reads:

*16(3) In determining under subsection (1) or (2) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*

*(c) the personal information is relevant to a fair determination of the applicant's rights.*

[para 44] If considered to be a relevant circumstance, section 16(3)(c) weighs in favour of disclosing personal information.

[para 45] The Public Body submitted that it reviewed section 16(3)(c) but determined it was not relevant in light of the agreement negotiated between the parties. According to the Public

Body, there are no outstanding legal issues that would make the release of the personal information relevant to a fair determination of the Applicant's rights as no relationship between the parties exists which could give rise to legal obligations. In reviewing the agreement, I observed a clause which indicates that the Applicant agreed to (1) waive any rights arising under the Master Agreement between the Provincial Government and AUPE arising from the termination of the Applicant's employment; and (2) release the Provincial Government, its officers and employees, from any present or future claims arising from the Applicant's employment or termination of the employment.

[para 46] The evidence presented during the inquiry also indicated that the agreement entered into by the parties embodied the entire agreement negotiated.

[para 47] There appeared to be some confusion on the part of the Applicant who believed that the Public Body was supposed to provide the Applicant with a letter of apology and a public statement indicating that the Applicant had not breached the public trust. According to the Applicant, this was the understanding that the Applicant had following discussions with the AUPE representative. The Applicant further submitted that the Applicant generally found the union representation unsatisfactory and ineffective. The Applicant was particularly upset over the fact that during the grievance process, neither the Applicant nor the union representative was able to access the Applicant's personnel file, and the Applicant believes that this had a detrimental affect on the ability to respond to the allegations made.

[para 48] The Public Body submitted that the Applicant was treated fairly throughout the investigation, disciplinary, and grievance process. The Public Body's evidence was that the Third Party witness statements formed part of the investigation which led to the action taken by the Public Body but were not included in the Applicant's personnel file at the grievance stage and therefore would not have been accessible to either the Applicant or the union representative. Further, the Public Body testified that even though specifics of the allegations (names and details of incidences and discussions) were not released, the Applicant was made aware of the content of the allegations and had an opportunity to respond at all stages of the process.

[para 49] As I explained during the inquiry, I can only deal with matters within my jurisdiction, namely, issues relating to decisions made under the Act and, specifically in this case, the Public Body's decision to sever the Records. While I recognize the Applicant's frustration, this is not the appropriate forum to question the adequacy or inadequacy of the Applicant's union representation. I am unable to comment on whether the Applicant had sufficient information to answer the charges made and to enter into the agreement negotiated by the parties.

[para 50] The evidence is that when the Applicant consented to the terms of the agreement, the Applicant waived any and all current and future claims against the Public Body arising out of the Applicant's employment and the subsequent termination. As a result, there do not appear to be any outstanding legal issues between the parties. Therefore, if, as here, no "rights" remain to be determined, the personal information cannot be considered to be relevant to a fair determination of those "rights".

[para 51] Accordingly, I find that in this case section 16(3)(c) is not a relevant circumstance to consider when determining whether disclosure of the Third Parties' personal information

would be an unreasonable invasion of the Third Parties' personal privacy under section 16(1) and 16(2).

**c. Personal information supplied in confidence (section 16(3)(f))**

[para 52] Section 16(3)(f) reads:

*16(3) In determining under subsection (1) or (2) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*

*(f) the personal information has been supplied in confidence*

[para 53] If considered to be a relevant circumstance, section 16(3)(f) weighs in favour of not disclosing personal information.

[para 54] The Public Body submitted that section 16(3)(f) is a relevant circumstance when determining whether disclosure of the Third Party's personal information would be an unreasonable invasion of the Third Party's personal privacy under sections 16(1) and (2).

[para 55] I have reviewed the Record at issue and find that there was an *express* request for confidentiality by one Third Party contained therein. The fact that this Third Party refused to consent to the disclosure of personal information is evidence that the personal information was supplied in confidence.

[para 56] Therefore, I find that section 16(3)(f) is a relevant circumstance for the Public Body to consider when determining whether disclosure of the Third Party's personal information would be an unreasonable invasion of that individual's personal privacy under sections 16(1) and (2) of the Act.

**d. Other relevant considerations**

[para 57] The Public Body said that it also considered the responses received when it sent out Third Party Notices under section 29 of the Act, notifying the Third Parties that it was considering giving access to a record that may contain their personal information.

[para 58] The evidence presented by the Public Body was that all but one of the Third Parties refused to consent to the release of their personal information. In addition, one Third Party did not respond to the Public Body's enquiries regarding disclosure.

[para 59] The Public Body explained that where it received no response to its enquiries, it relied on section 16 of the Act and severed the third party personal information. In light of my findings that the Records do contain third party personal information and because section 16 is a mandatory provision in the Act, I find the Public Body's actions in this regard appropriate.

[para 60] Further, in Order 97-011, I said that a third party's refusal to consent to release that third party's personal information is also a relevant circumstance to consider under section 16(3) of the Act.

[para 61] Accordingly, I find that certain Third Parties' refusals to consent to release of their personal information is a relevant circumstance for the Public Body to consider when determining whether disclosure of the Third Party's personal information would be an unreasonable invasion of that individual's personal privacy under sections 16(1) and (2).

**e. Disclosure of personal information desirable for public scrutiny  
(section 16(3)(a))**

[para 62] Section 16(3)(a) reads:

*16(3) In determining under subsection (1) or (2) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all relevant circumstances, including whether*

*(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny.*

[para 63] If considered to be a relevant circumstance, section 16(3)(a) weighs in favour of disclosing personal information.

[para 64] The Applicant implied that the Public Body should also have considered section 16(3)(a) when determining whether disclosure of the Third Parties' personal information would be an unreasonable invasion of the Third Parties' personal privacy under sections 16(1) and (2).

[para 65] In Order 97-002, I discussed the interpretation of section 16(3)(a). In that Order, I said evidence had to be provided to demonstrate that the activities of the public body had been called into question, necessitating disclosure of personal information to subject the activities of the public body to scrutiny. I was persuaded by the following Ontario Orders: (1) Ontario Order P-347, which held that it was not sufficient for one person to have decided that public scrutiny was necessary; (2) Ontario Order M-84, which held that the applicant's concerns had to be about the actions of more than one person within the public body; and (3) Ontario Order P-673, which held that where the public body had previously disclosed a substantial amount of information, the release of personal information was not likely to be desirable for the purpose of subjecting the activities of the public body to public scrutiny. This was particularly so if the public body had also investigated the matter in issue.

[para 66] In this case, I find the following:

(1) the only evidence put forth that suggests that public scrutiny is warranted is that of the Applicant;

(2) the Applicant's concerns are directed toward the actions of a number of individuals within the Public Body; and,

(3) the Public Body's evidence was that it has disclosed all of the information that it could to meet the Applicant's request without jeopardizing the Third Parties' rights to personal privacy.

[para 67] With respect to the latter point, the Public Body said that, given the nature of the information requested, i.e., information relating to a termination, it made every effort to accommodate the Applicant's request. These efforts included transcribing handwritten statements into a typed format and then only severing the personal information contained therein, rather than severing the handwritten Records in their entirety. In addition, the Public Body's evidence was that personal information of certain Third Parties and the Applicant's supervisor was voluntarily released to the Applicant. The Public Body emphasized that the content of the allegations was released to the Applicant during the disciplinary process, and that the only information severed included the names of the Third Parties, their addresses and phone numbers, and descriptions of events and circumstances that would identify one or more Third Parties because they interacted with the Applicant.

[para 68] I fail to see how disclosing the Third Parties' personal information (names, addresses, telephone numbers, and other "identifying characteristics") would subject the activities of the Public Body to public scrutiny.

[para 69] Consequently, I find that section 16(3)(a) is not a relevant circumstance to consider when determining whether disclosure of the Third Parties' personal information would be an unreasonable invasion of personal privacy under section 16(1) and (2).

#### **f. Conclusion under section 16(3)**

[para 70] The Public Body considered all the relevant circumstances, and determined that the relevant circumstances weighed in favour of not disclosing personal information. If, after considering all the relevant circumstances, including those listed under section 16(3), a public body determines that disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy, that public body must refuse to disclose that personal information, as provided by section 16(1).

[para 71] My role under section 16(3) is to determine whether a public body used the right process. In this case, I find that the Public Body used the right process.

#### **g. Conclusion under section 16**

[para 72] I find that the Public Body correctly applied section 16(1) and section 16(2)(g) to the Records.

### **4. Has the Applicant met the burden of proof under section 67(2)?**

[para 73] Because disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy, the burden of proof is on the Applicant to show that

disclosure of the personal information would not be an unreasonable invasion of a third party's personal privacy, as provided under section 67(2) of the Act.

[para 74] Having reviewed the Applicant's arguments, discussed above under section 16(3), I find that the Applicant has not met the burden of proving that disclosure of the Third Parties' personal information (names, addresses, telephone numbers, events and discussions identifying the Third Party's) would not be an unreasonable invasion of the Third Parties' personal privacy.

## **VI. ORDER**

[para 75] Pursuant to section 68 of the Act, I find that the Public Body correctly applied section 16 of the Act (personal information). Consequently, I uphold the head's decision to refuse access to the personal information severed in the Records.

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Robert C. Clark  
Information and Privacy Commissioner